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The Uniform Gifts to Minors Act: A Patent Ambiguity

*Margaret M. Mahoney**

I. INTRODUCTION

All fifty states and the District of Columbia have enacted the Uniform Gifts to Minors Act (UGMA). The Act provides an easy and effective means of transferring property to minors. The transferor designates an adult custodian to receive and manage the property, in accordance with the provisions of the Act. The custodial relationship created is a unique relationship with regard to property, distinct from all other fiduciary arrangements. A serious inconsistency in the provisions of the Act that define this relationship is the subject of this Article.

One section of the Uniform Act provides that once the transfer has taken place only the minor has any legal or beneficial interest in the custodial property. Another section authorizes the custodian to use the fund for the support of the minor. When the fund is applied for the minor's support, a clear benefit redounds to the parent who owes a duty of support to the minor. To the extent that this application of custodial funds satisfies the parental support duty, a person other than the minor effectively derives a beneficial interest from the custodial property. The two provisions are thus inconsistent, creating an ambiguity in the Act regarding the custodian's authority to use the fund in satisfaction of parental support duties.

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The ambiguity has provoked litigation in situations in which the resolution of other legal issues turns upon the existence or non-existence of a parent's beneficial interest in the custodial fund. For example, some states allow spousal claims under elective share statutes against property held in custodianship for a decedent's minor child only if the fund was available to discharge the decedent's support duties. Because of the ambiguity, both the surviving spouse and the party resisting the spouse's claim currently find support in the Act for their conflicting positions on this matter. In the area of federal taxation of uniform gifts, various tax consequences depend upon the existence of a power in the custodian to use the fund for the minor donee's support. Current tax laws recognize this custodial power for some purposes and expressly deny it for other purposes in a manner that generates maximum revenue.

The ambiguity in the provisions of the UGMA is a critical shortcoming in this widely used estate planning device. Resolving the ambiguity by modifying one of the inconsistent provisions is desirable. The resulting uniform definition of the custodian's powers and of the interests created under the Act would avoid future litigation based on the existing inconsistent definitions. In addition, the proposed clarification would introduce an element of integrity to the federal tax treatment of uniform gifts.

II. THE AMBIGUITY IN THE UGMA

The Model Gifts of Securities to Minors Act, which was sponsored by the New York Stock Exchange and the Association of Stock Exchange Firms, was enacted by thirteen states and the District of Columbia in 1955 and 1956.¹ The Model Act attempted to meet the perceived need for a simple method of making gifts of securities to minors. In 1956, the National Conference of Commissioners on Uniform State Laws adopted the Uniform Gifts to Minors Act, which "follow[s] the Model Act in every material respect but incorporate[s] some variations in detail."² The Uniform Act

1. Commissioners' Prefatory Note to the 1956 Uniform Gifts to Minors Act, 8 UNIFORM LAWS ANNOTATED 225 (1972).

2. *Id.* The Commissioners' Note, *id.* at 227, summarizes several changes made by the 1956 Uniform Act: The Uniform Act broadened the scope of the Model Act by allowing gifts of money as well as securities. While the Model Act limited the donor's choice of custodian to the donor, an adult member of the minor's family, or the guardian of the minor, the Uniform Act permitted any adult person to be named as custodian. In addition, the Uniform Act added banks with trust powers to the list of eligible custodians. None of these

has been revised twice—in 1965 and 1966.³ Each of the fifty states and the District of Columbia have enacted some version of the Uniform Act.⁴

Under both the Model Act and the Uniform Act a transfer made to a qualified custodian for the designated minor automatically incorporates the provisions of the Act as the terms of the gift. Those provisions include the irrevocable vesting of legal and equitable title in the minor,⁵ broad management powers in the custodian,⁶ wide custodial discretion regarding the retention or distribution of property and income during the period of the custodianship,⁷ and mandatory distribution of principal and in-

changes affect the analysis in this Article of the relationships created by the custodial arrangement.

3. The 1966 Revised Act permits gifts of securities, money, life insurance policies, and annuity contracts.

4. ALA. CODE §§ 35-5-1 to -10 (1975); ALASKA STAT. §§ 45.60.011-.101 (1962 & Supp. 1979); ARIZ. REV. STAT. ANN. §§ 44-2071 to -2077 (1967 & Supp. 1979); ARK. STAT. ANN. §§ 50-901 to -925 (1971); CAL. CIV. CODE §§ 1154-1165 (West 1954 & Supp. 1980); COLO. REV. STAT. §§ 11-50-101 to -112 (1973); CONN. GEN. STAT. ANN. §§ 45-101 to -109b (West 1958 & Supp. 1979); DEL. CODE ANN. tit. 12, §§ 4501-4510 (1979); D.C. CODE ENCYCL. §§ 21-301 to -311 (West 1967 & Supp. 1970); FLA. STAT. ANN. §§ 710.01-10 (West 1969 & Supp. 1980); GA. CODE ANN. §§ 48-301 to -313 (1979); HAWAII REV. STAT. §§ 553-1 to -9 (1976); IDAHO CODE §§ 68-801 to -810 (1973); ILL. ANN. STAT. ch. 110 ½, §§ 201-211 (Smith-Hurd 1978); IND. CODE ANN. §§ 30-2-8-1 to -10 (Burns 1972 & Supp. 1980); IOWA CODE ANN. §§ 565A.1-.11 (West 1950 & Supp. 1980); KAN. STAT. ANN. §§ 38-901 to -911 (1973 & Supp. 1979); KY. REV. STAT. ANN. §§ 385.011-.200 (Baldwin 1978); LA. REV. STAT. ANN. §§ 9:735-.742 (West 1965 & Supp. 1980); ME. REV. STAT. ANN. tit. 33, §§ 1001-1010 (1964 & Supp. 1980); MD. EST. & TRUSTS CODE ANN. §§ 13-301 to -310 (1974 & Supp. 1980); MASS. GEN. LAWS ANN. ch. 201A, §§ 1-11 (West 1958 & Supp. 1980); MICH. COMP. LAWS ANN. §§ 554.451-.461 (1967 & Supp. 1980); MINN. STAT. ANN. §§ 527.01-.11 (West 1975); MISS. CODE ANN. §§ 91-19-1 to -19 (1972); MO. ANN. STAT. §§ 404.010-.190 (Vernon 1979); MONT. CODE ANN. §§ 72-26-101 to -404 (1979); NEB. REV. STAT. §§ 38-1001 to -1010 (1978); NEV. REV. STAT. §§ 167.010-.110 (1973); N.H. REV. STAT. ANN. §§ 463-A:1 to :10 (1968 & Supp. 1979); N.J. STAT. ANN. 46:38-13 to -41 (West Supp. 1980); N.M. STAT. ANN. §§ 46-7-1 to -10 (1978); N.Y. EST., POWERS & TRUSTS LAW §§ 7-4.1 to .12 (McKinney 1967 & Supp. 1980-1981); N.C. GEN. STAT. §§ 33-68 to -77 (1975 & Supp. 1979); N.D. CENT. CODE §§ 47-24-01 to -10 (1978); OHIO REV. CODE ANN. §§ 1339.31-.39 (Anderson 1979); OKLA. STAT. tit. 60, §§ 401-410, 415-418 (1971 & Supp. 1980); OR. REV. STAT. §§ 126.805-.880 (1979); 20 PA. CONS. STAT. ANN. §§ 5301-5310 (Purdon 1974 & Supp. 1980); R.I. GEN. LAWS §§ 18-7-1 to -11 (1969); S.C. CODE §§ 35-3-10 to -120 (1977 & Supp. 1979); S.D. COMP. LAWS ANN. §§ 55-10-1 to -39 (1967 & Supp. 1979); TENN. CODE ANN. §§ 35-801 to -810 (1977); TEX. REV. CIV. STAT. ANN. art. 5923-101 (Vernon 1962 & Supp. 1980); UTAH CODE ANN. §§ 75-5-601 to -609 (1978); VT. STAT. ANN. tit. 14, §§ 3201-3209 (1974 & Supp. 1980); VA. CODE §§ 31-26 to -36 (1979); WASH. REV. CODE ANN. §§ 21.24.010-.900 (1978); W. VA. CODE §§ 36-7-1 to -11 (1966 & Supp. 1980); WIS. STAT. ANN. §§ 880.61-.71 (West 1958 & Supp. 1980-1981); WYO. STAT. §§ 34-13-101 to -110 (1977).

5. 1966 REVISED UNIFORM GIFTS TO MINORS ACT § 3(a) [hereinafter cited as UGMA]. All subsequent references to the Uniform Gifts to Minors Act are to provisions of the 1966 Revised Act unless otherwise indicated.

6. *Id.* § 4(e).

7. *Id.* § 4(b).

come to the minor upon the minor's twenty-first birthday (or to the minor's estate in the event of death).⁸ Provisions waiving the requirements of a fiduciary's bond,⁹ mandatory accountings,¹⁰ and compensation for the custodian¹¹ further simplify the fiduciary relationship. Additionally, third parties are encouraged to enter into transactions involving custodial property by provisions relieving them of the duty to determine the actual authority of the person who purports to act as the property's custodian.¹²

An inconsistency exists within the provisions of both the Model and Uniform Acts. On the one hand, each clearly states that a transfer under the Act vests the property absolutely in the minor donee. Section 3(a) of the Uniform Act provides, "A gift made in a manner prescribed in this act is irrevocable and conveys to the minor indefeasibly vested legal title to the [property] given." On the other hand, section 4(b) of the Uniform Act, setting out the custodian's distributive powers, provides that,

The custodian shall pay over to the minor for expenditure by him, or expend for the minor's benefit, so much or all the custodial property as the custodian deems advisable *for the support, maintenance, education and benefit of the minor* in the manner, at the time or times, and to the extent that the custodian in his discretion deems suitable and proper, with or without court order, *with or without regard to the duty of himself or of any other person to support the minor or his ability to do so*, and with or without regard to any other income or property of the minor which may be applicable or available for any such purpose.¹³

Sections 3(a) and 4(b) are inconsistent to the extent that section 4(b) authorizes the use of the fund to reduce the obligation of support imposed by law upon the minor's parents.¹⁴ This use in-

8. *Id.* § 4(d).

9. *Id.* § 5(d).

10. *Id.* § 8.

11. *Id.* § 5(c).

12. *Id.* § 6.

13. *Id.* § 4(b) (emphasis added).

14. In every American jurisdiction, the law imposes upon parents a duty to support their minor children. H. CLARK, *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* § 15.1, at 488 (1968). Until fairly recently, the obligation was viewed as primarily a duty of the father and only secondarily a duty of the mother. *Id.* §§ 6.2, 15.1, at 187-88, 488-89. Statutes and case law in a number of jurisdictions now impose the duty equally upon both parents. *E.g.*, Weiner, *Child Support: The Double Standard*, 6 FLA. ST. U.L. REV. 1317, 1324-25 (1978); *see, e.g.*, Conway v. Dana, 456 Pa. 536, 318 A.2d 324 (1974); TENN. CODE ANN. § 36-828 (Supp. 1980). The law provides the means of enforcing the duty against parents. Statutes authorize the court ordering a decree of divorce to rule as well on the matter of child support. *See, e.g.*, Divorce Code, Act No. 1980-26, 1980 Pa. Laws § 301(a)(3). In addition, statutes commonly authorize a representative of the child to bring a civil proceeding for support against the parent, outside of the divorce context. *See, e.g.*, 62 PA. CONS. STAT. ANN.

creases the parents' net worth by the amount that they would owe for support but for the custodian's distributions. Correspondingly, the net worth of the minor decreases by the same amount. This result contradicts the section 3(a) provision that the fund belongs to the minor donee.

A. *The Proper Construction of Section 4(b)*

An important threshold question, then, is whether the language of section 4(b) authorizes the custodian to use the fund to discharge support obligations owed by others to the minor. Read literally, the statement that "[t]he custodian shall pay over . . . for the support . . . of the minor . . . in his discretion . . . with or without regard to the duty of himself or of any other person to support the minor or his ability to do so," seems to confer upon the custodian authority to discharge support obligations. This literal meaning of the language of section 4(b) conflicts with the section 3(a) provision that the minor alone has an interest in the property.

It is possible to construe section 4(b) in a manner consonant with the vesting provision. As suggested by one writer,

The fact that the custodian is given the power to use the child's property for the child's benefit "without regard to the duty of himself or of any other person to support the minor" does not mean that the custodian can discharge the parent's obligation. . . .

A parent or other custodian of a child's property who used the child's funds to pay the parent's bills would not thereby have discharged his obligation. He would have paid the bills but he would, in effect, have embezzled the child's funds and be responsible to him for reimbursement. The same would be true of a guardian who used the child's funds to pay the parent's bills.

It is submitted that the same rule applies under the custodian statutes. It is one thing to give the custodian *power* to expend the child's funds so that the child is not left in need or in want because the parent fails in his duty, but quite another thing to say that the custodian has been given the power to relieve the parent's obligation out of property unequivocally vested in the child.¹⁵

In *In re Marriage of Wolfert*,¹⁶ the Colorado Court of Appeals concluded that property transferred by a father to his children under the UGMA prior to the parents' divorce could not be subse-

§ 1973 (Purdon 1968). Criminal sanctions exist for the punishment of those who violate the duty. See, e.g., 18 PA. CONS. STAT. ANN. § 4321 (Purdon 1973). State agencies that assume the burden of support when parents default are authorized to seek reimbursement from the parents. See, e.g., PA. STAT. ANN. tit. 62, § 1974 (Purdon 1968).

15. Tenney, *Using the Custodian Statute as a Planning Device*, 16 N.Y.U. INST. FED. TAX. 937, 951-52 (1958) (footnotes omitted).

16. 42 Colo. App. 433, 598 P.2d 524 (1979).

quently used to reduce his support obligation. In imposing this restriction on the use of the funds, the court construed the language of section 4(b) in a manner similar to that suggested above. The court stated that,

[T]he intent of the Uniform Gifts to Minors Act is to allow custodians to disburse funds whether or not the children are adequately supported. The section does nothing to relieve a parent of the separate duty to support the children, nor does it authorize the custodian to disburse the funds as a means of fulfilling the parent's obligation to support. This interpretation is unavoidable in light of the fact that the gift is irrevocable and gives the children an "indefeasibly vested legal title" to the gift.¹⁷

The court distinguished between the permitted use of the fund for support needs and impermissible attempts to use the fund to relieve parental obligations. The distinction is more easily drawn in the context of the separated family when a court order has fixed the amount of the support obligation. In this situation, the amount owed under the order will not be reduced by virtue of the disbursement of the fund for the child's support needs.¹⁸

In the ongoing family, however, the *Wolfert* distinction is difficult to maintain. The value of the support obligation will not have been fixed. With any disbursement by the custodian, therefore, it may be unclear whether the disbursement supplements or replaces the parents' support payments. Only disbursements *in place of* support payments are at issue here. In the case of a disbursement actually used for the child's support, the effect will be a reduction of the parental support obligation unless the custodian seeks reimbursement from the parent. When the custodian is also the parent, reimbursement is unlikely.

Thus, the strained reading that reconciles section 4(b) with section 3(a) makes a distinction that, in the setting of an ongoing family, may well be unworkable. The literal and workable construction of the language in section 4(b), a construction recognizing an interest in the person owing a duty to support the minor, renders it contrary to the interest of the minor defined in section 3(a).

At first glance, UGMA section 4(i) promises to shed some light on the custodian's powers generally, including the power to use the fund for support. The section provides that "A custodian has [and holds as powers in trust], with respect to the custodial property, in

17. *Id.* at ___, 598 P.2d at 526.

18. In *Wolfert* the court affirmed the trial court's order that the fund be used only for the children's extraordinary needs. *Id.* at ___, 598 P.2d at 526. Its discussion of the effect of a potential disbursement for support upon the support duty, therefore, is dictum.

addition to the rights and powers provided in this act, all the rights and powers which a guardian has with respect to property not held as custodial property."¹⁹ The Commissioners' Note following the section states, "If the statutes or decisions of the enacting State give recognition to powers in trust, the bracketed language relating thereto should be included to define the legal status of the custodian in the light of existing law."²⁰ The greatest development of the power in trust concept has occurred in New York State, although a number of other jurisdictions recognize the concept as well.²¹ A power in trust is defined as "an authority to do any act relating to property for the benefit of a person or persons other than the holder of the power, which the person granting or reserving the power might lawfully perform himself."²² Because of the trust aspect of the power in trust relationship, the donee of the power is held to strict standards of fiduciary conduct. Generally, the fiduciary must use property for the exclusive benefit of the named beneficiary. This general rule, standing alone, would go far to define the powers of UGMA custodians. It has been noted, however, that

the statute does excuse the custodian of much liability which might otherwise be incurred by a donee of a power in trust. The statute excuses the noncompensated custodian from all liability for loss of the property except loss due to bad faith, intentional wrongdoing, or imprudent investment. Thus the statute attempts to place the custodian in the familiar conceptual setting of a donee of a power in trust, with clearly marked boundaries, only to provide later in the very same section of the act a modification which defeats the purpose for which the power-in-trust clause was included. As a result, the . . . courts have a new concept, the boundaries of which will have to be formed in ensuing litigation.²³

Thus, the power in trust language²⁴ does nothing to clarify the custodian's authority to use the fund to benefit anyone other than the minor donee.

Another provision of the UGMA that deals expressly with the use of the custodial fund for the support of the minor is section

19. UGMA § 4(i).

20. 8 UNIFORM LAWS ANNOTATED 207 (1972).

21. See Note, *The Indiana Uniform Gifts to Minors Act*, 33 IND. L.J. 242, 256 n.78 (1958).

22. SUBCOMMITTEE ON THE UNIFORM GIFTS TO MINORS ACT, REPORT, reprinted in 108 TRUSTS & EST. 983, 984 (1964).

23. 32 N.Y.U. L. REV. 203, 209 (1957) (footnotes omitted).

24. According to the notes following § 4(i) regarding Action in Adopting Jurisdictions, all but thirteen states have enacted the power in trust language. 8 UNIFORM LAWS ANNOTATED 208-11 (1972).

4(c). That section states,

The court, on the petition of a parent or guardian of the minor or of the minor, if he has attained the age of fourteen years, *may order* the custodian to pay over to the minor for expenditure by him or to expend so much or all the custodial property as is *necessary* for the minor's *support, maintenance or education.*²⁵

No reported case involves a petition under section 4(c).²⁶ The Commissioners' Note following section 4 of the 1966 Revised Act states that, "[s]ubsection (c) makes clear the enforceable duty of the custodian to expend income or principal *when necessary* for the support, maintenance or education of the minor."²⁷ The most obvious meaning of the language empowers the court to order payments by the custodian upon the petition of a designated person only in limited circumstances. A finding must be made that the distribution is "necessary for the support, maintenance or education of the minor," and a finding of necessity can be made only after a determination that other sources are insufficient. In such cases, available resources of the parents to support the minor will have been exhausted. Distribution of the fund under this provision, then, will not discharge the parental duty of support, but rather will only supplement it. Section 4(c), therefore, does not affect the analysis of the availability of UGMA property to discharge obligations to support minors.

Neither section 4(i), section 4(c), nor any other provision of the Act aids in construing the language of section 4(b). The literal and most workable construction confers upon the custodian the authority to distribute the property in a manner that benefits the minor's parents. This power is inconsistent with the statement of section 3(a) that the minor donee is the sole beneficiary of UGMA property.

25. UGMA § 4(c) (emphasis added). No counterpart to § 4(c) of the Uniform Act existed in the Model Gifts of Securities to Minors Act.

26. In *Butcher v. Butcher*, 544 S.W.2d 249 (Mo. Ct. App. 1976), a father appealed from a divorce court order requiring him to pay child support. The father argued that the UGMA fund, held for the child by the mother as custodian, should be taken into consideration in reducing the amount of child support for which he was liable. The court rejected the father's claim, stating that under the provisions of the Missouri Uniform Act the custodian mother "is under no duty to provide support for the beneficiary. . . . The trial court clearly could not in considering the welfare of the child be sure that income would be available to the minor." *Id.* at 256. The father apparently did not rely upon the discretionary language of § 4(c) to support his claim. The court looked to § 4(b) as authority for its conclusion that the custodian has no duty to support the minor out of the custodial fund when other sources of support are available.

27. 8 UNIFORM LAWS ANNOTATED 207 (1972) (emphasis added).

B. *Early Warnings*

When the Model and Uniform Acts were first enacted, they were the subject of much discussion in legal journals. Some scholars who scrutinized these new laws anticipated the problems that have arisen regarding the authority of the custodian to use the fund for the minor's support. For example, the author of one critical summary of the Model Act analyzed the section dealing with distributive powers of the custodian as follows: "Under this authority, a parent acting as custodian *can support his child* with the child's own property and income so that all or a substantial portion may be consumed without any actual advantage to the minor."²⁸ The author assumed without discussion that the custodian has the authority to use gift securities to discharge support obligations of the minor's parents. In states that had changed the standard for payment from the Model Act standard of "support, maintenance, education and general use and benefit," by deleting the term "general use," the author felt that the authority of the custodian to use the fund for support was "less clear."²⁹ Finally, in an effort to remedy the perceived uncertainty regarding the custodian's authority, the author suggested that "some clear standard should be written into the act for the distribution of property." The author proposed that a standard "allowing distributions from property only for emergencies" and not in discharge of the support duty would eliminate the identified ambiguity.³⁰ The National Conference of Commissioners, however, did not adopt the proposed "emergency" standard in the Uniform Act. Rather, the "support, maintenance, education and benefit" standard, regarded in the work cited above as the most ambiguous, was incorporated into the UGMA.

A premonition of the problems created by the Model Act's uncertain definition of custodial powers led the Association of the Bar of the City of New York's Committee on State Legislation to disapprove the Model Act when it was introduced into the state legislature in 1955. Among the Association's objections to the proposed legislation were that "it created a new type of legal relationship without setting out in sufficient detail the applicable powers, duties and liabilities of the custodian . . . [and that] everyone concerned with a gift of securities to a minor was given complete pro-

28. 69 HARV. L. REV. 1476, 1480 (1956) (emphasis added).

29. *Id.* at 1480 n.31.

30. *Id.*

tection, except the minor."³¹

While the Association's objections to the language of the Model Act do not specifically refer to the invasion of funds for support, the objections seem to relate to that concern. The authority to use the funds for such a purpose, if it exists, is an important power of the custodian. This power certainly decreases the protection afforded the interest of the minor under the Act since it gives rise to the possibility that the fund may be used for the benefit of someone other than the minor.

Prior to the issuance of rulings on point by the Internal Revenue Service, writers who attempted to predict the federal tax consequences of transfers under the Model Act were similarly troubled by the ambiguity of the Act's provisions.³² Various tax consequences turn upon whether the custodian has authority to use the custodial property in discharge of support duties owed to the minor.³³ The statute's lack of clarity in this area led scholars to disagree both on that underlying issue and, as a result, on the taxation issues.³⁴

Since section 3(a) seems to foreclose the existence of an interest in the custodial property in anyone other than the minor, the income and estate tax treatment of such property should accordingly be modeled after the treatment of an outright gift. Gifts generate income and estate tax consequences for no one other than the donee. If, however, the focus is on the language of section 4(b), it is possible to conclude that the custodial fund is available for the indirect benefit of parents obligated to support the minor donee. The tax laws would then impose income and estate tax burdens upon the parent in certain circumstances.³⁵

Existing income, estate, and gift tax rules rely selectively upon the two conflicting definitions of the interests created by the custodial arrangement. This lack of integrity in the tax treatment of

31. The Bar Association Comm. Bull. No. 6, Memo No. 104, at 351 (1955), quoted in Newman, *The Uniform Gifts to Minors Act in New York and Other Jurisdictions—Tax Consequences, Possible Abuses, and Recommendations*, 49 CORNELL L.Q. 12, 15 n.32 (1963).

32. See Lauritzen, *Tax Problems on Gifts of Securities to Minors—Additional Comments*, 1 TAX COUNSELOR'S Q. 123 (1957); Mallory, *Estate, Gift and Income Tax Problems Under Gifts of Securities to Minors Acts*, 9 U.S. CAL. TAX INST. 649, 663-64 (1957); Letter from Daniel G. Tenney, Jr., to Christian M. Lauritzen II, appearing at 1 TAX COUNSELOR'S Q. 123 (1957) [hereinafter cited as Tenney].

33. See Parts IV & V *infra*.

34. Compare Lauritzen, *supra* note 32, with Tenney, *supra* note 32.

35. See Lauritzen, *supra* note 32; Mallory, *supra* note 32; Tenney, *supra* note 32; Parts IV & V *infra*.

uniform gifts is discussed at length in Part IV of this Article.

C. *The Surviving Spouse's Elective Share*

The inconsistent meanings expressed by sections 3(a) and 4(b) have prompted litigation between parties interested in the nature of the custodial relationship. The courts called upon to articulate the custodian's authority to use the custodial fund for the minor's support have failed to clarify the ambiguity in the Act.

In *Schwartz Estate*³⁶ the Supreme Court of Pennsylvania reviewed a surviving wife's claim, under the state's elective share statute, to a share of property placed into custodianship by her deceased husband. The decedent had made the gift of property, valued at \$37,000, to his son by a former marriage shortly before decedent's death. The relevant statutory provision allowed the widow to reach transferred property in which the decedent had retained certain incidents of ownership, including the power of consumption.

The trial court,³⁷ relying upon section 4(b) of the Uniform Act, resolved the issue in favor of the surviving spouse. The court noted that prior to the creation of the custodianship the decedent was under a duty to support the minor. The opinion does not indicate whether the duty existed pursuant to a court order, or simply under the general rule in the state requiring parents to support their minor children. Next, the court held that section 4(b) of the Uniform Act allowed the father to use the transferred property in discharge of his preexisting obligation of support. Since this authority constituted a power to consume under the election statute, the court concluded that the surviving spouse was entitled to a share of the fund. The court's opinion does not consider the possible impact of section 3(a) of the UGMA upon the custodial powers set out in section 4(b). Thus, the trial court never confronted the ambiguity in the Uniform Act.

On appeal, the Pennsylvania Supreme Court likewise failed to deal with the inconsistency of the statutory provisions. The court assumed, since neither party had placed the matter in issue, that under section 4(b) the custodian could in fact have used the fund to support his son.³⁸ Next, citing section 3 of the Act, the court stated that the "custodian may exercise his power of consumption

36. 449 Pa. 112, 295 A.2d 600 (1972).

37. 94 Montg. 168 (Pa. Orphans' Ct. 1971).

38. 449 Pa. at 115 n.2, 295 A.2d at 603 n.2.

over the custodial property *solely* for the benefit of the minor and not for the custodian's benefit."³⁹ Thus, unlike the trial court, the supreme court set out both relevant provisions. The court, however, failed to make the next logical step in the analysis and confront the impossibility of relying upon both provisions simultaneously. Instead, the court simply concluded that section 3(a) forecloses the possible use of the fund for the indirect benefit of the parent. Therefore, no power existed to consume the fund under the elective share statute, and the widow's claim was disallowed. The court did not indicate how this conclusion could be reconciled with its initial assumption, set out above, that the fund could be used by the parent to relieve his support duty.⁴⁰

The failure of the Pennsylvania Supreme Court to confront the ambiguity in the Uniform Act resulted in a confusing opinion that has been the subject of criticism.⁴¹

D. Erdmann v. Erdmann

The Supreme Court of Wisconsin in *Erdmann v. Erdmann*⁴² also failed to bring order to this confusing area. The gifts involved in *Erdmann* had been created when the minor donee's parents divorced. The divorce decree required the father to transfer investment trust shares to himself as custodian under the Wisconsin UGMA. The money to purchase the shares had been given to the children by their grandfather.⁴³ In addition, the decree granted

39. *Id.* at 117, 295 A.2d at 603.

40. The court's own preference for § 3 over § 4 is reflected in an earlier statement that § 4(b) can be read as conferring only administrative powers upon the custodian rather than the substantive authority to use the property to discharge support duties:

In order to give the custodian maximum flexibility in the administration of the fund, the Act specifically provides that he can make distributions for the benefit of the minor "with or without regard" to his own or any other person's duty to support the minor. The plain meaning of the language does not indicate that the custodian can use the proceeds of the fund in lieu of an independent prior support obligation.

449 Pa. at 115 n.2, 295 A.2d at 603 n.2. As stated in the text, however, the court assumes, for purposes of the opinion, that the proper reading of § 4(b) does allow the use of the fund to relieve parental support duties.

41. See 12 Duq. L. Rev. 125, 131-36 (1973); 47 Temp. L.Q. 140, 146-53 (1973). The *Schwartz* opinion is cited with approval in *In re Estate of Zeigher*, 95 Misc. 2d 230, 406 N.Y.S.2d 977 (Sur. Ct. 1978). In *Zeigher* the surviving spouse asked the court to include transfers made by the decedent under the UGMA in the elective estate. The court refused to do so. Without considering the relevant terms of the UGMA, the court accepted the statement in *Schwartz* that the fund cannot be used for the benefit of the custodian. *Id.* at 231, 406 N.Y.S.2d at 978.

42. 67 Wis. 2d 116, 226 N.W.2d 439 (1975).

43. The court stated that even though the shares were held in the father's name, they

custody of the children to the mother and required that the father pay a monthly allowance for child support as well as all medical and educational expenses incurred by the children. During the minority of the children the father invaded the custodial fund for their support, medical, and educational expenses. At the time of their majority he handed over to them the balance of the custodial fund as required by the Act. The mother sued for reimbursement of the amounts expended for the children's benefit. The father's defense was section 4(b) of the Uniform Act.⁴⁴ The trial court rejected his defense, and the supreme court affirmed.⁴⁵

While it is clear that that court did not believe that section 4(b) justified the father's use of the funds to relieve his own obligation to the children, it is less clear why the court reached this conclusion. The court said,

While the investment fund here created incorporates the Uniform Gifts to Minors statutory provisions, it remains a court-created fund of property belonging to the children and to be used for their benefit. . . . Here the role and authority of the court-named custodian are alike impressed with a trust obligation to treat the fund as belonging to the children and to expend it only for the benefit of the children, not for the benefit of the trustee.

. . . [W]here the fund is court-created and the fund involved represents property of the children who are the sole beneficiaries of the fund, the parent-custodian here was required to apply to the court which created the fund to establish the fact of his inability as parent to make the payments ordered,

belonged to the children. *Id.* at 122, 226 N.W.2d at 442. Under § 2(a) of the Act, only property owned by an adult can be transferred into the custodial arrangement. Arguably, the property could not be transferred under the UGMA. The court does not deal with this issue.

44. The defendant father also argued that *Estate of Prudowsky v. Commissioner*, 55 T.C. 890 (1971), *aff'd per curiam*, 465 F.2d 62 (7th Cir. 1972), was authority for his use of the funds to discharge his support duties. In *Prudowsky* the Tax Court held that custodial property could be included in the gross estate of the donor-parent custodian. The court relied alternatively upon two provisions of the Internal Revenue Code—§§ 2036 and 2038. The property was includible under § 2036 because the taxpayer had the authority to use it in discharge of his own support obligation. The court cited § 4(b) of the UGMA in support of this conclusion without any discussion. The property was includible under § 2038 because the taxpayer had the power to terminate the relationship by paying out the entire fund to the minor.

In *Erdmann* the Wisconsin court held first that § 2038, not § 2036, provided the necessary basis for including the property. 67 Wis. 2d at 120-21, 226 N.W.2d at 441-42. The court, however, simply did not deal with the key issue, *i.e.*, the Tax Court's determination that the UGMA allows the discharge of support duties. The court misread the *Prudowsky* treatment of termination power under § 2038, stating that the Tax Court found authority in the custodian to terminate by revoking *for his own benefit*. *Id.* at 120, 226 N.W.2d at 442. The court distinguished *Prudowsky*, then, by pointing out that the father in *Erdmann* had no such power. *Id.* at 121, 226 N.W.2d at 442. The court's analysis is disappointing.

For a discussion of § 2036, § 2038, and *Prudowsky*, see Part IV *infra*.

45. 67 Wis. 2d 116, 226 N.W.2d 439.

and of the need or benefit to the children in using the fund to make such payments as a custodian.⁴⁶

The court seemed to say that, because the custodianship was created by a judicial order, the court remained interested in its operation, and could require that its permission be obtained before distributions that might benefit the parent could be made. This aspect of the arrangement was not expressly set out in the divorce decree, and it is inconsistent with section 4(b) of the Uniform Act, which authorizes the custodian to make distributions "with or without court order." In other words, the arrangement, in the eyes of the court, was not truly a uniform gift; it was a court-created device that selectively applied the UGMA provisions. It is unlikely, therefore, that the court intended the *Erdmann* holding to extend beyond the facts of the case to situations in which the custodianship is not court-created.⁴⁷ When so limited, the opinion does not aid in the effort to resolve the ambiguity in the UGMA.

Nevertheless, the *Erdmann* dispute probably would not have arisen but for the effect of section 4(b) on this arrangement regarding property vested in the children. The same conflict between ownership of the fund and a parent's interest suggested by section 4(b) exists in every uniform gift. The conflict must be resolved.

III. RESOLVING THE AMBIGUITY IN THE UGMA

The resolution of the conflict in meaning between sections 3(a) and 4(b) of the UGMA must take the form of modification of one of the statutory provisions. Either section 3(a) must be altered to recognize that the interest of the minor is subject to a use of the property for the parent's benefit, or section 4(b) must be rewritten to foreclose any use of the custodial fund to discharge parental support obligations to the minor. Most appropriately, this modification should occur at the legislative level; alternatively, courts faced with the issue must identify and confront the statutory in-

46. *Id.* at 122-23, 226 N.W.2d at 442-43.

47. Arguably, some of the court's statements are broad enough to apply generally to uniform gifts. To the extent that the court relied upon the fact that the property belongs exclusively to the minor as the basis for disallowing use of the fund to discharge a support duty, the analysis might apply to all custodianships. Every donee of a uniform gift acquires irrevocably vested legal and equitable title under § 3(a). It is not at all clear from the court's opinion, however, that the ownership interest of the minor, absent the involvement of the court, would generate the same result.

A contrary view appears in 59 MARQ. L. REV. 447, 453 (1976), in which the author concludes that *Erdmann* prohibits the use of custodial funds to discharge the parental support duty whenever the parent is the custodian, but not the donor, of the uniform gift.

consistency.⁴⁸ Only a resolution of this ambiguity will create certainty regarding the nature of the property interests and the authority of custodians under the UGMA. Then the federal taxing authorities will be required to treat the arrangement as creating the same interests for all tax purposes.

In resolving the ambiguity in the UGMA, the goal must be to reform the provisions in accordance with the original intent of the drafters. Their expressions of intent in the body of the Act are, of course, inconsistent. The Commissioners' comments on the relevant provisions shed no light on the matter. In seeking to identify the drafters' probable intent, it is helpful to investigate their purpose in drafting the Uniform Act.

As the Commissioners' Prefatory Note to the 1966 Revision of the UGMA points out, prior to the Model Gifts of Securities to Minors Act of 1955 no satisfactory method of making modest gifts of securities to minors existed.⁴⁹ Each of the available property arrangements—outright transfer to the minor, transfer to a nominee, transfer to a trust, and establishment of a guardianship of the property for the minor—had significant flaws. The main purpose of the Model Act and the subsequent Uniform Act was to establish a new method of transferring property to minors.⁵⁰

It is possible to transfer property, including securities, outright to a minor. The problem with this method of making a gift arises when an attempt is made to reconvey the asset. Since minors generally have the power to disaffirm their contracts,⁵¹ at least until their age of majority, potential purchasers are reluctant to deal with the minor seeking to transfer securities in the minor's name. Property placed in the child's name may become "frozen" and in-

48. The issue arose in *Schwartz Estate*, 449 Pa. 112, 295 A.2d 600 (1972), and in *Erdmann v. Erdmann*, 67 Wis. 2d 116, 226 N.W.2d 439 (1975). The failure of the courts in these cases to confront the ambiguity in the statute is discussed in the text accompanying notes 36-47 *supra*. The question of the fund's availability to discharge support duties has also arisen in a number of federal tax cases. As discussed in Part IV *infra*, the courts deciding these cases also have failed to reconcile their results with both § 3(a) and § 4(b).

49. 8 UNIFORM LAWS ANNOTATED 182 (1972). For more detailed discussions of the available methods of making gifts of securities to minors prior to the Act, see *Browning, Gifts to Minors*, 27 CONN. B.J. 407 (1953); *Rogers, Some Practical Considerations in Gifts to Minors*, 20 FORDHAM L. REV. 233 (1951).

50. Moore, *Uniform Gifts of Securities to Minors Act: A Consideration of Its Merits*, 33 U. DET. L.J. 298, 299-306 (1956); 44 CALIF. L. REV. 569, 569-73 (1956); 25 FORDHAM L. REV. 390, 390-91 (1956); 69 HARV. L. REV. 1476, 1476-78 (1956); 33 IND. L.J. 242, 244-51 (1958); 54 MICH. L. REV. 883, 883-85 (1956); 32 N.Y.U. L. REV. 203, 203-05 (1957).

51. 1A A. CORBIN, CORBIN ON CONTRACTS § 227 (1963); J. MURRAY, MURRAY ON CONTRACTS § 12 (2d rev. ed. 1974); RESTATEMENT (SECOND) OF CONTRACTS § 18B, Comment b (Tent. Draft Nos. 1-7, 1973).

capable of being transferred until the child's majority.

The method of transferring securities to a nominee for the benefit of the minor is likewise objectionable. Since the property is not registered in the child's name, it is uncertain whether delivery, an essential element of making a gift, can be established. There may be no effective transfer, therefore, to the minor. In addition, the room for abuse of the child's interests under this method is obvious.

Two devices that overcome these problems are the guardianship and the trust. A guardian of the property may be appointed by the court to receive and manage securities donated to the minor.⁵² A guardian can enter into a binding contract to sell the securities. The interests of the child in the property will be carefully guarded by the court that created the relationship. If, however, the gift is a small one, the high degree of protection provided by the guardianship arrangement and the attendant costs may make the arrangement impractical. In addition to the initial requirement that the court create the relationship, there may be a requirement that the guardian post bond, account to the court periodically, and obtain a court order before selling the property. The expense and inflexibility of the guardianship may discourage the use of the device for transferring property to a minor.

Like the guardianship, the trust avoids the problems created by placing title in the minor or in a nominee. Furthermore, the flexibility missing in the guardianship arrangement can be drafted into the terms of a trust. Nevertheless, the drafters of the UGMA believed that the trust did not provide a useful alternative for making gifts of securities to minors because of the cost involved in creating a trust. Especially in the case of a small gift, the threshold cost of a lawyer's services to draft the instrument could be prohibitive.

Both the Model Act and the Uniform Act sought to establish a method for making small gifts to minors that avoided the problems encountered in the existing devices. To that end, the Acts create a custodial relationship in which the adult custodian has broad powers to manage and enter into contracts involving the property transferred to a minor. The Uniform Act protects the interests of the minor to the extent that it requires the minor's interest to be expressly stated in the document creating the custodianship. The

52. See, e.g., 20 PA. CONS. STAT. ANN. § 5111 (Purdon 1975).

Uniform Act provides a simple and inexpensive⁵³ method for transferring property that usually entails no judicial involvement.⁵⁴ The donor simply states in writing that he or she is making a transfer of the designated property "to A as custodian for B under the State X UGMA."

The drafters of the Model Act devised the custodial relationship in an effort to create an alternative device to the outright gift, guardianship, and trust arrangements. The drafters, however, expressed contradictory intentions on the issue of the availability of the custodial property for the minor's support. In seeking to clarify their intent, an examination of this aspect of the gift, guardianship, and trust arrangements is relevant.

Outright gifts to a child by a parent or anyone else do not reduce the parental support obligation. An outright gift, of course, vests legal and equitable title in the child and confers no right or interest in the property upon any other person.⁵⁵ Use of the property for the support of the minor has the effect of shifting the benefit from the minor to the parent, whose support obligation is thereby reduced, an effect that is generally impermissible. The exception to this rule is the necessitous circumstance when the parent is without resources to support the child.⁵⁶

The general rule has its most frequent application in the context of the broken family, after a court has ordered custody of the child to one parent and imposed a fixed obligation of support upon the noncustodial parent. In this setting, "it is generally recognized that gratuitous contributions from relatives, friends, charities, or governmental agencies neither indicate a diminished need for child support nor reduce the . . . [noncustodial parent's] obligation to furnish such support."⁵⁷

53. Under the UGMA, the reasonable expenses of managing the property are chargeable to the estate. Generally, no bond is required. A custodian other than a donor custodian, may be compensated for services from the fund. See UGMA § 5.

54. Judicial intervention will take place only upon the petition of an interested party in exceptional circumstances. The court may be asked to intervene to remove a custodian or to appoint a successor custodian. UGMA § 7(d)-(f). Such petitions will be granted only for good cause. See *Martin v. Martin*, 271 So. 2d 391 (Miss. 1972); Application of Muller, 18 A.D.2d 1067, 239 N.Y.S.2d 519 (1963) (petitions for removal denied). Section 8 of the UGMA allows designated parties to petition the court for an order requiring the custodian to make an accounting.

55. If the property received by the minor exceeds a certain value, the law may require the appointment of a guardian for the property. See, e.g., 20 PA. CONS. STAT. ANN. § 5101 (Purdon 1975).

56. 67A C.J.S. *Parent & Child* § 51 (1978).

57. Annot., 1 A.L.R.3d 324, 346 (1965); see, e.g., *Slaughter v. Slaughter*, 313 S.W.2d

When the court places property of a minor in the hands of a guardian, legal and equitable title remain in the minor. The relationship between the guardian and ward with regard to the property is a fiduciary one that generally requires the guardian to use the property solely for the benefit of the ward.⁵⁸ Under most circumstances use of the ward's estate in discharge of any support duty owed to the ward by the guardian or another would constitute a breach of this fiduciary duty.⁵⁹

A trust is a fiduciary arrangement in which the trustee assumes possession of and legal title to property and manages it for the benefit of the beneficiary who has equitable title. Absent an express statement to the contrary in the creating instrument, property held in trust for a minor beneficiary, like the outright gift and guardianship estate discussed above, cannot lawfully be used for the beneficiary's support in a way that reduces the obligation of support of the minor's parents.⁶⁰ The use for the indirect benefit of the parent is a breach of the trustee's fiduciary obligation to use the property solely for the benefit of the beneficiary.

The trust is a very flexible device. The settlor, in the private act of creation, can establish the terms of the trust; many variations in the terms are possible. The donor can create a trust that expressly provides that income and/or principal can or must be used by the trustee for the support of the minor, and that such use is intended to relieve parental duties of support owed by the trustee or others. Such a trust by its express terms is intended to benefit the parents as well as the minor beneficiary.

Even when trusts are created expressly for the support of a minor beneficiary, uncertainty can exist about the scope of the trustee's authority to disburse the funds for support. In a number of cases in which the trust terms are unclear on the issue the courts have been asked to determine whether the trustee must take into consideration the amount of support owed to the child by its parents and to limit distributions for support to those needed to supplement this resource. As a general rule, the result will turn upon the court's determination of the settlor's intent regarding the matter.⁶¹

193 (Mo. Ct. App. 1958).

58. G.G. BOGERT & G.T. BOGERT, *HANDBOOK OF THE LAW OF TRUSTS* § 17, at 37 (5th ed. 1973).

59. *E.g.*, 39 C.J.S. *Guardian and Ward* §§ 64(c), 65(b) (1976).

60. 2 A. SCOTT, *THE LAW OF TRUSTS* § 168, at 1291 (3d ed. 1967).

61. Annot., 41 A.L.R.3d 255, 262 (1972); *see, e.g.*, *Ingalls v. Ingalls*, 256 Ala. 321, 54 So.

It is unclear whether the drafters of the UGMA intended to create a property arrangement modeled after the outright gift and guardianship or whether they intended to create a device that for this purpose was like the unlimited support trust. On the one hand, the custodianship is patterned after the guardianship in many respects. Although the UGMA expressly deviates from the guardianship model by abolishing the requirements of judicial participation in the arrangement, other important characteristics of the guardianship arrangement appear in the Act. Like the guardian, the custodian acquires neither legal nor equitable title to the property. Section 4(i) of the UGMA provides that the custodian has all of the powers of a guardian under state law. The stated purpose of the Act is to set up a convenient means of making gifts to children. It does not mention gifts for the benefit of minors *and* their parents. It is very possible that the drafters' intent was to follow the guardianship and outright gift examples and not to confer a benefit upon parents.

On the other hand, it is possible to interpret section 4(b) as similar to the term in a support trust instrument expressing an intention that the property be available to discharge support duties owed to the minor beneficiary. Under this analysis, section 4(b) is a specific limitation of the more general statement of section 3(a) that the property belongs to the minor.

It is impossible to follow both the guardianship and the special support trust models, although the UGMA currently attempts to do so. The resulting inconsistency can be eliminated in one of two ways. Section 4(b) can be modified to remove any custodial authority to use the fund to relieve parental support duties. Conversely, section 3(a) can be rewritten to provide that the interest of the minor in custodial property is not absolute, but rather is limited by the parental interest found in section 4(b). This limitation has *not* been read into the current language of section 3(a) by either the courts or the Internal Revenue Service in the area of federal gift taxation. Thus, if the drafters' purpose was to allow the use of the fund to benefit the parent, this purpose is not being accomplished in all cases. If, on the other hand, the true purpose of the Act is to confer benefit upon the minor alone, then the language of section 4(b) is an obstacle to its accomplishment.

The general purpose of the Uniform Act is to create a device for making gifts to minors. That purpose should be the controlling

factor in this analysis. By providing that custodial property vests irrevocably in the minor, section 3(a) is consistent with the goal. To the extent that section 4(b) is inconsistent with the general purpose, it should be rewritten to clearly limit the distributive powers of the custodian. The modification would clarify the custodian's inability to use the fund for the minor's support, and the corresponding absence of any property interest in the parent for elective share, federal tax, or other purposes. The clarification would eliminate the need to litigate these issues in cases like *Schwartz Estate*⁶² and *Erdmann v. Erdmann*.⁶³

IV. THE TAX TREATMENT OF UNIFORM GIFTS: REFLECTION OF AN AMBIGUITY

Section 3(a) of the UGMA provides that the minor donee has absolutely vested legal and equitable title to the gift property. On the other hand, section 4(b) provides that the custodian has the authority to use the fund for, *inter alia*, the support of the donee. This use, to the extent that it offsets the parent's duty to support the donee, benefits the parent and is inconsistent with the statement in section 3(a) that the minor has the total interest in the custodial fund.

These irreconcilable definitions of the interests created under the UGMA have resulted in the inconsistent treatment of the arrangement for federal tax purposes. The gift tax treatment is based upon section 3(a), which recognizes only the interest of the minor, resulting in the taxation of a UGMA transfer as a completed gift. Conversely, the income and estate tax consequences are based upon, *inter alia*, the availability of the custodial fund for support. This treatment ignores the section 3(a) statement that the donee alone has an interest in the property. It is inappropriate to base the various tax consequences of a transaction selectively upon one or the other of its inconsistent characteristics. In UGMA cases, however, the Internal Revenue Service has done so in a manner that generates maximum tax revenue.

As a threshold matter, it is necessary to distinguish the perceived inconsistency here from other familiar situations in which, under well-established principles, a single transaction is treated

62. 449 Pa. 112, 295 A.2d 600 (1972). See notes 36-41 *supra* and accompanying text.

63. 67 Wis. 2d 116, 226 N.W.2d 439 (1975). See notes 42-47 *supra* and accompanying text.

differently for income, estate, and gift tax purposes.⁶⁴ A transfer that is "complete" for gift tax purposes and therefore is subject to the gift tax when made, for example, may nonetheless be viewed as "incomplete" for estate tax purposes and so includible in the gross estate at the time of the donor's death. If *O*, owning property in fee, transfers the property "to *O* for life, remainder to *X*," *O* must pay gift tax on the value of the remainder at the time of the transfer under Internal Revenue Code section 2511.⁶⁵ *O* has made a completed gift of that value to *X* because *O* has relinquished dominion and control over the remainder. Yet upon *O*'s death, the full fair market value of the property may be included in *O*'s gross estate under section 2036. The retention of a life estate means that for estate tax purposes no part of the transfer is complete until the donor's death. As pointed out by the Supreme Court in *Smith v. Shaughnessy*,⁶⁶ the landmark case allowing inconsistent treatment of transfers with a retained interest, the creation by Congress of an estate tax credit for gift taxes paid on property includible in the gross estate suggests that the two taxes were not intended always to be mutually exclusive.⁶⁷

In a case in which the transfer of property is viewed as complete for the purposes of one transfer tax, but not the other, the income tax treatment necessarily will be inconsistent with one or the other. In the above hypothetical, for example, *O*'s transfer of property "to *O* for life, remainder to *X*" will be viewed as an incomplete transfer for income tax purposes. That is, the income will continue to be taxed to *O* after the conveyance. The income tax treatment is consistent with the estate tax treatment but inconsistent with the gift tax perception that the *inter vivos* transfer was complete.

In the above hypothetical, the transfer is complete for gift tax purposes and incomplete for estate and income tax purposes be-

64. This phenomenon of differing definitions of taxable conduct for the various taxing systems has been referred to as the "gift, gaft, gefft" phenomenon. The phrase comes from the suggestion of Judge Frank in *Commissioner v. Beck's Estate*, 129 F.2d 243, 246 (2d Cir. 1942), that the use of the several words might help to clarify the area. The lack of mutuality among the taxing systems in this regard is discussed at D. KAHN, E. COLSON & G. CRAVEN, *FEDERAL TAXATION OF ESTATES, GIFTS, AND TRUSTS* 250 (2d ed. 1975); C. LOWNDES, R. KRAMER & J. McCORD, *FEDERAL ESTATE AND GIFT TAXES* 703-05 (3d ed. 1974); 3 RESEARCH INSTITUTE OF AMERICA, *ESTATE PLANNING & TAX COORDINATOR* ¶ 47,660 (1980).

65. I.R.C. § 2511. All references to Code sections hereinafter are to the Internal Revenue Code of 1954 unless otherwise indicated.

66. 318 U.S. 176 (1943).

67. *Id.* at 179.

cause tax authorities utilize different definitions of "completeness." The hypothetical transfer is, however, uniformly perceived as creating a vested remainder in *X* following a retained life estate in *O*.

Compare this with the treatment of a transfer under the UGMA. Suppose that *O*, owning property, transfers it to *O* as custodian for *O*'s child *C*, pursuant to the provisions of the UGMA. Gift tax law regards the transaction as the creation of total ownership interests in *C*, applies the gift tax definition of completeness, and taxes the transfer. Estate tax law relies upon the retained interest of *O* as indirect beneficiary under UGMA section 4(b) and includes the full value of the property in *O*'s gross estate under section 2036. Similarly, income tax law recognizes the interest of the parent created by section 4(b) of the Act, resulting in potential income tax consequences for the parent. The inconsistency exists not only in the varying definitions of complete transfer used by the taxing systems, but also in the perceived nature of the arrangement being taxed. Indeed, as discussed below, the result under the gift tax would be different in many cases if the possible use of the fund for the benefit of the parent were acknowledged. The results under section 2036, and the income tax consequences, would be different if total vesting in the donee were acknowledged.

It is inappropriate for the tax laws to treat the custodial arrangement as creating one set of relationships for one federal tax system and a different set of relationships for another. Nevertheless, the inconsistency between sections 3(a) and 4(b) of the UGMA allows such an anomalous result.

A. *The Gift Tax*

The expectation of the New York Stock Exchange attorneys who drafted the Model Gifts of Securities to Minors Act was that the transfers made pursuant to the Act's provisions would be viewed as completed gifts when made and would qualify for the annual gift tax exclusion. Further, all income after the transfer would be attributed to the minor donee, and for estate tax purposes would be includible only in the estate of the donee. This tax perception of the arrangement is consistent, treating the gift as absolutely vesting the property in the donee for all tax purposes.⁶⁸

68. For a detailed description of the communications between attorneys for the New York Stock Exchange and the Internal Revenue Service during the period after the promulgation of the Model Act and before the issuance of the revenue rulings on point, see New-

Consistent with these expectations, Revenue Ruling 56-86⁶⁹ set forth the gift tax consequences of a transfer under the Act. The Internal Revenue Service took the position that the transfer constitutes a completed gift at the time of the transfer and is therefore subject to the gift tax. Furthermore, the Service concluded that the transfer qualifies for the \$3,000 per donee annual exclusion for gifts of present interests under Internal Revenue Code section 2503(b).⁷⁰ The conclusion that the transfer constitutes a completed gift is based expressly upon the fact that the statutory transfer "conveys to the minor indefeasibly vested legal title to the securities."⁷¹ It ignores, however, the provision of the Act that allows use of the property for the donee's support. Despite the ruling's possible infirmity on this ground, no cases have been reported in which the validity of Revenue Ruling 56-86 has been challenged.

B. The Income Tax

Prior to the issuance of revenue rulings on point, it was impossible to predict with certainty the income tax consequences of transfers under the Model Act:

If the custodianship is regarded as equivalent to a trust for the minor, for income tax purposes, taxation will presumably be governed by I.R.C. Sections 671-678. . . .

If the custodianship is not regarded as equivalent to a trust, but as analogous to a guardianship or as being unique and distinctive, for income tax purposes, taxation will presumably be governed by I.R.C. Section 61 and the case law under it. . . . That, it is submitted, is the preferable and more accurate analysis of the nature of the minor's ownership under the Gifts of Securities to Minors Act. It gives effect to the emphatic declaration in the Act that a gift of securities under the Act "shall convey to the minor indefeasibly vested legal title to the securities thus delivered." It is consistent with the holding and background of Rev. Rul. 56-86 which ruled on the gift tax consequences of a gift of securities to a minor under the Act. It should result in taxation of the entire custodianship income to the minor alone.⁷²

The author was understandably unable to predict whether the sup-

man, *supra* note 31, at 35-43.

69. 1956-1 C.B. 449.

70. For a discussion of § 2503, see text accompanying notes 105-07 *infra*.

71. Rev. Rul. 56-86, 1956-1 C.B. 449.

72. Mallory, *supra* note 32, at 656-57 (footnotes omitted).

Sections 671-678 comprise the portion of Subchapter J of the Code dealing expressly with grantor trusts. In the situations identified in those sections, the grantor is regarded for income tax purposes as the owner of the trust fund. If a trust were created and the trustee-grantor expressly retained the powers set out in § 4 of the UGMA, § 677(b) would apply. To the extent that the grantor trustee actually distributed income in discharge of the support obligation, the trust fund would be regarded as the grantor's retained property, and the income so used would be taxed to the grantor under § 677(b).

port trust model or the guardianship model would be applied to determine the tax consequences of gifts under the Act. To the extent that income under the Model Act could be used lawfully to discharge the obligation of the parent, the appropriate reference would be to a trust setting rather than to the outright gift situation. On the other hand, as the transfer is totally vested in the minor, to the exclusion of interests in anyone else, the more appropriate analogy would be to the outright gift situation, with the income tax burden properly falling upon the donee. The two concepts, which are both present in the Model Act, are inconsistent. For income tax purposes, the Service chose to rely upon the former.

Revenue Ruling 56-484⁷³ states that the income from securities transferred pursuant to the Model Act is income of the person legally responsible for the support of the minor donee to the extent that the income is actually used to discharge the obligation.⁷⁴ Income not so used is taxable to the minor. The ruling expressly relies upon the provision in the Act that allows use of both the fund's income and its corpus to support the minor.⁷⁵

The ruling distinguishes cases in which an outright gift to a minor is made with no express provision for support. The laws of most jurisdictions would disallow the use of such property for the support of the minor, thereby negating any indirect benefit flowing to the parent whose support duty would be satisfied by such a use. When use of the minor's property for the indirect benefit of another is proscribed by law, the income is taxable only to the minor.⁷⁶

The provision in the Model Act, like an express provision in a

73. 1956-2 C.B. 23.

74. The ruling analogizes the statutory gift to the support trust for income tax purposes. Reliance is expressly placed upon the general definition-of-income provision, § 61, not upon the taxation-of-trust income sections of the Code. This properly reflects the fact that Subchapter J treats only the taxation of trusts, and that statutory gifts are not trusts.

The coverage of the ruling is wider than the analogous area covered by §§ 671-678 in the trust setting, discussed at note 72, *supra*. The ruling states that "income derived from property transferred under the model custodian act . . . which is used in the discharge or satisfaction, in whole or in part, of a legal obligation of any person to support or maintain a minor is, to the extent so used, taxable to such person under Section 61. . . ." Rev. Rul. 56-484, 1956-2 C.B. 23, 24 (emphasis added). In the trust area, taxation of income to the nondonor parent in such a case would take place under § 662. Treas. Reg. § 1.662(a)-4 (1956).

75. Rev. Rul. 56-484, 1956-2 C.B. 23, 24.

76. *Visintainer v. Commissioner*, 187 F.2d 519 (10th Cir.), *cert. denied*, 342 U.S. 858 (1951); Rev. Rul. 58-65, 1958-1 C.B. 13.

trust agreement that permits the use of trust income for the support of the minor, is held to qualify "the property interest transferred to the minor under such trust or statute so as to permit the use of all or a part of the income therefrom to be diverted to another."⁷⁷ For income tax purposes, then, the Internal Revenue Service recognizes that the minor donee's interest in the custodial fund is *not* the absolutely vested legal and equitable title to the property. Rather, the minor's interest is limited by an interest in the parent that exists by virtue of the availability of the property to relieve the parental support duty.

The revenue ruling had a chilling effect upon the theoretical, as well as the tax planning, advantages of the Model Act.

The Treasury Department had thus, for income tax purposes, analogized the custodian statute situation to a trust. . . . The attorneys for the Stock Exchange believed this qualification to be dangerous on both the theoretical and practical level. The theory of the custodian statute was that a mechanism different from a trust relationship had been established. Thus, for example, the investment standards were not those of the trustee but were more extensive. The liability provisions were also more favorable to the custodian. This was a new legal concept, neither trust nor guardianship. Yet the income tax treatment did not recognize the creation of new concept but preferred instead to treat it as a trust. As a practical matter, the Gifts to Minors Act would be more attractive to the potential investor if the income were taxed only to the minor, thus providing a means of shifting the income payable by the donor.⁷⁸

The Tax Court was called upon to apply Revenue Ruling 56-484⁷⁹ in *Commissioner v. Friedman*.⁸⁰ Dividends from securities held by the taxpayer parents, as custodians for their children

77. Rev. Rul. 56-484, 1956-2 C.B. 23, 24.

78. Newman, *supra* note 31, at 40 n.138.

79. In another case, the Tax Court considered the nature of the custodial relationship, not for the purpose of determining *who* should pay the income tax, but rather to determine *when* the tax was payable. In *Anastasio v. Commissioner*, 67 T.C. 814 (1977), the taxpayer won \$100,000 in a lottery in 1970 when he was 20 years old. State law required that the fund be given to the taxpayer's parents as custodians for him under the UGMA. The custodians paid over to the taxpayer the \$100,000 plus interest in 1977 when he was 21. The parties agreed that the donee would pay the tax on both the original gift and the income earned during the year of custodianship. The issues were whether the prize was income to the taxpayer in the year of the gift (1970) or in the year of distribution to him (1971) and whether the interest was income to the taxpayer in the year earned (1970) or in the year of distribution to him (1971). Relying on an economic benefit theory, the court held that both amounts were taxable to the donee in 1970. Under the provisions of the UGMA, the taxpayer "received sufficient benefit to be subject to tax on the prize money in 1970" to warrant inclusion in income for that year. *Id.* at 817. The limitations upon his enjoyment imposed by the UGMA's custodial requirements were deemed irrelevant. For this limited purpose of determining the timing of income taxation to the minor donee, the court expressly analogized the UGMA to the guardianship arrangement. *Id.* at 818.

80. 37 T.C.M. (P-H) 792 (1968), *aff'd*, 421 F.2d 658 (6th Cir. 1970).

under the Ohio UGMA, were included in the gross income of the parents. In support of this result the court cited Revenue Ruling 56-484 and noted that "the dividends on all shares so held were freely used by petitioners to satisfy personal obligations, including their obligation to support their children."⁸¹ No attempt was made to determine what amounts were actually used for the children's support. The court therefore exceeded the scope of the ruling, which allows taxation of income to one other than the minor only when and to the extent that a support duty has been relieved. This treatment may be justified by the facts of the case, which arguably warrant a complete disregard of the transfer on the ground that it was one of mere form rather than substance. The court noted that all dividends received were placed in the taxpayers' checking account.⁸² In addition, the court observed that upon the twenty-first birthday of one of the minor donees, no change was made by the taxpayers in the ownership and control of the property held for her.⁸³ The distribution required by the UGMA was not made. These facts suggest that the dividends were taxed to the parents chiefly because they never really made a gift of the securities. Regrettably, however, the court placed no express reliance upon this theory.⁸⁴

C. *The Estate Tax*

The Internal Revenue Service stated its position on the estate tax consequences of gifts made under the Model Act in Revenue Ruling 57-366.⁸⁵ The ruling relied upon Internal Revenue Code section 2038 to include in the gross estate of the donor custodian the value of property held in custodianship at the time of his or her death. Of greater significance to this discussion is the subsequent reliance by the courts upon section 2036 as an alternative basis for taxing the gift at the death of the donor parent custodian.

Revenue Ruling 56-366 analogized transfers under the Model Act to certain transfers in trust taxable under section 2038 pursu-

81. *Id.* at 804.

82. *Id.*

83. *Id.*

84. In another UGMA case the Tax Court relied upon this economic reality theory to tax the income to the donor parents. In *Duarte v. Commissioner*, 44 T.C. 193 (1965), the taxpayers transferred shares in a Subchapter S corporation to their children under the UGMA. The Tax Court rejected this attempt to shift the income tax burden to the children because the facts of the case indicated that "[t]he purported transfers of stock by petitioner to his minor children had no economic reality" *Id.* at 196.

85. 1957-2 C.B. 618.

ant to well-established principles of estate taxation. Earlier, these principles had been enunciated by the Supreme Court in two cases, *Commissioner v. Estate of Holmes*⁸⁶ and *Lober v. United States*.⁸⁷

In *Estate of Holmes* the Court held that the value of certain trusts created by the decedent for his children was includible in his estate under a Code provision that, like section 2038 of the later 1954 Code, taxed transferred property over which the decedent had the power to "alter, amend, revoke or terminate." The irrevocable trust in *Estate of Holmes* gave the donor trustee discretionary power to distribute or accumulate income and to distribute any or all of the corpus at any time. Moreover, the trust provided that if a primary beneficiary should die before the actual termination of the trust, the primary beneficiary's portion of the trust would then go to certain other designated individuals. The Court noted that the decedent's power to accelerate the primary beneficiary's actual enjoyment of the trust property could eliminate the possibility that the trust property would go to a secondary beneficiary because of a primary beneficiary's death prior to distribution. The Court concluded that property subject to such a "power which affects not only the time of enjoyment but also the person or persons who may enjoy the donation" was taxable.⁸⁸

In *Lober* the Court extended the *Estate of Holmes* rule to a trust in which the beneficiary had an indefeasibly vested equitable interest. Under the terms of the trust agreement, the death of the beneficiary prior to the termination of the trust would cause all interest in the trust to pass to the beneficiary's estate. As in *Estate of Holmes*, the donor trustee had discretion either to pay income and principal to the named beneficiary at any time or to withhold enjoyment until a time specified in the trust instrument. In this case, however, the donor retained no power to terminate a contingency, for there was no contingency. Rather, the power to delay or accelerate the distribution of the trust property was merely the power to affect the timing of the enjoyment by the primary beneficiary who would take, personally or by successors in interest, in any event.

The *Lober* Court relied upon the broad statement in *Estate of Holmes* that "[a] donor who keeps so strong a hold over the actual and immediate enjoyment of what he puts beyond his own power

86. 326 U.S. 480 (1946).

87. 346 U.S. 335 (1953).

88. 326 U.S. at 487.

to retake has not divested himself of that degree of control which . . . [the forerunner of section 2038] requires in order to avoid the tax."⁸⁹ The Court applied this standard to the trust in *Lober*, concluding that the donor's retained power to affect the timing of actual possession was a sufficient basis for taxation.⁹⁰

The custodial relationship is analogous to the trust in *Lober*. The custodian has the same broad discretion to accumulate income or to distribute income or principal at any time. Prior to termination of the custodianship, either by distribution of the property or by passage of time, the donee's death causes the property to pass to the donee's estate. The Internal Revenue Service in Revenue Ruling 57-366 takes the position that the rationale of *Lober* is applicable in the statutory gift setting. The application seems appropriate, since the *Lober* Court relied upon the retained power to affect the enjoyment and accelerate the possession of the gift, without regard to vestedness. This power is also present in the statutory gift setting.

One commentator has suggested a basis for distinguishing the statutory gift situation from the trust cases in the above situation.⁹¹ He notes that the donee under the terms of the gift statute has the vested legal title at all times, while the beneficiary in the *Lober* trust situation acquires legal title only at the time of distribution of the property by the trustee. Until this distribution, legal title rests with the trustee, although the beneficiary has the indefeasibly vested equitable title. This difference is not a compelling basis for different treatment in the estate tax area. As acknowledged by the author of the suggestion, "[a]rguably the minor under the gift statute has present enjoyment because he has legal title; but such an analysis seems formalistic since the property may be preserved and the income accumulated so that the minor receives no tangible benefits until he reaches twenty-one."⁹²

The thrust of *Lober* is that any retained authority to affect the timing of actual possession and enjoyment of the transferred property makes the transfer "testamentary" and therefore taxable in the decedent's estate. The same authority concerning the property

89. 346 U.S. at 337 (quoting *Commissioner v. Estate of Holmes*, 326 U.S. 480, 487 (1946)).

90. For a discussion of *Lober*, see 3 J. MERTENS, *THE LAW OF FEDERAL GIFT AND ESTATE TAXATION* ¶ 25.41, at 720-23 (1959). The current Treasury Regulations have adopted the holding in *Lober*. Treas. Reg. § 20.2038-1(a) (1958).

91. 69 HARV. L. REV. 1476 (1956).

92. *Id.* at 1483-84.

exists on the part of the donor custodian at the time of death prior to the majority of the donee. It can be maintained, however, that *Lober* is an extreme extension of section 2038 and should therefore be limited, as a matter of policy, to its facts. Indeed, the decision in *Lober* has been sharply criticized.⁹³ The Tax Court has stated that it would resolve the *Lober* issue in favor of the taxpayer, but for the Supreme Court's decision in *Lober*.

If the question involved herein were one of first impression, it might have been possible to sustain petitioner's position under § 2038. At most, the power retained by the decedent permitted him merely to shift principal and income between the life beneficiary and the latter's estate. . . . It could be argued that such a limited power in a decedent is not a "power . . . to . . . terminate" within the meaning of § 2038(a)(1). . . .

The difficulty is that in *Lober v. United States*, the Supreme Court faced the issue . . . and held directly against the position taken by the petitioner herein.⁹⁴

These remarks aside, several courts have sustained the Internal Revenue Service's ruling⁹⁵ that the *Lober* rule applies to uniform gifts.⁹⁶ While Revenue Ruling 57-366 states generally that the custodian's powers satisfy the section 2038 test requiring "a power . . . to alter, amend, revoke, or terminate," these courts have based taxation on the custodian's authority to terminate the custodial relationship by paying out the entire principal at any time.

93. Critics have pointed out that the *Lober* Court relied upon *Estate of Holmes* without discussing the important difference between the two cases. *Estate of Holmes* involved the power to affect the identity of the taker after the transfer; *Lober* did not. See, e.g., 28 ST. JOHN'S L. REV. 303, 305-06 (1954). The appropriateness of taxing the power to affect only the timing of enjoyment has been questioned, since the value of the beneficiary's interest arguably remains constant regardless of the time of distribution. See 37 MINN. L. REV. 405, 406 (1953).

94. *Estate of Varian v. Commissioner*, 47 T.C. 34 (1966), *aff'd per curiam*, 396 F.2d 753 (9th Cir.), *cert. denied*, 393 U.S. 962 (1968) (citations omitted). That reasonable jurists can differ on the *Lober* issue is suggested also by the fact that prior to the Supreme Court's decision, the Fifth Circuit decided the issue in favor of the taxpayer in *Hay's Estate v. Commissioner*, 181 F.2d 169 (5th Cir. 1950).

95. Rev. Rul. 57-366, 1957-2 C.B. 618.

96. *Zien v. United States*, 73-2 U.S. Tax Cas. (CCH) ¶ 12,964 (E.D. Wis. 1973); *Eichstedt v. United States*, 354 F. Supp. 484 (N.D. Cal. 1972); *Crocker-Citizens Nat'l Bank v. United States*, 320 F. Supp. 673 (N.D. Cal. 1970) (mistakenly reported as E.D. Cal.); *Estate of Carpousis v. Commissioner*, 43 T.C.M. (P-H) 1064 (1974); *Estate of Prudowsky v. Commissioner*, 55 T.C. 890 (1971), *aff'd per curiam*, 465 F.2d 62 (7th Cir. 1972); *Stuit v. Commissioner*, 54 T.C. 580 (1970), *aff'd*, 452 F.2d 190 (7th Cir. 1971); *Jacoby v. Commissioner*, 39 T.C.M. (P-H) 813 (1970); *Estate of Chrysler v. Commissioner*, 44 T.C. 55 (1965), *rev'd on other grounds*, 361 F.2d 508 (2d Cir. 1966).

Prudowsky, *Chrysler*, *Crocker*, and *Carpousis* rely on both § 2038 and § 2036 as the basis for taxation of the custodial property. Section 2036 is discussed in the text accompanying notes 111-24 *infra*.

Taxpayer arguments against the application of section 2038 to custodianship property have been consistently rejected by the courts. In *Estate of Prudowsky v. Commissioner*⁹⁷ the taxpayer sought to distinguish adverse precedents by establishing that in this case there was evidence showing that the donee custodian had no intention to "pay out" the fund during the donee's minority. Both the Tax Court⁹⁸ and the Court of Appeals⁹⁹ considered the taxpayer's subjective intent to be irrelevant.

The taxpayer in *Jacoby v. Commissioner*¹⁰⁰ attempted to distinguish *Lober*. The UGMA provides that a court in certain situations may order the custodian to pay out income and/or principal to the minor.¹⁰¹ Since no similar provision appeared in the terms of the *Lober* trust, the discretion of a taxpayer custodian under the UGMA is arguably less than the discretion of the *Lober* trustee. While conceding that this restriction upon the authority to retain the fund may distinguish the two arrangements, the Tax Court emphasized that the authority to pay out the whole fund and thus terminate the arrangement was the same under both the *Lober* trust terms and the *Jacoby* Uniform Act transfer. This authority to terminate was held a sufficient basis for taxation under section 2038.

Whether the UGMA in fact grants the custodian unfettered authority to terminate the arrangement was considered in *Stuit v. Commissioner*.¹⁰² The Uniform Act provides that "[t]he custodian shall pay over to the minor . . . so much of or all the custodial property as the custodian deems advisable for the support, maintenance, education and benefit of the minor."¹⁰³ The taxpayer in *Stuit* argued that this language creates an objective and enforceable standard limiting the authority of the custodian regarding the amounts that may be paid out, and thus limiting the power to terminate. The Tax Court concluded that the statutory language is so

97. 55 T.C. 890 (1971), *aff'd*, 465 F.2d 62 (7th Cir. 1972).

98. 55 T.C. at 893-94.

99. 465 F.2d at 62.

100. 39 T.C.M. (P-H) 813 (1970).

101. Section 4(c) of the UGMA provides,

The court, on the petition of a parent or guardian of the minor or of the minor, if he has attained the age of fourteen years, may order the custodian to pay over to the minor for expenditure by him or to expend so much of or all the custodial property as is necessary for the minor's support, maintenance or education.

This provision is discussed at greater length in the text accompanying notes 25-27 *supra*.

102. 54 T.C. 580 (1970), *aff'd*, 452 F.2d 190 (7th Cir. 1971).

103. UGMA § 4(h).

broad that it creates no limitation on the authority of the custodian.¹⁰⁴

Attempts have been made to reverse this result under section 2038 by pointing to a perceived inconsistency between taxation under section 2038 and eligibility for the annual gift tax exclusion. Section 2503(b) creates a limited exclusion from taxation for transfers of present interests in property. Section 2503(c) states that certain transfers to minors, despite their characterization for property law purposes, shall be considered gifts of present interests for this specific tax purpose. Revenue rulings in the gift tax area provide that transfers made pursuant to the Model and Uniform Acts satisfy the requirements of section 2503(c) and qualify for the section 2503(b) exclusion.¹⁰⁵

It is possible to argue that such treatment of the custodial fund as a present interest of the minor is fatally inconsistent with the section 2038 requirement that the beneficiary's enjoyment of the property be subject to a power in the taxpayer.¹⁰⁶ Courts confronted with this argument, however, have rejected it with little discussion.¹⁰⁷ The classification of the interests identified in section 2503(c) as present interests is admittedly an artificial one, created in order to achieve a single gift tax purpose. The Code evinces no apparent intent that such arrangements should be treated as if they confer present enjoyment upon the beneficiary for any other purpose.

The position of the Internal Revenue Service on the estate taxability of Model Act transfers was a disappointment to the Act's drafters.

The Treasury ruling had again discouraged the simplicity of the custodian statute device. The solution to the estate tax difficulty was not complex. The donor would now merely have his spouse or someone else designated as custodian. Unfortunately, when transfers had already been made in which the donor was custodian, the only way to avoid the possible estate tax difficulty was to have the custodian resign and designate a successor. This required a court proceeding and, in New York, the possible additional expense of a special guardian. What had been originally conceived as a simple substitute for a trust had become, at least insofar as estate tax consequences were concerned, a rather intricate procedure.¹⁰⁸

Following the enactment of the UGMA in 1956, the Internal

104. 54 T.C. at 583-84. This issue was not discussed in the Seventh Circuit's opinion.

105. Rev. Rul. 56-86, 1956-1 C.B. 449; Rev. Rul. 59-357, 1959-2 C.B. 212.

106. See Tenney, *supra* note 15, at 947-48.

107. *Stuit v. Commissioner*, 452 F.2d 190, 192 (7th Cir. 1971); *Estate of Varian v. Commissioner*, 47 T.C. 34, 43 (1966).

108. Newman, *supra* note 31, at 42.

Revenue Service issued Revenue Ruling 59-357,¹⁰⁹ extending the earlier rulings regarding tax consequences under the Model Act to transfers under the Uniform Act as well. The drafters of the Act expressed dissatisfaction with the estate tax portion of the ruling: "In making Rev. Rul. 57-366 applicable to gifts made under the Uniform Gifts to Minors Act, the Internal Revenue Service refused to recognize that the clear intent of these statutes was to *indefeasibly vest title* in the minor."¹¹⁰

This "clear intent" of the UGMA framers has been ignored by some courts as well. Several opinions have relied upon section 2036 as an alternative basis to section 2038 to justify including property transferred under the UGMA in the gross estate of the donor-parent-custodian taxpayer. This result is possible only because the courts recognized the possible use of the fund to discharge the parental support duty.

Generally, section 2036 operates to include in the gross estate of the decedent taxpayer the value of the property transferred *inter vivos* by the decedent in which the decedent retains certain interests for a specified period of time.¹¹¹ The donor of a statutory gift to a minor, who retains interests in the transferred property and dies before the minor's majority, has retained the interests "for a period that does not in fact end before [the donor's] death," as required by the statute. The donor's death during the custodianship thus satisfies the timing requirement of the statute. It must next be determined under what circumstances the retained interests requirement of section 2036 will be met, so that includibility in the donor's gross estate results. As discussed below, to the extent that the taxpayer donor owed a duty of support to the donee, the property transferred under the UGMA is includible in the

109. 1959-2 C.B. 212.

110. Commissioners' Prefatory Note to the Revised 1966 Uniform Gifts to Minors Act, 8 UNIFORM LAWS ANNOTATED 184 (1972). The criticism is not well reasoned. Given *Lober* as precedent, vesting is irrelevant in determining the taxability of a transfer under § 2038.

111. I.R.C. § 2036(a) provides,

(a) GENERAL RULE.—The value of the gross estate shall include the value of all property to the extent of any interest therein of which the decedent has at any time made a transfer (except in case of a bona fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death—

(1) the possession or enjoyment of, or the right to the income from, the property,

or

(2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom.

gross estate of the taxpayer if the taxpayer was the custodian at the time of death.

Section 2036(a)(1) includes transferred property in the gross estate of the taxpayer if "the possession or enjoyment of, or the right to the income from, the property" is retained by the donor. In cases involving trusts, the principle is clearly established that the transferor who retains an enforceable right to the indirect benefit of the transferred property falls within the provisions of section 2036(a)(1). For example, when the trust terms *require* use of the trust income to discharge a support duty owed by the donor taxpayer, section 2036 clearly applies.¹¹² In contrast, when a third party trustee has discretion regarding the use of transferred property for the discharge of a support obligation of the transferor, there is no inclusion in the gross estate of the donor. Since the donor cannot force the trustee to distribute funds for the indirect benefit of the donor, there is no retained enforceable right to any benefit from the trust.¹¹³

When the donor taxpayer is the trustee with discretion to use transferred property to discharge a duty of the donor, the authority to use the transferred property at will for the donor's own benefit is a retained right as contemplated by the statute.¹¹⁴ By analogy, the custodian's discretion under the UGMA to use the fund for the support of the minor results in taxation only when the taxpayer donor is, at the time of death, both the custodian and the parent of the minor. A number of cases have so held.

In *Estate of Chrysler v. Commissioner*¹¹⁵ the Tax Court, upon finding that the taxpayer had in fact placed securities into custodianship for his daughter, relied on the provision of the New York law that gave the custodian the discretion to use the fund for the "support, maintenance, education and benefit of the minor."¹¹⁶ The court concluded that

112. Treas. Reg. § 20.2036-1(b)(2), T.D. 6501, 25 Fed. Reg. 10,869 (1960); D. KAHN, E. COLSON & G. CRAVEN, *supra* note 64, at 42-43; R. STEPHENS, G. MAXFIELD & S. LIND, *FEDERAL ESTATE AND GIFT TAXATION* ¶ 4.08(4)(b), at 4-136, S4-19 & n.17 (4th ed. 1978 & Supp. 1980) (collecting cases).

113. D. KAHN, E. COLSON & G. CRAVEN, *supra* note 64, at 43; 3 J. MERTENS, *supra* note 90, § 24.13, at 240-44 (Cum. Supp. 1972); R. STEPHENS, G. MAXFIELD & S. LIND, *supra* note 112, at 4-137, S4-19 & n.19 (collecting cases).

114. D. KAHN, E. COLSON & G. CRAVEN, *supra* note 64, at 43; 3 J. MERTENS, *supra* note 90, § 24.12, at 487-88; R. STEPHENS, G. MAXFIELD & S. LIND, *supra* note 112, at 4-136 to 137, S4-19 & n.21 (collecting cases).

115. 44 T.C. 55 (1965), *rev'd on other grounds*, 361 F.2d 508 (2d Cir. 1966).

116. 44 T.C. at 68.

under this section the decedent had the right as custodian to apply as much of the income as he may deem advisable for the support, maintenance, education, and benefit of the minor and that, therefore, he had made a transfer under which he had in effect retained the right to use the income from the property to discharge his legal obligation to support [his daughter]. We think such a retained right is sufficient to require the property transferred to be included in the decedent's gross estate under § 2036(a).¹¹⁷

Similarly, in *Estate of Prudowsky v. Commissioner*¹¹⁸ the Tax Court held that the right of the donor parent to use the fund for the minor donee's support is a retained "power to apply said assets in satisfaction of his legal obligation. It follows therefrom that the value of the transferred assets is includible in the custodian's estate under § 2036."¹¹⁹ The taxpayer apparently argued that such a use of the child's funds for the indirect benefit of the parent would be illegal under state law. The court rejected this argument, relying upon the provision of the UGMA that expressly allows this use and thus distinguishes the arrangement from a common-law gift to a minor.¹²⁰

In *Eichstedt v. United States*¹²¹ the decedent had transferred property to her minor daughters under the California UGMA, and had named herself custodian. One daughter married during her minority and prior to her mother's death. The question arose whether the marriage of the daughter terminated the support obligation of the mother under California law. The court, without resolving this question of emancipation, discussed in dictum the impact of the daughter's marriage upon includibility under section 2036. If the obligation of support was ended by the marriage there would be no includibility. If, on the other hand, the duty to support existed at the time of the donor's death, then pursuant to the rationale of *Chrysler* and *Prudowsky* the value of the transferred property would be included in the mother's gross estate under section 2036. The court ultimately relied upon section 2038 as the basis for taxing the property at decedent's death.¹²²

117. *Id.*

118. 55 T.C. 890 (1971), *aff'd per curiam*, 465 F.2d 62 (7th Cir. 1972).

119. 55 T.C. at 894. In *Estate of Carpousis v. Commissioner*, 43 T.C.M. (P-H) 1064 (1974), the Tax Court held that shares in a mutual fund purchased by the decedent and registered in his name as custodian for six minor children under the District of Columbia UGMA were includible in the gross estate under §§ 2036 and 2038. The Court relied upon *Prudowsky* as authority for its result.

120. 55 T.C. at 895.

121. 354 F. Supp. 484 (N.D. Cal. 1972).

122. In *Crocker-Citizens Nat'l Bank v. United States*, 320 F. Supp. 673 (N.D. Cal. 1978) (mistakenly reported as E.D. Cal.), the court relied upon its earlier opinion in *Eichstedt*, as well as the Tax Court's opinion in *Estate of Prudowsky*, as the basis for taxing

Thus, courts confronted with the situation of the donor-parent custodian who dies during the minority of the donee while owing a duty of support have uniformly included the property in the gross estate under section 2036.

A second theory that supports includibility of custodial property in the estate of the donor-parent taxpayer under section 2036 relies upon section 4(c) of the UGMA. That section provides, "The court, on the petition of a parent . . . may order the custodian to pay over to the minor for expenditure by him or to expend so much of or all the custodial property as is necessary for the minor's support, maintenance or education."

Under section 2036, the estate of one who transfers property to another but retains an enforceable right to have some portion of it used for his or her own benefit is subject to tax on the value of that portion at death. Whether section 4(c) creates this enforceable right depends upon one's construction of the statutory language. Taxation is appropriate only if the statute is read to create a *right* in the parent to have the fund used in discharge of the parent's support duty at the parent's demand and without regard to the parent's own resources. This interpretation renders the donor's estate taxable in all cases in which the donor is also the parent, regardless of whether the parent is also the custodian. It thus reaches farther than the "retained power" theory relied upon by the courts, since the "retained power" theory requires the taxpayer to wear all three hats before tax liability is incurred. As discussed earlier in this Article,¹²³ a more restrictive construction of section 4(c) was probably intended by the drafters. No case law deals with the rights created by section 4(c). Likewise no courts have relied upon section 4(c) as the basis for taxation under section 2036.¹²⁴

Section 2041 has been suggested as a possible basis for including custodial property in the estate of a parent who is the custodian at death, but who never owned the property. If the possible use of the fund by the custodian for the minor's support is acknowledged, the taxpayer parent has the power to appoint the property for his or her own benefit. Section 2041 includes in the gross estate property subject to an appointive power in the dece-

custodial property under §§ 2036 and 2038.

123. See text accompanying notes 25-27 *supra*.

124. This theory is discussed and rejected in Weil & Heald, *Uniform Gifts to Minors Act—Some Second Thoughts on its Usefulness as an Estate Planning Tool*, 55 *TAXES* 271, 275 (1977). The authors conclude that the necessity to petition and prove need is a limitation on the parents' right that forecloses a determination of taxability.

dent that was exercisable in favor of the decedent at death. No case or ruling is reported in which the Internal Revenue Service has sought to include custodial property in the estate of the decedent-parent custodian under section 2041.¹²⁵

While alternative bases for the taxation of custodial property in the estate of one other than the minor have been noted, the courts have relied upon sections 2036 and 2038. Includibility under section 2038 relies neither upon the vested interest of the minor donee nor upon the availability of the fund to discharge parental support duties under section 4(b) of the UGMA. Includibility under section 2036, on the other hand, is based upon section 4(b). When considered in light of the Uniform Act drafters' intent that the gift property should benefit only the minor donee, section 2036 is a questionable basis for taxation.

V. RESOLVING THE AMBIGUITY IN THE UGMA: THE EFFECT UPON THE TAX CONSEQUENCES

As indicated above, federal taxing authorities currently rely upon one definition of custodianship for gift tax purposes and a different definition for estate and income tax purposes. The two definitions are derived from two conflicting provisions in the UGMA—sections 3(a) and 4(b). Eliminating the conflict between the provisions of the Act, as proposed in this Article, would produce changes in the tax treatment of uniform gifts. It is appropriate, therefore, to consider the changes that would result if a single definition of the custodial arrangement were relied upon for all tax purposes.

A. *The Gift Tax*

The Internal Revenue Service currently treats all uniform gifts as completed transfers taxable at the time of creation. This result is based upon UGMA section 3(a), which states that the legal and equitable title to the transferred property passes irrevocably to the minor donee. The question arises whether the gift tax result would be different if recognition were given to the possible use of the fund for the support of the donee. Under established principles of gift tax law, when the support provision of the Act is taken into account, then in some cases the transfer must be regarded as incomplete. Thus, not all uniform gifts would be taxable at the time

125. For a discussion of the idea that custodial property might be includible under § 2041, see Weil & Heald, *supra* note 124, at 274; 69 HARV. L. REV. 1476, 1484 (1956).

of their creation if the Service recognized the interests created by section 4(b) of the UGMA here, as it does in the estate and income tax contexts.¹²⁶ There are four fact patterns to be analyzed.

First, when the donor is both the parent of the donee and the custodian, the retained right to discharge the donor's own support obligation out of the fund renders the transfer incomplete. The Treasury Regulations provide that "a gift is incomplete in every instance in which a donor reserves the right to revest the beneficial title to the property in himself."¹²⁷ The authority to use the property in discharge of the donor's support obligation is clearly such a right. The transfer of property is incomplete under this analysis only to the extent of the value of the taxpayer's support duty. To the extent that the donor transfers property in excess of the amount owed to the donee as support, the donor cannot subsequently use the amount for the donor's own benefit. These excess amounts are complete gifts to the minor at the time of the transfer.

Next, when the taxpayer donor is also the custodian, but not the parent of the donee, the donor retains no beneficial interest in the custodial fund. The retained power to use the property either for the benefit of the minor or (indirectly) for the benefit of the parent, however, renders the transfer incomplete. A donor's failure to surrender dominion and control over the property, to the extent that the identity of the beneficial owner remains within the discretion of the donor, removes the transfer from the definition of taxable gift.¹²⁸ Just as in the first situation considered, when the donor parent retains a beneficial interest, the transfer is incomplete only to the extent of the value of the support duty owed by the parent. To the extent that the value of the transferred property exceeds that amount, the donor has no authority to pass the benefit of the property to anyone other than the minor or the minor's estate.¹²⁹

126. If both § 3(a) and § 4(b) are taken into consideration, the possibility of double gift taxation arises. Taxation would take place (under current law) at the time of the initial transfer. Section 3 provides the basis for such treatment. If, at the time of termination of the custodianship, attention is focused upon the support provision of the statute, then a second imposition of the gift tax is possible. When the custodian is also the parent, the termination of the custodianship can be viewed as the release of a power of appointment exercisable for the taxpayer's own benefit. Such a release is taxable under I.R.C. § 2514. See 69 HARV. L. REV. 1476, 1482-83 (1956).

127. Treas. Reg. § 25.2511-2(c), T.D. 7296, 38 Fed. Reg. 34,202 (1973).

128. Estate of Sanford v. Commissioner, 308 U.S. 39 (1939); Treas. Reg. § 25.2511-2(b), T.D. 7296, 38 Fed. Reg. 34,202 (1973).

129. The authority to affect only the timing of the beneficiary's enjoyment does not render the transfer incomplete for gift tax purposes. Treas. Reg. § 25.2511-2(d), T.D. 7296,

The value belonging exclusively to the minor constitutes a complete and taxable gift.

The third situation occurs when the donor parent transfers property to a third-party custodian. Here, the custodian has the power to use the property for the benefit of the donor to the extent of the value of the support obligation. In the analogous area of trust taxation, this power may render the gift incomplete. The Treasury Regulations¹³⁰ state that when a third party trustee must distribute income to the donor pursuant to an ascertainable and enforceable standard, the gift is incomplete to the extent of the value of the enforceable interest of the donor. A purely discretionary power in the third party does not affect the completeness of the gift.

This rule is consistent with the more general rule enunciated by the Supreme Court in *Robinette v. Helvering*.¹³¹ In *Robinette* the Court declined to reduce the amount of a taxable gift by the value of the settlor's retained reversionary interest. Since the taxpayer failed to demonstrate the value of the reversion, the Court concluded that the entire value of the property transferred was subject to tax. The third-party power is regarded as a retained interest and is therefore not taxable as a gift if its value is ascertainable by virtue of an enforceable standard that preserves rights to the transferred property in the donor.

The broad discretion conferred upon the custodian by section 4(b) of the UGMA is clearly inconsistent with the existence of any enforceable right in the parent regarding the use of the fund for the child's support. Similarly, it seems unlikely that the language of section 4(c), which creates the parent's right to petition for distribution, would be construed as creating an enforceable right in the parent capable of valuation.¹³² Sections 4(b) and 4(c) seem to create no bar to imposing the gift tax on a transfer that utilizes a third-party custodian.

38 Fed. Reg. 34,202 (1973).

130. *Id.* at § 25.2511-2(b).

131. 318 U.S. 184 (1943).

132. In *Ellis v. Commissioner*, 51 T.C. 182 (1968), the taxpayer transferred property to a trustee that could pay out income, in its discretion, for the "care, comfort and support" of taxpayer's wife. Taxpayer urged an alternative rationale to the enforceable standard theory as a rationale for finding the gift to be partially incomplete. Taxpayer argued that his own ability to withhold support from the beneficiary forced the trustee to exercise its discretion and pay out income for her support, thereby constituting retained dominion and control over the transferred property. The court rejected the theory, holding that such "control" is not sufficient to render the gift of the life estate incomplete. *Id.* at 187.

In the analogous trust area, even in cases in which the discretion of the trustee appears to be absolute, the transfer may not be deemed complete. If the trustee's power to use property for the benefit of the donor creates rights to the property in the creditors of the donor under local law, the transfer is incomplete. The rationale is that since the donor retains the power to incur debts resulting in possible creditor access to the fund, the donor retains control and dominion.¹³³ Unless it could be established that the creditors of a particular donor parent had access to the custodial fund, this rule, developed in the trust setting, would have no impact upon the completeness of transfers under the UGMA.

Beyond the situations in which the donor can compel distribution of an ascertainable portion of the transferred property or the donor's creditors can reach the assets, the Internal Revenue Service now takes the position that the discretionary power in a third party to use the property for the benefit of the donor does not prevent the transfer from being a completed gift.¹³⁴ The Service has not always maintained this position. In Revenue Ruling 54-538¹³⁵ the Service approved the holding of *Gramm v. Commissioner*,¹³⁶ a case in which the Tax Court seemed to veer from the general principles discussed above.¹³⁷ Subsequently, in Revenue Ruling 62-13¹³⁸ the Service seemed to support an even larger exception to the general principle of *Robinette* for this third-party power situation. The later ruling appeared to shift to the Commissioner the burden of proving the value of interests conferred upon persons other than the grantor before the tax would be imposed.¹³⁹

133. See, e.g., *Commissioner v. Vander Weele*, 254 F.2d 895 (6th Cir. 1958).

134. Rev. Rul. 77-378, 1977-2 C.B. 348.

135. 1954-2 C.B. 316.

136. 17 T.C. 1063 (1951).

137. In *Gramm* the settlor taxpayer created a trust, reserving a life income interest in herself and empowering the trustees to invade the principal for her comfort, education, maintenance, or support. Because of the relatively small size of the corpus (\$83,000), the "unlimited possibility of withdrawal," and the likelihood that such withdrawals would be made, the court held that the settlor did not make a completed gift of the remainder.

In Rev. Rul. 54-538, 1954-2 C.B. 316, the Internal Revenue Service attempted to reconcile *Gramm* with *Robinette* by limiting the former strictly to its facts—i.e., "the small amount of corpus and the resulting small annual income, [making] substantial invasion of the corpus . . . very probable . . ." *Id.* at 317. Had it not been for those "unusual and particular facts," the Service implied, the taxpayer in *Gramm* would have been required to establish the value of her reversion before being allowed to escape gift tax thereon.

138. 1962-1 C.B. 181.

139. In the 1962 ruling, advice was requested by a taxpayer who had transferred a substantial amount of property into trust, giving the trustee broad discretion in distributing income and corpus to the taxpayer. It was held that since "there appears to be no assurance

Fifteen years later, in Revenue Ruling 77-378 the Service reached its current position in this area. In the 1977 pronouncement, the Service held that the result in Revenue Ruling 62-13 would apply only when the settlor's creditors could reach the fund or when the settlor could compel distribution to himself or herself in accordance with an ascertainable standard.

To summarize this area of third-party powers, it appears that when the donor parent names someone else custodian, the gift will be considered complete and therefore taxable if certain assumptions can be made. First, one must assume that the language of neither section 4(b) nor section 4(c) of the UGMA creates an enforceable right in the parent. Second, the creditors of the parent must not have access to the custodial fund. Last, the facts of the particular case must be distinguishable from those that produced the aberrational result in the *Gramm* case.¹⁴⁰

The fourth and final situation to be considered is when the donor is neither the custodian nor the parent of the donee. In this context, recognition of the custodian's power to use the fund for the minor's support has no effect on the determination of whether the transfer is a complete gift when made. The donor clearly has retained no control and no beneficial interest in the property, regardless of whether the fund can be used for support.

When section 4(b) of the UGMA is taken into consideration, no gift tax consequences occur at the time of the transfer in the first and second situations above. In all cases in which the donor is also the custodian, the gift tax would be imposed at the time of actual distribution by the custodian. If the donor custodian is also the parent, the gift tax would be imposed at the time of those distributions to the minor donee that do not in fact relieve the parent's legal duty to furnish support. When the donor custodian is not the parent, the tax would be imposed at the time of any distribution. This result differs, of course, from the current treatment of

at the time of creating the trust that anything of value will be paid to a beneficiary . . . other than the grantor, such transfer constitutes, for purposes of the Federal gift tax statute, an incomplete transfer and, hence, does not result in a taxable gift." The Service further explained that the *Robinette* rule concerning the taxpayers' burden to prove value "is considered applicable only to cases where it has already been determined that a gift has been made and the issue concerns the valuation of an interest retained by the donor" *Id.* at 182.

140. Regarding the area of third-party powers generally, see Lowndes, *Some Doubts About the Use of Trusts to Avoid the Estate Tax*, 47 MINN. L. REV. 31, 42-52 (1962); Macris, *Open Valuation and the Completed Transfer: A Problem Area in Federal Gift Taxation*, 34 TAX. L. REV. 273, 285-90 (1979).

statutory gifts by the Internal Revenue Service. The Service presently ignores the possible use of the fund for the minor's support. When that possible use is ignored, the gift is properly taxed at the time of the transfer.

B. The Income Tax

Income tax provisions currently contemplate the possible use of income from the custodial fund for the minor's support pursuant to section 4(b) of the UGMA. Revenue Ruling 56-484¹⁴¹ states that the income used in this way should be taxed to the parent. This result would be different if reliance were placed instead upon section 3(a) of the UGMA, which states that title is indefeasibly vested in the minor. If one relies on section 3(a), diversion of income to the parent is not legally possible under the UGMA any more than it is possible when an outright gift is made. Total liability for income tax purposes would then rest with the minor donee.

C. The Estate Tax

Custodial property has been included in the estate of the donor decedent under section 2036 based on the retained right to use the fund in discharge of the donor's support obligation. This is inconsistent, of course, with the UGMA section 3(a) theory that the transfer creates total ownership in the minor to the exclusion of any retained interest in the transferor. If reliance were placed upon the latter view of the transaction instead of the former, estate taxation under section 2036 would be foreclosed. Of course, section 2038 provides an alternative basis for taxation that depends not upon any interest retained by the taxpayer, but rather upon the authority retained by every custodian taxpayer to affect the timing of the donee's enjoyment. Taxability under section 2038, therefore, is unaffected by the ambiguity that exists in the UGMA. In every case in which section 2036 applies to a uniform gift, section 2038 also applies. Although section 2036 applies only in situations in which the donor is also the custodian and the parent of the donee, section 2038 reaches all cases in which the donor is also the custodian. Since the power of the custodian taxpayer extends over the entire principal as well as income, the amount includible in the gross estate under section 2038 will be the value of the corpus plus accumulated income at the date of death. The amount includible

141. 1956-2 C.B. 23.

under section 2036 will be limited by the value of the support obligation owed by the decedent to the minor donee at the time of death. No lesser amount, therefore, would ever be includible under section 2038 than would be includible under section 2036. Thus, shifting to the gift tax perception of the uniform gift will not affect the estate taxability of the arrangement, but will affect only the Code section and the theory upon which one relies.

VI. CONCLUSION

The current treatment of uniform gifts as creating interests in only one person for gift tax purposes, and as creating interests in others as well for income and estate tax purposes, is inappropriate. Resolution of the underlying ambiguity within the Uniform Gifts to Minors Act would produce a more uniform tax treatment. If section 4(b) were modified to state clearly that the custodian is not empowered to use the fund to discharge parental support duties, no change would occur in the gift tax treatment. Income tax liability would be incurred by only the minor donee, the result presumably desired by most donors. Situations in which the estate tax is imposed would remain unchanged, but different Code authority would apply. On the other hand, if section 3(a) were modified to limit expressly the interest of the minor in the custodial fund by recognizing the interest in the parent, only the gift tax treatment would be affected.

The framers of the UGMA intended to facilitate the conveyance of property to minor donees by creating the custodial relationship. Eliminating the custodian's authority to use the uniform gift fund to discharge parental duties to support the minor donee would be consistent with this general purpose. Clarifying section 4(b) to allow use of the fund only for the benefit of the minor donee would produce changes in the income and estate taxation of custodial property that are reconcilable with the current gift tax treatment of uniform gifts.

Outside the area of federal taxation, the ambiguity in the Uniform Act regarding the availability of custodial funds for the support of the minor donee has generated uncertainty and needless litigation centered around the ownership of UGMA property. Section 3(a) indicates that only the minor donee has an interest, while section 4(b) indicates that both the minor and the minor's parents have interests in the custodial fund. Resolution of this ambiguity, by amending section 4(b) in the manner proposed in this Article, would introduce a desirable element of certainty to the custodial relationship created by the Uniform Gifts to Minors Act.