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Estates - Election by Surviving Spouse - Power of Consumption - Inter Vivos Gift under Uniform Gifts to Minors Act

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ESTATES—ELECTION BY SURVIVING SPOUSE—POWER OF CONSUMPTION—INTER VIVOS GIFT UNDER UNIFORM GIFTS TO MINORS ACT

The Supreme Court of Pennsylvania has held that the donor-custodian of property transferred to a minor under the Pennsylvania Uniform Gifts to Minors Act does not retain a power of consumption merely because the Act authorizes use of the property by a custodian for the support of the minor with or without regard to his independent duty or the duty of any other person to support the minor.

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

Decedent died testate leaving one half of his residuary estate to his wife. Prior to his death, decedent made an inter vivos transfer under the Pennsylvania Uniform Gifts to Minors Act[1] of a $37,000 bond to his minor son. Under this act a custodian must be named for property transferred to a minor.[2] Decedent named himself custodian. Pursuant to section 8 of the Wills Act,[3] decedent's surviving spouse elected to take against his will. She also elected to take against the inter vivos transfer of the bond, claiming that the transfer was within the scope of section 11 of the Estates Act.[4] Under the Uniform Gifts to Minors Act, a custodian has the authority to expend the custodial fund for the support of a minor with or without regard to his duty or the duty of any other person to support the minor.[5] The surviving spouse con-

1. The Pennsylvania Uniform Gifts to Minors Act, PA. STAT. ANN. tit. 20, § 3601 (1964), has been consolidated into the Probate, Estates & Fiduciaries Code, PA. STAT. ANN. tit. 20, § 5301 (1972) (citations will be made to this code).

2. PA. STAT. ANN. tit. 20, § 5303 (1972).

3. The Wills Act of 1947, PA. STAT. ANN. tit. 20, § 180.1 (1950), has been consolidated into the Probate, Estates & Fiduciaries Code, PA. STAT. ANN. tit. 20, § 2501 (1972) (citations will be made to this code). Section 8 of the Wills Act provides in part:

> When a married person dies testate as to any part of his estate, the surviving spouse while living shall have a right of election under the limitations and conditions hereinafter stated: Provided, that the spouse so electing also must elect to take against all conveyances within the scope of section 6111(a) [section 11 of the Estates Act] of this code [relating to conveyances to defeat marital rights], of which he is a beneficiary.

Id. § 2508(a).

4. The Estates Act of 1947, PA. STAT. ANN. tit. 20, § 301.1 (1950), has been consolidated into the Probate, Estates & Fiduciaries Code, PA. STAT. ANN. tit. 20, § 6101 (1972) (citations will be made to this code). Section 11 of the Estates Act provides in part:

> A conveyance of assets by a person who retains a power of appointment by will, or a power of revocation or consumption over the principal thereof, shall, at the election of his surviving spouse, be treated as a testamentary disposition so far as the surviving spouse is concerned to the extent to which the power has been reserved, but the right of the surviving spouse shall be subject to the rights of any income beneficiary whose interest in income becomes vested in enjoyment prior to the death of the conveyor . . . .

Id. § 6111(a).

5. PA. STAT. ANN. tit. 20, § 5305(b) (1972).

tended that decedent, as a custodian of the bond, retained a power of consumption because he could have used the bond to discharge his own legal obligation to support his minor son. The Orphans' Court Division of the Court of Common Pleas of Montgomery County agreed with the surviving spouse and held the inter vivos transfer "testamentary" within the meaning of section 11 of the Estates Act.[6]

The Supreme Court of Pennsylvania reversed.[7] In an opinion written by Chief Justice Jones, the court held the statutory authorization for a custodian to expend custodial funds to support a minor ". . . not such an 'important right of ownership' or 'power of consumption' to make the transfer a testamentary disposition under section 11 of the Estates Act."[8] The court noted that a power of consumption is considered an interest retained by a donor that can be exercised to his own advantage. Even though it was assumed a donor-custodian could in fact substitute custodial funds for his parental support obligation,[9] the court found such a statutory power distinguishable from a power of consumption because the Uniform Gifts to Minors Act precludes a custodian from exercising his discretion for his own benefit.[10] The court reasoned that this limitation on a custodian's discretion, together with the fact that a minor by the terms of this act has indefeasible vested legal title to the custodial property,[11] mandated a reversal of the lower court's opinion.

Justice Roberts filed a dissenting opinion. He concluded that the self-appointment of the decedent-donor as custodian created for the decedent the exclusive right to decide whether to fulfill his parental support obligation from his personal assets or from the custodial fund. Justice Roberts reasoned that this exclusive power of decision constituted a power of consumption within the meaning of section 11 of the Estates Act.[12] In support of his rationale, he notes that where a decedent-donor transfers property under the Uniform Gifts to Minors Act and names himself custodian, the property transferred remains in the decedent's gross estate for estate tax purposes. He found it ironic that a decedent would have sufficient control of the custodial property to

6. Schwartz Estate, 21 Pa. Fid. Rep. 347, 352 (O.C. Montg. Co. 1971), *rev'd*, 449 Pa. 112, 295 A.2d 600 (1972).
7. *Id.*
8. *Id.* at 119, 295 A.2d at 604.
9. *Id.* at 115 n.2, 295 A.2d at 603 n.2.
10. *Id.* at 116-17, 295 A.2d at 603.
11. PA. STAT. ANN. tit. 20, § 5304(a) (1972).
12. 449 Pa. at 122-23, 295 A.2d at 606.

bring it within the ambit of the Federal Estate Tax and not sufficient control for purposes of section 11 of the Estates Act.[13]

Prior to the passage of the Estates Act of 1947, it was relatively easy for a decedent to disinherit a surviving spouse from his personal estate. A mere divestment of legal title from such property before death was all that had to be done.[14] A complete divestment of ownership, however, was not a practical method of disinheritance unless the decedent knew exactly what his financial condition would be up to the point of death. Property once given away may later be needed if life was prolonged beyond expectation or if financial conditions changed. Thus, it was in the best interest of a spouse to divest himself of legal title, but yet maintain control of the transferred property. The law before 1947 permitted him to do this.[15] Section 11 of the Estates Act of 1947 changed the law where a conveyor of assets retained ". . . a power of appointment by will, or a power of revocation or consumption . . . ."[16] Where such powers are retained, the inter vivos transfer is treated as a testamentary disposition so far as a surviving spouse is concerned and as a result, subject to a forced statutory share.[17]

In *Schwartz,* the surviving spouse claimed the decedent-donor-custodian of the bond retained a power of consumption to the extent that he had the statutory authority to use the custodial property to relieve his parental support obligation. Nowhere in the Estates Act is a power of consumption defined. The *Schwartz* case gave the Pennsylvania Supreme Court its first opportunity to judicially give meaning to the term.[18] The court's rationale indicates that a necessary requisite of a power of consumption is the ability of the transfer to exercise a retained interest for his own benefit.[19] In *Schwartz,* the court found this

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13. *Id.* at 124-26, 295 A.2d at 607.
14. Rynier Estate, 347 Pa. 471, 32 A.2d 736 (1943).
15. *See* Beirne v. Continental-Equitable T.&T. Co., 307 Pa. 570, 161 A. 721 (1932); Windolph v. Girard Trust Co., 245 Pa. 349, 91 A. 634 (1914).
16. PA. STAT. ANN. tit. 20, § 6111(a) (1972).
17. Section 11(b) provides:

> The spouse may elect to take against any such conveyance and shall be entitled to one-third thereof if the conveyor is survived by more than one child, or by one or more children and the issue of a deceased child or children, or by the issue of more than one deceased child, and in all other circumstances one-half thereof.

Id. § 6111(b).
18. Prior to *Schwartz,* appellate authority dealing with "powers of consumption" was limited to cases where there had been either an expressed retention of the power of consumption or where the transferor retained the expressed right to use the transferred property to maintain himself. *See* Pengelly Estate, 374 Pa. 358, 97 A.2d 844 (1953).
19. 449 Pa. at 115-17, 195 A.2d at 603.

necessary ingredient lacking because the donor-custodian, while retaining control over the transferred property, could exercise it under the Uniform Gifts to Minors Act only for the benefit of the minor.

The rationale used by the court leaves the analysis of the surviving spouse's contention incomplete. The court left two questions unanswered. First, the court should have considered the *extent* to which a parental support obligation would be relieved or discharged by a custodian's expenditure of funds for a minor's support. The court assumed that a custodian could substitute custodial funds for his own legal support obligation. This assumption was made because the issue was not raised in either the lower court or on appeal.[20] The *degree* to which the parental support obligation is relieved or discharged is crucial to the resolution of the surviving spouse's contention. If the parental support obligation is not relieved or discharged by a custodian's expenditure of funds, the claim made by the surviving spouse must fail, for in no way would the decedent-custodian have benefited by the exercise of his retained control of the property.

Secondly, if the parental support obligation is relieved or discharged, the court should have then considered whether or not a custodian would abuse his discretion if he expended custodial funds under such circumstances. It may be argued that the court's consideration of this question is reflected in its emphasis on the point that the decedent-custodian could only exercise his discretion for the benefit of the minor. The argument fails, however, when one considers the court's assumption that a custodian can substitute custodial funds for his own parental support obligation. In any event, the resolution of this issue by the "benefit of the minor" approach is too narrow. If a custodian does not abuse his discretion by expending funds that will in effect relieve his own parental support obligation, then he has retained a power of consumption within the meaning of the court's understanding of the term. An exercise of discretion will in fact benefit the custodian to the extent that his own support obligation is relieved or discharged.

It is well established that a father has a legal obligation to support his minor children.[21] This obligation is owed to a minor child even

20. *Id.* at 115 n.2, 295 A.2d at 603 n.2.

21. At common law, a father had a legal obligation to support his minor children. *See* Commonwealth *ex rel.* Goodman v. Delara 219 Pa. Super. 449, 452, 281 A.2d 751, 753 (1971). Pennsylvania has codified the support obligation. *See* The Support Law, PA. STAT. ANN. tit. 62, § 1971 (1968). Failure to provide support has also been made a criminal offense. PA. STAT. ANN. tit. 18, § 4321 (1972).

though the child has independent means of support.[22] The existence of the support obligation, however, does not necessarily mean that the independent means of a child can not be considered in determining the *amount* of support required of a father. The purpose of support laws is not to punish one for failure to fulfill his legal obligation. Rather, the laws are directed to secure an allowance for a family's maintenance as is reasonable under the circumstances.[23] This purpose is demonstrated in the way in which the amount of support required is determined. Courts look to the father's "ability to pay" as evidenced by his property, income and earning capacity.[24] Consistent with the policy of the support laws, it has been held that while the independent means of a wife do not discharge a husband's support obligation, they are a factor to be considered in determining the amount of support required.[25] It is not so clear, however, what role the independent means of a minor child play in the amount of support determination.

In *Doelp v. Doelp,*[26] the court relied on *Hill v. Clark,*[27] to hold that where a trust had been created expressly for the support of a minor, and his father's income appeared inadequate, the minor's interest under the trust fund was to be considered in determining the amount of a support order.[28] It was also noted that even where a father had the ability to support his minor child, a trust expressly created to support the minor can be considered in the computation of the support amount.[29]

Doelp, however, is weak precedent for the proposition that the parental support obligation is relieved by a custodian's expenditure of funds for a minor's support. The court's reliance in *Doelp* on the authority of *Hill* was improper. In *Hill,* a trustee of a trust providing for a minor's education was found to have abused his discretion by refusing to reimburse educational expenditures made by the mother of the minor beneficiary.[30] A trustee's discretion under the provisions of

22. Commonwealth *ex rel.* Byrne v. Byrne, 212 Pa. Super. 566, 568, 243 A.2d 196, 197 (1968).
23. Commonwealth *ex rel.* Steacker v. Steacker, 217 Pa. Super. 382, 384, 272 A.2d 216, 217 (1970).
24. *Id.*
25. Commonwealth *ex rel.* Borrow v. Borrow, 199 Pa. Super. 592, 595, 185 A.2d 605, 607 (1962).
26. 219 Pa. Super. 420, 281 A.2d 721 (1971).
27. 74 Pa. Super. 181 (1920), *aff'd sub nom.* Hill v. Hill, 277 Pa. 165, 120 A. 775 (1923).
28. 219 Pa. Super. at 424, 281 A.2d at 724.
29. *Id.*
30. 277 Pa. 165, 120 A. 775 (1923).

a trust instrument is a separate and distinct question from the problem posed in *Doelp*. In that case, a determination of the amount of support a father owed his minor child was in issue.

Assuming *Doelp* is good law, there is a weakness in its application as precedent. In *Doelp,* the court inferred that the father's income was inadequate to fully support his minor children. Thus the court's statement that resort may be made to a minor's support trust when a parent is financially able is only *dicta.* Unless one places emphasis on this *dicta,* the *Doelp* decision has little bearing on the issue *Schwartz* raises. Under the "ability to pay" standard that courts use in setting a support amount, resort to a minor's beneficial interest in a support trust when a father is financially unable to provide full support does not in any way "relieve" a parental support obligation.

It should also be noted that the court in *Doelp* did not go so far as to say that every trust in which the minor child has a beneficial interest is to be considered in the determination of the amount of support owed by his parent. The court limited its holding to only those trusts "expressly created" for the support of the minor.[31] There is no indication that the legislature expressly intended that a gift made to a minor under the Uniform Gifts to Minors Act be used for his support and maintenance. The language in section 5 authorizing a custodian's expenditure of the custodial fund for a minor's support is of little help in this regard. Section 5 is couched in "discretionary" language and as such pertains to what a custodian may or may not do under this act.[32] It does not indicate the express purpose of the legislature in enacting the statute.

In spite of the limitations inherent in the *Doelp* case, it is in one sense relevant to the issue raised in *Schwartz. Doelp* held the earned income of a minor to be a relevant consideration in the amount of

31. 219 Pa. Super. at 424, 281 A.2d at 724. The court did say, however, that every trust in which the minor has a beneficial interest can be considered when the father's means of support are inadequate. *Id.*

32. Section 5(b) provides in part:

> The custodian shall pay over to the minor for expenditure by him or expend for the minor's benefit so much of 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.

PA. STAT. ANN. tit. 20, § 5305(b) (1972).

support payable by a father.[33] In view of the policy of the support laws, it is questionable whether distinctions should be made between the different types of a minor's independent means.

In any event, it is not at all clear that a parental support obligation can be avoided by having a custodian expend funds for a minor's support under the Uniform Gifts to Minors Act. The question is crucial to the power of consumption claim made by the surviving spouse and should not have been avoided by the court.

Even if the parental support obligation is relieved by a custodian's expenditure of funds for a minor's support, it does not necessarily follow that to the extent the obligation is relieved, there exists a power of consumption. Before such a conclusion can be reached, an inquiry must first be made into the limits of a custodian's discretion under the Uniform Gifts to Minors Act. If he abuses his discretion by making support payments from custodial property in order to relieve his parental support obligation, a power of consumption can not be said to have been retained. The "legal power" to exercise the retained interest for the custodian's benefit would not be present.

The court's consideration of a custodian's discretion under the Uniform Gifts to Minors Act is at best confusing. On the one hand, it assumes that a custodian can in fact substitute custodial funds for his parental support obligations.[34] But the court then concludes there is no power of consumption because section 5 requires that the custodian's control of the property be exercised solely for the benefit of the minor.[35] The court appears to contradict itself. If the custodian has the discretion to use custodial funds as a substitute for his parental support obligation, he then has the "legal power" to exercise the retained interest in a way which will at least indirectly benefit him. It would seem to mandate the finding of a power of consumption. The "benefit of the minor" qualification, however, negates the assumption that the custodian can exercise his discretion to relieve his support obligation. When a minor's father has the ability to provide support, the minor would never receive any benefit by a custodian's expenditure of funds that would have the effect of relieving the father's support obligation. The court's ultimate conclusion may have been correct. It is suggested, however, that the "benefit of the minor" approach

33. 219 Pa. Super. at 425, 281 A.2d at 724.
34. 449 Pa. at 115 n.2, 295 A.2d at 603 n.2.
35. *Id.* at 116-17, 195 A.2d 603.

used to reach the conclusion does not adequately answer the question concerning a father-donor-custodian's discretion under the Uniform Gifts to Minors Act.

In 1957, the Pennsylvania Legislature, with some minor changes, adopted the 1956 version of the Uniform Gifts to Minors Act.[36] This act was designed to avoid the difficulties that resulted when donors, not reflecting upon the disabilities of minority, placed gifts in the names of minors.[37] Under this act, a custodian has the discretion to expend the custodial fund for the support of a minor.[38] Whether he can make such an expenditure to relieve his own parental support obligation and not abuse his discretion in the process has not been decided in Pennsylvania or in any other state that has adopted the Uniform Gifts to Minors Act.

Where a gift has created an ordinary trust and the trustee has been given the discretion to expend income or corpus for the support of a beneficiary, much litigation has resulted. This litigation has centered on the propriety of the trustee considering a beneficiary's other resources before exercising discretion.[39] The cases turn on the settlor's intent in creating the trust.[40] Unless a contrary intent is shown, it is usually presumed that an expenditure is proper even though the beneficiary has other resources.[41] Pennsylvania courts have followed this trend when the trust beneficiary is the settlor's surviving spouse.[42] It has been indicated, however, that a different rule may be applied where the beneficiary is a minor and his "other resources" are in the nature of an independent parental support obligation.[43]

36. 8 Uniform Laws 231 (1972).

37. FIDUCIARY REVIEW, Feb., 1973 at 2. The commissioners on Uniform Laws evidenced this purpose in their prefatory note to the Act:

> A direct gift of a security to a minor involves serious practical difficulties, particularly upon the sale of the security during minority. The minor may disaffirm the sale; hence, brokers, issuers and transfer agents deal with the minor at their peril.
>
> A formal guardianship provides no adequate substitute. The guardian may be liable for losses sustained if a "non-legal" security is retained. Generally, he cannot reinvest except in "legals". Generally also, he is required to furnish a bond and to make frequent expensive formal accountings.
>
> The net result is to discourage, if not prevent, small gifts of securities to minors.

8 Uniform Laws 225 (1972).

38. PA. STAT. ANN. tit. 20, § 5305(b) (1972).

39. Purver, *Propriety of Considering Beneficiary's Other Means Under Trust Provision Authorizing Invasion of Principal for Beneficiary's Support*, Annot., 41 A.L.R.3d 255 (1972).

40. 2 A. SCOTT, THE LAW OF TRUSTS § 128.4, at 1020 (3d ed. 1967).

41. *Id.* This view is in accord with the RESTATEMENT (SECOND) OF TRUSTS § 128, comment (*e*) at 277 (1959).

42. *See* Demitz Estate, 417 Pa. 316, 208 A.2d 280 (1965); Baylor's Estate, 249 Pa. 5, 94 A. 442 (1915); Swinson Estate, 167 Pa. Super. 293, 74 A.2d 485 (1950).

43. Hill v. Clark, 74 Pa. Super. 181 (1920).

In *Hill v. Clark*,[44] a trust was created whereby the trustee was directed to use the income to provide for the education of a minor beneficiary. Any income not so expended was to go to the minor's father. The minor's mother sued the trustee for abusing his discretion by not reimbursing her for educational expenditures made on behalf of the minor. The court in finding for the mother held ". . . that a trust fund created for the express purpose of educating a child may be applied for that object notwithstanding the liability of the parents and the fact that they may be able to support and educate the child out of their own means."[45] If the court would have said no more, there would be no question that Pennsylvania was following the general trend even where the beneficiary was a minor. The court further noted, however, that "The sums here asked to be paid Mrs. Hill [the minor's mother] will not come from any separate estate belonging to her children nor consume any fund that would otherwise accumulate for their benefit . . . ."[46]

The additional language of the court in *Hill* leaves doubtful the degree of discretion a trustee has under a support trust where the minor has a vested interest in the corpus and his parents are financially able to provide support. Recourse to decisions in other jurisdictions is of only limited value. Some courts have indicated that expenditure in such circumstances should only be made if the settlor uses language that in effect does not allow discretion, but rather *mandates* expenditure by the trustee.[47] Even with the additional language in *Hill*, it does

44. *Id.*
45. 74 Pa. Super. at 190.
46. *Id.*
47. *See* Ingalls v. Ingalls, 54 So. 2d 296 (Ala. 1961). The court phrased the issue:

> There is no doubt that under the common law it is the duty of the father to support his minor children. But the question presented here is whether where estates are expressly created for the support, education, maintenance and comfort and expenses of travel of a child during minority, and the instrument creates a "mandatory" duty on the trustee to use and apply the net income of the estate for such purposes, the fact the father beneficiaries is financially able to furnish their support, relieves the trustees of their duty to undertake to perform the trust . . . .

Id. at 306. *See also* Cleveland Clinic Foundation v. Humphreys, 97 F.2d 849 (6th Cir. 1938). It was noted:

> Where a testator devises property or its income for the express purpose of the maintenance and education of infants, the application of the property or income for the purpose must be made without regard to the ability of parents to support them.
>
> The apparent conflict of authority on this subject disappears when the criterion for decision is the language of the will. If it be absolute in terms, showing no qualification, condition or limitation, the cestui que is entitled to the whole estate to the extent of the devise and whoever discharges the obligation imposed on the trust estate, if not a volunteer, is entitled to recoupment, whether it be a parent or another standing in loco parentis, and without regard to his estate or independent means.

Id. at 858.

not appear that Pennsylvania courts will question a trustee's discretion in expending funds where there is no doubt that the settlor intended the fund be used notwithstanding the minor's other resources. It is unclear, however, what Pennsylvania courts will do when there is no explicit indication of the settlor's intent. There is the additional problem in *Schwartz* with determining just whose intent is supposed to be considered, the donor's or that of the legislature. Since the donor makes the gift pursuant to the terms of the Uniform Gifts to Minors Act, it would seem that the intent of the legislature should be determinative.

The duties and powers of a custodian are provided in section 5 of the Uniform Gifts to Minors Act.[48] At first glance, it would appear that the discretion issue is resolved by the language of subsection (b). This subsection authorizes a custodian to expend funds for the support of a minor ". . . 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."[49] This language indicates that the custodian can expend funds to relieve his support obligation and as such the donor-custodian may be said to have retained a power of consumption. There is other language in this act, however, that negates such a conclusion. Section 4 provides that the minor beneficiary has "indefeasible" vested legal title to the custodial property.[50] If the donee's property interest was vested subject to divestment, it would not be inconsistent to find a retained power of consumption in the donor. But where the donee has an indefeasible vested interest, it does not logically follow that the donor can have a legal power to consume the property for his own benefit. Thus the language of section 5 appears to contradict the language of section 4.

The court's "benefit of the minor" approach emphasizes rather than resolves the conflict within this act. Section 5 provides that expenditures made from the custodial fund must be for the minor's benefit.[51] It is because of this provision that the court finds a custodian unable to act for his own benefit and as such lacking a power of consumption. Since the court assumes a custodian can substitute custodial property for his parental support obligation, the court's conclusion can not be explained unless one infers that a custodian acts in bad faith if his

48. PA. STAT. ANN. tit. 20, § 5305(b) (1972).
49. *Id.*
50. *Id.* § 5304.
51. *Id.* § 5305(b).

motive in exercising his discretion is to relieve his parental support obligation.[52] The difficulty with this approach is the practicality of its application in light of the section 5 language authorizing a custodian to expend funds "with or without regard to the duty of himself or of any other person to support the minor."

In view of the conflict between sections 4 and 5, the court should not have made the assumption that the custodian could substitute the custodial fund for his parental support obligation. Perhaps it is to be implied that while expenditures can be made of the custodial fund to support a minor, expenditures made under this act do not relieve a parent of his independent support obligation, *i.e.*, a parent could be required by a court to reimburse the custodial fund.

This solution is not altogether implausible. The Uniform Gifts to Minors Act was drafted with the provisions of section 2503(c) of the Internal Revenue Code[53] in mind.[54] That section provides a $3,000 annual gift tax exclusion for gifts made to a minor. In order to comply with section 2503 (c), the trustee must be given maximum administrative flexibility to make disbursements to the minor beneficiary.[55] The Pennsylvania legislature enacted a statute with language giving the custodian such maximum flexibility. The language does not suggest, however, that the disbursements are to be substituted for a parent's independent support obligation. It should be noted that the Internal Revenue Service takes a different view. Because it feels that the support obligation is relieved, it considers the property held by a father-donor-custodian to be within his gross estate at death.[56] In this sense the tax laws are relevant but not necessarily persuasive. Pennsylvania courts

52. It should be noted that section 6(e) of the Uniform Gifts to Minors Act holds a custodian liable for losses to the custodial fund if he acts in bad faith. PA. STAT. ANN. tit. 20, § 5306 (e) (1972).

53. 26 U.S.C. § 2503(c) (1971).

54. Straus, *Gifts to Minors Inter Vivos and the New Uniform Act,* 29 PA. BAR ASS'N Q. 35, 39 (1957).

55. 26 U.S.C. § 2503(c) (1971) provides:

> No part of a gift to an individual who has not attained the age of 21 years on the date of such transfer shall be considered a gift of a future interest [the $3000 exclusion applies only to gifts of a present interest] . . . if the property and the income therefrom—
>
> (1) may be expended by or for the benefit of, the donee before his attaining the age of 21 years, and
>
> (2) will to the extent not so expended
>
> (A) pass to the donee on his attaining the age of 21 years and,
>
> (B) in the event the donee dies before attaining the age of 21 years, be payable to the estate of the donee or as she may appoint under a general power of appointment.

56. Rev. Rul. 357, 1959-2 Cum. Bull. 212, 213.

are not bound by an interpretation placed on a Pennsylvania statute by the Internal Revenue Service.

The Pennsylvania Supreme Court should not have avoided the conflict within the Uniform Gifts to Minors Act. By doing so, the court missed an opportunity to make law in an area that is ripe for future litigation.

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