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Dwight Rogers

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Cover Page Footnote
Member of the New York Bar. Acknowledgement to so many who by comment or advice have assisted in the preparation of this brief paper may seem pompous. George Blattmachr, Logan Fulrath, Harold C. Jesse, John A. Lyon, Marvin Lyons, Donald McManus, Francis X. Rohn, Joyce Stanley, and Joseph Trachtman of the New York Bar, Eugene F. Endicott, Robert B. Gowing and Mayo Adams Shattuck of the Boston Bar, Clifford Bragdon, C. Herbet Rauch, G. Dykeman Sterling and Mrs. Robert Turner have all been of major assistance, but none should be held responsible for any views expressed, any errors or omissions. The similarity in arrangement between this paper and Mr. Austin Fleming's article in the February, 1951 Michigan Law Review is startling, but as the author of "The Infant's Lawyer" (see note 1 infra) remarks of his own treatise, "... indeed it is in the Nature of the Subject, which ought to direct the Method." Mr. Fleming's painstaking work has been extremely helpful. The paper by Mr. Shattuck, "Gifts to Minors," delivered to the Real Property, Probate and Trust Section of the American Bar Association in New York on September 17, 1951 became available too late for complete cross reference here. Mr. Shattuck's paper will have been published in full in the October, 1951 issue of the Boston University Law Review, slightly condensed at 90 Trusts and Estates 659, October, 1951, and in other printings of the Proceedings of that Section before this appears. It may be accurate to say that Mr. Shattuck's remarks are directed to larger affairs of more prosperous clients than those mainly considered here.
SOME PRACTICAL CONSIDERATIONS
IN GIFTS TO MINORS

DWIGHT ROGERS†

TO THE
READER.

It is a frequent Saying in our Law-Books, De minimis non curat Lex, which is true if it be understood of petty Things and minute Circumstances, but if we apply it to Persons, it is not so; for it is most certain, that our Law hath a very great and tender Consideration for Persons naturally disabled, and especially for Minors. The Law protects their Persons, preserves their Rights and Estates, excuseth their Laches, and assists them in their Pleadings. And as it is ingenuously observed in Holford and Platt’s Case, 2 Roll. Rep. 18. The Judges are their Counsellors, the Jury are their Servants, (for they ought to find the Title at large in an Affize) and the Law is their Guardian. And let me add, They are under the special Aid and Protection of his Equity, who is no less than Keeper of the King’s Conscience.

† Member of the New York Bar. Acknowledgement to so many who by comment or advice have assisted in the preparation of this brief paper may seem pompous. George Blattmachr, Logan Fulrath, Harold C. Jesse, John A. Lyon, Marvin Lyons, Donald McManus, Francis X. Rohn, Joyce Stanley, and Joseph Trachtman of the New York Bar, Eugene F. Endicott, Robert B. Gowing and Mayo Adams Shattuck of the Boston Bar,
Introduction

In 1712, when St. John Baker's treatise (never before attempted, he says) was published, infants acquired property largely through inheritance. They still do, but inter-vivos transfers by gift are increasingly important and the concerns of the courts have perforce entered new fields. Taxpayers have had many difficulties with gifts. Their gifts to minors have been no exception. Because of the legal incapacity of the donee to manage the donated property, they have been perhaps rather more troublesome than others. Some donors have failed in one way or another to make their gifts complete and have consequently found themselves liable for possibly unexpected estate, income or gift taxes. Others, time and again, have made gifts in trust for the benefit of minors, and then strenuously and for the most part unsuccessfully have litigated their right to use the annual exclusion or some part of it in determining their "net" gifts for the year, while still others have boldly asserted

Clifford Bragdon, C. Herbert Rauch, G. Dykeman Sterling and Mrs. Robert Turner have all been of major assistance, but none should be held responsible for any views expressed, any errors or omissions. The similarity in arrangement between this paper and Mr. Austin Fleming's article in the February, 1951 Michigan Law Review is startling, but as the author of "The Infant's Lawyer" (see note 1 infra) remarks of his own treatise, "...indeed it is the Nature of the Subject, which ought to direct the Method." Mr. Fleming's painstaking work has been extremely helpful. The paper by Mr. Shattuck, "Gifts to Minors," delivered to the Real Property, Probate and Trust Section of the American Bar Association in New York on September 17, 1951 became available too late for complete cross reference here. Mr. Shattuck's paper will have been published in full in the October, 1951 issue of the Boston University Law Review, slightly condensed at 90 Trusts and Estates 659, October, 1951, and in other printings of the Proceedings of that Section before this appears. It may be accurate to say that Mr. Shattuck's remarks are directed to larger affairs of more prosperous clients than those mainly considered here.

1. The Infant's Lawyer. The Second Edition, In the Savoy: Printed by J. Nutt, Assignee of Edw. Sawyer, Esq., for St. John Baker, at Thavies-Inn-Gate in Holborn, 1712. When on p. 77 the same author writes, "in the Lord Anglesey and the Lord Ossery's Case, 27 Car. 2, B. R. Hale, Chief Justice; and the Court agreed, that this Statute extends to Ireland, and that the Guardian appointed by the Will may have Ravishment of Ward, as the Guardian by Knights Service or Guardian in Socage at Common Law," the protective function he ascribes to the courts suffers some shrinkage. At least the infant's property seems to have been carefully protected against ravishment and the courts today retain most of their jurisdiction over infants and their property.

2. E.g., MacManus Estate et al. v. Commissioner, 172 F.2d 697 (6th Cir. 1949).

3. E.g., Chas. F. Roeser, 2 T.C. 298 (1943); Edw. H. Heller, 41 B.T.A. 1020 (1940); Adolph Weil, 31 B. T. A. 899 (1934), aff'd, 82 F. 2d 561 (5th Cir.), cert. denied, 299 U. S. 552 (1936).

4. E.g., Estate of Sanford v. Commissioner, 308 U. S. 39 (1939); Richardson v. Commissioner, 126 F.2d 562 (2d Cir. 1942); Frederic E. Camp, 15 T.C. 412 (1950).

5. Fondren et al. v. Commissioner, 324 U. S. 18 (1945), and Commissioner v. Dilston, 325 U. S. 422 (1945), are good examples. A mere listing of cases involving distinctions between present and future interests would require a half page or more of footnotes.
that property which they continued to manage and to use indistinguishably from their own had been "given" to others.\textsuperscript{6}

The difficulties with which this paper is concerned relate to the inherent need of providing some sort of management for most gifts to a minor and the concurrent wish to secure the benefit of the annual exclusion from the gift tax without also incurring the complication, expense and ritual of a legal guardianship.

\textit{Theses}

Many potential donors seem preoccupied with the annual exclusion, and unduly reluctant to make gifts which will require filing returns.\textsuperscript{7} Accumulation trusts, even though no exclusion is available, are recommended. Suggestions are also made as to methods by which property such as shares of stock can be kept in manageable form without the intervention of a legal guardian, with possible retention of the benefit of the annual exclusion.\textsuperscript{8} The potential usefulness of common trust funds and investment company shares is emphasized.\textsuperscript{9}

\textit{Certain Assumptions}

It is assumed throughout this paper, as it was recently by Judge Raum of the Tax Court, that an outright gift to a minor through his guardian is a gift of a present interest.\textsuperscript{10} It is also assumed that an outright gift of property or income to the minor himself is a gift of a present interest.

\begin{itemize}
  \item \textsuperscript{6} Ludwig Bendix, 14 T.C. 681 (1950).
  \item \textsuperscript{7} Mr. Shattuck suggests a donor might "better de-emphasize the gift tax exclusion in his thinking." Shattuck, \textit{Gifts to Minors}, PROCEEDINGS OF THE SECTION OF REAL PROPERTY, PROBATE AND TRUST LAW, Ams. BAR ASS'N 11, 16 (1951), reprinted, 50 TRUSTS AND ESTATES 659, 665 (1951).
  \item \textsuperscript{8} The methods noted are not all court tested, but seem to meet the tests of logic within the statute, regulations and decisions. Mr. Shattuck, \textit{supra} note 7, warns against complications that may follow the use of informal methods. In a letter to the writer Mr. Fleming, (see note 11 infra), said: "For donors who are willing to hazard the final outcome of litigation, the steps which you outline in your paper for accomplishing gifts to minors seem well considered and worth a try. But for less venturesome tax-minded donors, I am afraid I cannot conscientiously suggest the use of a gift program to minors except in the case of those within 'shooting distance' of majority."
  \item \textsuperscript{9} The writer's enthusiasm for investment company shares arises from long experience as an associate of a firm which sponsors and manages two investment companies. These companies are also popularly known as investment trusts and mutual funds.
  \item \textsuperscript{10} The court said in a footnote: "We reject as untenable the suggestion advanced, but not developed, by respondent, that if there were no trusts, the fact of minority and consequent legal disability of the donees resulted in the postponement of enjoyment which characterizes future interests. If that view were carried to its logical conclusion all gifts to minors would be subject to this same contention. Yet it is clear that a minor, through his guardian, may obtain immediate enjoyment of an outright gift." John E. Daniels, P-H 1951 TC Mem. Dec. ¶ 51,044 (1951).
\end{itemize}
if the circumstances would make it a present interest were the donee a competent adult.\footnote{11} 

This may still be too bold an assumption, but the Seventh Circuit has recently gone even further to grant the exclusion in a case that turned on the right of a six months old infant beneficiary or his non-existent guardian to terminate a trust by a demand in writing.\footnote{12}

\footnote{11} But see Fleming, \textit{Gifts for the Benefit of Minors}, 79 \textit{Mich. L. Rev.} 529 (1951), where the author discusses, and suggests that, the leading cases, Fondren \textit{et al. v. Commissioner}, 324 U.S. 18 (1945), and Commissioner \textit{v. Disston}, 325 U.S. 442 (1945), practically close the door on any present interest in a gift to a minor which is not to be promptly spent or consumed by the donee. The writer questions that interpretation of those cases and discusses the matter with Mr. Fleming in 7 \textit{Tax L. Rev.} 84 (1951). See also \textit{Note, Gifts to Minors}, 37 A.B.A.J. 78 (1951), and Anderson, \textit{Gifts to Children and Incompetents}, 26 \textit{TaxExec} 911 (1948). It should be noted that a gift may be "outright" from the viewpoint of property law, but so hedged or restricted as still to be partly or wholly a future interest from the viewpoint of the gift tax. Spyros P. Skouras, 188 F.2d 831 (2d Cir. 1951) (a gift requiring joint action of beneficiaries); Rosa A. Howze, 2 T.C. 1254 (1943) (a gift of a remainder following a life estate); Roberts \textit{v. Commissioner}, 153 F.2d 657 (5th Cir. 1944), \textit{aff'd}, 2 T.C. 679, \textit{cert. denied}, 324 U.S. 841 (1945) (a gift of deferred annuities without cash surrender value); typify this situation. See Rogers, Fleming, 7 \textit{Tax L. Rev.} 84 (Nov. 1951).

\footnote{12} Kieckhefer \textit{v. Commissioner}, 189 F. 2d 118 (7th Cir. 1951) (italics supplied). Discussing the opposing theory the court said, "But because the beneficiary is a minor, with the disabilities incident thereto, it is reasoned that the gift is of a future interest because the disabled beneficiary is not capable of making demand. . . . Suppose the instant taxpayer instead of creating a trust had deposited in a bank $3,000.00 in a savings account (or even in a checking account) in the name of his grandson or had purchased government bonds in his name. Obviously, the grandson could not have made demand upon the bank . . . or on the government . . . and he could not have obtained the use, possession or enjoyment of either. What he would have acquired would have been the \textit{right} to the use, possession or enjoyment . . . through the means provided in all jurisdictions, so far as we are aware, that is, through a legally appointed guardian. However, we think under either supposition that the minor would have been the beneficiary of a gift of present rather than future interest. Certainly that would have been true if the beneficiary of the gift in either case had been an adult, and applying the Commissioner's concession that the same principle is to be applied in each case, it would seem to follow that it would be equally so where the beneficiary was a minor. At any rate, no court, so far as we are aware, has held to the contrary and we are not disposed to be the first." \textit{Id.} at 121. In Arthur C. Stifel, Jr., 17 T.C. No. 71 (Oct. 10, 1951), the Tax Court, with three Judges dissenting, has expressly refused to follow the Kieckhefer case elsewhere, although presumably bound by it within the confines of the Seventh Circuit. See note 172 \textit{infra}. The Senate Finance Committee Report on the Revenue Act of 1951, discussing family partnerships, made some observations which seem pertinent to the subject of this paper: "Two principles governing attribution of income have long been accepted as basic: (1) income from property is attributable to the owner of the property; (2) income from personal services is attributable to the person rendering the services . . . If an individual makes a bona fide gift of real estate, or of a share of corporate stocks, the rent or dividend income is taxable to the donee . . . . Transactions between persons in a close family group, whether or not involving partnership interests, afford much opportunity for deception
GIFTS TO MINORS

The Practical Setting

Many parents, grandparents, uncles, aunts, other relatives and friends at one time or another wish to give an infant money or property which he may use, or if he is too young to use it himself, may be freely used for him by his parents. Often the donors hope to provide educational advantages which might otherwise be difficult or impossible of attainment. Gifts to minors are also frequently stimulated by tax saving motives.

What lawyer or trust officer has not at some time been perplexed when asked about convenient and practical methods of making—and managing—such gifts? Questions arise as to the best kind of property to give. Should it be given outright or in trust? Should the outright gift be to a guardian? If so, what about surety bonds, annual accountings, “legal” investments? If a trust is considered, present interests, future interests, exclusions, lifetime exemptions, possible loss of dependency credits, as well as prospective administrative problems, quickly come to mind. In addition to gift taxes in certain states, three separate and only loosely integrated Federal tax structures are involved, so that tax consequences may flow from the gift even in the absence of tax saving motives.

With so many intersecting and interacting rules, injunctions and restrictions, an exploration of the possibilities soon takes on some of the aspects of Mr. Lloyd Kennedy’s n-dimensional chess game, in which the rules have to be made up as the game progresses.13

The requirements of a completed gift have been frequently stated.14

and should be subject to close scrutiny. All the facts and circumstances at the time of purported gift and during the periods preceding and following it may be taken into consideration in determining the bona fides or lack of bona fides of a purported gift or sale."

CCH 1951 Fed. Tax Rep. No. 41, 38-40 (Sept. 26, 1951). These remarks will doubtless fail to reassure those practitioners who have a deep distrust of irrevocable gifts; they certainly contain no balm for the donor who is unwilling to sever the strings that denote substantial ownership; and of course they do not solve the problem of Visintainer, (See Visintainer v. Commissioner, 187 F. 2d 519 (10th Cir. 1951) 500 sheep given to each of four children), as to what part of an income is attributable to personal services, and what part to ownership of property. Certiorari has been applied for in the Visintainer case.

Gifts to minors benefit from at least two general rules—that there is a presumption of acceptance by the minor and of validity of the gift, and that possession of a natural guardian is deemed possession of the infant.

The gift tax provides that in addition to a lifetime exemption of $30,000 granted to citizens or residents of the United States, each donor may give each year to each of as many donees as he may select, property to the value of $3,000, not only excluded from and thus free of gift tax, but also without the necessity of filing a gift tax return, except that to the extent the gift is one of a future interest in property, no matter how small, there is no exclusion and a return must be filed. Unlimited gifts to charity may be made free of gift tax. Moreover, since the "family income splitting" and "community property" amendments of 1948, a donor whose spouse in a proper case "consents" may effectively double his gifts both within the exclusions and within the exemption, although if his gift exceeds $3,000 he will have to file a return, and if the gift includes any future interest in property the con-

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16. Ibid.
18. Id. § 1004 (a) (1); U.S. Treas. Reg. 108, § 86.12 (1943).
19. Id. § 1003 (b) (3); U.S. Treas. Reg. 108, § 86.10 (1943).

Throughout this paper $3000 ($6000 if married) is used as if that amount might be normally available to the donor for gifts of securities, cash or other similar property. Counsel should bear in mind however that Christmas gifts, wedding presents and "numerous small gifts" as well as "occasional gifts of relatively small amounts" are specifically mentioned, (Committee Reports, Revenue Act of 1932) as reasons for granting any exclusion from the gift tax. Clients should be warned that the value of such gifts should be given consideration in deciding whether or not total gifts for the year must be reported. The practice of increasing the size of borderline gifts so that they will exceed $3000 at least by a few dollars and thus require filing a return has much to recommend it.

20. Id. § 1006 (a); U.S. Treas. Reg. 108, § 86.20 (1943).
22. U. S. Treas. Reg. 108, § 86.20 (1943). Section 86.21 requires the filing of an information return by the donee, beneficiary or trustee whenever the donor is required to file (except in the case of charitable gifts).
senting spouse also must file.\textsuperscript{28} Gifts of community property to third persons are generally attributable one-half to each spouse.

Proposals have been made to limit the annual exclusions to $3,000 per donor rather than per donee, but as long as some lifetime exemption remains in the law and as long as there are any annual exclusions from gift tax, it is believed that the discussion which follows will continue pertinent and—if tax saving is concerned—may possibly be even more significant.

In considering methods of making and managing gifts, it may be helpful to assume as a point of reference a simple set of facts. To avoid, whenever mentioning gifts in trust, frequent references to and warnings about the problems typified by Helvering v. Clifford\textsuperscript{29} and Helvering v. Stuart,\textsuperscript{30} the prospective donor is assumed to be a grandfather, Elder Jones, married, who is considering making gifts to Tertius, his “grandchild of tender years.”\textsuperscript{31} He wishes to give the boy funds which may be used for his support, maintenance and comfort, and which if not used up in the interim, can help with his higher education. Elder's previous gifts, if any, to his adult son, Jones II, the father of Tertius, or to others, have all been outright and all within the annual exclusions, so that both his $30,000 lifetime exemption and that of his wife are still intact. He knows about the exclusion and thinks he can spare from $3,000 to $6,000 now and perhaps be able to make additional gifts in the future.

The gift may be made outright or in trust. A trust might provide that income would be paid out to or for his grandson annually or more often. It may provide for accumulation, a combination of accumulation and pay-out, or it could give to the trustee discretion in the matter. The gift tax consequences of these various provisions differ. They will be considered later, as will some of the kinds of property that might be given. A mere list of possible media will suggest to the experienced some reasons why gifts should be made in trust, for as soon as an outright gift is made the management of the infant’s property may require either a ritualistic conformity with rules of guardianship or an equally troublesome attempt to avoid them.

**PART I—OUTRIGHT GIFTS**

*Guardianship*

Protection of infant’s property is no new concern of the state. For centuries courts of equity have claimed and exercised, independently of

\textsuperscript{28} Ibid.
\textsuperscript{31} See Fondren et al. v. Commissioner, 324 U. S. 18, 19 (1945).
statute, inherent jurisdiction over the custody, care and control of infants whether or not property rights are involved. As a broad generalization only a guardian legally appointed, bonded and qualified can safely act in connection with most properties of a minor. One not so armed who undertakes to deal directly with the property of an infant may be treated as a trespasser. In effect he becomes an insurer not only of the value of the property but of the disposition of the proceeds of its sale.

This is the terrifying spectre that confronts banks, brokers, transfer agents or any other solvent persons dealing with funds or property of minors. So strict is the rule that even in ordinary commercial transactions a third party purchaser for value in good faith and without notice may be called on to pay a second time for property belonging to an infant. Thus it is a bold financial institution which will throw onto the shoulders of its own stockholders the risk of any sort of transaction in the funds or property of a minor unless the ritual of guardianship is fully carried out.

Technically, then, it would appear that almost any property owned outright by a minor should be held and managed by a legal guardian under strict court supervision. Generally speaking, other methods are extra-legal and so involve some financial risk both to the one who holds or manages the property and also perhaps to innocent third parties who deal with him. Despite the supervision by the courts there seems to be no censure—as contrasted with financial risk—for a failure to use legal guardianship routines where inter-vivos transfers are reviewed.

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32. In New York legislative concern as well as judicial is both extensive and particular. It is against N.Y. Penal Law § 483c to tattoo an infant under sixteen, while N.Y. Conservation Law § 217 permits him to sell certain bait fish without a license. See generally 43 C.J.S. 51 (1945).


34. Sherman v. Ballou, 8 Cow. 304 (N.Y. 1828).


37. Ibid.

A legal guardianship, however, is often cumbersome. Annual accounts must be filed. Every expenditure of principal or income must be authorized or approved. If investments with high yields have to be sold to conform the list to legal standards, a sharp reduction in income may follow.\(^{39}\) It is expensive in out-of-pocket costs, too.

In a recently closed New York guardianship involving $30,000 principal, the costs over its three year period are believed to have been about as follows:

<table>
<thead>
<tr>
<th>Expenses</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>Income—3 years @ 3% (estimated)</td>
<td>$2,700</td>
</tr>
<tr>
<td>Expenses</td>
<td></td>
</tr>
<tr>
<td>Original Proceeding</td>
<td></td>
</tr>
<tr>
<td>Legal Fees^40</td>
<td>$750</td>
</tr>
<tr>
<td>Costs and Expenses</td>
<td>70</td>
</tr>
<tr>
<td>Bond—3 years @ $135</td>
<td>405</td>
</tr>
<tr>
<td>Legal Fees on Accountings</td>
<td>200</td>
</tr>
<tr>
<td>Guardian’s Commissions</td>
<td>970</td>
</tr>
<tr>
<td>Balance for Infant (1/3 of 1% per year)</td>
<td>$305</td>
</tr>
</tbody>
</table>

The infant would have received about $1,425 or 48% of the estimated 3% income because guardian’s commissions, payable to a parent, were waived.

If Elder Jones gives $3,000 to his grandson, and a guardian is appointed, the account might run something like this:

\(^{39}\) See the Section “Investments of Guardians and Conservators” in Schuyler, Probate Courts: Law and Procedure, Proceedings of the Section of Real Property, Probate, and Trust Law, Am. Bar Ass’n 29, 31 (1951), reprinted, 50 Trusts and Estates 695, 697 (1951), for a review of state laws. Possibly these observations greatly overstate the nuisance and cost of small guardianships. Mr. Thurston Greene of the Connecticut and New York Bars mentions Mr. Shattuck’s summary of the difficulties of guardianships (see Shattuck, supra note 7, at 12) and says in part “with the possible exception of one of these four reasons it seems to me that there must be many communities where his objections do not hold water. Up here in the hills where I practice, for example, a guardianship can be set up in an hour’s time with virtually no expense, under the benign investment guidance of the full Prudent Man rule and with the only “bond” consisting of the name of the wife on a piece of paper in which the guardian says he will be a good guardian. . . . The stakes in this arrangement are not high, but it seems to me that it can be extraordinarily useful and might be used frequently . . . ."

\(^{40}\) This fee is believed to be substantially higher than would usually be sanctioned by the Surrogate’s Court in New York County in an uncomplicated guardianship.
<table>
<thead>
<tr>
<th>Income</th>
<th>3%</th>
<th>$ 90</th>
</tr>
</thead>
<tbody>
<tr>
<td>or</td>
<td>6%</td>
<td>180</td>
</tr>
</tbody>
</table>

**Expenses**

<table>
<thead>
<tr>
<th>Description</th>
<th>Estimate</th>
</tr>
</thead>
<tbody>
<tr>
<td>Surety bond for $3,000 each year**</td>
<td>$20</td>
</tr>
<tr>
<td>Legal fees in original proceeding**</td>
<td>50</td>
</tr>
<tr>
<td>Guardian's commissions (waived)</td>
<td>—</td>
</tr>
<tr>
<td>Annual accountings—end of first year and</td>
<td></td>
</tr>
<tr>
<td>every year thereafter**</td>
<td>25</td>
</tr>
<tr>
<td>Total expenses 1st year (est.)</td>
<td>$95</td>
</tr>
<tr>
<td>Annual expenses thereafter (est.)</td>
<td>$45</td>
</tr>
</tbody>
</table>

Commissions to the guardian could be waived by the particular appointee, who might be the father or mother of the infant, but the cost seems excessive to Jones when he glances at the figures. He thinks of it as a serious obstacle to his objectives.

In New York, where the guardian files his annual accounts with the Surrogates Court, he is not compelled to convert guardianship property to “legal” investment,** but like other fiduciaries whose powers are derived from statute rather than from a written instrument he assumes a personal financial risk if he fails to conform investments to the statutory standard within a “reasonable” time.** Inasmuch as he must frequently furnish a bond, his surety, if a commercial bonding company, will interest itself in the investment situation, and if there is any doubt about the adequacy of the guardian’s financial resources, the surety may use its position to press for compliance with “legal” investment standards. The New York rule now says the guardian may be 35% “prudent.”** If Jones makes his gift in property which is not “legal,” as in stock of his own or of

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**41. In New York a bond may be waived if the guardianship property is (a) under $10,000 and administered jointly with the clerk or guardian clerk of the Surrogate’s Court in certain counties, (N.Y. Surrogate’s Court Act § 190 (5)), or (b) under $7,500 and administered jointly with the Surrogate in the rest of the State, (N.Y. Surrogate’s Court Act § 180). Section 106 provides for custody in a banking institution, a method of dispensing with bond if the fund is larger.

42. In New York County the services of a lawyer are unnecessary in simple guardianships. The guardian clerk will assist in obtaining necessary appointment and maintenance orders.

43. See note 42 supra.


46. N.Y. Pers. Prop. Law § 21 (M), effective July 1, 1950, permits 35% of the assets of “fiduciaries” to be invested under limited “Prudent Man” standards in what were formerly non-legal investments.
another corporation, he could presumably attach to the gift the condition
that the stock should be retained until needed for proper expenditures
of the guardianship. If he is interested in the benefit of the $3,000
annual exclusion for his gift, however, he should avoid the implications
of Kathrine Schuhmacher, in which the taxpayer was denied an exclu-
sion, on the grounds she had created a future interest in the property,
where she had instructed the “guardian” to hold the property until the
infant-donee reached twenty-one. The “natural” as distinguished from
the “legal” or “general” guardian is often mentioned by the courts in
cases involving minors’ property. Customarily a parent has acted in
the interest of the child without court appointment and accounting.
He is said to have acted as “natural” guardian.

Infants’ Acts and Contracts Validated by Statute

Here and there the ancient rules have been changed. Most significant
in its nation-wide consequences is the extreme liberality of the regulations
governing issue and redemption of United States Savings Bonds of all
series. These provide in substance that anyone, including the minor,
may purchase bonds in the name of a minor, and that payment will be
made “direct to such minor presenting the bond for payment if, at the
time payment is requested, he is of sufficient competency and understand-
ing to sign his name to the request and to comprehend the nature of
such act.” Otherwise payment may be made to a parent or to another
with whom the minor resides. Provisions for the reissue of Savings
Bonds are similarly liberal.

The legislature in New York has also granted extensive privileges to
minors and corresponding protection to those who deal with them in the
Banking Law, the Insurance Law, the Negotiable Instruments Law and the Debtor and Creditor Law. It has thus opened the way to many

47. 8 T. C. 453 (1947).
48. Eg., John E. Daniels, P-H 1951 TC Mem. Dec. § 51,044 (1951); Charles F. Reeser,
2 T. C. 298 (1943); Emil Frank, 27 B. T. A. 1158 (1933); Harry C. Moores, 3 B. T. A.
301 (1926); Haynes v. Gwin, 137 Ark. 387, 209 S. W. 67 (1919).
49. See note 33 supra.
50. 31 Code Fed. Regs. § 315.39 (1949). Mr. Shattuck supra note 7, calls this “an
unsettling rule.”
53. N. Y. Banking Law § 134 (1). Cf. N. Y. Banking Law §§ 239 (1), 171 (1), 310
(2), and 394 (3), for other banking provisions.
54. N. Y. Insurance Law §§ 145, 146, 147.
55. N.Y. Negotiable Instruments Law § 41; Uniform Negotiable Instrument
Act § 22.
business transactions while effectively barring some particularly obnoxious forms of disaffirmance. Under the Insurance Law minors of 14 years, 6 months and over may contract for life insurance with some moderate restrictions on selection of beneficiaries, but they enjoy every other “right, privilege and benefit” as though an adult. An insurance company is protected in paying within the terms of the policy $2,000, or up to $2,000 per year, to a minor of eighteen or over. When the statute was called to its attention one company was willing to make a substantial payment to a seventeen-year-old college student.

The liberality of the Banking Law on the subject is impressive. Relating to commercial banks and trust companies, it starts out: “any minor may endorse a check payable to his order for the purpose of depositing the proceeds in a deposit in his name and when any deposit shall be made by or in the name of a minor...” the statute continues that the deposit shall be the minor’s alone, that he can draw on it “by check or otherwise” and that “the receipt, acquittance or order of payment of such minor shall be a valid and sufficient release and discharge for such deposit or any part thereof to the bank or trust company.” Section 239 makes comparable provisions for a minor’s control of his own savings account, while other sections treat private banks, industrial banks and savings and loan associations.

These provisions seem solidly grounded on common sense, but even remedial legislation has to stop somewhere and this line of enactment ceases abruptly at the transfer of stock. One might hazard a guess that in dollar value savings bank deposits or Series “E” Savings Bonds, or for that matter checking accounts in the names of minors, exceed by many millions of dollars the total of stocks registered in their names, but Section 2 of the Uniform Stock Transfer Act states firmly, “Nothing in this article shall be construed as enlarging the powers of an infant... to make a valid... assignment or power of attorney.”

The United States Treasury will apparently permit a minor to buy up to $100,000 of Series “F” or “G” bonds in each calendar year and also to redeem them, but if the same minor wishes to sell a single share of a $10 stock, the Stock Transfer Act stands squarely in his way. Reasons for the difference are obscure, but it might be realistic to guess

58. N.Y. INSURANCE LAW § 145.
59. N.Y. INSURANCE LAW § 145 (2). $2,000 would buy a lot more groceries in 1940 when the amount was set than it does in 1951.
60. N.Y. BANKING LAW § 134 (1).
that the Government needed the money, and that bankers and insurance companies are more effective with the legislatures than stock brokers.

Against this background of the legal perimeters of management of property in the outright ownership of minors, it may be instructive to examine briefly various forms of property which Elder Jones might use to make his gift to Tertius.

(1) **Currency**

If the donor physically hands his grandson "bills in his crib"\(^{102}\) it would certainly seem a 100% present interest. The donee's father or mother could see to it that "U. S. Savings Bonds and annuities"\(^{103}\) were bought a savings account opened in the infant's name,\(^{64}\) or the bills themselves, until needed, safely hoarded. Presumably a guardian subsequently appointed would take them under his control and presumably the infant's father or mother would be accountable either to the guardian or to Tertius himself on his coming of age, not only for the principal but also, if uninvested, for reasonable interest in the meantime.\(^{65}\) If his parents turn the money over to Tertius, and while still a minor he squanders "some part of the property he has received, or even all of it, he may, nevertheless, disaffirm the contract and get back what he himself gave [his receipt], giving back only what he continues to hold."\(^{103}\)

(2) **Bank Deposit—Commercial or Savings, etc.—in Tertius' Name**

The Bank can accept a deposit and can disburse it on the infant's order.\(^{67}\) As no unauthorized person intermeddles with the minor's property it would seem a riskless procedure.\(^{68}\) Such a deposit would appear to be a gift of 100% present interest.\(^{69}\)

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63. Chas. F. Roesser, 2 T. C. 298 (1943).
64. Ibid. See also John E. Daniels, P-H 1951 TC Misc. Dec. 51,044 (1951).
65. Clarkson et al. v. De Peyster, 1 Hopkins Ch. 424 (N.Y. 1825). The guardian in this case seems to have had a most unfortunate experience. He was first surcharged for interest (at 7%) because he had not invested the money, then when he paid it into court to be invested by court order he was later held responsible for a decline in market value. Id. at 504.
67. See note 53 supra.
68. An officer of a medium sized bank in a college town in a state which then had no statute corresponding to §134 of the New York Banking Law, remarked a few years ago that his bank had handled many millions of dollars in accounts of minors without a single attempt that he knew of to disaffirm.
69. See Kieckhefer v. Commissioner, 189 F. 2d 118, 121 (7th Cir. 1951). But see Note, Gifts To Minors, 37 A. B. A. J. 78 (1951), which suggests it might be a future interest if the minor were too young to draw it out. See note 11 supra.
U. S. Savings Bonds, Series "E," "F," "G"

The purchase of Savings Bonds by registry in the name of a minor would also seem to be wholly a gift of a present interest. As explained earlier, the minor or his parent or his "natural" guardian can redeem them with a minimum of red tape at any time an adult could do so. Naming a co-owner of the bond, since either of the owners can cash it, creates an element of uncertainty as to the ultimate recipient of the gift which should be avoided. Naming a beneficiary to whom the bond is payable on the death of the owner is somewhat analogous to creating a Totten trust in a savings bank, merely tentative and always subject to revocation by the true owner. Such a designation should not limit the present interest of the owner in the bond.

Other Bonds—Government, Corporate, Municipal

Checks for interest on registered bonds can be deposited by the minor or in his name. The Banking Law is not equally specific about coupons, although as bearer paper they can be easily cashed for him by his parents. So can proceeds of sale or at maturity of bearer bonds, but not without the inherent risks that accompany other unauthorized dealings with the minor's property. Collection of proceeds or transfer of registered bonds may present about the same problems as transfer of stocks. One tangential point might be mentioned. When the gross income of the infant exceeds $599 his parents "lose" him as a dependent for income tax purposes. The loss of a $600 credit for a dependent may be costly to them. As the infant's income approaches $600, tax exempt bonds as a medium for gifts or of investment may result in a materially better family income tax result.

Life Insurance Policies and Premiums

The gift of a conventional life insurance policy, if complete and outright, would appear to be one of a present interest. This would

70. See note 69 supra.
71. 31 Code Fed. Regs § 315.45 (a) (1949).
72. Cf. Skouras v. Commissioner, 188 F. 2d 831 (2d Cir. 1951).
73. Matter of Totten, 179 N.Y. 112, 71 N. E. 748 (1904).
75. See note 53 supra.
77. Arthur A. Frank, P-H 1944 TC Mem. Dec. ¶ 44,360 (1944); Sidney R. Baer, P-H 1943 TC Mem. Dec. ¶ 43,294 (1943), aff'd mem., 149 F. 2d 637 (8th Cir. 1945). U. S. Treas. Reg. 108, § 86.11 (1943), states: "The term [future interests] has no reference to such contractual rights as exist in . . . a policy of life insurance, the obligations of which are to be discharged in the future," but warns that a future interest may be created by the
seem true regardless of whether the policy is single premium, limited payment, ordinary life or endowment. Premiums paid on such a policy after the gift would also seem to be present interests and to constitute additional gifts. A gift of a life insurance policy is frequently effected by a written assignment recorded at the home office of the company, but is sometimes made by originally “taking out” the policy in the name of the donee as owner.

The Regulations prescribe a method for valuing life insurance policies. The payment of premiums would seem to be self-valuing. The gift of a policy at a time when it had no cash value was held to be a gift of a future interest. That holding would probably be followed even though the policy there under consideration was also subject to joint control of more than one beneficiary-owner, which alone ordinarily delineates a future interest and thus precludes any benefit of the exclusion.

Most companies will write many forms of policies on the lives of minors. Insurance on the life of the donor or on the life of another person in the family group can also be the subject of the gift.

"Instrument of transfer employed in effecting a gift."

78. Sidney R. Baer, supra note 77.
79. An “insurable interest” is usually required by company practice, at least when the policy is first put in force in order to have a valid contract of insurance. For a case illustrating the rule of some jurisdictions that any beneficiary must have an insurable interest, see the long battle culminating in Griffin et al. v. McCough, 123 F. 2d 550 (5th Cir. 1941). Although it cannot be recommended, a less formal assignment by manual delivery of a policy of which the insured’s estate was the beneficiary has been held to effectuate a valid gift. Rothstone v. Norton, 231 App. Div. 59, 246 N.Y. Supp. 354 (1st Dep’t 1930), aff’d without opinion, 256 N.Y. 601, 177 N. E. 157 (1931) (policy on life of Arnold Rothstein).
81. Sidney R. Baer, P-H 1943 TC MEM. DEC. ¶ 43,294 (1943); U. S. Treas. Reg. 103, § 86.2 (a) (8) (1943).
83. Spyros P. Skouras, 14 T. C. 523 (1950), aff’d, 188 F. 2d 831 (2d Cir. 1951).
84. Most companies are believed to have self-imposed restrictions, related generally to insurable interests and to the amount of insurance on the life of the parent or other person effectuating the insurance. Under N.Y. INSURANCE LAW §§ 145, 146, 147, the general scheme is § 145 to permit a minor over fifteen to deal freely with insurance on his own life with a few restrictions on the designation of beneficiaries, to permit § 145 (2) the insurance company to pay up to $2,000 per year directly to a minor beneficiary of eighteen or over, to limit severely § 147 the amount of valid insurance on the lives of very young infants but gradually to increase the limit as the child grows older, fixing the limit in part
If funds are needed for the expenses and education of the infant donee, the appointment of a legal guardian will ordinarily be required to cash in or borrow on the policies or even to collect the proceeds of a policy on the life of another. An exception would be when the infant took out the insurance himself and by statute as in New York, or by company rule, can deal directly with the company. Practices and requirements of the companies vary widely one from another. Before effecting insurance on their lives or giving insurance policies to minors, the donor would be well advised to inform himself as to the company rules for payment of cash values, principal sums or installments to minors or their representatives. With this exception insurance contracts require minimum intervention for management and seem well suited to the needs of minor donees.

Annuity type policies are also of many kinds. First is the ordinary single premium annuity, payments on which begin immediately. If every right in such a contract is transferred to the donee it would seem a gift of a present interest. Another type is the deferred annuity, either single or multiple premium, which has an immediate cash surrender or refund value. The same rule would seem to apply. A third group is typified by a contract, either single or multiple premium, providing for annuity payments to begin at a future specified age such as 65, but without immediate cash surrender value. No recent case has been found, but the imperfect analogy to an interest in an accumulation trust suggests an element of future rather than present enjoyment in the gift of such a contract or in a gift through the payment of premiums on it.

(6) Tangible Personal Property

In the law school case of Hamer v. Sidway, the elder Story wrote his

by reference to the amount of insurance on the life of the one effectuating the insurance, and to define insurable interests in the lives of minors under fifteen. New York is said to be the only state with such severe restrictions on insuring the lives of minors. A bill to increase the amount of valid insurance on the lives of minors was passed by the 1951 New York Legislature but vetoed by the Governor.

85. N.Y. INSURANCE LAW § 145.
86. N.Y. INSURANCE LAW § 145 (2).
87. FLITCRAFT, MANUAL OF SETTLEMENT OPTIONS (1950) quotes 45 of 60 companies as answering an unqualified "no" to the question, "May periodic payments be made direct to the minor beneficiary?" despite N.Y. INSURANCE LAW § 145(2).
88. Similar precautions should be taken before naming young infants as either contingent or primary beneficiaries of insurance.
89. Fleming, supra note 11, at 555, includes an extensive study on insurance. See Becker, supra note 77.
90. Cf. Roberts v. Commissioner, 143 F. 2d 657 (5th Cir. 1944). If gifts are made in cash, subsequent use of part of the cash to pay such premiums might be distinguishable.
91. 124 N.Y. 538, 541, 27 N. E. 256 (1891).
nephew in 1875:92 "One thing more. Twenty-one years ago I bought you 15 sheep. These sheep were put out to double every four years. I kept track of them the first eight years; I have not heard much about them since. Your father and grandfather promised me that they would look after them till you were of age.93 Have they done so? I hope they have. By this time you have between five and six hundred sheep,94 worth a nice little income this spring. Willie, I have said much more than I expected to; hope you can make out what I have written. . . . Truly Yours, W. E. Story." With 500 sheep and wool over $3.00 a pound in Spring 1951, a college education for the donee seems possible.

Antiques, stamps, paintings or rare books might be given. Selling such chattels without the intervention of a legal guardian might well involve an innocent purchaser in later trouble95 as well as subjecting the meddler96 to the risks previously discussed. But what about storage, repairs, insurance, wear and tear? Gifts of such things, like the sheep, often require attention, care and management. An outright gift of tangible personal property would seem to qualify as one of a present interest.

(7) Real Estate

In the eyes of the law, real property enjoys historical precedence that is sometimes hard for a harassed landlord to understand,97 but as the subject matter of a gift to an infant, it has limitations as well as advantages. Unlike a few kinds of personal property mentioned above, even unimproved lots or woodlands are likely to require some management. Who, for example, is to pay the taxes? Improved real property, too, normally requires management, but Tertius' father, when he undertakes to make leases, collect rents, pay taxes, insurance and repairs without a court appointment as a guardian, is in far better position than he might find himself in regard to personal property. Section 80 of the New York Domestic Relations Law names him98 officially as "Guardian in Socage."

If the infant has no general guardian, the guardian in socage is authorized by the statute to exercise certain limited powers over the property with-

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92. Id. at 541, 27 N. E. at 256.
93. Quaere, Would a gift subject to this promise create a future interest? Cf. Alexander v. Commissioner, 190 F. 2d 753 (5th Cir. 1951) (income tax).
94. Seventy-six years later 500 sheep appear again, this time as gifts to each of four minor children, in the income tax case of Visintainer v. Commissioner, 187 F. 2d 519 (10th Cir. 1951), rev'd, 13 T. C. 805 (1950). Certiorari applied for.
97. Personal property, for example, always used to be and often still is sold first to pay debts and expenses of decedents' estates.
98. The statute specifies in order, (1) parents jointly, (2) surviving parent, (3) nearest and eldest relative of full age. N.Y. Dom. Rel. Law § 80.
out calling on the machinery of legal guardianship. These powers, however, do not include power of sale. The minor cannot give a good title without the assistance both of the court and of a “special” or general legal guardian.99

(8) Corporate Stocks

Elder would incline towards stock, perhaps of his own corporation, as a medium for his gift partly because of the generous dividends he expects for his grandson. No problems ordinarily arise at the time of the gift when he instructs the transfer agent, directly or through his bank or broker, to register 30 shares of his XYZ Company in the name of Tertius Jones.100 Cashing dividend checks for small sums or depositing them in an account in the name of the minor normally presents no practical problem.

However, if later it seems desirable to sell the stock for investment reasons or if principal is needed for college expenses it may be necessary to appoint a legal guardian. As a practical matter this may often be avoided if the minor is old enough to endorse the certificate or sign a stock power and if, as is sometimes the case, the father’s bank or broker is willing to guarantee the signature. But since the guarantee is generally regarded as covering legal capacity as well as the genuineness of the signature, the bank or broker may be reluctant to assume this risk101 and the father may be reluctant to make the request. Whether the court would even then approve the use of the funds for tuition, board and other college expenses—principal funds of a minor in the hands of a guardian cannot properly be expended without court order102—may be another matter. Unless college expenses are deemed “necessaries,” court approval of “such a sum as to the surrogate seems proper,”103 “differs with the circumstances of each case.”104 A showing that the parent is unable to maintain the infant is said to be essential.105

There may be a practical alternative, however, in original registra-

99. N.Y. Surrogate’s Court Act § 194b, added in 1948, greatly simplifies the procedure in the sale of an infant’s real estate.

100. It is helpful if the donor will attach to the new stock certificates a memorandum noting his own income tax “basis” for the stock, the date on which he acquired it, the date of the gift and the value on that date.


103. N.Y. Surrogate’s Court Act § 194.


105. Matter of Brown, supra note 104. This is one of the causes of the concern of some writers lest a gift to an infant through his guardian might be a future interest. See note 11 supra.
tion of the shares in the name of a nominee. For example, when Elder makes the gift he might have the 30 shares of XYZ Company endorsed in blank or perhaps transferred into the name of "M. Smith Jones." Mary Jones, née Smith, is the mother of Tertius. She is not an appointed legal guardian. When Elder hands her the certificate he tells her the stock is a gift to Tertius and that she is merely a nominee for her child, neither the owner nor a trustee. He makes it clear to her that both income and principal are exclusively his grandson's and are not in any other way restricted. He suggests that she promptly put the Treasury on notice as to the true ownership of the shares, and he hands her an "Ownership Certificate," Treasury Department Form 1087, suggesting that she keep a copy of it and also that she keep a careful record of all transactions relating to the stock including a record of dividends and the disposition of them. Perhaps he writes her a letter confirming this conversation. If the stock is endorsed in blank she will proceed to have it transferred to this unusual form of her name (or, of course, if she dislikes the nominee role, to the name of her son).

If at a later date it seems wise or becomes necessary to sell the stock no problems should arise in relation to the transfer agent, as the registered owner, M. Smith Jones, is a competent adult and the only person known to the bank, broker or transfer agent as having any interest whatever in that certificate. Proceeds of the sale can be deposited in an account in the name of the minor or Mary can reinvest the proceeds, filing new 1087 forms for the new investments. She should continue to keep careful records showing that the new investments are also Tertius' and that the income has been spent or saved for him alone.

Such a course of action is not without certain risks, but at least permits freedom of investment action and has the merit of convenience and simplicity. Risks appear on four fronts.

(a) The minority risk.

When Tertius reaches majority or when a legal guardian may be appointed for him before then, either may demand of Mary an accounting. The market value of the stock may have declined severely. She will find herself in a vulnerable position, and she may have to make good to the infant both the proceeds of transactions that turned out to his advantage and the cost of any that turned out badly. Possibly she will have to make good on income not earned or alleged to have been improperly spent.

106. Shattuck, supra note 7, seriously doubts the wisdom of any kind of informal arrangement by which the minor's property is to be kept in manageable form.
107. N.Y. Banking Law §§ 134, 239. See note 53 supra.
(b) The income tax risk. Mary will receive dividends on property belonging to her son. Her filing of Form 1087, her other records, a separate bank account for the infant's money, should be a sufficient defense to an assertion of income tax against her.\textsuperscript{108}

(c) The gift tax risk. It may be contended, although there is support for a contrary view,\textsuperscript{109} that no part of the gift in her name as nominee is a gift of a present interest to Tertius. This contention might be based on the theory that Elder had inadvertently created a trust.\textsuperscript{110} If Elder is in a high gift tax bracket this is serious.

(d) The estate tax risk. If Mary Jones dies it might be contended that the stock was hers and includible in her gross estate. The contention is obviously without merit, but is plausible should she fail to keep records, and would perhaps be difficult to counter.\textsuperscript{111} However, unless her taxable estate exceeds the statutory $60,000 exemption, the federal tax consequences would not be severe.

Despite these risks the procedure commends itself for its simplicity, and in a proper case may be a practical solution to the problem of gifts of stock.

It may be that real estate can be handled similarly. The "straw" man is a common device in real estate transactions in some sections of the country. A nominee is only a "straw" with a less colorful appellation. Normally the "straw" signs an agreement to convey to the true owner on demand. A declaration disclaiming any interest and naming the true owner might be a useful adjunct to Mary's post as nominee.\textsuperscript{112}

\textsuperscript{108} See Visintainer v. Commissioner, 187 F. 2d 519 (10th Cir. 1951), for an example of the usefulness of records. The regulations specifically require donors to keep "permanent books of account or records" of their gifts. U. S. Treas. Reg. 108, § 86.25 (1943). Alexander v. Commissioner, 190 F. 2d 753 (5th Cir. 1951), recites an entertaining success story of an infant rancher. Records were well kept and appear to have figured largely in the result. The case seems unique in its line because the expression "natural guardian" is never used. Certiorari applied for in the Visintainer case.


\textsuperscript{110} Cf. Curtis A. Herberts, 10 T. C. 1053, 1063 (1948); Lawrence Miller, 2 T. C. 285 (1943); and John E. Daniels, supra note 109, wherein parents were held unable to place in trust property owned by infant children. It is, however, the general rule that no special words are necessary to create a trust. 1 Scott, Law of Trust § 24 (1939).

\textsuperscript{111} If Mary dies, a "reverse discovery" proceeding (N.Y. Surrogate's Court Act § 206-a) may be necessary to gain possession of these certificates for Tertius from the executor of his mother's estate.

\textsuperscript{112} The Trustee's agreement to turn the property over to the infant or to his guardian.
A Deed of Gift

When executed with certain formalities, a document appointing Mary or another as "nominee" or "custodian" of Tertius' 30 shares of XYZ Company stock dignifies the "straw" concept as that of a "donee of a power in trust." Although the statutory provisions covering such powers in New York are collected in the Real Property Law, they have been held to apply equally to personal property. The "power in trust" is a familiar device to New York draftsmen. In the standard "minority holdover" provision in wills and trust agreements, it is often used for dealing with the property of minors when management is needed and the permitted limits to the rule against perpetuities may have been exhausted.

It would be impossible to advise a client with any certainty that 100% of a gift under such a power constitutes a present interest for the purpose of the gift tax exclusion, as no case appears to have come before the courts on the precise facts. Perhaps the closest analogy is found in the instruments considered in the Prudence Miller, and Stricklovsky cases, all of which support an inference that the infant would receive 100% present interest. The rationale of the Seventh Circuit in Kieckhefer v. Commissioner also seems applicable, and there Chief Judge Major certainly appears to go much further than would seem necessary to sustain the present interest in a gift to an infant under such a deed. A gift under this power would not seem to fall within the definition of a "future interest" in the Regulations, for the

on written demand was sufficient to give the infant a present interest in the Kieckhefer trust. Kieckhefer v. Commissioner, 189 F. 2d 118 (7th Cir. 1951). Note that the Tax Court in Arthur C. Stifel, 17 T.C. No. 71 (Oct. 10, 1951), has refused to follow the Kieckhefer case.

The existence of such a paper might eliminate need for the "reverse discovery" proceeding discussed in note 111 supra.

113. N.Y. REAL PROP. LAW § 140.
114. Matter of Babbage, 125 N. Y. L. J. 2232, Col. 3 (Sur. Ct. June 14, 1951), contains an interesting discussion of a "power in trust" under a will. It suggests that bond may be dispensed with by the terms of a gift to Tertius through his guardian.
115. N.Y. REAL PROP. LAW ART. 5; N.Y. Surrogate's Court Act § 194-a.
117. TWEED AND PARSONS, LIFETIME AND TESTAMENTARY ESTATE PLANNING 16, 118 (1950); FINGAR AND BOOKSTÄVER, NEW YORK WILLS §§ 105.4-7, 146.32 (1949); GORDON, STANDARD ANNOTATED FORMS OF WILLS 6, 9, 204 (1947).
118. See note 8 supra.
119. 7 T. C. 1245 (1946) (income tax).
121. 98 F. Supp. 331 (W. D. N. C. 1951).
122. 189 F. 2d 118 (7th Cir. 1951).
123. The Regulations do not undertake to define a present interest, but they do comment on its counterpart. "Future interests," they say, "is a legal term, and includes
deed would impose no time limitation, it would give a right to immediate use, possession and enjoyment. With or without such a deed the nominee registration provides a simple mechanism to convert the stock to money and in turn to the needs of its owner. For this purpose it may be superior to the legal guardianship which needs the intervention of a court order as well as, at least in theory, a showing of inability of the parents to provide support before the principal of the investment can be of immediate physical use to the infant. Essentially the deed of gift is merely a device to circumvent the transfer agent who is forced to prevent the transfer of the infant’s stock if he knows it belongs to an infant.

Other Methods of Registration

For many years members of one of the oldest law firms in the State of New York have acted as trustees for numerous clients. Using a bank as custodian, the firm has also acted as nominee or agent for others. Books of account are kept, bills and insurance premiums paid, tax returns prepared, all in the tradition of the English family solicitor. Some of these clients have made outright gifts to minor friends and relatives. The individually owned property of the minors is managed in much the same way as the individually owned property of adult clients. Stocks and bonds are bought and sold, income tax and information returns are regularly filed, and when the infants become twenty-one the arrangement usually continues without change except that reports are sent to the actual owner instead of to his natural guardian. Members of the firm are well aware of the business risks involved but feel that in view of the close relationship between the firm, its clients and their families the service is natural and justified and under such circumstances actual experience has shown the risk to be inconsequential. The method deserves consideration in appropriate cases.

A more common method is for the parent to keep the securities given to the infant in a “special” or other separate account with a bank or broker. Transferability is maintained because the financial institution

reversions, remainders, and other interests or estates, whether vested or contingent, and whether or not supported by a particular interest or estate, which are limited to commence in use, possession or enjoyment at some future date or time. The term has no reference to such contractual rights as exist in a bond, note (though bearing no interest until maturity), or in a policy of life insurance, the obligations of which are to be discharged by payment in the future. But a future interest or interests in such contractual obligations may be created by the limitations contained in a trust or other instrument of transfer employed in effecting a gift.” U. S. Treas. Reg. 108, § 86.11 (1943). See excellent discussion of future interests in 3 MONTGOMERY, FEDERAL TAXES—ESTATES, TRUSTS AND GIFTS 1005 et seq. (1951).

124. Cf. Edward H. Heller, 41 B. T. A. 1020 (1940). In Emil Frank, 27 B. T. A. 1158 (1933), the broker was informed of the true ownership as he was in Delafield v. Barret,
GIFTS TO MINORS

has no means of knowing that the property belongs to a minor. It would be unjust without some notice to hold it in any way responsible. The records of the parent-nominee including tax returns should be complete and careful, but the burden of record keeping is greatly simplified by allowing all dividends, interest, credits and charges to go through the bank or brokerage account where they are recorded in detail. It is believed that few individuals using this method have consistently filed the Treasury Form 1087 ownership record mentioned earlier. It is recommended they do so as standard practice.

When it seems likely that no sale will be necessary until the infant becomes of age, the donor can simply register the stock in the name of the infant donee.\textsuperscript{125} Should sale become essential a guardian can be appointed if other methods of attaining transferability fail. In this connection investment company shares are frequently desirable, as they ordinarily provide broad diversification among issues and can be selected to provide diversification in the type of securities within the portfolio of the company.\textsuperscript{126} Continuous investment management is provided. The combination would seem to make them suitable for retention as a semi-permanent form of investment. Occasionally an investment company can be found whose officers will guarantee the signature of a minor if redemption or sale of the shares during minority becomes necessary. Not unlike the partners of the law firm mentioned earlier they may be willing to accept the business risk as an accommodation to a valued customer.

**Partnership Interests**

After its severe relapse under the impact of *Tower*\textsuperscript{127} and *Lusthaus*\textsuperscript{128} in 1946, *Culbertson v. Commissioner*\textsuperscript{129} revived interest in the family partnership as a tax-saving device. "Practical" advice might be to avoid gifts to young minors of partnership interests without retaining, ready

\textsuperscript{125} 270 N. Y. 43, 200 N. E. 67 (1936). N. Y. Dom. Rel. Law § 85 was amended to overcome in part the latter case.

\textsuperscript{126} The range of choice is wide. At one extreme are companies with portfolios exclusively of institutional grade bonds, at the other are those with largely common stock portfolios against which bonds or preferred stocks or both are outstanding in addition to the common stock of the investment company. Various descriptions of balanced funds and stock funds come in between.

\textsuperscript{127} Commissioner v. Tower 327 U. S. 280 (1946).

\textsuperscript{128} Lusthaus v. Commissioner, 327 U. S. 293 (1946).

\textsuperscript{129} 337 U. S. 733 (1949). The Revenue Act of 1951 contains provisions designed to clarify the rules governing family partnerships.
for instant use, (1) a mature specialist in federal tax litigation and (2) any “saved” taxes.

Summary of Outright Gifts

The foregoing is by no means an exhaustive review of the field of outright gifts to minors. It suggests six main points:

First, despite its safeguards of strict court supervision, legal guardianship at least in some jurisdictions is cumbersome, out-of-pocket expense may be high and hidden investment penalties may be costly.

Second, unless gifts are confined to United States Savings Bonds, single premium insurance policies or bank deposits in the name of the minor, some form of management intervention, such as periodic payments, sale, lease, collection, repair, disbursement, storage or safekeeping, is likely to be needed.

Third, investment company shares deserve consideration as a medium for such gifts, with or without a guardianship.

Fourth, with few exceptions, one attempting to manage a minor’s own property without court authority takes a genuine and potentially serious financial risk.

Fifth, even where there seems to be no doubt that every possible property right has been given over to the immediate, complete and present ownership of the minor, unless there is a guardian to receive the property there is usually no one who can with orthodox propriety deal with it to make it most useful to the donee. Sometimes, as with a stock certificate or a parcel of real estate, the property will be frozen and unavailable for sale until a guardian is appointed. A contention, therefore, that such a gift is entirely one of a future interest, or that at most the only present interest in the gift is the right to income on it for life, is not as far-fetched as it might seem. No case seems to have gone so far, but in effect that contention has been made both by taxpayers.

130. “To aid and protect them, the court is ever ready to listen to their appeals, its hands are always near to lead them in paths of safety, its doors are evermore ajar, awaiting the tread of every child to whom a wrong has been done. In the closed bud of their unblossomed years lie sleeping, dreaming, the good or ill whose fruit may hereafter ripen upon the tree of life, and it is the duty of the court to see that the heritage which some father or mother has left them shall nourish its roots and make shapely the boughs from which the harvest must be gathered.” In re Bushnell, 4 N. Y. Supp. 472, 479 (Surr. Ct. 1888). Despite any inference from this quotation, the case has an excellent outline of the duties of guardians. Id. at 477.

131. Ashcraft v. Allen, 90 F. Supp. 543 (M. D. Ga. 1950) (taxpayer unsuccessful in contention that trust created present interest because it gave infant everything possible under Georgia law). Similar arguments in Fondren et al. v. Commissioner, 324 U. S. 18, 29 (1945), were brushed aside by the court as irrelevant.
and by the commissioner. Subjectively, it is obvious that if Tertius is young enough his past, present and future interests merge within his crib.

It was, however, a more objective test laid down by Mr. Justice Rutledge in Fondren et al. v. Commissioner when he asked for some “right to substantial present economic benefit” as prerequisite to finding a present interest. Economic benefit is about as objective as one can get. With a guardian or without one, when the infant alone actually owns the property or when the income is his absolutely any objective test seems to be met.

Sixth, nevertheless counsel should consider the advisability of filing gift tax returns for outright gifts to minors even when well within the annual exclusions. Gifts near the $3,000 limit might be deliberately increased by enough to require filing a return. This procedure would put the statute of limitations in motion and thus appear to give some protection against the possibility of an outright gift to an infant some day being held to be a gift of a future interest.

PART II—THE SMALL TRUST

This brings us to an examination of the small trust as a means of making gifts. It will be irrevocable, at least by the grantor. Objections to a small trust might include:

(1) The cost seems high. Corporate trustees, at least in large cities, usually have schedules of minimum fees that seem a heavy burden on a trust of $3-10,000.

(2) Diversification and supervision of investments is difficult and is expensive both for the trustee and for the beneficiaries.

(3) The investment, bookkeeping and diversification problems which impose heavy costs on the professional trustee, impose heavy burdens on the non-professional. As a result the donor who might otherwise ask

132. Kieckhefer v. Commissioner, 189 F. 2d 118 (7th Cir. 1951); John E. Daniels, P-H 1951 TC Mem. Dec. ¶ 51,044 (1951); Chas. F. Roeser, 2 T. C. 298 (1943).

133. 324 U. S. 18, 20 (1945) (italics supplied). During the first nine months of 1951 the courts seem to have confirmed this point of view in Daniels, Kieckhefer and Cannon (gift tax), and in Visintainer and Alexander (income tax), three of them Circuit Court reversals of the Tax Court and all in favor of taxpayers. No case on comparable facts seems to have gone the other way until in October the Tax Court, in Arthur C. Stifel, Jr., 17 T.C. No. 71 (Oct. 10, 1951), with Black, Arundell and Johnston dissenting, refused to follow the Seventh Circuit’s decision in the Kieckhefer case. As there is a real substantive difference between outright ownership and beneficial ownership through a trust, no matter how the trust is phrased, and as there is a shadowy area of interpretation as to whether the limitations imposed on the gifts in Stifel and Kieckhefer were in fact imposed by the grantor as the Tax Court seems to have thought, or whether they were merely the result of the infant-donee’s legal disabilities as the Seventh Circuit believed, the decision in Stifel is still far from saying that an outright gift to an infant is a gift of a future interest.
his lawyer, a business associate or a friend to serve as trustee of a small trust seldom does so.

(4) Income tax problems raised by Helvering v. Clifford and the "Clifford" regulations.¹³⁴

(5) Income tax problems springing from Helvering v. Stuart.¹³⁵

(6) Estate tax problems, primarily those of § 811(c),(d) of the Internal Revenue Code.¹³⁶

(7) Custody, bond, successor trusteeship, etc.

(8) Uncertainties as to future legislation and judicial action.

(9) A $3,000 gift in trust will ordinarily qualify for less than $3,000 of annual exclusion for gift tax purposes, as a part or all of it will be a "future interest in property."¹³⁷

(10) A gift tax return must be filed if there is a transfer of any "future interest" whatever.¹³⁸

This is a formidable list. They are known to and recognized by virtually every lawyer and trust officer, and many are known, suspected or feared by prospective donors. Objections (1), (2) and (3) may be considered together. The difficulty and excessive cost of administration and diversification, as well as the heavy burden on non-professional trustees, can now all be met by investment in shares of an investment company,¹³⁹ or when one is available, in a discretionary common trust account.

¹³⁴ 309 U. S. 331 (1940); U. S. Treas. Reg. 111, § 29.22 (a) (1943), T. D. 5567, 1947-2 CUM. BULL. 10. The substance of the Clifford rule as set out in the Regulations is that income of a trust may be taxed to the grantor because of (1) the short duration of the trust if it may revert to the grantor, or (2) the power to change beneficial interests, or (3) a power of administrative control that can be exercised primarily for the benefit of the grantor. See Stanley and Kilculen, The Federal Income Tax 269, 272 (1948) (also c. 8 forthcoming 1951 ed.).

¹³⁵ 317 U. S. 154 (1942). The substance of the Stuart rule as modified by Int. Rev. Code § 167 (c), added in 1943, is that when the donor of a trust is legally obligated to support the beneficiary, in a father-donor, child-donee situation for example, any trust income used for the child's support, i.e., in discharge of the father's legal obligation to support the child, will be taxed to the father-donor.

¹³⁶ The somewhat oversimplified substance of the estate tax tests for trusts is that the trust shall not have (1) been created in contemplation of death, (2) been intended to take effect in possession or enjoyment at or after the donor's death, (3) reserved the right to the income for the donor, or to discharge legal obligations of the donor, (4) reserved to the donor as trustee or otherwise any right to change beneficial interests, or (5) reserved to the donor power to alter, amend, revoke or terminate. U. S. Treas. Reg. 105, § 81.15 (1942). See Schneider, The Inter Vivos Trust for a Minor—Its Estate Tax Aspect, 28 TAXES 825 (1950).

¹³⁷ An exception may be a "Strekalovsky," "Cannon" or "Kieckhefer" trust briefly discussed later.


¹³⁹ This remark should not be construed as a promise of profitable investment results. Diversification does not protect against market risks. Management fees and acquisition...
GIFTS TO MINORS

...fund. Often the most practical procedure is to create a trust providing that (a) the corpus shall consist of or shall be invested in shares of the "Prudent Investment Fund," (b) the shares may (shall) be held, and (c) the income shall be accumulated and may (shall) be invested in additional shares of the same Fund until the infant beneficiary attains a stated age. It is difficult to imagine any arrangement for a gift to a minor less burdensome or easier to manage.141

The "eat your cake and have it, too" trust has had a deservedly rough road. But there can be no certainty that any inter vivos gift in trust will be free from unexpected income or estate tax consequences. These hazards, mentioned as objections (4), (5) and (6), have been carefully analyzed and adequately pointed out.142 The estate tax implications of the leading income tax cases, *Clifford* and *Stuart*, are still unresolved. The rationale of *Douglas v. Willcuts*143 can easily be expanded to impose an estate tax on any trust of which the income might be used to discharge the legal obligations of the grantor. Thus far, however, the courts have refused to extend the *Clifford* case into the estate tax field and have restricted the application of *Douglas v. Willcuts*144 to similar facts.145

Care in drafting is certainly essential to provide as complete a severance of ties to the grantor as possible, and so is an administration of the trust that will reject any conceivable benefits to the grantor in favor of all possible benefits to the beneficiary.146 The practical approach would seem to be

costs of investment company shares should also be considered in computing and comparing costs.

140. These are operated by corporate trustees to facilitate investment and provide broad diversification for small trusts; the number is growing rapidly but there are still fewer than 100.

141. For suggestions as to drafting provisions for capital gain dividends of investment companies, see Rogers, *Capital Gain Dividends—A Suggestion for Draftsmen*, 20 FIND. L. REV. 79 (1951) or 90 TRUSTS & ESTATES 300 (1951).

142. See especially Shattuck, *supra* note 7; Fleming, *supra* note 11, at 561 et seq; Schneider, *supra* note 136.

143. 296 U.S. 1 (1935); U.S. Treas. Reg. 105 § 81.18 (1942) (as amended by T.D. 5741, 1949-2 CUM. BULL. 114); Helvering v. Mercantile—Commerce Bank & Trust Co. et al., 111 F.2d 224 (8th Cir. 1940), cert. denied, 310 U.S. 654 (1940).

144. 296 U. S. 1 (1935).

145. Cf. Commissioner v. Douglass Estate, 143 F. 2d 961 (3d Cir. 1944). The cautious draftsman may wish to include in the agreement a prohibition against use of any income to discharge legal obligations of the grantor, such as support of infant beneficiaries.

146. Substantially (and oversimplified), if both income and principal are for the beneficiary alone or for his estate (without reference to the donor's death), if no one other than the beneficiary or his guardian can alter, amend or revoke the trust, if the donor can not deal with or use the trust for his own benefit or to discharge his own legal obligations, and if the income is in fact not used to discharge legal obligations of the grantor, the income will presumably be taxed to the trustee or beneficiary and the trust corpus,
to recognize that the apparent opportunities for tax saving may prove temporary or illusory. There is little to lose taxwise if hopes are disappointed, and much may be gained if other objectives of the donor are furthered, especially if the tax fears do not materialize.

Objection (7) is again largely a problem of draftsmanship. Exemption from bond would seem to be normal, one or two nominations for successor trustees might be made, and the trustee should always be authorized to employ a bank custodian. If the trust is not so small as to make corporate trusteeship seem too expensive, many problems will be solved or reduced by appointment of a corporate trustee.\textsuperscript{147}

The uncertainties of the future, objection (8), so far as they relate to taxes, have little more to do with gifts in trust than with any other form of gift. Proposals for the integration of gift and estate taxes have not discriminated against gifts in trust.\textsuperscript{148} As to future uncertainties of investment and management of the property, it is obviously wise to equip the trustee with broad discretionary powers, bearing in mind the admonition of Professor Leach that "To regulate events in 1960 the judgment of a mediocre mind on the spot is incomparably preferable to the guess in 1940 of the greatest man who ever lived."\textsuperscript{149}

Objections (9) and (10), relating to loss of exclusions and the probable necessity for filing returns, are doubtless the greatest psychological obstacles to the use of trusts for small gifts. If the prospective donor has a large estate, has numerous prospective minor donees, and is already in a high gift tax bracket, and especially if he plans a continuing program of annual gifts, the multiple $3,000 ($6,000 if married)\textsuperscript{150} exclusions should be cherished as they may be valuable tax-saving tools.\textsuperscript{151} But a large majority of donors are not in that position. They are likely to have used little or none of their lifetime exemption of $30,000 ($60,000 aside from questions of contemplation of death, will presumably be outside the grantor's estate. See notes 134, 135 and 136 supra on the Clifford and Stuart cases and estate tax rules.

\textsuperscript{147} Corporate trustees are frequently available for trusts of $3,000 to $10,000 only at minimum rates that often seem disproportionately high. Corporate trusteeship should always be considered for convenience and safety and for the disinterested position of the fiduciary.

\textsuperscript{148} Joint Study on Integration of Estate and Gift Taxation, Gov't. printing office (1947).

\textsuperscript{149} Leach, Cases and Materials on Future Interests 240 (2d ed. 1940).


\textsuperscript{151} Mr. and Mrs. Fondren had made gifts to seven grandchildren "of tender years" and fought vainly for exclusions all the way through the Supreme Court. Fondren et al. v. Commissioner, 324 U. S. 18 (1945).
if married)\textsuperscript{152} and—this is the important point—probably never will use all of it. They will not use it all because they just do not have enough total wealth to afford to give away $60,000 in addition to their outright gifts to competent adults and to charities.

Assuming this to be true, many advantageous opportunities to make gifts in trust have been rejected because the donor was correctly advised that if made in trust (a) his gift would be at least in part a gift of a future interest and to that extent outside the annual exclusion, and (b) a gift tax return would be required. While both propositions are true, neither singly nor together do they seem important enough to control his decision. As noticed earlier filing returns may be a wise protective step even when not required.

Since 1948, if Elder uses the maximum permissible exclusion for any single donee in any single year he will give $6,000 and his wife will "consent\textsuperscript{153}" to the use of her exclusion also for his gift. But if he gives even $1 in excess of his own personal exclusion of $3,000 he must file a return\textsuperscript{164} He must do so whether or not the donee is a minor and whether or not the gift is in trust. Thus the filing requirement for a gift in trust adds no real obstacle except that if the consent gift, no matter how small, includes a future interest in property the consenting spouse must also file a return.\textsuperscript{165}

As most donors are unlikely ever to use their entire $30-$60,000 lifetime exemption it is not too serious a matter to use a few thousand dollars of it from time to time. It will otherwise be wasted. What better use can one imagine than to facilitate the administration and investment of a gift for an infant donee?

Some Observations on Present and Future interests

"Because of the many and varied ways in which gifts in trust may be made and carried out, there can be no one simple rule to determine whether a gift in trust is a gift of a present or a future interest, so it becomes necessary in each case to examine the trust provisions and decide each case on its own particular facts. Commissioner of Internal Revenue v. Kempner, 5 Cir., 1942, 126 F. 2d 853.\textsuperscript{150} Despite the repetition of this warning in one of the latest cases, there are certain rules that seem well enough established to serve as guides.\textsuperscript{157}"

\textsuperscript{152} See note 150 supra.
\textsuperscript{153} See note 150 supra.
\textsuperscript{154} U. S. Treas. Reg. 108 § 86.20 (1943).
\textsuperscript{155} Id., T. D. 5698 § 9, 1949-1 Cum. Bull. 239.
\textsuperscript{156} Cannon v. Robertson, 98 F. Supp. 331,333 (D. N. C. 1951).
The Regulations provide methods of valuing "annuities, life estates, remainders and reversions" and include two tables captioned "A" and "B" which may be used in making the necessary computations. Income from trust property is termed a "Hypothetical Annuity" and may be valued in approximately the same way as a true annuity. The immediate right to income from a trust for life or for a term of years has been held a present interest, whether or not the beneficiary is a minor. Thus a conventional trust to pay income to Tertius for life, remainder to X, is for our purposes divided into two parts. The right of Tertius to the income computed in accordance with table "A" is a present interest, while the right of X to the remainder is a future interest. If Tertius is ten years of age and is given the right to income for life in a trust of $10,000, the computation of the value of his life estate requires the following two steps:

First, to determine the number of dollars to be assumed as income for one year.

$10,000 \times 4\% = \$400

This annual 4% value of the income is arbitrary. The tables are called 4% tables, which merely means that they assume a 4% yield. Opposite age 10 (in column 1), column 2 of table "A" shows the actuarial value that is to be attributed to an income of $1 per year for the life of a beneficiary age 10. This is $19.45359. Inasmuch as our hypothetical trust of $10,000 is presumed to yield, as above, $400 a year (whether in fact at the time invested in Treasury Bills to yield 1.60% or in a stock that yields 12%), the value of the lifetime right to $400 annually at age 10 is determined by the second step.

159. Id. at 36 (Table A), 37 (Table B).
160. Id. § 86.19 (f) (5).
161. Fisher v. Commissioner, 132 F. 2d 383 (9th Cir. 1942). See also Sensenbrenner v. Commissioner, 134 F. 2d 883 (7th Cir. 1943), both cited with apparent approval by the Supreme Court in Fondren et al. v. Commissioner, 324 U. S. 18, 21 (1945).
162. Commissioner v. Sharp, 153 F. 2d 163 (9th Cir. 1946). Should an outright gift to an infant be held to constitute a future interest on the mere grounds of minority, it would then seem to follow that the gift of trust income to a minor would also become one of a future interest.
163. "The definition of 'future interests' reached over the centuries by the substantive law, for its own purposes, and that reached in a few short years by the tax structure, for its own purposes, are not identical. The tax regulations say that "'future interests' is a legal term, and includes reversions, remainders, and other interests or estates, whether vested or contingent, and whether or not supported by a particular interest or estate, which are limited to commence in use, possession or enjoyment at some future date or time." [Reg. 108, Sec. 86.11]." Shattuck, supra note 7, at 13.
$19.45359 \times 400 = 7,781.44$

Thus, if Elder Jones sets up such a trust for a ten year old Tertius, $7,781.44 will be the computed value of the infant's life estate. This is a present interest,\textsuperscript{164} and in computing his "net gifts" for the year, Elder may subtract $3,000 (or $6,000 if his wife consents) from the total value of his gift to Tertius, reporting only the balance as a "net gift." The value of the remainder is a future interest, and as no exclusion may be applied to it, it is always a part of his "net gifts."

To create a trust so that the entire corpus would be a present interest it would seem necessary to give the beneficiary, if an adult, an immediate, unfettered right to terminate the trust in his own favor. This right given to an extremely young infant was held sufficient to accomplish that result in the Kieckhefer trust.\textsuperscript{165} A few years earlier Mrs. Strekalovsky made gifts for each of three minor children to a trustee who was instructed to hold and administer the property as though he were their guardian. The property was vested in the infants and not subjected to defeasance. No distinction was to be made between principal and income. There was no spendthrift provision. The trust for each child would terminate on the demand or request of a legal guardian, on the beneficiary reaching twenty-one or on the prior death of the beneficiary.\textsuperscript{166} A district court in Massachusetts held the transfer to have been one of a present interest.\textsuperscript{167}

In June, 1951 this decision was followed in Cannon v. Robertson,\textsuperscript{168} when a determined taxpayer fought through the District Court for a refund of $5.39 (and interest) of allegedly improperly collected gift taxes. The court found "well nigh identical facts" where the trustees were to pay or apply such principal from time to time "... as may be approved and directed by the court ... to the same extent and with like effect as if the Trustees were the duly appointed Guardians of the Estate of the said James William Cannon.\textsuperscript{169} The exclusion was granted and the refund won.

The Tax Court, however, in considering the Kieckhefer trust and distinguishing it from the transfer under review in the Strekalovsky case, evinced no enthusiasm for the Massachusetts decision.\textsuperscript{170} The

\textsuperscript{164} See notes 161 and 162 supra, and Certain Assumptions, p. 235 supra.

\textsuperscript{165} Kieckhefer v. Commissioner, 189 F. 2d 118 (7th Cir. 1951). The Tax Court has refused to follow the Kieckhefer case. See note 133 supra.

\textsuperscript{166} See Anderson, Gifts to Minors and Incompetents, 26 TAXES 911 (1948).


\textsuperscript{168} 98 F. Supp. 331 (D. N. C. 1951).

\textsuperscript{169} Id. at 332.

\textsuperscript{170} 15 T. C. 111, 115 (1950), rev'd, 189 F. 2d 118 (7th Cir. 1951).
Strekalovsky and Cannon cases seem correct. To hold otherwise would obliterate substance by highly formal distinctions. If, as assumed throughout this paper, a gift to a minor either outright or through his guardian is a gift of a present interest, why should it be transmuted into a gift of a future interest merely because it is made through a trustee whose obligation to the beneficiary is the same as that of a guardian to his ward?  

The Kieckhefer trust provided for termination upon written demand by the infant or on his behalf by a legally appointed guardian. Reversing the Tax Court, the Seventh Circuit, with one dissent, granted the taxpayer an exclusion for the corpus of the trust even though there was no guardian when the trust was created, nor at the time of the trial. The decision was placed squarely on the point that any restrictions on the gift were not imposed by the donor but were "imposed by law due to the fact that the beneficiary is incapable of acting on his own."  

These three appear to be the only recent cases in which the entire corpus of a trust qualified for a gift tax exclusion. It seems to have been difficult for draftsmen to achieve this result. But less aggressive taxpayers would have been defeated in the Kieckhefer case at the Tax Court level, and might have paid the $5.39 and tried another tack in the Cannon case. The cases derive stature from the fact that they were decided after the leading gift tax cases on future interests in the Supreme Court. Each was specifically distinguished on its facts.  

Aside from these interesting exceptions, the maximum of present interest in a trust for the benefit of a minor is obtained by giving a life income and no more to the first beneficiary as in the example earlier in this section. Thus a trust of "income to Tertius for life," paradoxically perhaps, gives him a greater present interest than "income to Tertius until he reaches 21 and then pay him the principal." It also gives him

171. But it does not inevitably follow, as has been contended, that if a "Strekalovsky" trust is not a transfer of a present interest then no outright gift to a young minor whose parents are able to support and educate him can be a present interest. See Anderson, supra note 166.

172. Kieckhefer v. Commissioner, 189 F. 2d 118, 122 (7th Cir. 1951). It seems to the writer that "terms of the transfer" imposed by the donor were such that the case could have gone the other way, affirming the opinion of the Tax Court below, without any necessary implication that an outright gift to a minor would be a future interest. Cf. Arthur C. Stifel, Jr., 17 T.C.—No. 71 (Oct. 10, 1951).


175. This result has been thoughtfully criticized in Charles v. Hassett, 43 F. Supp. 432, 435 (D. Mass. 1942), but has the merit of simplicity. See discussion in 2 PAUL, ESTATE AND GIFT TAXATION 638-40 (Supp. 1946). Shattuck, supra note 7, criticizes Sylvia
a greater present interest than "income to Tertius for life but in the
discretion of the trustee pay over the principal at any time." Here all
or a part of the income would cease should principal be distributed.
The uncertainty prevents computation of a value for the right to income
and eliminates any present interest whatever as effectively as if the
trustee had the right to accumulate the income in his discretion or had
been instructed to accumulate it.

The following chart may illuminate the discussion:

<table>
<thead>
<tr>
<th>Income Provision</th>
<th>Principal</th>
<th>Present Interest</th>
</tr>
</thead>
</table>
| Tertius for life  | To B. on Tertius' death | Yes, "%" depends on age
| Tertius to 21    | To B. when Tertius is 21 | Yes — but less
| Tertius for life  | To Tertius at 21 | Identical with above
| Tertius for life  | To Tertius at Trustees' discretion | None
| Accumulate for Tertius to 21 | To Tertius at 21 | None
| Pay to Tertius or accumulate for him | To Tertius at Trustees' discretion | None
| Pay to Tertius or accumulate for him | To Tertius at 21 | None
| Pay to Tertius or accumulate for him | To Tertius on demand | 100% or none
| Tertius as though he were a ward | To Tertius as though he were a ward (in any event at 21) or demand of Guardian | 100%

Computation of Present and Future Interests in Trusts

No matter how young the beneficiary, there is a considerable difference
between the computed value of "income for life" and "income to 21." The
computation of the later is also more complicated. If Tertius is
one year old and is to receive income from the trust until he is 21 it is
not enough merely to take a twenty year term certain from table "B"
and from it directly compute the value of the right to the income for
that 20 year period because "income to 21" means "income to 21 or for
life, whichever is shorter." The computation from table "B" has first
to be made and then to be adjusted for the possibility the beneficiary

H. Evans, P-H 1951 TC Dec. § 17.24 (1951), on much the same grounds. In the Evans
case the exclusion was denied for gifts to the adult donees as well as to the infants.

178. Depending on where donor lives. Kieckhefer v. Commissioner, 189 F.2d 118
(7th Cir. 1951). Tax Court says "None" elsewhere. See Arthur C. Stifel, Jr., 17 T.C. 10,
No. 71 (Oct. 10, 1951). An appeal is expected in the Stifel case.
179. Strekalovsky v. Delaney, 78 F. Supp. 556 (D. Mass 1948); Cannon v. Robertson,
will not live to reach that age. For this purpose tables and formulae not included in the Regulations have to be used.

To illustrate:

\[
\text{Life Income @ age 1} - 17.30771_{180} \times 4\%_{181} = 69\%
\]
\[
\text{Income to 21 @ age 1} - 11.33875_{182} \times 4\%_{183} = 45\%
\]

It is evident that a much larger "present interest" component will be included in a gift of "income for life" than in one of "income to 21." As the infant grows older or the age for terminating the fixed right to income diminishes the difference widens rapidly. As a rule of thumb it is easy to remember that during most of infancy a life income is valued at about 75% of the corpus.\textsuperscript{184} At age ten it is over 77%,\textsuperscript{185} while at age ten "income to age 18" for example is worth only about 26% of the corpus.\textsuperscript{186} If the infant is twenty years, nine months,\textsuperscript{187} the value of the "income to 21" is only a tiny fraction of the corpus, but that three month period is "not in substantial,"\textsuperscript{188} and when the trustee had the right to accumulate income during that three month period it has been held that the donor could not claim any exclusion as the entire gift was of a future interest.\textsuperscript{189} At age 21, an income for life, or the present interest, is still worth over 73% of the total gift.\textsuperscript{190}

When it seems important to conserve the lifetime exemption and to utilize the maximum of annual exclusion, and at the same time circumstances commend both the use of trusts and a minimum of gifts over the exclusion, the proportion and amount of the present interest and the

\textsuperscript{180} U. S. Treas. Reg. 108, § 86.19, Table A, column 2 (1943). Infant mortality reflected in the tables causes the value for the life income or present interest to increase year by year to age 7. At age 1 the value is greater than if the beneficiary is less than a year old (see Table A), but still smaller than it will be at any subsequent age up to 29.


\textsuperscript{182} Approximate. Factor derived from U. S. Treas. Reg. 108, § 86.19 (1943), Table B for 20 years diminished for life expectancy in accordance with formula shown in WOLFE, INHERITANCE TAX CALCULATIONS 51 problem 4 (2d ed. 1937).

\textsuperscript{183} See note 181 supra.

\textsuperscript{184} U. S. Treas. Reg. 108, § 86.19 (1943), Table A column 2, multiplied by 4% (4% is the assumed annual rate of return throughout these tables).

\textsuperscript{185} Ibid.

\textsuperscript{186} See note 182 supra. Eight years certain, adjusted for expectancy.

\textsuperscript{187} "It is not always flattering to our young men in college and in business . . . to refer to them as infants, and yet this is exactly what the law considers them . . ." Sternlieb v. Normandie National Securities Corp., 263 N. Y. 245, 250, 188 N. E. 726, 728 (1934) (per Crane, C. J.).

\textsuperscript{188} Hessenbruch v. Commissioner, 178 F. 2d 785 (3d Cir. 1950).

\textsuperscript{189} Ibid.

\textsuperscript{190} U. S. Treas. Reg. 108, § 86.19, Table A (1943).
correct size of the total gift can be computed easily if the trust directs income to a named beneficiary for life.\footnote{191}

Problem: To determine size of gift in trust to give $3,000 present interest, \textit{i.e.}, value of income, to Tertius for life, he being seven years old.\footnote{192}

Column 2 of table "A"\footnote{193} gives the present value of $1 per year for life at the ages shown in column 1, or $19.62502 at age 7. The assumed rate of return is 4\%. (4\% \times 19.62502 = .7850008). Thus 78.5\% of the gift is present interest and the required answer is the number of dollars which, multiplied by 78.5\%, will equal $3,000, or $3,821.66. A consent gift designed to use both Elder's own exclusion and his wife's would be twice as large or $7,643.32. They will then have a combined total of $1,643.32, or $821.66 each, of net gifts to report after deducting the appropriate exclusion. This is the portion of the $30,000 lifetime exemption of each used by the total gift of $7,643.31.

Should Elder wish to carry out a series of such gifts the following table shows at a glance the results of starting at any selected age during minority and making a gift to a trust of $4,000 each year until Tertius reaches 21. Because the present interests for most ages during minority are in the neighborhood of 75\%, $4,000 was arbitrarily selected as a gross gift on which about $3,000 of exclusion would be available. The fourth and fifth columns are cumulative, showing for example that starting when Tertius is one year old (second line, first column), if Elder gives $4,000 to such a trust each year until his grandson is twenty he will have given $80,000 (fourth column), all but $20,327.68 of which (fifth column) will have been within the annual exclusion, so that he will still retain unused nearly $9,700 ($30,000-$20,327.68, sixth column) of his exemption. With the "consent" of his spouse the gifts can be doubled; the table would then show the results for each spouse.

The proportions of present interests running up to 78\% are large because they provide "income for life." Income for a shorter period, as has been shown, may reduce that proportion sharply. A trust providing for accumulation or giving the trustee discretion as to payments of principal or income will entirely eliminate the present interest.\footnote{194}

\begin{footnotesize}
\begin{enumerate}
\item Or, but less easily, to any given age. See note 182 \textit{supra}.
\item Table A shows that at seven years the present interest will be fractionally larger per dollar of gift than at any other age. The adverse effect of infant mortality is thereafter no longer apparent in the Table.
\item U. S. Treas. Reg. 108, \S 86.19 (1943).
\item See chart, p. 265, \textit{supra}.
\end{enumerate}
\end{footnotesize}
$4,000 ANNUAL GIFTS TO IRREVOCABLE LIFETIME TRUST FOR MINOR

<table>
<thead>
<tr>
<th>Age of Minor</th>
<th>Life or Present Interest</th>
<th>Future Interest</th>
<th>Total Gifts to Age 21</th>
<th>Total &quot;Net Gifts&quot; to Age 21</th>
</tr>
</thead>
<tbody>
<tr>
<td>Less than 1 year</td>
<td>$2,356.53</td>
<td>$1,643.47</td>
<td>$84,000</td>
<td>$21,971.15</td>
</tr>
<tr>
<td>1 year</td>
<td>2,769.23</td>
<td>1,230.77</td>
<td>80,000</td>
<td>20,327.68</td>
</tr>
<tr>
<td>2 years</td>
<td>2,991.32</td>
<td>1,008.68</td>
<td>76,000</td>
<td>19,096.91</td>
</tr>
<tr>
<td>3 years</td>
<td>3,065.44</td>
<td>934.56</td>
<td>72,000</td>
<td>18,088.23</td>
</tr>
<tr>
<td>4 years</td>
<td>3,105.96</td>
<td>894.04</td>
<td>68,000</td>
<td>17,088.23</td>
</tr>
<tr>
<td>5 years</td>
<td>3,128.48</td>
<td>871.52</td>
<td>64,000</td>
<td>16,088.23</td>
</tr>
<tr>
<td>6 years</td>
<td>3,138.77</td>
<td>861.23</td>
<td>60,000</td>
<td>15,088.23</td>
</tr>
<tr>
<td>7 years</td>
<td>3,140.00</td>
<td>860.00</td>
<td>56,000</td>
<td>14,088.23</td>
</tr>
<tr>
<td>8 years</td>
<td>3,137.76</td>
<td>862.24</td>
<td>52,000</td>
<td>13,088.23</td>
</tr>
<tr>
<td>9 years</td>
<td>3,112.57</td>
<td>887.43</td>
<td>44,000</td>
<td>11,088.23</td>
</tr>
<tr>
<td>10 years</td>
<td>3,099.11</td>
<td>900.89</td>
<td>40,000</td>
<td>10,088.23</td>
</tr>
<tr>
<td>11 years</td>
<td>3,085.09</td>
<td>914.91</td>
<td>36,000</td>
<td>9,088.23</td>
</tr>
<tr>
<td>12 years</td>
<td>3,070.50</td>
<td>929.50</td>
<td>32,000</td>
<td>8,088.23</td>
</tr>
<tr>
<td>13 years</td>
<td>3,055.34</td>
<td>944.66</td>
<td>28,000</td>
<td>7,088.23</td>
</tr>
<tr>
<td>14 years</td>
<td>3,039.62</td>
<td>960.38</td>
<td>24,000</td>
<td>6,088.23</td>
</tr>
<tr>
<td>15 years</td>
<td>3,023.31</td>
<td>976.69</td>
<td>20,000</td>
<td>5,088.23</td>
</tr>
<tr>
<td>16 years</td>
<td>3,006.42</td>
<td>993.58</td>
<td>16,000</td>
<td>4,088.23</td>
</tr>
<tr>
<td>17 years</td>
<td>2,988.91</td>
<td>1,011.09</td>
<td>12,000</td>
<td>3,088.23</td>
</tr>
<tr>
<td>18 years</td>
<td>2,970.80</td>
<td>1,029.20</td>
<td>8,000</td>
<td>2,077.14</td>
</tr>
<tr>
<td>19 years</td>
<td>2,952.06</td>
<td>1,047.94</td>
<td>4,000</td>
<td>1,047.94</td>
</tr>
</tbody>
</table>

simply means that the donor will use up his lifetime exemption more rapidly. Many—if not most—prospective donors can well afford to do so.

An Accumulation Trust

If the trustee is directed to accumulate the income for later distribution to the beneficiary, or if he is given discretion to do so, the exclusion is lost. This may influence the grantor's plans materially. If he can adapt use of the exclusions to his purposes he may wish to spread his proposed gift over a number of years. If he finds a somewhat larger trust more to his liking he can perhaps better plan to take advantage of prospective income tax savings, make his entire gift at once, and forego multiple exclusions.

Suppose he and his wife believe they can afford to give $20,000 to each of three grandchildren. Assuming three separate trusts, each of $20,000, and each for a single beneficiary, the trustee can be given power to accumulate, or to pay or to apply, the income.\(^{195}\) He can be given similar power to disburse principal.\(^{196}\) With no exclusions these gifts


\(^{196}\) Ibid.
will immediately use up the $60,000 lifetime exemption of the donor and his spouse. If at this stage, however, it seems desirable to utilize some of the benefits of the exclusions it can easily be done. Part of the income can be fixed on the grandchildren, and if the gift is large enough, as it would be on these facts, some part of the principal can be retained in the trust for enough years to get a full exclusion. For example: income from $20,000 at the 4% table rate is $800. Table "B" shows that each dollar of annual income for thirty years is worth $17.29203. Adjusting this factor downward for Tertius' life expectancy at one year, each dollar of annual income (@ 4%) is found to be worth in the neighborhood of $14 in terms of present interest and of exclusion. Thus a provision in the agreement that one-half of the corpus shall constitute a separate trust to be held until Tertius reaches 31, granting him the immediate and absolute right to the income on that half gives about $5,600 exclusion for the year in which the trust is created. Pro forma it works out like this:

<table>
<thead>
<tr>
<th>Total Gift in Trust for a One-Year-Old Infant</th>
<th>$20,000</th>
</tr>
</thead>
<tbody>
<tr>
<td>½ or $10,000 “Pay-Out” share:</td>
<td></td>
</tr>
<tr>
<td>Annual Income @ 4%</td>
<td>$400</td>
</tr>
<tr>
<td>Approximate Present Value of $1 Annual Income from Age 1 to Age 31</td>
<td>$5,600</td>
</tr>
<tr>
<td>Approximate Value of Present Interest (available against annual exclusions)</td>
<td>4,400 $10,000</td>
</tr>
<tr>
<td>Balance (representing future interest)</td>
<td></td>
</tr>
<tr>
<td>$10,000 “Accumulation” Share (representing entirely future interest)</td>
<td>10,000 $20,000</td>
</tr>
<tr>
<td>Total Present Interest</td>
<td>$5,600</td>
</tr>
<tr>
<td>Future interest in pay-out portion</td>
<td>$4,400</td>
</tr>
<tr>
<td>Future interest in accumulation</td>
<td>10,000</td>
</tr>
<tr>
<td>Total Future Interest</td>
<td>14,400 $20,000</td>
</tr>
</tbody>
</table>

198. See note 182 supra.
199. Of course this amount will differ for each of the three grandchildren unless both the duration of the trusts and the ages of the infant beneficiaries are identical. One, three or six indentures may be used to create two trusts for each of three grandchildren provided, if combined, the language is sufficiently clear. The larger fund tends to simplify investing.
If the "pay-out" share is increased from $10,000 to $11,000 the present interest will be increased to about $6,100 or slightly more than the allowable $6,000 exclusions. Similar results will follow postponing termination of the pay-out trust to age 36, while leaving the amount unchanged, or by reducing the age while increasing still further the size of the "pay-out" portion.

Within the accumulation portion the trustee can be authorized to use income or accumulations to pay college expenses, or to invade the corpus even to the point of exhaustion without altering by this added flexibility the gift tax consequences. If Elder has four grandchildren and can afford to give each $20,000 (or an aggregate of $80,000), he can in this way still hold his net consent gifts below $60,000 (i.e., $14,400), the other $22,400 (4 × $5,600) of the $80,000 total being covered by four exclusions for himself and his consenting spouse.

**Income Tax—Tertius as a Dependent for Income Tax Purposes**

An accumulation trust or a combination of accumulation and pay-out may be found especially desirable and possibly preferable to either a pay-out trust or to outright gifts of property producing taxable income, when it seems desirable to keep Tertius as an income tax dependent of his parents. This can be done only as long as Tertius' gross income is less than $600. A program such as outlined in the foregoing twenty-one year table would soon give him more than $600 if the trust produces a normal amount of taxable income.

A further advantage that applies equally to an accumulation or pay-out trust, in comparison with outright gifts in any form, is the taxation of capital gains separately to the trust instead of to the infant himself. Gains taken in the infant's own account, as opposed to those taken in a trust for his benefit, may make him ineligible as a dependent in his parents' return even in years in which he would otherwise qualify.

One of the few disadvantages of the common trust fund as an investment vehicle for such trusts where the income is currently distributable would appear to be the impracticability of managing the investments of the trust with a sensitive eye to the family tax picture as it develops from year to year. While simplicity and ease of administration are high on the list of objectives for the trust, attention to the tax-saving aspects of investment policy can be profitable even in a small trust. Among pos-

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200. Table B shows figures only to 30 years, but if the income from one-half the trust is fixed on a one year old infant to age 36, the computed value of the income will closely approximate $6,000. See tables in WOLF, op. cit. supra note 182.

201. INT. REV. CODE § 25(b)(1)(D). The Revenue Act of 1951 raised this figure from $800.
possibly useful investment media to adjust this feature of tax liability may be mentioned tax-free municipal bonds, Series “F” Savings Bonds on which income may be accrued for twelve years, and an occasional common stock, dividends on which are likely to be free of current income tax. Series “E” Savings Bonds are not available to trustees. This kind of tax saving can be given attention in drafting the trust. For example, the trustee may be instructed to pay out only some specified amount or fraction of the income under $600 per year, or some smaller amount designed to provide leeway for the beneficiary’s possible income from other sources. Such a limitation may affect the proportion of the gift which can be considered a present interest, but not necessarily adversely to the donor taxpayer. The combination of pay-out and accumulation has the merit of dividing the ordinary income produced by the trust between two taxpayers, the beneficiary and the trust itself. This is usually an advantage, and if the income is large can result in important savings.

Summary of Gifts in Trust

Many donors have been deterred from making small gifts in trust because normally gift tax returns are required and portions of the lifetime exemptions are consumed. The high cost of administration and the related problems of adequate diversification of the small trust have been additional deterrents.

Investment company shares and discretionary common trust funds now supply a ready-made answer to the more serious cost and administrative problems, and can supply a complete answer to the problem of diversifying a small trust fund. For the great majority of donors the use of portions of lifetime exemptions from the gift tax should prove no hardship as otherwise the exemption may never be used. Attention to income tax saving in the small trust may be rewarding, and here the trust offers great flexibility compared with outright gifts. The trust also meets the problems of management of the infant’s property without the trouble and expense of legal guardianship. Problems of the Clifford and the Stuart cases, and the estate tax can usually be overcome. The small trust as a vehicle for gifts to minors deserves much wider use than it has had. It offers a fertile field for trust promotion and for the expansion of trust company activities, particularly into largely unexploited areas, through their common trust funds and wider use of investment company shares as trust investments.


203. See Putney, Mutual Funds Make Small Trusts Possible, 89 Trusts and Estates 836 (1950).
If trust companies care to obtain their share of this attractive business, those which have schedules of high minimum fees in the $5-50,000 area should re-examine them in relation to simple accumulation trusts that are to be invested and reinvested in their own discretionary common trust funds or in investment company shares. Properly drafted, these trusts can be administered with maximum advantage to the beneficiaries, minimum cost to the trust company, and with a minimum of risk. If they are to terminate at age twenty-one or with distributions for education beginning about age eighteen, they will presumably result in an average collection of principal commissions considerably sooner than the average of all trusts. The field would seem especially attractive to hundreds of smaller banks and trust companies. Lacking common trust funds of their own, they can use shares of investment companies to reduce the cost of administration and to eliminate problems of diversification.

204. For suggested clauses authorizing this method of investment, see Rogers, Capital Gain Dividends,-- A Suggestion for Draftsmen, 20 FORD. L. REV. 79 (1951); 90 TRUSTS AND ESTATES 300 (1951). A sentence authorizing the trustee to rely on the investment company's characterization of any distribution might well be added to the clauses suggested in those papers. See Anderson, Principal or Income?, 90 TRUSTS AND ESTATES 530 (1951). If the donor expects to benefit from the consent of his spouse to a gift in trust, there is a possible drafting booby-trap in a provision such as the following: "To trustee, income to Tertius in discretion of trustee with any accumulated income during Tertius' life to be added to corpus (or any other provision that introduces an element of uncertainty or discretion as to who takes what and when) remainder to the spouse of the donor if then living and if not then living etc." Splitting such a gift by consent may not be available because the regulations provide that "If one spouse transferred property in part to his spouse and in part to third parties, the consent is effective with respect to the interest transferred to third parties only insofar as such interest is ascertainable at the time of the gift, and hence severable from the interest transferred to his spouse." U.S. Treas. Reg. 108, § 86.3a (a) (4) (1943); T.D. 5698 ¶ 4, 1949-1 CUM. BULL. 228. If, however, the gift is simply to trustee, income to Tertius for life without discretion as to any other payment and if accumulations, if any, and income on accumulations are also directed to third parties, the interests transferred to third parties would appear to be ascertainable at the time of the gift and a consent as to the gift of income for the life of Tertius would be permitted.

205. On January 3, 1952 the Commissioner of Internal Revenue proposed the use of revised 3½% tables A and B for use as to gifts made after December 31, 1951. If adopted they will of course, affect the particular calculations in this section on Trusts. No changes appear to be proposed in the methods of computation. The new tables increase the valuation of life estates at early ages. The "75%" rule of thumb suggested on page 266, for example, might be changed to "80% or more." In note 192 supra, the words "seven years" should be changed to "one year" in order to bring it into conformity with the new tables. The text of note 180 supra, might be omitted.