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Gifts to Minors[†]

By BEN N. FORBES*

GIFT TAX CONSEQUENCES

Everyone wants to reduce his tax liability. An easy way to do so is simply to give property away. It's very easy to find plenty of takers. It becomes more difficult, however, to give it away, but keep it in the family at the same time. However, Congress and many states, including Montana, are making it easier to do just that.

Probably the easiest way to make a gift, whether to a minor or anyone else, is simply to give the property outright to the donee. Such a method of making a gift to a minor is also as advantageous from a gift tax standpoint as any other method. In Revenue Ruling 54-400,¹ the government ruled that an outright gift to a minor, whether it is with or without the appointment of a guardian, is not a future interest and is therefore qualified for the \$3,000 annual exclusion, taking the position that the disabilities against minors under various state laws should not be conclusive regarding federal tax consequences.

If cash or a check is given to the minor, there is no gift tax problem and the donor will be allowed the annual exclusion. If a gift is made to a minor of an insurance policy, it is quite clear that the donor will receive the full \$3,000 exclusion allowed by law. Although the proceeds from such a policy may not be paid over to the minor for a long period of time, it still is not deemed a future interest. Regulation 25.2503-3² states that the term "future interest" does not have reference to such contractual rights as exist in bonds, notes or life insurance policies wherein the money may not actually be paid to the owner until some future time.

As a general rule, however, donors do not like to make outright gifts to minors. The main reason for this attitude is their reluctance to turn over control of any substantial amount of money or property to a minor who very probably is not yet mature enough to handle it wisely. In addition, if one wishes to make a gift of corporate securities or government bonds, an outright gift presents an immediate and practical problem. If no guardianship is established, then it is almost impossible to sell such securities. Almost all stockbrokers and others dealing in such securities will not buy them from a minor, or even act as the minor's agent to make a sale, since the minor can disaffirm the sale in the event it turns out to be disadvantageous. Even if a guardian for the minor is appointed, the problem is not solved. In Montana, as in most other states, a guardian of

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¹1954—2 CUM. BULL. 319.

²Proposed Reg. Sec. 25.2503-3(a) (1957).

a minor is required to post a bond conditioned upon the faithful performance of his duties,⁴ which sometimes means that the surety on the bond desires some control over the assets. An accounting must be made regularly to the court⁴ and, more troublesome yet, the kind of investments that a guardian may make is very limited.⁵ Generally speaking, the inconvenience and restrictions of a guardianship preclude the use of this device in an estate plan.

Because of the undesirable aspects of outright gifts to minors, many donors have attempted to make restrictive gifts to their children. In the gift tax field the main problem regarding a restrictive gift to a minor is found in the Internal Revenue Code, section 2503(b). This section denies the \$3,000 annual exclusion (or \$6,000 if husband and wife join in the gift⁶) if the gift made is one of a future interest. A future interest is defined in the regulations and court decisions as an interest in which the donee does not have the right to the present use, possession and enjoyment of the property.⁷ In order to appreciate some of the problems created by this limitation, a brief examination of some of the relevant cases dealing with this provision will be made. In *Stifel v. Commissioner*,⁸ the donor set up three trusts, one for each of his children, that were irrevocable. Each trust was for the life of the child beneficiary and gave to the trustee the power to invade the corpus of the trust or to accumulate the income from the trust in the trustee's discretion. The trusts also provided that a child, through a guardian, could demand all of the income at any time, and the child could likewise at any time terminate the trust and thereby obtain all of the accumulated income and corpus. The Second Circuit held that this was a gift of a future interest to the child even though the child had the right at any time to terminate the trust and thereby obtain all of the corpus and accumulated income. The reasoning of the court was that since there was no actual guardian appointed for the child, and since a guardian would of necessity have to be appointed in order for the child to demand and receive all of the income and corpus from the trust, the child did not really have the present use, possession and enjoyment of the property. Therefore, the \$3,000 annual exclusion was not allowed. Though the disallowance of this exclusion may not in many instances cause very much tax liability, in other situations the amount involved can be quite large. For example, in the *Stifel* case it apparently was the intention of the donor to make gifts to each of the trusts each year to the maximum of the annual exclusion. And since the annual exclusion can amount to the sum of \$6,000 each year for as many different persons to whom the donor desires to make gifts, the amount involved can be substantial. In the *Stifel* case, if the donor and his wife joined together, they could make payments totaling

⁴REVISED CODES OF MONTANA, 1947, § 91-4608 (Hereinafter the REVISED CODES OF MONTANA are cited R.C.M.).

⁴*Ibid.*

⁵MONT. CONST. art. V, § 37: "No act of the legislative assembly shall authorize the investment of trust funds by . . . guardians . . . in the bonds or stock of any private corporation."

⁶INT. REV. CODE OF 1954 § 2513.

⁷Proposed Reg. § 25.2503-3(a) (1957); *Evans v. Commissioner*, 198 F.2d 435 (3d Cir. 1952).

⁸197 F.2d 107 (2d Cir. 1952).

\$18,000 every year without any gift tax liability if their trusts had qualified for the annual exclusion.

In *Kieckhofer v. Commissioner*,⁹ the Seventh Circuit, in dealing with a trust substantially the same as those found in the *Stifel* case, held that the mere fact that no guardian had been appointed for the minor donee did not disqualify the trusts so as to disallow the annual exclusion. The *Kieckhofer* case is directly contrary to the *Stifel* case.

The *Kieckhofer* approach is to look solely at the trust instrument, and if the right to present enjoyment is found in the instrument, the inquiry ends and a present interest will be deemed to have been given. Under the *Stifel* approach, the finding of a right to present enjoyment in the trust instrument is only the first step toward finding a present interest, for inquiry is then made into the "surrounding circumstances" at the time of the creation of the trust to find someone—namely a guardian—who can effectively exercise such a right. Another point made in a footnote by the court in the *Stifel* case, however, is very significant. Assuming there is a guardian, it is indicated that he must not be under the control of the donor. Such a view is grounded on the basic policy against allowing the donor to escape taxes by effecting illusory transfers. But avoiding this policy will seriously curtail the desirability of granting the beneficiary the power of termination. That is, by placing such a power in the hands of an independent guardian, so as to comply with the *Stifel* case, will often disturb family purposes by placing the ultimate control of funds in the hands of a stranger. Moreover, should the power be exercised by such a third party, the advantages of a trust form over a guardianship are lost.

In two other cases the basic problem presented in the *Stifel* and *Kieckhofer* decisions was solved in another way. In *Strekalovsky v. Delaney*¹⁰ and *Cannon v. Robertson*,¹¹ both federal district court cases, the trust instruments directed the trustees to apply or pay over the principal as if they were guardians for the minor beneficiaries. In these cases the courts reasoned that a gift outright in guardianship would be a present interest and that the relation between the trustee and the minor beneficiary created by the guardianship language found in the trust instruments was so closely analogous to outright guardianships that the interests created should be considered a present interest rather than a future interest. However, the use of this device is not very practical, since it merely creates in a different form some of the same problems that are inherent in any guardianship; e.g., the trustee's power to pay income to the minor may be restricted by the necessity of showing need as per the general guardianship rule.

Many donors have established trusts in which the donors themselves or some friendly third party are named as trustee, in which the right was reserved to accumulate or pay out so much of the income as the trustee in his discretion deemed proper, and further provided that the corpus must be distributed to the minor beneficiary at some age subsequent to the age of twenty-one. In *Rassas v. Commissioner*,¹² the Seventh Circuit, which decided the *Kieckhofer* case, made it clear that such a trust would not come

⁹189 F.2d 118 (7th Cir. 1952).

¹⁰78 F. Supp. 556 (D. Mass. 1948).

¹¹98 F. Supp. 331 (W.D.N.C. 1951).

¹²196 F.2d 611 (7th Cir. 1952).

within the *Kieckhofer* rule, and the court therefore denied the applicability of the annual exclusion. The court held that even though the right to the income from the trust was vested in the minor, the minor did not have the immediate right of use and possession and therefore the gift was of a future interest.

In order to give some relief in this field and to provide more certainty in the law, Congress in 1954 enacted section 2503(c) of the Internal Revenue Code. This section provides that a gift to a minor will qualify for the annual exclusion, whether or not in trust, if (1) the property and the income may be expended for the minor before the minor reaches the age of twenty-one; (2) to the extent not so expended, the income must pass to the minor when he reaches the age of twenty-one; and (3) in the event the minor dies before reaching the age of twenty-one, the corpus and accumulated income must be payable to the minor's estate or as the minor may appoint under a general power of appointment. For example, a father creates a trust with income to his son, who is four years of age, for seventeen years. The corpus and the accumulated income are to be distributed to his son at the age of twenty-one or to his estate if he dies sooner. The trustee is given the discretionary power to accumulate the income and to invade the corpus for the benefit of the son. Each year the father transfers \$3,000 in cash to the trust. Under section 2503(c), these annual gifts would qualify for the gift tax exclusion even though the son would not receive any income during his minority if the trustee should choose to accumulate it. The main problem of section 2503(c) is that many donors will hesitate to fulfill the second statutory requirement; *i.e.*, that the entire property must be distributed to the donee upon his reaching the age of twenty-one, especially where the gift is a large one or involves managerial duties. In this event, the donor must therefore go back to the law as it existed prior to the enactment of 2503(c), namely, attempt to come under the doctrine of the *Kieckhofer* case, if that is the law in the district wherein the donor resides.

In order to take full advantage of the change made by Congress through section 2503(c), many states, including Montana,¹³ have enacted the Uniform Gifts to Minors Act. As will be seen from the following explanation of the terms of this Act, it is designed to qualify under section 2503(c). The Uniform Act makes it possible for an adult to make a gift to a minor of securities or money without the gift being outright, in guardianship or in trust. If the gift is a gift of a security in registered form, the gift is made by registering the security in the name of the donor, an adult member of the minor's family, a guardian of the minor, or a trust company, followed by the words "as custodian for [name of minor] under the Montana Uniform Gifts to Minors Act."¹⁴ If the subject of the gift is a security not in registered form, the gift can be made by delivering it to

¹³R.C.M. 1947, §§ 67-1801 to 1811. The Uniform Act was promulgated in 1956 and has already been adopted by 16 states. It is closely patterned on the Model Act Concerning Gifts of Securities to Minors adopted by 12 other states plus the District of Columbia in 1955 and 1956. Commissioners' Prefatory Note, Uniform Gifts to Minors Act, 9B U.L.A. See also *Montana Legislative Summary*, 1957, 18 MONTANA L. REV. 125, 134 (1957).

¹⁴It may be well to note that the portion of the act, as adopted in Montana, which specifies to whom the property is to be delivered, or in whose name it is to be reg-

an adult person other than the donor, who must be either a member of the minor's family or a guardian of the minor, or to a trust company, accompanied by a statement of gift. The form of this statement of gift is prescribed in the statute, and is substantially that the donor does thereby deliver to the custodian for a named minor, under the Montana Uniform Gifts to Minors Act, certain described securities. A gift of money is made by paying or delivering it to a broker or a bank for credit to an account in the name of the donor, an adult member of the minor's family, a guardian of the minor, or a bank with trust powers, and giving a statement following the payment or delivery "as custodian for [name of minor] under the Montana Uniform Gifts to Minors Act."

If a gift is made in any of the ways set forth above, then under the terms of the Act the gift is made irrevocable and conveys an indefeasibly vested legal title to the securities or money given to the minor, and, in making a gift in the prescribed manner, the donor incorporates in his gift all of the provisions of the Uniform Act, thereby granting to the custodian all of the powers contained therein.

A gift made under the terms of the Act gives to the custodian the power to collect, hold, manage, invest and reinvest the custodial property. In fact, the provisions regarding the powers of the custodian read like a modern liberal discretionary trust instrument. It is provided that the custodian

pay over to the minor for expediture by him, or expend for the minor's benefit, so much of or all the custodial property as the custodian deems advisable for the support, maintenance, edu-

istered, is ambiguous. An examination of subsection 1 of section 67-1802 will be sufficient to point this out, as the other two subsections are similarly worded.

After the preliminary portion of section 67-1802, authorizing a gift by an adult to a minor, subsection 1 reads as follows: "If the subject of the gift is a security in registered form, by registering it in the name of the donor, another adult person (an adult member of the minor's family, a guardian of the minor) or a trust company." A possible construction of this passage is that if the gift is not registered in the name of the donor or a trust company, it must be registered in the name of an adult member of the minor's family who is also a guardian of the minor. Such a construction would defeat a major purpose of the act, which is to avoid the necessity of appointment of a guardian when a gift is made to the minor. Therefore, the proper construction would be that while the parenthetical phrase qualifies the words "another adult person," it presents two alternatives rather than restricting them to one class of persons.

The commissioners' note regarding this portion of the act provides that if the words "an adult member of the minor's family, a guardian of the minor" are to be used, the words "another adult person" immediately preceding should be omitted. Furthermore, the act did not intend that the words be enclosed in parentheses at all: the words were enclosed in brackets by the commissioners to indicate that they could be eliminated if the legislature wished to allow the gift to be made to "any adult person." In other words, it was contemplated that either "any adult person," or "an adult member of the minor's family, a guardian of the minor" could be used, but they were not to be used at the same time. Commissioners' note, Uniform Gifts to Minors Act, § 2, 9B U.L.A.

If the statute had been drafted in accordance with this apparent intent, subsection 1 would read as follows: "if the subject of the gift is a security in registered form, by registering it in the name of the donor, an adult member of the minor's family, a guardian of the minor, or a trust company." As pointed out above, subsections 2 and 3 of the statute, as it is presently drafted, contain the same ambiguity.

cation and benefit of the minor in the manner, at the time or times, and to the extent that the custodian in his discretion deems suitable and proper, with or without court order, with or without regard to the duty of himself or of any other person to support the minor or his ability to do so, and with or without regard to any other income or property of the minor which may be applicable or available for any such purpose.¹⁵

The Act further provides that on the petition of a parent or guardian of the minor, or of the minor himself if he has attained the age of fourteen years, a court may order the custodian to pay over to the minor for expenditure by him, or to expend so much or all of the custodial property as is necessary, for the minor's support, maintenance or education. To the extent that the custodial property is not expended on behalf of the minor, then the custodian is required to pay all of it over to the minor upon his attaining the age of twenty-one years; if the minor dies before attaining the age of twenty-one years, the custodian is required to deliver the property to the estate of the minor.

The custodian is given broad powers of investment and may invest in any properties he desires without regard to statutes restricting investments by fiduciaries, the only standard set up being that of the "prudent man." The "prudent man" is defined to be a person of discretion and intelligence who is seeking a reasonable income and the preservation of his capital. The Act likewise provides that the custodian may retain any security given to the minor in the manner therein prescribed without reinvesting same. It is provided in detail how a custodian shall hold and register securities, and further that the custodian must keep all custodial property separate and distinct from his own property; he must keep records of all transactions and make them available for inspection by a parent or legal representative of the minor or by the minor himself if he has attained the age of fourteen years.

To protect the custodian the Act provides that he is entitled to reimbursement from the custodial property for all his reasonable expenses. A custodian may receive reasonable compensation for his services unless he is a donor. The amount of his compensation is determined by (1) a direction by the donor when the gift is made, (2) a statute of Montana applicable to custodians, (3) the statute of the state applicable to guardians, or (4) by an order of the court. A custodian is not required to give a bond for the performance of any duties except upon the order of a court.

In order to allow a custodian to freely buy and sell bonds or securities and other property, all third persons are exempted from any liability in connection with any dealings they may have with a custodian (in the absence of fraud, of course).

The Act provides in great detail the method of choosing a successor custodian in the event of the resignation, death or removal of the original custodian. If the custodian is not the donor, he may resign by executing an instrument of resignation, designating the successor custodian, and causing all securities to be registered in the name of the successor custodian.

¹⁵R.C.M. 1947, § 67-1801.

A custodian, whether or not the donor, may also resign by petitioning a court to appoint a successor custodian. Protection is also given in the event a custodian violates any of his obligations. Either the donor, the legal representative of a donor, an adult member of the minor's family, a guardian of the minor, or the minor himself if he has reached the age of fourteen years may petition the court to remove the custodian for cause and appoint a successor custodian, or, in the alternative, require that the custodian give a bond for the performance of his duties.

Any of the persons named above can at any time petition the court for an accounting by the custodian or his legal representative, and the custodian must then make an accounting to the court.

The Uniform Act is a very convenient way to make a gift to a minor. It qualifies under section 2503(c) so that the annual exclusion will be obtained, yet it avoids the red tape and limitations of a guardianship. It also allows a gift to be made to a minor without the necessity of executing trust instruments. In Revenue Ruling 56-86,¹⁶ the Internal Revenue Service has ruled that a gift under the Colorado Act constitutes a completed gift for federal gift tax purposes at the time of the transfer of securities to the custodian, and therefore qualifies for the annual exclusion. Considerable importance was placed on the provision in the Act to the effect that the gift "shall convey to the minor indefeasibly vested legal title." This emphasis on legal title may be of considerable significance in determining the income and estate tax consequences of these custodianship gifts, as will be pointed out below.

Though the foregoing discussion has concerned itself solely with qualifying a gift to take advantage of the \$3,000 exclusion, it should not be overlooked that the question of whether or not a gift is a future interest is applicable only to the value of the corpus, or remainder interest. For example, suppose a trust is created to pay the income of *B*, a minor, for his life, with the remainder to *C*. Obviously the gift of the remainder does not qualify for the annual exclusion. But if it is also clear that the value of *B*'s income interest will qualify for the annual exclusion since it is a present interest. Therefore, even though a donor does not wish to qualify under section 2503(c), he may still obtain an exclusion with respect to the value of the income interest he may give to a minor. Therefore, in those cases where a donor does not want the donee to obtain the full amount of the corpus and accumulated income at the age of twenty-one, or does not want to authorize invasion of the corpus, he can still obtain the annual exclusion to the extent of the value of the income interest that he may give to the minor. Of course, the value of the income interest will always be less than the amount of cash or market value of other property given to the minor, and therefore a gift tax liability would result if the gift does not

¹⁶1956—1 CUM. BULL. 449.

¹⁷The Colorado act is not exactly the same as the Uniform Act. Colorado has adopted an act based upon the "Model Act Concerning Gifts of Securities to Minors." See note 13 *supra*. Although there are variations between the two acts with regard to form and substance, the elements of the Model Act which led to the ruling under consideration are also present in the Uniform Act. Commissioners' Prefatory Note, Uniform Gifts to Minors Act, 9B U.L.A.

qualify under section 2503(c), assuming that the donor has exhausted his lifetime exemption as distinguished from the yearly exclusion.

INCOME TAX CONSEQUENCES

Since the enactment of section 2503(c) and likewise since the enactment of the Uniform Act, the gift tax consequences of gifts to minors have become clear if a donor is willing to qualify under the Act. The income tax consequences, however, are not so clear. As has been pointed out, a gift qualifying under section 2503(c) must allow a discretion in the trustee or the custodian to apply income for the benefit of the minor donee. Therefore, as under section 677,¹⁸ which is part of the so-called "Clifford Trust" rules, to the extent any income is actually applied or distributed for the support or maintenance of a beneficiary whom the donor is legally obligated to support or maintain, such income will be taxed to the donor. This tax result is proper, since it has long been held that to the extent the income is used to satisfy and perform obligations required of the donor, such use is substantially the same as though the income was paid directly to the donor.

The Internal Revenue Service, however, raised a rather serious question when it promulgated Revenue Ruling 56-484.¹⁹ This ruling discusses the income tax consequences of the Colorado Model Custodian Act,²⁰ and concludes:

Regardless of the relationship of the donor or of the custodian to the donee, income derived from property transferred under the model custodian act adopted by the State of Colorado and a number of other states which is used in the discharge or satisfaction, in whole or in part, of a legal obligation of any person to support or maintain a minor is, to the extent so used, taxable to such person under section 61 of the Internal Revenue Code of 1954. However, the amount of such income includible in the gross income of a person obligated to support or maintain a minor is limited by the extent of his legal obligations under local law. To the extent that income derived from the property in question is not so includible in the gross income of the person obligated to support or maintain the minor (donee), such income is taxable to the minor.

This revenue ruling shows that there should be no danger that the donor or some other person will be treated as the substantial owner of the

¹⁸INT. REV. CODE OF 1954, § 677(b): "Income of a trust shall not be considered taxable to the grantor . . . merely because such income in the discretion of another person, the trustee, or the grantor acting as trustee or co-trustee, may be applied or distributed for the support or maintenance of a beneficiary whom the grantor is legally obligated to support or maintain, except to the extent that such income is so applied or distributed."

¹⁹1956-2 CUM. BULL. 23.

²⁰As pointed out in footnote 18, *supra*, although the Colorado act is not identical to the Uniform Act, as far as federal tax consequences are concerned they may be considered the same.

personal properties under sections 671-678²¹ of the 1954 Code, and hence taxed on the income because he had dominion over them. In addition, it should be noted that the Commissioner has read into section 61(a)²² the limitation found in section 677(b) and 678(c), wherein only to the extent that trust income is actually used to discharge a legal obligation of support is it taxable to someone other than the trust beneficiary. However, the main problem created by this Revenue Ruling is that it holds that income of the custodianship used to discharge someone's obligation of support is taxable to the person having the obligation, whether he be the donor, custodian or some innocent parent who had nothing whatever to do with the gift. For example, if A grandparent transfers to himself a large quantity of securities as custodian for B's minor children and uses the income therefrom to support such children, then under Revenue Ruling 56-484, B will be taxed on the income so used for support of the children. Such a position is contrary to the case of *Frank E. Joseph*,²³ where income from a trust used to support a minor son was taxable to his father only to the extent of the portion of the trust fund attributed to the father, excluding that portion contributed by the minor's grandfather. The ruling also seems contrary to Revenue Ruling 55-469,²⁴ wherein dividends on stock given by grandparents to their grandchildren but registered in the names of the parents as nominees were taxable to the minors and not to the parents, although the Revenue Service, to distinguish the two rulings, has stated that in Revenue Ruling 55-469 it was assumed that none of the income under local law could have been used for the support and maintenance of the minors. There is some support, however, in dictum contained in *Stix v. Commissioner*.²⁵ In any event, the ruling of the Commissioner with respect to this matter seems unduly harsh if the donor is a person who has no legal obligation to support the minor beneficiary. It does not seem proper that to the extent such money is used to support the minor, the minor's parents should be taxed on such income since the complete transaction was out of their hands.

If an outright gift is made to a minor, in the usual situation there is no income tax consequence to the donor. For example, if a donor gives outright to a minor certain moneys or other personal property, the donor does not pay any tax on the future income that may be earned from such property, and such income is taxed to the minor. However, there is an area in the law, not yet fully explored, in which the donor will incur income tax upon property which is the subject of an outright gift to a minor. The leading case in this area is that of *Helvering v. Horst*,²⁶ where the owner of negotiable bonds detached interest coupons from them shortly before their due date and delivered the coupons as a gift to his son, who then

²¹INT. REV. CODE OF 1954. The provisions referred to are those enacted for the purpose of preventing avoidance of a tax on income from property where the grantor in substance derives the benefit while concealing this fact through the use of a trust device.

²²INT. REV. CODE OF 1954, § 61(a) : "Except as otherwise provided . . . gross income means all income from whatever source derived. . . ."

²³5 T.C. 1049 (1945).

²⁴1955-2 CUM. BULL. 519.

²⁵152 F.2d 562 (2d Cir. 1945).

²⁶311 U.S. 112 (1940).

obtained their payment. The United States Supreme Court held that the amount of the interest was includable in the gross income of the father, still the owner of the bonds. The reasoning of the *Horst* case was that the donor had the power to dispose of the income from the bonds, and the exercise of that power to procure the payment of income to another is the enjoyment and hence the realization of income. In fact, in that case the donor taxpayer was on a cash basis, but this was immaterial according to the Court, since he in effect realized the income himself when he gave it to his son.

The *Horst* doctrine was followed by the Internal Revenue Service in I. T. 3932,²⁷ involving a gift situation that is pertinent in this area. A father, a livestock raiser, made a gift to his son of some feeder cattle. At the time of the gift the cattle were worth \$1,500, and the father had deducted his cost of feeding and raising the cattle on prior tax returns. The ruling held that the fair market value of the cattle on the date of the gift was includable in the father's gross income for the taxable year of the gift. That value in turn became the son's basis for the cattle. The reasoning of the ruling was based on the *Horst* case; i.e., a gift of income which in effect was realized by the father when he made the gift to his son. In *Campbell v. Prothro*,²⁸ the Fifth Circuit rejected I. T. 3932 in the case of a gift of calves to the YMCA, a qualified charitable organization. The court there held that there was no income realized by the donor when he made the gift to charity, even though the calves were clearly inventory-type property. Likewise, in *Estate of Farrier v. Commissioner*,²⁹ involving a gift of cattle by a mother to her daughter, the Tax Court refused to apply the *Horst* doctrine and I. T. 3932, and held that there was no income to the mother at the time of the gift. The same result was reached in *Sorelle v. Commissioner*,³⁰ which involved a gift of land with a matured wheat crop having a value of over \$50,000 about one week prior to harvesting. The effect of these decisions is to permit a cash basis taxpayer to deduct the expenses of raising cattle or crops and also to either obtain a charitable deduction for the full amount of the gift or to shift the income to a donee such as a child of the donor.

After the last three cases were decided against the Commissioner, the Internal Revenue Service promulgated Revenue Ruling 55-138.³¹ This Revenue Ruling concerned the problem of a gift to a charitable institution of inventory-type assets such as cattle or unharvested wheat. The effect of this Ruling is that the Commissioner no longer will claim that the gift when made constitutes income to the donor, but the Commissioner's position now is that all expenses that have been paid or incurred by the donor in connection with the property given away will be disallowed as a deduction to the donor. Since Revenue Ruling 55-138 does not mention the situation involved when a donor makes a gift to an individual rather than a charitable institution, presumably I. T. 3932 is still in effect. However, it is hard to see how the principle differs in the two situations.

²⁷1948—2 CUM. BULL. 7.

²⁸209 F.2d 331 (5th Cir. 1954).

²⁹15 T.O. 277 (1950).

³⁰22 T.C. 459 (1954).

³¹1955—1 CUM. BULL. 223.

The position of the Commissioner in apparently abandoning the *Horst* doctrine in this area because of some adverse decisions in the courts, and instead of disallowing as deductions the expenses of raising the particular property given away, seems to this writer to be incorrect in theory. The *Horst* doctrine certainly gives the Commissioner a substantial right to claim that income resulted to the donor when inventory-type property is made the subject of a gift. There is, however, little, if any, authority for the Commissioner to disallow valid and proper business expenses paid or incurred in the raising of the property involved. This writer believes that the Commissioner should rather insist on the application of the *Horst* doctrine in this situation until finally adjudicated by the United States Supreme Court rather than to disallow various expenses for which there is little authority for the Commissioner to rely on.

ESTATE TAX CONSEQUENCES

Finally, a word must be said regarding the estate tax consequences of gifts to minors. The Commissioner has not yet issued a ruling on the estate tax consequences of transfers under the Uniform Act and there may be some serious questions involved. It would seem logical that if a valid and completed gift has been made under the Uniform Act, there should not be any portion of such property included in the donor's estate upon his death, except for a possible gift made in contemplation of death within three years of the donor's decease.³² However, if the donor is the custodian of the property, section 2038(a)(1) of the Internal Revenue Code might well include in the gross estate of the donor all of the property unexpended at the date of death of the decedent. Section 2038(a)(1) includes in the gross estate a transfer by a decedent where its enjoyment is subject to a power in him to alter, amend, revoke, or terminate. Since the custodian under the Uniform Act has the power to invade the corpus and in effect to terminate the custodianship, the securities may well be included in the donor's estate if he should die before the minor reaches twenty-one. In *Lober v. United States*,³³ the United States Supreme Court held that such a power to invade is equivalent to a power to alter, amend or revoke. Therefore, until the Commissioner rules on the estate tax consequences of the Uniform Act, it might well be prudent for the donor to select a custodian other than himself if he wishes to be certain that the property will not be included in his estate should he die before the minor reaches the age of twenty-one.

In conclusion, the enactment of the Montana Uniform Gifts to Minors Act is a forward step to encourage legitimate tax reduction and to minimize the cumbersome and unsatisfactory results attendant upon the use of a guardianship for minors. It should be taken advantage of whenever circumstances permit, and lawyers and accountants should educate their clients to the advantages possible.

³²INT. REV. CODE OF 1954, § 2035: "(a) The value of the gross estate shall include the value of all property . . . of which the decedent has at any time made a transfer (except in case of a bona fide sale . . .) . . . in contemplation of death." Subsection (b) provides in effect that there is a rebuttable presumption that transfers within three years of death are in contemplation of death and, also, that there is a conclusive presumption that transfers before this time are not in contemplation of death.

³³346 U.S. 335 (1953).