Uniform Transfers to Minors Act Accounts - Progress, Potential, and Pitfalls

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UNIFORM TRANSFERS TO MINORS ACT ACCOUNTS—PROGRESS, POTENTIAL, AND PITFALLS

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I. INTRODUCTION

A frequently employed technique for those parents, grandparents, and others desiring to make completed, irrevocable transfers to minors, without engaging in complicated transactions or incurring legal fees, is to transfer wealth to a Uniform Transfers to Minors Act ("UTMA") account. This article discusses the general provisions of the Florida UTMA, noting why such accounts may be attractive to clients. Of equal importance, this article explores several pitfalls of which the creator of a UTMA account may not be aware. Clients may create UTMA accounts without advice, assistance of counsel, or other knowledgeable professional advisors. This presents a unique challenge to attorneys to raise the subject of UTMA accounts, and to provide at least general information to enable a client to determine if a UTMA account is an appropriate vehicle to accomplish the client's aims; and if it is, how it should be established and administered properly.

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Use of such accounts has become increasingly popular since changes to applicable law in 1985.¹ These changes expanded the uses of UTMA accounts, and the types of property which could be owned in a custodianship for a minor.² As general market conditions and investments increased in value, so did the balances in UTMA accounts. In light of the enhanced wealth, which may now be found in these accounts, the rules applicable to administration and restrictions on these accounts warrant a review. The popularity of UTMA accounts nationwide has also resulted in increased litigation involving them. Both the creator of a UTMA account and the custodian should be aware of the possibility of litigation before the account is created.

While UTMA accounts serve valuable purposes and may be appropriate in some instances, if a creator of a UTMA account is fully informed about the account and the pitfalls mentioned in this article prior to its creation, three advantageous consequences might result. First, certain actions and precautions suggested in this article might be taken by the creator, decreasing the possibility of future problems, unintended results, and the need for future legal action. Second, some persons contemplating creation of UTMA accounts may select a different vehicle as more appropriate to accomplish their aims. Third, where a UTMA account is created, the informed custodian may be in a better position to avoid certain hazards.

II. GENERAL BACKGROUND

UTMA accounts are opened to accomplish a variety of purposes. Lifetime gifts to minors are often driven by the donor’s desire to minimize income, gift, estate, and generation-skipping transfer taxes, as well as, motives to benefit the donee. The donor may seek to shift income from the donor in the higher tax bracket to the minor, who may be in a lower tax bracket and taxed at a lower income tax rate. The donor frequently also desires to eliminate the asset from donor’s probate and taxable estates, and to part with the asset on a gift-tax-free basis.

The simplest form of gift is a direct outright gift of the property to the minor. However, the outright gift vests full title in the minor on completion of the gift. One drawback to an outright gift is the immediate and permanent loss of donor’s control over the gifted property. Furthermore, state laws treat minors as legally incompetent persons, thus requiring guardianships or trusts

². Compare id., with FLA. STAT. § 710.11 (2003).
to be created for the property until the minor reaches the age of majority. Institution of a court guardianship proceeding or creation of an express trust entails legal fees and costs a client may be attempting to avoid. One way to transfer legal ownership of property from a grantor to a minor and yet allow the grantor or another adult selected by the grantor to retain control of the property, and to keep the control temporarily out of the hands of the minor for a period of time, is through a custodianship under the UTMA.

Florida adopted its version of the UTMA in 1985. Every American jurisdiction has adopted a version of the UTMA. "The Uniform Transfers To Minors Act was approved by the National Conference of Commissioners on Uniform State Laws in 1983." The UTMA revises and restates its predecessor, the Uniform Gifts To Minors Act ("UGMA").

UGMA was developed as a simple and inexpensive alternative to establishing a guardianship or trust for making lifetime gifts of property to a minor. UGMA was originally proposed by the National Conference of Commissioners on Uniform State Laws in 1956. The Conference revised UGMA in 1965 and 1966 "to expand the types of financial institutions which could serve as depositories of custodial funds, to facilitate the designation of successor custodians, and to add life insurance policies and annuity contracts to the types of property ([formerly limited to] cash and securities) that could be made the subject of a gift under the" UGMA.

Uniformity in the area of gifts to minors is important because the person making the gift, the custodian, and the minor, who benefits from the gift, may all reside in different states, and may change their residences after the gift is completed. The original UGMA was "designed to avoid conflicts of law when the laws of more than one state might apply to a transaction or a series of transactions." However, many states substantially revised their versions of UGMA "to expand the kinds of property that may be made the..."
subject of a gift under [UGMA]." As a result, non-uniformity arose among the states. As discussed later in this article, the result is that problems may arise when UTMA accounts opened in one state are moved to another state.

UTMA restates and rearranges the UGMA of 1966. It was hoped that UTMA would improve clarity, uniformity among the state jurisdictions, and expand the types of assets covered. UTMA "follows the . . . approach taken by several states and allows [many types] of property, real or personal, tangible or intangible, to be made the subject of a transfer to a custodian for the benefit of a minor." Additionally, it permits transfers by trusts, estates, and guardianships to UTMA accounts, not just gifts from individuals; "whether or not [such transfers are] specifically authorized in the governing instrument." Once assets are transferred to a UTMA account from a trust, they are thereafter governed by UTMA statutes and not by the terms of the trust from which they were derived. Transfers from "[a] third party[] indebted to a minor who does not have a conservator, such as [a] party against whom a minor has a tort claim or judgment, and depository institutions holding deposits or insurance companies issuing policies payable . . . to a minor," may also be made to a UTMA account. Even with these changes, many states have made further revisions when adopting UTMA to govern transfers to minors in their jurisdictions; Florida is one such state. The Florida UTMA applies to transfers of property to minors through custodians. Under the UTMA the custodianship generally terminates when the minor

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12. Id.
13. Id.
15. Id. at 4.
17. Id.; see also UNIF. TRANSFERS TO MINORS ACT § 1(6), 8C U.L.A. 14 (1983).
18. Prefatory Notes to 8C U.L.A. 3. Because of these enlargements, the name of the act was changed from "Gifts" to "Transfers." Id.
20. Id. "[A] custodianship is not a separate legal entity or taxpayer." Prefatory Notes to 8C U.L.A. 3. The custodianship does not file a federal tax return or pay taxes. See id. "[T]he custodial property is indefeasibly vested in the minor, not the custodian, and thus any income received is attributable to and reportable by the minor, whether or not actually distributed to the minor" Prefatory Notes to UNIF. TRANSFERS TO MINORS ACT, 8C U.L.A. 3 (1983); § 11(b), 8C U.L.A. 73.
22. "'Minor' means an individual who has not attained the age of 21 years." § 710.102(11).
23. A "custodian" is defined as "a person so designated under § 710.111 or a successor or substitute custodian designated under § 710.121." § 710.102(7).
reaches the age of twenty-one regardless of Florida’s majority age of eighteen.\textsuperscript{24}

The balance of this article examines the benefits of UTMA accounts and hazards to guard against in selection, creation, and administration of the accounts. As relatively few Florida reported court decisions exist, cases from other jurisdiction with similar statutes are frequently cited.

III. IRREVOCABLE TRANSFER

To create a Florida UTMA account is there must be a transfer from a donor to a custodian for a minor, and that the transfer be irrevocable.\textsuperscript{25} Whether or not the custodian of the account is the transferor, the custodian must be informed that the custodianship assets may not be returned to the transferor, nor may the transferor thereafter direct how the UTMA assets are to be invested or expended.\textsuperscript{26} This is true even if, due to an unanticipated change in circumstances, the transferor develops a dire need for the assets, or if the transferor did not understand that a UTMA account was being created and the restrictions on such an account.\textsuperscript{27} If the grantor is also the custodian, and after the transfer to a UTMA account the transferor improperly uses the account assets as his own, for his personal benefit or retitling them in his own name, adverse consequences may result.\textsuperscript{28} The grantor/custodian may be liable to the beneficiary for breach of fiduciary duties,\textsuperscript{29} and may be sub-

\textsuperscript{24} § 710.123(1); UNIF. TRANSFERS TO MINORS ACT § 20(1), 8C U.L.A. 73 (1983).

\textsuperscript{25} §§ 710.113(2), .108(1). Other jurisdictions have also recognized that a transfer of property made to a custodianship account irrevocably vests legal title in the minor beneficiary. See Roman v. Commissioner, 73 T.C.M. (CCH) 2375 (1997) (referencing New Mexico UGMA); Gordon v. Gordon, 419 N.Y.S.2d 684, 688 (App. Div. 1979).

\textsuperscript{26} Cf. § 710.113(3).

\textsuperscript{27} See Florida Bar v. Rose, 607 So. 2d 394 (Fla. 1992). In Rose a husband and wife, who were both attorneys, were divorced. Id. Stock was owned in the name of the wife as custodian for the parties’ minor children, under the Florida UGMA. Id. Years after the divorce, the father directed the sale of the stock. Id. The broker with whom the account was maintained sold the shares and issued checks to the former wife as custodian. Id. However, the checks were physically secured by the former husband. Rose, 607 So. 2d at 394. The former husband endorsed the checks with the wife’s name and used the proceeds for his own personal purposes. Id. at 394–95. In disciplinary proceedings before the Florida Bar, the father contended he thought the trust created was revocable, or that a Totten Trust was created. Id. at 394. Not only was the father disciplined by the Florida Bar, but the brokerage firm replaced all funds misappropriated by the husband. Id. at 395. The claim of the creator of the account that he did not understand the restriction on the account did not alter the outcome. Id.


\textsuperscript{29} See infra Part VII.
ject to tax on income and gains earned on the assets.\textsuperscript{30} The actions of a grantor/custodian in dealing with assets for his personal benefit may justify a court in concluding that the grantor lacked donative intent, and the UTMA account was not validly created.\textsuperscript{31}

After the transfer to a UTMA account, the use of the assets is limited. Hence, the custodian, even if he or she is the transferor, may not use the account assets for unlimited purposes, even if the purposes directly or indirectly benefit the designated minor beneficiary.

The transferor may not, after creation of a UTMA account, alter the designation of beneficiary or change the time at which the beneficiary receives the assets in the account.\textsuperscript{32} For example, if the transferor created a UTMA account for grandchild A, and grandchild B is thereafter born, grandchild B may not be named a beneficiary of grandchild A’s UTMA account. Statute mandates that there be only one beneficiary of each UTMA account.\textsuperscript{33} Nor may the transferor direct on creation of a UTMA account for A that on the birth of B, A’s UTMA account be divided into two separate accounts to benefit A and B equally. Similarly, if the transferor created and funded a UTMA account for A as an \textit{inter vivos} gift, when A is twenty-one-years-old, A must receive the assets remaining in the account,\textsuperscript{34} notwithstanding that A is a spendthrift, using illegal substances, or the existence of other reasons which would cause the transferor to prefer postponement of delivery of account assets to the beneficiary. The flexibility available in a trust to address such issues is lacking with UTMA assets.

\textit{The Florida Statutes} provide substantial direction about the mechanics of creating a custodianship.\textsuperscript{35} Stocks are transferred to a custodianship by titling the security in the name of the custodian as custodian for a named minor beneficiary under the Florida UTMA.\textsuperscript{36} Similarly, monies may be delivered to a financial institution to open an account in the name of the custo-
dian, as custodian for the named beneficiary under the Florida UTMA.\textsuperscript{37} Life insurance, an annuity, real estate, tangible personal property, and other assets susceptible to custodianship ownership may be similarly titled.\textsuperscript{38} The proper titling of an asset in a UTMA account gives rise to a rebuttable presumption of donative intent.\textsuperscript{39} The argument that this presumption is conclusive has been rejected.\textsuperscript{40} Extrinsic evidence of fraud, mistake or other facts to establish that the grantor did not intend to create a UTMA account, despite the titling of the account or asset, is admissible to rebut the presumption.\textsuperscript{41} The signed documents creating the UTMA account at a financial institution may constitute prima facie evidence of donative intent.\textsuperscript{42} Failure to maintain adequate records reflects lack of donative intent.\textsuperscript{43}

Questions may arise about whether certain assets are capable of being transferred to a custodianship. \textit{Florida Statutes} define custodial property generically, as "any interest in property transferred to a custodian under [the] act and the income from and proceeds of that interest in property."\textsuperscript{44} Section 710.111 of the \textit{Florida Statutes}, in providing instructions for the mechanics of titling property in a custodianship, refers to securities, money, life insurance policies, endowment policies, annuity contracts, irrevocable powers of appointment, rights to payments under contract and interests in real property as all qualifying as custodianship property.\textsuperscript{45} What constitutes a security is not defined.\textsuperscript{46} Although no Florida appellate court has ruled on this question,

\begin{itemize}
  \item \textsuperscript{37} § 710.111(1)(b).
  \item \textsuperscript{38} § 710.111.
  \item \textsuperscript{39} Golden v. Golden, 500 So. 2d 260, 261 (Fla. 3d Dist. Ct. App. 1986). "An allegation and showing that the funds were expended for the named child's education, maintenance or rehabilitation may rebut the presumption." \textit{Id.} In Golden, a father created a UTMA account in Florida for his son, and claimed that he spent the monies for rehabilitation, education and maintenance for his son. \textit{Id.}; see Dubisky v. United States, 62 F.3d 182, 185 (7th Cir. 1995); \textit{see also} Gordon v. Gordon, 419 N.Y.S.2d 684, 688 (App. Div. 1979).
  \item \textsuperscript{40} Golden v. Golden, 434 So. 2d 978 (Fla. 3d Dist. Ct. App. 1983); Gordon, 419 N.Y.S.2d at 688.
  \item \textsuperscript{41} \textit{Golden}, 434 So. 2d at 978. In this case the court found the testimony of the grantor alone insufficient to rebut the presumption. \textit{Id.} at 979. Where a transferor disputes the contention that he intended to make an irrevocable transfer to a custodianship account, this argument must be raised at trial or it is waived. See Tritter v. Corry, No. 95-1406, 1995 WL 648252, at *1 (1st Cir. Nov. 6, 1995).
  \item \textsuperscript{42} Heath v. Heath, 493 N.E.2d 97, 100 (Ill. App. Ct. 1986). There the court stated that the party disputing the existence of donative intent has the burden of overcoming "the presumption of donative intent by clear, convincing, unequivocal, and unmistakable evidence". \textit{Id.} at 101.
  \item \textsuperscript{43} Dubisky, 1994 WL 861127, at *1.
  \item \textsuperscript{44} § 710.102(6).
  \item \textsuperscript{45} § 710.111(1)(a)(2), (1)(b)-(e).
  \item \textsuperscript{46} See § 710.102.
\end{itemize}
other jurisdictions have held that a promissory note from grantor payable to 
the custodian is not a security, and the signing by grantor of a promissory 
note in favor of the custodian, where no consideration is received by grantor 
in exchange, is not a valid transfer to a custodianship. Other jurisdictions 
have recognized partnership interests as assets capable of custodianship 
ownership.

Where the transfer of funds or other assets is properly and directly ac-
complished by the donor to a custodian, and the assets are immediately titled 
in custodianship name, there may be little reason to question either the do-
nor's intent or whether the applicable statutes were complied with when cre-
ating the UTMA account. However, where a transfer is made by a donor to 
another, and thereafter a UTMA account is opened by the recipient of the 
asset, or where the account is improperly titled, or where other irregularities 
exist and the statute has not been strictly complied with, questions may arise 
concerning the donor's intent to make an irrevocable gift to the minor. The 
failure to sufficiently comply with the statutory formalities may prevent crea-
tion of a UTMA account. Donative intent must exist at the time the transfer 
of assets to the custodian occurs.

47. Crosby v. Commissioner, 36 T.C.M. (CCH) 1401, 1403 (1977). Taxpayers opened 
savings accounts in their names as custodians for their minor children under California 
UGMA. Id. at 1402. They then signed promissory notes payable to themselves as custodians. 
Id. The taxpayers received no monies or other consideration in exchange for the promissory 
notes. Id. Grantors paid interest due on the promissory notes to the UGMA accounts, and 
claimed deductions for the interest expenses. Id. The applicable California UGMA defined 
security to include any note, other than one of which donor was the issuer. Crosby, 36 T.C.M. 
(CCH) at 1403 n.3. California law also provided that a gift of donor’s promissory note, with-
out consideration, did not create a legally enforceable obligation to repay under California 
law. Id. at 1403. Hence, the court concluded that the purported transfers of promissory notes 
to UGMA accounts were of no effect, there was no legally enforceable obligation by grantors 
to pay interest, and grantors could not deduct interest paid under I.R.C. § 163. Id.; see also 
Karlin v. Commissioner, 54 T.C.M. (CCH) 1381, 1383 (1987) (involving Kansas UGMA 
statutes); In re Jacobs, 180 Cal. Rptr. 234, 242 (Ct. App. 1982) (involving California UGMA 
statutes).


50. See id.

51. Id. In Marshall, a grandmother transferred funds annually for the benefit of her 
grandchildren. Id. at 992. The checks delivered by grandmother to her daughter (the minor 
beneficiary’s parent) were mostly payable to the grandchild, and did not indicate on their face 
a custodianship arrangement. See id. at 993. Some, but not all, of the checks were deposited 
The court made an independent finding based on the grandmother’s testimony that, since she 
transferred the funds solely to benefit her grandchildren and did not expect to ever receive the 
funds back, she had the donative intent required to make an irrevocable transfer under 
UGMA. Id. at 1002. The court recognized that, although the formalities of the New York
Where the transfer by a donor is not made directly to a custodian for the minor, questions may arise concerning whether there was effective delivery of the gift to the donee. Failure to literally comply with all statutory requirements does not necessarily compel a court to decide that delivery failed or that a UTMA account was not created.

There must be a bona fide transfer of an asset to create a UTMA relationship. Where a donor owned 100% of the stock in a closely held corporation, issued stock certificates purporting to transfer half of the shares to his wife as custodian for their two sons, thereafter retained full control of opera-

UGMA were not literally complied with, as checks were delivered to donor's daughter payable to the grandchildren, to the extent the daughter deposited them in UGMA accounts there was sufficient compliance with the statute. But see Thompson v. Sundholm, 726 F. Supp. 147, 150 (S.D. Tex. 1989) (stating that the donor failed to create a UGMA account when he endorsed a cashier's check with the notation that it was to be deposited into the account of two named minors); § 710.111. The Texas statute, like the Florida statute, required certain language to be used to create a custodianship. Thompson, 726 F. Supp. at 150. Both states precluded a gift to two minors in one custodianship. Id.; see also § 710.112. As the donor in Thompson failed to adhere to the statutory language, there was no gift to the minor, and no effective transfer under UGMA occurred. Thompson, 726 F. Supp. at 150.


53. See Marshall, 831 F. Supp. at 1002; Driscoll v. Commissioner, 31 T.C.M. (CCH) 418 (1972) (example of how a grantor may fail to effectively make a transfer to a custodianship). In Driscoll, the grantor was a married father of nine minor children, all residing in California. 31 T.C.M. (CCH) at 419. The taxpayer initially conducted a business as a sole proprietorship. Id. He then signed a partnership agreement, purporting to cause his children to own fifty-percent of the business, and to have a fifty percent interest in capital and profits. Id. The taxpayer's wife signed the partnership agreement as trustee for the minor children, and a document appended to the partnership agreement stated that the taxpayer transferred a security interest in the business to his wife as custodian under the UGMA for the minor children. Id. at 420. The following year, bank accounts were opened in the name of the taxpayer and his wife as trustees for each child. Id. A year later, new bank accounts were opened in the name of the taxpayer's wife as custodian under the UGMA. Driscoll, 31 T.C.M. (CCH) at 420. In the following year, court proceedings were instituted to have taxpayer's wife appointed guardian of each minor child. Id. When faced with these facts, the court held that intent by a grantor to make a gift in a custodianship was missing, and no valid custodianship was established. Id. at 422.

54. Marshall, 831 F. Supp. at 1002. "The case law is clear that the protection of UGMA will extend to gift giving even when the precise requirements of the statute are not followed." Id. However, when accounts are titled in the names of donors "as trustees" for the minor, and evidence reflects that the transfers were revocable by donors, the court will not deem the transfers to be irrevocable transfers under the UGMA. Heintz v. Commissioner, 41 T.C.M. (CCH) 429, 430–31 (1980).

tions of the corporation, made an S election, never delivered the certificates or any income earned to the custodian, and no custodianship accounts were opened, no bona fide transfer had occurred. The facts that the donor filed income tax returns for the minors, reported their share of the S corporation income, and paid the tax owed by the minors did not change the court’s conclusion. Creation and transfer to a custodianship account cannot be used to defraud creditors.

Although the UTMA statutes typically refer to intentional transfers made by a grantor, UTMA accounts may arise as a result of other laws. For example, lottery statutes may specify that lottery winnings are to be paid to a custodian for a minor who wins the lottery.

The irrevocability of the transfer, combined with the restrictions on and inflexibility of UTMA accounts, may lead transferors to conclude that other vehicles would be more responsive to their needs. This is particularly true if the UTMA account is expected to own considerable wealth when distribution to the beneficiary is required.

IV. MANDATORY DISTRIBUTION

As alluded to above, section 710 of the Florida Statutes requires mandatory distribution to the beneficiary of a UTMA account. When the distribution of all remaining account assets is required depends upon how the account was initially created. Perhaps the most common occurrence is the creation of a UTMA account by inter vivos gift from the transferor pursuant

56. See Duarte, 44 T.C. at 193.
57. Id. at 195–96. But see Kirkpatrick v. Commissioner, 36 T.C.M. (CCH) 1122 (1977) (stating the Tax Court recognized the validity of transfers of closely held stock from both parents to one parent as custodian for their minor children). Many factors influenced the court to recognize the validity of the transfers, even though corporate profits were not distributed to the minors. Id. at 1126. First, shares were actually titled in custodianship name. Id. at 1123. Second, the custodian played an active role in the business, safeguarding the minors’ investments. Id. at 1126. Third, when corporate funds were spent to purchase assets for the corporation and expand the business, the custodian was involved in the decision making. Id. Fourth, when sums were borrowed by the grantor-shareholder, there was adequate interest and security provided. Kirkpatrick, 36 T.C.M. (C.C.H.) at 1128. The borrower even took a bank loan personally, to enable him to pay interest to the custodianship accounts. Id. at 1124.
58. See Dubisky v. United States, 62 F.3d 182, 184 (7th Cir. 1995). The taxpayer created UGMA accounts while he was being investigated by the I.R.S., at a time when the taxpayer had reason to believe he had engaged in illegal tax shelters. Id. These transfers did not create valid custodianship accounts. Id.
59. N.Y. STATE LOTTERY FOR EDUC. LAW § 9553(b) (McKinney 2003); N.Y. TAX LAW § 1613(b) (McKinney 2003); Anastasio v. Commissioner, 67 T.C. 814 (1977).
60. § 710.123.
to section 710.105 of the Florida Statutes. In that instance, distribution of remaining account assets to the beneficiary is required on the beneficiary’s twenty-first birthday. The same result follows if the account was created as a consequence of a gift to a minor made in a decedent’s last will and testament, or a gift emanating from a trust which directs delivery to a custodian.

While the above may reflect the more common means of creating a UTMA account, such accounts may arise in other circumstances. Where a will or trust agreement makes a gift to a minor but does not designate a custodian to receive the gift for the minor, or if a gift arises to a minor in intestacy, the personal representative or trustee may nevertheless deliver the gift to a custodian of a UTMA account, if certain requirements are met. A conservator may likewise have power to create a UTMA account for a minor. In these less prevalent circumstances, mandatory distribution of the UTMA account occurs when the minor attains age eighteen.

Clients appreciative of the possibility of changes in circumstances may not wish to guarantee that distributions will occur at the ages set by statute. The beneficiary may not be sufficiently mature to manage the assets, or may be a spendthrift, or may suffer from other vices or disabilities causing distribution to be unwise. At the least, if clients are informed of the mandatory distribution requirements of the statutes, they may limit the funding of the UTMA accounts.

61. § 710.123(1). In Borbonus v. Commissioner, 42 T.C. 983, 992 (1964), the Tax Court recognized the pervasive uniformity of this requirement in the vast majority of states.

62. §§ 710.106-.123(1).

63. § 710.107(1). Section 710.107(3) allows such a transfer only if:
   (a) The personal representative, trustee or conservator considers the transfer to be in the best interest of the minor;
   (b) The transfer is not prohibited by or inconsistent with provisions of the applicable will, trust agreement, or other governing instrument; and
   (c) The transfer is authorized by the court if it exceeds $10,000 in value.

64. § 710.107(2). A conservator includes “a person appointed or qualified by a court to act as general, limited, or temporary guardian of a minor’s property or a person legally authorized to perform substantially the same functions.” § 710.102(4).

65. § 710.123(2). Were this not the case an inequity could result. Absent this rule, where a UTMA account was created in circumstances that could otherwise warrant guardianship, distribution to the minor would be delayed to age twenty-one, whereas if guardianship option had been selected or continued, distribution would occur at age eighteen. Cf. id.
Mandatory distribution of UTMA accounts also occurs on the death of the minor prior to the minor attaining the age set forth in the statute. The possible consequences of this requirement are discussed below.

V. PREMATURE DEATH OF MINOR

Section 710.123(3) of the Florida Statutes requires that the assets remaining in a UTMA account be distributed to the minor’s estate immediately upon the minor’s death occurring before he or she attains the age otherwise applicable for distribution. While this provision may not deter transferors from creating UTMA accounts, two principal consequences flowing from this statute are worthy of consideration by the transferor prior to creation of the account.

The first consequence is that the statute is likely to cause a need for a probate of the minor’s estate. While various short forms of probate may be available if the account is not substantial in value and the minor does not own significant other assets, the need for any court probate proceeding nevertheless depletes remaining account assets. There is neither a mechanism in the applicable statutes to provide for an alternative beneficiary in the event of the minor’s untimely demise, nor to avoid the need for court probate proceedings on the minor’s death, as would be possible in a trust.

The second consequence which may be viewed as adverse by the transferor involves who becomes entitled to the account assets in the event of the minor’s death. Assuming that the UTMA account was created under section 710.105 by inter vivos gift, or section 710.106 by will or trust agreement, and the account beneficiary dies after attaining age eighteen, it is possible that the beneficiary will die testate, stating in his or her will who receives the UTMA account assets. However, in the majority of cases this is unlikely to occur. Hence, the beneficiary’s estate is more likely to be distributed through intestacy. It may thus be in-laws of the transferor, former in-laws of the transferor, or others whom the transferor does not wish to benefit who receive part or all of the remaining UTMA account assets.

66. § 710.123(3).
67. Id.
68. § 735.201(2) (permitting summary administration to occur when the decedent’s entire estate subject to probate is worth no more than $75,000.00).
69. Even in this situation, the transferor has little control over who the UTMA account beneficiary names as beneficiary under his or her Last Will and Testament. It is suggested that beneficiaries of UTMA accounts over age eighteen be encouraged to execute Wills, thus exercising control over who receives account assets in the event of their untimely demise.
70. See generally §§ 732.102-103. To illustrate, assume that grandpa created and funded a UTMA account, with inter vivos gifts, for the benefit of his granddaughter. Grandpa’s son
It is suggested that the transferor be informed of these potential consequences, however remote or infrequent, before the creation of a UTMA account or funding it with substantial assets.

VI. EXPENDITURES FROM UTMA ACCOUNTS

While the Florida Statutes are detailed in their coverage of the mechanics and logistics governing creation of a UTMA account, no similar thorough guidance is provided with respect to the custodian’s obligations. One of the most important obligations of a custodian is to expend account principal and income appropriately. The custodian may only spend for the benefit of the minor. Directions afforded the custodian are principally generic. The custodian is given “all the rights, powers, duties, and authority provided in this act.” The custodian is directed to “observe the standard of care that would be observed by a prudent person dealing with property of another.” Although the custodian is given “all the rights, powers, and authority over custodial property that unmarried adult owners have over their own property,” this clearly does not include unrestricted spending power.

The primary direction to the custodian about proper spending is set forth in section 710.116 of the Florida Statutes. It purports to allow the custodian discretion to spend, without court order, “so much of the custodial property as the custodian considers advisable for the use and benefit of the minor.” In determining what sums are to be expended, the custodian need not be mindful of the minor’s other assets or income, or the obligation or ability of any person to support the minor. Finally, the Florida Statutes served as custodian and wisely invested the account assets. When granddaughter is age sixteen and the UTMA account is worth $150,000.00, granddaughter dies. Her death occurs one year after the dissolution of her parents’ marriage. Under Florida intestacy law, each parent of the deceased beneficiary receives $75,000.00. See § 732.103(2). Grandpa may not be pleased with this outcome.

71. See § 710.114.
72. See generally id.
73. § 710.113(2).
74. See § 710.114(2) (discussing investments).
75. § 710.115(1).
76. § 710.116.
77. See generally § 710.116(1).
78. Id.; see also Weiss v. Weiss, No. 91CIV.5115(KMW)(MHD), 1996 WL 91641, at *1 (S.D.N.Y. Mar. 4, 1996) (discussing whether, under New Jersey statutes, a custodian should use custodianship assets to pay bills which are normally a parental obligation of support).
authorize the expenditure of UTMA account assets to pay the custodian’s reasonable expenses and compensation.\textsuperscript{79}

What constitutes spending for the minor’s benefit is not clearly defined. Courts recognize that the custodian may use account assets for the minor’s maintenance, education, and benefit, decide to spend or refuse to spend account assets, and even terminate the account by spending all assets for or distributing them to the minor beneficiary.\textsuperscript{80} Once the beneficiary is an adult, the beneficiary may sue the custodian if the beneficiary contends expenditures were improper.\textsuperscript{81}

In other jurisdictions, where one parent of the minor beneficiary was the custodian of an account, and funds from the account were loaned to the beneficiary’s other parent for use in his business, the court held that this loan was for the benefit of the minor.\textsuperscript{82} However, where the custodian loaned funds from a UGMA account to her friend, without obtaining a signed promissory note, security agreement or other proper documentation; without setting due dates for repayment or an interest rate; and without keeping proper records of the loan or its repayment, or assuring that it was repaid, the loan was not for the benefit of the minor.\textsuperscript{83} “Loans from a custodia[n] to an individual outside the family are subject to a high degree of scrutiny.”\textsuperscript{84} Use by a custodian, who is grantor of the account and the parent of the minor beneficiary, to pay

\textsuperscript{79} § 710.117.
\textsuperscript{80} Exch. Bank & Trust Co. of Fla. v. United States, 694 F.2d 1261, 1263 (D.C. Cir. 1982).
\textsuperscript{81} See Weiss, 1996 WL 91641, at *1. This case presents an example of a situation in which a son, who was the beneficiary of a UGMA account, sued his father who was both donor and custodian. \textit{Id.} The father created and funded UGMA accounts, intending to use the assets for his son’s education and related expenses. \textit{Id.} at *3. The father actually used his own monies to pay these charges, and reimbursed himself from UGMA assets. \textit{Id.} at *3–5. On attaining the age of majority, the son claimed that the reimbursement was improper and the father, as custodian, should have distributed all remaining UGMA assets to the son. \textit{Id.} at *5–6.
\textsuperscript{82} See, e.g., Marshall v. United States, 831 F. Supp. 988, 1005 (E.D.N.Y. 1993). In this case the custodian was the mother of the minor beneficiaries, and custodianship assets were received from the custodian’s mother. \textit{Id.} at 992. The custodian loaned funds from the UGMA account to her husband, the father of the minor beneficiaries, for use in his law practice. \textit{Id.} at 995. The loans were made without proper documentation, and without setting due dates or interest rates. \textit{Id.} Despite these facts, since the borrower had a legal and moral obligation to repay the loans and to support his minor children, the court held that it was in the best interests of the children that he be provided with needed funds for his business. \textit{Id.} at 1005.
\textsuperscript{83} Marshall, 831 F. Supp. at 1005–06.
\textsuperscript{84} \textit{Id.} at 1005.
the custodian’s legal fees to litigate custody or visitation issues, is not proper spending for a minor from a UTMA account.\textsuperscript{85}

In addition to the potential liability of the custodian to the minor for breach of fiduciary duties if the custodian improperly expends UTMA account assets,\textsuperscript{86} other adverse consequences may flow from the custodian’s wrongful expenditure.\textsuperscript{87} To the extent that a custodian uses or expends assets owned by a UTMA account for purposes other than for the benefit of the minor, the assets may lose their protection from claims of the custodian’s creditors.\textsuperscript{88} This is true even if the custodian was not the donor of the UTMA account.\textsuperscript{89}

Any interested person may request a court to order the custodian to spend additional sums for the minor, and the UTMA account beneficiary may personally seek such a court order after the beneficiary is fourteen-years-old.\textsuperscript{90} Due to the need for the custodian to expend sums properly from the account, and the custodian’s potential liability for improper spending, the lack of direction in the statutes about what constitutes proper spending is particularly distressing. This lack of direction has been recognized by at least one Florida court.\textsuperscript{91} The vague standard set forth in the statutes leaves the custodian exposed to potential liability.

\textsuperscript{85} Tritter v. Corry, No. 95-1406, 1995 WL 648252, at *2 (1st Cir. Nov. 6, 1995).
\textsuperscript{86} See Marshall, 831 F. Supp. at 1006. In that case the court found that the custodian of a UGMA account created by the custodian’s mother for the custodian’s minor children violated her fiduciary duties by failing to account for all monies contributed by donor and by failing to place them beyond the reach of the custodian’s creditors. \textit{Id.} The lack of proper records from the custodian to establish that all sums received from donor were properly deposited in custodianship accounts and expended for the benefit of the minor beneficiary constituted a breach. \textit{Id.} The custodian in that case could not prove where certain monies given to her were deposited and where other monies were spent. Marshall v. United States, 831 F. Supp. 988, 1005 (E.D.N.Y. 1993); see discussion infra Part VII (discussing breach of fiduciary duties by the custodian).

\textsuperscript{87} Marshall, 831 F. Supp. at 1002. In Marshall, both the inability of the custodian to explain how certain contributed funds were spent and the custodian’s improper expenditure of funds for purposes other than the benefit of the minor caused those amounts to be available for seizure by the custodian’s creditor. \textit{Id.} at 1006.


\textsuperscript{89} Marshall, 831 F. Supp. at 988.

\textsuperscript{90} § 710.116(1)-(2). This section uses the term interested person, but fails to define it. See generally \textit{id.} One might conclude in light of analogous probate law, that this term includes any person who could be impacted by the outcome of the proceeding. See § 731.201(21).

\textsuperscript{91} See Irvin v. Seals, 676 So. 2d 436 (Fla. 2d Dist. Ct. App. 1996). That case involved a paternity suit, in which the father of the child admitted paternity. \textit{Id.} at 437. The child’s mother was a full time student, and the father was a professional football player earning a substantial income of over $800,000.00 annually. \textit{Id.} The court ordered the father to pay
A related concern is when and whether the custodian should distribute property in a UTMA account to the minor beneficiary prior to the time mandated by statute. The Florida Statutes allow the custodian to do so whenever the custodian considers distribution advisable for the use and benefit of the minor beneficiary. Courts have opined that, as a custodianship account has only one beneficiary, it is unlikely that a custodian would be restrained from distributing all custodianship property early. This may lead a grantor to question what assurance he really has that the assets will be preserved and protected for the minor before the beneficiary attains the age of majority.

VII. SELECTION OF CUSTODIAN AND SUCCESSOR

The applicable statute requires a custodian to be named for a UTMA account to be created. The custodian named may be the transferor or another qualified person. Care should be exercised in selecting the initial custodian and alternates. The custodian has legal obligations and needs to carefully guard the account against the wrongdoing of others. Unanticipated complications may arise if the transferor is the custodian or if the initial custodian nominated becomes unable to serve.

A transferor creating a UTMA account will frequently desire to be the custodian and to retain control over investments in the account, perhaps for lack of other trustworthy persons to nominate, in an effort to regulate spend-
ing from the account or due to other motivations. Although ownership of the account assets is by law vested in the minor beneficiary once the account is created and funded, the account may, as a practical matter, remain subject to seizure by the transferor's creditors if the transferor is also the custodian. In one case where a transferor created a UTMA account in Florida for her daughter and the transferor was the custodian, the UTMA account was thereafter seized by the Internal Revenue Service to pay deficiencies in the transferor's income taxes. The transferee was deemed to be merely a nominee for the transferor-custodian. The possibility of such an outcome resulting may be diminished (although not eliminated) if the transferor providing the funding for the account is not the custodian. Furthermore, adverse estate tax consequences may follow to the donor's estate if the transferor is the custodian.

Adverse consequences may result from the failure to account for future circumstances and from the transferor's failure to select a sufficient number of alternate custodians. The Florida Statutes expressly allow the transferor to name not only an initial custodian, but also alternates to serve if the initial custodian becomes unable or unwilling to serve. Florida law only allows one custodian to serve at a time. While there is admittedly no guaranty that any one of multiple successor custodians will remain willing and able to

98. See e.g. Marshall v. United States, 831 F. Supp. 988 (E.D.N.Y. 1993) (finding that the custodian misappropriated some of the funds).
100. Ryiz, 516 So. 2d at 1069-70. The I.R.S. levied on the UTMA account. Id. Normally, a defense to such a levy could have been that the bank was not in possession of funds belonging to the taxpayer-custodian, as she was not the account owner. Id. at 1071. The minor beneficiary was the owner of the account. Id. at 1070. However, in this case the I.R.S. levy served named the child as nominee for the parent-custodian-taxpayer. Id.
101. Ryiz, 516 So. 2d at 1070.
102. See Marshall, 831 F. Supp. at 988. In that case a grandmother gave cash to her grandchildren which was deposited in UGMA accounts. Id. at 993. The mother of the minor grandchildren was the custodian. Marshall v. United States, 831 F. Supp. 988, 997 (E.D.N.Y. 1993). The custodian and her spouse owed substantial income taxes. Id. at 996. The income tax liability arose after the grandmother made some gifts, but before she made other. Id. at 993. The court held the I.R.S. was entitled to levy on a portion of the UGMA account assets. Id. at 1003.
103. See discussion infra Part XII (discussing tax consequences); see also Exch. Bank & Trust Co. of Fla. v. United States, 694 F. 2d. 1261, 1265 (D.C. Cir. 1982).
104. See § 710.104(1) (providing for substitute custodians in the event the first named custodian dies before the transfer, among other circumstances).
105. Id.
106. § 710.112.
serve in the future, designation of alternates at the outset is wise. If the one or more persons named as the custodian or substitute custodian die or cease serving as custodian of a UTMA account, prior to the time set for distribution of assets to the beneficiary, and no successor custodian was named, the statutes allow replacement of the custodian without court action in only limited circumstances.\textsuperscript{107}

Where the transferor is alive or in existence (in the case of transfers from estates or trusts), if all persons designated custodian become unwilling or unable to serve, or continue to serve in this capacity, the transferor may designate a substitute custodian,\textsuperscript{108} and no disruption to the account should occur. If the transferor is deceased, or the transferor entity no longer exists, this is not an option.\textsuperscript{109} Court action may then be required to designate a successor custodian.\textsuperscript{110}

If the initial custodian named declines to serve at the time of creation of the UTMA account, statute provides that the transferor or the transferor's legal representative may designate a new custodian.\textsuperscript{111} The term "legal representative" for this purpose is narrow, and includes only the transferor's personal representative or conservator.\textsuperscript{112} Since this provision allowing a personal representative to act applies only on creation of the account, it applies solely to UTMA accounts created in wills. If a transferor attempts to create an \textit{inter vivos} UTMA account and thereafter becomes incompetent or dies, and the initially named custodian declines to serve and there are no willing alternates, no other person is authorized to name a substitute custodian to cause the account to be effectively established.

Statute also allows one who is serving as custodian to name his or her own successor; provided that the transferor may not be named in this fashion.\textsuperscript{113} Where the transferor neglected to name alternate custodians, the acting custodian should consider promptly doing so to avoid the problems discussed below which result when no successor is named. This is true even if the acting custodian does not intend to immediately resign, as the designation of substitute may be effective on the death, resignation or incapacity of the acting custodian.\textsuperscript{114}

\textsuperscript{107} § 710.121(4).
\textsuperscript{108} § 710.121(1).
\textsuperscript{109} \textit{Id.}
\textsuperscript{110} \textit{Id.}
\textsuperscript{111} \textit{Id.}
\textsuperscript{112} § 710.102(9).
\textsuperscript{113} § 710.121(2).
\textsuperscript{114} \textit{Id.}
If there is no custodian serving at any time, due to death, disability, removal, or resignation of the custodian, and no successor nominated by the transferor or the acting custodian is available, or if the transferor and the last serving custodian are deceased or incompetent and hence unable to appoint a successor custodian, whether court action will be required depends, in part, on the age and actions of the minor beneficiary. If the beneficiary is at least fourteen years old, the beneficiary may name a successor custodian. The successor custodian must be an adult member of the minor’s family, a conservator, or a trust company. This is a much more limited group of eligible custodians compared to the options initially available to the creator of the UTMA account. The minor has up to sixty days after a vacancy exists in the office of custodian to act.

Should the minor beneficiary fail to timely name a new custodian as described above, or if the minor is not fourteen and hence is ineligible to do so, court appointment of a custodian is needed. If there is already a conservator in place for the minor, that conservator becomes the custodian of the UTMA account.

Court action to seek appointment of a successor custodian may be instituted by any interested person, the transferor, the transferor’s legal representative, the custodian’s legal representative, or an adult member of the minor’s family. Where court action is needed to replace a custodian, a separate action must be instituted for each separate UTMA account created by a transferor for a different beneficiary. In light of the potential need for court action to appoint a custodian and the costs of such court action, care

115. § 710.121(4).
116. Id.
117. Id.
118. Id.
119. § 710.121(4)-(6).
120. § 710.121(4).
121. Id. Although the transferor has the right to institute suit for appointment of a custodian, it is difficult to understand why such action would be warranted. Section 710.104(1) of the Florida Statutes allows the transferor to name successive custodians. Unless this statute is interpreted to afford transferor this right only on inception or creation of the UTMA account, since the statute says that the designation is revocable, the transferor should have a continuing right and should not have to resort to court action to nominate a successor when no custodian is serving. See § 710.104(1).
122. § 710.121(4), (6).
123. See § 710.112. If there are several different UTMA accounts for one beneficiary at different financial institutions held by one custodian, only one court proceeding should be needed. Id. Section 710.112 of the Florida Statutes provides that “[a]ll custodial property held under this act by the same custodian for the benefit of the same minor constitutes a single custodianship.” Id.
should be exercised to assure that alternates are named at all times, and the likelihood of court action is diminished.

The investments contributed to the UTMA account initially, and the investments the UTMA account is expected to own in the future, may impact who is an appropriate custodian. For example, a custodian, who is a director of a publicly traded company, has certain disclosure and reporting requirements to satisfy if he owns stock in a company of which he is a director in a UTMA account.\textsuperscript{124}

It is also wise to select a solvent, fiscally responsible, diligent person, who is adept at proper record keeping as the initial custodian. The same characteristics should be sought in a successor custodian. If not, harm may occur to the UTMA account if the custodian is indebted and his creditors seek to recover from the UTMA account.\textsuperscript{125} Other problems can arise if proper records and documentation are not maintained to establish that the account was properly created, that assets were at all times properly titled in the custodianship, and that investments and expenditures were in accordance with the statute. The need for proper record keeping for all custodianship transactions should be emphasized.

VIII. LIABILITY OF CUSTODIAN

The two major ways in which a custodian of a UTMA account is subject to liability include: 1) failure to properly spend account assets; and 2) failure to properly title, account for, protect, preserve, and invest account assets.\textsuperscript{126} As noted previously, a custodian is not given adequate instruction in the statutes in respect to expending funds from the UTMA account.\textsuperscript{127} Custodians are given discretion with respect to management and investment of UTMA account assets.\textsuperscript{128}

The custodian must invest as a reasonable prudent person.\textsuperscript{129} The custodian is not generally held to the same standards with respect to investments

\textsuperscript{124} SEC v. Golconda Mining Co., 291 F. Supp. 125, 127 (S.D.N.Y. 1968). That case involved a director of three publicly traded corporations who traded in stock of those corporations through Idaho UGMA accounts he created for his minor children, and of which he served as custodian. \textit{Id.} Because the beneficiaries of the UGMA accounts were the custodian’s immediate family members, he was required to report the purchases and sales. \textit{Id.} Legal action ensued against him when he neglected to report these and other stock transactions. \textit{Id.} at 125.

\textsuperscript{125} \textit{See} discussion \textit{infra} Part VIII.

\textsuperscript{126} § 710.114.

\textsuperscript{127} \textit{See} discussion \textit{infra} Part VI.

\textsuperscript{128} § 710.114.

\textsuperscript{129} \textit{Id.}
as a trustee. Whether the custodian invests prudently is a separate issue from whether the custodian acts for the benefit of the minor. Unlike other fiduciaries, the custodian may merely retain assets contributed to the account by the transferor. Hence, the custodian does not appear to have the same obligation as a trustee or other fiduciary to diversify investments. Where the custodian has special expertise, such skill must be used for the benefit of the minor. The UTMA account must be segregated from all other property owned or held, individually or in a fiduciary capacity, by the custodian. The custodian must maintain adequate records of all account assets and transactions.

The custodian is subjected to liability, both to third parties and the minor. In the event of suit, UTMA account assets may be at risk, and the custodian may be personally liable. The first potential liability considered is to third parties other than the minor beneficiary. Where liability to a third party arises under a contract entered by the custodian in relation to the custodianship, such as an obligation arising from the ownership of custodial property or a tort committed by the minor or the custodian during the course of the custodianship, the third party may recover judgment out of the custodianship assets. In addition, recovery may be available against the custodian and/or the minor personally.

Generally, assets in the custodianship account cannot be reached to pay personal debts of the custodian. Where an attempt is made by a creditor of

130. See Buder v. Sartore, 774 P.2d 1383, 1388 (Colo. 1989). The court analyzed the standard of care applicable to a custodian of a Colorado UTMA account, and held that the custodian was liable for damages resulting from breach of fiduciary duties when he invested about half of the monies in penny stocks and lost considerable sums. Id. at 1390. Damages awarded included decline in value of investments, lost income, and attorneys' fees. Id.

131. Marshall v. United States, 831 F. Supp. 988, 1003 (E.D.N.Y. 1993). Two separate inquiries may be needed when the custodian's action is questioned. Id. The first inquiry questions whether the investment was for the benefit of the minor. Id. The second inquiry is whether the investment was prudent. Id. Where an investment might be prudent but not be for the benefit of the minor, the converse is not true. Id.

132. § 710.114(2).
133. Id.
134. § 710.114(4).
135. § 710.114(5).
136. See § 710.119(1)(a)-(c).
137. Id.
138. § 710.119(1)(a).
139. § 710.119(1)(c).
140. See Friedman v. Mayeroff, 592 N.Y.S.2d 909, 912 (Civ. Ct. 1992). In that case a parent served as custodian of bank accounts for her minor children. Id. at 910. After the accounts were created, the parents of the minor children were sued in a landlord-tenant action, and a judgment was entered against them. Id. The court held that the judgment creditor could
the custodian to collect a debt from UTMA assets, the custodian must be
careful to promptly take correct legal steps if seizure of the UTMA assets is
to be avoided. In one case a grantor created a UTMA account for the benefit
of her minor daughter.\textsuperscript{141} Grantor named herself the custodian of the ac-
count.\textsuperscript{142} The Internal Revenue Service ("I.R.S.") determined that the gran-
tor/custodian personally owed delinquent taxes, and levied on the UTMA
account.\textsuperscript{143} The financial institution in which the account was invested hon-
ored the levy, despite the custodian’s objection.\textsuperscript{144} When the custodian sued
the financial institution in state court for wrongfully honoring the levy, the
action was dismissed.\textsuperscript{145} The appellate court based its conclusion on the cus-
todian’s failure to follow proper procedures to prevent enforcement of the
levy, which required the custodian to institute suit against the government.\textsuperscript{146}
The Broward County Circuit Court lacked jurisdiction over the dispute.\textsuperscript{147}
The custodian’s failure to take proper legal action in a timely manner re-
sulted in the loss of the UTMA assets.\textsuperscript{148}

At times custodianship assets may be subject to seizure by the creditor
of a custodian, where the underlying liability owed by the custodian person-
ally to the creditor had nothing to do with the UTMA account, and where the
custodian was not the donor of the account.\textsuperscript{149} Where a custodian’s creditor
attempts to reach assets in a UTMA account to satisfy the custodian’s per-
sonal debt, the court faces a dilemma.\textsuperscript{150} While the court does not wish to
deprive the innocent minor of funds, it also does not wish to afford debtors
an opportunity to deal with assets as if the debtor personally owned them, yet
allow the debtor to shield the assets from the debtor’s creditors.\textsuperscript{151}

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\textsuperscript{141} Ryiz v. First Bankers, N.A., 516 So. 2d 1069, 1070 (Fla. 4th Dist. Ct. App. 1987).
\textsuperscript{142} Id.
\textsuperscript{143} Id.
\textsuperscript{144} Id.
\textsuperscript{145} Id.
\textsuperscript{146} Ryiz, 916 So. 2d at 1071.
\textsuperscript{147} Id.
\textsuperscript{148} See id. at 1070–71; see also Marshall v. United States, 831 F. Supp. 988, 997–1001
(E.D.N.Y. 1993) (explaining the proper procedure to be followed by the custodian when the
I.R.S. levies a UTMA account assets is to collect a tax liability of someone other than the
beneficiary of the account).
\textsuperscript{149} See Marshall, 831 F. Supp. at 1003.
\textsuperscript{150} Id.
\textsuperscript{151} Id. In Marshall, the court recognized this dilemma stating:
If a court condones a delinquent taxpayer’s or debtor’s use of UGMA custodial funds then the
court creates a means by which a delinquent taxpayer or debtor can improperly shield assets
from the I.R.S. or a creditor and at the same time permit the delinquent taxpayer or debtor to
use those funds as if he/she owned them. On the other hand, if the court fails to honor the

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Where a custodian's creditor attempts to reach the funds to satisfy the custodian's personal debt, the court may look at various factors as persuasive. These include: whether the donor is also the custodian of the account or if the donor is not the custodian then whether the custodian is a family member of donor; whether the donor or the custodian owes the debt for which collection is sought; whether the custodian converted funds in the account for his or her personal use; and other "family circumstances." Even where the custodian is the debtor, and the separate donor is not indebted to the creditor, a creditor of the custodian may be permitted to seize custodianship assets because the custodian wrongly previously converted them to the custodian's own personal use. Once the conversion occurs, the funds are no longer being held for the benefit of the minor.

Similarly, where a UTMA account is initially established to defraud donor's creditors and to prevent them from recovering debts owed by the custodian/donor, the assets in the custodianship account will not be protected by the custodian's creditors.

There are also situations in which the creation and existence of UTMA accounts may cause them to be involved in or a subject of litigation, necessitating defensive action by the custodian, although no one is yet attempting to seize the accounts themselves. In various litigations and contexts an issue may be raised about whether the custodian holds the assets in the account UGMA arrangement it will deprive the minor of property intended as a gift under the Uniform Gifts to Minors Act.

Id. at 1003–04.

154. Id. at 1003–04.

155. Id. at 1003.


157. Id. By converting the funds to the custodian's own personal use, they are placed beyond the reach of the minor. Id. at 1004. A rebuttable presumption may arise that such action was taken to preclude creditors from collecting. Id. The custodian is entitled to rebut the presumption, by establishing that the action was inadvertent or negligent, and perhaps preclude the creditor reaching the funds. Id.

158. Friedman v. Mayeroff, 592 N.Y.S.2d 909, 912 (Civ. Ct. 1992); see also Hall v. United States, 71 A.F.T.R.2d 93-360 (N.D. Ga. 1992). In Hall, a father owed payroll taxes. Id. To avoid collection by the I.R.S., he transferred funds to his wife as custodian for their minor child. Id. at 93-362. The I.R.S. was successful in levying on the custodianship accounts. Id. at 93-364; see also Dubisky v. United States, No. 93C 4505, 1994 WL 861127, at *1 (N.D. Ill. Sept. 13, 1994).
solely in a fiduciary capacity, or whether the custodian personally has rights to account assets.159

The second potential liability of the custodian is to the minor for a breach of fiduciary duties.160 One duty of the custodian is to protect the UTMA assets.161 The increased variety of assets which may be titled in UTMA fashion increases the risks and need for vigilance. If others wrongly obtain custodianship assets, the custodian has a duty to attempt to recover those assets from the wrongdoer or a third party.162 Custodians who received or made proper investments have needed to institute law suits to protect UTMA assets in complicated transactions resulting in litigations.163 The fact

159. See Estate of Cardulla v. Commissioner, 51 T.C.M. (CCH) 1511 (1986) (involving a dispute about whether decedent and his wife owed income taxes). One issue concerned whether numerous UGMA accounts the taxpayers created for their minor grandchildren, of which one taxpayer served as custodian, were assets owned by the taxpayers for purposes of determining their net worth. Id. at 1515. As the UGMA accounts were opened in compliance with the New York UGMA, the court held that these were not personal assets of the custodians and not included in their net worth. Id. at 1521.


161. See generally id.

162. Id. at 238. The custodian’s spouse had created and funded a UTMA account for the custodian’s son. Id. at 239. The parties separated and before their marriage was dissolved, the creator of the account forged the custodian’s signature to recover the account assets for himself. Id. When the custodian discovered the wrongdoing, she sued the brokerage firm in which the UTMA account was invested for breach of contract, and sued the bank in which the wrongdoing grantor deposited the account proceeds by forging the custodian’s endorsement. Snow, 580 So. 2d at 240. Financial institutions are not liable for the improper titling of assets in a custodianship name or for the improper withdrawal and expenditure by the custodian. Id. at 243. In Gale v. Harbor Federal Savings & Loan, 571 So. 2d 114, 115 (Fla. 4th Dist. Ct. App. 1990), a guardian titled assets owned by a minor in a custodianship account rather than a guardianship. The guardian was the minor beneficiary’s mother. Id. When it was discovered that the guardian dissipated the UGMA account for her personal benefit, she was removed as guardian. Id. The successor guardian unsuccessfully sued the financial institution in which the UGMA account had been maintained, in an effort to recover the monies lost. Id. Because the court had not ordered a restricted account in the guardianship, the financial institution was not liable for the mother’s breach of fiduciary duties. Id.

163. See Simon v. New Haven Bd. & Carton Co., 393 F. Supp. 139 (D. Conn. 1974). In that case, the plaintiff was a custodian of stock under the New York UGMA. Id. When the corporation whose stock the custodian held became involved in a questionable merger with several Florida corporations, the custodian instituted a stockholder’s derivative suit. Id. at 140.; see also Kahn v. Chase Manhattan Bank, 760 F. Supp. 369 (S.D.N.Y. 1991) (custodians instituted an action for RICO violations against a brokerage firm, its employees and counsel arising from allegedly fraudulent securities transactions); Rabinowitz v. Cont’l-Wirt Elecs. Corp., No. 86-1537, 1987 WL 14687, at *1 (E.D. Pa. Nov. 13, 1987) (involving disputes about a stockholders agreement where some shares in the closely held corporation were held in an UGMA account); Goldstein v. Rusco Indus., Inc., 351 F. Supp. 1314 (E.D.N.Y. 1972) (mother commenced an action as custodian of her son’s UGMA account for alleged federal securities laws violations by a company whose stock was owned in the UGMA account).
that stock, or other assets, involved in the lawsuits is owned by a UTMA account frequently has no legal impact on the lawsuit. The point is that by virtue of asset ownership, the custodian may become involved in litigation. Cases exist nationwide in which custodians are instituting or otherwise becoming parties to suits in connection with the purchase or ownership of securities in UTMA accounts or the actions of the publicly traded companies whose stock is owned by UTMA accounts. Institution of, or participation in these lawsuits by the custodian may be necessary for the custodian to avoid liability to the beneficiary for breach of fiduciary duties. The custodian may be made a defendant in such a lawsuit.

One issue which may arise in such litigation is which court has jurisdiction, particularly where the custodian and the asset are located in one state, but the minor beneficiary resides in another state. While in other contexts, courts frequently distinguish a custodianship from a trust, in deciding jurisdictional issues, the court may analogize a custodianship to a trust. Where a custodian attempted to establish diversity jurisdiction in federal court based on the minor beneficiary’s state of residence, the court determined that it was the custodian’s residence which controlled. For this purpose, the court

166. Knowledge of both the creator of a UTMA account and a custodian about the potential for lawsuits, may influence decisions about what is a proper asset to contribute to a UTMA account and whether investments should be made or retained in a UTMA account.
169. Id.
170. Id. at *2. A Connecticut UGMA account had been created, under statutes which provided that legal title to custodianship property was vested in the minor beneficiary. Id. at *1. The court stated:

The fact that the beneficiary has indefeasibly vested legal title to the custodial property does not mean that his title is exclusive or absolute. . . . [T]he beneficiary is not entitled to have all of the custodial property released to him until he attains the age of 21. Certainly, therefore, the beneficiary’s title is not absolute. What has been created here is a trust, albeit under a different name, and the creation of a trust entails the separation of legal and equitable title, and the vesting of legal title in the trustee (custodian).

Id. (citations omitted); see also Thompson v. Sundholm, 726 F. Supp. 147 (S.D. Tex. 1989). In that case, the plaintiff attempted unsuccessfully to establish diversity jurisdiction premised on alleged creation of Texas UGMA transfers. Id. at 149. The court held that the plaintiff’s
viewed the custodian as similar to a trustee, and ruled it was the custodian's residence which was relevant to determining whether diversity jurisdiction existed.\footnote{171}

Custodians are, and should be, liable for their improper use of UTMA assets. Actions have been instituted against custodians for their failure to account for UTMA assets, improper transfer of UTMA assets into their names individually, and fraudulent transfer of UTMA assets into the names of persons other than the minor beneficiary of the account.\footnote{172} A custodian is liable to the minor beneficiary for using funds in the custodianship account for personal living expenses of the custodian.\footnote{173} Such action gives rise to a debt owed by the custodian to the minor which is not dischargeable in bankruptcy.\footnote{174}

actions in endorsing a check as payable to two named minors did not comply with Texas statutory requirements to create a UGMA account. \textit{Id.} at 150.

\footnote{171. See generally Von Ritter, 1992 WL 175535, at *1.}

\footnote{172. See Elliott v. Kiesewetter, 98 F.3d 47 (3d Cir. 1996). In Elliott, prior to his death, a wealthy father placed his assets in the name of his son, an attorney with a masters in tax law. \textit{Id.} at 51. Assets were owned by the son, individually and as custodian for his father's minor grandchildren. \textit{Id.} The understanding was that the son would manage the father's wealth for the benefit of all family members. \textit{Id.} The son thereafter misappropriated assets and transferred some of them into his wife's name. \textit{Id.} at 50. Decedent's other children, for themselves and as natural guardians of their minor children, instituted actions for accounting, breach of fiduciary duties, fraud, unjust enrichment, and violations of the UGMA. \textit{Elliott}, 98 F.3d at 50. The action was commenced against the son with respect to assets in UGMA accounts and other assets the son held in a fiduciary capacity. \textit{Id.}}

\footnote{173. See \textit{In re Johns}, 181 B.R. 965 (Bankr. D. Ariz. 1995). In this case, the father established UGMA accounts for his minor son, both before and after the father's divorce from the son's mother. \textit{Id.} at 967. The father was the custodian of the accounts. \textit{Id.} Thereafter, the father withdrew most of the funds in the accounts and spent them for his own benefit. \textit{Id.} When the son sought to collect the monies and have the debt owed to him declared nondischargeable in the father's bankruptcy, the father unsuccessfully presented two arguments. \textit{Id.} at 969–72. First, the father claimed that Arizona's repeal of UGMA and replacing it with UTMA somehow canceled UGMA accounts opened prior to the repeal. \textit{Johns}, 181 B.R. at 972. Second, the father asserted that he only intended the UGMA accounts to be used for the son's college education, and the son's failure to attend college justified the father's use of account assets for himself. \textit{Id.} at 969. The court rejected both arguments. \textit{Id.} at 969–72.}

\footnote{174. \textit{Id.} at 975; see also \textit{In re} Merrill, 246 B.R. 906, 912 (Bankr. N.D. Okla. 2000) (involving a parent who established a UTMA account in Oklahoma for his minor child, and thereafter withdrew sums from the account to invest in an oil and gas venture in the father's name as trustee of another trust). Despite the fact that the funds allegedly initially came from this other trust, once they were placed in a UTMA account, an irrevocable transfer occurred which could not be changed. \textit{Id.} at 913. The UTMA statutes, not any separate trust agreement, controlled the ownership, management, investment, and distribution of the funds thereafter. \textit{Id.} The court further ruled that when a fiduciary, including a custodian of a UTMA account, breaches a duty imposed by law, the debt that thereby arises is a defalcation which is not dischargeable in bankruptcy. \textit{Id.} at 922.}
However, where the custodian unwittingly makes unwise investments of UTMA account assets, the custodian may need to defend her decisions and even litigate to retain the benefits of them for the minor beneficiary. In one instance a donor created UGMA accounts in Colorado for her minor children. She then invested the accounts in what was later disclosed to be an unlawful Ponzi scheme. Before the discovery was made and before the entities operating the scheme went bankrupt, the custodian received a return well in excess of her investment. Once the partnerships filed bankruptcy, the bankruptcy trustee unsuccessfully attempted to recover the profit from the custodian.

A custodian may be liable to the beneficiary for breaches of other duties. Another duty of a custodian is to segregate the UTMA assets from other wealth owned by the custodian either personally or in another fiduciary capacity. Fulfillment of this duty can be particularly important when the person serving as custodian owes debts unconnected with the custodianship or files personal bankruptcy. Others may also be penalized for wrongful conduct of a custodian with reference to a minor’s funds.
IX. REMOVAL OF CUSTODIAN

While the *Florida Statutes* address removal of trustees\(^{183}\) and provide grounds for removal of personal representatives,\(^{184}\) no statute exists setting forth grounds for removal of a custodian. Section 710.121 of the *Florida Statutes* references removal of a custodian in its caption, and identifies who has standing to seek removal of a custodian.\(^{185}\) What constitutes cause for removal is not specified by statute. Breach of the custodian's fiduciary duties should constitute ground for removal. Clients should be informed of the uncertainty in the law regarding the basis and procedures for seeking removal of a custodian.

X. RELOCATION OF UTMA ACCOUNTS

For a UTMA account to be initially created in Florida, the transferor, the minor, or the custodian must be a Florida resident.\(^{186}\) If a UTMA account is initially created in another jurisdiction, the account may be moved to Florida.\(^{187}\) If it was created under a similar law, its terms may be enforced in Florida.\(^{188}\) If the account was initially established in another jurisdiction in which the statutes governing UTMA accounts differ from those in Florida, the account remains subject to the statutes under which it was initially created.\(^{189}\) A practical problem which arises is whether the brokerage firms, banks, or other financial institutions in Florida to which the account is transferred, note the differences or adhere to the applicable foreign law. However, other issues exist. To illustrate, as the standard of care to which a custodian is held in investing assets may differ from one state to another, confu...

\(^{183}\) §§ 737.201(1)(a), 737.205. Section 737.201(1)(a) of the *Florida Statutes* grants the circuit court jurisdiction in actions to remove a trustee, and section 737.205 of the *Florida Statutes* governs institution of such proceedings.

\(^{184}\) Sections 733.504 and 733.505 of the *Florida Statutes* grant the circuit court jurisdiction in actions to remove a trustee, and section 737.205 of the *Florida Statutes* governs institution of such proceedings. *Florida Probate Rule 5.440* provides further procedures applicable to removal of a personal representative.

\(^{185}\) The creator of the UTMA account, his or her legal representative, an adult member of the minor beneficiary's family, the guardian or conservator of the minor beneficiary, or the minor beneficiary if he or she is over the age fourteen, may institute suit to remove and replace a custodian. § 710.121.

\(^{186}\) § 710.103(1); 28 FLA. JUR. 2d Gifts § 24 (1998).

\(^{187}\) § 710.103(3).

\(^{188}\) Id.

\(^{189}\) Id.
sion may occur if attention is not paid to the standard set by the state of the account's creation after the account is moved to a new state. In addition, some states preclude or limit spending from UTMA accounts to discharge a parental obligation of support when the minor beneficiary's parents have sufficient assets to meet these obligations, while other states do not. Care must be taken to assure that, if a UTMA account is relocated, the laws applicable in the state of its creation are still applied adhered to and to the account.

If a UTMA account is initially established in Florida, although the minor beneficiary and the custodian thereafter leave the state and move the account to another state, Florida law states the custodianship will survive.\textsuperscript{190} When a UTMA account is relocated to another state, the custodian remains subject to personal jurisdiction in the state in which the account was created.\textsuperscript{191}

XI. TERMINATION OF CUSTODIANSHIP

Just as questions may arise about whether a transfer under UTMA was intended and in fact occurred, issues may arise concerning whether the custodianship assets were distributed and the custodianship was terminated.\textsuperscript{192} Florida Statutes are silent about the procedures for terminating a UTMA account, the documents to be executed, and what constitutes termination. In another state, where a grandmother purchased stock and titled it in her name as custodian for her minor grandchildren; forwarded all original stock certificates she received to the grandchild's parent; endorsed and forwarded dividend checks to the grandchild's parent; and forwarded stock dividends to the grandchild's parent until shortly before the grantor's death when she was too ill to forward documents; the court held that the grantor manifested an intent to relinquish all of her rights as custodian during her life.\textsuperscript{193}

To avoid such complications and the litigation they generate, when a custodian resigns or intends to distribute custodianship assets, it is advisable for the assets to be promptly retitled and a clear written record created.

\begin{itemize}
\item \textsuperscript{190} James R. Ledwith & Mary Ann Robinson, \textit{Expanded Opportunities Available Under Uniform Transfers To Minors Act}, 13 \textit{EST. PLAN.} 258, 260 (1986).
\item \textsuperscript{191} \textit{Id.}
\item \textsuperscript{192} Estate of Vogel v. Commissioner, 36 T.C.M. (CCH) 875 (1977).
\item \textsuperscript{193} \textit{Id.} at 876–77. That case involved Minnesota UGMA accounts for a minor beneficiary residing in Oklahoma. \textit{Id.} at 876. The Minnesota UCC allowed a transfer by gift of a security to be completed on delivery without endorsement by the donor. \textit{Id.}
\end{itemize}
XII. TAX CONCERNS

There are income tax, estate tax, and gift tax consequences to creation and ownership of UTMA accounts. The grantor of a UTMA account is frequently attempting to diminish his or her taxable estate by making annual tax free transfers for younger family members to UTMA accounts. Thus, the first concern becomes whether the transfers to the UTMA accounts are free of gift tax. A transfer of assets to a UTMA account is a completed gift for federal gift tax purposes.\textsuperscript{194} If the transfers to a UTMA account in any given year per grantor do not exceed the $10,000.00 limit, transfers may qualify for the annual gift tax exclusion under section 2503 of the \textit{Internal Revenue Code}.\textsuperscript{195} The value of the gift is the fair market value of the asset transferred to the UTMA account at the time of the transfer.\textsuperscript{196} However, the fact that a transfer to a UTMA account is a completed gift for federal gift tax purposes does not mean that the UTMA account assets are excluded from the taxable estate of grantor.\textsuperscript{197}

The fact that a completed gift has occurred for federal tax purposes also does not mean that there are no income tax consequences flowing from the

\begin{footnotes}
\footnote{194. Rev. Rul. 59-357, 1959-2 C.B. 212. A bona fide transfer with economic substance must have occurred for the creation of a custodianship arrangement to be recognized for federal income tax purposes. \textit{Duarte v. Commissioner}, 44 T.C. 193, 197 (1965). In that case the taxpayer was the sole owner of all stock in a corporation. \textit{Id.} at 193. He issued stock certificates reflecting that he transferred half of his stock to his spouse as custodian for his two minor sons. \textit{Id.} at 194. Taxpayer filed a federal gift tax return reflecting the transfers, although no gift tax was due. \textit{Id.} at 195. He then made an S election for the corporation, and otherwise continued to solely operate the corporation’s business. \textit{Id.} However, he reported one-fourth of the profits as income to each of his minor sons, despite the fact that no distributions were ever made. \textit{Duarte}, 44 T.C. at 195. The court determined that the purported transfers lacked economic reality. \textit{Id.} at 196. As such, donor owed income tax on all profits of the corporation. \textit{Id.; see also} \textit{Beime v. Commissioner}, 52 T.C. 210, 220 (1969).}

\footnote{195. Rev. Rul. 59-357, 1959-C.B.212. If the value of assets transferred to the UTMA account results in the payment of gift tax, and the UTMA account is included in donor’s taxable estate, section 2012 of the \textit{Internal Revenue Code} may allow a credit for gift tax paid against federal estate tax owed by a donor’s estate. Rev. Rul. 59-357, 1959-2 C.B. 212.}

\footnote{196. Rev. Rul. 56-86, 1956-1 C.B. 449.}

\footnote{197. \textit{See, e.g.}, \textit{Ritter v. United States}, 297 F. Supp. 1259, 1262 n.1 (S.D. W. Va. 1968) (citing \textit{Estate of Varian v. Commissioner}, 47 T.C. 34 (1966)). This case involved a grantor who created irrevocable \textit{inter vivos} trusts for his minor children, of which he was the trustee, rather than UTMA accounts. \textit{Id.} at 1260. However, grantor retained for himself trustee powers and discretions strikingly similar to those a custodian of a UTMA account would have. \textit{Id.} at 1262.}
\end{footnotes}
Once a UTMA account is created and funded, a change in the custodian is not a taxable event and does not result in a taxable gift.

The next concern is whether the UTMA account is included in the taxable estate of grantor or the custodian under sections 2036 or 2038 of the Internal Revenue Code. Section 2036(a)(2) of the Internal Revenue Code generally provides that a decedent’s gross estate for federal estate tax purposes includes any assets transferred by decedent, other than transfers for full and adequate consideration, in which decedent retained the right to determine alone or with another, who shall possess or enjoy the property gifted or the income thereon. Similarly, under section 2038(a) of the Internal Revenue Code, a decedent’s gross estate for federal estate tax purposes includes assets transferred during life by decedent, other than for full and adequate consideration, if decedent retained the right, alone or with another, “to alter, amend, revoke, or terminate” enjoyment of the asset.

If the custodian of the UTMA account is not the grantor or the spouse of the grantor of the account, then assets in the UTMA account are not generally included in either the grantor’s or the custodian’s taxable estate for federal estate tax purposes. If the grantor serves as custodian of the account, the balance in the account is included in grantor’s gross estate for federal estate tax purposes. The broad powers of a custodian to use and spend assets, as

198. Basis issues and assignment of income issues can arise with respect to gifts to UTMA accounts, just as they arise with other inter vivos gifts. To illustrate, in *Peterson Irrevocable Trust #2 v. Commissioner*, 51 T.C.M. (CCH) 1300 (1986), a taxpayer transferred stock in a corporation by whom he was employed to his wife as custodian for his minor children. *Id.* at 1301. The transfers were made immediately prior to the sale of the corporation’s stock to a third party, and before the contract for that sale was signed. *Id.* at 1311–12. The court determined that at the time of the transfer the taxpayer had reason to know that the stock would shortly be sold. *Id.* at 1319. Hence, the taxpayer-transferor was responsible for reporting and paying income tax on the gain realized on the stock sale. *Id.* Similarly, where a father was custodian for his minor children and regularly traded their custodianship brokerage accounts, the father rather than the children had to report and pay income tax on gains where he transferred stock to his children after he knew a merger could occur. Estate of Applestein v. Commissioner, 80 T.C. 331, 342 (1983). The court stated that:

where the right to income has matured at the time of the transfer, the transferor will be taxed notwithstanding the technical transfer of the income-producing property. However, the mere anticipation or expectation of income at the time of the assignment is insufficient to give rise to a fixed right to earned income.

*Id.* at 345. The court did not alter its conclusion because the custodian sold the stock to the children at a bargain price as opposed to gifting it for no consideration. *Id.* at 346.

201. § 2038(a)(1).
202. §§ 2036(a)(1), 2038(a)(1). In Revenue Ruling 57-366, 1957-2 C.B. 618, the I.R.S. analogized the UTMA account to a trust, and stated:
well as invest and distribute, cause the account assets to be included in a custodian’s estate when the custodian is the creator of the account. Where the grantor/custodian is the parent of the minor beneficiary, this conclusion has been based at times on the fact that UTMA account assets may be expended to satisfy the custodian’s obligation to support the minor beneficiary. It is irrelevant that the parent who creates the account and serves as UTMA account custodian never uses account assets to discharge the parent’s legal support obligation to the minor beneficiary. The mere power to use assets in this fashion results in inclusion of the entire account balance in the parent-

_id_. (citations omitted). In Revenue Ruling 70-348, 1970-2 C.B. 193, the I.R.S. further ruled that even if powers to alter, amend, revoke or terminate enjoyment of custodianship property are not retained by the grantor/custodian at his death, the mere possession by grantor of the custodianship assets causes inclusion in his taxable estate. This rule applies even if the beneficiary of the account has been emancipated by marriage and is no longer a minor for state law purposes. 

_Eichstedt v. United States_, 354 F. Supp. 484, 487 (N.D. Cal. 1972); _see also Stuit v. Commissioner_, 54 T.C. 580, 582 (1970); _Estate of Jacoby v. Commissioner_, 29 T.C.M. (CCH) 737 (1970). In _Estate of Jacoby_, a grandfather titled shares of stock in a closely held corporation in his name as custodian for his minor grandchild. _Id._ All dividends thereafter on the shares owned in custodianship were deposited in a bank account in the name of the grantor as custodian for the minor grandchild. _Id._ at 738. On the grantor’s death, the Tax Court held that both the value of the stock and the UGMA bank account were included in grantor’s taxable estate under section 2038 of the _Internal Revenue Code_. _Id._ at 740. Revenue Ruling 70-348, 1970-2 C.B. 193 likewise stated that where the donor of assets to a UGMA account was the successor custodian of the account for his minor children, his wife having been the initial custodian who resigned, the value of the account was included in the donor’s estate at his death under section 2038 of the _Internal Revenue Code_.


204. _See Estate of Chrysler v. Commissioner_, 44 T.C. 55 (1965), _rev’d on other grounds_, 361 F.2d 508 (2d Cir. 1966); _Estate of Carpousis_, 33 T.C.M. (CCH) at 1143. Similarly, in _Estate of Prudowsky v. Commissioner_, a father opened UGMA accounts for his three minor children and titled securities in his name as custodian for his minor children. 55 T.C. 890, 892 (1971). On his death the court held that the custodianship assets were included in his federal taxable estate. _Id._ at 895. The court stated that “where one who has a legal obligation of support transfers property to himself as custodian under a Uniform Gifts to Minors Act . . . he thereby retains the power to apply said assets in satisfaction of his legal obligation” to support the minor beneficiary. _Id._ at 894. As such, section 2036(a) of the _Internal Revenue Code_ mandates inclusion of custodianship assets in the custodian’s taxable estate.
custodian’s estate at the parent’s death, when the parent was both grantor and custodian of the account. Where grantor is the custodian, inclusion of UTMA assets in grantor’s estate may also be based on the custodian’s power to terminate and distribute the assets.

The same conclusion is reached that the UTMA account assets are included in the grantor/custodian’s taxable estate where the grantor is not the beneficiary’s parent and has no legal obligation to support the beneficiary. As the custodian of a UTMA account controls when principal and income are enjoyed by the beneficiary, on the custodian-grantor’s death prior to full distribution of the UTMA account, the value of the account may be included in the custodian/grantor’s taxable estate.

To avoid inclusion in the grantor’s estate of UTMA account assets, a parent might attempt to create UTMA accounts for her children, naming her spouse as custodian. If only one parent creates a UTMA account for the parties’ minor child and names the other parent as custodian, the UTMA account may escape inclusion in the grantor’s estate. However, where both parents of the minor simultaneously engage in similar transactions, each creating a UTMA account for the minor child, and each naming the other parent as custodian, the reciprocal trust doctrine precludes exclusion of the UTMA account assets from the deceased grantor’s estate. Where such tactics were
tried, the court recognized that each parent could just have easily created a
UTMA account of which he or she was the custodian. Had that been done,
upon the death of the grantor-parent while serving as custodian, the UTMA
account value would have been included in the deceased custodian’s estate.
There was no reason to alter the estate tax outcome merely because each
grantor named his spouse as custodian rather than himself. This conclu-
sion follows even if estate tax avoidance was not the factor motivating cre-
ation of the reciprocal UTMA accounts. In light of the foregoing, at a
minimum both parents of the minor should not be creating UTMA accounts
for their children on which their spouse is the custodian. A more conserva-
tive approach to avoid adverse estate tax consequences to the parent-grantor
would be to have someone other than the minor beneficiary’s parent or the
grantor serve as custodian.

When the grantor/custodian dies, further inquiry may be warranted to
determine if there is a basis for excluding the assets titled in grantor’s name
as custodian from grantor’s taxable estate. If grantor, during grantor’s life,
took action reflecting intent to resign as custodian, relinquish grantor’s rights
as custodian, or distribute the custodianship assets to the minor beneficiary,
the custodianship assets may avoid inclusion in grantor’s taxable estate.

spouse is a life beneficiary and decedent’s issue or other beneficiaries are designated, and
decedent’s spouse created an identical trust. United States v. Estate of Grace, 395 U.S. 316,
325 (1969). In Estate of Grace, the trusts were interrelated, being part of a mutual scheme or
plan of grantors to benefit each other and the same remainder beneficiaries. Id. The arrange-
ment left the grantors in essentially the same position as they would have been in had they
each created a trust for their own benefit as opposed to their spouse’s benefit. Id. The outcome
where irrevocable trusts were created was that the assets in the trust created by decedent
were included in the grantor’s gross estate for federal estate tax purposes. Id.

See Exch. Bank & Trust Co. of Fla. 694 F.2d at 1261. A husband and wife both
purchased and inherited real property. Id. at 1262. They formed a corporation of which they
were both shareholders, and then each gifted shares of stock in the closely held corporation to
their spouse as custodian for the couple’s minor children. Exch. Bank & Trust Co. of Fla. v.
United States, 694 F.2d 1261, 1262 (Fed. Cir. 1982). The couple repeated these gifts to
UGMA accounts four different times between 1960-1962. Id. When the husband died he was
custodian of UGMA accounts for his two minor children. Id. His surviving spouse was like-
wise custodian of two UGMA accounts for the same minor children. Id. The I.R.S. success-
fully claimed that the UGMA accounts of which decedent was custodian for his minor
children were included in his taxable gross estate. Id. at 1263.

Nor does it matter that each parent funded the UTMA account with
his or her separately owned earned assets. See id. at 1266.

Estate of Vogel v. Commissioner, 36 T.C.M. (CCH) 875, 877-78 (1977). In Estate
of Vogel, a grandmother titled stock in her name as custodian for her minor grandchildren
under Minnesota UGMA. Id. at 876. She thereafter forwarded the original stock certificates
to the minors’ parent. Id. When stock dividends or cash were received, they too were sent by
grantor to the beneficiaries’ parent. Id. Shortly before grantor’s death a stock dividend was
received by grantor. Id. Due to advanced age and illness, these last shares were not for-
Furthermore, if the decedent was custodian for his minor child at the decedent’s death, but the decedent was not the grantor or transferor of the assets, the UTMA assets may be excluded from the decedent’s taxable estate.\textsuperscript{213} If a grantor desires to avoid inclusion in assets gifted during life in his taxable estate, grantor’s purpose may be accomplished by selection of a proper custodian or by creation of an irrevocable trust for the minor.\textsuperscript{214}

The final tax question is who is responsible for reporting and paying income tax on the income earned in the UTMA account. Income earned on a UTMA account is generally taxable income to the minor beneficiary, whether or not income is distributed to or expended for the minor, or retained in the account and accumulated.\textsuperscript{215} The minor beneficiary, not the grantor, was awarded and remained in the custodian’s possession at her death. \textit{Estate of Vogel}, 36 T.C.M. (CCH) at 877. The I.R.S. argued that all shares were included in the grantor’s taxable estate, because they were all titled in her name as custodian at her demise. \textit{Id.} at 876. The court agreed with the taxpayer’s position that the grantor had effectively distributed all custodianship assets and her actions evidenced intent to release all custodianship powers. \textit{Id.} at 877. In light of these distributions, the stock certificates titled in custodianship name but delivered to the beneficiaries’ parent were not included in decedent’s taxable estate. \textit{Id.} at 877–78.

\begin{itemize}
\item \textsuperscript{213} \textit{Estate of Folks v. Commissioner}, 43 T.C.M. (CCH) 427, 436 (1982). In \textit{Estate of Folks}, Mr. Folks, at his death, owned stock in a closely held corporation in his name as custodian for his minor child. \textit{Id.} That custodianship was established pursuant to a contract under which decedent’s mother transferred the shares to decedent as custodian in exchange for valuable consideration. \textit{Id.} at 430. Because the stock was transferred from decedent’s mother rather than from decedent, the shares were not included in decedent’s taxable estate. \textit{Id.} at 436.
\item \textsuperscript{214} See \textit{Estate of Chrysler v. Commissioner}, 44 T.C. 55 (1965). In that case assets in irrevocable trusts created by decedent for the benefit of his minor children remaining in the trusts at grantor’s death were not included in his taxable estate. \textit{Id.} However, the securities titled in decedent’s name as custodian for his minor children, located in a safe deposit box jointly rented by decedent and his spouse, were included. \textit{See id.} No other documents were in the safe deposit box. \textit{Id.} at 58. Both sections 2036 and 2038 of the \textit{Internal Revenue Code} justified the court’s conclusion. \textit{Id.} at 68–69.
\item \textsuperscript{215} \textit{Anastasio v. Commissioner}, 67 T.C. 814, 818 (1977). In that case a twenty-year-old purchased a lottery ticket and won $100,000.00 from the New York State lottery. \textit{Id.} at 815. As he was a minor, under applicable law, the lottery winnings were paid to his parents as custodians and deposited in a UGMA account. \textit{Id.} For the following year, when the child attained age twenty-one, the parents filed a fiduciary federal income tax return reporting the lottery winnings and interest earned thereon, as well as the distribution of all sums to the lottery winner. \textit{Id.} Taxpayer’s argument that he should not be liable for income tax on the winnings until they were distributed to him from the UGMA account was rejected. \textit{Id.} at 815–16. As the taxpayer had all economic benefits of his winnings in the year he won the lottery, subject only to the UGMA requirements that his parents invest the monies until the taxpayer was age twenty-one, the economic benefit theory justified requiring the minor to report and pay income tax on his winnings and the interest thereon in the year he won the lottery and the winnings were deposited into a UGMA account for his benefit. \textit{Anastasio}, 67 T.C. at 817–18. The court declined to treat the UGMA account as if it were a trust, hence tax alternatives.
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tor/custodian, is entitled to deductions for any losses suffered on investments.\(^{216}\)

However, if the grantor is custodian of the UTMA account, and after its creation and funding, he uses account assets for personal investments titled in his name individually; the court may find that a completed gift to the UTMA account did not occur for federal income tax purposes.\(^{217}\) Where after a transfer of title of an asset from grantor to grantor as custodian, grantor has not relinquished dominion and control over the asset, but instead retains dominion, control, and the economic benefit of the asset for himself personally, a completed gift for federal income tax purposes has not occurred.\(^{218}\) This could result in all income and gains on the UTMA account being taxable to grantor personally.\(^{219}\)


In Roman, the father of a child contributed assets to a UGMA account of which the father served as custodian and his minor child was a beneficiary. \(\text{Id.}\) The account was opened and maintained at a discount broker, and funds in the account were used to purchase securities. \(\text{Id.}\) When the securities declined in value, the custodian sold them at a loss. \(\text{Id.}\) The sale occurred after the date on which the son was entitled to receive the account under applicable law. \(\text{Id.}\) The custodian’s attempt to claim the loss on his personal income tax return was unsuccessful. \(\text{Roman, 1997 WL 122832, at *8.}\) The account was properly titled in the father’s name as custodian for his son, the son’s social security number was on the account, and all brokerage statements were issued to the father as custodian. \(\text{Id.}\) The son, rather than the grantor/custodian, was to report any income and was entitled to deductions for losses. \(\text{Id.}\)


\(^{218}\) See \(\text{id.}\) at 457.

\(^{219}\) Id. at 458. In Gray, a donor owned a substantial number of shares of stock in a closely held bank corporation, and was a member of the Board of Directors of the bank. \(\text{Id.}\) at 454–55. At a time when he claimed to have no knowledge of a proposed merger of that bank with another financial institution, and as part of his estate plan, he transferred shares of bank stock to himself as “guardian” (rather than custodian) for his minor children. \(\text{Id.}\) at 455. While the donor may have been unaware of the proposed merger, information about it was available. \(\text{Gray, 738 F. Supp. at 455.}\) The donor failed to file gift tax returns reflecting the transfers, although his accountant informed him that they were due. \(\text{Id.}\) Donor retained possession of the stock certificates after the alleged transfers to his minor children. \(\text{Id.}\) at 457. When the merger occurred and the shares were redeemed, he accepted checks for all shares, and although three checks were payable to him as custodian, he deposited all funds in his personal account. \(\text{Id.}\) at 455. He then used the funds to purchase certificates of deposit, one of which was titled solely in his name, and thereafter continued investing the funds for himself. \(\text{Id.}\) at 455–56. As donor commingled the funds with his own after the alleged gifts to his UTMA accounts, and at all times retained dominion, control and economic benefit of the stocks transferred and their proceeds, the court held that an irrevocable transfer to UTMA accounts had not occurred for federal gift tax purposes. \(\text{Gray, 738 F. Supp. at 457.}\) The court held that the grantor was subject to tax on the gains on the stock sales and interest income available with a trust were not available to custodians of a New York UGMA account. \(\text{Id.}\) at 818. The so-called “kiddie tax” may lessen the income tax benefits of transfers to UTMA accounts. I.R.C. § 1(g) (2000).

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Owners of stock in closely held corporations, at times, have attempted to shift income and profits of the corporation to minors in a lower income tax bracket with mixed results. Merely titling the stock in custodianship name and delivering the stock to the custodian, combined with filing income tax returns for the minor reflecting receipt of income from the corporation, will not suffice to shift the income tax burden to the minor.\(^{220}\) However, where the facts indicate that the grantor relinquished control over the gifted shares and the custodian took action to protect the shares gifted and the minor’s beneficiary interest in the corporation, the transfer may be respected for income tax purposes.\(^ {221}\)

Similarly, where a grantor transfers assets to a custodianship account for his children, he continues to manage the accounts, solely directs all trades in the accounts, personally provides loans to the custodianship account to make further investments without promissory notes or definite interest rates or repayment dates, and repays the loans with profits from trades at his own discretion, the grantor is liable for income tax on all gains realized on the custodianship accounts.\(^ {222}\) Because the grantor/custodian continued to personally use the custodianship assets, retained total control over them, and the minor beneficiaries received no present benefit, the income tax burden was not shifted to the children.\(^ {223}\)

However, where a grantor transferred limited partnership interests to his wife, as custodian for the couple’s minor children, in exchange for consideration gifted by the grantor to the minors, the court upheld the children’s liability for income tax on partnership income.\(^ {224}\) The court reached this conclusion despite the facts that the grantor continued to operate the business as general partner, and the custodian was not sufficiently educated or informed to protect the interests of the minor beneficiaries.\(^ {225}\)

As noted above, income earned on a UTMA account is generally required to be reported for federal income tax purposes by the minor beneficiary, and it is this beneficiary who pays any income tax due. An exception

\(^{220}\) See Duarte v. Commissioner, 44 T.C. 193, 197 (1965).

\(^{221}\) Kirkpatrick v. Commissioner, 36 T.C.M. (CCH) 1122, 1126 (1977).


\(^{223}\) Id. at 351.

\(^{224}\) Sharon v. Commissioner, 57 T.C.M. (CCH) 1562, 1563 (1989) (providing an example of real estate and partnership interests owned by a father/donor/custodian and managed in UGMA accounts for his daughters); Garcia v. Commissioner, 48 T.C.M. (CCH) 425, 427, 437 (1984). The UGMA accounts were upheld for income tax purposes. Sharon, 57 T.C.M. (CCH) at 1568.

\(^{225}\) Garcia, 48 T.C.M. (CCH) at 436.
exists if the income is used for the support of the minor. In that situation the person legally obligated to support the minor must report the income and pay any tax due.\textsuperscript{226} This is true regardless of the relationship between the grantor or custodian and the beneficiary.\textsuperscript{227}

While the minor is taxed on the income earned by the UTMA account, there are situations under the federal tax law where the grantor/custodian may be treated as owning the assets in the account. For example, in \textit{Robishaw v. United States},\textsuperscript{228} a question arose concerning whether a taxpayer owned more than eighty percent of the outstanding stock of a corporation.\textsuperscript{229} If he did, capital gain treatment of a sale could be denied.\textsuperscript{230} The shares in the corporation held by the grantor/custodian in a UGMA account for his minor child were, for the purpose of the litigation in \textit{Robishaw}, treated as owned by the taxpayer.\textsuperscript{231}

Questions concerning the validity and effectiveness for federal tax purposes of purported transfers of assets to custodianship accounts arise in connection with other tax issues, such as whether the payor of sums to a UGMA account is entitled to a deduction for interest expense,\textsuperscript{232} and the proper basis of assets for depreciation purposes.\textsuperscript{233} The outcome frequently depends on the extent of control retained by a grantor after the transfers to custodianships.\textsuperscript{234} Where the transfer to the minor was not to a UTMA account, but

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\item \textsuperscript{226} Rev. Rul. 56-484, 1956-2 C.B. 23; Rev. Rul. 59-357, 1959-2 C.B. 212; Rev. Rul. 70-348, 1970-2 C.B. 193; Estate of Cardulla v. Commissioner, 591 T.C.M. 1512 n.8 (1986); see also T.J. Henry Assocs., Inc. v. Commissioner, 80 T.C. 886, 889 (1983); Garriss Inv. Corp. v. Commissioner, 43 T.C.M. (CCH) 396 (1980). \textit{Garriss} involved a situation in which a mother opened joint bank accounts with her children, deposited monies in the accounts, and used monies in the accounts for the support of her children. \textit{Garriss}, 43 T.C.M. (CCH) at 400. The court referenced the North Carolina UGMA, and noted that "when a parent makes a gift to a child under [UGMA], income from the gift that is used to support the child is taxable to the person who is legally liable for such support." \textit{Id.} at 405-06.
\item \textsuperscript{227} Rev. Rul. 56-484, 1956-2 C.B. 23.
\item \textsuperscript{228} 616 F.2d 507 (Ct. Cl. 1980).
\item \textsuperscript{229} \textit{Id.} at 510.
\item \textsuperscript{230} \textit{Id.}
\item \textsuperscript{231} \textit{Id.} at 511.
\item \textsuperscript{232} Trans-Atlantic Co. v. Commissioner, 1970 WL 1834, at *15 (Nov. 3, 1970). In that case, shareholders in a corporation assigned debentures owed by the corporation to trusts for the benefit of their minor children. \textit{Id.} at *3. The trusts permitted payments to UGMA accounts for the minor trust beneficiaries. \textit{Id.} at *4. The court held that the payments on the debentures were not interest deductible by the corporation. \textit{Id.} at *15.
\item \textsuperscript{233} D'Angelo Assocs., Inc. v. Commissioner, 70 T.C. 121, 128 (1978).
\item \textsuperscript{234} \textit{Id.} at 132. In D'Angelo an important issue was whether section 351 of the \textit{Internal Revenue Code} applied to a series of transactions engaged in by the taxpayer. \textit{Id.} at 128. The court found that grantor remained in control of the corporation after the transfers to minors and throughout the series of transactions in question. \textit{Id.} at 131. Hence, section 351 of the
\end{itemize}
was to a trustee, and was revocable, the grantor remains liable for income tax on income earned on the account. 235

Similarly, where taxpayers own several corporations, transfer shares of stock in one corporation to family members in an effort to shift income to them, and the corporation which the taxpayers continue to own pays income to the corporation owned by the taxpayers’ relative; the transferring taxpayers remain liable for income tax on dividends paid to the taxpayers’ relatives. 236 The court stated that “the shifting of funds between corporations for the purpose of directing income to children of the common, controlling shareholder provides a direct, personal benefit to the shareholder, which gives rise to constructive dividend treatment.” 237

Cases arise concerning the transfer of closely held corporate stock to UTMA accounts. Where the stock is in an electing S-corporation, care must be taken to timely file a new selection. Failure to do so after a transfer to a custodianship results in a loss of the S-corporation status of the business. 238

XIII. EXPENSES AND FEES

Although, as a practical matter, custodians may not charge a fee for their services or incur any substantial expenses, a custodian of a UTMA account has a right to receive reasonable compensation for services performed during the year. 239 The custodian is also entitled to reimbursement for expenses reasonably incurred in managing the account. 240

Internal Revenue Code applied to the transaction as contended by the Internal Revenue Service. Id. at 136.

235. Heintz v. Commissioner, 41 T.C.M. (CCH) 429, 430-31 (1980). In that case parents deposited funds in bank accounts in their names “as joint trustees” for their minor children. Id. at 430. Documentation to open several of the accounts did not expressly indicate that the transfers were revocable, but since it was expressly stated that several of the trusts were revocable, and the other trusts did not say the trusts were irrevocable, they were also deemed to be revocable. Id. at 430–31. Because the parents had not complied with California UGMA in opening the accounts, the parents owed income tax on the interest earned on the accounts. Id. at 431.

236. See generally Bell v. Commissioner, 45 T.C.M. (CCH) 97 (1982). In that case three physicians owned a medical practice and formed a separate corporation to operate an X-ray business. Id. at 99. Shareholders transferred stock in the X-ray corporation to family members. Id. at 102.

237. Id. at 111; see Horn v. Commissioner, 45 T.C.M. (CCH) 413 (1982).


239. FLA. STAT. § 710.117(2) (2003).

240. § 710.117(1).
XIV. OTHER IMPACTS AND RISKS OF UTMA ACCOUNTS

A minor’s UTMA account may impact other legal matters. Minors are generally entitled to be supported by one or both of their parents.\(^{241}\) In a dissolution of marriage, a court may consider the assets owned by or available to a child in determining the parents’ obligations to pay child support.\(^{242}\) Courts may also consider the existence of custodianship accounts, the earnings thereon and distributions there from in determining the support provided by divorced parents for their child, the support contributed by the child, and who is entitled to a dependency exemption for the child.\(^{243}\) Courts, in the context of a divorce, may need to determine if custodianship accounts were effectively created, or if the assets in them belong to the parents as marital property or community property.\(^{244}\) Hence, the existence of a UTMA account available to a minor whose parents’ marriage is dissolved may affect the child support that either or both parents are obligated to pay. The existence of a custodianship account should also be considered in terms of potential impact on a disabled beneficiary’s eligibility for government benefits.\(^{245}\)

XV. CONCLUSION

Due to the frequent use of UTMA accounts nationwide and the benefits they may offer to donors, they warrant closer scrutiny by attorneys and more elucidation by the legislatures facilitating their operation. Attorneys, stockbrokers, accountants, bankers, and financial advisors perform a valuable ser-

\(^{241}\) § 61.13(1)(a).
\(^{242}\) § 61.30(11)(a)(2), (11)(a)(7).
\(^{243}\) See generally Muraca v. Commissioner, 47 T.C.M. (CCH) 1762 (1984). The parents in that case were divorced, and each contributed sums for the support of their minor son. \textit{Id.} at 1765. The father contributed sums to a Pennsylvania UGMA account of which he was custodian. \textit{Id.} at 1768. Stocks in the account were sold, and some of the proceeds were distributed to the son for his support. \textit{Id.} at 1768. Although the father established the account, the distributions were not considered support paid by him. \textit{Id.} However, additional contributions to the account provided by the father, which were subsequently withdrawn and used for the son’s support were considered payments by the father for dependency exemption purposes. \textit{Muraca}, 47 T.C.M. (CCH) at 1768.

\(^{244}\) See Allen v. Allen, 301 So. 2d 417, 419–20 (La. Ct. App. 1974) (rejecting the position that assets in an UGMA account were community property, due to the parties failure to comply with certain statutory formalities); see also \textit{In re Jacobs}, 180 Cal. Rptr. 234, 242 (Ct. App. 1982) (finding that donative intent to create custodianship accounts was lacking when the question arose in a divorce case).

\(^{245}\) See Cruz v. Apfel, 48 F. Supp. 2d 375, 378 (S.D.N.Y. 1999). In that case the minor was already the owner of the asset, hence the attempt to transfer to an UGMA account was invalid. \textit{Id.} The transfer attempt was an effort to render the minor eligible for government benefits. \textit{Id.} at 376.
vice for customers if they are knowledgeable about UTMA accounts and take the initiative to provide relevant information and guidance to their customers.