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Property Management and Estate Planning for Nebraska Minors

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*Leading Articles*PROPERTY MANAGEMENT AND ESTATE PLANNING
FOR NEBRASKA MINORS

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Present tax laws provide an added stimulus for the traditional benevolence which has brought minors into an economic ownership of wealth. It has become increasingly important for estate planners to consider all family members, adults and minors, present and future, and their estates, to achieve a maximum enjoyment of property for the entire family.

The purpose of this article is to evaluate the available planning methods under Nebraska law for dealing with the vexatious problems which arise from ownership of wealth by minors. This includes a consideration of the nature and extent of a minor's disability to deal with his own property; a comparison under Nebraska law of guardianships, trusts and custodianships; and some fairly clear recommendations which can be made to define the relative estate planning roles of outright gifts, with or without guardianships, trusts and custodianships.

I.

THE NATURE AND EXTENT OF A MINOR'S DISABILITY TO DEAL WITH PROPERTY.

A. MINORITY DEFINED.

For most purposes in connection with property management and estate planning, the terms "minor" and "infant" include "all persons under twenty-one years of age . . . but in case a female marries under the age of twenty-one years her minority ends."¹ This is the definition contained in the guardianship statutes.

It is not clear how broadly this definition is meant to apply

¹ NEB. REV. STAT. § 38-101 (Reissue 1960).

throughout Nebraska law. The statute has been construed to mean that a married female is "of lawful age" to convey real property.² A bequest to be accumulated in trust for beneficiaries "until they shall reach their majority" was held to be payable to a female beneficiary married under the age of twenty-one.³ And the Court has referred to this definition with respect to the term "minor child" under the adoption statutes.⁴

Recent legislation, however, has tended to specify an age. The custodianship statutes define a minor as any person who has not attained twenty-one years.⁵ The liquor control act⁶ and juvenile court statutes⁷ now employ specified ages which have eliminated former ambiguities.

To the extent that undefined usage of the term "minor" remains in the Nebraska statutes,⁸ it would seem that a female would lose her minority when she marries. A policy argument exists that a married female should retain her majority status upon the death of her spouse or divorce from him, or even after an annulment, although the questions have never been passed upon by the Supreme Court.⁹ Otherwise, third persons would be required

² NEB. REV. STAT. § 76-211 (Reissue 1958); *Ward v. Laverty*, 19 Neb. 429, 27 N.W. 393 (1886).

³ *Rotzin v. Miller*, 133 Neb. 4, 274 N.W. 190 (1937).

⁴ NEB. REV. STAT. § 43-101 (Reissue 1960); *In re* Petition of Ritchie, 155 Neb. 824, 827, 53 N.W.2d 753, 755 (1952).

⁵ NEB. REV. STAT. § 38-1001(11) (Reissue 1960).

⁶ NEB. REV. STAT. § 53-103(21) (Supp. 1961). Previously, the Attorney General had ruled that the statute prohibiting procuring alcoholic liquors "to or for any minor" contemplated a twenty-one year age requirement. OP. ATTY GEN., Jan. 29, 1944. See NEB. REV. STAT. §§ 53-145, 53-180 to .02 (Reissue 1960). For a discussion of a lower court decision reaching an apparently opposite conclusion, see Note, *The Effect of Marriage on the Legal Status of a Female Under Twenty-one Years of Age in Nebraska*, 31 NEB. L. REV. 425 (1952). And the Revisor of Statutes had included a cross reference to the guardianship definition of minor.

⁷ NEB. REV. STAT. § 43-201 (Supp. 1961). For the previous use of the term "minor," see NEB. REV. STAT. § 43-201 (1943).

⁸ E.g., NEB. REV. STAT. §§ 43-230 (Supp. 1961) (divorce jurisdiction of separate juvenile court), 71-2508 (Reissue 1958) (sale of poison to "any minor under eighteen years of age"). For a consideration of the requirement that a testator be "of full age," see text at notes 41-43 *infra*.

⁹ Cf. 3 WHITFORD, NEBRASKA PROBATE AND ADMINISTRATION 1293 (1957): "It would seem that having once attained her majority she could not thus lose it but there are no Nebraska cases on the point. If the marriage were annulled then presumably in contemplation of law she had never reached majority." But see Note, *The Effect of Marriage on Minority in Iowa*, 41 IOWA L. REV. 436, 438-439 (1956).

to deal with a married female under age twenty-one at their own peril as to her possible marital deficiencies.

B. CONTRACTS.

(1) *The General Rules of Voidability.*

Nebraska follows the rule that minors' contracts are voidable transactions.¹⁰ According to the black letter of the general law, this means that the agreement is valid and enforceable, but may be avoided at the option of the minor, or probably by his guardian, administrator or heirs.¹¹ But the agreement cannot be avoided by the other contractual party on this ground, or by creditors.¹²

This power of avoidance may be exercised against an assignee or a holder in due course of a negotiable instrument under present law¹³ and under the Uniform Commercial Code.¹⁴ Under both the Uniform Sales Act¹⁵ and Uniform Commercial Code,¹⁶ however, the power of avoidance may not be asserted against a bona fide purchaser for value of a chattel.

The transaction may be avoided during minority or within a

¹⁰ *E.g.*, *Smith v. Wade*, 169 Neb. 710, 100 N.W.2d 770 (1960); *Star v. Watkins*, 78 Neb. 610, 111 N.W. 363 (1907); *Englebert v. Troxell*, 40 Neb. 195, 58 N.W. 852 (1894); *Johnson v. Storie*, 32 Neb. 610, 49 N.W. 371 (1891); *Nations v. Gregg*, 290 Fed. 157 (8th Cir. 1923).

¹¹ See note 10 *supra*; 2 WILLISTON, CONTRACTS 23-24 (3d ed. 1959).

¹² 2 WILLISTON, CONTRACTS 23-25 (3d ed. 1959).

¹³ *Id.* at 25-26. *But see* BEUTEL'S BRANNAN, NEGOTIABLE INSTRUMENTS LAW 435-36, 754-55 (7th ed. 1948).

¹⁴ UNIFORM COMMERCIAL CODE § 3-305, comment 4: "Paragraph (a) of subsection (2) is new. It follows the decisions under the original Act in providing that the defense of infancy may be asserted against a holder in due course, even though its effect is to render the instrument voidable but not void. The policy is one of protection of the infant against those who take advantage of him, even at the expense of occasional loss to an innocent purchaser. No attempt is made to state when infancy is available as a defense or the conditions under which it may be asserted. In some jurisdictions it is held that an infant cannot rescind the transaction or set up the defense unless he restores the holder to his former position, which in the case of a holder in due course is normally impossible. In other states an infant who has misrepresented his age may be estopped to assert his infancy [see *Klinck v. Reeder*, 107 Neb. 342, 185 N.W. 1000 (1921)]. Such questions are left to the local law, as an integral part of the policy of each state as to the protection of infants."

¹⁵ NEB. REV. STAT. § 69-424 (Reissue 1958). See 2 WILLISTON, SALES 349-50 (Rev. ed. 1948).

¹⁶ UNIFORM COMMERCIAL CODE § 2-403.

reasonable time after becoming of age,¹⁷ whether it is executory or executed.¹⁸

An infant may ratify the contract upon reaching majority.¹⁹ In fact, if he uses, sells or retains the goods previously received during infancy,²⁰ or does not act to disaffirm within a reasonable time of becoming of age,²¹ he may be deemed to have ratified the agreement. Ratification is a mixed question of law and fact and turns upon the circumstances in the individual case.²²

(2) *Exceptions to the General Rules.*

There are a number of exceptions and qualifications to the general rules of voidability in Nebraska:

(a) *Necessaries.* A minor is liable for the reasonable value of

¹⁷ *E.g.*, *Smith v. Wade*, 169 Neb. 710, 100 N.W.2d 770 (1960); *Star v. Watkins*, 78 Neb. 610, 111 N.W. 363 (1907); *Englebert v. Troxell*, 40 Neb. 195, 58 N.W. 852 (1894); *Bloomer v. Nolan*, 36 Neb. 51, 53 N.W. 1039 (1893); *Johnson v. Storie*, 32 Neb. 610, 49 N.W. 371 (1891); *Nations v. Gregg*, 290 Fed. 157 (8th Cir. 1923).

¹⁸ In the case of an executed or partially executed contract the infant, to disaffirm, need return only so much of the consideration as he then has in his possession. See, *e.g.*, *Star v. Watkins*, 78 Neb. 610, 111 N.W. 363 (1907); *Englebert v. Troxell*, 40 Neb. 195, 58 N.W. 852 (1894); *Bloomer v. Nolan*, 36 Neb. 51, 53 N.W. 1039 (1893). See generally 2 WILLISTON, CONTRACTS 35-43 (3d ed. 1959).

¹⁹ *E.g.*, *Klapka v. Shranger*, 135 Neb. 354, 281 N.W. 612 (1938); *Philpot v. Sandwich Mfg. Co.*, 18 Neb. 54, 24 N.W. 428 (1885).

²⁰ *First Nat'l Bank v. Guenther*, 125 Neb. 807, 252 N.W. 395 (1934) (use of property amounted to affirmation); *Krbel v. Krbel*, 84 Neb. 160, 120 N.W. 935 (1909) (retaining benefits while taking no action to disaffirm); *Uecker v. Koehn*, 21 Neb. 559, 32 N.W. 583 (1887) (could not affirm part of transaction which was beneficial and repudiate that which imposed obligation). *But see* *Brownell v. Adams*, 121 Neb. 304, 236 N.W. 750 (1931) (infant stockholder relieved of statutory liability since stock worthless and, consequently, he received no benefit); *Bloomer v. Nolan*, 36 Neb. 51, 53 N.W. 1039 (1893) (ratification of mechanic's lien cannot be implied from retaining the property and collecting the rents from it). See generally 2 WILLISTON, CONTRACTS 45-46 (3d ed. 1959).

²¹ *O'Brien v. Gaslin*, 20 Neb. 347, 30 N.W. 274 (1886) (conveyance by minor sought to be disaffirmed thirteen years after reaching majority; held, not within reasonable time). *But see* *Englebert v. Troxell*, 40 Neb. 195, 58 N.W. 852 (1894) (two months after reaching majority was reasonable time to disaffirm conveyance); *Johnson v. Storie*, 32 Neb. 610, 49 N.W. 371 (1891) (disaffirmance of promissory note eighteen months after reaching majority held to be within a reasonable time).

²² *Brownell v. Adams*, 121 Neb. 304, 236 N.W. 750 (1931); *Englebert v. Troxell*, 40 Neb. 195, 58 N.W. 852 (1894).

necessaries contracted for and received, by case law,²³ under the Uniform Sales Act,²⁴ and under the Uniform Commercial Code.²⁵

(b) *Misrepresentation of Age.* The general rule is that in an action at law on the contract, although not in equity, a minor is not precluded from asserting the defense of infancy even though he has misrepresented his age.²⁶ Nebraska, however, has held a minor liable on a contract, relying on the theory of estoppel *in pais*, where the misrepresentation was fraudulently made and has been relied upon by the other party.²⁷

(c) *Statutes.* By statute, a minor can deal with life, health, or accident insurance or annuity contracts if he is fourteen years of age or over,²⁸ accounts in building and loan and savings and loan associations,²⁹ United States government bonds purchased by

²³ See 2 WILLISTON, CONTRACTS 49-52 (3d ed. 1959); cf. *Cobbey v. Buchanan*, 48 Neb. 391, 67 N.W. 176 (1896) (lawyer's investigation as to title and interest infant had in deceased father's estate is not necessary; nor were the services rendered in habeas corpus proceeding); *Englebert v. Troxell*, 40 Neb. 195, 58 N.W. 852 (1894) (lawyer's services in foreclosure suit not considered as necessities).

²⁴ NEB. REV. STAT. § 69-402 (Reissue 1958).

²⁵ UNIFORM COMMERCIAL CODE § 1-103.

²⁶ 2 WILLISTON, CONTRACTS 64 (3d ed. 1959).

²⁷ *Klinck v. Reeder*, 107 Neb. 342, 185 N.W. 1000 (1921); *Cobbey v. Buchanan*, 48 Neb. 391, 67 N.W. 176 (1896). The UNIFORM COMMERCIAL CODE § 1-103 by rephrasing sections 2 and '73 of the UNIFORM SALES ACT and expressly adding the word "estoppel" appears to incorporate this case law.

²⁸ NEB. REV. STAT. § 44-705 (Reissue 1960).

²⁹ NEB. REV. STAT. § 8-318(1) (Reissue 1962): "Shares of stock in any association, or in any federal savings and loan association incorporated under the provisions of the Home Owners' Loan Act of 1933, with its principal office and place of business in this state, may be subscribed for, held, transferred, surrendered, withdrawn, and forfeited, and payments thereon received and receipted for by any minor in the same manner and with the same binding effect as though such person were of full age, except that the said minor or his estate, shall not be bound on his subscription to stock except to the extent of payments actually made thereon." Although the formal language is in terms of "shares of stock," the statute apparently covers all of the types of accounts presently employed by building and loan and savings and loan associations in Nebraska. Prior to its amendment in 1955, this statute applied only to minors over fourteen years of age. NEB. REV. STAT. § 8-318 (Reissue 1954). In 1959, the legislature repealed a similar provision, NEB. REV. STAT. § 8-161 (Reissue 1954), dealing with savings banks, apparently because there were no savings banks in Nebraska. There are no similar statutory provisions in Nebraska applying to commercial banks, notwithstanding a general practice by these banks to accept savings deposits from minors and open checking accounts for minors. Some states have granted ex-

him,³⁰ and veterans loans or insurance with the United States government.³¹

C. GIFTS.

The capacity of a minor to dispose of his property by gift is subject to the same limitations as an attempted contractual obligation of a minor. The transfer of property by gift is voidable at the

tensive statutory privileges to minors in the banking law and corresponding protection to those who deal with them. See, e.g., N. Y. BANKING LAW § 134(1); cf. N. Y. BANKING LAW §§ 239(1), 171(1), 310(2), 394(3). Although no Nebraska cases have been found on the point, it may be that commercial banks are subjecting themselves to a risk of liability in opening savings accounts and checking accounts for minors in Nebraska. Analytically, if the establishment of the account is based upon a contract, the contract would be voidable by the minor whether or not it is still executory. The minor would need to return only so much of the consideration as he still possesses. And as a matter of statutory construction, a negative inference unfavorable to commercial banks may be drawn from the existence of section 8-318 and the absence of any corresponding provision for commercial banks. See also NEB. REV. STAT. § 38-121 (Reissue 1960). The case of a minor withdrawing funds from a savings or checking account may be different from the case of a minor writing checks payable to third persons. Even though in both cases a debtor-creditor relationship is established, the return of funds to the minor might be comparable to a bailee returning bailment property to a minor bailor. On the other hand, the checking account payment to a third party may be analogous to that of a loan of money to a minor for a purchase from a third person. See 2 WILLISTON, CONTRACTS § 243 (3d ed. 1959); *Ellis v. Ellis*, 3 Salk 197, 91 Eng. Rep. 774 (1795): "An infant is chargeable for *money lent*, if it is laid out for necessities, according to his degree; but all that is at the peril of the lender." See also *Rowe v. Griffiths*, 57 Neb. 488, 495, 78 N.W. 20, 22 (1899): "If this was an action for the recovery of the money paid, we can imagine that it might be proper for Mr. Creighton to allege and show that the money had been used in the purchase of necessities, and that under such circumstances a court might refuse to recognize the defense of infancy." In view of the uncertainty of a commercial bank's liability in these matters, banks should be given statutory protection in the areas in which public policy of present times makes it desirable to extend banking privileges to minors.

³⁰ Treas. Reg. 31, § 315.51 (1957) (reprinted in Treas. Dep't Cir. No. 530): "If the owner of a savings bond is a minor and the form of registration does not indicate that there is a representative of his estate, payment will be made to him upon his request, provided that he is of sufficient competency to sign his name to the request for payment and to understand the nature of the transaction. In general, the fact that the request for payment has been signed by a minor and duly certified will be accepted as sufficient proof of competency and understanding." For the conditions on which payment may be made to a parent or other persons on behalf of a minor, see Treas. Reg. 31, § 315.52 (1957).

³¹ NEB. REV. STAT. § 80-701 (Reissue 1958).

option of the infant or his personal representative.³² The rationale behind these holdings is simply that if the law deems voidable the contracts of a minor so as to protect him from his improvident acts, then a fortiori the gifts of a minor would also be avoidable.³³ This concept of voidability, as in the case of contracts, is supplemented by rules concerning ratification, disaffirmance, and avoidance.³⁴ Though there are no Nebraska cases on this subject, it should be assumed for planning purposes that the court would consider the gift of a minor to be voidable.

There is, however, some authority that an infant's gift is absolutely void.³⁵ The concept upon which these decisions are based seems to be an early common law distinction that if the infant's contract was to his benefit he was bound, if it was to his prejudice the contract was void, and if the beneficial or prejudicial nature was uncertain then the contract was voidable.³⁶ On this basis, a gift was considered manifestly and necessarily prejudicial and thus void.³⁷ The great weight of authority, however, is that a gift by a minor is merely voidable.

For federal tax purposes, the voidable nature of a minor's purported gifts would preclude the imposition of a gift tax during the period of voidability³⁸ and the property would remain a part of his federal estate tax gross estate.³⁹ The same property also might be includable in the estate of the donee if the donee predeceases the minor, although the valuation might be reduced because of the power of avoidance.⁴⁰

³² See, e.g., *Person v. Chase*, 37 Vt. 647 (1865) (apparently the leading case on voidability of gifts); *Slaughter v. Cunningham*, 24 Ala. 260 (1854); *Johnson v. Alden*, 15 La. Ann. 505 (1860); *Mott v. Iossa*, 119 N.J. Eq. 185, 181 Atl. 689 (Ch. 1935); *Murray v. McKenzie*, 23 Ont. L. Rep. 287 (1911).

³³ See *Person v. Chase*, 37 Vt. 647, 649 (1865).

³⁴ See *Person v. Chase*, 37 Vt. 647 (1865); *Murray v. McKenzie*, 23 Ont. L. Rep. 287 (1911).

³⁵ *Gillmet v. Tourcott*, 213 Mich. 617, 182 N.W. 128 (1921); cf. *Oxley v. Tyron*, 25 Iowa 95 (1868) (result turned on other facts).

³⁶ *Robinson v. Weeks*, 56 Me. 102 (1868); *Gillmet v. Tourcott*, 213 Mich. 617, 182 N.W. 128 (1921); 2 *WILLISTON, CONTRACTS* 3 (3d ed. 1959).

³⁷ *Robinson v. Weeks*, 56 Me. 102 (1868); *Gillmet v. Tourcott*, 213 Mich. 617, 182 N.W. 128 (1921).

³⁸ *Commissioner v. Allen*, 108 F.2d 961 (3d Cir. 1939), *cert. denied* 309 U.S. 680 (1940) (gift complete upon attaining majority without disaffirmance).

³⁹ This result could be reached under either INT. REV. CODE of 1954, § 2033 (power to avoid treated as substantial ownership) or INT. REV. CODE of 1954, § 2038 (power to revoke). *LOWNDES & KRAMER, FEDERAL ESTATE & GIFT TAXES* 51 (2d ed. 1962).

⁴⁰ *Id.* at 52.

D. WILLS.

The wills statutes permit a testamentary disposition of real and personal property by "every person of full age."⁴¹ The statutes do not specify whether the term "full age" contemplates the common law requirement of twenty-one years or is modified by the general guardianship language defining majority that "in case a female marries under the age of twenty-one years her minority ends."⁴² It seems probable that a married female under twenty-one can execute a valid will in Nebraska.⁴³

E. TRUSTS.

A minor has capacity to establish a trust of his property only to the extent that he could transfer the property by outright gift.⁴⁴ This means that a trust created by a minor is valid, but may be avoided by the minor, his guardian, his heirs, or his personal representative.⁴⁵ An infant can serve as trustee of a trust created by an adult, but his powers of administration are no broader than if he owned the trust property outright.⁴⁶

F. POWERS OF APPOINTMENT.

There is little American authority dealing with the capacity of a minor to exercise or release a power of appointment.⁴⁷ Some

⁴¹ NEB. REV. STAT. §§ 30-201, 30-202 (Reissue 1956).

⁴² NEB. REV. STAT. § 38-101 (Reissue 1960).

⁴³ See 1 PAGE, WILLS 582 (Bowe-Parker Rev. 1960): "In many statutes persons of 'full age' can make wills and testaments. What full age is depends upon the law of each state with reference to the age of majority; and this rule is thus adopted by the Wills Act."; 1 WHITFORD, NEBRASKA PROBATE AND ADMINISTRATION 100 (1954); Bordwell, *The Statute Law of Wills*, 14 IOWA L. REV. 172, 177-179 (1929). For concise discussion of the policy reasons, see Note, *The Effect of Marriage on Minority in Iowa*, 41 IOWA L. REV. 436, 437-438 (1956). This reasoning could also allow a married female under twenty-one to do other acts dependent upon arriving at "full age," such as serving as an executrix. NEB. REV. STAT. § 30-308 (Reissue 1956).

⁴⁴ 1 SCOTT, TRUSTS 176-79 (2d ed. 1956); RESTATEMENT (SECOND), TRUSTS § 18 (1959): "A person has capacity to create a trust by declaring himself trustee of property to the extent that he has capacity to transfer the property inter vivos."

⁴⁵ See notes 10-12 *supra*.

⁴⁶ RESTATEMENT (SECOND), TRUSTS § 91 (1959).

⁴⁷ RESTATEMENT, PROPERTY § 345, caveat (1940): "As to such capacity of infants and insane persons there is neither sufficient authority nor sufficiently clear analogy to justify restatement."

state statutes⁴⁸ and the opinions of most of the writers,⁴⁹ however, take the position that a minor cannot exercise a power of appointment to a greater extent than he could make an indefeasible transfer of the property subject to the power. In a strict property sense, the exercise of a power of appointment is an event upon which a defeasible title shifts and not an independent transfer by the donee of the power.⁵⁰ Arguably, under the "relation-back" doctrine the minor donee of the power is merely carrying out the intention and capacity of the donor of the power, and, like the minor agent for a competent principal,⁵¹ can act under the authority of the donor of the power.⁵² On balance, the same considerations which generally limit a minor's ability to make contracts and gifts will probably prevail to prevent his exercise of a power of appointment, general or special. It is possible that a guardian may be able to exercise a general power of appointment presently

⁴⁸ See 5 AMERICAN LAW OF PROPERTY 573 n.3 (Casner ed. 1962).

⁴⁹ *Id.* at 572-574; SIMES & SMITH, THE LAW OF FUTURE INTERESTS § 971 at 420-422 (2d ed. 1956); SIMES, FUTURE INTERESTS 201 (1951); 3 TIFFANY, REAL PROPERTY 35 (3d ed. 1939); 3 POWELL, REAL PROPERTY 363 (1952).

⁵⁰ See SIMES & SMITH, THE LAW OF FUTURE INTERESTS §§ 911-912 at 370-375 (2d ed. 1956).

⁵¹ RESTATEMENT (SECOND), AGENCY § 21, comment *a* (1958). But a minor's contracts through a competent agent are, like the minor's own contracts, held to be voidable. *Id.* § 20, comment *c*.

⁵² A preliminary answer to this argument may be that, in most cases, the intent of the donor is not to create a power exercisable by an incompetent donee. See SIMES & SMITH, THE LAW OF FUTURE INTERESTS § 971 at 419 (2d ed. 1956): "If the donor, in creating the power, merely states that it is exercisable by deed or by will, it is a reasonable inference that he means a deed or will executed by a person having the capacity to execute such an instrument as a conveyance or devise of property."; 5 AMERICAN LAW OF PROPERTY 573 (Casner ed. 1952): "If the matter is approached as a question of the presumed intent of the donor of the power, the same conclusion is reached. Surely a donor who has placed a dispositive creation in a donee is not likely to have intended that the act of the donee should be effective even if the donee, at the time of the act, was incapable of exercising reasonable judgment." The issue unanswered by the case law is whether a minor can exercise a power of appointment where the donor has expressly stated that the requirement of age has been waived. It is at this point that the public policy underlying the protection of minors should declare the provision invalid as being against public policy (even a public policy which would permit a married female to be of age at eighteen, but a married male only at twenty-one). However, the question would still remain whether the provision is wholly invalid or only partially invalid so as to permit an exercise by someone on the minor's behalf, or by the minor himself if he can demonstrate a personal reasonable judgment.

exercisable in favor of the minor.⁵³ But the guardian would not appear to have authority to exercise the general power in favor of others unless given this power under the governing instrument,⁵⁴ since the guardian could not make a gift of the minor's property.⁵⁵ Whether or not a guardian can exercise a special power of appointment for the minor is likely to depend wholly upon a determination of the intention of the donor of the power as to its exercisability.⁵⁶

Nevertheless, there may be important federal tax consequences from a general power of appointment possessed by a minor donee. The Commissioner has taken the position that property subject to a general power is includable in the federal estate tax gross estate even though the beneficiary is at all times incompetent to exercise the power.⁵⁷ In some situations, a gift to a minor may qualify for the gift tax present interest exclusion if the minor has a general power of appointment over the property, even though the transaction would otherwise be a gift of a future interest, and even though the general power of appointment is not exercisable under local property law.⁵⁸ Similarly, a minor beneficiary could be taxable on trust income subject to his formal power to vest income or

⁵³ See *Jacques v. Swallow*, 77 R.I. 517, 78 A.2d 4 (1951); *Jones v. Clyman*, 193 Iowa 1248, 188 N.W. 954 (1922).

⁵⁴ See 3 POWELL, REAL PROPERTY 363 (1952): "It would seem that a general power might well be so exercisable by the guardian or committee to produce funds needed for the ward's support, although other representative exercises of a general power and all representative exercises of special powers could well be denied."

⁵⁵ In addition to the lack of statutory authorization for a guardian to make gifts (or, specifically, to exercise a power of appointment), see, e.g., *In re Hall's Guardianship*, 31 Cal. 2d 157, 187 P.2d 396 (1947); *In re Title Guarantee & Trust Co.*, 268 N.Y. 494, 273 N.Y.S. 158 (2d Dep't 1934), *aff'd* 271 N.Y. 537, 2 N.E.2d 368 (1934); *In re Tillman*, 137 N.E.2d 172 (Ohio Prob. Ct. 1956).

⁵⁶ There is no clear-cut policy or case law on this issue. If the minor could exercise the special power upon becoming of legal age, it might be contended that a guardian would be making a gift of the minor's property by eliminating the minor's personal ability to exercise the power. If the power is exercisable only during minority (e.g., if the minor dies during minority as he shall appoint by a special power of appointment), both the policy of the law and the donor's presumed intent might favor exercise by the legal guardian appointed to act in the interests of the minor, rather than a gift in default of appointment (assuming, of course, that any exercise of a power of appointment is within a guardian's powers with respect to the minor's property).

⁵⁷ Rev. Rul. 55-518, 1955-2 CUM. BULL. 384. See note 282 *infra*.

⁵⁸ See discussion, notes 280-284 *infra*.

principal in himself, although the minor cannot personally exercise the power.⁵⁹

G. PARTNERSHIPS.

The income tax law now makes clear that a minor can be a partner for income tax purposes to the extent that capital is a material income-producing factor.⁶⁰ The desire to split income among all family members has brought some infants into the family business within a few moments of birth.⁶¹

Ordinary contract rules apply to partnership situations. This means that the partnership agreement is valid and enforceable, except that it is personally voidable by the minor.⁶² There is a split of authority whether the infant partner is automatically entitled to a return of his contribution upon repudiation.⁶³ The majority view apparently is that the adult partners have a lien on the infant's contribution to the extent of creditors' unpaid claims and partnership losses.⁶⁴

An infant partner has the same rights and powers as any other partner, plus his personal right of avoidance. Since a minor can act as agent for an adult principal,⁶⁵ a contract entered into by him in the partnership name is binding upon the partnership, the adult partners, and the third party.⁶⁶ Only the personal liability of the

⁵⁹ Cf. INT. REV. CODE of 1954, § 678; *Trust No. 3 v. Commissioner*, 285 F.2d 102 (7th Cir. 1961); note 281 *infra*.

⁶⁰ INT. REV. CODE of 1954, § 704(e).

⁶¹ This was especially true prior to the 1948 amendments permitting joint income tax returns by spouses. See, e.g., *Tinkoff v. Commissioner*, 120 F.2d 564 (7th Cir. 1941) (son made partner in accounting firm on day of birth); *Charles Redd*, 15 P-H Tax Ct. Mem. 528 (1946) (partners were husband, wife, and four children aged seven, five, two and three months, but wife reportedly testified she was "too busy producing partners" to participate in the management of the partnership).

⁶² CRANE, PARTNERSHIPS 39 (2d ed. 1952); 2 WILLISTON, CONTRACTS 17 (3d ed. 1959).

⁶³ See *Kuipers v. Thome*, 182 Ill. App. 28 (1913) (may rescind agreement and recover the sum advanced); *Thomas v. Banks*, 224 Mich. 488, 195 N.W. 94 (1923) (could recover amount paid, less amount received from the partnership). *Contra*, *Adams v. Beall*, 67 Md. 53, 8 Atl. 664 (1887) (could disaffirm partnership contract and avoid personal liability, but could not recover the money paid in unless he was induced to enter into the partnership by fraudulent misrepresentations).

⁶⁴ 2 WILLISTON, CONTRACTS 18 (3d ed. 1959); CRANE, PARTNERSHIP 40 (2d ed. 1952).

⁶⁵ RESTATEMENT (SECOND), AGENCY § 21, comment *a* (1959).

⁶⁶ 2 WILLISTON, CONTRACTS 17 (3d ed. 1959).

infant on any partnership contract, whether made by himself or another partner, is subject to his right of avoidance.⁶⁷

H. JOINT OWNERSHIP.

A minor can become the owner of a joint interest in property to the same extent he can own property outright. The problems arise not in the ownership of property, but in its management or disposition by either the minor or the other joint tenant. For example, where a husband and wife, both under twenty-one, executed a mortgage on homestead real estate, and where the husband repudiated his obligations thereunder, the entire mortgage was held invalid.⁶⁸ The husband could avoid the mortgage and the related notes on the basis of his infancy. The mortgage itself was also invalid as to the wife because of the statutory requirement that both spouses must execute a conveyance of a homestead interest.⁶⁹ If the mortgage had not been invalid as to the wife, it would have operated as a severance of the joint tenancy into a tenancy in common.⁷⁰ This would not only have defeated the intention of the owners as to survivorship rights, but, on the facts involved, quite likely have brought about a partition suit and guardianship proceedings.

In addition, Nebraska has a rule that a survivorship bank account may not be entirely withdrawn by one joint tenant without the knowledge and consent of the other.⁷¹ A minor joint tenant is probably as incapable of consenting to a withdrawal of an excess proportion of the funds as he would be of making an outright gift of the property.

The creation of a joint tenancy with a minor, then, seems very unwise. It not only risks a vesting of the entire interest outright in a minor incapable of dealing with it, but may substantially tie up the effective use of the property during the lifetime of the adult joint tenant until the minor becomes of age.

⁶⁷ *Kuehl v. Means*, 206 Iowa 539, 218 N.W. 907 (1928) (infant partner could not repudiate partnership contract, but only personal liability); *Latrobe v. Dietrich*, 114 Md. 8, 78 Atl. 983 (1910); 2 WILLISTON, CONTRACTS 17-18 (3d ed. 1959); CRANE, PARTNERSHIP 39 (2d ed. 1952); cf. *Klinck v. Reeder*, 107 Neb. 342, 185 N.W. 1000 (1921) (infant partner not allowed to set up defense because of misrepresentation of age).

⁶⁸ *Smith v. Wade*, 169 Neb. 710, 100 N.W.2d 770 (1960).

⁶⁹ NEB. REV. STAT. § 40-104 (Reissue 1960).

⁷⁰ See, e.g., *Buford v. Dahlke*, 158 Neb. 39, 62 N.W.2d 252 (1954).

⁷¹ *Crowell v. Milligan*, 157 Neb. 127, 59 N.W.2d 346 (1953); cf. *Whiteside v. Whiteside*, 159 Neb. 362, 369-70, 67 N.W.2d 141, 146 (1954).

II.

A COMPARISON OF LEGAL IMPLICATIONS OF GUARDIANSHIPS, CUSTODIANSHIPS AND TRUSTS.

There are three schemes for management of the property of minors under Nebraska law. Guardianships and custodianships are provided for by the statutes. Trusts, of course, are systems for the management of property in accordance with the governing trust instrument.

There are a large number of significant differences in the legal consequences of these arrangements.⁷² Perhaps the most important factor from an estate planner's point of view is that the operative consequences of guardianships and custodianships are spelled out by statutory provisions which the planner is virtually powerless to vary, whereas he has a comparatively free hand in designing the scope and operation of trusts. An analysis of the legal implications of guardianships, custodianships and trusts indicates that important objectives can be achieved from each in some situations, but that where substantial amounts of property are involved, the use of a trust will normally have overwhelming advantages.

The "guardian" contemplated in these comparisons is the statutory guardian having a duty of care and management of the property of the minor. Although parents are natural guardians of their minor children,⁷³ a natural guardian does not have authority as such to deal with the property or estate of minors.⁷⁴ The role of a natural guardian pertains to custody of the person of the minor and responsibility for education. The statutory guardianship provisions do not limit the powers and obligations of courts to appoint guardians ad litem to protect the interests of minors in specific litigation.⁷⁵

⁷² The comparisons in this article originated in part from material prepared by Flavel A. Wright, *What Every Lawyer Should Know About Trusts*, 16TH ANN. INST. ON FEDERAL TAX LAW AND ESTATE PLANNING 19, 24-26 (Neb. State Bar Ass'n 1958).

⁷³ NEB. REV. STAT. § 38-107 (Reissue 1960).

⁷⁴ *Wells v. Steckleberg*, 50 Neb. 670, 70 N.W. 242 (1897); see cases collected in Annot., 6 A.L.R. 115 (1920).

⁷⁵ NEB. REV. STAT. §§ 38-114 (Reissue 1960), 24-615, 25-309, 25-310, 26-130, 26-131, 27-202 (Reissue 1956); *Cass v. Pense*, 155 Neb. 792, 54 N.W.2d 68 (1952); *Workman v. Workman*, 167 Neb. 857, 95 N.W.2d 186 (1959). See *Peterson v. Skiles*, 173 Neb. 470, 481-482, 113 N.W.2d 628, 637 (1962): "An action by an infant must be brought by his guardian or next friend, who alone is liable for costs. The infant is not liable to a judgment for costs. . . . By statute, one who as next friend brings an unsuccessful suit on

A "custodian" is a person so designated under the Uniform Gifts to Minors Act or the related statutes permitting bequests to minors.⁷⁶ The authority for this device is derived from these statutes which were enacted to facilitate the making of gifts of securities to minors. It might be best to regard the custodianship as purely a statutory creature, free from the general rules or analogies of trusts, guardianships, agency, bailments, or other traditional legal categories. The statute contains a considerable conceptual ambiguity, however, by stating that "a custodian has and holds as powers in trust, with respect to the custodial property, in addition to all rights and powers provided in sections 38-1001 to 38-1010, all the rights and powers which a guardian has with respect to property not held as custodial property."⁷⁷ From this, it may be difficult in areas where the statutory framework for custodianships is unclear to infer whether the legislature intended to create a wholly independent group of rules for custodianships or to employ some portions of either trust or guardianship law.

A word of caution should also be injected about what might in lawyerlike language be called "informal management devices," but to the layman sometimes means "do it yourself estate planning."

behalf of an infant is chargeable with the costs. Section 25-308, R.R.S. 1943. . . . The defense of an infant must be by a guardian for the suit, who may be appointed by the court in which the action is prosecuted. Section 25-309, R.R.S. 1943. It is the duty of an attorney to act as the guardian of an infant defendant in any suit pending against him when appointed by the court to do so. He is entitled to such compensation for such service as the court shall deem reasonable. . . . The courts of this state are authorized by statute to tax as costs a reasonable fee for the services of a guardian ad litem. The litigant to whom the fee for services of a guardian ad litem shall be taxed as costs depends upon the circumstances of each particular case and the discretion of the court. . . . An attorney acting under appointment as a guardian ad litem must look only to the court for the amount of his compensation, to be taxed as a part of the costs of the proceedings and collected as such."

⁷⁶ NEB. REV. STAT. § 38-1001(6) (Reissue 1960). For a preliminary consideration of the custodianship statutes, see Note, *The Nebraska Uniform Gifts to Minors Act*, 40 NEB. L. REV. 466 (1961). Apart from this statute, there is no clear-cut meaning of the terms "custodian" or "custodianship," although they are generally employed as an undefined usage of the concept of a "stakeholder."

⁷⁷ NEB. REV. STAT. § 38-1004(9) (Reissue 1960). These problems are not made any less difficult by the fact that the guardian can be named custodian. In fact, if the named custodian is not eligible, renounces or dies, the guardian automatically becomes custodian. See NEB. REV. STAT. § 38-1007(4) (Reissue 1960). But see NEB. REV. STAT. § 38-1003(1) (Reissue 1960), note 130 *infra*. Although the draftsmen appear to have been primarily concerned with overcoming the existing limitations on making effective gifts to minors for tax purposes, the statute does appear in-

These devices are usually arrangements by which the donor intends to make a gift to the minor to take effect only upon the donor's death, with a right to revoke the gift anytime prior to death. In a lawyer's hands, the results from the well-known executed but undelivered (or ambiguously delivered) deeds, joint safe deposit boxes, and similar equivocal transactions, can quite easily be achieved effectively by either a will or revocable trust.

These "informal management devices" have been fertile sources of litigation both from the factual issues of donative intent, delivery and acceptance, and from the resulting legal consequences in various circumstances of attempted revocation by the donor, heirs of the donor challenging the donee's rights, the donee or his heirs attempting to enforce rights against the donor or his heirs, creditors of either the donor or donee claiming rights in the property, or taxing authorities imposing income, gift, estate or inheritance taxes upon either the donor or donee. Even though the donor may not have chosen to label or define his transaction initially, the law will characterize the arrangement in terms of the existing nomenclature in the ensuing litigation. Unfortunately, "informal management devices" are not as uncommon as they are legally ineffective.

It also seems that joint ownership of property with a minor is not a reasonably available alternative to the property management devices in this section. The creation of the joint tenancy is in many forms the legal equivalent of an outright gift.⁷⁸ Inheritance by the minor would involve all of the disadvantages of outright ownership at the time of inheritance by the minor. Not only does the device involve possible uncertainty concerning the rights of the minor in the property and its proceeds, but also it does not remove the property from the donor's taxable estate or eliminate the necessity for some court proceedings on the death of any joint tenant.

A. SUBJECT MATTER.

The subject matter of a guardianship covers all property of the minor in the State of Nebraska.⁷⁹ Separate guardianships are required for property located in other states, unless the law of the foreign state permits the Nebraska guardian to deal with the property.

tended to define the entire consequences of the statutory custodianship as a legal arrangement.

⁷⁸ See notes 68-71 *supra*.

⁷⁹ See NEB. REV. STAT. §§ 38-505, 38-109, 38-110(1) (Reissue 1960).

A trust may normally contain any type of property regardless of jurisdictional location. Insofar as general trust law is concerned, a Nebraska trustee can hold property in other states.⁸⁰ A foreign individual, but not a foreign corporation,⁸¹ can serve as a trustee of a Nebraska trust.⁸² A Nebraska corporate trustee may not be qualified or permitted by certain foreign states to act as a fidu-

⁸⁰ RESTATEMENT (SECOND), TRUSTS § 94 (1959).

⁸¹ NEB. REV. STAT. § 8-201 (Reissue 1962). Also, a foreign corporation cannot hold title to Nebraska real estate. NEB. REV. STAT. § 76-402 (Reissue 1958).

⁸² The Nebraska statutory provisions with respect to residence of a fiduciary are unclear. An administrator is required to be a Nebraska resident. NEB. REV. STAT. § 30-315 (Reissue 1956). In addition, nonresidence is specifically a ground for a court's removal of an administrator. NEB. REV. STAT. § 30-324 (Reissue 1956). Nonresidence is also a ground for removal of an executor. NEB. REV. STAT. § 30-310 (Reissue 1956). The statute on appointment of an executor provides, however, that "the county court shall issue letters testamentary thereon to the person named executor therein, if he is legally competent, and he shall accept the trust and give bond as required by law." NEB. REV. STAT. § 30-302 (Reissue 1956). There is authority that this section requires the initial appointment of an otherwise qualified nonresident executor, even though the nonresidence might constitute grounds for his subsequent removal. *In re Estate of Haeffele*, 145 Neb. 809, 18 N.W.2d 228 (1945), *overruling In re Estate of Cachelin*, 124 Neb. 556, 247 N.W. 422 (1933); *Janzen v. Goos*, 302 F.2d 421, 426 (8th Cir. 1962): "Legal competency under this statute, although it was once held otherwise . . . apparently does not include Nebraska residence."; Stubbs, *Probate Procedures Available To Beneficiaries*, 39 NEB. L. REV. 311, 316 (1960). But a forceful argument can be made that the probate court can refuse at the outset to appoint a named nonresident executor. Spencer, *Practical Legal Problems*, 26 NEB. L. REV. 226, 232-233 (1947): "On two different occasions I have refused to appoint a nonresident of Nebraska as the executor of a will. There has been some criticism of this practice but I believe I am right. Section 30-302 provides that the court shall appoint the person named executor, if he is legally competent. It is true that Section 30-302 lays down no residence requirement. However, Section 30-310 provides that a court may remove an executor if, among other reasons, he shall reside out of this state. If, therefore, a court may remove an executor because he resides out of the state, certainly the court should have the right to refuse to appoint a non-resident in the first instance. . . . [I]n that case [*In re Estate of Haeffele*], the point involved was the fact that the executor might eventually have a conflict of interest and the court suggested that courts should not anticipate improper conduct. I suggest that this case can be distinguished because, at the instant of his appointment, a non-resident is subject to removal under Section 30-310." The testamentary trustee provision seems to infer that the named trustee will be formally appointed by the court if competent. NEB. REV. STAT. § 30-1801 (Supp. 1961). The testamentary guardian sections create the same inference. NEB. REV. STAT. §§ 38-112, 38-507 (Reissue 1960). There is no statutory requirement that a statutory guardian be a Nebraska resident. The statutes do provide, however, that a testamentary trustee, statutory

ciary.⁸³ Some local practice in this regard has been for corporate trust officers to serve as individual trustees to the extent the corporation is precluded from acting in another state,⁸⁴ although this practice is specifically prohibited by some foreign states.⁸⁵ Other states forbid the appointment of any nonresident trustee, give the court discretion to refuse the appointment of a nonresident trustee, broaden the normal jurisdiction of the court in situations involving nonresident trustees, require the appointment of a resident agent for the service of process upon nonresidents, or impose other conditions upon the appointment of a nonresident as a trustee.⁸⁶

The duties of a guardian with respect to the minor's property

guardian or testamentary guardian may be removed if evidently unsuited to carry out his duties. NEB. REV. STAT. §§ 30-1805 (Reissue 1956), 38-507 (Reissue 1960). An equity court would have inherent authority to remove an inter vivos trustee if the trustee cannot properly carry out the trust. From this, it would seem that a nonresident would not be disqualified merely because of his nonresidence from serving as a testamentary trustee, statutory guardian, testamentary guardian or inter vivos trustee. But it might still be possible for a court to take the position that the fact of nonresidence renders the person unsuitable to properly perform his duties, either at the time of an initial appointment or later in a removal proceeding.

⁸³ For a survey of these practices, see Note, *Right of a Non-Resident to Qualify and Serve in Fiduciary Capacities—An Analysis*, 37 VA. L. REV. 1119 (1951).

⁸⁴ This practice has apparently been carried on nationally for a good number of years. *Id.* at 1133, quoting from Stephenson, *Rights of Out-of-State Trust Institutions*, 16 STUDIES IN TRUST BUSINESS, 2d SERIES 342 (1944): "As soon as the states began to close their doors to out-of-state trust institutions, the draftsmen of wills began to have their clients name individuals connected with out-of-state trust institutions. Sometimes these individuals were designated, not by name, but by office. For example, the will read, 'I name as executor of my will the person who shall be the officer in charge of the trust department of the X Trust Company at the time of my death and his successor or successors in office.' Doubtless it was understood by both the draftsman and the testator that the trust company would serve as agent for the head of its trust department, that it would assume the responsibility, do the work, receive the allowance, and, to all intents and purposes, be the executors."

⁸⁵ *E.g.*, KAN. GEN. STAT. ANN. §§ 59-1701 (1949) ("No officer, employee or agent of such bank or corporation shall be permitted to act as a fiduciary in this state, whether such officer, employee or agent is a resident or nonresident of this state, when in fact such officer, employee or agent is acting as such fiduciary on behalf of such bank or corporation"), 59-1702 ("Every fiduciary, before entering upon the duties of his trust, shall take and subscribe to an oath . . . that he is acting on his own behalf and not on behalf of any bank or corporation organized and having its principal place of business outside this state.").

⁸⁶ See 1 SCOTT, TRUSTS § 94 (2d ed. 1956).

are more extensive than a trustee's. A guardian may act on personal items due to or from the minor and has authority to represent the minor in legal proceedings.⁸⁷ Where neither parent is living and competent, a guardian has duties beyond those of managing the minor's property, such as personal custody and care for the education of the minor,⁸⁸ and consenting to adoption⁸⁹ or marriage.⁹⁰

It may be necessary to have a statutory guardian appointed to perform the duties growing out of custody of the person or litigation even in a thoroughly planned estate. A surviving parent may make this appointment by will.⁹¹ If the best interests of the minor and his property would be served, the county court can appoint separate guardians of the property and of the person of the minor.⁹² This is required if a trust company is named guardian of the property.⁹³

The gifts to minors statutes only authorize contributions of money and securities to the custodianship.⁹⁴ The investment powers of a custodian may be broad enough to permit other forms of property to be obtained by reinvestment of the original fund of money and securities.⁹⁵ The duties and authority of a custodian are probably limited, in any event, to matters involving the minor's property.⁹⁶

B. THE FIDUCIARY.

(1) *Guardian.*

If the minor is a Nebraska resident, only the county court of the county in which the minor resides can appoint a guardian for

⁸⁷ See NEB. REV. STAT. §§ 38-502 (Reissue 1960), 25-307 (Reissue 1956).

⁸⁸ NEB. REV. STAT. § 38-108 (Reissue 1960).

⁸⁹ NEB. REV. STAT. § 43-105(3) (Reissue 1960).

⁹⁰ NEB. REV. STAT. § 42-105(4) (Reissue 1960).

⁹¹ See NEB. REV. STAT. § 38-112 (Reissue 1960); note 111 *infra*.

⁹² *State v. Young*, 121 Neb. 619, 237 N.W. 677 (1931).

⁹³ NEB. REV. STAT. § 8-206(5) (Supp. 1961) (permitting a corporate trust company to act "as guardian, of the property of any infant").

⁹⁴ NEB. REV. STAT. §§ 38-1002(1), 38-1101 (Reissue 1960). A number of states have amended the statute to include life insurance and life insurance proceeds.

⁹⁵ See notes 341 and 342 *infra*.

⁹⁶ The literal language of the statute might even permit a custodian to act as a guardian of the person of the minor. The term "guardian" is defined in the custodianship statute to include a guardian of the estate or person. NEB. REV. STAT. § 38-1001(7) (Reissue 1960). And a custodian is given all the rights and powers of a guardian. NEB. REV. STAT. §

the minor and his property in Nebraska.⁹⁷ The residence of a minor is determined by that of his parents or other person having legal custody of the child.⁹⁸ If the minor is not a Nebraska resident, a foreign guardian may, upon a proper showing, be entitled to possession of all personal property in Nebraska and to conduct litigation in Nebraska without the appointment of a Nebraska guardian.⁹⁹ A foreign guardian may be authorized to sell Nebraska real estate for the payment of debts of the ward and the charges of managing his estate.¹⁰⁰ Otherwise, a Nebraska guardianship would be needed for real property owned by a nonresident minor.¹⁰¹

The selection of a guardian lies in the discretion of the county court to act for the best interest of the minor. The court may appoint

38-1004(9). This could include guardianship of the person of the minor. NEB. REV. STAT. § 38-108 (Reissue 1960). But, so far, there has been no suggestion that the statute be this broadly construed. This construction might conflict with NEB. CONST. art. V, § 16.

⁹⁷ NEB. REV. STAT. § 38-102 (Reissue 1960): "The county court in each county, when it shall appear necessary or convenient, may appoint guardians to minors and others, being inhabitants or residents in the same county, and also to such as shall reside without the state, and have an estate within the same." *In re Guardianship of Peterson*, 119 Neb. 511, 229 N.W. 885 (1930); *In re Connor*, 93 Neb. 118, 139 N.W. 834 (1913). Once guardianship jurisdiction attaches, it continues even though the minor may move to another county. See *Olsen v. Marsh*, 142 Neb. 800, 810, 8 N.W.2d 169, 174 (1943) (quoting from a Maine decision): "'Such minor cannot acquire a residence in another county from that in which the guardian was appointed that will oust the judge of probate who appointed such guardian, of jurisdiction over the minor and his estate, and the appointment of a new guardian by the judge of probate in another county, while the first guardianship continues, is void.'"

⁹⁸ Application of Walker, 172 Neb. 398, 109 N.W.2d 724 (1961); *In re Guardianship of Peterson*, 119 Neb. 511, 229 N.W. 885 (1930); *In re Connor*, 93 Neb. 118, 139 N.W. 834 (1913).

⁹⁹ NEB. REV. STAT. § 38-801 (Reissue 1960). The foreign guardian must reside in the same state or territory as his ward; he must post a security bond double the value of the ward's property; the removal of the property must not be prejudicial to the interests of the ward; all Nebraska creditors of the ward must be fully paid or full payment tendered; and the foreign jurisdiction must have enacted a similar provision for recovery and possession of property by nonresident guardians for their nonresident wards.

¹⁰⁰ NEB. REV. STAT. § 38-621 (Supp. 1961).

¹⁰¹ See NEB. REV. STAT. §§ 38-513, 38-514 (Reissue 1960).

any "suitable person,"¹⁰² charitable corporation,¹⁰³ trust company,¹⁰⁴ or humane society.¹⁰⁵ In addition, the Juvenile Court Act contains a reference to guardianship of the person of a neglected, dependent or delinquent child by the association or individual to whose care the child is committed by the juvenile court.¹⁰⁶

There is apparently no residence requirement for an individual guardian.¹⁰⁷ Also, there is no order of priority as to persons entitled to the appointment,¹⁰⁸ although the court has held that it is in the best interests of the minor to appoint a parent who has had custody of the minor for a number of years and is otherwise competent and suitable.¹⁰⁹

A minor, fourteen years old or over, is entitled to nominate his own guardian, "and ordinarily the county court should approve the person so nominated unless, in the exercise of its discretion it comes to the conclusion that the person nominated is disqualified to act as such."¹¹⁰ A surviving parent may by will appoint a testamen-

¹⁰² *In re* Guardianship of Lyon, 140 Neb. 159, 163, 299 N.W. 322, 324 (1941): "No statute of Nebraska, aside from one relating to the appointment of a guardian for one receiving payment from the United States Veterans' Bureau . . . seems to place any restriction upon what person shall act as a guardian of a minor or incompetent person, other than to provide that a 'suitable person' shall be so appointed."

¹⁰³ NEB. REV. STAT. § 38-103 (Reissue 1960) ("any charitable corporation organized under the laws of this state, and now or hereafter authorized by its articles to undertake the care and management of minor children").

¹⁰⁴ NEB. REV. STAT. § 8-206(5) (Supp. 1961) (guardian of the property only).

¹⁰⁵ NEB. REV. STAT. § 38-118 (Reissue 1960).

¹⁰⁶ NEB. REV. STAT. § 43-209 (Supp. 1961). The potential constitutional conflicts of jurisdiction between the juvenile courts and county and district courts in guardianship matters have not yet arisen in the reported decisions.

¹⁰⁷ See NEB. REV. STAT. § 38-102 (Reissue 1960); *In re* Guardianship of Lyon, 140 Neb. 159, 299 N.W. 322 (1941). For a comparison of the residence requirements for Nebraska fiduciaries, see note 82 *supra*.

¹⁰⁸ See *In re* Guardianship of Lyon, 140 Neb. 159, 162, 299 N.W. 322, 324 (1941): "No statute of Nebraska is cited that gives preference to any person, spouse, or next of kin of the ward, in the appointment of a guardian, as is the case in the appointment of an administrator of a person deceased." *But cf.* Workman v. Workman, 171 Neb. 554, 561, 106 N.W.2d 722, 726 (1960): "If one having a legal right to the appointment of guardian, such as a parent, is a fit and proper person to act in that capacity, he should not ordinarily be denied such right."

¹⁰⁹ Workman v. Workman, 171 Neb. 554, 106 N.W.2d 722 (1960).

¹¹⁰ *Id.* (syllabus by the court); NEB. REV. STAT. § 38-102 (Reissue 1960); see Bradley v. Bradley, 126 Neb. 52, 252 N.W. 469 (1934).

tary guardian, with the same powers and duties as a statutory guardian.¹¹¹

The matters of resignation or removal of guardians and appointment of successors are also carried out in the county court.¹¹² The county court can seek the removal of a guardian, or take other actions concerning the guardianship, on its own motion.¹¹³

(2) *Trustee.*

The selection, removal and resignation of trustees, and appointment of successor trustees, are normally controlled by directions in the trust instrument in the case of living trusts.¹¹⁴ Even in the case of testamentary trusts, the directions in the will govern, but the county court has authority to approve a voluntary resignation¹¹⁵ and to remove a trustee (or possibly to refuse a decedent's nomination of a trustee or successor trustee).¹¹⁶ These matters, however,

¹¹¹ NEB. REV. STAT. §§ 38-112, 38-113 (Reissue 1960). The appointment is probably not conclusive on the county court, but, like the executor named under a will, effective unless the guardian is found to be incompetent or "otherwise unsuitable." See NEB. REV. STAT. § 30-302 (Reissue 1956). The "appointment" of a testamentary guardian by a surviving parent may be entitled to a greater persuasive effect than a "nomination" by a minor fourteen or over, since the testamentary guardian statute does not contain the language "if approved by the court," and, in fact, seems specifically to distinguish "a guardian appointed by the court." Note, too, that the word "appoint" (by the court) is employed in section 38-104, the minor's provision, in contrast to the word "nominate" (by the minor). Only the term "appointment" appears in the testamentary guardian provisions. And see NEB. REV. STAT. § 38-507 (Reissue 1960) ("appointed either by the testator or county court").

¹¹² NEB. REV. STAT. § 38-507 (Reissue 1960).

¹¹³ See *Workman v. Workman*, 168 Neb. 408, 413, 95 N.W.2d 704, 708 (1959) ("of controlling importance is that the duty to protect a minor in a guardianship proceeding devolves upon the court on notice to the guardian and not necessarily upon some other person having a relationship to the proceeding or the estate"); *Robertson v. Epperson*, 78 Neb. 279, 110 N.W. 540 (1907); *Crooker v. Smith*, 47 Neb. 102, 66 N.W. 19 (1896).

¹¹⁴ Absent a provision in the trust instrument, these matters must be judicially determined, but the consent of all beneficiaries may permit the resignation of a trustee. See RESTATEMENT (SECOND), TRUSTS §§ 106-108 (1959).

¹¹⁵ NEB. REV. STAT. § 30-1804 (Reissue 1956).

¹¹⁶ NEB. REV. STAT. § 30-1805 (Reissue 1956). Section 30-1801 can be read literally as precluding the county court from failing to appoint the named trustee, and section 30-1803 can be read as leaving the matters of perpetuating the trust solely to the trust instrument if there are provisions

are primarily in the control of the settlor and his draftsman. Compared with the rules for guardianships and custodianships, trusts offer wide latitude for planned control of these important items in the establishment and administration of the arrangement.

(3) *Custodian.*

A custodianship is created by a gift¹¹⁷ or bequest¹¹⁸ of securities or money with a designation that it is made under the Nebraska Uniform Gifts To Minors Act. The gift can be made to only one minor, and only one person may be custodian.¹¹⁹ The initial designation of a custodian is made by the donor. The statutes do not state that a trustee may be permitted under a gift or bequest to distribute from the trust to a custodian for the minor, but such a device could have estate planning uses.¹²⁰

For a security in registered form,¹²¹ or money,¹²² the custodian may be any adult, including the donor, a guardian of the minor, or a trust company. The donor cannot be custodian of securities not in registered form.¹²³ From a tax standpoint, the donor should not be selected as custodian.¹²⁴

A resigning custodian may designate his successor by an instrument in writing, reregistration of the securities, and delivery of all custodial property to the successor.¹²⁵ The resignation and designa-

in the instrument. Read as a whole, it would appear that the express power of the county court to remove "any trustee . . . who shall be evidently unsuitable to perform his duties as such trustee" would permit the court to refuse at the outset to designate such a person as trustee or successor trustee. See note 82 *supra*.

¹¹⁷ NEB. REV. STAT. § 38-1002 (Reissue 1960). But failure to transfer possession and control to the custodian, erroneous designation of a custodian, or renunciation by the custodian, will not invalidate the gift.

¹¹⁸ NEB. REV. STAT. §§ 38-1101, 38-1102 (Reissue 1960).

¹¹⁹ NEB. REV. STAT. § 38-1002(2) (Reissue 1960).

¹²⁰ For an illustration of the usefulness of such an arrangement, see text at note 271 *infra*. Also, the Nebraska statutes do not specifically provide that insurance proceeds can be made payable to a custodian.

¹²¹ NEB. REV. STAT. § 38-1002(1) (a) (Reissue 1960).

¹²² NEB. REV. STAT. § 38-1002(1) (c) (Reissue 1960).

¹²³ NEB. REV. STAT. § 38-1002(1) (b) (Reissue 1960).

¹²⁴ See note 263 *infra*. Tax factors may be more important in selecting a custodian than a trustee, since in some situations a trustee can be immunized by draftsmanship from powers which could have adverse tax consequences.

¹²⁵ NEB. REV. STAT. § 38-1007(2) (Reissue 1960).

tion of a successor could also be handled through the county court.¹²⁶ Only an adult member of the minor's family (i.e., parents, grandparents, brothers, sisters, uncles and aunts¹²⁷), a guardian of the minor, or a trust company can become successor custodian.¹²⁸

Where the named custodian is not eligible, renounces or dies, the guardian of the minor becomes successor custodian, or if there is no guardian, the county court designates a successor.¹²⁹ A guardian can exercise all of the powers of a custodian with respect to the custodial property free from county court supervision of the guardianship.¹³⁰ In the case of a bequest, the executor can name a custodian with the approval of the county court if the named custodian does not act.¹³¹

C. BOND.

Guardians are required to furnish bonds in the amount fixed by the county court.¹³² Testamentary guardians¹³³ and testamentary trustees¹³⁴ may serve without bond if permitted by the will, unless the court finds a "sufficient" reason to require a bond. Absent any provision in the trust instrument, trustees of inter vivos trusts need

¹²⁶ NEB. REV. STAT. §§ 38-1007(3) to (6) (Reissue 1960).

¹²⁷ NEB. REV. STAT. § 38-1001(10) (Reissue 1960).

¹²⁸ NEB. REV. STAT. § 38-1007(1) (Reissue 1960).

¹²⁹ NEB. REV. STAT. § 38-1007(4) (Reissue 1960).

¹³⁰ NEB. REV. STAT. § 38-1003(1) (Reissue 1960): "[N]o guardian of the minor has any . . . duty . . . with respect to the custodial property except as provided in sections 38-1001 to 38-1010." Thus, the guardian could as custodian hold guardianship powers "in trust" free from county court supervision. See NEB. REV. STAT. § 38-1004(9) (Reissue 1960).

¹³¹ NEB. REV. STAT. § 38-1104 (Reissue 1960).

¹³² NEB. REV. STAT. § 38-110 (Reissue 1960) (requiring a corporate surety for an individual guardian if the personal estate is \$1,000 or more).

¹³³ NEB. REV. STAT. § 38-113 (Reissue 1960).

¹³⁴ NEB. REV. STAT. § 30-1801 (Supp. 1961). See *In re Estate of Grainger*, 151 Neb. 555, 38 N.W.2d 435 (1949) (bond required "by a change in the circumstances or situation of the trustee or for other sufficient reason" within discretion of county court where trustee proposed to act under a nominee statute not in existence during the lifetime of testator, even though the will, itself, referred to a nominee); Mattoon, Ronin, & Troyer, *Selected Probate Questions*, 39 NEB. L. REV. 349, 363 (1960): "Therefore, the county judge has discretion to determine whether or not the waiver clause in the will will be followed. Generally the court should not interfere with the wishes of the testator unless for good reason. . . . This wide discretion invested in the county judge should be exercised with care and in accordance with the testator's wishes unless there is some good reason for not complying with his intentions."

not be bonded. Custodians are ordinarily not required to furnish a bond,¹³⁵ although it is possible for the county court to require one.¹³⁶

D. JUDICIAL SUPERVISION OF ADMINISTRATION.

(1) *Jurisdiction.*

The Constitution gives county courts "original jurisdiction in all matters of probate, settlement of estates of deceased persons . . . appointment of guardians, and settlement of their accounts; and such other jurisdiction as may be given by general law."¹³⁷ Under this provision, the jurisdiction of county courts over executors and guardians is exclusive.¹³⁸

The jurisdiction over inter vivos trusts and trustees, however, rests in the district courts under general equitable powers.¹³⁹ Before 1931, the district courts also had general jurisdiction of testamentary trusts and trustees.¹⁴⁰ In 1931, the legislature granted statutory jurisdiction to county courts for testamentary trust administration.¹⁴¹ The technical effect of this amendment has been to provide a concurrent jurisdiction in supervising the administration of testamentary trusts,¹⁴² even though, as a practical matter, the administration is presently being conducted by the county courts.

The scope of county court jurisdiction over testamentary trusts is unclear. The county court is without jurisdiction to interpret the

¹³⁵ NEB. REV. STAT. § 38-1005(4) (Reissue 1960).

¹³⁶ NEB. REV. STAT. §§ 38-1007(5)-(6) (Reissue 1960).

¹³⁷ NEB. CONST. art. V, § 16.

¹³⁸ See, e.g., *Rohn v. Kelley*, 156 Neb. 463, 56 N.W.2d 711 (1953); *Stewart v. Herten*, 125 Neb. 210, 249 N.W. 552 (1933).

¹³⁹ See, e.g., *Burnham v. Bennison*, 121 Neb. 291, 236 N.W. 745 (1931).

¹⁴⁰ See *In re Estate of Frerichs*, 120 Neb. 462, 233 N.W. 456 (1930) (rights of minor under testamentary trust enforceable only in district court by guardian or next friend).

¹⁴¹ NEB. REV. STAT. §§ 30-1801 (Supp. 1961), 30-1802 to 30-1805 (Reissue 1956).

¹⁴² See *In re Estate of Grblny*, 147 Neb. 117, 125, 22 N.W.2d 488, 493 (1946): "The act of 1931 contains no provisions attempting in any manner to deprive the district court of its inherent equity jurisdiction over the supervision of the administration of trusts generally of which, as held in *Burnham v. Bennison*, *supra*, it cannot be legislatively deprived. The act simply conferred jurisdictional powers upon the county court in all testamentary trust estates, such as the one at bar, without depriving the district court of its original equitable powers, whether inherent or conferred. The result is that the county court and the district court have concurrent jurisdiction in supervision over the administration of testamentary trusts."

wills which create testamentary trusts or to exercise equitable jurisdiction insofar as rival claimants are concerned.¹⁴³ Even under the constitutionally exclusive jurisdiction in probate matters, the construction of a will by a county court is solely for the purpose of advising the executor in carrying out his duties and does not determine the rights of persons beneficially interested under the will.¹⁴⁴ The county court also lacks jurisdiction where the title to real estate is involved, except to the extent it is incidentally necessary to carry out other aspects of its jurisdiction.¹⁴⁵ In the event there is uncertainty in the application of these rules in a given case, the safest solution from the testamentary trustee's standpoint might be to institute suit in the district court, pleading the cause so as to invoke the full range of equitable power of district courts over trust administration, construction of documents, and title to real estate.¹⁴⁶

In 1957, the legislature enacted provisions permitting probate assets to be "poured over" into an inter vivos trust and the entire property administered free from county court supervision so long as one of the trustees is a corporate fiduciary.¹⁴⁷ As an inter vivos

¹⁴³ *In re Trust Estate of Myers*, 151 Neb. 255, 37 N.W.2d 228 (1949) (county court lacks jurisdiction to try issues of termination of testamentary trust and distribution of trust corpus); *DeWitt v. Sampson*, 158 Neb. 653, 64 N.W.2d 352 (1954); cf. *In re Estate of Greenamyre*, 133 Neb. 693, 276 N.W. 686 (1937) (trustee-beneficiary estopped to contest county court jurisdiction to order, pursuant to apparent family settlement, that trust was created under a will).

¹⁴⁴ See *Lutecavish v. Eaton*, 166 Neb. 268, 89 N.W.2d 44 (1958); *Stubbs, Probate Procedures Available to Beneficiaries*, 39 NEB. L. REV. 311, 319-322 (1960).

¹⁴⁵ See generally *Hahn v. Verret*, 143 Neb. 820, 11 N.W.2d 551 (1943).

¹⁴⁶ This is based upon the theory that district courts have concurrent jurisdiction with county courts in the supervision of testamentary trust administration. See note 142 *supra*. A testamentary trustee cannot make a jurisdictional error by filing suit with respect to the questionable item in the district court. This should be distinguished from the conservative approach which an executor or administrator might wish to take. Because of the constitutional exclusive probate jurisdiction of the county court, an executor or administrator might wish to file parallel suits in some instances in both the county and district courts to insure against a jurisdictional deficiency. The two suits might be consolidated for trial in the district court, but the appeal from the county court to the district court would not alone invoke the general equitable jurisdiction of the district court. *In re Trust Estate of Myers*, 151 Neb. 255, 37 N.W.2d 228 (1949).

¹⁴⁷ NEB. REV. STAT. §§ 30-1806, 30-1807 (Supp. 1961): "A testator may by will, devise and bequeath real and personal property to a trustee or to cotrustees of a trust, including an unfunded life insurance trust, which is evidenced by a written instrument in existence when the will is made and which is identified in the will, even though the

trust, the whole trust would be subject to the general equitable jurisdiction of the district court. Unless one co-trustee is a corporate trustee, the trust would be partially subject to the jurisdiction of two courts. So much of the property as has been poured over would be within the continuing county court jurisdiction (and also subject to the concurrent jurisdiction of the district court¹⁴⁸), but the balance of the property would be under the jurisdiction of only the district court.¹⁴⁹

The county court is given general jurisdiction over custodians under the gifts to minors statutes.¹⁵⁰ Inasmuch as these statutes reflect a legislative attempt to eliminate the ordinary trust and guardianship rules, the statutory jurisdiction of county courts given by the act may be exclusive in matters concerning custodianship administration.¹⁵¹

trust is subject to amendment, modification, revocation, or termination. Unless the will provides otherwise, the estate so devised and bequeathed shall be governed by the terms and provisions of the instrument creating the trust, including any amendments or modifications in writing made at any time before or after the making of the will and before the death of the testator. The property so devised or bequeathed shall be administered under the provisions of sections 30-1801 to 30-1805 as if held under a trust created by will unless the designated trustee or one of the designated cotrustees is a corporate trustee authorized by law to exercise trust powers. An entire revocation of the trust prior to the testator's death shall invalidate the devise or bequest."

"No trustee or cotrustee of an inter vivos trust, including an unfunded life insurance trust, shall be required to comply with the provisions of sections 30-1801 to 30-1805 by reason of any testamentary bequest or devise to him as such trustee if he or one of his cotrustees is a corporate trustee authorized by law to exercise trust powers unless such compliance is expressly required by the will and if compliance is so required, only the property so bequeathed or devised shall be subject to administration under sections 30-1801 to 30-1805."

¹⁴⁸ See notes 142 and 146 *supra*.

¹⁴⁹ See Mattoon, Ronin & Troyer, *Selected Probate Questions*, 39 NEB. L. REV. 349, 372 (1960): "This may create an awkward situation, because as a result, the trustee must manage two trusts which may not be computable. This is of importance to draftsmen. If the testator has confidence in the trustee, it is advisable to omit provisions requiring compliance with the testamentary trust statute where property is poured into an existing trust." See also Troyer, *Problems in Probate and Administration Procedure*, 37 NEB. L. REV. 134, 144-148 (1958).

¹⁵⁰ See NEB. REV. STAT. § 38-1001 (4) (Reissue 1960).

¹⁵¹ This question is theoretically difficult. If the custodianship statute is an aspect of guardianship, county court original jurisdiction would need to be exclusive. But a trust analogy would mean that the district courts would have concurrent jurisdiction under the inherent equitable powers. The statute should probably be viewed simply as a statutory creature, distinct from either guardianship or trust comparisons. As

(2) *General Procedure for Judicial Supervision.*

A significant difference in the operation of guardianships, inter vivos trusts, testamentary trusts, and custodianships is found in the degree of judicial supervision given to matters of fiduciary administration. Supervision of inter vivos trusts and custodianships occurs only when sought by an interested party. Ordinarily, no judicial determinations are necessary to complete these arrangements, although neither trust law¹⁵² nor the custodianship statute¹⁵³ makes it necessary to allege mismanagement to secure a judicial accounting. The court inquiry, if any, is one of determining whether the fiduciary has acted within the range of discretion permitted by the trust instrument or by the gifts to minors statutes.

In the case of trusts, the available remedies would follow the ordinary procedure for equity suits in the district courts. Custodianship matters are handled under county court practice. In either case, it would probably be necessary to join the minor as a party to the action and see that his interests are protected by a guardian ad litem.

Guardianships and testamentary trusts are subject to the continuing supervision of county courts. Both are required to file inventories, periodic accountings, and final accountings.¹⁵⁴

The nature and extent of judicial supervision of testamentary trusts and guardianships is quite different. A trustee is required to render an initial accounting, submit periodic accounts "at such times as the court shall direct,"¹⁵⁵ and "faithfully execute such trust under the direction of the court according to the true intent and meaning thereof."¹⁵⁶ In general a testamentary trustee is free to act within the ordinary standard of fiduciary care in performing

such, the county court would appear to have exclusive jurisdiction to try an action brought under the provisions of the act, but this would not preclude any other form of suit, existing apart from the statute, to be brought in the district court under the general equitable or civil jurisdiction of district courts. See notes 142 and 146 *supra*.

¹⁵² BOGERT, TRUSTS & TRUSTEES § 963 at 21 (2d ed. 1962).

¹⁵³ NEB. REV. STAT. § 38-1008 (Reissue 1960).

¹⁵⁴ NEB. REV. STAT. §§ 30-1801 (Supp. 1961); 38-110, 38-505 (Reissue 1960); see NEB. REV. STAT. §§ 24-607, 24-609 (Reissue 1956).

¹⁵⁵ NEB. REV. STAT. § 30-1801(2) (Supp. 1961). The virtually identical language in the guardianship provisions has been construed to require annual reports. See 3 WHITFORD, NEBRASKA PROBATE AND ADMINISTRATION 1450-1451 (1957).

¹⁵⁶ NEB. REV. STAT. § 30-1801(3) (Supp. 1961).

discretionary acts.¹⁵⁷ The phrase "under the direction of the court" probably implies no more than that the court, on its own motion or the request of an interested party, can require the trustee to carry out the terms of the trust and exercise the discretion given to the trustee.¹⁵⁸ The phrase has not been interpreted in practice to require continuous approval of administrative matters by the county court. The role of the county court is to see that the trustee uses the discretion reposed in him; its role is not to substitute the discretion of the court for that of the trustee.

Unless specific directions appear in the trust instrument, the primary discretion which is exercised in carrying out the terms of a testamentary trust is that of the trustee. The role of the court is to correct a nonuse or misuse of the testamentary trustee's discretionary authority.

In guardianship matters, the statutes appear to contemplate that the court exercise a primary continuing supervision over administrative matters. The statutes require advance court approval for

¹⁵⁷ *Scully v. Scully*, 162 Neb. 368, 76 N.W.2d 239 (1956); *In re Sullivan's Will*, 144 Neb. 36, 12 N.W.2d 148 (1943); *In re Vohland's Estate*, 135 Neb. 77, 280 N.W. 241 (1938); see *Reed v. Ringsby*, 156 Neb. 33, 54 N.W.2d 318 (1952); RESTATEMENT (SECOND), TRUSTS § 187 (1959).

¹⁵⁸ See *Scully v. Scully*, 162 Neb. 368, 369, 76 N.W.2d 239, 242 (1956) (headnotes by the court): "Where discretion is conferred upon the trustee with respect to the exercise of a power, its exercise is not subject to control by the court, except to prevent an abuse by the trustee of his discretion. The extent of the discretion conferred upon the trustee is measured by the settlor's manifestation of intention, and the manner in which a trustee shall exercise his function rests ordinarily within his own discretion and judgment. In the matter of control of discretionary powers of a trustee, the real question is whether it appears that the trustee is acting in that state of mind in which it was contemplated by the settlor that he should act. The mere fact that, if the discretion had been conferred upon the court, the court would have exercised the power differently is not ordinarily a sufficient reason for interfering with the exercise of power by the trustee. If discretion is conferred upon the trustee in the exercise of a power, the court will not interfere unless the trustee in exercising or failing to exercise the power acts dishonestly, or with an improper even though not a dishonest motive, or fails to use his judgment, or acts beyond the bounds of a reasonable judgment."; 3 WHITFORD, NEBRASKA PROBATE AND ADMINISTRATION 1591-1592 (1957): "Where a will bequeaths property in trust for certain purposes but with a provision that the trustees have 'full and uncontrolled discretion as to the application of said income and trust estate for the use aforesaid' the court may order the trustees to act to carry out a purpose of the trust but it cannot specify their action. For example, it can order the trustees of a trust for support of a beneficiary to do something for the dependents of that beneficiary but it cannot specify a certain sum per month."

virtually all matters affecting guardianship principal, such as sale of personal or real property, investment of funds, borrowing or lending funds, or use of principal for support and education.¹⁵⁹ Only the guardianship income may be expended for maintenance and education without prior authorization.¹⁶⁰

Under both guardianships and testamentary trusts, there are a multitude of procedural problems which could conceivably arise from the requirement of judicial supervision. For example, consider the issue of giving notice of an application for court approval. For the adjudication to be effective, notice of the hearing, and in some cases the actual report or petition, must be given to all persons whose rights are involved in the determination. Also, if a minor is entitled to notice and an opportunity to be heard, then it is necessary to have a guardian ad litem appointed for him in order that the adjudication be final as to his rights.

One area of uncertainty concerns who will be considered as "interested parties." The provision dealing with the sale of guardianship personal estate and the investment of guardianship funds requires "such notice to all persons interested therein as the court shall direct."¹⁶¹ It is not clear whether the court direction relates only to the type of notice, or to both the notice and the persons entitled to receive notice. The guardianship statute covering a mortgage or pledge of personal property specifies that the county judge "shall direct to what persons and in what manner notice of such hearing shall be given."¹⁶² There might be constitutional objections to an *ex parte* determination concerning who is an interested party which deprives a known individual, whose rights are in fact affected by the hearing, from receiving notice.¹⁶³

¹⁵⁹ See notes 179, 182, 184-187, 242 *infra*.

¹⁶⁰ See NEB. REV. STAT. § 38-111 (Reissue 1960); *Hoga's Estate v. Look*, 134 Mich. 361, 96 N.W. 439 (1903).

¹⁶¹ NEB. REV. STAT. § 38-506 (Reissue 1960).

¹⁶² NEB. REV. STAT. § 30-1208 (Reissue 1956).

¹⁶³ See *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950); *Walker v. City of Hutchinson*, 352 U.S. 112 (1956). *But cf. McCaughey v. Lyall*, 224 U.S. 558 (1911); *Robards v. Lamb*, 127 U.S. 58 (1887); *Florentine v. Barton*, 69 U.S. (2 Wall.) 210 (1864). Where judicial proceedings consist of several distinct steps, it appears that personal notice of each step must be given because notice at the beginning of the proceeding would be insufficient for the whole proceeding. *City of New York v. New York, N. H. & H. R.R.*, 344 U.S. 293 (1952); *Fraser, Jurisdiction by Necessity—An Analysis of the Mullane Case*, 100 U. PA.L.REV. 305, 316 (1951). There also are statutory personal notice requirements in Nebraska specifically requiring that personal notice

For a sale of guardianship real estate, the statutes provide that "all those who are next of kin and heirs apparent or presumptive of the ward shall be considered as interested in the estate."¹⁶⁴ There is authority under this section that in a guardianship proceeding, the minor himself is not entitled to notice.¹⁶⁵ On the other hand, in guardianship and testamentary trust accountings, the ward is specifically entitled to notice, a copy of the report, and a reference to any other items for which approval is requested,¹⁶⁶ and, al-

by United States mail of published notices be given to every person appearing to have a direct legal interest "in any action or proceeding of any kind or nature, as defined in section 25-520.02." NEB. REV. STAT. § 25-520.01 (Supp. 1961). NEB. REV. STAT. § 25-520.02 (Supp. 1961): "The term action or proceeding means all actions and proceedings in any court and any action or proceeding before the governing bodies of municipal corporations, public corporations, and political subdivisions for the equalization of special assessments or assessing the cost of any public improvement."

¹⁶⁴ NEB. REV. STAT. § 38-610 (Reissue 1960).

¹⁶⁵ *Myers v. McGavock*, 39 Neb. 843, 58 N.W. 522 (1894). See *Thaw v. Ritchie*, 136 U.S. 519 (1889). Since both the court and the guardian have duties of protecting the interests of the minor, notice to the minor would seem unnecessary. The whole purpose of the judicial determination, however, is to determine whether the proposed action of the guardian is in the minor's interests. Neither the guardian nor the court is an advocate on behalf of the minor. When the guardian's actions are in question, the court has a duty not only to the ward but to all "interested parties." It is strange that the minor's heirs at law are entitled to notice but not the minor. From a policy standpoint, it would seem that at least if the minor were more than fourteen years old (the age at which he alone might be served with a summons and an age at which he could request the appointment of and nominate a guardian) he should be entitled to notice and an opportunity to have his own views and wishes presented for consideration. The views, analysis and contribution of the minor could, subject to final court discretion, prove advantageous to the best use of the guardianship property. Yet, it would be preposterous that the court might need to appoint, or the minor request, a guardian ad litem to examine the routine actions of the guardian. As a practical matter, the protection afforded the minor from the general guardian and court discretion may be sufficient. The court could, if it thought necessary, appoint a representative for the minor's interest at any time. What this analysis indicates is that there may be no real need for judicial approval of a number of guardianship matters which now require advance court action. If the court proceeding really is designed to achieve important substantive results, and if the consequences are significant enough to warrant notice to the contingent takers upon the ward's death, then a strong argument can be made in favor of giving the minor notice and an opportunity to be heard in the matter.

¹⁶⁶ NEB. REV. STAT. §§ 24-611 (requiring these items to be mailed to each living beneficiary and providing, in effect, that a minor cannot waive their receipt), 24-606(2)(c) (Reissue 1956) (defining beneficiary to include ward).

though the guardian also receives copies,¹⁶⁷ the minor himself can personally file objections or exceptions.¹⁶⁸ This could mean that to have a guardianship accounting conclusive as to the ward, it is necessary to appoint a guardian ad litem.¹⁶⁹

The provisions covering guardianship and testamentary trust accountings also provide for mailing the reports, notices and other papers to each living beneficiary, which apparently includes contingent beneficiaries.¹⁷⁰ There could be some question concerning the meaning of "contingent beneficiary," such as whether a residuary beneficiary under the will is a contingent beneficiary for purposes of testamentary trust administration. Read as a whole, the statute requires notice to every known individual whose rights are in fact at stake in the proceeding. It might be well for guardians and testamentary trustees to take this approach in all situations requiring notice, whether or not such complete notice is required by the court.

(3) Requirement of Prior Judicial Approval.

Under only the guardianship statutes is there a requirement of advance judicial approval for items of routine administration. Trustees may exercise administrative powers free from prior court supervision unless limited by the trust instrument.¹⁷¹ It is possible for any fiduciary or interested party to request court directions or a declaration of rights in unusual or unclear situations,¹⁷² but the

¹⁶⁷ NEB. REV. STAT. § 24-612 (Reissue 1956).

¹⁶⁸ NEB. REV. STAT. § 24-614 (Reissue 1956).

¹⁶⁹ This result might also be required by the due process clause. See Fraser, *Jurisdiction by Necessity—An Analysis of the Mullane Case*, 100 U. PA.L.REV. 305, 319 (1951): "Actual notice is insufficient because of the ward's incapacity, therefore a guardian *ad litem* should be appointed prior to the settlement of the guardian's account in order to satisfy due process When a person is subject to a disability, a guardian must be appointed to protect his interests. This is true in all types of cases, not just guardianship cases."

¹⁷⁰ NEB. REV. STAT. §§ 24-608(6), 24-611 (Reissue 1956).

¹⁷¹ See notes 157 and 158 *supra*, concerning the requirements applicable to a testamentary trustee, especially that the trust be executed "under the direction of the court."

¹⁷² NEB. REV. STAT. § 25-21,152 (Reissue 1956). A similar power would also exist under the inherent equitable jurisdiction of the district courts. The statutory jurisdiction of the county court (and constitutional jurisdiction over guardianships) can also be construed to contain this authority insofar as the court otherwise has jurisdiction of the subject matter of adjudication.

normal trust operation is carried on without advance court proceedings.

A custodian would also normally be expected to act without court supervision of administrative matters. The custodianship statutes do, however, contain specific provisions permitting judicial authorization of expenditure of custodial property for support, maintenance or education upon application of a parent, guardian or minor over fourteen,¹⁷³ or the custodian,¹⁷⁴ and court orders for the compensation of the custodian,¹⁷⁵ approval of accountings,¹⁷⁶ removal of custodian or posting of a bond by the custodian,¹⁷⁷ permission to resign as custodian and designation of a successor custodian.¹⁷⁸

A guardian may not sell, exchange or otherwise transfer guardianship personal property without prior approval of the county court.¹⁷⁹ This requires notice to interested parties and a hearing.¹⁸⁰ The consequence of improper court approval may be that the sale is

¹⁷³ NEB. REV. STAT. § 38-1004(3) (Reissue 1960).

¹⁷⁴ NEB. REV. STAT. § 38-1004(2) (Reissue 1960).

¹⁷⁵ NEB. REV. STAT. § 38-1005(3) (b) (Reissue 1960).

¹⁷⁶ NEB. REV. STAT. § 38-1008 (Reissue 1960).

¹⁷⁷ NEB. REV. STAT. §§ 38-1007(5) & (6) (Reissue 1960).

¹⁷⁸ NEB. REV. STAT. §§ 38-1007(3) & (4) (Reissue 1960).

¹⁷⁹ NEB. REV. STAT. § 38-506 (Reissue 1960): "The county courts in their respective counties, on the application of a guardian, or of any person interested in the estate of any ward, after such notice to all persons interested therein as the court shall direct, may authorize or require the guardian to sell and transfer any stock in public funds, or in any bank or corporation, or any other personal estate or effects held by him as guardian, and to invest the proceeds of such sale, and also any other money in his hands in accordance with the provisions of section 24-601, or in real estate, life insurance, endowment insurance or annuities, as the county court may authorize"; *Hendrix v. Richards*, 57 Neb. 794, 796, 78 N.W. 378, 379 (1899): "A fair construction of the foregoing language leads to the conclusion that if the guardian desires to dispose of the ward's property of the nature described in the law, he must submit the matter to the proper probate (county) court, and obtain its order that it be done. The words of the section are 'may authorize or require,' and the meaning seems perfectly clear; a sale or transfer of the property of the ward must be by the authorization of the court." See *First Trust Co. v. Hammond*, 139 Neb. 546, 298 N.W. 144 (1941); *Wilkins v. Deal*, 128 Neb. 78, 257 N.W. 486 (1934); *Coe v. Nebraska Bldg. & Inv. Co.*, 110 Neb. 322, 193 N.W. 708 (1923).

¹⁸⁰ NEB. REV. STAT. § 38-506 (Reissue 1960) ("after such notice to all persons interested therein as the court shall direct"); see *In re Estate of O'Brien*, 80 Neb. 125, 113 N.W. 1001 (1907) (*ex parte* county court approval of annual account was not authorization for a loan made by the guardian).

voidable by the minor against a party who knows of the guardianship relationship,¹⁸¹ and that the guardian becomes a virtual insurer of the value of the property.

The same statute provides that a guardian must obtain court approval to invest guardianship funds. If he fails to secure judicial approval and loss results, the guardian is liable for the full principal plus legal interest.¹⁸² The limitation requiring judicial approval is in addition to the comparatively conservative legal list of investments to which guardians are limited.¹⁸³

A guardian is also required to secure authority to borrow funds,¹⁸⁴ mortgage or pledge the guardianship personal property,¹⁸⁵ loan guardianship property,¹⁸⁶ and sell or mortgage real estate.¹⁸⁷ The real estate provisions are especially complicated, requiring not only the county court proceedings, but a cumbersome procedure in the district court,¹⁸⁸ and if the property to be sold has a value of five hundred dollars, a public sale.¹⁸⁹

Reading the guardianship provisions as a whole, it appears that the county court is expected to exercise a much higher degree of discretion in administrative matters than might be done by the court under a testamentary trust. This seems apparent both from the fact that it is advance approval which the statutes require, and from the wide variety of items placed under court supervision by the statutes. Especially in situations where the ward may not be entitled to notice, the court is expected to act in the best interests of the ward and his estate. This implies that the ultimate discretion rests with the court rather than with the guardian. The court merely supervises the exercise of discretion by a testamentary trustee, but it can be expected to participate much more materially in the actual exercise of discretion by a guardian.

The probable reason for this unusually high degree of judicial supervision is that guardians are quite likely to be laymen, normally

¹⁸¹ *Hendrix v. Richards*, 57 Neb. 794, 78 N.W. 378 (1899).

¹⁸² *In re Guardianship of Morris*, 145 Neb. 319, 16 N.W.2d 442 (1944); NEB. REV. STAT. § 38-506 (Reissue 1960); note 179 *supra*.

¹⁸³ See NEB. REV. STAT. § 24-601 (Supp. 1961).

¹⁸⁴ NEB. REV. STAT. §§ 30-1207, 30-1208 (Reissue 1956).

¹⁸⁵ NEB. REV. STAT. §§ 30-1207, 30-1208 (Reissue 1956).

¹⁸⁶ *In re Guardianship of Morris*, 145 Neb. 319, 16 N.W.2d 442 (1944); *In re Guardianship of Phillips*, 144 Neb. 183, 13 N.W.2d 99 (1944); *In re Estate of O'Brien*, 80 Neb. 125, 113 N.W. 1001 (1907).

¹⁸⁷ NEB. REV. STAT. §§ 38-601 to 38-643 (Reissue 1960).

¹⁸⁸ NEB. REV. STAT. § 38-607 (Reissue 1960).

¹⁸⁹ NEB. REV. STAT. § 38-613 (Supp. 1961).

a relative of the minor or some other person having custody of the child. Trustees are more likely to be generally informed in business affairs.

There are a number of disadvantages to the requirement of prior court approval. There is always the added cost, nuisance, and risk of procedural error. In addition, matters of investment may require immediate attention. Maintenance of a proper investment portfolio involves not only buying sound assets, but continuing to review and reinvest the fund as events change. The guardian is extremely burdened in these matters by the statutory requirements.

(4) *Nonjudicial Settlement of Accounts.*

A judicial settlement of trust accounts, and perhaps some guardianship matters, does not bind a minor unless he is represented by a guardian ad litem. Thus, a fiduciary may be potentially subject to claims by the minor until he is barred by becoming of legal age. This raises a possibility of tremendous cumulative liability. As a result, the estate may be depleted by expensive and cumbersome full-scale periodic judicial accountings with the appointment of guardians ad litem for the minors. In the absence of these procedures, fiduciaries customarily will be extremely cautious in the management of the account.¹⁹⁰

The mechanism for settling guardian and custodian accounts is fixed by the statutory provisions discussed above, but, to some degree, the problems of periodic accountings for trusts may be lessened by effective trust draftsmanship. For instance, the trustee may be allowed a broad discretion in exercising administrative powers, or may be given a general or special power of appointment to alter the beneficial interests under the trust. These powers reduce the likelihood of hidden potential liability which may trap a trustee regardless of his good faith and freedom from negligence. In addition, a trust may contain an exculpatory provision limiting the liability of the trustee to matters of gross negligence, wilful default, or acts done in bad faith.¹⁹¹

Many trusts now provide that the trustee periodically render an accounting to some person or persons whose approval of the matters

¹⁹⁰ See Westfall, *Nonjudicial Settlement of Trustees' Accounts*, 71 HARV. L. REV. 40 (1957).

¹⁹¹ *Fleener v. Omaha Nat'l Co.*, 131 Neb. 253, 267 N.W. 462 (1936). A non-compensated custodian is liable only for losses from bad faith, intentional wrongdoing, gross negligence, or failure to comply with the "prudent man" standard in investments. NEB. REV. STAT. § 38-1005(5) (Reissue 1960).

shown in the accounting becomes binding upon everyone who may claim an interest under the trust.¹⁹² This provision could have special value where minors are interested in the disposition. Presumably, the person selected to approve the accounting would be someone having an identity of interest with the minor under the trust or a parent or other person concerned generally with protecting the welfare of the minor.¹⁹³ It should be noted, however, that this clause does not free the trustee from the duty of rendering an accounting to the beneficiaries. While a provision dispensing altogether with a trustee's duty to account would probably be held invalid,¹⁹⁴ the proposed clause merely provides a nonjudicial method for settling the account submitted by the trustee.

The Restatement of Trusts takes the position that such a procedure for a nonjudicial settlement of accounts is valid and enforceable.¹⁹⁵ The reasoning is that the settlor should be free to dispose

¹⁹² The most comprehensive analysis of these practices is Westfall, *Non-judicial Settlement of Trustees' Accounts*, 71 HARV. L. REV. 40 (1957). The following clauses are typical:

"The Trustee shall each year render an account of its administration of the trust to the person or persons of full age entitled at the time to receive its income. Such person's or persons' written approval of such an account shall, as to all matters and transactions stated therein, be final and binding upon all persons (whether in being or not) who are then or may thereafter become entitled to share in either the principal or the income of the trust." *Id.* at 60 (specimen form from Old Colony Trust Company).

"If such person or one or more of such persons is a minor, his parents or surviving parent may act for such person in approving such an account with the same effect as if such minor had been of full age and had himself approved such account. Nothing contained in this paragraph shall be deemed to give such parents or surviving parent acting in conjunction with the Trustee the power or right to enlarge or shift the beneficial interest of any beneficiary of the trust." *Id.* at 76.

¹⁹³ *Id.* at 74-76.

¹⁹⁴ See cases collected in Annot., 171 A.L.R. 631 (1947). *But cf.* RESTATEMENT (SECOND), TRUSTS § 172, comment *d* (1959): "Such a provision is effective, unless, as in the case of testamentary trusts in some states, there is a statutory requirement for court accounting which cannot be dispensed with."

¹⁹⁵ RESTATEMENT (SECOND), TRUSTS § 172, comment *d* (1959): "By the terms of the trust it may be provided that the trustee shall submit an accounting to a particular person, for example one of the beneficiaries of the trust, and that the approval of the account by that person shall discharge the trustee. Such a provision is effective, provided that the third person acts in good faith in giving his approval and provided that the trustee made a proper disclosure in his accounting of his conduct in the administration of the trust." See 2 SCOTT, TRUSTS 1290-92 (2d ed. 1956). For federal estate and gift tax purposes "the right in a beneficiary of a trust

of his property upon whatever basis and with whatever powers over the property he may specify in the trust instrument; the beneficiaries receive only so much as they are granted under the instrument; and the long-range interests of both the beneficiaries and trustees are enhanced by such a provision.¹⁹⁶ It also seems likely that there is an overriding equitable jurisdiction in Nebraska district courts to remedy acts of fraud or bad faith in the administration of this clause.¹⁹⁷

There is some authority and reasoning, however, against the validity of a provision for a binding nonjudicial settlement of accounts.¹⁹⁸ The clause may violate the statutory provisions concerning testamentary trust accounting in the county court.¹⁹⁹ The clause also could be invalid as in derogation of the statutes providing for guardians to handle the property interests of minors,²⁰⁰ the inherent

to assent to a periodic accounting, thereby relieving the trustee from further accountability, is not a power of appointment if the right of assent does not consist of any power or right to enlarge or shift the beneficial interest of any beneficiary therein." Treas. Regs. §§ 20.2041-1(b)(1), 25.2514-1(b)(1).

¹⁹⁶ See Westfall, *Nonjudicial Settlement of Trustees' Accounts*, 71 HARV. L. REV. 40 (1957).

¹⁹⁷ See *Burnham v. Bennison*, 121 Neb. 291, 298, 236 N.W. 745, 748-49 (1931): "Indeed, the inherent power of a court of equity to supervise and control trustees in the execution of their trust is well recognized. In the proper exercise of this power, courts may review and revise the exercise of the discretion of a trustee, and if they find there has been an abuse of discretion, or if the trustee has acted in bad faith, or has failed to follow the directions and requirements imposed by the terms of the trust, or the requirements of the law, such trustee's conduct will be subject to judicial control, and the court will make such orders as may be necessary to fully effect the purpose of the trust and to secure to the beneficiaries therein their just rights as lawfully intended and expressed by the creator thereof."

¹⁹⁸ See BOGERT, TRUSTS AND TRUSTEES, § 973, at 249-50 (2d ed. 1962): "If the settlor tries to reduce the accounting duty of the trustee, either by providing that the common-law duty shall be diminished or by stipulating that it shall not be necessary for his trustee to obey a duty to account expressed in statutory form, it would seem that the effort should be invalid and the duty of the trustee unaffected. The settlor ought not to be able to oust the court of its constitutional or statutory jurisdiction, or to override the acts of the Legislature concerning information to be furnished by trustees to their beneficiaries. . . . There is a small amount of authority on the subject. The better reasoned decisions hold that the trustee still must account to the proper court."

¹⁹⁹ See *Blatz Estate*, 21 Pa. D. & C. 2d 117 (Orphans' Ct. 1960).

²⁰⁰ This argument might be especially forceful in a situation where the power of approval is in a nonbeneficiary of the trust (such as a parent or person having custody of the child), since the actions of that person

equitable jurisdiction of district courts,²⁰¹ or of the constitutional requirement that every person shall have a remedy in court for every injury done him.²⁰²

All in all, however, there seems to be nothing in the use of a clause for the nonjudicial settlement of accounts which could do more than invalidate that particular provision. If this is correct, then there would be everything to gain and nothing to lose by the use of the clause in at least all inter vivos trusts where minors are involved. Even though the clause were in the trust, the trustee still might be well advised to seek a judicial determination of the issue if a known question arises. The presence of the clause might provide an additional barrier against unforeseen future trustee liability of a considerable amount.²⁰³

would exist only to protect the interests of the minor, the traditional role of guardianships. But a trust for the sole purpose of protecting a minor's interest is not itself invalid on that ground. Also, a power of a parent to act in his own interest, even if adverse to that of the minor, might be valid. See Westfall, *Nonjudicial Settlement of Trustees' Accounts*, 71 HARV. L. REV. 40, 74-75 (1957). The "unduly formal" result may be that if, as a result of the legal draftsmanship, "the transferor has purported to create a power in the minor himself but to make such power exercisable on his behalf by another . . . [arguably, it would contravene the statutes enacted to require the appointment of guardians] inasmuch as the parent may act on behalf of the minor without the statutory safeguard."

²⁰¹ See NEB. CONST. art. V, § 9; *Burnham v. Bennison*, 121 Neb. 291, 236 N.W. 745 (1931); cf., NEB. CONST. art. V, § 16.

²⁰² NEB. CONST. art. I, § 13. The Nebraska Court has held that unexecuted agreements to arbitrate claims under an insurance policy, private contract or collective labor agreement, whether of all disputes arising under the contract or merely the amount of loss or damages, will not be enforced, and a refusal to arbitrate is not a defense to an action on the contract. See, e.g., *Wilson & Co. v. Fremont Cake & Meal Co.*, 153 Neb. 160, 43 N.W.2d 657, cert. denied, 342 U.S. 812 (1951); *Rentschler v. Missouri Pac. R.R.*, 126 Neb. 493, 253 N.W. 694 (1934); *Phoenix Ins. Co. v. Zlotky*, 66 Neb. 584, 92 N.W. 736 (1902); *Hartford Fire Ins. Co. v. Hon*, 66 Neb. 555, 92 N.W. 746 (1902); *German-American Ins. Co. v. Etherton*, 25 Neb. 505, 41 N.W. 406 (1889). But an award of an arbitrator made upon a voluntary and unrevoked submission of the parties does not become enforceable when made. See, e.g., *Connecticut Fire Ins. Co. v. O'Fallon*, 49 Neb. 740, 69 N.W. 118 (1896).

²⁰³ On the other hand, there is some possibility that a fiduciary could rely upon the clause to his detriment if the provision were later found to be invalid. Further, the presence of such a clause might be used persuasively as a legal argument for withholding some other judicial remedy which the trustee might seek. See Annot., *Contractual Provision as to Remedy as Excluding Other Possible Remedies*, 84 A.L.R.2d 322 (1962). It has been held, for example, that a mortgagee in possession of the mortgaged premises by agreement with the mortgagor cannot have a receiver appointed because he should continue to collect the rents

E. APPLICATION OF INCOME AND PRINCIPAL.

The authority of a fiduciary to expend income and principal for the minor is, of course, at the very core of the donor's wishes in making economic wealth available to the minor. Under Nebraska law, the availability of property held by a fiduciary for a minor is tightly interwoven with a definition of the legal obligation of support which other persons may have toward the minor. The legal obligation of support by a mother, for instance, is probably extinguished by property owned by the child. A father's support obligation is not normally lessened by the fact that his child has property (although it may be in a few limited instances), and the guardianship rules preclude an expenditure of any guardianship property to the extent the father does have a support obligation.

The definition of a legal obligation of support, then, can be both determined by, and determinative of, the amount of property which can be expended by the fiduciary. For federal tax purposes, the legal obligation of support as defined under state law may become a critical element in determining who, within the family, is subject to income, gift or estate taxes.

The next three portions of this article deal with these three questions. This section considers the circumstances in which guardianship, custodianship and trust income and principal can or must be expended for the minor. The following section outlines the federal tax consequences which may occur from property ownership by or for a minor. And the succeeding section considers the special and difficult (if not impossible) problems of defining and characterizing the legal obligation of support under Nebraska law.

(1) *Trusts.*

A trustee may pay the trust income or principal to or apply it for the benefit of any person or object permitted in the trust instrument.²⁰⁴ The legal issues which arise with respect to the use

and profits himself without burdening the mortgagor with the additional expenses of a receiver. *Hays v. Christiansen*, 105 Neb. 586, 181 N.W. 379 (1921). See Note, 14 NEB. L. BULL. 272, 275-76 (1936): "For the same reason, a receivership should be denied a mortgagee where the mortgage contains a stipulation that the mortgagee shall have possession of the premises on default or during foreclosure; the mortgagee in such case has his proper remedy by the very terms of the mortgage, and should not be permitted to subject the mortgagor to the added expense of a receivership."

²⁰⁴ For a discussion of the general rules concerning the power of a trustee to exercise discretionary authority, see *Scully v. Scully*, 162 Neb. 368, 76 N.W. 2d 239 (1956); notes 157 and 158 *supra*.

of trust income and corpus are primarily ones of drafting and interpreting the authority of the trust instrument to require or permit an expenditure of funds in accordance with the trustor's wishes.

(2) *Custodianships.*

The authority of a custodian to expend funds is extremely broad and seems relatively clear. The statute provides that:²⁰⁵

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

(3) *Guardianships.*

In contrast to the authority of trustees and custodians, the present Nebraska statutes concerning the application of guardianship income and principal seem ambiguous, conflicting and unexplainable. An analysis of the historical development of the sections, however, may provide a sufficient explanation of what the various provisions are designed to accomplish even if it does not lead to a thorough understanding of their meaning and interrelationship. What this analysis shows is primarily a need for legislative revision rather than a guide for conscientious property managers or estate planners. Nevertheless, answers to many of the critical issues affecting the use of income and principal by a guardian rest upon the rather general inferences which can be drawn from a number of separate Nebraska statutes.

The initial Nebraska statutes were adopted by the territorial legislatures in 1856 and 1860, following Wisconsin statutes.²⁰⁶ Wis-

²⁰⁵ NEB. REV. STAT. § 38-1004(2) (Reissue 1960). Subparagraph (3) provides: "The court, on the petition of a parent or guardian of the minor or of the minor, if he has attained the age of fourteen years, may order the custodian to pay over to the minor for expenditure by him or to expend so much of or all the custodial property as is necessary for the minor's support, maintenance or education."

²⁰⁶ Neb. Terr. Laws c. XLV, § 43 (predecessor of part of § 38-601) (1856); Neb. Terr. Laws c. LIII, §§ 10 (predecessor of § 38-111), 22 (predecessor of § 38-501), 24 (predecessor of § 38-503) (1856); Neb. Terr. Laws c. III, § 1, p. 66 (predecessor of part of § 38-601) (1860). See WIS. REV. STAT. c. 64, § 1 (1849); WIS. REV. STAT. c. 80, §§ 9, 20, 22 (1849); WIS. REV. STAT. c. 65, § 38 (1849).

consin had taken the statutes from Michigan in 1849, and Michigan from Massachusetts in 1838.

Under the general rules of statutory construction, these provisions derived from Wisconsin, Michigan and Massachusetts have been held to adopt the interpretation of the sections in the other states at the time of their enactment by Nebraska.²⁰⁷ Any construction by the other states after the introduction into Nebraska would, of course, have only persuasive effect in interpreting the Nebraska law.

(a) *Section 38-503.*

The Massachusetts law, insofar as guardianships for minors are concerned, originated in a 1783 enactment.²⁰⁸ One of the Nebraska sections which can be traced directly to the Massachusetts act of 1783 is section 38-503, which now provides:²⁰⁹

Every guardian shall manage the estate of his ward frugally and without waste, and apply the income and profit thereof, as far as may be necessary, for the comfortable and suitable maintenance and support of the ward and his family, if there be any. If such income and profits shall be insufficient for that purpose, the guardian may sell the real estate, upon obtaining a license therefor, as provided by law, and shall apply the proceeds of such sale, as far as may be necessary, for the maintenance and support of the ward and his family, if there be any.

The language "income and profit thereof"²¹⁰ seems clearly to contrast expenditure of income items from the balance of "the estate." This has been the uniform interpretation of the section throughout the years.

²⁰⁷ See, e.g., *Stark v. Stark*, 128 Neb. 524, 259 N.W. 523 (1935); *Goble v. Simeral*, 67 Neb. 276, 93 N.W. 235 (1903). See also *Myers v. McGavock*, 39 Neb. 843, 58 N.W. 522 (1894).

²⁰⁸ Mass. Acts & Res. c. 38, § 4 (1783).

²⁰⁹ NEB. REV. STAT. § 38-503 (Reissue 1960).

²¹⁰ This phrase probably means "net income" in a sense comparable to that used for purposes of ordinary trust accounting. The term "profit" would not seem to contemplate capital gains, which are likely properly allocable to corpus. It is not clear whether the phrase "income and profit" means (a) net income for the current year only, (b) net income from the inception of the guardianship, (c) total annual net income from the inception of the guardianship without regard to years of deficit, or (d) net income from the time of any previous deficit. With respect to these questions, the litigation concerning analogous problems under trust law would seem relevant. There is also considerable historical precedent under statutes concerning the payment of corporate dividends which might present analogous issues.

The phrase "as far as may be necessary" probably has two ramifications: (1) as a limitation on the quality of "comfortable and suitable maintenance and support," and (2) as a limitation on the application of funds where another has a legal obligation to support the ward. To the extent that any person has an obligation to support the ward, it would not appear "necessary" to expend guardianship income.

The second sentence of the section permits a sale of real estate if the income and profits are insufficient to provide maintenance and support. The failure of this section, and other sections, initially to consider an application of items of principal other than real estate might be explainable in that the statutes originated out of the practices in Massachusetts and England in the 1700's. At that time, personal property, other than income and profits, might not readily have been thought of as having economic significance in providing continuing expenses of maintenance and support.

This section does not refer to the use of the funds for purposes of "education." Historically, however, there is some authority for treating at least a limited education as an aspect of maintenance and support, and this statute could be so construed.²¹¹

(b) *Section 38-501.*

A related provision, section 38-501, states:²¹²

Every legally appointed guardian, whether for a minor or for any other person, shall pay all just debts due from the ward out of his personal estate and the income of his real estate, if sufficient; or if not, then out of his real estate, upon obtaining license for the sale thereof, and disposing of the same in the manner provided by law.

The original statute would appear to have been concerned with the payment of debts existing at the establishment of a guardianship. The initial language can be traced through the 1783 Massachusetts statute to a Massachusetts Bay Province enactment of 1726,

²¹¹ See, e.g., *Middlebury College v. Chandler*, 16 Vt. 683 (1844) (though recognizing that a "good common school education" was necessary for an infant, held that a college education did not rank as such, and thus the infant defendant was not liable on contract). The word "education" was added to other statutes carried into Nebraska law. Massachusetts used the word "education" in the original version of Section 38-111 in 1836. MASS. REV. STAT. c. 78, § 2 (1836). Michigan added the word to what is now Section 38-601 in 1838. MICH. REV. STAT. pt. 2, tit. V, c. 2, § 1 (1838).

²¹² NEB. REV. STAT. § 38-501 (Reissue 1960).

applicable only to guardianships for mentally incompetents.²¹³ It provided that the guardianship was subject "to the payment of all such just debts, owing by such persons, which were contracted before their distraction, out of the personal estate of such idiots, persons *non compos*, or distracted, or, in case that not be sufficient, then out of the real estate." This phrase was repeated in substantially the same language in the legislation of 1783 which added guardianships for minors.²¹⁴ The language of the present Nebraska statute, "and the income of his real estate," was added by Michigan in 1846²¹⁵ and then carried into Wisconsin and Nebraska law.²¹⁶

The application of the statute to debts existing at the commencement of a guardianship may explain why the term "personal estate" was used in this section and not in the other relevant sections.²¹⁷ Upon the opening of a guardianship, personal property, even cash, crops or similar property, would not have been thought of as income or profits. "Personal estate" might have been an appropriate term to cover economic wealth of the early 1700's which could be used for the payment of existing debts although it would not have been descriptive of that which could be used to satisfy the support and maintenance of the ward over a period of time during the continuation of the guardianship.

²¹³ Mass. Bay Prov. Acts & Res. c. 12, § 5 (1726).

²¹⁴ Mass. Acts & Res. c. 38, §§ 1, 4 (1783). This could explain the statutory reference to debts "before distraction" even though a minor could not technically have any debts contracted before his "distraction." In this regard, "distraction" might refer to the creation of the guardianship, at which time the minor could be liable for some debts. But, after commencement, the fact that the guardian has a duty to supply necessities for the ward would mean that the ward could not normally incur "just debts."

²¹⁵ MICH. REV. STAT. tit. XX, c. 86, § 21 (1846).

²¹⁶ WIS. REV. STAT. c. 80, § 20 (1849); Neb. Terr. Laws c. LIII, § 22 (1856).

²¹⁷ The first use of the term "personal estate" in a section applicable to the expenditure of guardianship funds other than in this section appears to have been in 1836 when what is now section 38-604 was added. MASS. REV. STAT. c. 72, § 3 (1836). Massachusetts first amended its laws to deal specifically with the problem of expenditure of personal property principal for support and education in 1844. MASS. ACTS & RES. c. 88 (1844). The forerunner of present section 38-601 used the phrase "goods, chattels, rights and credits" as being subject to the payment of just debts of the ward. MASS. REV. STAT. c. 71, § 26 (1836). Massachusetts changed this phrase to "personal estate" in 1882 and Nebraska did so in 1913. MASS. PUB. STAT. c. 140, § 1 (1882); NEB. REV. STAT. § 1675 (1913); cf. Annot., *What Passes Under the Term "Personal Estate" in Will*, 53 A.L.R. 2d 1059 (1957).

(c) *Section 38-601.*

Section 38-601 is another statute having its origin in the Massachusetts laws of 1783. It now provides:²¹⁸

When the income of the estate of any person under guardianship, whether a minor, insane person, idiot, spendthrift, or other person, shall not be sufficient to maintain the ward and his family or to educate the ward, when a minor, or the children of such insane person or other person under guardianship, or when the personal property in the hands of the guardian of any person under guardianship shall be insufficient to pay all of the debts of his ward, with charges of managing his estate, or when the improvements on the said real estate of the ward are not in use and are deteriorating in value to the injury of the ward's estate, the guardian of any such person may sell the real estate, including the homestead, of his ward, or the improvements thereon, for any of the purposes enumerated above. He shall first obtain a license therefor and take proceedings therein as provided in sections 38-601 to 38-643.

The section has had an interesting history. Originally in 1783,²¹⁹ it appeared merely as a power of sale in the same section as the forerunners of sections 38-503 and 38-501. The Massachusetts statutory revision of 1836 divided the section into two virtually unrelated sections,²²⁰ and the two sections remained separate through the movement to Michigan,²²¹ Wisconsin²²² and Nebraska²²³ until they were reunited into a single provision in the Nebraska statutory revision of 1913.²²⁴

In its original form, the section was merely a grant of procedural authority to sell guardianship property. The Massachusetts revision of 1836 appears to have used the portion dealing with the insufficiency of income to support the ward and his family as convenient draftsmanship to initiate the procedural provisions covering the sale of guardianship real estate. This was in the same general physical arrangement as present sections 38-601 and following. The provisions concerning a deficiency of personal property to pay debts were contained in a separate chapter dealing with the payment of debts by executors, administrators and guardians. Historically, then, the first portion of section 38-601 is a procedural coun-

²¹⁸ NEB. REV. STAT. § 38-601 (Supp. 1961).

²¹⁹ Mass. Acts. & Res. c. 38, § 4 (1783).

²²⁰ MASS. REV. STAT. c. 71, § 26, and c. 72, § 1 (1836).

²²¹ MICH. REV. STAT. pt. 2, tit. V, c. 1, § 24, and c. 2, § 1 (1838).

²²² WIS. REV. STAT. c. 65, § 38, and c. 64, § 1 (1849).

²²³ Neb. Terr. Laws c. 45, § 43 (1856); Neb. Terr. Laws c. 3, § 1, p. 66 (1860).

²²⁴ NEB. REV. STAT. § 1675 (1913).

terpart for the substantive section 38-503, and the second portion of 38-601 a procedural counterpart for section 38-501.

In this background, it seems reasonable to interpret the phrase in section 38-601, "sufficient to maintain the ward and his family," as being equivalent to the phrase in section 38-503, "as far as may be necessary, for the comfortable and suitable maintenance and support of the ward and his family." Also, the term "income" in section 38-601 would seem to have the same effect as "income and profit" in section 38-503.

But section 38-601 has acquired some substantive meaning beyond that of section 38-503. When Michigan adopted the statute in 1838, the language was added "and to educate the ward when a minor, and the children of such insane person or spendthrift."²²⁵ This could constitute a separate grant of substantive authority to expend income and sell real estate for the education of the ward or his family. Arguably, this "education" could be more extensive than that inferred from the phrase "maintenance and support" in section 38-503.²²⁶ This section would not, however, appear to define a parent's legal duty to provide an education or constitute authority to expend guardianship funds where the parent does have such an obligation. It would seem to be implied from the historical development of the section that, like section 38-503, guardianship funds cannot be applied where another has a legal obligation to support or educate the minor.

There is another inference from the present wording of section 38-601 which indicates that the section can be construed as having a broader substantive meaning than sections 38-503 and 38-501. Section 38-503 provides for the expenditure of income and the proceeds from the sale of real estate for the support of the ward. There is no apparent authority under that section to apply the guardianship personal principal for purposes of support. Section 38-501 may be construed to permit an expenditure of the entire "personal estate" but only for paying "debts," which probably means pre-existing debts.

The Massachusetts revision of 1836, however, added the language to what is now section 38-601 that when the guardianship items of personal property are insufficient to "pay all of the just debts of the ward, with charges of managing his estate," the real

²²⁵ MICH. REV. STAT. pt. 2, tit. V, c. 2, § 1 (1838).

²²⁶ Concerning the expenditure of funds for "education," see note 211 *supra* and note 327 *infra*. Although "education," is used in section 38-111, that section does not grant authority to sell real estate.

estate can be sold for this purpose.²²⁷ The language "with charges of managing his estate" has been construed by the Nebraska court to be broader than merely paying debts and to include payment of the expenses of support of the ward.²²⁸ From this, there can be an inference that personal principal may be expended under the authority of section 38-601 for support.

The purpose of the sections which follow section 38-601, also stemming from the 1836 Massachusetts revision, would seem to verify this interpretation of legislative intent. Section 38-604²²⁹ states that following the sale of real estate, the proceeds are applied to the purpose creating the authority for the sale, and the residue invested by the guardian at interest or "in the best manner in his power until the capital shall be wanted for the maintenance of the ward and his family, for the education of the ward when a minor, or the children of such insane person or spendthrift, in which case the capital may be used for that purpose, as far as may be necessary, in like manner as if it had been personal estate of the ward." The 1836 Massachusetts legislature may have acted on an assumption that guardianship personal principal could be used for the maintenance, support and education of the ward and his family.

(d) Section 38-111.

Section 38-111 is contained in the present provisions relating exclusively to guardianships for minors, and reads:²³⁰

If any minor, who has a father living, has property, the income of which is sufficient for his maintenance and education in a manner more expensive than such father can reasonably afford, regard being had to the situation of the father's family, and to all the circumstances of the case, the expenses of the education and maintenance of such minor may be defrayed out of the income of his own property, in whole or in part, as shall be judged reasonable, and shall be directed by the court, and the charges therefor may be allowed accordingly in the settlement of the account of such guardian.

The section was first enacted as a part of the general Massachusetts statutory revision of 1836.²³¹ It appears to have been a codification of previous Massachusetts and common law decisions. Use of the term "father" and not "mother" may be explained by

²²⁷ MASS. REV. STAT. c. 71, § 26 (1836).

²²⁸ *Seward v. Didier*, 16 Neb. 58, 20 N.W. 12 (1884).

²²⁹ NEB. REV. STAT. § 38-604 (Reissue 1960).

²³⁰ NEB. REV. STAT. § 38-111 (Reissue 1960).

²³¹ MASS. REV. STAT. c. 78, § 2 (1836).

the fact that the Massachusetts court had stated that a father's obligation of support continued although his minor children had property of their own,²³² but that a widow did not have an obligation to support a propertied child.²³³

The phrase "in a manner more expensive than such father can reasonably afford, regard being had to the situation of the father's family, and to all the circumstances of the case" is also likely a codification of common law decisions. There were decisions that guardianship property could be used to maintain a child in accordance with the child's own property if the father could not afford such lavish support,²³⁴ that the court would not order a father to support a child in a manner which would cause hardship to other children of the father,²³⁵ and that a father might not be compelled to support a child where he had been deprived of the custody of the child.²³⁶

The statutory reference to "income" and not "principal" seems significant, although it may have been historical oversight. Regardless of the fact that the 1836 Massachusetts legislature may have assumed that personal principal could be expended for maintenance and education, and although there may have been Massachusetts case authority for that proposition,²³⁷ it has been necessary in all these states to amend the statutes to cover specifically the application of personal principal for purposes of maintenance and education. In 1844, just eight years after the adoption of the section and six years after the provision had been copied into Michigan law, Massachusetts amended this section to cover the application

²³² *Dawes v. Howard*, 4 Mass. 97 (1808).

²³³ *Whipple v. Dow*, 2 Mass. 415 (1807).

²³⁴ See *Buckworth v. Buckworth*, 1 Cox 80, 29 Eng. Rep. 1072 (1784) (though an allowance was not made because the child's property had not yet vested, the court stated that "maintenance is given when the father is not in such circumstances as to be able to give the child such an education as is suitable to the fortune which he expects"); SIMPSON, *INFANTS* 202 (4th ed. 1926).

²³⁵ See, e.g., *Hoste v. Pratt*, 3 Ves. 730, 30 Eng. Rep. 1243 (1789).

²³⁶ See, e.g., *Wellesley v. Beaufort* (the Duke of), 2 Russ. 1, 38 Eng. Rep. 236 (1827).

²³⁷ See *Dawes v. Howard*, 4 Mass. 97, 98 (1808): "The Court, after considering this cause, observed that, although, in *England*, guardians of infants were not permitted to trench on the principal of the funds belonging to their wards in any case, unless leave has been first given by the chancellor, upon application to him, our statutes have altered the law in this respect, and have even made the real estates of minors liable to be sold for their support and education, when the personal estate shall be insufficient."

of personal principal.²³⁸ Michigan also amended this section in 1887.²³⁹ Wisconsin amended its version of section 38-503 in 1909²⁴⁰ and amended this section in 1933 to cover personal principal.²⁴¹

(e) *Sections 38-126 and 38-127.*

In 1953, the Nebraska legislature added sections 38-126 and 38-127:²⁴²

The appointment of a guardian for a minor shall not relieve his parent or parents or other persons liable for the support of such minor from their obligation to provide for such minor. If such persons are able to care for, maintain, and educate him, the principal of his estate shall not be expended for any purpose except as provided by sections 38-126 to 38-128.

Upon a proper showing to the court that the use of principal of a minor's estate would be for the best interest of the ward, considering all the circumstances of the ward and those liable for his support, the court may from time to time authorize the guardian to use so much of the principal of the estate of the minor as it may deem proper, if it is also shown that (1) the income of the estate of the minor and the financial ability of those liable for the ward's support, maintenance, and education are insufficient to properly support, maintain, and educate him in a manner commensurate with his estate; (2) an emergency exists which justifies an expenditure; or (3) a fund has been given to the ward for special purpose and the court can, with reasonable certainty, ascertain such purpose but, in such event, the principal may only be used for the special purpose so ascertained.

The minutes of the legislative hearing²⁴³ and the legislative committee report²⁴⁴ state only that the purpose of the enactment was to make principal available for expenditure by a guardian where the persons liable for support are unable to maintain the minor. The legislature appears to have acted on the premise that personal principal was not then expendable by a guardian for support and education.

As late as 1953 there may have been no authority for a guardian to expend personal principal (except for debts) even though real

²³⁸ Mass. Acts & Res. c. 88 (1844).

²³⁹ Mich. Acts No. 173, p. 181 (1887).

²⁴⁰ Wis. Laws c. 236, p. 255 (1909).

²⁴¹ Wis. Laws c. 190, § 63 (1933).

²⁴² NEB. REV. STAT. §§ 38-126, 38-127 (Reissue 1960).

²⁴³ Minutes of Hearing by the Judiciary Committee on L.B. 299, March 4, 1953.

²⁴⁴ COMMITTEE REPORT OF THE JUDICIARY COMMITTEE ON L.B. 299, March 9, 1953 (on file in office of clerk of the Nebraska Legislature).

estate could be sold in some situations. At least, the legislatures of Massachusetts, Michigan and Wisconsin had previously amended their statutes to achieve this result. The County Court of Douglas County, and probably other courts, also reached this conclusion.²⁴⁵ But if this was the result, it seems to have been the product of historical accident rather than choice. On the theory that such a paradox could not intentionally exist under the statutes, some county courts were apparently permitting the expenditure of guardianship principal for support and education purposes.²⁴⁶

To a degree, however, the enactment of sections 38-126 and 38-127 has continued a portion of the historical anomaly and added a number of new problems.

1. The sections are applicable only to guardianships for minors. This raises considerable doubt as to whether any of the other statutes may now be construed to permit an application of personal property for purposes of support and education.²⁴⁷ In view of the apparent legislative intent merely to provide an additional power for guardians of minors, and the constitutional requirement that statutes intended to be amended must be reenacted in the amendatory measure,²⁴⁸ it would seem that the enactment of sections 38-126 and 38-127 did not change the then existing law under the other statutes.

2. If sections 38-126 and 38-127 do not amend the other sections, then it would not be necessary for a guardian using the power to sell real estate provided in sections 38-503 or 38-601 to show that personal principal has previously been expended under section 38-127. It is not clear, though, whether or not a guardian must show as a prerequisite for his having authority under section 38-127 that he has exhausted the property available under sections 38-503, 38-601 and 38-111.

There was no specific legislative purpose expressed that the previously existing priority of application of guardianship funds

²⁴⁵ See Minutes of *Hearing by the Judiciary Committee on L.B. 299*, March 4, 1953 (on file in office of clerk of the Nebraska Legislature). This was the reported opinion of Judge Robert R. Troyer, County Judge, Douglas County.

²⁴⁶ See, e.g., 3 LIGHTNER, NEBRASKA FORMS ANNOTATED § 3697 (2d ed. 1951).

²⁴⁷ The question raised involves not only whether personal principal can be applied under any other section under a guardianship for minors, but also whether or not guardians for mentally ill or incompetent persons or spendthrifts have these powers. Cf. NEB. REV. STAT. §§ 38-201.02, 38-306 (Reissue 1960).

²⁴⁸ NEB. CONST. art. III, § 14.

would be changed by the 1953 enactment. But if the legislature meant to provide merely a power of sale which came into existence only after all the other property then expendable had been applied,²⁴⁹ it would seem to be a condition precedent for an order under section 38-127 that both income and real estate have been first expended under the other statutes (or, possibly, that a request for such authority had been denied by the court).

The language of section 38-127 would not appear to require this result. From the literal language of section 38-127, it would now seem that a guardian may have authority under present law to receive an order for selling either real estate or personal principal without a showing that the other is unavailable for such expenditure.

3. The language of section 38-126 is that if another person having a duty of support is able to support the minor, "the principal of his estate shall not be expended for any purpose except as provided by sections 38-126 to 38-128." In the light of its historical development, the term "principal" would seem to relate only to personal property. It would not appear to relate to the application of real estate which is provided for in the other sections. Conceivably, however, these sections could be construed as an additional grant of authority to expend real estate beyond the purposes specified in the other sections. For example, section 38-127 (3) might authorize an expenditure of real estate for a special purpose for which the property was given to the ward, whereas this use of real estate (or any guardianship income²⁵⁰) would not be permitted under any other section.

4. Section 38-126 also provides that "The appointment of a guardian for a minor shall not relieve his parent or parents or other persons liable for the support of such minor from their obligation to provide for such minor." This language does not mean that the legislature necessarily acted on an assumption that a mother had an obligation of support equal to that of a father, or that another person had an obligation equal to that of either the father or mother. It does seem to recognize that a mother has some

²⁴⁹ It may have been a strange quirk of the law, dating back to the original Massachusetts statutes, that real estate, the historical favorite of the common law which at one time could not even be levied for debts, was required to be expended for support and education even though personal property could not be so used.

²⁵⁰ It is also strange that under the present statutes, the principal of a fund given to a minor for a special purpose can be expended for the special purpose, but that there is no statutory authorization for the income of the fund to be so expended.

legal obligation of support, however. The inherent difficulties in defining the nature and extent of the legal obligations of support of fathers, mothers and other persons under Nebraska law is discussed in a subsequent portion of this article.²⁵¹ There is a residual problem of conflict, however, between the enactment of sections 38-126 and 38-127 and the former law concerning the priority of the various legal obligations of support. The question arises from the fact that if the underlying legislative assumption was correct, then, before 1953, guardianship personal principal was not expendable for purposes of support and education. After the application of all income and real property, a mother or other persons, who might not previously have had a support duty, would then have had a legal obligation of support under other requirements of Nebraska law.²⁵² This order of priority would have meant that the income and real estate would be first expended and then the other support obligations would come into existence because guardianship principal could not be expended. Although the above language of section 38-126 literally purports to leave unchanged the previously existing obligations of support, and although there is no legislative history which indicates that any change in the priority or definition of legal obligations of support was intended, it is suggested that in some cases (at least under the pauper and criminal law provisions), the enactment of sections 38-126 and 38-127 did change previously existing legal obligations of support.

(f) *Summary.*

In summary, the answers to many of the critical issues affecting the use of income and principal by a guardian rest upon the rather general inferences which can be drawn from these separate Nebraska statutes. Most of the answers are not now clear under Nebraska law. As a minimum, the fundamental issues of defining the existence and priority of obligations of support, especially those of a mother and a widow, and the priority of application of guardianship income and principal (including real estate), should be clarified by a comprehensive legislative revision of the present sections. Fortunately, the present laws of Wisconsin, which were

²⁵¹ See text at notes 288 to 331 *infra*.

²⁵² See NEB. REV. STAT. § 68-101 (Reissue 1958). If guardianship principal could not be expended for the minor, then he would apparently be a "poor person, who shall be unable to earn a livelihood in consequence of an unavoidable cause," and entitled to support under this section. See also note 319 *infra*.

thoroughly overhauled in 1933²⁵³ and also in 1957,²⁵⁴ may again provide a suitable starting place for the formulation of Nebraska legislation in this area.

F. TAX CONSEQUENCES.

(1) *Guardianships.*

An outright gift of property to a minor or his guardian results in taxation of all future items of income and gain to the minor personally.²⁵⁵ The minor or his guardian or parent must file an income tax return for the minor if the minor has gross income over \$600.²⁵⁶ A parent providing more than half of the actual costs of support can claim the child as a dependent although the child has gross income over \$600, and the child can continue to claim his own personal exemption in his return, so long as the child is under nineteen or a full time student.²⁵⁷

An outright gift (whether or not there is a guardian) qualifies for the gift tax present interest annual exclusion²⁵⁸ and becomes a part of the minor's estate for federal estate tax and Nebraska inheritance tax purposes. Since under Nebraska guardianship law the property of a minor cannot be applied in such a way as to discharge another's obligation of support,²⁵⁹ the outright gift would not involve later tax consequences to anyone other than the minor.

(2) *Custodianships.*

The Gifts to Minors Act permits a custodian to expend property for the support, maintenance, education and benefit of the minor "with or without regard to the duty of himself or of any other person to support the minor or his ability to do so."²⁶⁰ The custodianship income is taxed to the minor except that it becomes taxable to any other person whose support obligation is satisfied

²⁵³ Wis. Laws c. 190 (1933).

²⁵⁴ Wis. Laws c. 468 (1957). See WIS. STAT. ANN. §§ 319.01 to 319.71 (1958). See also MICH. STAT. ANN. § 27.3178 (463) (1943).

²⁵⁵ Rev. Rul. 55-469, 1955-2 CUM. BULL. 519.

²⁵⁶ See Treas. Regs. §§ 1.6012-1(a)(4), 1.6012-3(b)(3). See also INT. REV. CODE of 1954 § 6201(c).

²⁵⁷ See INT. REV. CODE of 1954 §§ 151(e), 152(a).

²⁵⁸ Rev. Rul. 54-400, 1954-2 CUM. BULL. 319.

²⁵⁹ See notes 209, 218, 230 to 233, 241 *supra*.

²⁶⁰ NEB. REV. STAT. § 38-1004(2) (Reissue 1960).

by the expenditure.²⁶¹ A gift under the Act qualifies for the present interest annual exclusion under the Internal Revenue Code.²⁶²

If the donor is custodian, the property remains a part of his federal estate tax estate and Nebraska inheritance tax estate as a power to alter or terminate.²⁶³ The Commissioner has apparently yielded on some additional potential tax limitations, at least temporarily. It would seem possible to view a transfer for one whom the donor is legally obligated to support as a retained life interest for estate tax purposes,²⁶⁴ and the ability of a custodian other than the donor to apply the property to the satisfaction of his own legal obligation of support as a general power of appointment for estate and gift tax purposes.²⁶⁵ Other than taxing the donor-custodian on the basis of the power to alter or terminate, the custodial property may become a part solely of the minor's estate tax estate.²⁶⁶

²⁶¹ Rev. Rul. 56-484, 1956-2 CUM. BULL. 23; Rev. Rul. 59-357, 1959-2 CUM. BULL. 212.

²⁶² Rev. Rul. 56-86, 1956-1 CUM. BULL. 449; Rev. Rul. 59-357, 1959-2 CUM. BULL. 212.

²⁶³ INT. REV. CODE OF 1954, § 2038; *Lober v. United States*, 346 U.S. 335 (1953); Rev. Rul. 57-366, 1957-2 CUM. BULL. 618; Rev. Rul. 59-357, 1959-2 CUM. BULL. 212; NEB. REV. STAT. §§ 77-2002(1)(b) & (c) (Reissue 1958).

²⁶⁴ INT. REV. CODE OF 1954, § 2036. See *Commissioner v. Dwight's Estate*, 205 F.2d 298 (2d Cir. 1953), *cert. denied*, 346 U.S. 871 (1953); LOWNDES & KRAMER, *FEDERAL ESTATE & GIFT TAXES* 145-147 (2d ed. 1962).

²⁶⁵ See Treas. Regs. §§ 20.2041-1(c)(1), 25.2514-1(c)(1): "A power of appointment exercisable for the purpose of discharging a legal obligation of the possessor or for his pecuniary benefit is considered a power of appointment exercisable in favor of the possessor or his creditors." It can be argued that since the custodianship statute refers to "the support, maintenance, education and benefit of the minor," the power is not "limited by an ascertainable standard relating to the health, education, support, or maintenance of the decedent" as specified in sections 2041(b)(1)(A) and 2514(c)(1) of the Internal Revenue Code. The exercise or nonexercise of a power of appointment is not taxable under the Nebraska Inheritance Tax. NEB. REV. STAT. § 77-2008.04 (Reissue 1958).

²⁶⁶ See Rev. Rul. 59-357, 1959-2 CUM. BULL. 212, 213-4: "No taxable gift occurs for Federal gift tax purposes by reason of a subsequent resignation of the custodian or termination of the custodianship. . . . The value of property so transferred is includible in the gross estate of the donor for Federal estate tax purposes if (1) the property is given in contemplation of death within three years of the donor's death or (2) the donor appoints himself custodian and dies while serving in that capacity. . . . In all other circumstances custodial property is includible only in the gross estate of the donee."; NEB. REV. STAT. § 38-1003(1) (Reissue 1960).

(3) *Trusts.*

Of the planning devices which make property available to minors, trusts offer the widest variety of potential solutions to both the donor's and donee's tax problems. An outright gift will remove property from the donor's estate and result in future taxation to the minor. In every situation, however, a trust can offer equivalent or greater tax savings opportunities, and, in many cases, a number of nontax advantages.

Guardianships and custodianships are arrangements for only one beneficiary, normally involving the total legal ownership of the property. Trusts may be employed to divide the ownership of property into lesser components, present or future, and among a number of individuals or entities. This offers a flexibility which is needed in many instances to plan for a desired tax consequence, as well as to achieve a desired ownership of the property. It permits, for example, a short term trust for income tax savings to a donor who cannot afford to part with the entire ownership of the property, trusts which provide income to ages above or below the age of twenty-one, interests which can enlarge, diminish or shift on any specified contingency, trusts which sprinkle income among a number of beneficiaries depending upon tax consequences, splitting capital gains from ordinary income if desired, and successive ownership of property without estate taxation. The wide scope for designing the ownership interests in a trust may also be used, to a very considerable degree, to plan the incidence of taxation from the interests in the trust.

Prior to 1954, there was considerable uncertainty as to the circumstances in which a gift in trust for a minor would qualify for the gift tax present interest annual exclusion of \$3,000 per donee (or \$6,000 for a married couple claiming the split-gift privilege), because of the legal incapacity of the minor.²⁶⁷ In 1954, section 2503(c) was added to the Internal Revenue Code to provide that a gift to a person under twenty-one (regardless of marital status) is a gift of a present interest if it may be expended by or for the benefit of the minor under twenty-one, and to the extent not so expended will either pass to the donee at twenty-one or if the minor dies under twenty-one be payable to the minor's estate or as the minor may appoint under a general power of appointment.²⁶⁸

Section 2503(c), then, permits a trust equivalent of an outright gift or custodianship for estate and gift tax purposes. It al-

²⁶⁷ For a summary of these cases see LOWNDES & KRAMER, *FEDERAL ESTATE AND GIFT TAXES* 726-729 (2d ed. 1962).

²⁶⁸ INT. REV. CODE of 1954, § 2503(c).

lows property to be removed from the donor's estate tax estate with a maximum use of the gift tax present interest exclusion.

There may be an income tax disadvantage from a trust if the trust does not make any distributions to or for the minor and the minor has no other taxable income. The minor, as an individual taxpayer, has a \$600 personal exemption whereas a "complex" trust has only \$100,²⁶⁹ and the minor can use the standard deduction which is not allowed to a trust.²⁷⁰ This would mean that if there was \$1,000 in net income, the tax payable by a trust which made no distribution to or for the minor would be \$180, but if the same \$1,000 were earned by a guardianship or custodianship and the minor had no other income, the tax would be only \$60. Of course, the trust could always achieve an identical tax result by distributing \$1,000, and the balance of the property would still have the advantages which flow from the trust device. The money need not be distributed outright. It might be used to purchase life insurance or government bonds, placed in a savings account in the minor's name, used for items of "super-support" of the minor, or possibly distributed to a custodian.²⁷¹ It may be possible to make the trust income taxable to the minor merely by giving the minor or his guardian a power over the trust income or principal, whether or not the minor is capable of exercising the power under state law or a guardian is in fact ever appointed.²⁷² The trust could even reduce the total tax payable to just \$42 by distributing just \$900 (so as to make use of the trust's \$100 exemption).

In estate planning where quite large amounts are involved, trusts may actually provide an income tax advantage over custodianships or guardianships for minors. A trust is treated as a separate income taxpayer. Trust income and gain is taxable to the beneficiaries or to the trust under the rules of distributable net income. By carefully planned distributions, the trustee may be able to split income for tax purposes between the trust and

²⁶⁹ INT. REV. CODE of 1954, §§ 151(b), 642(b).

²⁷⁰ INT. REV. CODE of 1954, § 142(b)(4).

²⁷¹ The custodianship statute does not now permit distributions from a trust to a custodian, although the practice may presently exist in spite of the lack of specific authorization. See NEB. REV. STAT. § 38-1002 (Reissue 1960). The statute should be amended to provide that a trustee may be permitted to make distributions to a custodian (who may also be the trustee) for the minor. This situation illustrates the utility of such a device.

²⁷² Cf. INT. REV. CODE of 1954, § 678; Trust No. 3 v. Commissioner, 285 F.2d 102 (7th Cir. 1961); note 281 *infra*.

the minor in order to lessen the effect of progressive income tax rates.²⁷³ It may also be possible to create more than one trust to utilize additional income taxpaying entities.

It should be noted, however, that any use of the trust property in satisfaction of the grantor's,²⁷⁴ trustee's,²⁷⁵ or another person's²⁷⁶ legal obligation of support results in the trust income being allocated to that person for tax purposes. As in the case of custodianships, the donor should not be a trustee of a section 2503(c) trust,²⁷⁷ and there is considerable risk that in the case of a trust, the power to apply trust property to one's own support obligation could constitute a taxable general power of appointment for estate and gift tax purposes.²⁷⁸ It is also necessary in drafting the trust instrument to see that the donor does not retain any strings on the dispositive arrangement, such as a power to replace the trustee. Also, the income tax savings must be offset by what could be added costs of a trust, especially a small trust intended only to make use of the gift tax annual exclusion, and the additional administrative duties, tax returns and reports.

The attitude of the Commissioner and the few cases to date under section 2503(c) indicate that even greater use of trusts for minors may be permitted in the future. The regulations and revenue rulings provide that a minor may be permitted to extend the term of a section 2503(c) trust beyond the age of twenty-one, so long as the trust technically terminates at twenty-one and the action of the minor in extending the term at twenty-one is roughly equivalent to that of ownership of the property.²⁷⁹ While this is

²⁷³ For example, if there is \$10,000 net income, the tax would be (a) \$2,096 in a guardianship or custodianship, and (b) \$2,606 if all taxed to the trust, but (c) only \$1,864 if \$5,900 is distributed and \$4,100 remains taxable to the trust. The income accumulated before the beneficiary attains age twenty-one is not subject to the accumulation distribution rules when paid in a subsequent year. INT. REV. CODE OF 1954, § 665(b) (1).

²⁷⁴ INT. REV. CODE OF 1954, § 677(b).

²⁷⁵ INT. REV. CODE OF 1954, § 678(c).

²⁷⁶ Treas. Reg. § 1.662(a)-4.

²⁷⁷ INT. REV. CODE OF 1954, § 2038; *Lober v. United States*, 346 U.S. 335 (1953).

²⁷⁸ See Treas. Regs. §§ 20.2041-1(c) (1), 25.2514-1(c) (1) (set out in note 265 *supra*). There is a greater risk with trusts than custodianships, since legal title is not in the minor.

²⁷⁹ Rev. Rul. 60-218, 1960-1 CUM. BULL. 378-379: "The provisions of section 25.2503-4(b) (2) of the regulations are designed to permit the extension of the term of the trust by the donee upon such conditions as he may freely choose. This, of course, includes the right in the donee to extend the term of the trust upon conditions therein set forth by the donor but,

largely a matter of semantics (which might just as easily be conveyed in the case of an outright gift or custodianship), there could be a substantial psychological impact on the minor to carry out the full dispositive wishes of the donor for the trust property beyond age twenty-one, apart from the technical legal rules.

The statute specifies that if the minor dies under age twenty-one, the property must "be payable to the estate of the donee or as he may appoint under a general power of appointment."²⁸⁰ The regulations indicate that it is sufficient that a minor possess a general power of appointment over the property even though under local property law, the power of appointment may not be exercisable by a minor.²⁸¹ The property subject to a general power of appointment is probably a part of the minor's federal estate tax

in any event, the extension must be an act of the donee as absolute owner of the property. . . . He must be given the unequivocal and unconditional right to receive the property without any necessity for affirmative action on his part. A power conferred, as in the instant case, upon a donee to require immediate distribution of the property to him upon attaining the age of 21 years does not meet the statutory requirement that the property must pass to him upon attaining the age of 21 years." But note that if the minor is treated as the owner of the property at twenty-one, this could mean that for income tax purposes, he becomes the "grantor" of the trust at that point and must comply with the provisions of sections 671 to 677 if he does not wish to be personally taxable for the trust income.

²⁸⁰ INT. REV. CODE of 1954, § 2503(c) (2) (B).

²⁸¹ Treas. Reg. § 25.2503-4(b): "However, if the minor is given a power of appointment exercisable during lifetime or is given a power of appointment exercisable by will, the fact that under the local law a minor is under a disability to exercise an inter vivos power or to execute a will does not cause the transfer to fail to satisfy the conditions of section 2503 (c)." This is not really a concession on the Commissioner's part. In most situations, the Commissioner will take the position that the possession of a power over property makes the property includible in the decedent's estate tax gross estate in spite of the fact that the power may not have been exercisable by the decedent prior to death. See, e.g., Rev. Rul. 55-518, 1955-2 CUM. BULL. 384 (property subject to general power of appointment includible even though donee of power incompetent at all times from creation of power to date of death); Rev. Rul. 61-123, 1961-2 CUM. BULL. 151 (decedent possessed incidents of ownership in insurance policy although he could not have practically exercised the rights at the moment of his death). To maintain a consistent position, it is necessary for the Commissioner to concede certain other items, such as the qualification of property for the gift tax present interest exclusion, above, and the qualification for the estate tax marital deduction of property which is subject to a general power of appointment which the donee is incompetent to exercise. See Rev. Rul. 55-518, *supra*. But the Commissioner is not always willing to concede the point. See, e.g., Trust No. 3 v. Commissioner, 285 F.2d 102 (7th Cir. 1960) (power of

estate,²⁸² although it would not be subject to the Nebraska inheritance tax.²⁸³ A disposition giving the minor a general power of appointment has an advantage in being able to specify, according to the regulations, a gift-over on default of an exercise of the power of appointment, even when the power cannot be exercised under local

minors over trust property for income tax purposes); LOWNDES & KRAMER, *FEDERAL ESTATE & GIFT TAXES* 725-729 (2d ed. 1962) (present interest annual exclusion cases not covered by section 2503(c)).

²⁸² The statute defines a general power of appointment as one which is "exercisable" in favor of the decedent, his estate, his creditors, or creditors of his estate. INT. REV. CODE of 1954, §§ 2041(b)(1), 2514(c). For estate tax purposes, the Commissioner treats the taxable event as the existence or possession of the power under INT. REV. CODE of 1954, § 2041(a)(2) rather than a legal capacity to exercise the power. See Rev. Rul. 55-518, 1955-2 CUM. BULL. 384, 385: "Therefore, a person may have a power without ever being able freely to exercise it. There is a distinction between the existence of a power and the capacity to exercise it. The taxable event is the possession at death of the power rather than an exercise of the power." Cf. Rev. Rul. 54-143, 1954-1 CUM. BULL. 185; Treas. Reg. § 20.2041-3(b): "For example, if a decedent was given a general power of appointment exercisable only after he reached a certain age . . . the power would not be in existence on the date of the decedent's death if the condition precedent to its exercise had not occurred." Also, Rev. Rul. 55-518, and the authorities relied upon, seem to assume that although the power could not be exercised by the incompetent, it was exercisable by someone on her behalf. It is not clear that, absent a provision in the trust instrument, anyone other than the minor personally, even the court in a guardianship proceeding, could exercise a general power of appointment on behalf of the minor under Nebraska law. See notes 53 to 55 *supra*. See also Estate of Edelman, 38 T.C. No. 98 (Sept. 28, 1962): "Petitioner's position as to this is, in substance: . . . said power ceased to exist prior to her death because, due to her mental condition during about the last 10 months of her life, neither she nor any committee which might have been (but was not) appointed for her, could have exercised such power. Hence, petitioner argues that 'decedent's incompetency effected an involuntary relinquishment of the power' under New York law. Petitioner has cited no New York statute, and no decision either of any New York court or of any other court, which supports his position, as applied to the instant case. Moreover, as we have hereinabove found as a fact, Rebecca was never adjudicated to be an incompetent; and no committee was ever appointed for her. . . . [T]he fact that she became mentally deranged was, in the absence of any adjudication of her incompetency and in the absence of any appointment of a committee, not sufficient to eliminate or destroy said valuable property right." Also note that INT. REV. CODE of 1954 § 2037(b) refers to "a general power of appointment (as defined in section 2041) which in fact was exercisable immediately before the decedent's death," giving apparent legislative acquiescence to the interpretation that section 2041 includes general powers of appointment which are not in fact exercisable at the time of death.

²⁸³ NEB. REV. STAT. § 77-2008.04 (Reissue 1958).

law.²⁸⁴ Under a guardianship or custodianship, the heirs of the minor, in most cases his parents, would inherit his property in the event of his death under twenty-one. A gift-over in default of appointment by the minor may be made under the trust instrument (without necessity of becoming a part of the minor's probate estate) directly to the desired ultimate beneficiaries. The property need not return to the parents or other relatives whose estates would otherwise be unnecessarily augmented by inheritance from the minor.

Courts have supplied an even more surprising construction to section 2503(c). The statute provides that the "property and the income therefrom" must be expendable for the minor and pass to him or his estate or be subject to a general power of appointment. Several decisions have held that the trust estate may be divided into separate "properties." So long as a particular "property" and the income from that "property" pass to the minor at twenty-one (or to his estate or is subject to a general power of appointment), that portion of the transfer qualifies for the present interest exclusion.²⁸⁵ In other words, if only the income passes to the minor at twenty-one, the income share alone can qualify for the gift tax exclusion. The "property" (i.e., the separate "property" of income) and all of the income from the "property" (i.e., all of the income from the income) will pass to the minor at twenty-one or to his estate, or be subject to a general power of appointment if he dies under twenty-one.

For the present, estate planners should probably not rely on these apparent extensions of the literal language of section 2503(c) unless it is the only means to achieve important estate planning results, and only then with some warning to the client as to the risk

²⁸⁴ Treas. Reg. § 25.2503-4(b)(3).

²⁸⁵ *Commissioner v. Herr*, 303 F.2d 780 (3d Cir. 1962), *affirming* 35 T.C. 732 (1961); *Jacob Konner*, 35 T.C. 727 (1961); *Carl E. Weller*, 38 T.C. No. 79 (Sept. 10, 1962). *But see* LOWNDES & KRAMER, *FEDERAL ESTATE & GIFT TAXES* 723 (2d ed. 1961): "The reasoning in the *Herr* and *Konner* cases appears to be more ingenious than persuasive and it would not be surprising to see the cases reversed on appeal. If they are sustained, they offer an interesting opportunity for making a gift to a minor which will qualify as a gift of a present interest under Section 2503(c), even though the donated property is kept out of the minor's hands after he attains 21. In this connection it should be noted, however, that the present interest which will qualify for the exclusion will be the discounted value of the income from the trust property during the beneficiary's minority, rather than the entire trust property, which is ordinarily treated as a present interest when a transfer qualifies under Section 2503(c)."

of litigation and possible adverse tax consequences.²⁸⁶ The present trends do, however, offer an indication that there may be a continued lessening of a major tax objection to the use of trusts for minors—loss of the present interest exclusion.

It should also be noted that section 2503(c) is not the only means of securing the present interest exclusion. The same methods by which the exclusion can be utilized in the case of an adult, such as a current right to income, are still available in planning trusts for minors.²⁸⁷ In some situations, it may be useful to forgo qualifying all or part of the gift for the present interest exclusion in order to achieve income or estate tax objectives. This is certainly true where the total gifts in any calendar year exceed the amount of the annual exclusion. Only under trust planning is it possible to consider the comparative tax consequences of alternative dispositions, since only there does the draftsman have an ability to regulate the dispositive arrangement and, with it, the tax results.

G. SPECIAL PROBLEMS IN DEFINING "SUPPORT".

The primary significance an obligation of support assumes in estate planning and property management for minors is in connection with federal taxation. The payment or application of funds from a custodianship or trust constitutes taxable income to a person whose legal obligation of support is satisfied by the expenditure.²⁸⁸ A gift in trust to a person whom the donor is legally obligated to support may not remove the property from the donor's estate or be a completed gift under the federal estate and gift taxes.²⁸⁹

Perhaps the most expositive tax statement defining what is meant by an obligation of support is contained in the income tax regulations:²⁹⁰

Any amount which, pursuant to the terms of a will or trust instrument, is used in full or partial discharge or satisfaction of a legal

²⁸⁶ See LOWNDES & KRAMER, *FEDERAL ESTATE & GIFT TAXES* 812-816 (2d ed. 1962).

²⁸⁷ Treas. Reg. § 25.2503-4(c): "Thus, for example, a transfer of property in trust with income required to be paid annually to a minor beneficiary and corpus to be distributed to him upon his attaining the age of 25 is a gift of a present interest with respect to the right to income but is a gift of a future interest with respect to the right to corpus."

²⁸⁸ INT. REV. CODE of 1954, §§ 677(b), 678(c); Treas. Reg. § 1.662(a)-4.

²⁸⁹ For a discussion of these issues, see LOWNDES & KRAMER, *FEDERAL ESTATE & GIFT TAXES* 145-147 (estate tax), 687-689 (gift tax) (2d ed. 1962).

²⁹⁰ Treas. Reg. § 1.662(a)-4.

obligation of any person is included in the gross income of such person . . . as though directly distributed to him as a beneficiary The term "legal obligation" includes a legal obligation to support another person if, and only if, the obligation is not affected by the adequacy of the dependent's own resources. For example, a parent has a "legal obligation" within the meaning of the preceding sentence to support his minor child if under local law property or income owned from property by the child cannot be used for his support so long as his parent is able to support him. On the other hand, if under local law a mother may use the resources of a child for the child's support in lieu of supporting him herself, no obligation of support exists within the meaning of this paragraph, whether or not income is actually used for support. . . . In any event, the amount of trust income which is included in the gross income of a person obligated to support a dependent is limited by the extent of his legal obligation under local law. In the case of a parent's obligation to support his child, to the extent that the parent's legal obligation of support, including education, is determined under local law by the family's station in life and by the means of the parent, it is to be determined without consideration of the trust income in question.

Treating this regulation as being a correct interpretation of the law, and as expressing a rule which carries over to the other present federal tax provisions dependent upon the existence and extent of a support obligation, neither of which assumptions may be correct,²⁹¹ still does not provide a sufficient working basis for effective estate planning or management.

The "legal obligation" apparently need not be a "legally en-

²⁹¹ Compare Tomlinson, *Support Trusts and Gifts to Minors*, 97 TRUSTS AND ESTATES 929-31 (1958) (Report of A.B.A. Subcommittee on Estate and Tax Planning): "There is some doubt whether this extreme position of the Treasury will be sustained, for the prior court decisions have involved either grantors who had legal obligations or beneficiary-trustees with unfettered command over income. . . . Possibly the doctrine has been pushed too far in the case of support trusts. It seems reasonable that, where the person legally obligated to support the beneficiary is the grantor of the trust, he should be taxed with the income which is used to relieve him of his obligation and which but for the creation of the trust would be his and taxable to him. Perhaps the same principle is applicable where the obligor is the trustee of a trust created by another, or has the right (even though he is not the trustee) to control the application of its income. Where, however, a third person creates a trust for the benefit of one toward whom someone has an obligation of support, and the obligor has no voice in determining what amount of income is used for the beneficiary, it may be regarded as inequitable and possibly unconstitutional to tax him with income so used, or at least with any amount of income so used beyond that required for minimal support of the beneficiary. Since the trust does not provide the obligor with any funds with which to pay the tax falling upon him, it could be argued that he should not bear a tax burden on moneys used for anything but bare necessities.", with Pedrick, *Familial Obligations and Federal Taxation*.

forceable" obligation. There is no reported Nebraska decision permitting an independent suit by a minor for support and maintenance where the family has remained united.²⁹² Nevertheless, the apparent meaning of this regulation and the other regulations and code provisions referring to support is that the obligation must be imposed by law as distinguished from one arising out of moral or social pressures. It could be argued that a proper federal tax policy would pin the federal tax consequences to the satisfaction of the moral or social obligations which an individual has objectively established for himself and his family, as well as the legally-imposed obligations, especially where the donor is either the transferor of the property or its trustee, but the present tax code does not seem validly susceptible to this construction.²⁹³

tion: A Modest Suggestion, 51 NW. U.L. REV. 53 (1956) (quoted in note 293 *infra*). For a comprehensive study, see Note, *Federal Tax Aspects of the Obligation to Support*, 74 HARV. L. REV. 1191 (1961).

²⁹² Cf. NEB. REV. STAT. § 68-101 (Reissue 1958) (providing that any poor person unable to earn a livelihood may bring an action in his own behalf for support under the pauper statutes, discussed in notes 319 and 320 *infra*); *McGuire v. McGuire*, 157 Neb. 226, 59 N.W.2d 336 (1953) (discussed in text at note 326 *infra*).

²⁹³ For a very forceful argument to the contrary, as to how the present statutes should be applied, see Pedrick, *Familial Obligations and Federal Taxation: A Modest Suggestion*, 51 NW. U.L. REV. 53, 61-65 (1956). "The function, or at least the potential function, of the family support obligation in federal taxation must be to preserve the economic unity of the family and thus protect the progressive rate structures of income and transfer taxes against divisive schemes designed to splinter the family—for tax purposes only. To look too seriously or too long to a local law concept in this effort to make the progressive rate operate with uniformity could, in military parlance, only be described as an advance to the rear. Perhaps the outstanding characteristics of the local law family support obligation is its non-uniformity, its variation from state to state. . . . The fact is that there is little or no local law of a definitive nature on the subject of the nature or extent of the family support obligation while the family is united. . . . Of course, in cases involving transfers for support incident to divorce or separate maintenance, the courts do exercise some authority and the standards announced in such cases, vague as they may be, can serve as an appropriate reference in determining, especially for estate and gift tax purposes, whether the transfer for support is really what it claims to be. . . . What is important to the present subject, the taxation of the family united, is recognition that the duty to support the integrated family is a curious sort of unliquidated obligation which in its nature and extent is more societal and moral than legally enforceable. The tax cases that have considered the matter do recognize the facts of life. While paying lip service to the 'debt payment' theory of *Douglas v. Willcuts*, they charge the grantor with his own decision on what is needed for family support and tax him on all trust income so earmarked. This, of course, is a long step in the direction of recognition that support trusts generate taxable income

If there has been a bonafide state court determination of a support obligation of a parent, as by an award of a divorce court, guardianship determination, or construction of a trust instrument, the determination becomes binding for federal tax purposes in that matter.²⁹⁴ At least, any satisfaction of the judicial obligation would constitute the satisfaction of a legal obligation which is a taxable event apart from the issue of support.²⁹⁵

The tax regulation specifically leaves a number of items to state law. Its purport is that local law defining the obligation of support controls the federal tax consequences, both as to the existence of the support obligation and as to the extent of the obligation. The regulation refers to the existence of an obligation to support, especially possible differences between the support obligations of a father and mother. It also leaves to state law such questions as whether education is a phase of support, and whether the support obligation, once it attaches, is measured by the adequacy of the dependent's own resources and by the family's station in life.

There are many circumstances in which Nebraska law might be called upon to define a support obligation with respect to minors apart from the federal tax situation: the expenditure of or reimbursement from guardianship funds,²⁹⁶ divorce, separation and annulment child support awards,²⁹⁷ interpretation of a trust, will or other legal instrument employing this language,²⁹⁸ criminal

under section 61 not on the 'debt payment' theory but by discharging the grantor's societal obligation of family support. Further steps by the Treasury and the courts on the family support front are required, however, if the progressive rate structure is to be evenly applied."

²⁹⁴ Note, *The Role of State Law in Federal Tax Determinations*, 72 HARV. L. REV. 1350 (1959). One interesting application of this rule is that since under Nebraska law the support obligation of a father under a divorce decree may continue after the death of the father, the estate of the father (or other entity subject to court decree) might become an income tax beneficiary upon satisfaction of its obligation under the decree.

²⁹⁵ See *Douglas v. Willcuts*, 296 U.S. 1 (1935). Similarly, a parent may be taxable on trust income used to pay a note or contract which the parent has signed for a child.

²⁹⁶ NEB. REV. STAT. §§ 38-111, 38-126, 38-127, 38-503 (Reissue 1960), 38-601 (Supp. 1961).

²⁹⁷ E.g., NEB. REV. STAT. §§ 42-310 ("suitable maintenance during the pendency of such suit, as shall be deemed proper and necessary and for the benefit of the children"), 42-311 ("such further decree as it shall deem just and proper concerning the care, custody, and maintenance of the minor children of the parties") (Reissue 1960).

²⁹⁸ See, e.g., *In re Sullivan's Will*, 144 Neb. 36, 12 N.W.2d 148 (1943) (trust instrument provided expenditure for "the proper use, support and maintenance of said son . . . as his needs may require or necessitate"); Wil-

support statutes²⁹⁹ or the Uniform Reciprocal Enforcement of Support Act,³⁰⁰ paternity cases,³⁰¹ Lord Campbell's Act cases on behalf of minors,³⁰² negligence suits by parents against third parties for injuries to the child,³⁰³ decedent's estates for allowances during the first year of administration³⁰⁴ or until certain children reach seven³⁰⁵ or fourteen³⁰⁶ years of age, the pauper and state assistance laws,³⁰⁷ in contract suits for necessities furnished to the minor³⁰⁸ and undoubtedly other situations.

liams v. Williams, 168 Neb. 135, 95 N.W.2d 205 (1959) (separation agreement, incorporated by reference in divorce decree, to "provide suitably for the support, maintenance and education" of daughter).

²⁹⁹ NEB. REV. STAT. §§ 28-446 (abandonment and willful neglect to maintain and provide for wife and minor child); 28-449 (willful failure, refusal or neglect to provide "proper food, clothing, shelter, or in case of sickness to care for his wife, wife and minor child, or minor child, or dependent minor stepchild") (Reissue 1956); 28-477 (neglect of child under 18) (Supp. 1961).

³⁰⁰ See NEB. REV. STAT. §§ 42-704, 42-707 (Reissue 1960); Rice v. Rice, 165 Neb. 778, 87 N.W.2d 408 (1958).

³⁰¹ See NEB. REV. STAT. §§ 13-102, 13-106, 13-108 (Reissue 1954).

³⁰² See, e.g., Mabe v. Gross, 167 Neb. 593, 94 N.W.2d 12,13 (1959) (syllabus by the court): "A presumption of pecuniary loss exists in favor of one legally entitled to service or support from one killed by the wrongful act of another. . . . Where a presumption of pecuniary loss obtains from the relationship and a legal liability to support, the extent of the pecuniary loss must be left to the good judgment and common sense of the jury after it has considered all the evidence and circumstances in the case tending to fix the sum that will make full compensation for the loss sustained."

³⁰³ For example, a parent may be entitled to recover any increased expenses in the maintenance of the minor, in addition to other items of pecuniary loss. See MCCORMICK, DAMAGES § 91 (1935). But, arguably, the parent is not entitled to recover in his own right for increased costs of support, maintenance and education above his legal obligation to supply those items to the minor.

³⁰⁴ NEB. REV. STAT. §§ 30-103(2) ("such reasonable allowance . . . as the county court shall judge necessary for their maintenance during the progress of the settlement of the estate, according to their circumstances"), 30-229 (Reissue 1956).

³⁰⁵ NEB. REV. STAT. § 30-1301 (Reissue 1956) ("necessary expenses of the support").

³⁰⁶ NEB. REV. STAT. §§ 30-103(3) ("necessary maintenance of such children"), 30-229 (Reissue 1956).

³⁰⁷ See NEB. REV. STAT. §§ 68-101 *et seq.* (Reissue 1958), 43-401 *et seq.* (Reissue 1960).

³⁰⁸ See 2 WILLISTON, CONTRACTS § 244 (3d ed. 1959): "What are necessities is determined not simply by the nature of the thing, but by the need of that thing at that time by the infant in question. Accordingly, if an

The federal tax law does not attempt to specify what portion of Nebraska law is relevant to a determination of the tax issues of support of a minor. Presumably, the entire law becomes significant under the "legal obligation" theory, since the satisfaction of any legal obligation, however imposed, carries with it the tax consequence.

(1) *Existence Of The Obligation.*

The original common law concept that a father's duty to support his children was merely that of an imperfect moral obligation has developed into the full scale present legal duty to support. There are so many aspects of the total legal obligation of support owed by a father that it seems doubtful under Nebraska law that any voluntary act of the father or other person could extinguish a father's legal obligation of support.³⁰⁹ In fact, even a divorce decree making a child support award does not extinguish the father's legal support obligation.³¹⁰

infant is already supplied either by his guardian or by previous purchases, with sufficient food, clothing, or other necessities, no further purchase on credit of articles of the same kind can bind him. Therefore, whether a minor is living with a parent or guardian who is capable of supplying him with necessities is a fact vital for determining whether a particular contract made by him is for necessities. The presumption is that the infant's wants are sufficiently met, and the court will not substitute the judgment of a jury for that of a parent or guardian unless the discretion of the latter has clearly been abused." Cf. *In re Estate of Davenport*, 140 Neb. 769, 2 N.W.2d 17 (1942).

³⁰⁹ There is apparently no judicial precedent on the issue whether a parent's support obligations may be eliminated by an actual provision for support of the minor by some other means. At most, the support obligation would be eliminated only to the extent of the other property available for support, and would immediately reappear when that property is exhausted. If this is true, then there would seem to be no public policy against such an arrangement, as is sometimes applied to invalidate contractual releases of support rights between spouses, because the minor would be adequately cared for and would not become a public charge. The transfer undoubtedly would not be conclusive as to the support obligation in the event of a subsequent divorce, and would have a questionable effect in a number of other situations such as the damages resulting from the wrongful death of the father or support allowances to be made from the father's estate. All in all, it would seem from an extremely gross reading of the statutes, cases and public policies concerning support of minors that there would continue to be a residual legal duty to support owed by a father even after the transfer of property for the mandatory support of a minor under Nebraska law, but that the lesser obligations owed by other persons, including a mother, could be totally extinguished by such an arrangement.

³¹⁰ See, e.g., *Schalk v. Schalk*, 168 Neb. 229, 230, 95 N.W.2d 545, 547 (1959) (syllabus by the court): "The fact that the marriage relation is dis-

It may be important for federal tax planning purposes to consider whether a legal obligation of support can be extinguished under Nebraska law. Theoretically, it can be argued that a father's support obligations under Nebraska law might be extinguished, or temporarily extinguished, by trust provisions which mandatorily require the expenditure of trust funds for support of the minor. If so, then presumably the father would have no existing legal support obligation at the subsequent time when the trust funds are actually expended for the minor's support; and the father would, therefore, not be taxable on the income used for the minor's support. Admittedly, if the trust did not compel the support of the minor, the father's support obligation would remain at the time of expenditure. And an outright gift of property, or a gift to a custodian for a minor, would not extinguish the father's obligation of support.

There is no general support obligation by a mother to a property child equal to that owed by a father. A mother has a statutory, independently enforceable, obligation to support a child under the paupers statute,³¹¹ and the criminal statutes may impose some legal obligation on her to support her child where she has the means for support.³¹²

There has been a legislative assumption, as the guardianship statutes have been amended, that a mother does have some general support obligation toward her child, at least insofar as the guardianship property is concerned.³¹³ The best interpretation which can be drawn from the maze of existing guardianship law in Nebraska is that a mother's support obligation commences for guardianship purposes after the father's property has been expended and after the guardianship income has been applied for purposes of support, maintenance and education.³¹⁴ In other words, the priority of a

solved does not relieve the father of the duty to support his minor children."

³¹¹ NEB. REV. STAT. §§ 68-101, 68-102 (Reissue 1958).

³¹² Cf. NEB. REV. STAT. §§ 28-446 (abandonment and willful neglect), 28-449 (Reissue 1956) (willful failure, refusal or neglect), 28-477 (Supp. 1961) (neglect or contributing to neglect). These provisions contemplate only items of bare subsistence. The death of a child due to the mother's failure to support could constitute murder or manslaughter depending upon her state of mind. But, unlike a father, a mother probably cannot be required to go to work to provide funds for the child's support, even though the literal language of sections 28-449 and 28-477 might seem to infer that she could. Lacking the means of support, her sole duty would be to notify welfare or official agencies.

³¹³ See NEB. REV. STAT. § 38-126 (Reissue 1960) (enacted in 1953, discussed in text at notes 242 to 252 *supra*).

³¹⁴ See text at note 252 *supra*.

mother's support obligation would be following the father and guardianship income, but before the guardianship principal. This answer is not clear from the statutes, but it is a matter which easily can and should be amended by the Legislature. As clarified, these rules should be determinative for federal tax purposes as to the existence of a mother's support obligation towards minors.

Also, we might assume for estate planning purposes that a divorced wife or widow could have a more extensive support obligation than that of a mother in a united family. There is no definite authority for such a premise, but it is possible to generalize that there has been an implied assumption to this effect in some of the reported decisions.³¹⁵ It could be that ultimately the divorced wife or widow will be subject to the same obligation as that of a father in a united family.

There are also support obligations owed under Nebraska law by adoptive parents,³¹⁶ stepfathers and stepmothers,³¹⁷ and other persons *in loco parentis*.³¹⁸ In some situations, even though the minor is the beneficiary of property being held for him, a support obligation may be owed by a grandfather, grandmother, child, brother or sister.³¹⁹

With respect to the support obligations of persons other than the father, it seems possible that a transfer for the mandatory support of a minor would be held to extinguish the legal obligation

³¹⁵ See, e.g., *Waldbaum v. Waldbaum*, 171 Neb. 625, 107 N.W.2d 407 (1961); *Bize v. Bize*, 154 Neb. 520, 48 N.W.2d 649 (1951).

³¹⁶ NEB. REV. STAT. § 43-110 (Reissue 1960) (after adoption the same rights, duties and other legal consequences exist as between a natural parent and child).

³¹⁷ See *Fischer v. Fischer*, 106 Neb. 477, 184 N.W. 116 (1921). See also NEB. REV. STAT. § 28-449 (Reissue 1956).

³¹⁸ See *Austin v. Austin*, 147 Neb. 109, 22 N.W.2d 560 (1946) (syllabus by the court): "A person standing in loco parentis to a child is one who has put himself in the situation of a lawful parent by assuming the obligations incident to the parental relation, without going through the formalities necessary to a legal adoption, and the rights, duties, and liabilities of such person are the same as those of the lawful parent."

³¹⁹ See NEB. REV. STAT. § 68-101 (Reissue 1958). This statute permits an independent suit for support by a "poor person, who shall be unable to earn a livelihood in consequence of an unavoidable cause." In a situation where property is being held for a minor but can be applied for his benefit only in the discretion of someone else, the exercise of which discretion is beyond the power of a court to compel in favor of the minor, the minor would continue to be a "poor person," the support obligations of others toward him as a "poor person" would continue, and any satisfaction of that obligation would result in potential income tax liability to the person whose legal obligation under the statute was satisfied.

of support under Nebraska law.³²⁰ If so, in addition to the issue whether this determination would be given effect for federal income tax purposes, there are the questions whether the transfer of property is for a good and valuable consideration under the federal estate and gift tax laws.³²¹ Treating the transfer in satisfaction of one's own legal obligation of support as being for a good and valuable consideration would mean that the transfer might not be subject to the gift tax to the extent of the consideration, and arguably (but probably not successfully) not a part of the transferor's federal estate tax estate. In any event, this is the sort of an approach which should be utilized for estate planning purposes only when necessary to achieve some significant result. Apart from the practical effect of the literal language of the income tax regulation purporting to leave the federal tax consequences to state law determinations, the device might fall under the ever-expanding rule that for federal tax purposes substance controls over mere form.

(2) *Extent Of The Obligation.*

It may well be that, as a practical matter, state law is merely persuasive authority of, but not conclusive in determining, the extent of a support obligation for federal tax purposes; and that the best tax policy would be to apply a uniform federal definition of support for federal tax purposes.³²² The income tax regulation

³²⁰ The operation of NEB. REV. STAT. § 68-101 (Reissue 1958), discussed in note 319 *supra*, clearly illustrates this proposition. If a minor has property which is sufficient for his maintenance and support, he would not be a "poor person" under the statute and no other person would be legally obligated thereunder for his support. Similarly, where trust property is required to be used for the support of a minor, and is sufficient in amount, there would not seem to be any legal obligation of support on the part of any person, except possibly his father, to the extent of the minor's own property. One consequence of this reasoning, however, is that for federal tax purposes the person whose future legal obligation is discharged by such a transfer might continue to be treated as the donee of the property or income in subsequent years despite the technical absence of, or elimination of, any formal legal obligation of support with respect to the future years.

³²¹ See LOWNDES & KRAMER, *FEDERAL ESTATE & GIFT TAXES* 145-147, 687-689 (2d ed. 1962).

³²² See, e.g., Note, *Federal Tax Aspects of the Obligation To Support*, 74 HARV. L. REV. 1191, 1221 (1961): "But on the question of the extent of the support obligation, state law does not appear even today to be determinative, notwithstanding the lip service which is generally paid to it by the Commissioner and the courts. At best, state law seems to impose a slight restraint on the Commissioner. Yet, by talking as if

and present tax theory, however, operate on the satisfaction of a legal obligation concept which limits the federal tax consequences to "the extent of his legal obligation under state law." The guardianship analogy is the best source of Nebraska law available to determine the continuing substantive support obligation once it attaches, in the absence of actual adjudication. Historically, these rules have grown up with regard to a propertied child, the precise situation involved for federal tax purposes. If the issues of a legal obligation to support a propertied child can arise at all under Nebraska law so long as the family is harmonious, they are most likely to be determined in a guardianship setting.

An interpretation of state law for the purpose of determining the federal tax consequences will in virtually every case be an imagined, or hypothetical, application of a relatively uncertain and pliable body of state law to the operative facts. So long as one is required to make a guess as to the extent of a support obligation under state law, the most relevant guess would seem to be how the issue might be resolved in a guardianship setting. If the guardianship funds could have been applied in the situation involved, then the expenditure would *not*, under the rules discussed above, involve the satisfaction of a legal obligation of supporting the minor. If the guardianship funds could not have been applied to the transaction, an additional determination must be made whether the probable reason is that the payment would have been (a) in satisfaction of the support obligation of another person within the guardianship framework, or (b) that it involved matters outside the guardianship provisions for "support, maintenance, and education."

Granted that this hypothetical application of the guardianship law is subject to the logical fallacy of "begging the question," still, if state law is to be used, some analogy must be drawn.³²³ The relevant factors which can come into play to determine the expenditure of guardianship funds are the most meaningful tools which are available under present Nebraska law. At least, the

state law were controlling, the Commissioner and the courts have probably generated some confusion. This confusion and the lack of uniformity inherent in a reference to state law could be dispelled by a candid assertion that taxation is to be based on an independent federal standard."; Pedrick, *Familial Obligations and Federal Taxation: A Modest Suggestion*, 51 NW. U.L. REV. 53 (1956) (quoted in note 293 *supra*).

³²³ Since any recasting of the facts for federal tax purposes is admittedly hypothetical, the substance of the entire family situation rather than the mere transactional form should be used in applying the analogy.

guardianship rules have developed with respect to the precise situation of a propertied child, and normally within a united family.

The divorce cases, however, offer the most numerous and complete Nebraska law concerning the extent of a duty to support minor children. But these rules involve a divided family. Under Nebraska law, the divorce court exercises general equitable jurisdiction to "make such further decree as it shall deem just and proper concerning the care, custody, and maintenance of the minor children of the parties."³²⁴ This involves a full range of judicial discretion to make an award for the child's best interests based upon all of the circumstances of the case, and not merely to enforce what the father's legal obligations might be apart from the divorce.³²⁵ At this point, the ordinary social policy against judicial intrusion into family support matters in the interests of preserving domestic harmony is significantly reduced.

The fact that the father will normally be separated from his children in divorce situations, and not entitled to custody or earnings and services of the child, may also tend to distinguish the divorce cases. Divorce law contains an element of fault which may influence support awards as a practical matter, whether explicit or not. If, in a specific situation where the family is divided, the rules of divorce and separation would more accurately reflect the existing family picture, there is no reason why they cannot be applied to that case. But, where the family is happily united, there is likely to be a closer factual analogy to the guardianship rules than to the divorce rules.

The questionable obligation of a father for federal tax purposes

³²⁴ NEB. REV. STAT. § 42-311 (Reissue 1960).

³²⁵ See, e.g., *Koser v. Koser*, 148 Neb. 277, 27 N.W.2d 162 (1947): (syllabus by the court): "The disposition of minor children and provision for their support in an action wherein a divorce is granted is not controllable by agreement of the parties but by the court on the facts and circumstances as disclosed to it." A father's obligation to pay a stated monthly sum survives his death. *Spencer v. Spencer*, 165 Neb. 675, 87 N.W.2d 212 (1957). The court will consider the standard of living previously set by a father in making the award. See, e.g., *Cowan v. Cowan*, 160 Neb. 74, 69 N.W.2d 300 (1955); *York v. York*, 138 Neb. 224, 292 N.W. 385 (1940). There has been no detailed listing of factors which should be taken into consideration in making child support awards as in the case of alimony or the division of property. See, e.g., *Waldbaum v. Waldbaum*, 171 Neb. 625, 107 N.W.2d 407 (1961). Child support awards are apparently left to general judicial discretion to determine the reasonable needs of the minor from all of the facts and circumstances of the case. See, e.g., *Jones v. Jones*, 173 Neb. 880, 882, 115 N.W.2d 462, 463 (1962): "It is the continuing duty of the court to consider the reasonable needs of the children and the ability of the father to supply those needs."

to provide a private school, vocational or college education for his children illustrates a probable difference in result between approaching the problem of the extent of the duty to educate under Nebraska law from the standpoint of a united or divided family. Under the existing state of the law, a county court would appear to be justified in authorizing (with, of course, complete procedural formality) guardianship income and principal to be expended for private school, vocational or college education where the parents, although of sufficient means, refused to provide this education.

Apart from the issue of whether a minor or someone on his behalf could maintain an independent suit for support under the inherent equity power of district courts, it seems very likely that the court would find in such a separate proceeding, if entertainable, that education beyond the public school level is a discretionary and desirable moral duty, but substantively not a part of the required support obligation within a united family. The same considerations would be present in this determination as those which underlie the leading decision in *McGuire v. McGuire*.³²⁶ Technically, this decision stands for no more than that a wife cannot recover separate maintenance in equity while residing with her husband, because of the existence of statutory provisions dealing with other aspects of separate maintenance. The crux of this decision, from a policy standpoint, however, is to permit broad discretion to a husband in a united family as to the support level of the family. Even if the suit could be maintained, the reasoning of the opinion would indicate that a father would have a residual discretion to determine what educational expenditures, if any, should be made beyond the public school level.

Where a husband and wife are divorced or legally separated, there is a clearly enforceable obligation of a father of sufficient means to provide a private, vocational or college education for his unemancipated minor children. This matter is within the discretion of the divorce court based upon all of the circumstances of the case.

In a number of reported opinions, divorce and separation awards have included education costs beyond those of the public schools.³²⁷ The legal obligation of a father to support his children

³²⁶ 157 Neb. 226, 59 N.W.2d 336 (1953), noted in 33 NEB. L. REV. 103 (1953). See Annot., *Maintenance of Suit by Child, Independently of Statute, Against Parent for Support*, 13 A.L.R.2d 1142 (1950).

³²⁷ See, e.g., *Waldbaum v. Waldbaum*, 171 Neb. 625, 107 N.W.2d 407 (1961) (in the absence of unusual circumstances, father has no duty to provide college education beyond minority, but implies that during minority

continues after the decree of divorce.³²⁸ The initial decree can be modified for changed circumstances, or if it is in the best interests of the children on the court's own motion, or on the petition of either parent.³²⁹ If the issue of support has not been adjudicated in the original proceeding, the mother may maintain an independent suit in equity against the father for support of the children.³³⁰

Thus, in the case of a divorce, there are clearly enforceable rights which do not exist in the absence of divorce. The whole crux of the present federal tax theory flows from the satisfaction of a legal obligation of support as defined under state law. This should mean that under Nebraska law there is no legal duty for federal tax purposes to educate beyond the public schools where the family is united. To imply such a duty for federal tax purposes would go beyond the purported theory of satisfaction of a legal obligation. It would also seem to be a gross misconstruction of the operative facts to assume a hypothetical divorce for a united family. Further, there is no clear United States Supreme Court authority for extension of the income tax consequences beyond the "satisfaction of a legal obligation" theory under the present Internal Revenue Code, and an attempt to alter the basic tax policy in this regard might run into constitutional objections.

both divorced father and mother may have such an obligation); *Bize v. Bize*, 154 Neb. 520, 48 N.W.2d 649 (1951) (increased allowance under divorce decree to allow son, who had previously been in trouble, to attend military academy until he graduated, became twenty-one, or entered military service, infers that, on the facts involved, both parents had such a legal obligation toward the child); *Yost v. Yost*, 143 Neb. 80, 8 N.W.2d 686 (1943) (divorce decree affirmed requiring father to pay in addition to other specified amounts "all of the expenses of educating the minor daughter, including tuition, school supplies, transportation, board and room, with the expense incurred in membership in sororities or other school organizations, and in addition . . . the reasonable expense of vacations of said minor daughter"); *Ruehle v. Ruehle*, 161 Neb. 691, 74 N.W.2d 689 (1956) (nurse's training and university education impliedly treated as within divorce decree support obligation for purposes of decision on other issues); *Chambers v. Chambers*, 75 Neb. 850, 106 N.W. 993 (1906) (out-state private school); cf. *Blue v. Blue*, 152 Neb. 82, 40 N.W.2d 268 (1949) (father of very modest means not required to send self-supporting daughter to two years of college so she could qualify as an airline hostess); *Dimond v. State*, 110 Neb. 519, 194 N.W. 725 (1923) (implying that under some circumstances not present in that case, a college student might be within the criminal support statutes). See also Annot., *Education as Element in Allowance For Benefit of Child in Decree of Divorce or Separation*, 56 A.L.R.2d 1207 (1957).

³²⁸ See *Schalk v. Schalk*, 168 Neb. 229, 95 N.W.2d 545 (1959).

³²⁹ NEB. REV. STAT. § 42-312 (Reissue 1960).

³³⁰ *Geary v. Geary*, 102 Neb. 511, 167 N.W. 778 (1918).

On the basis of existing Nebraska law, it might be expected that guardianship proceedings would limit expenditures to those which are really needed to maintain the minor to age twenty-one when the property becomes his free from limitation. A divorce court might give more effect to the family's station in life. A guardianship might reflect more fully the contemporaneous wishes of the minor's parents with regard to his maintenance and education. In either case, the previous habits of the parents, the amount, character and availability of the minor's property, and the means of the parents, are factors to be taken into consideration, but without any specific weight assigned to them. Having to make one total generalization from state law as to whether a support obligation hypothetically exists in any particular case, the most opportune vantage point is that of the Nebraska Supreme Court in resolving a guardianship case.

In addition, if state law is to control these important federal tax considerations, then the Nebraska statutes should be clarified, if not substantively amended. A revision of the guardianship statutes concerning the application of principal and income which has been suggested above should then have the additional incidental effect of clarifying the federal tax consequences which flow from a Nebraska support obligation toward a minor.

It is possible for an estate planner to minimize the risks of adverse or unexpected tax consequences arising from support obligations. Some of the existing tools which might be used are to accumulate the income in the trust or custodianship; place the income in a savings account in the minor's name, or purchase government bonds or life insurance with the income; draft the trust instrument to limit the use of trust funds by specific language to non-support obligation items; expend trust or custodianship funds for items clearly beyond the ordinary support range, being cautious to record the actual provision of support by the person having a legal obligation; and use a mother rather than a father as trustee or custodian.³³¹ In any event, the person whose support obligation

³³¹ In addition to the authorities cited in note 291 *supra*, see Ehrlich, *The Effective Use of Support Trusts: Trusts for Minors, Custodian Statutes, Gifts of Future Interests*, N.Y.U. 19TH INST. ON FED. TAX. 729 (1961); Savage, *Comparative Advantages and Disadvantages of Support Trusts and Uniform Gifts to Minors Statute Gifts; What Constitutes Support for Tax Purposes*, N.Y.U. 17TH INST. ON FED. TAX. 1097 (1959); McIntire, *Practical Questions on Gifts to Minors*, 97 TRUSTS & ESTATES 320 (1958); Goodson, *When Is Payment in Discharge of Parent's Legal Obligation?*, 99 TRUSTS AND ESTATES 17 (1960); Lauritzen, *Super Support Trusts—Or How to Set Up a Trust To Pay Income to Minor Children Without Taxing the Income to the Settlor*, 1 TAX COUNSELOR'S Q. (No.2) 1 (June 1957);

is in fact satisfied by the expenditure would normally be no worse off financially after the expenditure than if it had not been made.

H. LIABILITY FOR GENERAL DEBTS OF MINOR.

Guardianship³³² and custodianship³³³ property is subject to the claims of creditors. The assets of a Nebraska trust can be placed beyond creditor's claims by a provision in the trust instrument.³³⁴ From the standpoint of insuring the intended disposition, it would seem that a clause of this type should be included as a matter of routine in trust instruments.³³⁵

Bronston, *Some Tax Problems in Making Gifts to or for Minors*, 45 ILL. BAR J. 320 (1957); Rogers, *Some Practical Considerations in Gifts to Minors*, 20 FORDHAM L. REV. 233 (1951); Tenney, *Using the Custodian Statute as a Planning Device*, N.Y.U. 16TH INST. ON FED. TAX. 937 (1958).

³³² NEB. REV. STAT. § 38-501 (Reissue 1960); see *Thomas v. First Nat'l Bank*, 112 Neb. 847, 201 N.W. 905 (1924) (judgment enforceable only through county court administration and not by execution).

³³³ See NEB. REV. STAT. § 38-1003(1) (Reissue 1960) (gift indefeasibly vests title to the security or money in minor).

³³⁴ *Weller v. Noffsinger*, 57 Neb. 455, 77 N.W. 1075 (1899); see *Miles v. Miles*, 120 Neb. 436, 233 N.W. 249 (1930) (after termination of trust, property subject to claims of creditors which arose before termination); *Beals v. Croughwell*, 140 Neb. 320, 299 N.W. 320 (1941) (provision that beneficiary receive property only when solvent; held valid, and the trust assets cannot be reached by creditors or trustee in bankruptcy). Compare *Lancaster County Bank v. Marshel*, 130 Neb. 141, 264 N.W. 470 (1936) (circumstances may establish intent to place assets beyond beneficiary's creditors in absence of specific clause) with *Flanagan v. Olderog*, 118 Neb. 745, 226 N.W. 316 (1929) (language must be clear and unequivocal to create valid spendthrift trust).

³³⁵ See, e.g., 2 CASNER, ESTATE PLANNING 1253 (3d ed. 1961): "The interest of each beneficiary in the income or principal of a trust under this instrument shall be free from the control or interference of any creditor of a beneficiary or of any spouse of a married beneficiary and shall not be subject to attachment or susceptible of anticipation or alienation. Nothing contained in this paragraph shall be construed as restricting in any way the exercise of any power of appointment granted hereunder." A trust is necessary to impose a restraint on alienation in Nebraska, since a restraint on a legal vested fee simple estate is void. *Andrews v. Hall*, 156 Neb. 817, 58 N.W.2d 201 (1953), noted in 52 MICH. L. REV. 616 (1954); cf. *Fleming v. Blount*, 202 Ark. 507, 151 S.W.2d 88 (1941). See generally 6 AMERICAN LAW OF PROPERTY §§ 26.13-26.47 (restraints on alienation of present legal fees simple or other absolute interests), 26.48-26.51 (restraints on present legal life estates or terms of years), 26.52-26.54 (Casner ed. 1952) (restraints on legal future interests).

I. INVESTMENT STANDARDS.

The investment powers of guardians and trustees are governed by the conservative statutory standards of the "legal list."³³⁶ The statute provides, however, that a trust instrument may specify its own investment rules. The practical effect of this is that a trustee may be (and normally should be) given a virtually complete freedom of investment under a trust instrument. Even under an unlimited investment power, a trustee would be subject to the exercise of reasonable discretion.³³⁷

The custodianship statute contains language which permits investment "as would a prudent man of discretion and intelligence who is seeking a reasonable income and the preservation of his capital."³³⁸ While this language probably implies no more than the normal "prudent man" standard of fiduciary investment authority, it is not clear whether the phrase "who is seeking a reasonable income and the preservation of his capital" may limit somewhat the scope for the exercise of prudence.³³⁹ At least, it is possible to imagine some types of investments, which might be prudent and desirable in some situations in connection with managing the property of minors, but, because of the lack of income, could leave a prudent custodian reasonably uncertain of his authority.

It also is not clear whether there is any subject matter limitation on subsequent investments by a custodian. The statutes permit only securities and money to be placed initially in the custodianship.³⁴⁰ There is nothing in the investment powers which would limit the subsequent authority of a custodian to only money and securities.³⁴¹ The definition of "custodial property" seems to create a definite inference that the reinvested proceeds of a custodianship need not be money or securities.³⁴² From an investment standpoint,

³³⁶ NEB. REV. STAT. § 24-601 (Supp. 1961).

³³⁷ 2 SCOTT TRUSTS § 187.2 (2d ed. 1956): "[E]ven though the trustee is given discretion in the making of investments, he commits a breach of trust if he fails to use care and skill and caution in the choice of investments. So also where the trustee has discretion whether to sell or retain land or securities of the trust, he is guilty of an abuse of discretion if he acts beyond the bounds of a reasonable judgment." See also RESTATEMENT (SECOND), TRUSTS § 227, comments *u*, *v*, and *w* (1959).

³³⁸ NEB. REV. STAT. § 38-1004(5) (Reissue 1960).

³³⁹ Cf. RESTATEMENT (SECOND), TRUSTS § 227 (1959); 3 SCOTT, TRUSTS §§ 227-227.15 (2d ed. 1956).

³⁴⁰ NEB. REV. STAT. §§ 38-1002(1), 38-1101 (Reissue 1960).

³⁴¹ NEB. REV. STAT. §§ 38-1004(5) & (6) (Reissue 1960).

³⁴² NEB. REV. STAT. § 38-1001(5) (Reissue 1960): "The custodial property includes: (a) All securities and money under the supervision of the

it is sound that the custodian's hands not be tied in advance to only money or securities. Yet, if the statute is construed to permit the custodian to deal in real estate or personal property other than securities, the statutory framework creating custodianships seems grossly insufficient.

All of these fiduciaries, however, are specifically permitted to retain the securities originally placed in the arrangement, apparently whether or not such retention is in fact reasonable.³⁴³

J. LEASES.

A lease of a minor's property by a guardian for a period beyond the term of the guardianship is voidable by the minor after attaining majority.³⁴⁴ A trustee, however, may be authorized to execute leases extending beyond the term of the trust.³⁴⁵ Special statutes permit guardians and trustees to execute oil and gas leases and pooling or unitization agreements³⁴⁶ and easements for oil and gas pipe lines³⁴⁷ beyond their terms upon an order of the district court.

K. TERMINATION AND SUCCESSION TO PROPERTY.

(1) *Upon Attained Age.*

Under the guardianship³⁴⁸ and custodianship³⁴⁹ statutes, a minor is entitled to receive the entire property outright upon becoming

same custodian for the same minor as a consequence of a gift or gifts made to the minor in a manner prescribed in sections 38-1001 to 38-1010; (b) the income from the custodial property; and (c) the proceeds, immediate and remote, from the sale, exchange, conversion, investment, reinvestment or other disposition of such securities, money and income." See NEB. REV. STAT. § 38-1004(7) (Reissue 1960) which describes how the custodian shall hold securities, money and "all other custodial property."

³⁴³ NEB. REV. STAT. §§ 24-602 (Reissue 1956), 38-1004(5) (Reissue 1960).

³⁴⁴ *Jackson v. O'Rourke*, 71 Neb. 418, 422, 98 N.W. 1068, 1070 (1904): "With reference to this right, it is well established that a guardian may lease the ward's lands during the term of his guardianship, but that any excess in such a lease beyond such term will be void at the election of the ward on coming of age."

³⁴⁵ See RESTATEMENT (SECOND), TRUSTS § 189 (1959); 2 SCOTT, TRUSTS 1409-1418 (2d ed. 1956); Annot., 67 A.L.R.2d 978 (1959).

³⁴⁶ NEB. REV. STAT. §§ 57-210 to 57-212.10 (Reissue 1960). See Merrill, *The Oil and Gas Lease—Major Problems*, 41 NEB. L. REV. 488, 492-94 (1962).

³⁴⁷ NEB. REV. STAT. §§ 57-401, 57-402 (Reissue 1960).

³⁴⁸ See NEB. REV. STAT. §§ 38-101, 38-109 (Reissue 1960); *In re Guardianship of Phillips*, 144 Neb. 183, 13 N.W.2d 99 (1944).

³⁴⁹ NEB. REV. STAT. § 38-1004(4) (Reissue 1960).

twenty-one, or in the case of a guardianship, upon the marriage of a female under twenty-one. A trust terminates at whatever date or dates are specified in the trust instrument. This means that only under a trust can a portion of the property be withheld from the beneficiary to a more advanced age than twenty-one. It is quite common in estate planning for a person to wish to withhold outright distribution beyond twenty-one for a variety of reasons; among others, to permit the beneficiary to gain added maturity and experience, to take over the property more gradually, to acquire property as his needs develop (such as marriage, children, or entry into business), or to serve as an incentive (such as completion of a college education).

(2) *By Death of the Minor.*

Guardianships³⁵⁰ and custodianships³⁵¹ are terminated by the death of a minor, and the property passes to the minor's estate. This presents a number of serious disadvantages:

(a) It is necessary to probate the estate of the minor, and sustain added costs and delays.

(b) Since a minor cannot make a testamentary disposition, the statute of descent defines the recipients of the property. The parents, or surviving parent, are the beneficiaries of an unmarried, childless minor, and receive one-half of the estate of a married, childless minor.³⁵² In many cases, the original transferor of the property would prefer to specify the alternate takers for the property in case the minor dies under age. Inheritance of the minor's property may unnecessarily augment the parents' estates. This may pass part or all of the property to a surviving spouse who is an "in-law" of the original donor. And if the heirs of the deceased minor are themselves minors, the property will be subjected to new guardianships.

(c) The property will be subject to federal estate tax³⁵³ and Nebraska inheritance tax.³⁵⁴

A trust can provide for a gift over to other persons on the death of a minor. It may not be necessary to probate an estate for the deceased minor. The successive beneficiaries following the

³⁵⁰ *Barret v. Provincher*, 39 Neb. 773, 58 N.W. 292 (1894) (after death of ward, only administrator can commence or maintain suit).

³⁵¹ NEB. REV. STAT. § 38-1004(4) (Reissue 1960).

³⁵² NEB. REV. STAT. §§ 30-101, 30-102 (Reissue 1956).

³⁵³ INT. REV. CODE of 1954, § 2033.

³⁵⁴ NEB. REV. STAT. § 77-2001 (Reissue 1958).

death of the minor can receive property immediately upon the death of the minor. The trust instrument, or some person acting under a power of appointment, may specify the contingent taker or takers on the death of the minor, and this may more precisely carry out long range family objectives. A gift-over under the trust instrument on the minor's death is not subject to the federal estate tax³⁵⁵ or the Nebraska inheritance tax.³⁵⁶

L. OTHER.

The preceding sections have not attempted to exhaust the differences between guardianships, custodianships and trusts. Special situations may well call into focus meaningful distinctions not considered in this paper. For example, ownership of securities of a Subchapter S corporation by a trust, but not a custodianship or guardianship, would terminate the Subchapter S election.³⁵⁷ There are administrative matters which are not normally of prime importance which might become significant in planning a specific estate. A guardian or trustee,³⁵⁸ but not a custodian,³⁵⁹ may register securities in the name of a nominee; a third party may not need to consider the validity of the actions of a custodian or trustee,³⁶⁰ but is likely to deal with a guardian at his peril.³⁶¹ Only a trust permits voting rights to be split off from legal ownership of the property, commingled investments, and a continuous management of the property uninterrupted by death of the minor. A custodianship may in some situations permit a quicker, easier and less expensive gift to minors, but this is primarily because non-professionals are more likely to be relied upon for fiduciary (or semi-fiduciary) decisions, and in place of comprehensive legal advice, in these situations. At this level of comparison, as at the others discussed in this article, it is likely that trust planning will in most cases offer the greatest number of significant estate planning

³⁵⁵ See, e.g., *Hugh D. Rhodes*, 41 B.T.A. 62, *aff'd*, 117 F.2d 509 (8th Cir. 1941).

³⁵⁶ *County of Holt v. Gallagher*, 156 Neb. 457, 56 N.W.2d 621 (1953).

³⁵⁷ INT. REV. CODE of 1954, §§ 1371(a) (2), 1372(e) (3).

³⁵⁸ NEB. REV. STAT. § 24-604 (Reissue 1956).

³⁵⁹ See NEB. REV. STAT. § 38-1004(7) (Reissue 1960).

³⁶⁰ NEB. REV. STAT. § 38-1006 (Reissue 1960) (custodianships). A similar provision may be included in the trust instrument, and, although it would not relieve from liability a third party who actually participated in the breach of trust, it would lessen the notice and duty of inquiry which might otherwise exist. See RESTATEMENT (SECOND), TRUSTS §§ 296, 297 (1959).

³⁶¹ See, e.g., *Hendrix v. Richards*, 57 Neb. 794, 78 N.W. 378 (1899).

opportunities. Chief among these is that the trust is a flexible product of legal draftsmanship whereas guardianships and custodianships are relatively impersonal statutory creatures.

III.

CONCLUSION.

Property management and estate planning for minors, like all types of estate planning, is most effective when tailored to fit individual needs and family objectives. The basic tools of an estate planner for property management for minors are outright ownership, guardianships, custodianships and trusts.

An analysis of the consequences of these property management arrangements verifies with emphasis one of the fundamental estate planning "rules of thumb" which becomes particularly applicable where minor beneficiaries are involved: Never create an inheritable future interest.³⁰² There is nothing to be gained from a planning standpoint in creating descendible future interests. Upon the death of the named taker prior to the time at which the interest ripens into unlimited ownership, additional expenses, and in many cases additional taxes, will be incurred.

³⁰² LEACH & LOGAN, FUTURE INTERESTS AND ESTATE PLANNING 329, 402-3 (1961): "Never create a vested interest. Perhaps we should say, to be more precise: Never create an inheritable interest—which includes, with vested remainders, the so-called vested interest in a contingent remainder or executory interest. The reason is that if the named taker of a future interest dies before the interest vests in possession it is bound to cause additional and unnecessary expense to have it pass through his estate—administration expense always, and additional taxes often. . . . As the cases in this section illustrate, the courts always attempt to find that future interests are vested so the death of a beneficiary prior to the time of distribution does not defeat his heirs, devisees and legatees. While this approach to protection of the interests of the deceased beneficiary may seem desirable in many cases, adverse consequences also result. Vested interests which are descendable are 'owned' assets in the estate of the deceased beneficiary subject to federal estate taxes and, generally, to state inheritance and estate taxes. Applied to future interests these taxes are imposed upon an owner who never has had the possession and enjoyment of the property, and they often involve assets which are quite difficult to value. Further, the taxes can be avoided entirely, while achieving the same result, by proper planning and drafting. We do not object to protection of issue and other persons taking from a beneficiary who does not survive until the time for distribution. But the proper method, which avoids unnecessary taxation, is by contingent interests with adequate substitute gifts, perhaps utilizing special powers of appointment." See also *id.* at 23-25, 734.

With respect to minors, the fundamental precept means:

First, minors should not receive outright ownership of substantial property during minority; and

Second, property interests should not normally vest in a minor or his estate during minority.

From this, it follows that outright gifts, guardianships and custodianships should ordinarily be avoided. These devices are controlled almost exclusively by a statutory framework which will probably not fit the intended disposition in a number of significant particulars, and certainly not to the same degree as a carefully drawn trust instrument. Even if the outright gift, guardianship or custodianship would result in a desired family disposition of the property, it is likely that where substantial property is involved, a trust could achieve the same result more effectively.

It is not fair to conclude that outright gifts to minors, guardianships and custodianships are never warranted in estate planning. An outright gift of certain personal items, such as jewelry, clothing and spending money,³⁶³ may properly be used for minors of a sufficient age to understand the value of the items involved. In fact, distribution of items of personal and household use of a decedent which have a comparatively insignificant value for planning purposes might advantageously be made by an executor to a parent, relative or person having custody of the minor where the minor is too young to take possession of the property himself.³⁶⁴ A testamentary guardian should be nominated, and carefully chosen, to provide for personal custody of the minor. Custodianships may

³⁶³ To the extent it may be socially desirable that minors should be permitted, or encouraged, to learn financial management by utilization of their own spending money, the statutes should be amended to clarify that minors may have checking and savings accounts in commercial banks. See note 29 *supra*.

³⁶⁴ Such a clause might relate to tangible personal property owned at death, except business property and money and securities. After establishing a method of division of the property, the clause would provide that the executor may select the person to whom distribution is to be made for the minor, and that person can determine the form in which the property shall be held for the minor. See, *e.g.*, 2 CASNER, ESTATE PLANNING 1268 (3d ed. 1961): "Property and cash [the proceeds from the sale of any described property] distributable to a minor under this Article FIRST may be distributed by my executors to such minor personally, or to such minor's legal guardian, or to some other person selected by my executors to receive such property for such minor, and the receipt of such minor, or such minor's legal guardian, or such other person, shall be a complete discharge of my executors in regard to such distribution.

be used for small investments in securities, preferably for short periods of time, even if not suited for a major estate planning role.³⁶⁵

This study also points up a major area for which immediate legislative revision is needed. The statutes concerning the use of guardianship funds are in reality legal anachronisms reflecting colonial statutes arising from entirely different economic and social considerations than exist today. Efficient guardianship administration, as well as the need for accurately defining the legal obligations of support owed to Nebraska minors for both Nebraska law and federal tax purposes, requires a comprehensive revision of these guardianship statutes.

The basic conclusion seems overwhelming that normally a trust (or trusts) should be employed as the primary estate planning device with respect to property interests of minors. Where substantial interests of minors in Nebraska property are involved in estate planning, the most effective ownership and tax results will be secured through careful trust draftsmanship.

The person to whom property is distributed under this Article FIRST for the benefit of a minor shall decide from time to time whether such property shall be retained for eventual distribution to the minor or whether some or all of it shall be sold and the proceeds of the sale held [and expended or invested?] for the minor. Such person's decision in this regard shall be conclusive on all concerned." This clause has the effect of creating an obviously unclear situation as to the relationships of the executor and distributee toward the property and the minor, in the interests of practicability and expediency in dealing with a comparatively insignificant portion of the over-all estate.

³⁶⁵ The usefulness of custodianships could be increased by broadening NEB. REV. STAT. § 38-1002 (Reissue 1960) to permit distributions from a trust to a custodian and payments by an insurance company to a custodian.