FEDERAL TAXATION: GIFT TO MINOR HELD A PRESENT INTEREST QUALIFYING FOR SECTION 2503 (c) GIFT TAX EXCLUSION DESPITE STATE LAWS RESTRICTING PRESENT ENJOYMENT

Due to the difficulty of qualifying for the annual exclusion under section 2503, while avoiding the conferral of complete control of the property to an inexperienced minor, Congress passed section 2503(c). However, the efficacy of this section for estate planning was limited by its ambiguity and the Treasury’s interpretation. The recent case of Ross v. United States has clarified to a certain extent the meaning of the criteria established by section 2503(c) and has, at least partially, rejected the Treasury’s interpretation. In so doing, it has contributed to the usefulness of this section as a workable tool in estate planning.

Section 2503 (b) of the Internal Revenue Code provides that a donor who conveys a present interest to a donee may exclude the first 3,000 dollars of that gift from the amount subject to gift tax.1 Under that provision, however, it has been difficult to convey a gift to a minor which would qualify for this exclusion and at the same

---

1 Section 2503 (b) states that “in the case of gifts (other than gifts of future interests in property) made to any person by the donor . . . the first $3,000 of such gifts . . . shall not, for purposes of subsection (a), be included in the total amount of gifts made during such year.” Int. Rev. Code of 1954, § 2503 (b). (Emphasis added.) Definitions of present interests and future interests are found in the regulations as follows:

a) “‘Future interests’ is a legal term . . . [denoting interests] which are limited to commence in use, possession or enjoyment at some future date or time.

b) “An unrestricted right to the immediate use, possession, or enjoyment of property or the income from property . . . is a present interest in property.” Treas. Reg. 25.2503-3 (1958).


In Helvering v. Hutchings, 312 U.S. 393, 396-97 (1941), the Court held that where gifts are placed in trust, the beneficiary, not the trustee, is the donee under the statutory phrase “any person.” Int. Rev. Code of 1932, § 504 (b), 47 Stat. 247 (now Int. Rev. Code of 1954, § 2503 (b)). As a result, the donor can receive as many exclusions as there are beneficiaries. Thus, the donor can receive a $3,000 exclusion ($5,000 at time of Helvering v. Hutchings, supra) for each donee and take advantage of the provision each year. Furthermore, each spouse may take advantage of the annual exclusion, making it possible to grant annually a $6,000 tax-free gift to each beneficiary. Int. Rev. Code of 1954, § 2513.

time contain restrictions on present enjoyment which are sufficient to guarantee proper management during the donee’s minority.\textsuperscript{2} To ameliorate this problem, section 2503 (c) was added in 1954 and provides that a gift to a minor may be accorded present interest status despite fetters upon the use and enjoyment of the property prior to majority.\textsuperscript{3} Specifically, the statute provides that a gift will not be considered a future interest if it “may be expended by, or for . . . the donee” before he reaches age twenty-one. The recent case of \textit{Ross v. United States}\textsuperscript{4} ruled upon the ambiguities latent in this proviso,\textsuperscript{5} and represents the first judicial attempt to clarify the “may be expended” criteria for a qualifying gift to a minor.

\textit{Ross} involved the question of whether three identical gifts, made in the form of trusts in favor of minor donees, qualified for the exclusion under section 2503 (c). The terms of the trusts provided that the trustees should have power to distribute income from the trust corpus, and that the corpus and any undistributed income should be distributed to the donees upon their attaining the age of twenty-one. In addition, the trustees were expressly authorized to exercise all powers conferred upon a guardian under the laws of the cestuis’ respective domiciles, which in this case involved the laws of Texas.\textsuperscript{6} No explicit authorization to invade the corpus was granted, 

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{2} “Gifts to minors are often hindered by the fact that it is not clear how such a gift can be made in trust or through a guardian . . . other than as a future interest, and for future interests the §3,000 exclusion is not available.” S. REP. No. 1622, 83d Cong., 2d Sess. 127 (1954).
\item\textsuperscript{3} Section 2503 (c) qualifies the future interest exception by providing that “no part of a gift to an individual who has not attained the age of 21 years on the date of such transfer shall be considered a gift of a future interest in property for purposes of subsection (b) if the property and the income therefrom—(1) may be expended by, or for the benefit of, the donee before his attaining the age of 21 years, and (2) will to the extent not so expended (A) pass to the donee on his attaining the age of 21 years, and (B) in the event the donee dies before attaining the age of 21 years, be payable to the estate of the donee or as he may appoint under a general power of appointment as defined in section 2514 (c).” INT. REV. CODE OF 1954, § 2503 (c). (Emphasis added.)
\item\textsuperscript{4} If a gift does not qualify under § 2503 (c), it still may be a present interest entitled to the exclusion under § 2503 (b). S. REP. No. 1622, 83d Cong., 2d Sess. 127, 478 (1954). See also LOWNDES & KRAMER, \textit{op. cit. supra} note 1, § 33.11; Lentz, \textit{How to Draft a Trust for a Minor}, 95 TRUSTS & ESTATES 12, 14-15 (1956). However, the donor is well advised to structure the terms of the gift in such a manner as to bring it within the specific terms of § 2503 (c) to avert the uncertainties of a judicial definition of “present interest.” See Norvell, \textit{Section 2503(c) Trusts}, 10 BAYLOR L. REV. 29, 32 (1958).
\item\textsuperscript{5} 348 F.2d 577 (5th Cir. 1965).
\item\textsuperscript{6} The major ambiguity is whether restrictions upon the expenditure of the trust property and income, imposed by the donor or the state, will disqualify the donor for the exclusion by some restrictive interpretation of the words “may be expended” within § 2503 (c).
\item\textsuperscript{7} 348 F.2d at 578. All the beneficiaries were domiciled in Texas and were not
\end{enumerate}
\end{footnotesize}
but under Texas law a guardian may obtain a court order authorizing invasion of the corpus of his ward's estate for the latter's maintenance and education.\footnote{7}

The Commissioner contended that the exclusion should be disallowed because the gifts did not meet the "may be expended" requisite of section 2503 (c) (1).\footnote{8} He argued that the trust provision investing the trustees with Texas guardianship powers was insufficient to make the corpus property a gift which "may be expended for the benefit of the minor" because of the restrictions imposed by state law upon a guardian's power to invade corpus.\footnote{10} The Commissioner urged that these restrictions upon discretionary expenditures by the trustees were "substantial" within the meaning of the regulations,\footnote{11} thereby disqualifying the gift under section 2503 (c).

The Fifth Circuit rejected the Commissioner's contention and stated that the restrictions imposed by state law upon a guardian's expected to move. In any event, the powers of a guardian, as well as the restrictions placed upon him, are substantially similar in most states. See notes 7, 30 infra.

\footnote{7} There are three restrictions which Texas case law imposes upon a guardian's power to invade corpus. First, expenditures may not be made from the minor's estate unless the parents are financially unable to maintain and educate that child. Second, such expenditures may be made only for the child's education and maintenance. Third, these expenditures may be made only upon obtaining a court order, except in cases of emergency. \footnote{348 F.2d at 579. See also Logan v. Gay, 99 Tex. 603 (1903); Pembro
ton v. Leatherwood, 218 S.W.2d 500 (Tex. Civ. App. 1949).} A Texas statute permits invasions of the corpus by the guardian where the net income of the minor's estate is insufficient to provide for his education and maintenance. \footnote{Tex. Prop. Code § 236 (a) (Supp. 1964).}

A careful reading of the Texas statute reveals that the restrictions apply solely to the corpus of a gift. The court might have interpreted § 2503 (c) as did the court in \textit{Axlean I. Herr}, 35 T.C. 732 (1961), aff'd, 202 F.2d 780 (3d Cir. 1962), and granted the donor an exclusion only for the income portion of the gift since there were no restrictions upon the trustees' discretion to distribute income. The objection to this result would be that "property and income" must meet the requirement of "may be expended," so that if "property" may not be expended, there can be no exclusion whatsoever. However, in \textit{Herr}, the court ruled that even though there is no possibility that corpus or property may be expended, the exclusion will be available if "income" may be expended. Thus, \textit{Herr} interpreted "property and income" to mean income and the income therefrom.

Due to the fact that the \textit{Ross} court does not consider the possibility of granting an exclusion solely for the income portion of the gift, \textit{Ross} might be read as a rejection of the \textit{Herr} analysis of § 2503 (c).

\footnote{8} See note 3 supra.

\footnote{9} \textit{Int. Rev. Code of 1954, § 2503 (c) (1).}

\footnote{10} 348 F.2d at 581. See note 7 supra.

\footnote{11} Brief for Defendant, pp. 8-9.

The regulations state that a gift will qualify under § 2503 (c) even though the determination of the amounts and the purpose of the expenditures is left to the discretion of the trustee, "... provided there are no \textit{substantial restrictions} under the terms of the trust instrument on the exercise of such discretion..." \footnote{Treas. Reg. § 25.2503-4 (1958).} (Emphasis added.)
power to invade the corpus should not preclude the availability of the exclusion under section 2503 (c). The pivotal statutory language, "may be expended," was interpreted by the court to mean "may be expended within the limitations imposed on guardians by state law."

Section 2503 (c) was ostensibly enacted in order to make it possible for a donor to realize the 3,000 dollar annual exclusion while at the same time conveying a gift to a minor containing restrictions on expenditures which are adequate to guarantee prudent management. Prior to the enactment of this provision, substantial confusion existed as to how a donor could qualify for the exclusion without giving the minor control over the property. The need for congressional action became compelling following the holding of the Supreme Court in Fondren v. Commissioner, where it was asserted that a gift in trust, which was to be distributed to the minor donee only if an emergency indicated a need for such distribution, could not be considered a gift of a present interest. The Court stated that a gift is not of a present interest if any circumstances operate to restrict the donee's ability to presently enjoy the gift.

In decisions subsequent to Fondren, a conflict developed as to the criteria which should govern the question of whether a gift constitutes a present interest for purposes of section 2503 (b). In

12 348 F.2d at 581.
13 See note 3 supra.
14 348 F.2d at 579.
15 "Almost in vain, the donors sought for a magic formula for making a gift in trust, particularly for the benefit of minors, which would pass the 'future interest' hurdle and at the same time avoid the donor's natural reluctance to vest full control of the property and the income in immature and inexperienced donees.

"In response to this widespread ... dissatisfaction and the accompanying demands for clarifying legislation, Congress . . . adopted section 2503 (c) . . ." Lentz, Drafting a Section 2503(c) Trust for a Minor, 38 Dicta 11, 12-13 (1961).

Congress recognized the problem which a donor faced in conveying a restricted gift which would qualify for the exclusion when it stated that "doubt arises as to whether a gift in trust for a minor can be a present interest since the child does not presently have complete control over the property." H. R. REP. No. 1337, 83d Cong., 2d Sess. 93 (1954). The report's discussion of § 2503 (c) implies that the provision was enacted to make it possible to convey a gift which would qualify for the exclusion without granting an inexperienced minor "complete control over the property." Ibid.

16 Compare John W. Kieckhefer, 15 T.C. 111, 112 (1950), rev'd, 189 F.2d 118, 120 (7th Cir. 1951), with Fondren v. Commissioner, 324 U.S. 18 (1945).
17 324 U.S. 18 (1945).
18 Id. at 24-25. "The question is of time, not when title vests, but when enjoyment begins. Whatever puts the barrier of a substantial period between the will of the beneficiary or donee now to enjoy what has been given him and that enjoyment makes the gift one of a future interest . . . ." Id. at 20-21 (dictum). (Emphasis added.)
one case involving a gift in trust to a minor which the beneficiary under the terms of the trust could terminate at any time, the Second Circuit held that the minor's incapacity under state law to make an effective demand for the property prevented the gift from being a present interest.19 However, the Seventh Circuit, on identical facts, held that the minor received a present interest despite state law restricting his ability to demand the donated property.20 The court reasoned that if a donor conveys as complete an interest as is possible under state law, he should receive the exclusion notwithstanding the inability of the beneficiary to physically enjoy or possess the gift property.21

In addition to the possibility that state law would prevent the creation of a present interest, it has also been held that a future interest was conveyed where the beneficiary's present enjoyment of the gift depended upon any contingency required by the terms of the gift itself.22 Thus, if the trustee were granted the power to use

---

19 Stifel v. Commissioner, 197 F.2d 107 (2d Cir. 1952). The court stated that “it is urged that neither the Tax Court nor we may properly consider these items, since they involve restrictions not contained in the trust instrument. . . . But in Fondren v. Commissioner, 324 U.S. 12, 24 [(1945)] . . . and Commissioner v. Diston, 325 U.S. 442, 449 [(1945)], . . . the Supreme Court, in determining the nature of the rights conferred by the trust instruments, took account of 'surrounding circumstances'; the court, in reaching its determinations, did not irrevocably lock itself inside the 'four corners' of the writings but held that the key might lie outside. Were this not the rule, a donor could make gifts which on paper were 100% present but in practice were 100% future.” Stifel v. Commissioner, supra at 110. Cf. William H. Pope, 12 P-H Tax Ct. Mem. 646 (1955); Rev. Rul. 54-91, 1954-1 (Cum. Bull. 207).


20 Kieckhefer v. Commissioner, 189 F.2d 118 (7th Cir. 1951).
21 Id. at 121. In Kieckhefer, the court made a distinction between restrictions imposed by the donor himself upon the minor's ability to enjoy the property, and those imposed by state law. If the donor has conveyed a present interest within the “four corners” of the trust instrument, he should receive the annual exclusion, notwithstanding “outside” state restrictions peculiar to minors which would prevent the actual enjoyment of the gift. The court based its decision on the theory that to hold otherwise would be to make an unreasonable distinction between minors and adults since the same gift would have been a present interest if conveyed to an adult, given the absence of state restrictions. Id. at 121-22.


See also 5 MERTENS, op. cit. supra note 1, § 88.19, at 511; Forbes, supra note 19, at 108.

22 Street v. Commissioner, 261 F.2d 666 (5th Cir. 1958) (beneficiaries not to receive corpus unless need arises); Commissioner v. Phillips' Estate, 126 F.2d 851 (5th Cir. 1942) (beneficiaries' enjoyment contingent upon death of donor or lapse of ten years); Elise McK. Morgan, 42 T.C. 1080 (1964) (trustee to expend gift only for health,
his discretion in distributing the donative property, the exclusion would be denied as to the property subject to the trustee’s discretion.

As a result of these decisions, a prospective donor of a gift to a minor was presented with a dilemma. Under the “actual enjoyment” test of the Fondren case, it appeared that the only certain method of creating a present interest in a minor donee was to make an outright gift. This method has the distinct disadvantage of placing an often substantial sum in the hands of an immature donee. The alternative was to delay distribution to an age when the donee would be better able to manage the property, thereby creating a future interest and losing the exclusion.

In enacting section 2503(c), Congress seemingly recognized the dilemma which a donor faced in placing necessary restrictions upon a gift to a minor while attempting to gain the exclusion by maintenance or education); William Goehner, 28 T.C. 542 (1957) (trustees to expend gift only if parents could not support or educate beneficiaries).

23 There were some authorities who disputed that even an outright gift to a minor would constitute a present interest. Fleming, A Different View of Outright Gifts to Minors, 7 Tax L. Rev. 89 (1953); Fleming, Gifts for the Benefit of Minors, 49 Mich. L. Rev. 529 (1951). Other writers regarded the question as unsettled. Anderson, Gifts to Children and Incompetents, 26 Tax Revs. 911 (1948). Diamond, Tops and Dolls—or Gifts to Minors, 30 Taxes 987 (1952). There was, however, substantial authority for the position that an outright gift to a minor would be a present Interest. Edward J. Kelly, 19 T.C. 27 (1952); Madelaine N. Sharp, 3 T.C. 1062 (1944), aff’d, 153 F.2d 163 (9th Cir. 1946); Chas. F. Roesser, 2 T.C. 298 (1943). Each of these cases involved gifts to a minor through a guardian. Of course, this method would have solved the problem of management implicit in actually placing the property in the hands of the minor. However, it was not until 1954 that the Treasury finally acquiesced in the holdings that an outright gift to a minor through a guardian is a present interest. Rev. Rul. 54-400, 1954-2 Cum. Bull. 319.

Thus, an outright gift to a minor through a guardian represents a method by which a donor can gain the annual exclusion and still avert the problem of management implicit in an outright gift to the minor himself. However, the use of a guardian is expensive and cumbersome. See Caplin, supra note 1, at 201.

24 For example, in United States v. Pelzer, 312 U.S. 399 (1941), the trust instrument provided for a mandatory accumulation of the corpus and income and the Court held that the minor had received a future interest.

However, a means of partially circumventing this dilemma was devised in Sensenbrenner v. Commissioner, 134 F.2d 883 (7th Cir. 1943), and in Fisher v. Commissioner, 132 F.2d 383 (9th Cir. 1942). In these two cases the trustee was directed to distribute income to the beneficiary, but was not permitted to make any distribution of the corpus until the beneficiary matured. Sensenbrenner v. Commissioner, supra at 884; Fisher v. Commissioner, supra at 384. In both cases it was held that a present interest had been conveyed in the income portion of the gift, but that the beneficiary had received a future interest in the corpus. The obvious advantage of this method is that a donor receives an exclusion for at least part of the gift while avoiding the distribution of a large sum to a minor who is not equipped to manage it, although the distribution of the largest part of the gift is postponed until the minor has matured.
creating a present interest. The problem was eased by making the exclusion available if the formulae prescribed by section 2503 (c) were followed. That new section does not require distribution of the trust corpus to a minor, but demands only that the instrument provide for a possible expenditure of the "property and income therefrom." However, section 2503 (c) did not solve the problem of whether

---

25 See note 15 supra.
26 See note 3 supra.

The Senate report concerning § 2503 (c) states that "it is not necessary that the property or income be actually expended by or for the benefit of a minor during minority . . . ." S. Rep. No. 1622, 83d Cong., 2d Sess. 479 (1954).

However, there are difficulties under § 2503 (c) which do not exist with § 2503 (b). It is possible under the latter section to defer distribution of a large corpus until the beneficiary attains a more mature age than twenty-one, the traditional demarcation between majority and minority, and still gain the benefit of the exclusion in relation to income by providing for a mandatory distribution of the latter. See note 24 supra.

It may not be possible to employ this beneficial scheme under § 2503 (c), as the provision seems to require a complete distribution of both "property and income therefrom" at age twenty-one if any remains undistributed at that time. See note 3 supra. See also Lowndes & Kramer, op. cit. supra note 1, § 33.10, at 721. If "property and income therefrom" are to be interpreted as corpus and income, then the total sum of the donated property must be distributed to the beneficiary at an age when he or she may not in fact be fully capable of managing such a sum. Section 2503 (c) does not afford the exclusive method of making such gifts, however, and does not preclude the use of the "Sensenbrenner-Fischer" trust under § 2503 (b), in which the trustee is required to distribute income but must wait until the beneficiary has matured before a distribution of corpus can occur. Of course, there is an advantage under § 2503 (c) which does not exist if the trust is to qualify under § 2503 (b), namely that the donor does not have to require a mandatory distribution under § 2503 (c). Therefore, substitution of the "Sensenbrenner-Fischer" trust for a § 2503 (c) trust is not as advantageous as the latter. See note 24 supra.

The recent case of Arlean I. Herr, 35 T.C. 732 (1961), aff'd, 303 F.2d 780 (3d Cir. 1962), may provide a method whereby a donor will be able to obtain the exclusion under § 2503 (c) for the income portion of the gift while avoiding the undesirable implications of distributing a large sum to an immature person. In Herr, the trustee was empowered to distribute income if he thought it prudent, but was directed to distribute corpus at age thirty. The Commissioner contended that the gift failed to qualify as a present interest under § 2503 (c) because under that section both corpus and income must be available to the minor at age twenty-one. 35 T.C. at 735. The court overruled the Commissioner and held that the word "property" in § 2503 (c) is not equivalent to corpus, but means "the totality of elements that go to make up the entire gift that is being considered for classification as a present interest." Id. at 736. Thus, the phrase "property and income therefrom" was held to mean income and the income therefrom.

As a result of the Herr case, a donor may be able to take advantage of § 2503 (c) in respect to income and still defer payment of corpus to the minor until he reaches a mature age, or defer payment of corpus completely and have it revert back to him at an age when he may need this property and when his income tax bracket is lower. Accord, Carl E. Weller, 38 T.C. 790 (1962); Jacob Konner, 35 T.C. 727 (1961).
or not certain legal disabilities, such as a state's legal restrictions upon a guardian's power to invade corpus, preclude a donor from qualifying for the exclusion. Although stipulating that, in addition to other requirements, a present gift to a minor must provide that property and income "may be expended," Congress did not specify in the text of the statute whether any impediment to such expenditure would be disqualifying, or whether a slight possibility of such expenditure would qualify. The Commissioner has interpreted "may be expended" as precluding the existence of "substantial restrictions" upon the trustee's discretion to distribute the property and income of the gift. Under this interpretation, it would appear that restrictions which states place upon the capacity of minors or the discretion of guardians might continue to prevent many gifts to minors from qualifying as gifts of present interests.

The Ross case, in interpreting the words "may be expended" to mean "may be expended within the limitations imposed on guardians by state law," seemingly repudiates the regulation's interpretation of section 2503 (c). Without mention of whether the restrictions imposed by Texas law constituted substantial restrictions, the court stated that state restrictions should not prevent an otherwise present interest from qualifying for the exclusion. This result would appear sound since Congress seems to have intended that gifts to minors through guardians or trustees could qualify for the exclusion under section 2503 (c).

---

28 See note 3 supra.
30 For examples of some of the restrictions which states impose upon the invasion of trust property, see CAL. PROB. CODE § 1504; MASS. ANN. LAWS ch. 21, § 41 (1955); N.J. STAT. ANN. § 3A: 20-1 (1953). The New Jersey statute is typical of other state statutes. It provides that the guardian must obtain court permission to invade corpus for support and education, and will be able to do so only when the income from the corpus is insufficient and the minor has no other proper means of support and education.
80 348 F.2d at 579.
81 Although the court did not decide whether the Texas restrictions were within the Commissioner's definition of "substantial restrictions," it seems fair to assume that they were since the Commissioner argued to that effect in his brief. See Brief for Appellee, p. 9.
82 348 F.2d at 581.
83 The Senate report concerning § 2503 (c) stated that "gifts to minors are often hindered by the fact that it is not clear how such a gift can be made in trust or through a guardian . . . other than as a future interest . . . . The House and your Committee's bill provides that gifts to minors will not be considered gifts of future interest if the income and property can be spent by or for the child prior to his attaining the age of 21." S. REP. No. 1622, 83d Cong., 2d Sess. 127 (1954). (Emphasis added.)
had been adopted, virtually all gifts made through the ordinary type of guardianship would have been disqualified because all states impose essentially similar restrictions upon guardians.\textsuperscript{35} As a result of the \textit{Ross} decision, state restrictions in the Fifth Circuit will no longer impose a barrier to a gift meeting the qualifications of section 2503 (c).

The \textit{Ross} case may be susceptible to an additional interpretation. Although the Fifth Circuit did not allude to the point, the reference within the trust instrument to “the laws of the domicile of the beneficiary”\textsuperscript{36} was ostensibly a shorthand method of imposing upon the trustees the restrictions which Texas law places upon guardians. Since this incorporation by reference could have been accomplished with the same efficacy by enumerating these restrictions, the holding may have necessarily established that any restrictions explicitly stated within the trust instrument which do not exceed the limitations of state guardianship law will not compel a denial of the exclusion under section 2503 (c).\textsuperscript{37}

By referring to the creation of gifts through a trustee \textit{or} a guardian, the Senate seems to imply that § 2503 (c) is designed to permit the creation of a gift either in trust \textit{or} through a guardian, which will qualify for the exclusion. A trustee who is accorded protective powers over the trust res is serving essentially the same function as a guardian with respect to such property, and the correlation of guardian and trustee by Congress would thus appear to be consistent and desirable. State law limitations upon the two capacities may vary, however.

\textsuperscript{35} 348 F.2d at 581; see note 30 supra.

\textsuperscript{36} 348 F.2d at 578.

\textsuperscript{37} There is another possible interpretation to the case. The court stated that “\textit{may be expended} means “\textit{may be expended within the limitations imposed on guardians by state law},” thus implying that the donor himself had not placed these restrictions upon the guardian. 348 F.2d at 579. Viewed in this manner, \textit{Ross} may be more restrictively interpreted as standing only for the obvious proposition that restrictions imposed by state law will not prevent a gift from qualifying under § 2503 (c) if the donor makes it clear that the trustee can, if he desires, invade corpus and income for the benefit of the donee. This narrower perspective would still leave in doubt the status of a gift in which the donor explicitly enumerated, within the instrument, the same restrictions which state law places upon guardians and/or trustees.

However, the possibility that a different result would occur if the donor enumerated the same restrictions within the trust instrument as were placed upon the guardians by Texas law is doubtful in light of Helvering v. Helmholz, 296 U.S. 93 (1935).

Under existing tax law, as well as at the time of the \textit{Helmholz} decision, a transfer which is subject at the date of death of the transferor to any change through the exercise of a power to alter, amend or revoke the transfer, either by the decedent himself or with any person, is taxable to the transferor’s estate. \textit{Int. Rev. Code of 1936}, § 2038. See also \textit{Int. Rev. Code of 1924}, § 302 (d).

In \textit{Helmholz}, the trust instrument stated that the settlor and all the beneficiaries could terminate the trust. 296 U.S. at 94-96. The government contended that this provision made the corpus taxable to the settlor’s estate. \textit{Id.} at 97. The Court rejected this contention, reasoning that local law permits all the interested parties to terminate the trust and this local law does not make the trust revocable. \textit{Ibid}. There-
In clarifying the meaning of the statutory phrase “may be expended,” the Fifth Circuit has significantly enhanced the utility of section 2503 (c). That section, which was apparently enacted to provide a method whereby a restricted gift to a minor could also qualify for the annual exclusion granted by section 2503 (b), has not in reality been an effective provision for the practitioner because of the uncertainty inherent in the phrase “may be expended.” By providing an interpretation of the statutory phrase which is susceptible of reliable application, Ross has, at least in the Fifth Circuit, made section 2503 (c) a workable tool of estate planning.

Therefore, the explicit reservation of a power, since it adds nothing to what the trust law already permits, does not make the trust revocable.

The case seems to stand for the proposition that the explicit mention of a power or duty which already exists under local law does not alter the tax status of a trust. Thus, it would seem that if a donor explicitly restricted the guardians by the terms of the trust instrument in the same way as did local law, the tax result would not be different because these restrictions are part of every trust instrument involving guardians due to local law.

See also LOWNDES & KRAMER, op. cit. supra note 1, § 9.3, at 164-65.

---

8 See note 15 supra.

38 348 F.2d at 579.