

HB

468

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April 26, 1988

Representative John L. Sund
Attn: John W. Hartle, Legislative Aide
Alaska State Legislature
P.O. Box V
Juneau, Alaska 99811

Re: H.B. No. 468 ("AUTMA")

Dear Sirs:

The proposed Alaska Uniform Transfers to Minors Act ("AUTMA") (H.B. 468) provides a much needed revision and update to the current Alaska Uniform Gifts to Minors Act ("AUGMA"). AUGMA was originally enacted by the Legislature in 1967, and was based on the Uniform Gifts to Minors Act, which was created by the Uniform Commissioners in 1966. Since that time many states, on their own initiative, have greatly expanded the scope and flexibility of the Uniform Gifts to Minors Act. In response to these changes the Uniform Commissioners revised and updated the Uniform Gifts to Minors Act in 1983. The revised and updated Uniform Gifts to Minors Act was titled the Uniform Transfers to Minors Act; the proposed AUTMA (H.B. 468) is, with few exceptions, the Uniform Commissioners' revised and updated Uniform Transfers to Minors Act.

The proposed AUTMA improves on the current AUGMA in three significant respects: (1) AUTMA allows virtually any type of property, real or personal, tangible or intangible, to be transferred into a custodial account; (2) AUTMA allows a custodial account to be established through the use of multiple legal vehicles (e.g. wills and trusts) from multiple parties (e.g. guardians, third party debtors, and estates); and (3) AUTMA allows tremendous flexibility in determining when the custodial property will be distributed to the beneficiary. These improvements are briefly described below.

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Under the current AUGMA only cash, insurance, annuities, and securities may be held in a custodial account for the benefit of the beneficiary. This unnecessarily restricts the usefulness of a custodial account; for example, the family home or other interests in real property may not be transferred into a custodial account for the benefit of a beneficiary. The proposed AUTMA will allow virtually any type of property, real or personal, tangible or intangible, to be transferred into a custodial account.

Under the current AUGMA the only way to transfer property into a custodial account is through a gift. This further unnecessarily restricts the usefulness of a custodial account; for example, a person cannot currently transfer property through his will or through his trust into a custodial account. The proposed AUTMA will allow such transfers. Moreover, the current AUGMA does not allow a trustee, personal representative, or third party debtor to establish a custodial account for the beneficiary's benefit; the proposed AUTMA would allow such custodial accounts to be established.

And finally under the current AUGMA, the property in the custodial account must be distributed to the beneficiary at the age of 18. Many people prefer to have the beneficiary receive the distribution from the custodial account at a more mature age or would prefer to use the custodial account to give financial support to a beneficiary throughout college. The proposed AUTMA allows the creator of the custodial account to determine any age between the age of 18 and 25 when the beneficiary will receive the distribution from the custodial account.

The current estate planning alternative to a custodial account is to use a trust. In many cases, the use of a trust is unnecessary and expensive. A trust has a far higher cost to create and to administer, and, in fact, professional administration is largely unavailable for a trust of less than \$50,000. In short, the proposed AUTMA would allow a custodial account to be used as a flexible and inexpensive alternative to a trust.

The proposed AUTMA does differ in some respects from the Uniform Commissioner's Uniform Transfers to Minors Act. The differences, however, largely reflect clarifications to the Uniform

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Transfers to Minors Act which were adopted by California. The major substantive difference, however, which also reflects the approach adopted by California, is that the distribution of the property in the custodial account may be delayed until the age of 25.

In my current position as Chairman of the Estate Planning and Probate Section of the Alaska Bar Association, I have had occasion to discuss the proposed AUTMA with many of the estate planning attorneys in the Anchorage area. In fact, the proposed AUTMA has been extensively discussed at several of our Section meetings. All of the estate planning attorneys with which I have discussed the proposed AUTMA are in support of its enactment. If there are any questions or if I may be of any assistance, please feel free to call. Thank you for your consideration.

Very truly yours,

ATKINSON, CONWAY & GAGNON

By Robin O. Brena
Robin O. Brena

ROB:blg

COMMENTARY TO THE

PROPOSED

Alaska Uniform Transfers to Minors Act

November 1987

Division of Legal Services
Legislative Affairs Agency
P.O. Box Y - State Capitol
Juneau, Alaska 99811

Preface

The Uniform Transfers to Minors Act (UTMA) revises and restates the Uniform Gifts to Minors Act (UGMA), one of the National Conference of Commissioners on Uniform State Laws most successful products, some version of which has been enacted in every American jurisdiction.

The original version of UGMA was adopted by the Conference in 1956 and closely followed a model "Act concerning Gifts of Securities to Minors" which was sponsored by the New York Stock Exchange and the Association of Stock Exchange Firms and which had been adopted in 14 states. The 1956 version of the UGMA broadened the model act to cover gifts of money as well as securities but made few other changes.

In 1956 and 1966 the Conference revised the UGMA to expand the types of financial institutions which could serve as depositories of custodial funds, to facilitate the designation of successor custodians, and to add life insurance policies and annuity contracts to the types of property (cash and securities) that could be made the subject of a gift under the UGMA.

Alaska adopted the 1966 version of the UGMA in 1967 (AS 45.-60). Many states which adopted the 1956 or 1966 version of the UGMA, have substantially revised their versions of the UGMA to expand the kinds of property that may be made the subject of a gift under the UGMA. A few states permit transfers to custodians from other sources, such as trusts and estates, as well as from lifetime gifts. Some states also permit the transferor to have an option to extend the date the custodial property may be distributed to the minor. As a result, a great deal of non-uniformity has arisen among the states. Uniformity in this area is important, for the Conference has cited the UGMA as an example of an act designed to avoid conflicts of law when the laws of more than one state may apply to a transaction or a series of transactions.

The Alaska Uniform Transfers to Minors act (AkUTMA) follows the expansive approach taken by several states and allows any kind of property, real or personal, tangible or intangible, to be made the subject of a transfer to a custodian for the benefit of a minor (sec. 13.46.990(6)). In addition, it permits such transfers not only by lifetime outright gifts (sec. 13.46.030), but also from trusts, estates, and guardianships, whether or not specifically authorized in the governing instrument (secs. 13.46.040 and 13.46.050), and from other third parties indebted to a minor who does not have a conservator, such as parties against

whom a minor has a tort claim or judgment, and depository institutions holding deposits or insurance companies issuing policies payable on death to a minor (sec. 13.46.060). For this reason, and to distinguish the enactment of this statute from the 1956 and 1966 versions of the UGMA, the title of this Act has been changed to refer to "Transfers" rather than to "Gifts," a much narrower term. Moreover, the AkUTMA permits the transferor or the minor to have an option to extend beyond the age of minority the date the custodial property may be distributed to the minor (sec. 13.46.195).

As so expanded, the AkUTMA might be considered a statutory form of trust or guardianship that may terminate at age 18 or, if the transferor or minor so elects, may be terminated at any age prior to age 25. Note, however, that unlike a trust, a custodianship is not a separate legal entity or taxpayer. Under sec. 13.46.100(b), the custodial property is indefeasibly vested in the minor, not the custodian, and thus any income received is attributable to and reportable by the minor, whether or not actually distributed to the minor.

The expansion of the AkUTMA to permit transfers of any kind of property to a custodian creates a significant problem of potential personal liability for the minor or the custodian arising from the ownership of property such as real estate, automobiles, general partnership interests, and business proprietorships. This problem did not exist under the UGMA under which custodial property was limited to bank deposits, securities, and insurance. In response, sec. 13.46.160 generally limits the claims of third parties to recourse against the custodial property, with the minor insulated against personal liability unless he is personally at fault. The custodian is similarly insulated unless he is personally at fault or fails to disclose his custodial capacity upon entering into a contract.

Nevertheless, the AkUTMA should be used with caution with respect to property such as real estate or general partnership interests from which liabilities as well as benefits may arise. Many of the possible risks can and should be insured against, and the custodian has the power under sec. 13.46.120(a) to purchase such insurance, at least when other custodial assets are sufficient to do so. If the assets are not sufficient, there is doubt that a custodian will act, or there are significant uninsurable risks, a transferor should consider a trust with spendthrift provisions, such as a minority trust under Section 2503(c), Internal Revenue Code, rather than a custodianship, to make a gift of such property to a minor.

Finally, the AkUTMA restates and rearranges rather than amends, the 1966 version of the UGMA. The addition of other forms of property and other forms of dispositions made adherence to the format and language of the prior act very unwieldy. In addition, the 1966 version of the UGMA closely followed the language of the earlier model act, which had already been adopted in several states, even though it did not conform to Conference style. It is hoped that this re-writing and revision of the UGMA will improve its clarity while also expanding its coverage.

ALASKA UNIFORM TRANSFERS TO MINORS ACT

Sec. 13.46.010. SCOPE AND JURISDICTION.

This section has no counterpart in the 1966 version of the UGMA. It attempts to resolve uncertainties and conflicts-of-law questions that have frequently arisen because of the present nonuniformity of the UGMA in the various states and which may continue to arise during the transition from the UGMA to the UTMA.

The creation of a custodianship must invoke the law of a particular state because of the form of the transfer required under sec. 13.46.080(a). This section provides that a choice of the AkUTMA is appropriate and effective if any of the nexus factors specified in subsection (a) exists at the time of the transfer. The AkUTMA continues to govern, and subsection (b) makes the custodian accountable and subject to personal jurisdiction in the courts of Alaska for the duration of the custodianship, despite subsequent relocation of the parties or the property.

Subsection (c) recognizes that residents of Alaska may elect to have the law of another state apply to a transfer. That choice is valid if a nexus with the chosen state exists at the time of the transfer. If personal jurisdiction can be obtained in Alaska under other law apart from the AkUTMA, the custodianship may be enforced in Alaska courts, which are directed to apply the law of the state elected by the transferor.

If the choice of law under subsection (a) or (c) is ineffective because of the absence of the required nexus, the transfer may still be effective under the UTMA of another state with which a nexus does exist. See sec. 13.46.200.

Sec. 13.46.020. NOMINATION OF CUSTODIAN.

This section is new and permits a future custodian for a minor to be nominated to receive a distribution under a will or trust, or as a beneficiary of a power of appointment, or of contractual rights such as a life or endowment insurance policy, annuity contract, P.O.D. account, benefit plan, or similar future payment right. Nomination of a future custodian does not constitute a "transfer" under the AkUTMA and does not create custodial property. If it did, the nomination and beneficiary designation would have to be permanent, since a "transfer" is irrevocable and indefeasibly vests ownership of the interest in the minor under sec. 13.46.-100(b).

Instead, this section permits a revocable beneficiary designation that takes effect only when the donor dies, or when a

lifetime transfer to the custodian for the minor beneficiary occurs, such as a distribution under an inter vivos trust. However, an unrevoked nomination under this section is binding on a personal representative or trustee (see sec. 13.46.040(b)) and on insurance companies and other obligors who contract to pay in the future (see sec. 13.46.060(b)).

The person making the nomination may name contingent or successive future custodians to serve, in the order named, in the event that the person first nominated dies, or is unable, declines, or is ineligible to serve. Such a substitute future custodian is a custodian "nominated . . . under AS 13.46.020" to whom the transfer must be made under secs. 13.46.040(b) and 13.46.060(b).

Any person nominated as future custodian may decline to serve before the transfer occurs and may resign at any time after the transfer. See sec. 13.46.170.

Sec. 13.46.030. TRANSFER BY GIFT OR EXERCISE OF POWER OF APPOINTMENT.

To emphasize the different kinds of transfers that create presently effective custodianships under the AkUTMA, they are separately described in secs. 13.46.030, 13.46.040, 13.46.050, and 13.46.060. This section in part corresponds to Section 2(a) of the 1966 version of the UGMA and covers the traditional lifetime gift that was the only kind of transfer authorized by the 1966 version of the UGMA. It also covers an irrevocable exercise of a power of appointment in favor of a custodian, as distinguished from the exercise of a power in a revocable instrument that results only in the nomination of a future custodian under sec. 13.46.020.

Sec. 13.46.040. TRANSFER AUTHORIZED BY WILL OR TRUST.

This section is new and has no counterpart in the UGMA. It is based on nonuniform provisions adopted by Connecticut, Illinois, Wisconsin, and other states to validate distributions from trusts and estates to a custodian for a minor beneficiary, when the use of a custodian is expressly authorized by the governing instrument. It also covers the designation of the custodian whenever the settlor or testator fails to make a nomination, or the future custodian nominated under sec. 13.46.020 (and any alternate named) fails to qualify.

Sec. 13.46.050. OTHER TRANSFER BY FIDUCIARY.

This section is new and has no counterpart in the UGMA. It covers a new concept, already authorized by the law of some

states through nonuniform amendments to the UGMA to permit custodianships to be used as guardianships or conservator substitutes, even though not specifically authorized by the person whose property is the subject of the transfer. It also permits the legal representative of the minor, such as a conservator or guardian, to transfer the minor's own property to a new or existing custodianship for the purposes of convenience or economies of administration.

A custodianship may be created under this section even though not specifically authorized by the transferor, the testator, or the settlor of the trust if three tests are satisfied. First, the fiduciary making the transfer must determine in good faith and in his fiduciary capacity that a custodianship will be in the best interests of the minor. Second, a custodianship may not be prohibited by, or inconsistent with, the terms of any governing instrument. Inconsistent terms would include, for example, a spendthrift clause in a governing trust, provisions terminating a governing trust for the minor's benefit at a time other than the time of the minor's age of majority, and provisions for mandatory distributions of income or principal at specific times or periodic intervals. Provisions for other outright distributions or bequests would not be inconsistent with the creation of a custodianship under this section. Third, the amount of property transferred, (as measured by its value) must be of such relative small amount that the lack of court supervision and the typically stricter investments standards that would apply to the conservator otherwise required will not be important. However, if the property is of significant size, transfer to a custodian may still be made if the court approves and if the other two tests are met.

The custodianship created under this section without express authority in the governing instrument will terminate upon the minor's attainment of the statutory age of majority in Alaska, i.e., at the same age a conservatorship of the minor would end. See sec. 13.46.190 and the Commentary to sec. 13.46.190.

Sec. 13.46.060. TRANSFER BY OBLIGOR.

This section is new and, like sec. 13.46.050, permits a custodianship to be established as a substitute for a conservator to receive payments due a minor from sources other than estates, trusts, and existing guardianships covered by secs. 13.46.040 and 13.46.050. For example, a tort judgment debtor of a minor, a bank holding a joint or P.O.D. account of which a minor is the surviving payee, or an insurance company holding life insurance policy or benefit plan proceeds payable to a minor may create a custodianship under this section.

Use of this section is mandatory when a future custodian has been nominated under sec. 13.46.020 as a named beneficiary of an insurance policy, benefit plan, deposit account, or the like, because the original owner of the property specified a custodianship (and a future custodian) to receive the property. If that custodian (or any alternate named) is not available, if none was nominated, or none could have been nominated (as in the case of a tort judgment payable to the minor), this section is permissive and does not preclude the obligor from requiring the appointment of a conservator to receive payment. It allows the obligor to transfer property to a custodian unless the property exceeds the stated value, in which case a conservator must be appointed to receive it.

Sec. 13.46.070. RECEIPT FOR CUSTODIAL PROPERTY.

This section discharges transferors from further responsibility for custodial property delivered to and receipted for by the custodian. See also sec. 13.46.150 which protects transferors and other third parties dealing with custodians. Because a discharge or release for a donative transfer is not necessary, this section had no counterpart in the UGMA.

This section does not authorize an existing custodian, or a custodian to whom an obligor makes a transfer under sec. 13.46.060 to settle or release a claim of the minor against a third party. Only a conservator, a guardian ad litem, or other person authorized under other law to act for the minor may release such a claim.

Sec. 13.46.080. MANNER OF CREATING CUSTODIAL PROPERTY AND EFFECTING TRANSFER; DESIGNATION OF INITIAL CUSTODIAN; CONTROL.

The 1966 version of the UGMA contained optional bracketed language permitting an adopting state to limit the class of eligible initial custodians to an adult member of the minor's family or a guardian of the minor. This optional limitation has been deleted because it would preclude the use of an individual and uncompensated custodian if no qualified or willing family member is available.

Otherwise, with respect to transfers of securities, cash, and insurance or annuity contracts, this section tracks the cognate provisions of subsection 2(a) of the 1966 version of the UGMA, with one exception. Under sec. 13.46.080(a)(1)(ii), a transfer of securities in registered form may be accomplished without registering the transfer in the name of the custodian so that transfers may be accomplished more expeditiously, and so that securities may be held by custodians in street name. In other words, sec. 13.46.080(a)(1)(i) is not the exclusive manner for making effective transfers of securities in registered form.

In addition, subsection (a) creates new procedures for handling the additional types of property now subject to the Act; specifically:

Paragraph (a)(3) covers the irrevocable transfer of ownership of life and endowment insurance policies and annuity contracts.

Paragraph (a)(4) covers the irrevocable exercise of a power of appointment and the irrevocable present assignment of future payment rights, such as royalties, interest, and principal payments under a promissory note, or beneficial interests under life or endowment or annuity insurance contracts or benefit plans. The payor, issuer, or obligor may require additional formalities such as completion of a specific assignment form and an endorsement, but the transfer is effective upon delivery of the notification. (See sec. 13.46.020 and the Commentary to sec. 13.46.020 for the procedure for revocably "nominating" a future custodian as a beneficiary of a power of appointment or such payment rights.)

Paragraph (a)(5) is the exclusive method for the transfer of real estate and includes a disposition effected by will. Under the law of those states in which a devise of real estate vests in the devisee without the need for a deed from the personal representative of the decedent, a document such as the will must still be "recorded" under this provision to make the transfer effective. For inter vivos transfers, of course, a conveyance in recordable form would be employed for dispositions of real estate to a custodian.

Paragraph (a)(6) covers the transfer of personal property such as automobiles, aircraft, and other property subject to registration of ownership with a state or federal agency. Either registration of the transfer in the name of the custodian or delivery of the endorsed certificate in registerable form makes the transfer effective.

Paragraph (a)(7) is a residual classification, covering all property not otherwise covered. Examples would include nonregistered securities, partnership interests, and tangible personal property not subject to title certificates.

The form of transfer document recommended and set out in subsection (b) contains an acceptance that must be executed by the custodian to make the disposition effective. While such a form of written acceptance is not specifically

required in the case of registered securities under (a)(1), money under (a)(2), insurance contracts or interests under (a)(3) or (a)(4), real estate under (a)(5), or titled personal property under (a)(6), it is certainly the better and recommended practice to obtain the acknowledgment, consent, and acceptance of the designated custodian on the instrument of transfer, or otherwise.

A transferor may create a custodianship by naming himself as custodian, except for transfers of securities under (a)(1)(B), insurance and annuity contracts under (a)(3)(B), and titled personally under (a)(6)(B), which are made without registering them in the name of the custodian, and transfers of the residual class of property covered by (a)(7). In all of these cases a transfer of possession and control to a third party is necessary to establish donative intent and consummation of the transfer, and designation of the transferor as custodian renders the transfer invalid under sec. 13.46.100(a)(2).

Note, also, that the Internal Revenue Service takes the position that custodial property is includable in the gross estate of the donor if he appoints himself as custodian and dies while serving in that capacity before the minor attains the age of 21. Rev.Rul. 57-366, C.B. 1957-2, 618; Rev.Rul. 59-357, C.B. 1959-2, 212; Rev.Rul. 70-348, C.B. 1970-2, 193; Estate of Prudowsky v. Comm'r, 55 T.C. 890 (1971), affd. per curiam, 465 F.2d 62 (7th Cir. 1972).

The AkUTMA has been drafted in an attempt to avoid income attribution to the parent or inclusion of custodial insurance policies on a custodian's life in the estate of the custodian through the changes made in the standards for expenditure of custodial property and the custodian's incidents of ownership in custodial property. See secs. 13.46.120 and 13.46.130 and the Commentary to secs. 13.46.120 and 13.46.130. However, the much greater problem of inclusion of custodial property in the estate of the donor who serves as custodian remains. Therefore, despite the fact that this section permits it in the case of registered securities, money, life insurance, real estate, and personal property subject to titling laws, it is generally still inadvisable for a donor to appoint himself custodian or for a parent of the minor to serve as custodian. See, generally Sections 2036 and 2038 Internal Revenue Code and Rulings and cases cited above; with respect to gifts of closely held stock when a donor retains voting rights by serving as custodian, see Section 2036(b), Internal Revenue Code overruling U.S. v. Byrum 408 U.S. 125 (1972), rehearing denied 409 U.S. 896.

Subsection (c) tracks in substance Section 2(c) of the 1966 version of the UGMA. However, it replaces the requirement

that the transferor "promptly do all things within his power" to complete the transfer, with the requirement that such action must be taken "as soon as practicable." This change is intended only to reflect the fact that possession and control of property transferred from an estate can rarely be accomplished with the immediacy that the term "promptly" may have implied. In the case of inter vivos transfers, no relaxation of the former requirement is intended, since "prompt" transfer of dominion is usually practicable.

Sec. 13.46.085. NATIVE CORPORATIONS; CUSTODIANS.

This section has no comparable provision in the UGMA or the UTMA. This section is derived from AS 45.60.016 which was added to the Alaska Uniform Gifts to Minors Act in 1972 to address the issue of transfers to minors arising under the Alaska Native Claims Settlement Act.

Sec. 13.46.090. SINGLE CUSTODIANSHIP.

The first sentence follows Section 2(b) of the 1966 version of the UGMA. The second sentence states what was implicit in the 1966 version of the UGMA, that additional transfers at different times and from different sources may be made to an existing custodian for the minor and do not create multiple custodianships. This provision also permits an existing custodian to be named as successor custodian by another custodian for the same minor who resigns under sec. 13.46.170 for the purpose of consolidating the assets in a single custodianship.

Note, however, that these results are limited to transfer made under the AkUTMA. Gifts previously made under the Alaska UGMA or under the UGMA or the UTMA of another state must be treated as separate custodianships, even though the same custodian and minor are involved, because of possible differences in the age of distribution and custodian's powers under those other Acts.

Even when all transfers to a single custodian are made under the AkUTMA and a single custodianship results, custodial property transferred under secs. 13.46.050 and 13.46.060 must be accounted for separately from property transferred under secs. 13.46.030 and 13.46.040 because the custodianship will terminate sooner with respect to the former property since the State of Alaska has a statutory age of majority at 18, which is lower than 21. See sec. 13.46.190 and the Commentary to sec. 13.46.190.

Sec. 13.46.100. VALIDITY AND EFFECT OF TRANSFER.

Subsection (a) generally tracks Section 2(c) of the 1966 version of the UGMA, except that the transferor's des-

ignation of himself as custodian of property, for which he is not eligible to serve under sec. 13.46.080(a) makes the transfer ineffective. See Commentary to sec. 13.46.080.

The balance of this section generally tracks Section 3 of the 1966 version of the UGMA with a number of necessary, and perhaps significant, changes required by the new kinds of property subject to custodianships. The 1966 version of the UGMA provides that a transfer made under its terms "conveys to the minor indefeasibly vested legal title to the [custodial property]." Because equitable interests in property may be the subject of a transfer under the AkUTMA, the reference to "legal title" has been deleted, but no change concerning the effect or finality of the transfer is intended.

However, subsection (b) qualifies the rights of the minor in the property, by making them subject to "the rights, power, duties and authority" of the custodian under the AkUTMA, a concept that may have been implicit and intended in the 1966 version of the UGMA, but not expressed. The concept is important because of the kinds of property, particularly real estate, now subject to custodianship. If the minor is married, it would be possible for homestead, dower, or community property rights to attach to real estate (or other property) acquired after marriage by the minor through a transfer to a custodianship for his benefit. The quoted language qualifying the minor's interest in the property is intended to override these rights insofar as they may conflict with the custodian's ability and authority to manage, sell, or transfer the property while it is custodial property. Upon termination of the custodianship and transfer of the custodial property to the former minor, the custodial property would then become subject to such spousal rights for the first time.

For a list of the immunities enjoyed by third persons under subsection (c), see sec. 13.46.150 and the Commentary to sec. 13.46.150.

Because of custodianship under the AkUTMA can extend beyond the age of majority in many states, or beyond emancipation of a minor through marriage or otherwise, the Drafting Committee of the UTMA considered the addition of a spendthrift clause to this section. The idea was rejected because neither the 1966 version of the UGMA nor its predecessors had such a provision, because spendthrift protection would extend only until 21 in any event and judgments against the minor would then be enforceable, and because the spendthrift qualification on the interest of the minor in the property may be inconsistent with the theory of the UTMA to convey the property indefeasibly to the minor.

Subsection (d), (e), and (f) are derived from California amendments to the UTMA but are not included in the UTMA. These subsections are included in the AkUTMA to make clear that (1) a person serving as guardian of the estate of the minor (conservator) may also serve as custodian and in this case the custodial property does not become a part of the guardianship estate; and (2) property may be transferred from a guardianship estate to the person who serves as guardian to be held by that person as custodian, and in such case the property is no longer a part of the guardianship estate but instead is governed solely by the AkUTMA. (17 Cal.L.Rev.Comm.Reports 61 (1984)).

Sec. 13.46.110. CARE OF CUSTODIAL PROPERTY.

Subsection (a) expands Section 4(a) of the 1966 version of the UGMA to include the duties to take control and appropriately register or record custodial property in the name of the custodian.

Subsection (b) restates and makes somewhat stricter the "prudent person" fiduciary standard for the custodian, since it is now cast in terms of a prudent person "dealing with property of another" rather than one "who is seeking reasonable income and the preservation of his capital," as under the 1966 version of the UGMA. The rule also adds a slightly higher standard for professional fiduciaries. The rule parallels section 7-302 of the Uniform Probate Code (AS 13.36.075) in order to refer to the existing and growing body of law interpreting that standard. The 1966 version of the UGMA permitted a custodian to retain any security or bank account received, without the obligation to diversify investment. This subsection extends that rule to any property received.

In order to eliminate any uncertainty that existed under the 1966 version of the UGMA, subsection (c) grants specific authority to invest custodial property in life insurance on the minor's life, provided the minor's estate is the sole beneficiary, or on the life of another person in whom the minor has an insurable interest, provided the minor, the minor's estate, or the custodian in his custodial capacity is made the beneficiary of the policies.

Subsection (d) generally tracks Section 4(g) of the 1966 version of the UGMA but adds the provision requiring that custodial property consisting of an undivided interest be held as a tenant in common. This provision permits the custodian to invest custodial property in common trust funds, mutual funds, or in a proportional interest in a "jumbo" certificate of deposit. Investment in property held in joint tenancy with right of survivorship is not permitted, but the AkUTMA does not preclude a transfer of such an

interest to a custodian, and the custodian is authorized under subsection (b) to retain a joint tenancy interest so received.

Subsection (e) follows Section 4(h) of the 1966 version of the UGMA, but adds the requirement that income tax information be maintained and made available for preparation of the minor's tax returns. Because the custodianship is not a separate legal entity or taxpayer, the minor's tax identification number should be used to identify all custodial property accounts.

Sec. 13.46.120. POWERS OF CUSTODIAN.

Subsection (a) replaces the specific list of custodian's powers contained in Section 4(f) of the 1966 version of the UGMA which related only to securities, money, and insurance, then the only permitted kinds of custodial property. It was determined not to expand the list to try to deal with all forms of property now covered by the AkUTMA and to specify all powers that might be appropriate for each kind of property, or to refer to an existing body of state law, such as the Trustee's Powers Act, since such powers would not be uniform. Instead, this provision grants the custodian the very broad and general powers of an unmarried adult owner of the property, subject to the prudent person rule and to the duties of segregation and record keeping specified in sec. 13.46.110. This approach permits the AkUTMA to be self-contained and more readily understandable by volunteer, nonprofessional fiduciaries, who most often serve as custodians. It is intended that the authority granted includes the powers most often suggested for custodians, such as the power to borrow, whether at interest or interest free, the power to invest in common trust funds, and the power to enter contracts that extend beyond the termination of the custodianship.

Subsection (a) further specifies that the custodian's powers or incidents of ownership in custodial property such as insurance policies may be exercised only in the capacity as custodian. This provision is intended to prevent the exercise of those powers for the direct or indirect benefit of the custodian, so as to avoid as nearly as possible the result that a custodian who dies while holding an insurance policy on his own life for the benefit of a minor will have the policy taxed in his estate. See, Section 2042, Internal Revenue Code; but compare Terriberry v. U.S., 517 F.2d 286 (5th Cir. 1975), and Rose v. U.S., 511 F.2d 259 (5th Cir. 1975).

Sec. 13.46.130. USE OF CUSTODIAL PROPERTY.

Subsections (a) and (b) track subsections (b) and (c) of Section 4 of the 1966 version of the UGMA, but with two significant changes. The standard for expenditure of custodial property has been amended to read "for the use and benefit of the minor," rather than "for the support, maintenance, education and benefit of the minor" as specified under the 1966 version of the UGMA. This change is intended to avoid the implication that the custodial property can be used only for the required support of the minor.

The Internal Revenue Service has taken the position that the income from custodial property, to the extent it is used for the support of the minor-donee, is includable in the gross income of any person who is legally obligated to support the minor-donee, whether or not that person or parent is serving as the custodian. Rev.Rul. 56-484, C.B. 1956-2, 23; Rev.Rul. 59-357, C.B. 1959-2, 212. However, Reg. 1.662(a)-4 provides that 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. Thus, if under local law a parent may use the resources of a child for the child's support in lieu of supporting the child himself or herself, no obligation of support exists, whether or not income is actually used for support, at least if the child's resources are adequate. See, Bittker, Federal Taxation of Income Estates and Gifts Para. 80.44 (1981).

For this reason, subsection (c) has been added to specify that distributions or expenditures may be made for the minor without regard to the duty or ability of any other person to support the minor and that distributions or expenditures are not in substitution for, and shall not affect, the obligation of any person to support the minor. Other possible methods of avoiding the attribution of custodial property income to the person obligated to support the minor would be to prohibit the use of custodial property or its income for that purpose, or to provide that any such use gives rise to a cause of action by the minor against his parent to the extent that custodial property or income is so used. The first alternative was rejected as too restrictive, and the second as too cumbersome.

The "use and benefit" standard in subsections (a) and (b) is intended to include payment of the minor's legally enforceable obligations such as tax or child support obligations or tort claims. Custodial property could be reached by levy of a judgment creditor in any event, so there is no reason not to permit custodian or court-ordered expenditures for enforceable claims.

An "interested person" entitled to seek court ordered distributions under subsection (b) would include not only the

parent or conservator or guardian of the minor and a transferor or a transferor's legal representative, but also a public agency or official with custody of the minor and a third party to whom the minor owes legally enforceable debts.

Sec. 13.46.140. CUSTODIAN'S EXPENSES, COMPENSATION, AND BOND.

This section parallels and restates Section 5 of the 1966 version of the UGMA. It deletes the statement that a custodian may act without compensation for services, since that concept is implied in the retained provision that a custodian has an "election" to be compensated. However, to prevent abuse, the latter provision for permissive compensation is denied to a custodian who is also the donor of the custodial property.

The custodian's election to charge compensation must be exercised (although the compensation need not be actually paid) at least annually or it lapses and may not be exercised later. This provision is intended to avoid imputed income to the custodian who waives compensation, and also to avoid the accumulation of a large unanticipated claim for compensation exercisable at termination of the custodianship.

This section deletes as surplusage the bracketed optional standards contained in the 1966 version of the UGMA for determining "reasonable compensation" which included, "in the order stated," a direction by the donor, statutes governing compensation of custodians or guardians, or court order. While compensation of custodians becomes a more likely occurrence and a more important issue under the AkUTMA because property requiring increased management may now be subject to custodianship, compensation can still be determined by agreement, by reference to a statute or by court order, without the need to so state in the AkUTMA.

Sec. 13.46.150. EXEMPTION OF THE THIRD PERSON FROM LIABILITY.

Sec. 13.46.150 carries forward, but shortens and simplifies, Section 6 of the 1966 version of the UGMA with no substantive change intended. The 1966 version of the UGMA permitted a 14 year old minor to appoint a successor custodian and specifically provided that third parties were entitled to rely on the appointment. Because this section refers to any custodian, and "custodian" is defined to include successor custodians (Sec. 13.46.990(7)), a successor custodian appointed by the minor is included among those upon whom third parties may rely.

Similarly, because this section protects any third "persons," it is not necessary to specify here or in sec.

13.46.100(c) that it extends to any "issuer, transfer agent, bank, life insurance company, broker, or other person or financial institution," as did the 1966 version of the UGMA. See the definition of "person" in AS 01.10.060.

This section excludes from its protection persons with "knowledge" of the irregularity of a transaction, a concept not expressed but probably implied in Section 6 of the 1966 version of the UGMA. See, e.g., State ex rel. Paden v. Currel, 597 S.W.2d 167 (Mo. App. 1980) disapproving the pledge of custodial property to secure a personal loan to the custodian.

Similarly, this section does not alter the requirements for bona fide purchaser or holder in due course status under other law for persons who acquire from a custodian custodial property subject to recordation or registration.

Sec. 13.46.160. LIABILITY TO THIRD PERSONS.

This section has no counterpart in the 1966 version of the UGMA and is based upon Section 5-429 of the Uniform Probate Code (AS 13.26.305), relating to limitations on the liability of conservators. Because some forms of custodial property now permitted under the AkUTMA can give rise to liabilities as well as benefits (e.g., general partnership interests, interests in real estate or business proprietorships, automobiles, etc.) the Drafting Committee for the Uniform Transfers to Minors Act believed it is necessary to protect the minor and other assets the minor might have or acquire from such liabilities, since the minor is unable to disclaim a transfer to a custodian for his benefit. Similar protection for the custodian is necessary so as not to discourage nonprofessional or uncompensated persons from accepting the office. Therefore this section generally limits the claims of third parties to recourse against the custodial property, as third parties dealing with a trust are generally limited to recourse against the trust corpus.

The custodian incurs personal liability only as provided in subsection (b) for actual fault or for failure to disclose his custodial capacity "in the contract" when contracting with third parties. In oral contracts, oral disclosure of the custodial capacity is sufficient. The minor, on the other hand, incurs personal liability under subsection (c) only for actual fault.

When custodial property is subjected to claims of third parties under this section, the minor, the minor's legal representative, if not a party to the action by which the claim is successfully established, may seek to recover the loss from the custodian in a separate action. See sec. 13.46.180 and the commentary to sec. 13.46.180.

Sec. 13.46.170. RENUNCIATION, RESIGNATION, DEATH, OR
REMOVAL OF CUSTODIAN; DESIGNATION OF SUCCESSOR CUSTODIAN.

This section tracks but condenses Section 7 of the 1966 version of the UGMA to provide that the custodian, or if the custodian does not do so, the minor if he is 14, may appoint the successor custodian, or failing that, that the conservator of the minor or a court appointee shall serve. It also covers disclaimer of the office by designated or successor custodians or by nominated future custodians who decline to serve.

The AkUTMA broadens the category of persons who may be designated by the initial custodian as successor custodian from an adult member of the minor's family, his conservator, or a trust company to any adult or trust company. However, the minor's designation remains limited to an adult member of his family (expanded to include a spouse and a stepparent, see sec. 13.46.990(10)), his conservator, or a trust company.

Sec. 13.46.180. ACCOUNTING BY AND DETERMINATION OF
LIABILITY OF CUSTODIAN.

This section carries forward Section 8 of the 1966 version of the UGMA, but expands the class of parties who may require an accounting by the custodian to include any person who made a transfer to the custodian (or that person's legal representative), the minor's guardian of the person, and the successor custodian.

Subsection (b) authorizes but does not obligate a successor custodian to seek an accounting by the predecessor custodian. Since the minor and other persons mentioned in subsection (a) may also seek an accounting from the predecessor at any time, it is anticipated that the exercise of this right by the successor should be rare.

Subsection (a) also gives the same parties (other than a successor custodian) the right to seek recovery from the custodian for loss or diminution of custodial property resulting from successful claims by third persons under sec. 13.46.160, unless that issue has already been adjudicated in an action under that section to which the minor was a party.

This section does not contain a separate statute of limitations precluding petitions for accounting after termination of the custodianship. Because custodianships can be created without the knowledge of the minor, a person might learn of a custodian's failure to turn over custodial property long after reaching majority, and should not be precluded from asserting his rights in the case of such fraud. In addition, the 1966 version of the UGMA has no such preclusion

and seems to have worked well. Other law, such as general statutes of limitation and the doctrine of laches, should serve adequately to protect former custodians from harassment.

Sec. 13.46.190. TERMINATION OF CUSTODIANSHIP.

This section tracks Section 4(d) of the 1966 version of the UGMA and provides that custodianships created by fiduciaries without express authority from the donor of the property under sec. 13.46.050 and by obligors of the minor under sec. 13.46.060 terminate upon the minor's attaining age 18, since these custodianships are substitutes for conservatorships that would otherwise terminate at that time. All other custodianships terminate at the time the minor attains 18 years of age unless the time of transfer of the custodial property is delayed under sec. 13.46.195 to a time after the time the minor attains the age of 18 years. Because property in a single custodianship may be distributable at different times, separate accounting for custodial property by source may be required. See Commentary to sec. 13.46.090.

Sec. 13.46.195. DELAY IN TRANSFER OF CUSTODIAL PROPERTY AFTER MINOR ATTAINS AGE 18.

This section is adopted from the California Uniform Transfers to Minors Act. This section is new. There is no provision for choice as to when custodial property shall be transferred to the minor under the Uniform Transfers to Minors Act or under prior Alaska law. This section gives this choice since most transferors who specifically authorize a custodian wish to preserve the custodianship as long as possible. This is most likely to be the case, for example, where the custodial property is intended to be preserved and used to finance a college education.

A transferor may feel that a particular child at 18 does not have, or will not have, sufficient maturity to manage a substantial gift, particularly when the transferor wishes to make the gift for a particular purpose, e.g. education. A custodian under the Alaska Uniform Gifts to Minors Act must deliver the property to the minor when the minor reaches 18 (AS 45.60.031(d)). Therefore, a testamentary or inter vivos trust may be necessary to achieve the transferor's goals. Continuing the custodianship past the age of 18 permits the transferor donor to avoid the expense of preparing a trust instrument to create a trust that otherwise would be required in order to retain the property under custodial management until the minor reaches the specified age.

The custodian is required to transfer the property to the minor when the minor attains the age of 18 years unless the

transfer under sec. 13.46.080 specifies a later time. See sec. 13.46.190.

Subsection (c) contains optional language which the donor-transferor may use to allow a minor the option of terminating the custodianship during a six month period beginning on the minor's 21st birthday. In order to exercise this option, a minor must provide written notice of the minor's intention to terminate to the custodian within 6 months of the minor's 21st birthday. This option has been provided so that a transferor may transfer property by irrevocable gift, under sec. 13.46.030, into a custodianship in a manner consistent with Section 2503(c) of the Internal Revenue Code and the Internal Revenue Service's position as put forth in Rev.Rul. 74-43.

Rev.Rul. 74-43 provides, in relevant part, that a gift into a trust for the benefit of a minor, when such a trust contains a provision that the minor has the right to compel distribution at age 21 by giving written notice to the trustee, qualifies as a gift of a present interest, and, therefore, also qualifies for the annual exclusion provided in Section 2503(b) of the Internal Revenue Code.

The use of the optional language contained in subsection (c) that allows a minor to compel delivery of custodial property when the minor reaches the age of 21 should qualify a transfer of property by irrevocable gift under sec. 13.46.030 as a gift of a present interest under Section 2503(c) of the Internal Revenue Code.

Subsection (d) permits the custodianship to continue until not later than the time the minor attains the age of 25 years where the transfer is made under a provision in a will or trust that provides that the custodianship is to continue until the specified age, not later than the time the beneficiary attains the age of 25. A custodianship may be established under a provision in a will or trust that provides that the custodianship is to continue until a specified age after age 18 even though the beneficiary has attained an age older than 18 but younger than the specified age at which the custodianship is to terminate. See sec. 13.46.990(11).

Subsection (e) permits the custodianship to continue until the time the minor attains the age of 25 years where the custodial property is transferred under sec. 13.46.030 if the transfer specifies that the custodianship is to continue until the specified age.

This section does not provide for continuance beyond age 18 of a custodianship created under secs. 13.46.010, 13.46.050,

13.46.060, 13.46.100, 13.46.110 or 13.46.120. These custodianships terminate at age 18 because they are substitutes for a guardianship that otherwise would terminate at that time (see sec. 13.46.150). And, in the cases where this section permits the custodianship to continue after the minor attains the age of 18 years, if the transfer under sec. 13.46.080 does not specify any age, the custodianship terminates when the minor attains 18 years of age. See (f) of this section.

Subsection (g) validates a transfer that specifies a maximum time for the duration of the custodianship that is longer than permitted by this section by reducing the duration of the custodianship to the maximum duration permitted for a custodianship created by that type of transfer.

Because property in a single custodianship may be distributable at different times, separate accounting for custodial property by source may be required. See Commentary to sec. 13.46.090. Also see 17 Cal.L.Rev.Comm. Reports 601 (1984); 84 Cal.S.J. 11794.

Sec. 13.46.200. APPLICABILITY.

This section is new and has two purposes. First, it operates as a "savings clause" to validate transfers made after its effective date which mistakenly refer to Alaska's UGMA rather than to the AkUTMA. Second, it validates transfers attempted under the UGMA of another state which would not permit transfers from the source or of property of that kind or under the UTMA of another state with no nexus to the transactions, provided in each case that Alaska has a sufficient nexus to the transaction under sec. 13.46.010.

Sec. 13.46.210. EFFECT ON EXISTING CUSTODIANSHIPS.

Subsection (a) is new and is based on Section 45-109a of the Connecticut Uniform Transfers to Minors Act which validates gifts of real estate and partnership interests made prior to their inclusion as "custodial property" under that Act. However, this provision goes further and purports also to validate prior transfers of the kind now covered by that Act, i.e., transfers from estates, trusts, guardianships, and obligators.

All states have previously enacted some version of the UGMA, and it will be more orderly to subject gifts or other transfers under the UGMA to the procedures of the UTMA rather than to keep both the UGMA and UTMA in force, presumably for 18 or 21 years until all custodianships created under prior law have terminated. Subsection (b) is intended to apply the AkUTMA to prior gifts and existing custodianships

insofar as it is constitutionally permissible to do so. However, prior custodianships will continue to terminate at the age prescribed by the Act under which the gift or transfer was made.

Subsection (c) is also new and is based upon Section 45-109b of the Connecticut Act. This subsection is intended for adoption in those states that reduced the age of majority to 18, but which adopt the recommended return to 21 as the age at which custodianships terminate. Its purpose is to avoid resurrecting custodianships for persons not yet 21 which terminated during the period that the age of 18 governed termination.

Subsection (d) is also new. This subsection is derived from sec. 27 of the UTMA, relating to the effect of the repeal of the UGMA.

Sec. 13.46.220. UNIFORMITY OF APPLICATION.

No commentary.

Sec. 13.46.990. DEFINITIONS.

To reflect the broader scope and the unlimited types of property to which the AkUTMA will apply, a number of definitional changes have been made from the 1966 version of the UGMA. In addition, several definitions specifically applicable to the limited types of property (cash, securities, and insurance policies) subject to the 1966 version of the UGMA have been eliminated as unnecessary. These include the definitions of "bank," "issuer," "life insurance policy or annuity contract," "security," and "transfer agent." No change in the meaning or construction of these terms as used in the AkUTMA is intended by these deletions.

The definitions of "domestic financial institution" and "insured financial institution" have been eliminated because few, if any, states limit deposits by custodians to local institutions, and the prudent person rule of sec. 13.46.110(b) of the AkUTMA may dictate the use of insured institutions as depositories, without having to so specify.

The principal changes or additions to the remaining definitions are discussed below.

"Benefit Plan" The definition of "benefit plan" is intentionally very broad and is meant to cover any contract, plan, system, account, or trust such as a pension plan, retirement plan, death benefit plan, deferred compensation plan, employment agency arrangement, or stock bonus, option or profit sharing plan.

"Conservator" The term "conservator" rather than "guardian of the estate" has been employed to conform to Uniform Probate Code terminology (AS 13.06 - 13.36). The term includes a guardian of the minor's property, whether general, limited or temporary, and includes a committee, tutor, or curator of the minor's property.

"Custodial Property" The definition of "custodial property" has been generalized and expanded to encompass every conceivable legal or equitable interest in property of any kind, including real estate and tangible or intangible personal property. The term is intended, for example, to include joint interests with right of survivorship, beneficial interest in land trusts, as well as all other intangible interests in property. Contingent or expectancy interests such as the designation as a beneficiary under insurance policies or benefit plans become "custodial property" only if the designation is irrevocable, or when it becomes so, but the AkUTMA specifically authorizes the "nomination" of a future custodian as beneficiary of such interests (see sec. 13.46.020). Proceeds of custodial property, both immediate and remote, are themselves custodial property, as is the case under UGMA.

Custodial property is defined without reference to the physical location of the property, even if it has one. No useful purpose would be served by restricting the application of the AkUTMA to, for example, real estate "located in this state," since a conveyance recorded in the state of the property's location if done with proper formalities, should be effective even if that state has not enacted the UTMA. The rights, duties, and powers of the custodian should be determined by reference to the law of the state under which the custodianship is created, assuming there is sufficient nexus under sec. 13.46.010 between that state and the transferor, the minor, or the custodian.

"Minor" "Minor" is defined as an individual who has not attained the age of 18 years (consistent with AS 25.20.010), except that the term "minor" may include an older individual under some circumstances when the term is used with reference to the beneficiary for whose benefit custodial property is held or is to be held for a period past the age of 18 years. See the Commentary to secs. 13.46.190 and 13.46.195.

"Personal Representative" The definition of the term "personal representative" is based upon the definition in the Uniform Probate Code (AS 13.06.050(30)).

"Transfer" The new definition of "transfer" is necessary to reflect the application of the AkUTMA not only to gifts, but

also to distributions from trusts and estates, obligors of the minor, and transfers of the minor's own assets to a custodianship by the legal representative of a minor, all of which are now permitted by the AkUTMA.

"Transferor" The new definition of "transferor" is required because the term includes not only the maker of a gift, i.e., a donor in the usual sense, but also fiduciaries and obligors who control or own property that is the subject of the transfer. Nothing in the AkUTMA requires that a transferor be an "adult." If permitted under other law of the state relating to emancipation or competence to make a will, gift, or other transfer, a minor may make an effective transfer of property to a custodian for his benefit or for the benefit of another minor.

"Trust Company" Only entities authorized to exercise "general" trust powers qualify as a "trust company"; that is, the authority to exercise only limited fiduciary responsibilities, such as the authority to accept Individual Retirement Account deposits, is not sufficient.

Sec. 13.46.999. SHORT TITLE.

No commentary.

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