

Extending a Guardianship for a Minor's Property Until Age 25

"To Age 25" Provisions in the Uniform Transfers to Minors Act

Several states have enacted a variation of the Uniform Transfers to Minors Act (or "UTMA") that can allow property to be retained by a custodian until the beneficiary reaches 25, rather than 18 or 21.

The initial question is why may an "Age 25 Provision" be Useful?

Individuals often resist the bother of establishing a trust for what they perceive to be modest gifts to minors and instead simply establish a custodial account.

Moreover, in almost every estate plan, even in one utilizing trusts, there is a limit on how far down the line one may wish to consider "control from the grave" provisions to cover remote contingent remainder interests to minors. A commonly used provision in wills and trusts gives express authority to the executor or trustee to turn property over to a custodian rather than directly to a minor.

The major problem with relying on a custodianship, rather than on a trust, is that the age of majority typically is either 18 or 21, at which time the property held in the custodial arrangement must be distributed outright to the young adult.

As a young adult reaches majority, the donor (often a generous grandparent) may suddenly realize that it seems like a very bad idea for the custodial arrangement to cease and the gifted amounts paid out to an 18 or 21 year old. In the case of a distribution from an estate or trust, the fiduciary may have reason for concern about making a required distribution. Even in the best of circumstances, coming into substantial funds at such a young age may influence a young adult to take a path different than what the older generation may deem desirable.

In response to these concerns, several states have enacted UTMA statutes that, in certain limited circumstances, would allow property to be retained by an UTMA custodian until age 25.

Five states (Alaska, California, Nevada, Tennessee, and Oregon) have age 25 provisions in their UTMA laws. In each case the option must be affirmatively chosen, the default being either 18 or 21.

The most fundamental question is whether, and how, one may use the laws of one of these five states even if he or she is in another?

All five of the age 25 states have adopted the Model UTMA provisions with respect to this issue. If neither the transferor nor the donee is a resident at the time the custodianship is created, then either the custodial property must be located in the state or the custodian must be a resident of the state.

It may be possible to locate property in the state simply by opening an account in a resident financial institution or by renting a

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safe deposit box containing tangible personal property, stock certificates or bonds.

Nevertheless, the choice is to name a resident custodian. This means choosing an institutional custodian unless you happen to have a relative or friend residing in the state. Where the funds are substantial, an institutional fiduciary is an especially appropriate choice.

There are two basic categories of transfers, gift transfers and transfers employed in the context of estate and trust planning and administration.

The major distinguishing factor with respect to gifts is consideration of the federal gift tax annual exclusion (indexed for inflation, the excluded amount presently is \$11,000 per donee per year) and, in the case of gifts to "skip persons" (grandchildren or others two generations or more younger), the related "zero inclusion ratio" treatment for purposes of the "generation-skipping transfer tax" (which is a tax benefit that allows a donor to side-step an extra tax that can apply to these gifts). Age 21 custodial arrangements qualify for both of these tax benefits. However, age 25 custodial arrangements pose particular problems because the tax law requires that the property be turned over to the donee or placed in the control of the donee at age 21 in order to qualify.

The states with age 25 provisions have approached this issue in several different ways.

- Perhaps the "simplest" is to carve out gift transfers from the age 25 option altogether. This approach does protect donors from a possible tax misstep; however, it seems overly restrictive, as not every donor limits gifts to the annual exclusion amount or need be concerned with the annual exclusion.
- Another simple approach is to allow the age 25 option for gift transfers without qualification. Certain donors could run into adverse tax consequences, but the option at least is available to those who do not have these concerns.
- Another approach is to allow gift transfers to be held until 25, but the transfer document

must expressly state that setting the termination date past age 21 will cause the transfer to be a gift of a future interest with potentially adverse tax consequences.

- Another approach is to allow the option of an age 25 provision for gifts but to require that there be a 6 month "window" at age 21 for the young adult to withdraw the property from the custodial arrangement. This approach mirrors a common estate planning technique using trusts with age 21 limited-duration withdrawal powers. The transfer document must expressly recite the withdrawal right, although there is no statutory requirement to give actual notice to the 21 year old. However, the conservative approach is to give actual, contemporaneous notice of the withdrawal right.

There are other non-gift situations that arise in the estate planning and administration context where the age 25 provision is useful, particularly when planning for contingent beneficiaries:

- (i) the receipt of required distributions from an estate;
- (ii) the receipt of distributions from a trust during the trust term or upon the trust's termination;
- (iii) the receipt of property upon the exercise of a power of appointment;
- (iv) the receipt of property subject to contractual rights, such as life insurance, retirement plan or IRA benefits, or a payable on death ("POD") bank account.

The Model UTMA and all five "age 25" states allow for planning ahead by using the governing instrument (e.g., a Will, trust agreement, deed, instrument exercising a power of appointment, or beneficiary designation) to do two essential things:

- To grant the express authority to the relevant fiduciary or to direct that the property be turned over to an UTMA custodian at some point in the future; and,
- To nominate a custodian to receive property in the future, including contingent and successor custodians.

An out-of-state guardianship can be established with an institutional fiduciary.

Thus, in all five states, the age 25 option is available only where the governing instrument either directs or authorizes the custodianship and includes language expressly authorizing or directing the retention of the property past the age of majority. The operative instrument always should expressly require or authorize the establishment of a custodial account to receive property, expressly require or authorize the retention of the property past the age of majority, and, if possible, nominate a custodian, successors and alternates.

- With a gift, the donor simply recites the termination age in the transfer document creating the custodianship and, since the transfer is immediate, must nominate a custodian, and, ideally, successors.
- With respect to a custodianship that may arise in the future, if the donor wishes to maintain flexibility in the plan, the issue is what to provide so that the language is sufficient to invoke the laws of a favorable jurisdiction but flexible enough to allow for future planning. To keep the options open for future transfers, the suggested approach is:

In Wills and Trusts:

- Expressly authorize the fiduciary to transfer the property to a custodian and authorize the selection of the jurisdiction, specifically stating that this includes jurisdictions that allow property to be held past the age of majority.

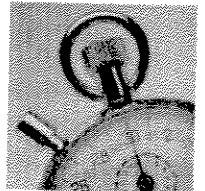
In Beneficiary Designations:

- Be more specific because there is no "fiduciary" like an executor or trustee whom the transferor chose and to whom it would be advisable (or even perhaps possible) to give discretion. The custodianship should be directed, and proposed custodians and alternates or successors, named or described (e.g., a parent or legal guardian of the minor). It should be stated that if the named custodian cannot act, the parent or legal guardian of the minor could select one. The jurisdiction should be selected and the maximum age set forth.

If an age 18 or 21 custodianship is terminating, can it be "fixed" by later electing age 25?

The strict language of all five of the statutes in question suggests that if the donor has not planned ahead by choosing an age 25 jurisdiction and the age 25 option when the transfer was first made, he or she cannot change mid-stream.

- Following the Model UTMA, the custodianship remains subject to the laws of the original jurisdiction for its duration regardless of the change in residence of the transferor, the minor or the custodian or the removal of the property from the state.
- Further, even if the donor is in a state with an age 25 provision but has not elected it at the original time of transfer, the donor cannot extend it later. Nor would the custodian or anyone else have authority to lengthen the duration.
- However, if the standard age 18 or 21 custodianship is ending, the situation may be no worse than if a trust with a limited duration withdrawal right at majority had been used. With the trust, the young adult would have to conclude not to exercise the withdrawal right or perhaps agree to self-settle a trust; with a terminating custodianship, it should be no less possible to counsel the young adult to turn the property over to a new custodianship with age 25 provisions or perhaps to a trust.
- The earlier custodianship will have ended, and thus the original state's law, and the age restriction whether in the same state or another, would no longer apply.
- Obviously, the donee must have legal capacity both to receive the distribution and then to transfer the property to a custodian. The donee either would have to be of legal age or an emancipated minor.
- We also need to consider at what age the custodianship can begin. Only a couple of the states appear to allow the initial gift, estate or trust distribution, or other transfer to an UTMA account, for individuals over age 21.



In conclusion, despite some open issues, the possibility of using the laws of the few states that have age 25 provisions in their UTMA statutes, whether or not the donor resides there, may provide an attractive adjunct to estate planning that can be incorporated as part of effective, flexible estate plans.

For more information, please call Mary DeMarco Lee or one of the other partners at the firm.

■ New Telephone and Fax Numbers

In addition to our direct dial numbers and 212-818-9000, we have a new main number: 212-944-0500.

We also have a new fax number: 212-869-4930. Our old fax number (212-661-3132) will be discontinued after January 31, 2003. Our attorneys also have direct fax numbers.

■ We extend our warmest congratulations to our partner Mary Demarco Abrams and to Dr. Edmund Lee on their recent marriage. Ms. Abrams will now be known as Mary DeMarco Lee.

About Hofheimer Gartlir & Gross, LLP

The firm conducts a general commercial practice. Our principal practice areas are:

- real estate
- corporate and securities law
- general business and commercial law
- cooperative and condominium matters
- financial institutions (loan transactions, leasing, acquisitions, credit restructuring, workouts, foreclosures)
- estate planning
- trust and estate administration
- general litigation and alternate dispute resolution
- matrimonial and family law
- taxation
- bankruptcy and creditors' rights

Clients of the firm range from major financial institutions and public corporations to closely-held businesses, individuals and families.

■ New York City Council Pending Bills

The NYC Council has numerous bills pending. Some of them may be of interest to you, such as:

#271 - requires equal employment benefits to the domestic partners of employees of contractors dealing with the city. Domestic partners are persons recognized as having registered in NYC as domestic partners or who have joined together in a civil union recognized by another jurisdiction.

#107 - adds to prohibited housing discrimination, any discrimination against actual or perceived victims of domestic violence, sex offences or stalking.

#251 - requires carbon monoxide detectors in apartments in multiple dwellings.

#73 - requires demolition contractors to have a construction site safety coordinator at the site when demolition is conducted.

#202A - provides for baby changing stations in public places accommodating 250 or more people, such as restaurants, catering establishments, auditoriums, recreation centers, houses of worship and community centers.

#57 - requires a certification that trapping or baiting of rats has been conducted as a requirement for foundation or earthwork permits.

#41 - requires the city (instead of the property owner) repair sidewalk damage as a result of a street opening or due to overgrowth of certain tree roots.

If you would like any further information regarding these bills, please contact a partner at HG&G.

■ Visit us on our website: www.hgg.com