Planning the Form of the Gifts

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the original owner of the property establishes a trust and gives beneficial interests in it to his various donees, title will remain unified, the administration of the donor's estate will be simplified, and the management of the property and its possible eventual sale will be facilitated.

*Subchapter S Stock*

The principal shareholder of a Subchapter S corporation may desire to make gifts of the Subchapter S stock to members of his family. If properly done, this is an extremely efficient way of shifting the tax burden on the income generated by the family business. However, care must be exercised that the gift does not revoke the election. For example, gift of Subchapter S stock to a trustee revokes the election. A gift to a custodian is permissible.

The determination whether or not to elect to be taxed under Subchapter S is fundamentally based on the relationship between the tax brackets of the corporation and its shareholders. Gifts of stock may change this relationship and make election desirable where it previously was not. For example, a high bracket sole shareholder of a corporation may give its stock to his children whose lower brackets make election profitable. This may also provide an escape route in cases where the threat of the accumulated earnings tax confronts a non-electing corporation the stock of which is owned by high bracket shareholders.

III

**PLANNING THE FORM OF THE GIFTS**

Edward J. Hawkins, Jr.

The rules of tax law, trust law, and property law relating to the form or manner in which gifts may be made are far too numerous to permit any useful comprehensive statement in the space available. Accordingly, attention will be limited here to selected topics which seem especially relevant to the problems of the Jones family, whose situation is set forth on page 292 above. In particular, attention will be paid to the mechan-
ics of making gifts to Mr. Jones' numerous minor grandchildren and to the problem of enabling Mr. Jones to give away the Jones Manufacturing Company for tax purposes while retaining control of it for business purposes.

The starting point for any analysis of the Jones problem is the realization that outright gifts to the grandchildren are probably unwise, even apart from professional reluctance to consider anything so simple. In general, gifts of property to minors create problems on the one hand of lack of transferability during minority (absent the appointment of a guardian) and on the other hand of the donee's lack of judgment should he get effective control of the property. Where the property which may be given to the minor is an interest in the family business both lack of transferability and lack of judgment are almost prohibitive objections. Thus we are limited as a practical matter to some form of gift whereby a qualified adult, possibly Mr. Jones himself, holds title to and operating control of the donated assets, the minor merely receiving a right to receive the income from the assets, now or at some time in the future, with possibly a right to invade the principal in certain cases.

The next step in an analysis of gifts to minors is the realization that a legal guardianship is not the best form in which to hold the donated property. The appointment of a guardian makes the entire operation a matter of public record and subject to court control. Also, a guardian's powers in investing and handling the minor's property are too inflexible and restricted. Furthermore, establishing a guardianship (unless a guardian has already been appointed for other reasons) is often as much trouble as preparing a trust adequate to avoid these problems. Thus, the forms to be considered seriously are actually limited to the custodianship device and the various types of trusts. For reasons of space, the discussion of trusts will be further limited to include only the section 2503(c) trust and the short-term reversionary trust.

CUSTODIANSHIPS

The custodianship device was originally created by a Model Act, adopted by Ohio in 1955. Subsequently a Uniform Act was drafted covering the same subject matter, and this act has now been adopted by most states. As of January 1, 1962, Ohio fell into line by changing over from the Model Act to the Uniform Act. Gifts already made under the Model Act are now governed by the Uniform Act.

2. The Uniform Act has been codified as Ohio Revised Code sections 1339.31 through 1339.39. Gifts under the new act are made to "X as custodian for Y under the Ohio Uniform Gifts to Minors Act." Applicability of the Uniform Act to gifts made under the Model Act is provided in section 1339.39(c).
The provisions of the Uniform Act are substantially the same as those of the Model Act. However, the Model Act was limited to gifts of stock and securities, whereas the Uniform Act also permits gifts of money, insurance policies, annuity contracts, and certain mineral interests. In addition, the Uniform Act permits a wider choice in selecting the custodian, permits compensation of the custodian, and makes certain improvements in the administrative provisions of the law.

If Mr. Jones should decide to use the custodianship device for his grandchildren, most of his tax objectives will be achieved. The gift will qualify for the $3,000 annual gift tax exclusion. Subject to the exceptions discussed below, the income will be taxed in the grandchild's low bracket, and the property itself will be removed from Mr. Jones' estate.

Furthermore, these tax results are the same whether the gift was made last year under the Model Act or this year under the Uniform Act.

The only flies in the tax ointment arise from two exceptions which the Commissioner believes must be made to the above rules. The first exception is that income from custodianship property used to discharge the obligation of the minor's parent to support him is taxed to the parent rather than to the child even though the parent is neither donor nor custodian. The second exception is that if the donor designates himself custodian, his statutory power either to pay out at once or to accumulate the income and principal requires the custodianship property to be included in his estate for estate tax purposes should he die before the minor reaches twenty-one. The correctness of applying these exceptions to custodians may be questioned, but it would be risky to plan gifts on the assumption that the Service will not be successful in asserting such application.

In addition to the advantage of knowing where the Internal Revenue Service stands on the tax questions, the use of a custodianship has the

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4. Regardless of the form of the gift, the property will be included in Mr. Jones' estate if he dies within three years after making the gift and is held to have made it in contemplation of death.


great advantage of simplicity. By referring to the statute in making the gift, the donor in effect incorporates by reference the terms of a discretionary trust already drafted by the legislature. This saves time, trouble, and legal fees, as does the fact that the custodian is not required to file an annual Form 1041.

There are several disadvantages in using a custodianship. (1) The Ohio statute requires that the property and all accumulated income be distributed at age twenty-one. In the opinion of many people, all of whom are themselves over twenty-one, a person at that age lacks sufficient discretion to use wisely the uncontrolled ownership of substantial property, and again the problem becomes especially significant if the property is an interest in the family business. (2) If the minor dies before reaching twenty-one, the property must be distributed according to the laws of intestate succession since the minor cannot make a valid will. This statutory pattern of distribution may or may not be what Mr. Jones would have preferred. (3) Since the custodianship must be for a designated minor, no provisions can be made, by this route, for after-born children. (4) The use of a custodianship incorporates the statutory provisions as a whole, even though Mr. Jones would have preferred different terms on certain points. In short, a custodianship cannot be hand-tailored to cover special problems or desires.9

TRUSTS UNDER SECTION 2503(c)

One tax problem of trusts for minors relates to qualifying for the $3,000 annual gift tax exclusion. The exclusion is inapplicable to gifts of a future interest, and trust for minors are especially likely to involve future interests. The chief reason for this is that where the beneficiary is under twenty-one the grantor typically will want the trustee to have the discretion to withhold and accumulate income for some future distribution to the child, rather than be compelled to pay it to or for him currently. The right to receive the income for sure only at some future date is a future interest.

In 1954, this problem was alleviated by new section 2503(c), which specifically allows the exclusion for a gift to a minor which meets certain requirements, even though it would otherwise be treated as a future interest. These requirements are that the property and the income therefrom may be expended by or for the donee during his minority, and that, to the extent not so expended, they will be distributed to him at age twenty-one or, should he die before reaching twenty-one, be payable to his estate or as he may appoint under a general power of appointment. The custo-

9. The present discussion deals with gifts during the life of Mr. Jones. It should be noted that a custodianship cannot be established at all by will. OHIO REV. CODE § 1339.32(A).
dianship statute was apparently designed to come within the provisions of this section. Accordingly, any trust drafted to come within its terms will bear a striking resemblance to a custodianship, including the disadvantages of the mandatory distribution at age twenty-one and the requirement that the trust be for the benefit of a specific minor.

Despite the similarity of a trust under section 2503(c) to a custodianship, there are certain differences which operate to the advantage of the trust form. (1) The terms of the trust, both as to investment powers and otherwise, can be adjusted to meet the needs of the particular case. (2) It is the position of the Internal Revenue Service that a trustee is a separate taxpayer, unlike a custodian. Thus, though all of the income from the custodianship property is taxed to the beneficiary whether distributed or not, income accumulated by the trustee of a trust under section 2503(c) is taxed to the trust. If any of Mr. Jones' grandchildren are already in high brackets the creation of such an additional taxpayer may be helpful. (3) In the case of the grandchild's death, custodianship property passes according to the laws of intestate succession. A trust under section 2503(c) can be drafted so as to insure that if the grandchild dies before reaching age twenty-one the property will be distributed to persons designated by the grantor in the trust instrument. (4) In the case of a custodianship both the principal and the related income must be distributed at age twenty-one. However, under section 2503(c) only that property for which the gift tax exclusion was obtained need be distributed at age twenty-one. Two recent decisions hold that the donee's interest in the income of a trust can constitute a property interest for purposes of section 2503(c). If so, Mr. Jones can place property in trust for his minor grandchildren with the provision that at age twenty-one only the accumulated income will be distributed to them, the principal continuing to be held in trust, and the value of the income interest will qualify for the gift tax exclusion.

In at least two situations a trust under section 2503(c) may be less

10. Section 2503(c) is not limited to gifts in trust.
12. On the other hand, if the minor has little other income, the applicability of his personal $600 exemption to the custodianship income may be preferable to the $100 exemption available to a discretionary trust. Of course, even with a trust the personal exemption of the minor can be utilized by income distributions to him, but such distributions would be subject to the same objections as any gifts directly to a minor. Authorization in the trust for payment of the income to a custodian might permit utilization of both the extra taxpayer and the $600 exemption, while permitting useful investment powers over the income distributed.
13. This is accomplished by giving the minor a general power to appoint by will with a gift over to the desired persons in default of its exercise. Under these circumstances the property will go to the takers in default since, in Ohio and many other states, a minor cannot make a valid will. Reg. § 25.2503-4(b) (1958).
advantageous than a custodianship.\textsuperscript{15} (1) If Mr. Jones designates as trustee the grandchild’s parent, and if the parent-trustee has power to use the trust income to discharge his own obligation to support the minor, it is possible that this might be regarded as a power of appointment making the trust property includible in the estate of the trustee-parent.\textsuperscript{16} A Revenue Ruling reaches a contrary result as to custodianships, however.\textsuperscript{17} (2) If the purpose of the gift is to permit the accumulation of income to provide for the minor’s college education, a custodianship would dearly avoid the five-year throwback rule,\textsuperscript{18} which relates only to trusts, and may avoid any tax on the parent at all if the criticisms of the Commissioner’s position on this point are sustained.\textsuperscript{19} Of course, the five-year throwback rule applies in any event only if the amount distributed in the taxable year is more than $2,000 in excess of the trust’s distributable net income.\textsuperscript{20}

\textbf{SHORT-TERM REVESIONARY TRUSTS}

If Mr. Jones places property in trust for a beneficiary for a period of ten years or more, he will not be taxed on the income from the trust property even though at the end of ten years the property is to be returned to him.\textsuperscript{21} This is another form of trust which might be particularly useful in making gifts to the minor grandchildren. Frequently it is impossible to determine in childhood what the ultimate financial needs and personal characteristics of a person will be and a reversionary trust permits Mr. Jones to take a second look. Such a device is also suitable for helping Mr. Jones’ grandparents, since it transfers the needed income flow from his tax bracket to theirs, without adding any property to their tax or probate estates. In addition, despite his stockholdings, Mr. Jones is in the common position of enjoying high annual compensation during his working years while facing the probability of a much reduced income after retirement. In these circumstances it is especially appropriate to distribute property in such a way as to avoid tax on the income from it during the years of prosperity, while regaining the property and income flow in the post-retirement years.

\textsuperscript{15} These advantages of the custodianship over the trust are in addition to simplicity and economy, and to the availability of the minor’s $600 exemption, which have already been mentioned.

\textsuperscript{16} Reg. § 20.2041-1(c) (1) (1958).

\textsuperscript{17} Rev. Rul. 59-357, 1959-2 CUM. BULL. 212.

\textsuperscript{18} Reg. § 1.666(a)-1 (1956). Generally speaking, a distribution of accumulated trust income more than $2000 in excess of distributable net income for that year is “thrown back” to each of the five preceding years in inverse order. This is done in such a manner as to eliminate any tax saving resulting from the accumulation of such income during those years.

\textsuperscript{19} See note 8 supra.

\textsuperscript{20} Code § 665 (b).

\textsuperscript{21} Code § 673.
If a reversionary trust is used for gifts to Mr. Jones' grandchildren, an important question will be whether the gift of the income interest qualifies for the gift tax exclusion. If the income is required to be distributed currently directly to the minor, the gift qualifies as a present interest. If the income may be accumulated during the period of minority, the gift may still qualify for the exclusion under the exception contained in section 2503(c), provided that the accumulated income is to be distributed to the beneficiary at age twenty-one. The two cases cited above so hold even though the principal of the trust is not distributed to the beneficiary.

A further problem as to the gift tax exclusion exists if the trust satisfies section 2503(c) for the period of minority but then continues for a period extending beyond the beneficiary's twenty-first birthday. This may be necessary in order to give the trust a duration of ten years or for some other purpose of the grantor. The theory pursuant to which the income interest until age twenty-one meets the test in section 2503(c) that both property and accumulated income thereon be distributed at age twenty-one is that the income interest until age twenty-one is itself an item of property, and that this is the property distributed at age twenty-one. If that is true, the income for the period after the beneficiary reaches twenty-one must be a separate item of property. Considered separately, it is a property interest which will commence in use, possession, or enjoyment at a future time and hence technically may be treated as a future interest, even though the income until age twenty-one is considered to be a present interest.

Although the preceding analysis has the logical appeal of the medieval land law, it may seem unreasonable as a practical matter to hold that income required to be distributed currently for ages twenty-one to twenty-five is a future interest simply because for ages fifteen to twenty the income may be temporarily accumulated. Accumulations during minority are based more on biological than tax considerations, and it is possible that the legislative thinking behind section 2503(c) was simply that such accumulations should not bar the exclusion, provided that the minor was in fact sure to get any accumulation on reaching twenty-one, or at his prior death.


Footnote 3 in the Tax Court opinion in Arlean I. Herr, 35 T.C. 732 (1961), states that the income interest after age twenty-one would not qualify as a present interest. However, the point was not contested in that case.

It should be repeated that this problem arises only if income may be accumulated until age twenty-one. If current distribution of the trust income to the beneficiary is mandatory throughout the period of the trust, the income interest would presumably qualify as a single present interest. However, this would have, as to the income distributed during minority, the prac-
It should be noted that the use of a reversionary trust can involve various technical problems. One of these is the treatment of capital gains which are realized by the trustee during the trust period. If such capital gains are distributed to the income beneficiary, the distribution has the effect of giving him some of the corpus. The possibility of this renders uncertain the amount of the original gift.

There is almost no authority on the resolution of this uncertainty, but in private rulings the Internal Revenue Service has taken three different positions, allegedly depending upon whether or not the grantor is trustee and whether or not the allocation of capital gain to the income beneficiary is mandatory or discretionary. (1) One view is that since the grantor cannot demonstrate how much of the corpus will ultimately return to him, the entire property, rather than simply the income interest, must be subjected to gift tax. This rule generally produces the maximum possible degree of error in computing the amount of gift, and is undesirable for the additional reason that it creates what may be a substantial tax penalty for a situation which is likely to be entered into inadvertently. In other words, for no particular policy reason it creates a trap for the unwary. (2) The second view is that the size of the gift should be measured by the total value of the property given less the present value of the grantor's right to the eventual return of an amount equal to its tax basis. The theory is that since the recovery of basis is not capital gain, at least an amount equal to the basis will be returned to the grantor. In fact, this will not be true in many cases if the basis of the trust assets ever exceeds their fair market value. Accordingly, this approach is also inaccurate, although the amount of the inaccuracy is almost certain to be less than that of the first approach. In addition, the error is less obviously slanted in favor of the Treasury. (3) A third possibility is to tax the grantor at the time of the gift only on the present value of the ordinary income interest. Then, as capital gains are realized and paid to the income beneficiary each such payment would be regarded for gift tax purposes as an additional gift. This rule is favorable to the taxpayer in splintering the gift in question, but it has the great advantage of ultimately determining with complete accuracy the amount actually given. It does, of course, raise the question of whether the payment of the capital gain to the income beneficiary constitutes an addition to or subtraction from the trust corpus during the mandatory ten-year period, and whether, if made within nine years of the termination of the trust, such payments constitute an addition to the trust for purposes of the five-year disadvantages of all direct gifts to minors. Perhaps, alternatively, mandatory distribution to a custodian during the period of minority would achieve the desired adult control without separating the income right until age twenty-one and the income right thereafter into separate interests.
year throwback rule. So far, however, the Commissioner appears to have made no such contention.

The practical solution to the problem of allocating capital gains to the beneficiary is to advise Mr. Jones not to do it but to have capital gains accumulated for ultimate return to himself. This makes it possible to compute the value of the income interest from the usual actuarial tables without complication or uncertainty. Of course, since the gains will then constitute capital gains accumulated for the grantor they will be taxable to him in the year realized by the trustee, even though the cash proceeds of the sale will not be received by the grantor until the trust terminates. Since short-term reversionary trusts are likely to be used primarily by taxpayers with high current incomes such as Mr. Jones, who is able to pay the tax before receipt of the accumulation, this theoretical disadvantage may not be significant in practice.

Another technical problem is measuring the duration of the trust. It is permissible to provide for a return of the trust corpus either at the end of ten years or at the death of the income beneficiary, whichever happens first. It is also possible to substitute for the ten-year requirement some event which may not reasonably be expected to occur within ten years, for example, the death of a person having a life expectancy of more than ten years. Possibly, however, Mr. Jones might like to have the trust terminate upon the happening of one of several events, such as the expiration of ten years, his own death, or his wife's death. The question in such a case is whether the ten-year expectancy is measured by the expectancy of the contingencies as a group (exclusive of the life expectancy of the income beneficiary, which is a separate and distinct standard) or of each contingency standing alone. For example, if two people each have a life expectancy of exactly ten years it is probable that one of the two will die in less than ten years. Would a trust for their joint lives qualify as a ten-year reversionary trust? Again, it is clearly the more conservative course to so limit the terminating events as to avoid this question.

24. CODE § 665 (b) (4).
25. The private rulings in this area are discussed in Shop Talk, 12 J. TAXATION 382 (1960) and 13 J. TAXATION 190-91 (1960).
27. CODE § 677 (a) (2).
28. Reg. § 1.673 (a)-1 (c) (1956).
29. Ibid. Measuring the trust period by the life of the income beneficiary is a separate standard from the ten-year measure, and hence is permissible regardless of the beneficiary’s life expectancy.
30. This overlooks the assumption made hitherto that Mr. Jones is a widower.
31. Still another technical problem applicable to trusts generally, but perhaps especially to reversionary trusts, is that a mere assignment of future income will be ineffective even if made in trust form. Reg. § 1.671-1 (c) (1956). See Newell, Gifts to Improve the Family’s Overall Tax Situation, p. 299 n. 24 supra and accompanying text.
If some of the gifts to be made by Mr. Jones are to consist of stock in the Jones Manufacturing Company, it will be important to determine to what extent he can avoid the loss or reduction of his control of the corporation.

The use of a revocable trust would permit the maximum retention of control as well as serving a number of important estate-planning objectives. However, such a trust would not remove the income from Mr. Jones' income tax return nor the corpus from his estate tax return and hence is somewhat outside the scope of the present discussion.

Even assuming an irrevocable trust, it may still be possible to maintain Mr. Jones' business control by designating him as trustee. In order to analyze this possibility, however, it is necessary to distinguish three types of control. The first type is the ability to use the trust assets for the grantor-trustee's personal purposes. Any such power will defeat the tax objectives of the trust even if it takes an indirect form such as giving the grantor-trustee the right to use trust funds to discharge his own legal obligations, or the right to buy assets from the trust for inadequate consideration, or the right to borrow from the trust without adequate security.

A second type of control relates to the ability to alter the allocation of benefits created upon the establishment of the trust, either as to who is to receive the benefits or as to when the benefits are to be received. Examples would be the power to allocate income among a designated group of beneficiaries or to terminate the trust at any time by the distribution of the corpus. If the grantor is to be the trustee, the trustee's powers in this category must be extremely limited. Some powers of this type

32. See 1 CASON, ESTATE PLANNING 120 (3d ed. 1961).
33. A revocable trust is not disregarded for every tax purpose and may thus give rise to rather unexpected consequences. A clear example is that a corporation, stock of which is held in a revocable trust, is disqualified from electing under Subchapter S. Also, in applying the attribution rules of sections 267, 318, and 554 a revocable trust creates substantial uncertainty. A similar confusion exists in state law areas, where a revocable trust is a separate entity for some purposes but not for others.
34. The right to use trust funds for the support of a beneficiary whom the grantor is legally obligated to maintain will not result in income tax to the grantor-trustee except to the extent the funds are so used. Code § 677(b). The mere existence of the power is likely to be treated as a general power of appointment for estate tax purposes, however. Reg. § 20.2041-1(c)(1) (1958).
35. Mr. Jones should understand that even apart from tax law, a transfer of property to himself as trustee is not a mere formality. As trustee Mr. Jones will have duties and obligations not present when he owned the stock beneficially. Self-dealing of the types suggested can lead to litigation, even within families, and the courts frequently deal quite harshly with lapses from proper fiduciary behavior.
36. The power of the grantor to discharge the trustee and appoint himself is the equivalent of naming himself trustee for purposes of this discussion. See, e.g., Reg. § 20.2036-1(b)(3) (1958).
are permissible but they are limited; the limitations vary as between estate tax and income tax, and the limitations in the field of estate tax are not as clear as they might be.

The third type of control relates to the business management of the trust assets. If these include a controlling stock interest in the family corporation, such business management powers would include rights in the trustee to vote the stock, to sit on the board of directors, and perhaps to continue his employment as chief executive of the company. Powers of this type appear never to have been questioned where held in a fiduciary capacity except where combined either with powers to benefit the grantor or to affect the beneficial interest of others.\(^\text{37}\) Especially where the grantor is already the president of the company with a substantial record of success there is no rule of tax or trust law which would require him as fiduciary to remove himself from management and appoint someone less qualified.

The difficulty with the foregoing principles is that the separation of the types of control may be difficult to accomplish. It is obvious that the terms of employment of the grantor-trustee-president must not suggest improper benefits to him.\(^\text{38}\) A more general example of the problem may arise from the right of the directors of a company to determine dividend policy. Through dividend policy, it may be argued, the grantor-trustee can allocate benefits between income beneficiaries and remaindermen.

No case has been found which holds that trust property should be included in the grantor’s estate simply because as shareholder or director he retained control over dividend policy.\(^\text{39}\) Furthermore, it is believed that as a practical matter such contention would have little chance of success except where the terms of the trust, the nature of the business, or the actual conduct of the trust and business suggest that an improper

\(^{37}\) The statute is explicit on this point in reference to income tax liability. CODE §§ 671, 675(4). For estate tax purposes the rule should be the same. See 1 Casner, Estate Planning 205 (3d ed. 1961); Reg. § 20.2041-1(b)(1) (1958). According to Helvering v. Safe Deposit & Trust Company, 316 U.S. 56 (1942), a generalized control situation which does not include the specific powers enumerated by the Code does not, at least in theory, result in estate tax liability comparable to the income tax liability which used to arise from the Clifford doctrine under the 1939 Code. (The Clifford doctrine is discussed in 4 CCH 1962 Stand. Fed. Tax Rep. ¶ 3703.01.).


\(^{39}\) Cf. Estate of C. Dudley Wilson, 13 T.C. 869 (1949) (reviewed by the court), non-acq., 1950-1 Cum. Bull. 8, aff’d on opinion below, 187 F.2d 145 (3d Cir. 1951):

"The Commissioner also advances two other farfetched arguments. One is that the decedent, a minority stockholder and officer of Luzerne Rubber Co., could have controlled the dividends on its common stock, and, as a director of the Trenton Banking Co., beginning in January 1944, could have controlled the action of that institution as trustee. These arguments are not sufficiently weighty to merit discussion." 13 T.C. at 873.

allocation of benefits between income beneficiaries and remaindermen was intended. However, as an added precaution it might be well in the trust instrument to attempt some language in reference to dividend policy designed to preclude the use of such policy to achieve the forbidden control while permitting flexibility to meet future business changes, foreseen and unforeseen.\(^{40}\)

An alternative method of combining effective gifts for tax purposes with the retention of business control is a separation of business property into portions having control but limited economic benefits and portions having substantial economic benefits but limited, if any, control. The clearest example is a division of corporate stock into voting and non-voting classes. After such a separation an outright gift of the non-control property either in trust or otherwise can be made with no strings attached without disturbing the business control inherent in the retained property.

Finally, in addition to devices which directly retain in Mr. Jones unquestioned legal control through stock ownership or otherwise, various devices may be employed which, although not as certain or as secure, may in certain circumstances be quite effective. Thus, if stock is placed in a reversionary trust, Mr. Jones will retain substantial power just from the knowledge of the corporate directors and officers that in ten years and one day he will once again be in the saddle. Again, if he retains the office of president of Jones Manufacturing Company, perhaps with an employment contract carefully drawn to define his role, he will probably retain substantial practical power over the operation of the business.\(^{41}\)

Again, in some cases it will be possible for him to retain practical control over the board of directors even though he may no longer have a majority stock interest. Factors of this type do not lend themselves to generalization since they are so dependent upon the details and personalities of the particular situation. However, concentration on safer and more orthodox procedures should not lead one to overlook the possibility of such devices.

40. Administrative powers generally can give the grantor-trustee the ability in effect to shift benefits from income beneficiary to remaindermen and vice versa. It is recognized, however, that such powers and hence such ability will be contained to some degree in almost every well-drawn trust, since the court-made and statutory rules governing investment policy and other matters, in the absence of contrary provisions in the trust instrument, are so conservative and restrictive that they are generally in conflict with the best interests of the beneficiaries they are designed to protect. Accordingly, reasonable provisions of this type should create no trouble. See note 37 supra. However, in attempting to avoid trust law restrictions, legal draftsmen have gone so far in the direction of giving freedom to the trustee that the terms of some trusts, taken literally, seem to contain no restraints whatever on the trustee's ability to shift benefits. In such cases, the grantor-trustee may be held to have the forbidden power, and the trust accordingly may be included in his estate. State St. Trust Co. v. United States, 263 F.2d 635 (1st Cir. 1959). This case is unlikely to be extended very far from its facts, but it suggests the importance of making explicit some of the limits on the trustee's power which are assumed in fact and intended by the grantor.

41. Such a contract should be a reasonable business agreement. See cases cited note 38 supra.