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Leroy McWhinney

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ACCOUNTING PROBLEMS OF AN EXECUTOR UNDER A WILL WHICH ESTABLISHES A RESIDUARY TRUST

Determining the Share of the Income Distributable to the Life Tenant During the Executorship—What Constitutes True Income—Finding the "Clear" Residue.

By LEROY MCWHINNEY, *of the Denver Bar; Vice-President, The International Trust Company.*

In order to present in concrete form the problem stated in the caption of this paper, let us assume the commonplace situation of an estate in which the will disposes of the decedent's personal effects, provides for one or more cash legacies, and gives the residue to a trustee to pay the income therefrom to A (let us say the widow) for life, with remainder over to B (let us say the son), with no definition of income and no direction as to the date from which the life tenant shall receive the income. It is immaterial to our illustration whether the executor and trustee are one and the same person or institution or are different persons or institutions.

The situation thus stated is the typical groundwork for a residuary testamentary trust. After delivering the personal effects to the legatees entitled thereto, the executor will proceed to distribute the balance of such an estate about as follows:

To the expenses of the last illness and funeral, which he will pay almost immediately; to the expenses of administration, little of which will be paid until he is ready to close his final accounts; to debts, which he will discharge from time to time as allowed and funds therefor become available; to inheritance, estate and other taxes which he will pay at various dates; then to the legacies; and finally will turn over what he has left to the trustee—ordinarily about fifteen to eighteen months after the death of the testator. During the course of his executorship he may also, doubtless should, make some distributions of income to the life tenant.

As to scarcely a single one of these disbursements can the executor know in advance the amount thereof or the date when it will be made. Obviously, however, the executor may not thus complete his administration without determining what among his various receipts is true income, what, of that which is true income, is distributable to the life tenant, and what constitutes the principal or capital fund of the residue to be turned over to the trustee. It follows that these three determinations are actually involved in *every* case of a residuary testamentary trust and that few problems of mixed probate

law and accounting are of greater practical importance to both executors and their counsel.

At first approach the answer to these questions may appear simple. We are naturally impelled to say that the income in the hands of the executor is the aggregate of the dividends, interest, rents, royalties, and the like, which he receives; that the income distributable to the life tenant is all of the income received by the executor; that the residue is just what it appears to be: namely, the mass left in the executor's hands when he comes into court to settle his final accounts. Not so. Probably no one of these first blush impressions will square with the weight of authority.

In practice there is a tendency to ignore such questions, partly because they present considerable difficulty and partly because we sometimes assume that the executor's discharge will forever bury his faults, with no real damage to the life beneficiary. This latter assumption is too dangerous for comfort. It has at least once been squarely held that even though the executor has grossly under-distributed to the life tenant, the error cannot be corrected after the executor has settled his accounts, that the trustee may not make the adjustment, and that the loss to the life tenant is permanent.* It is, therefore, plainly the executor's duty to make an honest effort at correct accounting.

In the discussion which follows it will be necessary for us to make frequent reference to five factors in our problem. For the sake of brevity it seems best at the outset to christen these factors and to agree upon a definition for each, which we may do as follows:

1. *Actual Income* embraces all receipts in the nature of income or which are commonly called income.
2. *True Income* is that which the law considers to be income for a particular purpose in hand—here, as between life tenant and remainderman.
3. *Equitable Income* is that income arrived at by applying a rate of interest deemed by equity to represent a fair average return on a given class of securities during a given period.
4. *Clear Residue* is that property which does (or will) constitute the principal of the residuary trust in the hands of the trustees.
5. *Eligible Assets or Securities* are those of a character which the executor and trustee are authorized to permanently retain or to purchase.

Broadly stated, the commonly accepted doctrines with

*Selleck v. Hawley (Mo. 1932), 56 S. W. 387, 395.

reference to the three phases of the executor's accounting here under consideration may be thus summarized:

First: THE RULE FOR DETERMINING TRUE INCOME

To arrive at his true income the executor should *exclude* from his actual receipts in the general nature of income the following:

(a) Apportionable income (such as interest and rents) accrued at the date of death,
(b) All income from wasting assets,
(c) All income from ineligible investments,
(d) Requisite sums to amortize premiums on bonds purchased by the executor;

and *contra* should *include:*

Equitable income on account of wasting or ineligible assets.

Second: THE RULE FOR DETERMINING THE LIFE TENANT'S INCOME

The income available for distribution by the executor to the life tenant during the period of the executorship is that part of the true income which arises, or is deemed by equity to arise, from the clear residue—as distinguished from income arising from assets which never become a part of the clear residue. This latter class of income does not go to the life tenant, but does go to the principal of the residue.

Third: THE RULE FOR DETERMINING RESIDUAL PRINCIPAL

The residual principal is determined by deducting the amount of the life tenant's income (for the period of the executorship) from the residual mass remaining in the hands of the executor after all other distributions and disbursements have been completed. This operation should be performed by the executor. Subsequent determination by the trustee may be permissible, but in view of the holding of the Missouri court above mentioned denying such right to the trustee, it is safer to have this duty fully discharged by the executor.

Let us next consider briefly the theory of the law which underlies the rules we have just stated. There is in the somewhat confused body of decisions and text writers' statements a fairly solid core of opinion representing the weight of authority and substantially consistent with the principles adopted and announced in the Restatement of the Law of Trusts. Underlying the whole subject is the premise, thoroughly established by the best authority, that, in such a case as ours, the gift made by the testator in providing for the residuary trust is of a residue to be ascertained in accordance with the rules of equity and which the courts commonly call the "clear" residue; and a gift of the income arising from that "clear" residue. And it is likewise true that in our jurisdic-

tion, and most other jurisdictions, the right to receive this income dates from the death of the testator. It seems to me that this conception may be likened to a gift of the kernel of a nut, which gift does not include the hull or the shell. The kernel is the clear residue and the shell is that part of the gross estate which goes to pay debts, expenses, legacies, etc. By this same doctrine the kernel which is thus bequeathed to the trustee is deemed in equity to exist within the shell from the beginning: i. e., from the date of the testator's death. And furthermore, it is deemed to consist of that type of asset of which it ultimately must be made to consist: namely, of eligible assets and nothing else. Obviously, eligible assets may be of either or both of two classes which are not necessarily alike:

First—Securities owned by the testator, the *permanent* retention of which he has actually authorized in his will; and

Second—The type of securities which he has authorized the trustee or executor to purchase for reinvestment (in the absence of expressed authority, then securities authorized by statute).

We recognize, however, that the clear residue may in fact temporarily include non-eligible assets. In such case, equity will consider that these non-eligible assets have actually been converted to eligible investments as of the date of the death of the testator and that the income derived therefrom, for the purposes of accounting between life tenant and remainderman, is that income which would have been produced thereby had such non-eligible assets been so converted. The income thus arbitrarily raised by equity is equitable income, as we have already defined that phrase.

Now, if we grant the premises just stated, and such is the weight of authority, we may easily proceed to adopt the following corollaries:

1. That the income available for the life tenant is only that income arising from the clear residue or kernel (because the bequest of income is, by its very terms, of the income on the clear residue, and on that only).
2. That such income is the *actual* income produced by eligible assets (less required premium amortization), plus *equitable* income on non-eligible or wasting assets temporarily held in the clear residue.
3. That the balance of the actual income received by the executor from all sources is added to principal—is, therefore, applicable to the payment of debts, expenses, legacies, etc., and thereby, in effect, augments the clear residue.

The courts and text writers accepting these principles differ somewhat in their detailed application. For example, there are two well recognized methods of determining the amount of income available for the life tenant, or, conversely, the amount of income which is to be transferred to principal.

First Method: One group, including the authors of the Restatement of the Law of Trusts, get at it by first computing the amount of income applicable to the payment of debts, legacies, expenses, etc., which sum, once determined, they then subtract from the aggregate true income and credit the balance of the true income to the life tenant. To illustrate: Assume, for the sake of simplicity, that the various sums paid out by the executor on various dates for debts, taxes, legacies, or expenses, and the like, aggregate $20,000 and were all paid out on the same day, exactly twelve months after the testator's death. The sponsors of the first method would determine the sum which, at death, plus interest at an equitable rate for twelve months, would equal $20,000. Let us say, $19,400. They would apply $600 of the true income, plus $19,400 of principal to pay debts, expenses, etc., thereby diminishing by such $600 the income otherwise available for the life tenant, and, in effect, thereby augmenting the clear residue by the same $600. In a fairly substantial estate, with the payment of legacies and Federal estate taxes delayed for twelve months or more, this sum is substantial and important. In practice, the first (or Restatement) method, which we have just illustrated, is complicated by the variety of the sums to be paid, and of the dates upon which payment is made, and is further complicated by the fact that its application requires that the apparent or actual income in the hands of the executor be first reduced to true income in accordance with the principles above outlined.

Second Method: The other, or second method, which we may call the equitable rule, is more simple, produces about the same mathematical result and seems to have no important disadvantages. Its disciples wait until the executor is ready to file his final account, at which period the residual mass is automatically determined. They then appraise the actual residual assets and determine their present worth as of the date of the testator's death, at equitable interest. To illustrate: Assume the residual assets to be worth $103,000; the elapsed time to

be an even year; the equitable rate of interest to be 3%; divide the $103,000 by 1.03; the resulting $100,000 is the principal forming the clear residue; the $3,000 is the income distributable to the life tenant. True, the executor may have already distributed some income to the life tenant based upon his minimum estimate of the net result. If so, the amount so distributed is added to the value of the residual assets before effecting the division.*

While the limits of this article do not permit of a comprehensive review of the authorities, we may examine a few. At the outset we may note that the fundamental principle of our rule of procedure in such cases is of English origin and that the leading case is Allhusen v. Whittell, L. R. 4 Eq. 295 (1867).†

*The equitable rule, illustrated in the body of the article, contemplates a valuation of the residual assets at the time when they are ready to be turned over by the executor to the trustee. Obviously, this value may differ materially from the value (actual or theoretical) as of the date of the testator's death, and this situation seems fairly recognized by the courts, particularly in Edwards v. Edwards, 183 Mass. 581. In the Edwards case the non-eligible asset was unimproved real estate inventoried by the executor at $150,000, appraised when turned over to the trustee at $155,000, and later sold by the trustee for about $196,000. This was, therefore, a case in which the conversion of the non-eligible asset was postponed beyond the date of the transfer of the trust fund by the executor to the trustee. The court took the ultimately realized value (approximately $196,000) as the basis for determining the income of the life tenant from the date of the testator's death to the date of conversion. This seems to recognize a practice of postponing the determination of the life tenant's income on non-eligible assets until after the executor has closed his accounts. The power of the court to go back of the final settlement of the executor's accounts was apparently not challenged in this case. In the case of Mulcahy v. Johnson, 80 Colo. 499, being an equitable action against the trustees after the executor had been discharged, the court approved and directed distribution by the trustees to the life tenant of funds in the hands of the trustees which arose from income received by the executor. Apparently the right to raise such question after the closing of the executor's accounts was not presented in the case. However, in view of the doctrine announced in the case of Selleck v. Hawley (supra), the practice of postponing the determination of the life tenant's income for the period of the executorship until after the executor's accounts have been closed is not to be commended. Consequently, it is doubtless wiser, in a case where the actual liquidation or conversion of the ineligible assets does not take place during the executorship, to nevertheless settle the question of the life tenant's income for the period of the executorship at the time when the executor closes his accounts and turns over the assets to the trustee. This could have been done in the Edwards case without violence to the principle involved, if the life tenant's income attributable to the real estate during the executorship had been settled at the close of the executorship on the basis of a valuation of $155,000 and her income attributable to that source for the subsequent period intervening before the actual conversion had been settled on the basis of a valuation of $196,000.

†The syllabus in Allhusen v. Whittell reads as follows: "Where a testator has bequeathed legacies, and given his residue to a tenant for life, with remainder over, executors, though, as between themselves and the persons interested in the residue, they are at liberty to have recourse to any funds they please in order to pay debts and legacies, yet will be treated by the court, in adjusting the accounts between tenant for life and remainderman, as having paid the debts and legacies not out of capital only, nor out of income only, but with such portion of the capital as, together with the income of that portion for one year, was sufficient for the purpose."

The English doctrine is likewise stated with apparent approval in Perry on Trusts, 7th Edition, paragraph 551, page 940.‡

Perhaps the best textbook statement of the rule as now embodied in the American procedure is that by Loring in his Trustee's Handbook, 4th Edition (1928), page 154, which reads as follows:

"In general, at the time the estate comes into the trustee's hands it is all principal in whatever condition it may happen to be, and all yearly increase thereafter is income. This would always be the case if the property came to him without delay and in the form of proper trust investments. Unless the settlor provides otherwise, the life tenant is entitled to income from the time of the testator's death; therefore, when for any reason property does not come into the hands of the trustee for some time after the beginning of the trust, the fund when received will be so apportioned that the life tenant will get the proper rate of interest from the beginning of the trust, and the remainder will be the principal.

"Where the trust fund is established by a legacy, ordinarily it will not be paid over by the executors until they wind up the estate and settle their accounts. This will necessarily be so if the trust fund is the residue of the estate. The general rule as applied in such cases is to find that sum which, with interest from the date of the testator's death at the rate which it would have earned if properly invested, will with the interest added equal the sum received from the executors."

Similar statements of the rule in Cyc. and R. C. L. are cited with approval by the Supreme Court of Wisconsin. In re Leitsch's Will, 201 N. W. 284 (1924).§

‡"When the trust principal is a residue which cannot be exactly ascertained until after the payment of debts and legacies which do not bear interest during the first year after the testator's death, it has been held, and seems to be the rule in England, that the life tenant should be given, not the income of the whole estate, but the income only of so much of the estate as is ultimately to constitute the trust fund. This principal of the residuary estate is to be determined by deducting from the entire fund out of which debts and legacies are to be paid, the sum which, 'together with the income of such part for the year, will be wanted for the payment of debts, legacies, and other charges, during the year; and the proper and necessary fund must be ascertained by including the income for one year which may arise upon the fund which may be so wanted.' "

§40 Cyc. page 1882. "It is settled by the great weight of authority that in the case of a bequest of a life estate in a residuary fund, or of some aliquot part thereof, if no time is prescribed in the will for the commencement of the interest or the enjoyment of the use or income of such residue, the legatee for life is entitled to the interest or income of the *clear residue*, as afterward ascertained to be computed from the time of the death of the testator."

28 R. C. L. page 355. "So where there is the bequest of the whole or of an aliquot part of the residue of an estate to a legatee for life, remainder over, and no time is fixed by the will for the commencementof such life use, the legatee is entitled to the use or income of the *clear residue* so bequeathed, as the same may be at last ascertained to be computed from the death of the testator."

In Stanley v. Stanley, 142 Atl. 851, 855-856 (Conn. 1928), the residue was given one-half outright to Stanley and one-half to trustees to pay the income for life to A with remainder to B. The point for discussion was the disposition of the income earned on Stanley's half of the residue during the executorship, which income the court allocated to the residue; i. e., one-half to Stanley and the other one-half to the principal of the trust fund. The court said in part:

"The other one-half of the income earned (i. e., the part earned on * * * Stanley's legacy) did not belong to * * * Stanley (as income) for he was a general legatee, nor to the trustee (as income) * * * since they had received all of the income which their one-half had earned. The will does not dispose of it otherwise than by the residuary clause. Necessarily it became a part of the residue and subject to the disposition made of all the residue, one-half to * * * Stanley and one-half to the trustees * * *. * * * We are asked, in view of the conclusions reached, as to the disposition of the undisposed of income, whether it became principal or income * * *. It became part of the residue and hence principal." (Words within parentheses are explanatory and were not used by the court.)

To the same effect is the language of the Restatement of the Law of Trusts, at Section 234, paragraph g, which reads as follows:

"To the extent to which the income received by the executor during the period of administration is derived from property which is subsequently used in paying legacies and discharging debts and expenses of administration, and has not been applied to the payment of interest on such legacies, debts and expenses, the trustee is entitled to receive the same, but it should be added to principal and not paid to the beneficiary entitled to income."

Upon the method of computing the "clear" residue and the life tenant's share of the income, the authority for the *first* method mentioned above is also the Restatement at Section 234 in a later portion of paragraph g.£ The *second* method, or so-called "equitable" rule, is very clearly presented in the case of Equitable Trust Company v. Kent, 101 Atl. 875, 877-878 (Del. Chancery 1917), where the court reviews the whole problem, notes the desirability of simplification, adds a fine statement from Hill on Trustees, and approves Mr. Loring's

£See also Accounting Principles and Procedure, Lecture 45, by Charles H. Langer, C.P.A., and Harold D. Greeley of the New York Bar (published by Walton School of Commerce, Chicago, Ill.).

rule above quoted. The concluding portion of this part of the opinion reads as follows:

"The simplest, most practicable and equitable rule is that which Hill on Trustees says has the weightiest authority, and which is adopted in Loring's Trustees' Handbook at page 122 (3d ed.), viz., equitable instead of actual income—that is to say, the sum which the life beneficiary would have received at the end of a year after the death of the testator if the trust fund had been invested at a certain selected rate of interest from the death of the testator. To illustrate, if the fund was $10,000 and the interest rate be fixed at five per cent, then if that sum be divided by 105 the result, $9,523.80, will represent principal and the balance, $476.20, will represent income for one year. This latter sum being five per cent of the former. This method is the simplest because it is based on simple terms in the calculation thereof; is not dependent on the classifications of the estate by the executor; and disregards the sources from which the fund is produced. It is equitable because it is applicable to productive and unproductive assets; includes proceeds of real estate as well as personalty; disregards proportions of productivity of income; includes all kinds of income such as rents, interest, dividends and accretions; and, which is highly important, gives to the life beneficiary income for the first year unaffected by the delays of executors in administering the estate of the decedent, or in paying over and delivering the trust fund.

"It would be applicable whether there was, or was not, an equitable conversion of realty into personalty. It should also be applied in cases where the trustee by authority of the Court of Chancery takes in specie in payment of a legacy property of the decedent, * * *.

"The rate of interest should be such as a trustee by careful, conservative investment in suitable trust investments could reasonably realize as interest or income, and should not be the legal rate of interest fixed by law as between debtor and creditor. Edwards v. Edwards, 183 Mass. 581, 67 N. E. 658."

Further statements and numerous citations, both pro and con, will be found in Restatement of Trusts, Tentative Draft No. 4 (American Law Institute), pages 195-197.¶

Now it will be noted that, if the last mentioned, or *second*

¶Among the relatively recent decisions are two which hold that the life tenant of a residuary trust is entitled to the interest arising on sums, which sums were later applied to the payment of debts, legacies, etc., and are, therefore, in direct conflict with the rules cited in the body of the article. The first of these cases is Old Colony Trust Company v. Smith, 165 N. E. 657 (Mass. 1929), and the second is City Bank Farmers Trust Company v. Taylor, 163 Atl. 734 (Rd. Is. 1933). The second case relies chiefly on the first case for its authority and the applicability of all the other authorities cited by both cases is fairly subject to question. It must probably be assumed that the decision in these cases was a deliberate attempt to change the rule to effect what these courts thought to be simplicity and the increased advantage of the life tenant. In neither of these cases was there involved any question of the income from non-productive, wasting, or ineligible assets.

method is applied, it will not be necessary, in determining either the life tenant's income or the "clear" residue, to go into a determination of what part of the actual income was true income because the so-called equitable rule automatically confines the life tenant to equitable income (which will approximate the true income on the clear residue). Nevertheless, we may note in closing certain landmark authorities on the manner of determining true income, as distinguished from what is sometimes called the actual income. As a premise we may review at the outset the axiom that the trustee is under a duty to dispose of property included in the trust at the time of its creation which would not be a proper investment for the trustee to make, unless specially authorized to permanently retain such property. (Restatement of Law of Trusts, Sec. 230.) From this premise we naturally proceed to the question of the disposition to be made of the actual income received from the assets which the trustee was under a duty to sell. As above indicated, the answer is that the life tenant is entitled to equitable income on the actual or theoretical proceeds of such assets as if converted to eligibles on the day of the testator's death; that, if the actual exceeds the equitable income, the excess goes to principal; while, if the actual is less than the equitable income, the deficiency will be raised from principal. Sec. 241 of the Restatement deals with the subject as follows:

"* * * if property held in trust * * * is property which the trustee is under a duty to sell, and which produces no income or an income substantially less than the current rate of return on trust investments, or which is wasting property or produces an income substantially more than the current rate of return on trust investments, and the trustee does not immediately sell the property, the trustee should make an apportionment of the proceeds of the sale when made.

"The net proceeds received from the sale of the property are apportioned by ascertaining the sum which with interest thereon at the current rate of return on trust investments from the day when the duty to sell arose to the day of the sale would equal the net proceeds; and the sum so ascertained is to be treated as principal, and the residue of the net proceeds as income. * * * In this case the beneficiary is entitled to income calculated from the day of the creation of the trust, since the duty to sell arises at that time, although by the terms of the trust the trustee is authorized to postpone the sale or although he properly postpones the sale because the sale could not be effected immediately without undue loss to the trust."

The leading case is Hemenway v. Hemenway, 134 Mass.

446, 450-452, where the rule regarding income from non-eligible assets temporarily retained is thus stated:

"It often happens, of course, that testators leave property of a kind which executors would not be authorized to invest in * * *. In such cases, the law allows the executor a proper time for the purpose of disposing of such property. But the fact that time is allowed in order to prevent a sacrifice does not make the investment an authorized one *ad interim* in such sense as to entitle the tenant for life to the actual dividends. The conversion would be made at once, if it were practicable, and the rights of the parties are not affected by the delays. The fund is treated as if converted and the tenant for life is allowed a fixed percentage on the amount. * * * The same thing is true where a testator allows time for the same purpose."

While the rules thus stated are the more logical, are sustained by the best reasoned cases and text book authorities, and apparently constitute the only accounting system which can be squared with the conclusions so painstakingly arrived at by the authors of the Restatement of the Law of Trusts, there is much conflict in the authorities. Moreover, these rules are general principles, subject, at best, to some exceptions and some special applications, for the development of which there is no place in this outline. For example: the subject of allocation between principal and income in the case of defaulted and foreclosed mortgages, upon which there is much recent authority, some of which is highly confusing, but which may, in the main, be reconciled with the general rules of apportionment on the basis of equitable income from the date of default. See Columbia Law Review, Vol. 37, No. 1, page 61.

The modern Massachusetts rule, as established in the Old Colony Trust Company case (supra), or the similar rule recently established by statute in New York, or any one or more of numerous special rules or variations suggested by other courts, may appear to one or another of us more satisfactory than the majority rules above reviewed. In this paper, however, our object is not to devise or adopt an ideal, but to state the law as we find it. We are substantially without judicial precedent in Colorado and cannot forecast the action of our Supreme Court on these questions. The Commissioners on Uniform Laws have prepared an accounting code endeavoring to arbitrarily settle a large number of such points, but that code is undergoing considerable dispute and has been adopted by but two states. Probably we will long be without either

judicial or legislative guides in this state. In the meantime, it would seem wisest to follow the majority rules as far as practicable, yet simplifying our work whenever possible by the exercise of some foresight. Specifically, it is most respectfully suggested to the members of the bar that as they write the wills of the future they either embody an accounting code of their own or expressly give to the executor and trustee adequate powers to conduct his accounting according to his own best judgment, or according to the opinion of his counsel, making such decisions conclusive on the parties in interest.

July 25, 1937.

DEAR DICTA:

In the interest of learning rather than of the law, attention is directed to our state Supreme Court's opinion in Assurance Society vs. Hemenover, 100 Colo. 231, where at page 235 of the opinion the court quotes Mr. Justice Cordozo as having said:

> "The attempted distinction between accidental results and accidental means will plunge this branch of the law into a Serbonian bog," following which our court with delightful humor says: "Whatever kind of bog that is we concur." To which may we add the words of Webster's Unabridged:
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> "Serbonian bog: A large bog or lake in Egypt surrounded by hills of loose sand, which, being blown into it, afforded a treacherous footing; figuratively, a difficult or complicated situation; a mess; a predicament."

This is not intended in any wise as a reflection upon the undoubted learning of the Chief Justice who wrote this opinion, and who gave this graceful gesture of modesty and good humor. His opinions are too frequently adorned with references to sources of learning too deep and far removed from the browsings of the average mind to admit of such implication. As instance, in Baker vs. Couch, 74 Colo. 380, at page 382, these words of his:

> "Said contract, upon which one of the defenses is based, recited that its consideration was love and affection, but if any deity presided over this affair it is evident that it was not Athenian Venus but Babylonian Ishtar."

Sincerely yours,

W. FELDER COOK.