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THE DISPOSITION OF PROBATE INCOME: RECENT DEVELOPMENTS

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Introduction

"Probate income" is a phrase used by the courts to describe receipts from personalty[1] held by an executor[2] which come into his hands during the period between his qualification and his payment or delivery of the assets of the estate to the legatees.

The purpose of this article is to examine the sources of probate income and the claimants for it where various types of legacies are found in the will, to observe the disposition made of such income by common law and statute in each of the several situations which may be involved, and to discuss the theories on which the income is allocated.

During the last twenty years there has been a strong tendency to codify the applicable rules. Statutes prepared and advocated by corporate trustees have changed the law to a considerable extent.

A. THE SOURCES OF PROBATE INCOME

The executor may receive probate income from property left by the testator (1) which was specifically bequeathed to a legatee outright or in trust for one or more beneficiaries; (2) which turns out to be a part of the residuary estate which the will bequeaths to one or more legatees outright or to a trustee for beneficiaries; (3) which was sold by the executor during the course of his administration for the purpose of raising funds with which to pay debts of the testator, cash legacies, taxes, and expenses of administration.

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1 It is assumed that realty passes directly to the devisee and not through the executor.

2 While administrators receive income from the personal property which passes to them for distribution to next of kin, none of the problems discussed herein apply to them, it would seem. But an administrator with the will annexed is in the same class as an executor.

B. The Claimants of Probate Income

The persons claiming under the will who seek to get the benefit of probate income include legatees of cash who take it outright or as trustee, legatees of specific property other than money to whom such property is bequeathed outright or in trust, and legatees of the residue who take part or all of it outright or as trustees.

Where there are legal or equitable interests of a temporary nature, followed by remainder interests, the question arises whether, if probate income is allotted to the legacy in question, it shall belong to the tenant for life or years or to the remaindermen beneficiaries.

C. Cash Legacies: Interest or Probate Income?

If the testator has made a pecuniary legacy absolutely or to a trustee for one or more beneficiaries, should the executor pay to the legatee interest on the amount of the legacy from the date of the death of the testator or from a later date, and if so at what rate? Or should the executor pay to the legatee a portion of the probate income which has come to him from any one of the three sources mentioned above? And if the executor should pay interest or probate income, and there are temporary and remainder interests in the cash legacy, should the payment be made to the legal life tenant or to the remainderman, or in the case of a trust of cash should the trustee treat a payment of interest or income received from the executor as trust income or trust capital?

It would appear that the prevalent common law view is that interest at the legal rate should be paid to the legatee of cash, whether taken absolutely or in trust, from the date when the executor was under a duty to pay the legacy (usually one year after the death of the testator); and that in the case of temporary and remainder interests in the legacy the temporary legatee should get the interest.[3]

However, in the case of some of the statutes enacted in the last twenty years there has been a tendency to give the cash legatee a proportionate part of the probate income from the portion of the estate not specifically bequeathed.[4]

Still a third view which has received some recent statutory support is that the absolute cash legatee should receive no part of probate income, but that a trustee receiving a cash legacy should get a proportionate part of the probate income of property not specifically bequeathed, and that he should credit it to the trust income account.[5]

With respect to the problem of the award of interest or probate income to cash legatees one basis of decision would be to determine whether there is an implied direction by the testator that either one of these payments should be made. It would seem difficult to find any such intent, unless it could be argued that when one promises to pay money, or directs another to pay money on his

3 Restatement (Second), Trusts § 234(c) (1957); 4 Page, Wills §§ 1595-97 (1941); Atkinson, Wills § 135 (1937). See also the recent statutes of California, Florida, and Pennsylvania discussed below at pp. 181-82. The 1959 Illinois act denies the absolute cash legatee both interest and probate income. Ill. Ann. Stat. ch. 30, § 163 (Smith-Hurd Supp. 1959).

4 See Conn. Pub. Acts of 1959, No. 110.

5 See the statutes of Connecticut, Florida, Illinois, and Maine discussed below at pp. 181-82.

behalf, and makes no express statement about interest, he is deemed to intend that interest shall be paid at the legal rate from the date when the obligation becomes due. There is also the well-established doctrine that interest at the legal rate will be awarded as damages for the failure to pay money on the due date.[6]

In the case of the cash legacy to a trustee it may be urged that an inferred intent that the income beneficiary was to have a proportionate part of the probate income can be based on the idea that there was an intent to furnish support to the life tenant from the date of the testator's death, and that since the cash legacy must be paid from the residue the cash legatee can be said in a loose sense to have been made the owner of a proportionate part of the residue, and is entitled to the profits which his share of the residue produced. This theory may be at the bottom of the statutes giving the cash legatee a proportionate part of probate income.

It is a matter of judgment whether the distinction made in some very recent statutes between absolute cash legacies and pecuniary legacies in trust can be justified. It may be thought that if no trust is involved there is no idea of support, but merely a lump sum bounty, and that in such a case it would be very unlikely that the testator would have intended the cash legatee to have any interest in the probate income.

Insofar as corporate trustees are seeking to provide the simplest rules, so that complicated computations and consequent expense may be avoided, it would seem better to give both absolute and trust legatees of cash merely interest from a fixed date which will approximate the time for the usual payment of cash legacies, say, one year after the death of the testator.

D. Specific Legacies: Income from the Property Given

If a testator leaves specific property other than money outright to a legatee or to a trustee for two or more beneficiaries, there has never been any doubt about the right of the legatee to receive from the executor the net income from the property given which was paid to the executor during his administration. The common law[7] and the codifications[8] agree on this.

It would seem that this result can be justified on ordinary property principles, namely, that ownership includes not only the right to use directly and to sell, give away, and consume, but also the right to take any products or increase coming from the thing owned. When a testator makes a gift of specific property he intends that the donee shall become the owner from the time of the testator's death, although delivery of the thing given is to be postponed until the executor can conveniently make it.

Where the specific legacy is in substance made to two donees, one with a temporary and the other with a remainder interest, both common law and statutory rules are clear that the net probate income from the property given should be paid to the legal tenant for life or years,[9] and that a trustee of the specific

6 5 Corbin, Contracts § 1045 (1950); Restatement, Contracts § 337 (1932).

7 *In re* Mangan's Will, 100 N.Y.S.2d 65 (Surr. Ct. 1950); Alig v. Levy, 219 Ind. 618, 39 N.E.2d 137 (1942); Dennison v. Lilley, 83 N.H. 422, 144 Atl. 523 (1928).

8 See, *e.g.*, Fla. Stat. Ann. § 733.01 (Supp. 1958); Md. Ann. Code art. 93, § 391 (1957).

9 Restatement (Second), Trusts § 234(b) (1957).

property receiving such net probate income from that property should credit it to the income account of his trust.[10] Income of such a trust includes that earned from the date of the testator's death and not merely from the date when the trust is set up by the trustee. It is a reasonable inference that the testator desired the first income beneficiary to have the probate income for his support, and not that it should be held by the trustee as trust capital for the benefit of the remaindermen beneficiaries who are to come into possession at a remote date. The argument, noticed later, that the income beneficiaries are usually those closest in family relationship to the testator, and that his primary interest is in their comfortable support from the date of his death, can be applied here.

E. Trusts of, or out of, the Residue: Probate Income

Testators generally make gifts outright or in trust of the residue or some part of it. The question arises as to the disposition by the executor and testamentary trustees of net probate income which the executor has received from property owned by the testator at his death, not specifically bequeathed and not sold to pay legacies and other obligations, but rather held throughout the executorial administration, and to be delivered to the several donees of the residue, either absolute legatees or trustees.

The disposition of this probate income has never given the courts any trouble[11] and is treated with uniformity by the recent codifiers.[12] Such income is divided between the several legatees of the residue in proportion to the value of their legacies, and in the case of legal temporary and remaindermen donees the former is entitled to keep all the income paid to him by the executor, and a trustee for temporary and remaindermen cestuis should allocate the part of the probate income paid to him to the trust income account.

The principles applicable would seem the same as in the case of gifts of specific property not out of the residue. The donees of parts of the residue become owners of it, with rights deemed to have been intended to attach from the testator's death, and as owners of the property producing the income they are owners of the products or benefits coming from the principal.

Some difference of opinion may develop with regard to the expenses of executorial administration which may properly be charged to the probate income account, in order to determine net probate income. In the absence of some special provision in the probate income statute, as in the case of the 1959 Illinois Act,[13] the rules of common or statutory probate law would govern the decision of this question.[14]

There is room also for discussion as to the time when the valuation of the gifts out of the residue should be made, and the method of fixing their values. The date of the testator's death or the date when the residue is distributed by

10 Hale v. Anglim, 49 F. Supp. 837 (N.D. Colo. 1943); Mayberry v. Carey, 268 Mass. 255, 167 N.E. 281 (1929).

11 *In re* DeLaveagn's Estate, 50 Cal. 2d 480, 326 P.2d 129 (1958); Wachovia Bank & Trust Co. v. Gruff, 233 N.C. 22, 62 S.E.2d 719 (1950); *In re* Koffend's Will, 218 Minn. 206, 15 N.W.2d 590 (1944).

12 See the statutes analyzed below at pp. 181-82.

13 Ill. Ann. Stat. ch. 30, § 172 (Smith-Hurd Supp. 1959).

14 The 1958 Uniform Amendment to the Uniform Principal and Income Act leaves the question of deduction from gross probate income to the existing probate law.

the executor could be used. Discretion might be given to the executor to make valuations,[15] or the results of a valuation for death tax purposes might be made determinative.[16]

The matter is further complicated by partial distributions of the residue, which are common. The probate income which accrues and is received after a partial distribution should be divided in accordance with the values of the several parts of the residue as they existed during the period when the income was received, as determined by a valuation at either the beginning or end of that period.[17]

F. Probate Income from Property Sold by Executor

Every executor of an estate of any size where the will contains various gift provisions faces the problem as to the disposition of the income which he receives from property which was owned by the testator at his death, which has come into the hands of the executor, but which was sold by him during the course of his administration in order to raise cash with which to pay legacies, debts of the testator, death taxes, and expenses of administration. Such sales occur at intervals during the course of the executor's work, after he has collected the estate property, advertised for claims, made tax returns, had the amount of tax liability fixed, and performed other preliminary work. Several months, or even in some cases years, pass before the executor can decide what claims he must pay and what is the property which can be best used for the purpose of raising the necessary amount of cash. In the case of large estates the property which is ultimately sold for this purpose will produce thousands of dollars of income.

It has been agreed by all that this type of probate income should be paid to the donees of the residue, in proportion to the values of their shares; but there has been great controversy as to whether, where the donees of the residue consist of legal or equitable temporary and remaindermen legatees, the benefit of the payment should be treated as income or capital, should go to the donee of a legal temporary interest or to the remainderman, or in the case of a trust of part or all of the residue the trustee should credit this probate income to his trust income or capital account.

Until about twenty years ago there were two lines of common law authority, the majority view being that this probate income should be treated as capital,[18] the other view being that it should be allocated to the income account.[19]

15 The 1958 Uniform Amendment to the Uniform Principal and Income Act gives this power to the executor. The 1959 California act gives no method of fixing values. Cal. Prob. Code §§ 162, 162.5 (Supp. 1959). The Connecticut and Maine statutes direct that inventory values shall control. Conn. Gen. Stat. Rev. § 45-192 (1958); Me. Rev. Stat. Ann. ch. 160, § 35 (Supp. 1957).

16 The 1959 Illinois act uses the value at the date of the testator, unless a federal estate tax return is required, in which case that valuation shall govern. Ill. Ann. Stat. ch. 30, § 163 (Smith-Hurd Supp. 1959). A somewhat similar provision is made in the Florida statute. Fla. Stat. Ann. § 733.01 (Supp. 1958).

17 See § 3 of the 1958 Uniform Amendment to the Uniform Principal and Income Act. This question is not noticed in most of the recent statutes, but it is included in the 1959 Illinois act. Ill. Ann. Stat. ch. 30, § 163 (Smith-Hurd Supp. 1959).

18 In Proctor v. American Security & Trust Co., 98 F.2d 599 (D.C. Cir. 1938), Vinson, J., in adhering to this rule stated that it had been followed in New York, Maryland, Connecticut, Kentucky, New Hampshire, Delaware, and New Jersey at common law. For further citations see 4 Bogert, Trusts & Trustees § 811, n. 3(b) (1951). The law has been changed in some of these states by statutes, as later shown.

The majority based its decision on the intent of the testator as to the meaning of the word "residue," holding that the word meant "all property not expressly disposed of by the will,"[20] and that since probate income of property sold to pay liabilities was not expressly mentioned in the will, it was included in the residue; and that, since the testator gave the income beneficiaries of his trust only the income on the "residue," they were not entitled to this type of probate income. It would seem equally arguable that the testator meant "residue" to include that part of his estate which remained on hand at the time of distribution, after the deduction of the amounts the executor had prior thereto properly taken out of the estate. This stress on the testator's supposed intent as to the meaning of "residue" seems somewhat legalistic. It does not at all consider what construction of the words "residue" and "income" will carry out the most natural and probable purposes as to the welfare of the donees, namely, the support and comfort of those who are closest to the testator at the time of his death rather than the conferring at a distant time of a benefit on remaindermen who are generally of secondary importance to the testator.

The minority courts in the period before codification awarded this type of probate income to the legal tenants for life or years or to the income beneficiaries of trusts of the residue, and stressed inferred or imputed intent of the testator based on the greater interest of the testator in his income beneficiaries because of their nearness in blood relationship in the normal case. The emphasis in these cases was not on the meaning of "residue," but rather on what the court could find was reasonably in the mind of the testator as to the meaning of "income." These courts sought a construction of the will which would achieve the trust objectives. It may be said that this was merely giving the word "income" a meaning which the testator would have had, if his attention had been called to the question.[21]

G. Statutory Development

When the Uniform Principal and Income Act was promulgated by the National Conference of Commissioners on Uniform State Laws in 1931, although this act was supposed to cover completely problems as to benefits and burdens where legal and equitable temporary and remaindermen owners were involved, no section regarding probate income was included. This was probably an oversight and not an intentional relegation of the problem to the common law.

Illinois alone, of the states which have adopted the Uniform Principal and Income Act, took note of the omission of treatment of probate income and inserted a section to cover the matter at the time of the original adoption of the Act in 1941.[22] Under this section, which controlled from 1941 to 1959, it was provided that probate income (except income from property specifically bequeathed) was to be distributed as income to donees of the residue by trust or

19 In the *Proctor* case, *supra* note 18, the minority rule was said to prevail in Massachusetts, North Carolina, and Rhode Island. Tennessee also later adopted it. For citations see 4 Bogert, *op. cit. supra* note 18, at § 811, n. 3(c).

20 See Proctor v. American Security & Trust Co., 98 F.2d 599 (D.C. Cir. 1938).

21 See, *e.g.*, the reasoning in Wachovia Bank & Trust Co. v. Jones, 210 N.C. 339, 186 S.E. 335 (1936).

22 Ill. Ann. Stat. ch. 30, §§ 159-76 (Smith-Hurd Supp. 1958).

otherwise; that income from property sold by the executor was to be considered principal; that a donee of income was to be entitled to it from the date of the death of the testator; but that in the case of a pecuniary legacy in trust, the trustee was to be entitled to income on the amount of the legacy at the rate of return received by the executor on the whole estate from the death of the testator.

In 1958 the Commissioners promulgated an amendment to the Act[23] which, except for outright cash legacies, awards to income all of the probate income in the cases above discussed (including probate income from property sold), thus giving its support to the minority view at common law and to the statutes in several states which have followed that minority view. This amendment was adopted in two states in 1959.[24] It did not make any provision regarding interest or probate income in the case of absolute cash legacies, but provided for probate income to be paid to a trustee of a pecuniary legacy.

In recent years corporate fiduciaries have initiated a movement to systematize and clarify the law regarding probate income, incited no doubt by a desire to secure guidance where there is no case law on the subject, to make the rules regarding various situations consistent, to secure results which will be fair to legatees and to carry out what are deemed the testator's primary objectives, to prevent a variation in practice among corporate fiduciaries in the same state, to collect the law regarding all phases of the topic in one place in the statute book, to prevent the incurrence of liability through ignorance or carelessness, and to save expense and work in the course of fiduciary administration.

This was done with a knowledge that in very few cases does the testator or his lawyer give any consideration to probate income questions, with a consequence that there is usually no mention whatever of the subject in the will. Diversity of practice is common. For example, in one large western city the two largest banks until recently pursued directly opposite courses regarding probate income.

The adoption of statutes on the subject will bring the question out into the open and force consideration of it by lawyers who are drafting wills, and in some cases procure for the legatees favorable results which they would not otherwise have had, as, for example, with regard to taxes.

Statutes covering part or all of the field have been adopted in the following chronological order: New York (1931),[25] Delaware (1945),[26] Virginia (1948),[27] Maryland[28] and Pennsylvania (1949),[29] Florida (1953),[30] Connecticut (1955)[31] and (1959),[32] Maine (1957),[33] California,[34] Illinois,[35] and Vermont (1959).[36]

23 For the text of the amendment and notes thereto see 4 BOGERT, TRUSTS & TRUSTEES § 811 (Supp. 1958, n. 3).
24 VT. STAT. ANN. tit. 14, § 3303(a) (Supp. 1959); Conn. Pub. Acts of 1959, No. 110.
25 N.Y. PERS. PROP. LAWS § 17-b.
26 DEL. CODE ANN. tit. 12, § 3525 (1953).
27 VA. CODE ANN. § 55-255.1 (1950).
28 MD. ANN. CODE art. 93, § 391 (1957).
29 PA. STAT. ANN. tit. 20, § 320.753 (1950).
30 FLA. STAT. ANN. § 733.01 (Supp. 1958).
31 CONN. GEN. STAT. REV. § 45-192 (1958).
32 Conn. Pub. Acts of 1959, No. 110.
33 ME. REV. STAT. ANN. ch. 160, §§ 34-35 (Supp. 1957).
34 CAL. PROB. CODE §§ 162, 162.5 (Supp. 1959).
35 ILL. ANN. STAT. ch. 30, § 163 (Smith-Hurd Supp. 1959).

These statutes may be analyzed as follows with regard to the four problems as to probate income, noted above:

Cash: absolute gifts:	California, interest at 4% from one year after death of testator; Florida, legal interest; Pennsylvania, 3% from one year after death of testator; Illinois, no interest or probate income;
gifts in trust:	proportionate part of probate income in Connecticut, Florida, Illinois, Maine, and Pennsylvania (as to demonstrative legacies and income of property from which payable); Pennsylvania, other cash legacies in trust, 3% from death of testator until legacy paid; California (interest at 4% beginning one year after death of testator; to be income of trust when paid to a trustee);
Property Specifically Bequeathed:	net probate income of it to income: Connecticut, Florida, Illinois, Maryland, Pennsylvania, and Vermont.
Residue: Probate income from residuary property:	is trust income of residuary trusts under statutes in California, Connecticut, Illinois, Maine, Maryland, New York, Pennsylvania, Virginia, Vermont. In Delaware the trust income account is given 4% on the sum which if invested at 4% at the death of the testator would have produced the value of the residue or part of it at the time of its delivery.
Residue: Probate income from property sold by Executor:	same results as in next category above, under statutes of states there named.

H. THE RESTATEMENT OF TRUSTS

The comments to Section 234 of the Restatement of Trusts cover the problems of interest and probate income discussed above, and may be digested as follows:

Cash legacies: absolute:	interest at the legal rate from expiration of period of administration which is customarily one year from death of testator;
in trust:	a proportionate part of probate income.
Specific legacy:	net income of property given is trust income.
Residue:	probate income goes to trust income account.
Property sold by Executor:	In the 1935 edition of the Restatement (234g) income from this property was said to go to trust capital of the residuary trust. In Restatement, Second (1957), it is

36 VT. STAT. ANN. tit. 14, § 3303(a) (Supp. 1959).

stated that such income goes to trust income, referring to the changes in favor of income by statute, and to the predominance of the income rule in a majority of the states.

Section 234(g) states that income on property sold shall be treated as income of a residuary trust if it "has not been applied to the payment of interest on such legacies, debts, and expenses." This implies that the executor has the choice of using this type of probate income to pay interest or of laying it aside for distribution to donees of the residue. The recent statutes allocating such probate income to income of a residuary trust do not contain any such exception, or make any statement as to the privilege of the executor to use this type of probate income to pay interest on debts and other liabilities. It would seem probable that under these recent codifications the privilege of the executor in this respect would be left to preexisting probate law and practice.[37]

37 For a recent statute to the effect that probate income may be used by an executor to pay debts and expenses, see Nev. Laws 1959, c. 648.