Fall 9-1-1958

Two Problems In Estate Administration In Virginia: Disposition Of Income And Payment Of Interest On Legacies

Edward S. Graves

J. Frank Shepherd

Follow this and additional works at: https://scholarlycommons.law.wlu.edu/wlulr

Part of the Estates and Trusts Commons

Recommended Citation
Edward S. Graves and J. Frank Shepherd, Two Problems In Estate Administration In Virginia: Disposition Of Income And Payment Of Interest On Legacies, 15 Wash. & Lee L. Rev. 198 (1958), https://scholarlycommons.law.wlu.edu/wlulr/vol15/iss2/4

This Article is brought to you for free and open access by the Washington and Lee Law Review at Washington & Lee University School of Law Scholarly Commons. It has been accepted for inclusion in Washington and Lee Law Review by an authorized editor of Washington & Lee University School of Law Scholarly Commons. For more information, please contact lawref@wlu.edu.
TWO PROBLEMS IN ESTATE ADMINISTRATION IN VIRGINIA:

DISPOSITION OF INCOME AND PAYMENT OF INTEREST ON LEGACIES

EDWARD S. GRAVES* and J. FRANK SHEPHERD†

The executor of a decedent, operating under the high standard imposed upon all fiduciaries, must carefully and expeditiously discharge his fundamental duties of collecting the assets and paying all proper obligations of the estate, including taxes, and of distributing the entire balance to those designated by the testator to receive it. The executor will generally receive earnings upon the property held during administration, even though requirements of liquidity may make the rate of earnings comparatively small; and the earnings must be accounted for with the same meticulous care as the corpus.

The intention of the testator being the polar star to guide the executor in distributing the property and its earnings, primary reliance must be upon the provisions of the will. If the will is silent, or its provisions confused or illegal, the executor must rely upon the law. If the applicable statutes and case law fail to provide the proper guide, then the executor may, and probably will, resort to the court, of which he is temporarily serving as an officer, for instructions. Such a proceeding may well be cumbersome and expensive, and may delay the orderly completion of administration.

There is one area in which the Virginia executor, unless the testator's draftsman has been astute enough to include express directions in the will, is in quite a quandary. This area is that involving the disposition of earnings upon the property held, and the payment of interest upon gifts. The particular problems are whether the beneficiaries of different kinds of gifts are entitled to income or interest; when interest begins to be payable; and what part of income received must be added

---


to corpus (i.e., capitalized) and what part distributed. The reason why the Virginia executor is in such a quandary is that the state of the law is still, despite consideration and action by the court and the General Assembly, confused and obscure.

The questions have been discussed in several Virginia cases decided by the Court of Appeals over the last sixty years, in a carefully written opinion by Judge Brockenbrough Lamb of the Richmond Chancery Court, and a timely law review article written by Mr. Thomas C. Gordon, Jr., of the Richmond Bar. As a result of Judge Lamb’s opinion and of Mr. Gordon’s article, the Virginia General Assembly acted in the matter on two separate occasions. In 1947, it enacted our present section 64-684 and in 1948 it enacted section 55-255.1.

The enactment of the so-called marital deduction provisions in the Internal Revenue Act of 1948, with the consequent execution of numerous wills designed to take advantage of this opportunity for tax minimization, has made the entire problem even more acute.

Consequently, at the risk of repeating much of what has been discussed before, it is believed worthwhile to go over the ground again, to the end that comprehensive legislative action may possibly be taken, and that cautious draftsmen may aid testators in making certain by their wills what is uncertain in the law. It will be understood, of course, that the case and statute law are both subject to the expressed intention of the testator; and the discussion of existing law is based on the assumption that the testator has not given express directions governing the subject matter.

I. The General Law

The law in jurisdictions other than Virginia will not be discussed in detail. Suffice it to say that Professor Scott has stated that the rules generally applicable are to the following effect:

---

2Dew v. Perkinson’s Executor, Opinions of Brockenbrough Lamb 218 (1946). A reprint of this decision has been distributed by the Trust Department, First and Merchants National Bank of Richmond, Virginia.
Specific Legacies. Where a specific legacy is given outright, or in trust to pay the income to one beneficiary for life with remainder over, the legatee, or life beneficiary, is entitled to any income accruing thereon from the date of the death of the testator, even though the legacy is not payable until the end of the period of administration.7

General Pecuniary Legacies. In the case of a general pecuniary legacy given outright rather than in trust, the legatee, according to the weight of authority, is not entitled to any interest or income until the expiration of the period of administration, as fixed under applicable law.8 If the legatee is not paid at the end of the statutory period, then he is entitled to simple interest at the legal rate from the end of such period. But, if such legacy is given in trust, the legatee is “presumptive-ly entitled to income from the date of the testator’s death.”9

Residuary Gifts. A third category is the residuary disposition to a beneficiary for life or years, with remainder over. Under the weight of authority, the first beneficiary is entitled to income from the date of the death of the testator. The same rule applies to the donee of an outright gift of the residue.10

In jurisdictions that follow the English rule, any income which has accrued (prior to sale) upon residuary assets sold to pay debts or other expenses is capitalized and becomes a part of the corpus of the fund. The Massachusetts rule is that the life tenant of the residuum is entitled to income from the date of the testator’s death even on assets sold during administration.11

According to the general law, then, donees of general pecuniary legacies are entitled to receive from the estate interest beginning when administration should be completed; donees of specific legacies are entitled to income from the testator’s death; donees of gifts in trust are entitled to income from the testator’s death; and donees under the

---

7 Scott, Trusts §234 (1939).
8 Ibid. While this is stated as the generally accepted rule, and it is thought that it was at one time the rule in Virginia, attention must be called to what has been termed a possible exception. In Hite v. Hite, 23 Va. (2 Rand.) 409 (1824), it was stated that as a general rule interest on a general pecuniary legacy is payable one year from the testator’s death. However, the holding was that if such a legacy was given by a parent to his child, then the “interest” was to be computed from the date of the death of the testator only if he stood in loco parentis. See also Couch v. Eastman, 29 W. Va. 784, 3 S.E. 23 (1889). Cf. Granberry v. Granberry, 1 Va. (1 Wash.) 246 (1798), where it was stated that there was no general rule as to an executor’s paying interest.
9 Scott, Trusts §234.2, at 1278 (1939).
10 Ibid. at §234.3.
residuary clause for life or a period, or of an outright gift, are entitled to *income* from the testator's death, except that, in jurisdictions following the English rule, income earned by assets subsequently used to pay obligations of the estate is not distributable, but is added to corpus.

*Distinction between income and interest.* It will thus be seen that a distinction is made between income and interest. As these terms are used in this field, income may be defined as the earnings which accrue upon the property held as corpus; interest may be defined as an amount equal to a certain fixed percentage of the corpus of the gift, irrespective of the actual productivity of the property. Possibly in the days past, when personal representatives invested the corpus in real estate bonds, bearing the same rate of interest as the rate fixed by law, and invested the bulk of the estate immediately, it was six of one and half a dozen of the other. In these days when demands for cash during administration are high, especially for succession taxes, and the interest earned on liquid securities varies, it is highly improbable that the rate of income will equal the legal interest rate, still 6 per cent in Virginia.\(^1\)

Irrespective of this consideration, the beneficiaries entitled to income and those entitled to interest occupy different positions toward the estate. As Judge Lamb pointed out:

"The pecuniary legatee claiming interest is asserting a claim adverse to the estate, because he has no claim to any particular property, or any particular fund, which could by any stretch of the imagination be deemed to be earning income for him. He asserts his claim with equal force, and like result, whether the estate has earned income in the interim or has been wholly barren.

"On the other hand a life tenant of the residuum when he asserts claim to interim income, asserts a claim to what has been earned by the property left for his benefit; and the claim is not asserted adversely against the estate or any other beneficiary. The life tenant is claiming only the yield that was left him by the will, only what has been actually received by way of income from the particular property dedicated by the will to produce income for him; or, if he be the life tenant of the residuum, from the equity of that particular property . . ."\(^2\)

No note seems to have been taken of this difference by the highest Virginia court in the various cases in which the question has been involved.

II. The Virginia Law

Chronological Development. In discussing the Virginia authorities the preliminary observation should be made that many of the estates involved various difficulties of administration. In *Moorman v. Crockett* and *Denny v. Searles*, the testators' widows renounced the wills; in the *Denny* case, there were quite difficult problems of disposing of unproductive real estate and settling the accounts of the first fiduciary; and in *Rosenberger v. Rosenberger*, there were unexplained delays in the qualification of the executors and in the progress of administration. Doubtless some of the confusion of the law is attributable to the fact that courts are faced primarily with the duty of meting out justice to the individuals involved in the particular case; and in doing so, they quite often necessarily depart from textbook rules.

Also by way of preliminary, it is believed that, because of the confusion in the law, a chronological consideration of pertinent cases in the last sixty years will be helpful before an effort is made to state what the rules in Virginia appear to be.

The *Moorman* case, decided in 1893, involved a legacy of $10,000 (to be comprised of money, bonds and accounts receivable) *in trust* for the testator's granddaughter. Without discussing whether the beneficiary was entitled to income or interest, the court assumed that interest was payable, and addressed itself to the question of the date when interest began accruing. The decision was that the interest began one year after the testator's death. In reaching this conclusion, the court relied upon section 2706 of the Code of 1887, reading in pertinent part as follows:

"A personal representative shall not be compelled to pay any legacy given by the will, or make distribution of the estate of his decedent, until after a year from the date of the order conferring authority on the first executor or administrator of such decedent . . . ."  

Three comments should be made upon the opinion. In the first place, the court dated interest from one year after the testator's death, but cited a statute giving the date prior to which distribution could not be compelled as one year after the qualification of the executor. The

---

14See notes 1, 2, and 3 supra.
1590 Va. 185, 17 S.E. 875 (1893).
16159 Va. 701, 143 S.E. 484 (1928).
18Moorman v. Crockett, 90 Va. 185, 17 S.E. 875 (1893).
19The corresponding section is now Va. Code Ann. § 64-167 (1950), with the applicable period being six months rather than one year. (Emphasis added.)
non sequitur was not explained. In the second place, a gift in trust was treated as if it were an outright legacy. In the third place, the court did not spell out the basis for its holding; and one is left to speculation. One theory would be that the beneficiary's right to interest is based upon his showing that the personal representative was at fault in not making a distribution at the time (whenever it is) when he could be compelled to make distribution. If this is the theory, then one would expect to find some discussion of the matter. Perhaps circumstances exist which would excuse the executor for not making distribution precisely on time, and, if so, interest would run from the time when he is delinquent. At any rate, if the executor is at fault, it would seem that he should be held liable for interest, not the estate.

A second theory is that, when the time that distribution can be compelled has arrived, then the gift is transformed into something like a debt; and interest begins to run, according to the usual rule, when the debt is due. It would be somewhat difficult to persuade a testator, who regards himself as in the role of a benefactor, that he is to become legally indebted to an object of his bounty; it is believed that while he might be willing to fix a date when a beneficiary should begin to receive earnings upon the property given, he would not be pleased at a rule which transforms a donee into a creditor, entitled to demand interest at the legal rate from his estate, irrespective of what the property earns.

Eighteen years later, in Armentrout v. Armentrout, the court considered a provision by which the testator directed that $1,200 be paid to beneficiaries by his children, who were to receive his property at the termination of a life estate in his widow. The court held that the testator did not intend that his children should pay the $1,200 until after they received the property, and so the pecuniary legacies did not bear interest until the widow's death. By way of dictum, however, the court stated that the general rule is that legacies begin to bear interest one year from the testator's death.

---

20 See Denny v. Searles, 150 Va. 701, 143 S.E. 484 (1928), discussed infra at n. 25, which seems based on this theory.
2312 Va. 660, 72 S.E. 721 (1911).
24 The testator by his will devised and bequeathed his entire estate (composed chiefly of real estate) to his wife for life, with remainder in fee to four of his children and directed that the children mentioned should pay the sum of $400.00 to each of his three remaining children. The three legacies of $400.00 each constituted a charge upon the estate in remainder.
The same rule that would apply, under the *Moorman* case, to pecuniary gifts in trust would consequently apply to such gifts made outright. The *Denny* case, decided by the Special Court of Appeals in 1928, is a notable example of an opinion in which the court said the law is one way, but held another. Here, as in the *Moorman* case, there was a general pecuniary legacy to be held in trust. Again the court did not even discuss the question of the difference between income and interest (although the testator had expressly provided that *income* upon the legacy should be paid to the legatee); it even seemed at one place in its discussion to treat the two terms as synonymous. Considerable nonproductive real property was involved, which was being sold from time to time, but the court did not go into the question of allocation between life tenant and remainderman of the eventual sales proceeds. The court stated that the general rule was that the beneficiary of a legacy was entitled to *interest* beginning one year after the death of the testator, but that this rule had been changed in Virginia by a statute, which was not cited, so that interest began one year from the date of the qualification of the personal representative. Presumably the court was referring to the same section, 2706 of the Code of 1887 (carried over unchanged into the Code of 1919 as section 5437), which had been cited by the court in the *Moorman* case; and was, in reliance on this statute, changing the beginning date specified by the holding in the *Moorman* case and the dictum in the *Armentrout* case. These two latter cases, it will be recalled, stated that interest began to run one year from the testator's death. At any rate, the court went on to hold that the beneficiary of the gift of a pecuniary legacy in trust was entitled to *interest*, but only upon "the liquidated assets when they came into [the executor's] ... possession for distribution."

The court doubtless felt that special circumstances compelled a departure both from what it stated to be the general rule, and from the new Virginia rule which it created. The decision was so explained later in the *Rosenberger* case. It may, on the other hand, have acted upon the first theory above postulated: that interest is payable only from the

---

20 Va. 701, 143 S.E. 484 (1928).

*Id.* at 729.

*See 2 Scott, Trusts § 240 (1939), for a discussion of the allocation of the sales price of unproductive property between the life tenant and remainderman.

19 Va. 185, 196, 17 S.E. 875 (1893).

122 Va. 660, 664, 72 S.E. 721 (1911).

150 Va. 701, 720, 143 S.E. 484 (1928).

time a legacy is wrongfully withheld by the executor from the legatee. In the next case, however, *Missionary Society v. Children’s Hospital,* the court, considering outright general pecuniary legacies, did not take advantage of the opportunity to discuss the basis for the rules, but quoted from both cases as follows:

“In the case of *Armentrout v. Armentrout’s Executors,* 112 Va. 660, 72 S.E. 721, it is held: ‘When legacies are payable by the executors out of the estate of the decedent in his hands to be administered, the general rule is that they are payable at the end of the year from the death of the testator, with interest from that date, unless some other time is fixed by the will when interest is to begin.’

“And in *Denny v. Searles,* 150 Va. 701, 143 S.E. 484, 493, where it was argued that the rule about interest is different in Virginia from other States, this court said: ‘This position is incorrect. The rule that a legacy bears interest from the end of the year after the death of the testator is a general rule (subject to exceptions) established by the Chancellors of England and adopted by all the States so far as we have been able to discover. In Virginia, however, by statute, interest begins to run from the end of the year after the qualification of the personal representative.’”

Furthermore, the court also cast considerable doubt upon the estate’s ability to assert that special circumstances existed which excused a delay in distribution, saying:

“And this is true although the fund out of which the legacy is payable is wholly unproductive, or where the delay in the payment of the legacy, due to the fact that the validity of the will was in litigation, or the legatee himself interposed obstacles, or assets sufficient were not then available.”

The holding of the court is in accordance with the new Virginia rule created in the *Denny* case: That outright pecuniary legacies bear interest beginning one year from the date of qualification of the personal representative.

The *Rosenberger* case, decided in 1946, really did not involve interest versus income at all. The will provided for outright gifts of cash and tangible personal property; the donee, who was one of the executors, simply took possession of this property, as well as a farm in which she was given a life estate; and questions of her receiving interest thereon or income therefrom were not raised. The principal

---

23163 Va. 114, 176 S.E. 193 (1934).
24Id. at 134.
25Id. at 135.
26184 Va. 1024, 37 S.E.2d 55 (1946).
issue concerned income received upon assets in the residuum, which was left to the same donee for life and then over. The question was whether Virginia should adopt the English rule under which income accruing upon assets sold during administration to satisfy claims against the estate (debts, administration expenses and taxes) is capitalized; or should adopt the Massachusetts rule under which such income retains its character as income. In discussing this question, however, and bolstering its statement that the question had already been decided in Virginia, the court went over the Moorman, Armentrout, Denny and Missionary Society cases; cited all with apparent approval; took cognizance of the fact that section 2706 had been amended to shorten the one-year period mentioned in the statute to six months; and stated, by way of dictum, that pecuniary legacies bear interest from six months after the qualification of the personal representative. Whether the court was discussing only outright gifts, or gifts in trust as well, is not made clear; outright gifts were involved in the Armentrout and Missionary Society cases, while the Moorman and Denny cases involved gifts in trust.

Upon the issue actually involved, the court held that income accrued upon assets sold during administration to pay claims must be capitalized, thereby adopting the English rule. It went further, however, and held that income accruing during the six-month period following the date of qualification of the personal representative must also be capitalized. Its reasoning must have been that the life tenant (or the trustee for her) was not entitled to demand delivery of the assets for six months after the personal representative qualified; so the estate was consequently not "indebted" to the life tenant during this period. The remainderman certainly was not entitled to the income because his right had not accrued; therefore, since something must be done with the income, it would be added to corpus.

The case is the more interesting because the executors did not qualify until ten months after the testator died. It therefore presents a good example of the impracticability of the rule that interest begins to run from the date of the qualification of the personal representative. The rule that interest begins one year after the death of the testator at least has the advantage of uniformity; to use the date of the qualification of the personal representative is, as the Rosenberger case demonstrates, to use a variable. Judge Lamb, in the Dew case, envisions a

---

30 Id. at 1039.
31 Id. at 1027.
32 Opinions of Brockenbrough Lamb 218 (1946).
situation in which the personal representative does not qualify for four and one-half years after the testator's death. Surely no testator ever intended that the payment of interest, even if he approved the creation of a debtor-creditor relationship between the estate and a beneficiary, would depend upon the time when the personal representative happens to qualify.

At any rate, the life tenant in the *Rosenberger* case was held entitled to income accrued during the ten months intervening between the testator's death and the qualification of the executors (except upon assets later sold to satisfy claims against the estate); the income received for the next six months was capitalized; then the right of the life tenant to receive income was resumed.

Doubtless most lawyers would recoil from the prospect of explaining the law, as developed thus far, to a testator who would be careful or curious enough to inquire about the matter of interest and income during the period following his death and until the administration of his estate had been completed.

The story does not, however, end here. Later in 1946, Judge Lamb wrote his opinion in *Dew v. Perkinson's Executor*. Here, as in the *Rosenberger* case, the only question in issue was the capitalization of income. Judge Lamb held that only the income accruing upon assets sold to pay claims should be capitalized. Despite the *Rosenberger* case, he refused to capitalize other income accruing during the six-month period following the qualification of the executor; and he justified his refusal upon the ground that the *Rosenberger* case involved peculiar circumstances not appearing in connection with the estate involved. Judge Lamb expressed frankly, by way of discussion obiter, considerable concern over the Supreme Court of Appeals' application of section 2706, as amended, to any of the instant questions, as well as its failure to distinguish between interest and income. He addressed a plea to the General Assembly to clarify what was payable, and when, upon general pecuniary legacies. The Legislature responded in 1947 by enacting a statute which now appears as section 64-68 of the Code and reads as follows:

"Unless a contrary intent is expressed in or to be implied from a will, interest on pecuniary legacies shall begin to run at the expiration of one year after the date of the death of the testator."40

It will be noted in passing that the Legislature, following the example

---

40Ibid.
of the courts, did not recognize the difference between legacies given outright and those given in trust; nor did it distinguish between general and specific pecuniary legacies.

Mr. Gordon's article, which was published in May 1957, after the Dew opinion and the enactment of section 64-68, again reviewed the situation and expressed considerable concern over the confusion in the law generally, and especially the capitalization rule laid down in the Rosenberger case. He noted the opinion in the Dew case, but pointed out that it was the opinion of a lower court, and so could only be regarded as one man's interpretation of the Rosenberger case.

Mr. Gordon also concluded with an appeal to the Legislature. He recommended that the Massachusetts rule, rather than the English rule, be made effective in Virginia; and to accomplish this, that the following be enacted:

"Where an annuity or the income from property, real or personal, is given by will to or in trust for a tenant or tenants, such tenant or tenants shall be entitled to receive the same from the date of death of the testator.

"Where the whole or any part of the residuary estate is devised or bequeathed to a trust fund for a tenant or tenants, all income earned from the date of death of the testator through the period of administration by the personal representative, and not payable to others or otherwise disposed of by the will shall not be added to the principal of the residuary estate, but shall be distributed as income to the tenant or tenants entitled thereto."

In 1948 the General Assembly enacted the second paragraph of this proposed legislation, which is now codified as section 55-255.1; but unfortunately failed to adopt the first paragraph. It is strongly arguable, therefore, that the Legislature intended to leave the state of the law governing matters of income from or interest upon gifts, other than residual ones, in the condition in which the law was then; and that the Legislature did not intend that the donee of a gift in trust of other than residual property should receive income thereon from the date of the death of the testator.

The year before this legislation was enacted, that is, in 1947, the Supreme Court of Appeals decided Muse v. Muse. Section 64-68 could not be applied because the testator had died before it became effective.

---

4Mr. Gordon, The Right to Income Earned During Administration, 33 Va. L. Rev. 568 (1947). The Dew case was decided in November 1946, and § 64-68 was enacted on January 29, 1947.
41Id. at 578.
43Va. 914, 45 S.E.2d 158 (1947).
The court held that the donee of a life estate in real property was entitled to the income from the date of death; and also that the donee of a general pecuniary legacy, given outright and not in trust, was entitled to interest from one year after the testator's death. Citing the Missionary Society and Rosenberger cases as if they had clearly set out this last rule, the court said that section 64-68 had been a statutory adoption of the rule "applied" in these cases. It will be remembered that the Missionary Society case had held that interest on a general pecuniary legacy ran from one year after the qualification of the personal representative and that the Rosenberger discussion had, by way of dictum, indicated that interest ran from six months after such qualification.

This completes the chronological account; and, in view of the confused state of the law, a short summary might be helpful:

1. The donee of an outright general pecuniary legacy is entitled to interest beginning one year from the testator's death. Section 64-68; Muse v. Muse.

2. If the general pecuniary legacy is left in trust, the rule is doubtful. Should it be held that section 64-68 applies to gifts in trust, then the rule would be the same as if it were left outright. If section 64-68 does not apply, then one must trace through holdings and dicta in the Moorman, Denny, Rosenberger and Muse cases. The holding in the first was that interest was payable beginning one year after the testator's death; the holding in the Denny case was that interest was payable from the time liquid assets came into the executor's hands for distribution. The dictum in the Denny case was that interest was payable beginning six months after the qualification of the personal representative. The Rosenberger case cited both the Moorman and the Denny cases with approval; and the Muse case, in turn, cited the Rosenberger case with approval. The general rule, outside of Virginia, is that a gift of a general pecuniary legacy in trust entitles the beneficiary to income from the testator's death. Probably the rule in Virginia is that the beneficiary is entitled to interest from six months after the executor's qualification; but it is also possible that the court might follow the general rule and that it might apply the statute.

3. The donee of a specific legacy or devise is entitled to the income therefrom from the testator's death, whether the gift is outright or in trust. While Virginia authority is sparse, it is believed that the Muse case, coupled with the general law, would sustain this conclusion, unless section 64-68 of the Code was intended to apply to specific pecuniary legacies, in which event they would receive different treatment.
4. Donees of residuary gifts, outright or in trust, are entitled to income from the testator's death. This is settled by section 55-255.1 of the Code.

One more aspect of the problem should be considered. Does income mean gross or net income? Must executor's commissions on income, for example, be paid out of residuary corpus? It is believed that where the beneficiary is held entitled to income, the word means gross income; and charges that might be made against it, were the property held in trust, must be paid out of the residue. See, for example, the Rosenberger and Muse cases; and note that section 55-255.1 of the Code flatly says, "all income." To make the problem, which is complicated enough, even worse, suppose that an item of property is real estate, requiring expenses of maintenance and operation, instead of being securities requiring substantially none. Doubtless the "income" from such property, during the period it was held during administration, would be gross earnings less such expenses.

With this picture in mind, we turn to a consideration of a present-day will drafted to secure, for Federal Estate Tax purposes, the maximum marital deduction. In such a will a testator may create two gifts in the article disposing of the residuary estate, the first to the spouse, the second to the spouse or others. If this is done, section 55-255.1 furnishes clear answers: the beneficiaries are entitled to income, not interest, from the testator's death; and none of the income is capitalized.

The will may be written, however, so as to give to the spouse, outright or in trust, an amount or a portion of his property equal to one-half of his adjusted gross estate; and by a subsequent article to dispose of the residue of his property. In both cases, he should use the word "portion" rather than "amount" because of potential income tax liability.

---


48See, e.g., 3 Rabkin & Johnson, Current Legal Forms, Forms 7.12, 7.15A (1957); Modern Legal Forms §§ 9601, 9602 (alternate), 9603, 9604 (1957).

49Suisman v. Eaton, 15 F. Supp. 119 (D. Conn. 1935), aff'd, 83 F.2d 1019 (2d Cir. 1936), cert. denied, 299 U.S. 573 (1936); Durand, Draftsmanship: Wills and Trusts 70, 74 (A.B.A. Section on Real Property, Probate and Trust Law, 1957). The argument of the Internal Revenue Service would be that, where the husband leaves his wife an "amount" equal to one-half of his adjusted gross estate, the wife is entitled to receive a fixed sum when values are determined; and that this amount is like a debt.
Such a gift comprises a substantial part of the testator's estate; and the questions whether the donee is entitled to income or interest, and from what date, are not de minimis.

If the word "amount" is used, and the gift is made outright, it would seem that section 64-68 applies. The spouse is entitled to no return on the gift for one year following the testator's death; from then on, the spouse is entitled to interest. Depending on the length of administration and the rate of income, the spouse will either receive a return at a less or greater rate than is actually earned by the property ultimately distributed. So, if the estate is completely administered in a year and a half, interest will be payable at the rate of slightly over 2 per cent for the period from the testator's death to the delivery of the property. If the administration continues for four years, interest will be payable at the rate of 4\(\frac{3}{4}\) per cent for the entire period.

If the word "portion" is used, it is arguable that the gift partakes of the nature of a legacy of specific property, at least to the extent that the gift is satisfied by delivery in kind of property owned by the testator. If this is so, then the wife would be entitled to the gross income upon such property from the date of his death.

Suppose the marital deduction gift, instead of being made outright, is made in trust. If the word "amount" is used, then the same difficulties in Virginia are created which arise in the case of any general pecuniary legacy bequeathed in trust. If the word "portion" is used, the situation would be the same, except to the extent that one might take the position that property delivered in kind from the testator's holdings at his death should receive the same treatment as a specific legacy.

A somewhat tenuous argument may be made that the marital deduction gift is really a gift of part of the residuum, whether or not it is physically a part of the article of the will disposing of resid-

Unless the estate happens to have the amount in cash, and hands it over in this form, there is likely to be a variation in the "amount" and the value of securities and cash which the wife receives on the date of actual delivery. So, if the wife is entitled to $150,000, and receives cash of $10,000 and securities which were worth $130,000 on the valuation date, but were worth $140,000 on the date of delivery, the estate has satisfied the gift with less cost to itself. The analogy between this situation and that in which a debtor pays a debt with appreciated property would doubtless be urged; in the latter situation, the debtor is held, in the absence of special circumstances, to have realized income. See 1 P-H 1958 Fed. Tax Serv. par. 7254-A (1958).

The writers do not feel that the Government's position would be sound, for the reason that a gift, and not a debt, is involved. Nevertheless, the Government doubtless would derive aid and comfort from the present law that, requiring an estate to pay interest on general pecuniary legacies, appears to create a debtor-creditor relationship.

For other bothersome tax questions, see infra note 50.
uary property. It partakes of the nature of a residuary gift in being subject to the payment of all obligations of the estate (except, usually, taxes) and of being precisely ascertainable only when these obligations have been discharged. If such treatment can be given these gifts, then section 55-255.1 would at least furnish a definite answer to the problem.

III. THREE POSSIBLE SOLUTIONS

There are three possible solutions to the various problems herein discussed.

A. Litigation.

First, the problems may be presented to the Supreme Court of Appeals, which may then, in the usual way, settle them one, or perhaps several, at a time. Courts do not, however, decide questions not actually at issue; and a substantial period may elapse before sufficient cases are instituted and appeals taken therefrom on all the questions that ought to be decided.

B. Legislation.

Second, the General Assembly may enact appropriate legislation in this field. The following is suggested:

“1. Subject to contrary provisions of a will:

“a. No interest shall be payable by the estate of a decedent upon any gifts made therein, either outright or in trust, whether by way of specific, general, or residuary legacy or devise.

“b. Proper charges shall be made against gross income by the personal representative; and discretionary powers given by a testator to his personal representative to determine what constitutes principal and income and what charges shall be deducted from each shall be respected.

“c. The donee shall be entitled to no interest or income from the estate where the gift is:

“i. Property over which the personal representative does not exercise dominion, or

“ii. Nonproductive tangible personal property delivered in kind.

“d. At the time of each distribution made to satisfy a testamentary gift, the property then held by the personal representative and over which he has exercised dominion, except unproductive tangible personal property, shall be valued, and the net income received thereupon
from the testator's death to the date of distribution shall be ascertained. The distributee shall be entitled to receive the same proportion of such net income as the value of the property distributed bears to the entire property held on the date of distribution.

“e. No income received by the personal representative on property of the decedent held during administration shall be added to corpus but shall retain its character as income. All income not otherwise distributable shall be held for the account of and distribution to residuary beneficiaries.

“2. Nothing herein contained shall prevent the personal representative from making advances of income during the administration of the estate.”

The first comment, that the contrary express provisions of the testator shall govern, hardly needs to be made. Illustrative provisions that may be included in the will are set out hereafter.

As to the other provisions, it is believed, in the first place, that the payment by the estate of interest on gifts is wholly inappropriate. The testator is making gifts, not creating a debtor-creditor relationship. If interest payments exceed the average rate of return on the property held by the estate, the excess must be paid out of other assets of the estate; and the law has, in effect, compelled the testator to make a larger gift than he intended. On the other hand, if the delivery is made before interest is payable on the gift by the estate under current law, or before the interest equals the average yield of all the estate, the residuary beneficiaries enjoy the fruits of property never intended for them. It is believed that most testators, not expressing a contrary direction, would prefer that the beneficiaries share in the net earnings of all of his property during administration, and that none be singled out for preferential treatment in this respect.50

This belief leads, in the second place, to the corollary that the recipients of all gifts should equitably share in the burdens properly incurred by all the property during administration. It is, of course, not easy to determine what charges should be made against income, and what against principal, but trustees have to meet and solve the problem in the regular course of business, aided currently, it is true, by the Uniform Principal and Income Act.51 Even if the executor's task is rendered more difficult, that would seem preferable to making the

50Tax questions arise. If the interest is not an additional gift, then the recipient should report it as income, and the estate would be entitled to a deduction. If it is a gift, then adjustments should be made in inheritance taxes.
residuary beneficiaries pay, for example, executors' commissions on, or income taxes attributable to, the income given to donees of specific gifts or general pecuniary bequests. In addition, the proper accounting will be helpful when the time arrives for the preparation of income tax returns for the estate.

It is recognized, thirdly, that accurate records must be kept to make possible the reconstruction of net income earned at the time each distribution is made. If there are several specific or general pecuniary gifts, the executor may see his way clear to satisfy various of these gifts at different times during administration. Even if records are accurate, some difficulties may be encountered in an endeavor precisely to attribute income received to the assets held at each time of distribution. Since, however, the fiduciary should, in the interest of all concerned, including his own, keep as meticulous records as possible, it is not anticipated that this necessity will place an undue burden upon the personal representative.52

Also, additional valuations will be required if several distributions are made. Again, however, the fiduciary is inured to the requirement of making valuations: He makes one, rather loosely, at the time of qualification, to fix the tentative probate tax and the amount of bond; another, as accurate as possible, as of the date of death; and another (if Federal Estate Tax is payable), a year later.53 Unless the estate consists of property without a readily ascertainable market value, an extra valuation or so should not be too difficult.

The words "... held by the personal representative and over which he has exercised dominion ..." are recognized to be enigmatic and definitely to require explanation.

These words are intended to exclude real estate which descends instantly to the donee and over which the executor, even though he may have the power to do so, exercises no dominion. For example, the

52 The following cases from other jurisdictions held that the equitable procedure would be to determine the net income received during the entire administration, and divide it between all trusts in the proportion which the principal amounts of the respective trusts bore to each other during administration. In the case of a will creating a marital trust and providing for payment of all taxes from property which will comprise other trusts, the proportion will be 50-50 up to the time estate and inheritance taxes were paid; from there on, the proportion will be in favor of the marital trust. In re Beresford's Estate, 41 N.Y.S.2d 830 (Surr. Ct. 1943); In re Herrington's Estate, 101 Colo. 27, 70 P.2d 337 (1937); In re Bond's Estate, 203 Pa. Super. 553, 157 Atl. 511 (1931); In re Billings' Estate, 137 Misc. 758, 244 N.Y. Supp. 686 (Surr. Ct. 1930). The records and calculations required by the rule imposed in these cases were as complicated as those that would be required by the legislation here suggested.

testator may leave his residence to his wife outright. Unless the estate is not sufficient to pay obligations out of other assets, the executor is not going to exercise over this real estate any general power given him in the will to sell realty; in fact, he is going to have nothing to do with it. The donee of this property will not, under the proposed legislation, share in any income of the estate, for two reasons: The executor has not "held" or exercised dominion over the property; and he has not distributed it to the wife. Her chain of title is not based on any document executed by him.

Personal property, on the other hand, all goes through the executor to the ultimate beneficiary (except small sums which the holder may pay directly). Unproductive tangible personal property, delivered to the donees, is essentially in the same category as real estate over which the executor exercises no dominion. Such property should not, therefore, carry any income with it, and the proposed statute so provides. Productive tangible personal property, such as rented machinery and tangible property used in a business of the testator, is treated like other income-producing property.

There is one situation in which inequity is bound to result. If, for example, the executor delivers 100 shares of General Electric to a specific legatee immediately before a dividend is declared, the legatee will not only receive the dividend, but will also share in the net income of the estate otherwise realized. The same inequity will, however, always occur where property is delivered before, or during periods at the end of which, it will yield income; and it is not believed wise to introduce further complications into an already sufficiently complicated picture in an effort to take care of an almost inherent difficulty, which the executor can minimize, if he sees substantial injustice, by a judicious timing of deliveries.

Subsection "e" prevents the capitalization of income on assets sold to pay obligations, continuing in this respect the legislation suggested by Mr. Gordon's article. The reasons why the Massachusetts rule should be preferred over the English are so well stated in his discussion that they will not be set out again. Nor is any effort made by the pro-

---

7There is a third rule under which income received during administration is apportioned. This rule is stated in the Restatement of Trusts § 234 (1939), Comment g, as follows: "A proper method of determining the extent to which legacies, debts and expenses of administration should be paid out of principal is by ascertaining the amount which with interest thereon at the rate of return received by the executor upon the whole estate from the death of the testator to the dates of payment
posed legislation to specify what is income and what is principal, or to interfere with any discretion which the testator may have vested in the executor to make this determination. That question would require an article in itself; sufficient unto the day is the evil thereof.

It should be emphasized that, in requiring the estate to pay only average net income to beneficiaries, and never to pay interest, there is no implication that a beneficiary is precluded from seeking to impose upon a delinquent personal representative any proper sanction—loss of commissions, the obligation to pay interest, or whatnot. The liability for the misdoings of the personal representative should be placed where it belongs—i.e., on him, and not on the estate.

Paragraph 2 would make it clear that the executor is not precluded from making advancements of income during administration to those ultimately entitled to income. In these days when a year must go by before estate taxes are determined, it is not unusual for the administration to last for two years; and unless the testator has taken care of the needs of his dependents by insurance payable directly to them, or otherwise, they may very well need support before the time has arrived for ultimate distribution.

C. Drafting.

The third possibility for solving the problems is that the draftsman will bring them to the testator's attention and have him state what his wishes are. The following are suggested clauses, simplified to illustrate the point here discussed:

A1. I give and bequeath to X 100 shares of the common stock of the General Electric Company. It is my desire that such stock shall be delivered to the said X as soon as possible after my death, and that, irrespective of the date of delivery, the gross income received thereupon, without deductions for expenses of transfer charges, cost of administration, or other charges, shall be paid over to him.

A2. I give and bequeath to X 100 shares of the common stock of the General Electric Company, to be delivered to the said X upon the would equal the amounts paid. This amount is charged to principal and the balance of the amount paid is charged to income."

This third rule is that actually followed in England, where it is called the rule of Allhusen v. Whittell, L.R. 4 Eq. 295 (1867). The rule is totally impractical and would present many more pitfalls than either the Massachusetts rule or what is most frequently called in this country, and is called in this article, the English rule. See Solving Three Administration Problems Under Marital Deduction, Trusts & Estates 421 (May 1958).


58See note 21 supra.
completion of the administration of my estate, or two years from my death, whichever event first occurs. Any cash dividends upon said stock shall be disposed of as a part of the residuum of my estate.

B1. I give and bequeath to Y the sum of $5,000.00, to be paid as soon after my death as possible. If said sum is paid within six months from my death, the said Y shall be entitled to receive from my estate the said $5,000.00 only; if payment is not made within such time, the said Y shall receive interest upon said sum, at the rate of 5 per cent per annum, until said sum is paid over; said interest shall be payable out of the earnings upon the residuum of my estate or out of the principal thereof if said earnings are insufficient.

B2. I give and bequeath to Y the sum of $5,000.00. Said sum shall be payable to Y, without income or interest, upon the completion of the administration of my estate.

C1. I give, bequeath and devise to Z my office building located at 105A Main Street, together with all my tangible personal property located therein. The operation of said building shall be assumed by the said Z immediately upon my death; and she shall be entitled to all income therefrom and shall pay all expenses thereof, prorated as of the date of my death.

C2. I give, devise and bequeath to Z my office building located at 105A Main Street, together with all my tangible personal property located therein; provided, however, that until the administration of my estate is completed, my executor shall take charge of, manage and operate said property. And during such time all income therefrom shall be paid into the residuum of my estate, and all expenses thereof, including, but not restricted to, taxes, utilities, maintenance and management, shall be paid, in the order hereafter stated, out of said income, the earnings upon my residuum, and the corpus thereof.

If the testator has provided for two trusts, a marital trust in, say, Article V, and a residuary trust in Article VI, he may provide as follows:

"Article VII. The trusts created by Articles V and VI of this, my last will and testament, shall not be entitled to any interest on any of the assets thereof during the administration of my estate. The net income earned on assets held by my Executors during the administration

---

59It is recognized that no one really knows when a Virginia estate is completed. To be technical, one should provide "Upon the approval of my executor's final account," instead of "Upon the completion of the administration of my estate." And even so, "final account" should be defined as the first account so labelled, filed by the executor.
of my estate, and not otherwise disposed of by other articles of this will, shall, upon the completion of the administration of my estate, be divided between the trusts created in Article V and Article VI hereof in the same proportion in which the value of the corpus of each trust created therein bears to the value of all of the trusts created therein. The value of the corpus of each trust, for the purpose of determining the allocation of income, shall be the value finally determined for inheritance and/or estate tax purposes. Prior to such ultimate determination, my Executors, in their discretion, may make advances of income to the said trusts. None of such income shall be capitalized, whether or not the assets on which it shall accrue shall be sold during administration."

This would give the spouse a pro rata part of the net income earned by assets sold to pay obligations of the estate, and no longer attributable to any property held at the time of distribution, instead of giving all of such income to the residuary beneficiaries, as the proposed legislation provides in subsection "e."

These provisions are, of course, not intended to be either comprehensive or especially desirable; they are suggested to remind draftsmen to have the testator, if he is so minded, make up his mind one way or the other. If he is satisfied to let the law take its course, and the proposed legislation is enacted, at least the draftsman will be in a position to tell him what the law is, rather than be forced to say that the law is unsettled and he is not certain what will happen.

IV. Effects Upon Determining Income Tax

While a discussion of income tax problems of estates, like that of allocation between principal and income, is wholly beyond the scope of this article, the writers feel that the time is overdue for somebody to say in print that the determination of net income for tax purposes and the determination of what an income beneficiary is entitled to are two entirely different problems; and it is only by sheer coincidence that the two will be the same.

Gross income may be different for the two purposes. When unproductive real estate, for example, is sold during the first year of administration by an executor, no income is realized for income tax purposes. The property is evaluated at the sales price for estate tax purposes, and the basis and price are the same. No gain is realized. On the other hand, as between the life tenant and remainderman, the sales price is allocated between principal and income, and the income beneficiary of the property must be given his share.60

---

60 See note 27 supra.
Similarly, deductions may be different. Litigation costs incurred by the executor are deductible from income in the determination of income taxes. The nature of the litigation, on the other hand, may determine what part of its costs are allocated to principal and what part to income in determining the respective amounts owing to the income beneficiary and those entitled to corpus.

While the principle stated is clear, it is easy for the personal representative to be puzzled over reaching two different amounts of net income for the same year; and occasionally to dread having to account for the difference to some of the representatives of the Internal Revenue Service with whom he has to deal.

Despite the difference, there will be many items that will receive the same treatment for both determinations; and the bookkeeping required to determine how the income from estates is to be distributed, under existing law and the legislation herein proposed, will be helpful to the determination of net income for tax purposes.

V. Conclusion

The obligation of the law to approach maximum clarity increases with the responsibility which it imposes. While the income and interest problems of many estates might well be close to de minimis, and might be dismissed by one engaged in ordinary business transactions as not worth bothering about, the conscientious fiduciary feels that he has not done a good job until he has got his accounts precisely straight. Sometimes, of course, the problems are not de minimus; and, especially if infants or unborn persons are interested, the personal representatives have no alternative but to resort to court proceedings.

It is the hope of the writers that this article will stimulate the thinking of others on the subject matter; and that, eventually, the collective judgment of those affected may work out a solution that will be as satisfactory as possible, and will have the virtue of being definite.

---