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Decedent's Estates—Date of Commutation of Annuity

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contingency, the Court rested its decision directly on the *Englis* case, and held for intestacy.

It is interesting to note that the air of certainty added to the *Fabbri* decision by the presumption against intestacy was entirely dispelled in the later cases. This suggests that the facts of each case must be *a priori* sympathetic to the claimant before the rule has any efficacy.

Date Of Commutation Of Annuity

Testatrix had during her lifetime created an inter vivos trust. She held a life interest in the profits—with her children designated as the primary beneficiaries. In lieu of a right retained in the trust agreement the settlor created an annuity in her will for her husband to be paid out of the said trust. The annuity being a lien on the trust, the beneficiaries contested the validity of the said annuity and requested that if found valid it be commuted. The validity was established in a previous decision as was the right to have it commuted.⁴⁰ However, this was not until fifteen years after the settlor's death. The Court in *In re Ferris' Trust*⁴¹ was faced with the question as to the date the annuity should be computed. Should the annuitant be paid his said annuity for the years up to the date of the decision of the Court to direct the commutation and at this date award the computed value, or should the date of the settlor's death be the date of the computed value? The first alternative means a larger settlement for the annuitant because the mortality tables set a later age as the life expectancy as one becomes older.

The majority of the Court were of the opinion that the date of the settlor's death should represent the computed value. Unless otherwise provided, an annuity runs from the date of the death of the testator with the first payment due at the end of the first twelve-month period.⁴² The Court reasoned that the commutation being a substitute for the annuity it should, if possible, be computed from the same date. To alleviate some of the difference between the amount he will receive and the amount he would have received if the later date were used, the Court authorized the maximum interest on the computed value for the years of litigation.

The dissent's opinion was that the annuitant should receive his annuity for the years up to the time the Court decides the commutation should take place and at this time direct the computed value. Their reasoning stems from the idea that

40. Application of Harris, 276 App. Div. 990, 96 N.Y.S.2d 88 (1st Dep't 1950), *aff'd*, 302 N.Y. 752, 98 N.E.2d 884 (1951).

41. 3 N.Y.2d 70, 163 N.Y.S.2d 953 (1957).

42. Kearney v. Cruikshank, 117 N.Y. 95, 22 N.E. 580 (1889).

the annuity was devised to the annuitant and it is not up to the courts to give to the annuitant any more, or any less, than was designated by the testatrix. By selecting the earlier date the dissent feels the Court is awarding the annuitant less than the value of the annuity, as his life expectancy decreases at a lesser rate than his life increases. They also reason that since it was the beneficiaries of the trust who brought the action, it should not be the annuitant who suffers any loss. In support of their argument the dissent cited *Dunham v. Deraiques*,⁴³ where the date of the computed value was the date the Court awarded the commutation. In that case the annuitant had been paid fifteen installments of the annuity before commutation was directed by the Court.⁴⁴ The *Dunham* case was distinguished by the Appellate Division in that the date of commutation was not specifically litigated. Also, the fifteen payments, if credited to an earlier computed value, would have left the annuitant with little or no recovery.

With the maximum interest directed by the Court, the Court seems justified in its result in that it is preventing legal protraction from affecting the final computed value. If the date was left to the date of the courts decision it can easily be seen that it would be to the best interest of the annuitant to extend the litigation as long as possible. This would distract from the efficiency of the courts and would not be an aid to prompt judicial settlements.

Commissions For Executor's Services

An executor or administrator of a will receives as compensation for his services, in the absence of agreement to the contrary, certain fixed statutory commissions paid out of the net income of the estate, and an additional commission of the value of the estate.⁴⁵ If an executor is required to manage real property as part of his services, he is then entitled to an additional commission (6%) on the gross rentals collected.⁴⁶ The executor, by a written agreement, may agree to accept less than the statutory commissions for this service.⁴⁷

The issue was raised in *Estate of Schinasi*⁴⁸ whether or not the executor trustee (a New York City bank) had waived these additional commissions for the management of realty. The will, which created the testamentary trust, was silent as to additional fees for the realty management. However, in the intermediate accountings in the Surrogate's Court dating back to 1933, it seemed to have been assumed by all parties that the wording of the will did not preclude

43. 165 N.Y. 65, 58 N.E. 789 (1900).

44. 286 App. Div. 794, 146 N.Y.S.2d 730 (1st Dep't 1955).

45. N.Y. SURROGATE'S COURT ACT §285(1).

46. *Id.* §285(6); In re Smathers' Will, 309 N.Y. 487, 131 N.E.2d 896 (1956).

47. In re Hayden's Estate, 172 Misc. 669, 16 N.Y.S.2d (Surr. Ct. 1939), *aff'd*, 261 App. Div. 900, 26 N.Y.S.2d 490 (1st Dep't 1941), *motion for leave to appeal denied*, 285 N.Y. 858, 34 N.E.2d 920 (1941).

48. 3 N.Y.S.2d 22, 163 N.Y.S.2d 664 (1957).