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TRUSTS—CONSTRUCTION—WHETHER DEVISE OF “ANY UNDISBURSED INCOME” AFTER LIFE TENANT’S DEATH INCLUDES INCOME WHICH ACCRUED BEFORE LIFE TENANT’S DEATH—Testator’s residuary estate was put in trust to pay income, dividends and profits to the testator’s wife “so long as she shall live.” In the same paragraph the will provided that at her death the “trustee shall stand seized and possessed of said residuary estate including any undisbursed income in trust.” In a sub-paragraph the trustee was directed to “pay over the balance of said residuary estate to St. Joseph’s Hospital.” During her widowhood, testator’s wife was in Switzerland where wartime exchange controls precluded payment of income to her under the terms of the trust. Both her administrator and the residuary legatee claimed the income accumulated and held by the trustee at the date of her death. *Held*, the income in question became a part of the testator’s estate and should be paid to the hospital. A will must be construed in accordance with the testator’s intention as indicated by his language which in this instance is unambiguous; the ordinary literal meaning of “undisbursed income” is “not paid out,” and testator intended to benefit only “the chief objects of his bounty, his wife so long as she was living and the hospital.” *Rhode Island Hospital Trust Co. v. Otis*, (R.I. 1950) 75 A. (2d) 210.

In a dispute concerning income accumulated but not distributed before the death of a life beneficiary of trust income, the basic problem is to determine the nature of the life cestui’s interest as created in the trust instrument.¹ The intention of the settlor as shown by the instrument as a whole is generally recognized as governing the construction of the instrument, although certain rules of construction exist and are used in cases where the settlor’s intention cannot be ascertained.² The general form, to T on trust to pay the income to B for life and on his death to transfer the trust corpus to C, is usually construed to give the life beneficiary a vested equitable interest enforceable in a court of equity in any income accruing and paid to the trustee to the time of the life tenant’s death

¹ This problem should be distinguished from that of apportionment of trust income accruing in part during the life cestui’s life and paid to the trustee after his death. The common law rule against such allocation has been changed by statute in several states including Rhode Island. R.I. Gen. Laws (1938) c. 566, §§37, 38. On this problem see 4 BOGERT, TRUSTS AND TRUSTEES §816 (1948) and cases annotated in 126 A.L.R. 12 (1940). The issue in the principal case ordinarily arises with respect to income paid to the trustee before the beneficiary’s death and between two periodic payment dates; often it arises in conjunction with an apportionment problem, and the two situations are sometimes not distinguished by the courts. For a case in which this distinction is made, see *Horlick v. Sidley*, 241 Wis. 81, 3 N.W. (2d) 710 (1942); see also 126 A.L.R. 30 (1940).

² 1A BOGERT, TRUSTS AND TRUSTEES §182 (1948).

unless a different intention is manifested in the trust instrument.³ In the principal case the court accepted the use of the phrase "and undisbursed income" in connection with the devise of the residuary estate as an unequivocal direction to pay such funds to the residuary legatee.

The literal meaning of this additional phrase was allowed to control language ordinarily construed to give the life tenant a presently vested interest in all income collected before her death.⁴ The court cites no authority and fails to discuss the legal implications of its decision.⁵ The result obtained indicates that the life beneficiary never had an absolutely vested interest in the trust income;⁶ the alternatives are that her interest was contingent on the event of actual payment to her⁷ or that it was vested subject to being divested in the event of her death at a time when accumulated income remained in the hands of the trustee.⁸ There is nothing to indicate that the testator intended to give any discretionary power to the trustee or that the court believed him to have such power. The only reasonable inference, therefore, is that the court found her equitable interest to be vested but limited on a condition subsequent that she be alive at the time of payment.⁹ This is not an unreasonable construction. It would assure the

³ 1 TRUSTS RESTATEMENT §233 (1935); 126 A.L.R. 30 (1940); Rhode Island Hospital Trust Co. v. Noyes, 26 R.I. 323, 58 A. 999 (1904); Williams v. Bradley, 3 Allen (Mass.) 270 (1861). The trustee has a duty to pay the income to the beneficiary: 1 TRUSTS RESTATEMENT 182 (1935).

⁴ On the distinction between vested and contingent interests, see 1A BOGERT, TRUSTS AND TRUSTEES §18 (1948), and notes 2 and 3. A presumption exists in favor of early vesting. 2 SIMES, FUTURE INTERESTS §348 (1936).

⁵ ". . . we need not refer to authorities outside this jurisdiction whether favorable or opposed to the construction which we find the distinctive and different language of the will before us requires. [The] . . . cases construing other wills are often of little value unless the testamentary language under consideration imparts a special meaning in the technology of the law." The court does cite without discussion the three cases "principally relied on by the administrator": Horlick v. Sidley, supra note 1; Commercial Trust Co. of New Jersey v. Spiegelberg, 117 N.J. Eq. 171, 175 A. 164 (1934); In re Yates's Estate, 281 Pa. 178, 126 A. 254 (1924). See note 12 infra.

⁶ The court does distinguish contrary New York decisions on the basis that those decisions are completely determined by the New York law prohibiting accumulation of trust income. "The postponement of . . . vesting for however short a time would offend the statute against unlawful accumulations." Matter of Keogh, 112 App. Div. 414, 98 N.Y.S. 433 at 436 (1906). Two cases exactly like the principal case except that the gift in remainder was of corpus and "undistributed income" were decided with reference to such statutes although the decisions favoring early vesting are also justified on other grounds: In re Walbridge's Will, 192 Misc. 746, 80 N.Y.S. (2d) 676 (1948); In re Coffman's Estate, No. 2, (Pa. Orph. 1937) 31 D. and C. 93.

⁷ The implication that the life beneficiary's rights are dependent on the exercise of the trustee's power of discretion has been cited as a reason for reaching a decision contrary to the principal case: Horlick v. Sidley, supra note 1; Commercial Trust Co. of New Jersey v. Spiegelberg, supra note 5; In re Yates's Estate, supra note 5; Williams v. Bradley, supra note 3. This construction is accepted in Bank of California v. Ager, 7 Wash. (2d) 179, 109 P. (2d) 548 (1941), in which testator's wife was given an annuity for life, and on her death the trust estate "including any accumulated net income" was to go to remaindermen: "It was not the purpose of the testator to give to any of the beneficiaries any vested interest in his estate." (at 193).

⁸ Rhode Island Hospital Trust Co. v. Noyes, supra note 3.

⁹ See 2 SIMES, FUTURE INTERESTS §§351, 352 (1936); Hemenway v. Hemenway, 171 Mass. 42, 50 N.E. 456 (1898).

beneficiary a remedy against the trustee during her life and would achieve the testator's overall purpose, as found by the court, of restricting his bounty to the two beneficiaries named in his will.¹⁰ However, at least two other interpretations of the phrase "undisbursed income" are possible:¹¹ (1) income accruing from the time of the life tenant's death to the distribution of the principal to the hospital¹² and (2) income accruing in part before the widow's death but paid to the trustee after her death.¹³ The first construction is not without precedent,¹⁴ and the latter is a probability in view of the Rhode Island statute providing for apportionment of trust income received after the death of the life cestui.¹⁵ The language used is, therefore, ambiguous, and in such cases the testator's comprehensive intention or, in the absence of a showing of intention, presumptive rules of construction become decisive. But in this case the court was willing to assume, without reference to other provisions of the will or the extrinsic evidence, that the testator did not intend to benefit his wife's estate,¹⁶ and neglected any discussion of the usual construction of language implying a present gift or of the presumption favoring early vesting.¹⁷ The failure to admit of the ambiguity in the language used resulted in an avoidance of accepted principles of trust construction.

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¹⁰ "By providing that 'any undisbursed income' should become part of the residuary estate he effectively avoided the possibility of anyone coming into the enjoyment of any part of his estate except the chief objects of his bounty, his wife so long as she was living and the hospital. Since such was his dominant intention a construction of his language that is consistent with it is desirable and should be adopted."

¹¹ In *in re Yates's Estate*, supra note 5, at 182, the court in a similar fact situation considered the possibility that "accrued income" could refer to income accrued before the death of the life cestui and before payment to her, but dismissed the suggestion as "ingenious but not sound. It makes the life tenant's right depend entirely on the action or inaction of others. . . . A testator could, of course, so provide; but he who asserts it has a heavy burden to carry." No reference was made in that case to the Pennsylvania statute against accumulations.

¹² *Commercial Trust Co. of New Jersey v. Spiegelberg*, supra note 5. This interpretation is rejected in the principal case as a special rather than an ordinary meaning of the phrase.

¹³ This interpretation indicates that the language is a direction against apportionment. No cases involving the phrase "undisbursed income" are reported, but apparently synonymous phrases have been construed in this way in otherwise identical fact situations: *Horlick v. Sidley*, supra note 1 ("which would have been paid to her [or him] if living"); *Commercial Trust Co. of New Jersey v. Spiegelberg*, supra note 5 ("all accumulations thereon and all income, gains and profits thereof in the hands of the trustees"); *In re Yates's Estate*, supra note 5 ("accrued income"); *Williams v. Bradley*, supra note 3 ("all interest or accumulation"). See also note 6 supra. A similar result is indicated by the dicta in *Estate of Baldwin*, 69 Cal. App. (2d) 760, 160 P. (2d) 124 (1945) ("undistributed income"). See *Industrial Trust Co. v. Budlong*, 70 R.I. 432, 40 A. (2d) 585 (1944).

¹⁴ Supra note 11.

¹⁵ R.I. Gen. Laws (1938) c. 566, §§37, 38. Supra note 1.

¹⁶ An intention to benefit only persons named in the will was accepted as controlling in construing language similar to that of the principal case in *Bank of California v. Ager*, supra note 7, and *Kirwin v. Hall*, 169 Wash. 501, 14 P. (2d) 62 (1932). The amount of income involved and the identity of the wife's heirs are relevant considerations.

¹⁷ Supra notes 3, 4, and 9. A construction favoring life tenants has sometimes been urged: *Mulcahy v. Johnson*, 80 Col. 499, 252 P. 816 (1927); Stone, "Life Tenant v. Remainderman," 84 TRUSTS AND ESTATES 530 (1947).