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TRUST ADMINISTRATION:
APPORTIONMENT OF PROCEEDS OF SALE OF
UNPRODUCTIVE LAND AND OF EXPENSES*

HENRY BRANDIS, JR.**

This article will concern itself largely with two types of problems in the administration of trust estates: (1) problems of principal and income arising where a part of the trust res is unproductive real estate; and (2) problems concerning the apportionment between principal and income of various expenses arising in connection with the management of the trust, regardless of the type of trust res. It should be kept in mind that the discussion is almost wholly confined to cases of testamentary trusts, in which the income from the fund is willed to one beneficiary for life, and the principal of the fund is willed to another. Where such a trust is set up during the life of the settlor, and particularly where a corporate trust company is appointed trustee, many questions relating to the allocation of various items of expense are, or should be, covered by the trust agreement. The typical testator, however, not being so familiar with the trials of administration, is not so careful.

I. UNPRODUCTIVE REAL ESTATE: (A) WILLED AS A PART OF THE TRUST RES

Where the trust estate, at the time of the beginning of the trust, consists wholly or partly of unproductive realty, and that realty is subsequently sold by the trustee, the question arises as to whether the entire sale price should be considered as principal or whether it should be considered as being partly principal and partly income.

In New York the general rules are fairly well settled. Where the testator intended to effect an equitable conversion, leaving in the trustee discretion as to time of sale only, a part of the sale price is

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Compare comment in the December issue of the YALE LAW JOURNAL entitled "Apportionment between principal and income of proceeds derived from the sale of unproductive realty held in trust," 40 YALE L. JOUR. 275.—Editor.

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allocated to income. Conversely, where no such conversion is intended the whole sale price is treated as principal. It is not possible here to discuss at length what constitutes a conversion. Suffice it to say that the language of the will, the amount of solicitude manifested for the life tenant and his welfare, and the peculiar circumstances of each case will govern. It has been held that no apportionment will be made where the unproductive realty is but a negligible percentage of the entire fund; though it seems that this factor was influential upon the court’s own opinion of what the life cestui should enjoy rather than upon the court’s finding of whether or not the testator intended to effect a conversion. Where apportionment is allowed the respective portions of principal and income are ascertained by finding the sum which, placed at a certain interest at the time of the testator’s death (subject to an exception to be discussed later), would have produced the sum received at the time of actual sale. The sum so found is principal and the balance is income.

Comparatively few jurisdictions have been called upon to decide this question. The New Jersey court refused to allow apportionment, even though the unproductive property constituted eighty per cent of the trust estate, where it found that no conversion was intended and that the will contemplated that the life cestui should receive only actual rents. The Delaware court applied the rule, which it terms “equitable apportionment,” to the entire first year’s income, regardless of productivity of estate or conversional intent.


3 In re Marshall’s Estate, 136 Misc. 116, 238 N. Y. S. 763 (1930). In this case the value of the entire fund was $1,000,000.00, whereas the value of the unproductive realty was $45,000.00.


5 Equitable Trust Co. v. Kent, 11 Del. Ch. 334, 101 Atl. 875 (1917). This case contains a very lucid explanation of the mechanics of apportionment in some respects, and allowed it even though figures showing actual income were available. It is concerned, however, with a problem slightly different from that involved in the cases cited in notes 1 to 4, inclusive. It is authority only with respect to income during the year immediately following the testator’s death, and, with respect to income on unproductive realty during that time, is directly contra to such a case as Furniss v. Cruikshank, supra note 1, which allowed income to begin only within a reasonable time after the trust fund was set up.
And the Kentucky court, in a comparatively old case, refused apportionment even though a conversion was found. The Massachusetts follows the same general rules as New York, though in that jurisdiction the preponderance of cases denying apportionment indicates that it takes a very strong case to persuade the court of the wisdom of applying the rule.

The Delaware court is undoubtedly correct in so far as it negates the idea that a conversion must be found before apportionment may be had. The theory of the conversion cases is that the direction to convert indicates the testator's desire that the life cestui be benefited by actual income. Ordinarily such an intent, and an intent that the life cestui and the remainderman are to enjoy, successively, one and the same thing, are implicit in the creation of a life estate and, unless there is an express negation in the creating instrument, should be ample basis for allowing an apportionment. The proposed Uniform Principal and Income Act makes no distinction between

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6 Hite v. Hite, 93 Ky. 257, 20 S. W. 778, 19 L. R. A. 173 (1892). The decision was based largely on the grounds: (1) that conversion is an arbitrary doctrine which should not be carried so far; (2) that there was a large estate from which other income was available and the testator, not intending that the life cestui should be in any better position than himself, did not intend that the cestui should receive more than actual income. The weakness of this position is that, conceding that conversion is arbitrary, its very purpose is to place the cestui in a better position than the testator, if not immediately, at least within a reasonable time.

7 Edwards v. Edwards, 183 Mass. 581, 67 N. E. 658 (1903) (allowing apportionment); Jordan v. Jordan, 192 Mass. 337, 78 N. E. 459 (1906) (refusing apportionment); Creed v. Connelly, 172 N. E. 106 (Mass. 1930) (in which an important factor in the refusal was the small percentage of unproductive property); Green v. Crapo, 181 Mass. 55, 62 N. E. 956 (1902) (in which refusal was based upon the definition of income given in the will). See also Parkhurst v. Ginn, 228 Mass. 159, 117 N. E. 202 (1917) (apportionment refused where income was to be used to pay specified annuities and bequests to charity).

8 Throughout the article reference will be made to this Act. It is now being prepared by Dean Charles E. Clark of the Yale University Law School. The form in which a part of it is set out in this note is the fourth tentative draft, drawn the early part of the summer of 1930. It is not yet in final form, and is here set out solely for the convenience of the reader in understanding references thereto. Sections 12 and 13 are the only ones pertinent to the discussion involved in this article. The sections are as follows:

"Section 12. Unproductive Estate.
(1) Where a principal in the hands of a trustee shall consist wholly or in part of realty or shares of a corporation or bonds or other obligations for the payment of money which for a period of more than a year are not productive of income amounting to more than one percentum per annum of their value, and a sale thereof is postponed but is finally made before the principal is distributed, the tenant or, if he is dead, his representative, shall be entitled to share in the proceeds of the sale as delayed income to the extent hereinafter stated. Such income shall be the difference between the sale price and the amount which, had it been placed at simple interest at the rate of (4) (5)
cases on the basis of conversional intent. Likewise the Reporter for percentum per annum for the period during which the sale was delayed would have produced the sale price by the time of such sale, but in no event shall such income be more than the amount by which the sale price exceeds the value of such property at the time it first became a part of the principal. The sale shall be taken to have been delayed from the time when it first could have been reasonably made, which shall be presumed, in the absence of evidence to the contrary, to be one year after the trustee first received the property if then unproductive, or one year after it ceased to produce income, if it later became unproductive. During the period while the sale is delayed all expenses in connection with the property shall be paid out of principal but such of them as might have been chargeable to income had the property been productive shall be repaid with simple interest at the legal rate out of the delayed income. If the tenant has received any income from the property, or has had any beneficial use thereof, during the period while the sale has been delayed, his share of the delayed income shall be reduced by the amount of such income received, or the value of the use had. In the case of successive tenants the delayed income shall be divided among them or their representatives according to the duration of time for which each was entitled to income.

(2) This section shall apply to unproductive property not held by a technical trustee where tenant and remainderman have agreed to a postponement of the sale or the instrument creating the estates so provides, and in each case no provision is made for the disposition of the proceeds.

Section 13. Expenses.

(1) All ordinary expenses incurred in connection with the trust estate or with its administration and management, including regularly recurring taxes assessed against any portion of the principal, water rates, premiums on insurance taken upon the estates of both tenant and remainderman, interest on mortgages on the principal, ordinary repairs, trustees' compensation except commissions computed on principal, compensation of assistants, and court and other fees on regular accountings, shall be paid out of income as of the time when due and payable. The trustee may, however, distribute these expenses throughout an entire year or part thereof, or where they are of unusual amount, throughout a series of years.

(2) All other expenses, including trustees' commissions computed upon principal, cost of investing or reinvesting principal, attorneys' fees and other costs incurred in maintaining or defending any action to protect the property or assure the title thereof, unless due to the fault or cause of the tenant, shall be paid out of principal. Any tax levied by any authority, federal, state or foreign, upon profit or gain defined as principal under the terms of paragraph three of Section 3 of this Act, shall be paid out of principal, notwithstanding said tax may be denominated a tax upon income by the taxing authority.

(3) The cost of improvements of a durable nature to property held as part of the principal, including special taxes or assessments, shall be paid out of income where such improvements are not reasonably expected to outlast the estate of the tenant. Such cost, where the improvements are of a permanent nature, shall be paid out of both income and principal in the proportion which the present value of the tenant's estate bears to the present value of the estate of the remainderman. Such cost, where the improvements, though not permanent, are reasonably expected to outlast the tenant's estate, shall be paid out of income in the proportion that the present value of the tenant's estate bears to the present value of an estate of the same form as that of the tenant except that it is limited for a period corresponding to the reasonably expected duration of the improvement; the remainder of such cost shall be paid out of principal. The computation of present values of the estate shall be made on the expectancy basis set forth in the mortality tables and no other evidence of duration or expectancy shall be considered."
the Law of Property\textsuperscript{9} believes that there is no basis for any such distinction, considering that the finding of such an intent is but a confusing, preliminary gesture. It must be conceded, however, that the decided cases talk the language of conversion; though the fact that several appellate tribunals have found an equitable conversion where the lower courts could see none may indicate that the conversion is but a convenient peg upon which to hang a result.\textsuperscript{10}

The question of whether or not the value of the unproductive property as compared with the value of the entire fund should be influential presents much the same considerations. If the intent that the life cestui and remainderman are to enjoy successively one and the same thing is implicit in the creation of a life estate, then such an intent is effective with regard to the whole fund, and not merely with regard to the greater part of it. Even if we adhere to the conversion rules, if a conversion is directed, it likewise is directed, in the absence of specific expression to the contrary, as to the entire fund. And if the rule that no apportionment may be had where the proportion of unproductive property is relatively small is adopted merely as a rule of convenience, as the result of a belief that the life cestui has no real need of apportionment, then there is opened up a fruitful field of unnecessary litigation—litigation to determine just where the line is crossed and the proportion of unproductive property becomes sufficiently great. Apparently neither the proposed Uniform Act nor the Reporter for the Law of Property contemplate any such restriction upon the operation of the apportionment rule.

The question of the propriety of carrying the apportionment rule over into cases of legal life estates is one which it is not proposed here to discuss. Suffice it to say that the basic purposes involved in the creation of the two estates are the same, the chief differences being differences in the mechanics of management, and the writer sees no compelling reason why the two should not be treated alike in the

\textsuperscript{9}Professor R. R. B. Powell, of the Columbia University Law School, is now reporting, for the American Law Institute, upon the Restatement of the Law of Property. Reference is here made to it because the Reporter has under consideration applying the apportionment rule to legal life estates. And reference will be made to it in the second part of this article, dealing with expenses, because the expense problems involved in trusts and legal life estates are decidedly similar and often identical. The Restatement is still entirely tentative in form, and all reference to it is made upon the basis of conversations with Professor Powell.

\textsuperscript{10}Edwards v. Edwards, supra note 7; Furniss v. Cruikshank, supra note 1. In the latter case conversion was found even though the will gave the life tenant only net income, and all powers given the trustee were denominated by the will as discretionary.
matter of apportionment. The Massachusetts case of *Spring v. Hollander* will, however, if followed, place some practical obstructions in the way of such a transfusion. In that case a life tenant, at whose instigation a statutory trustee had been appointed, was denied a refund for taxes paid upon and denied any share in the proceeds of sale of unproductive property sold by the trustee after a lapse of time. The court points out that it is a case of a legal life estate rather than of a trust, and that the statute allowing sale provides that the proceeds shall be treated as real estate. But an important factor in the decision is the court's belief that, since a statute permitted the life tenant to force a sale of the land and thus make the estate productive, having failed to do so, she had consented to the delay and was not entitled to share in the proceeds. This limitation, if carried over into the trust cases, would not be serious in jurisdictions having statutes similar to that of New York, by which the right to make application for sale is apparently limited to the trustee. It might be very serious, however, in states having statutes allowing petition for sale by the life cestui; and it will practically nullify the possibility of carrying the apportionment rule over into a number of legal life estate cases, the number of such cases being dependent upon the jurisdictional facts necessary for application under the various statutes.

It is the writer's belief that this limitation is not well founded. Delay of sale is ordinarily made largely for the benefit of corpus, attendant gain to income being indirect and not greatly in excess of the amount by which income suffered during the period of delay. If the life cestui, or tenant as the case may be, is assured that he will eventually receive a portion of the proceeds of sale as income, he may be perfectly willing to permit the delay. But if the *Spring* case be followed he will be forced to demand immediate sale, regardless of available price and the best interests of the corpus. The proper construction of his failure to bring statutory proceedings should be that he has merely manifested a willingness to postpone the time at which he is entitled to payment of income already accrued, rather than that he has done something in the nature of a waiver.

Where apportionment is allowed its mechanics are less simple than its generalities. In the first place there is the problem of when

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261 Mass. 373, 158 N. E. 791 (1927).

27 N. Y. Real Property Law, ss. 105-107.

income should be regarded as beginning. In \textit{Lawrence v. Littlefield} and \textit{Matter of Pinkney},\textsuperscript{14} the New York court adjudged that income should begin as of the time of the testator's death. The Massachusetts court followed the same rule in \textit{Ogden v. Allen}.	extsuperscript{15} But \textit{Furniss v. Cruikshank},\textsuperscript{16} another New York decision, reached a different result. There income was figured as beginning one year after the time at which the trust fund should have been set up, on the theory that the trustees had no power of sale until after the creation of the fund, and that they had a reasonable time thereafter in which to sell. Ordinarily this would be one year after the testator's death, but in the particular case the trust was not set up until three years after such time, and hence income was treated as beginning four years after the death of the testator.

The reason for this inconsistency is not wholly apparent. Conversion based upon imperative power of sale and solicitude for the life tenant was found in all three cases. Conceding that in the first two cases the fund was actually available three years earlier than in the last case, the difference in the allowance of the year's reasonable time within which to sell is still not explained. The \textit{Lawrence} and \textit{Pinkney} cases apparently regard the conversion as reason for an exception to the one year rule, the ordinary applicability of which they recognize. It seems to the writer, however, that the \textit{Furniss} case follows the better rule. Ordinarily the testator does not believe that his real estate can be sold immediately upon his death, and his plans hardly go so far as to contemplate giving income upon unproductive parts of his estate before the end of a reasonable time within which to sell it. Further, the apportionment is an arbitrary judicial creation of income where none was before, and, though its arbitrary character is no argument against its wisdom, it seems hardly necessary to date income from a time prior to that at which it would ordinarily begin. If the \textit{Lawrence} case be logically followed there must be an apportionment in every case where the testator leaves unproductive realty as a part of the trust, even though the delay in sale be only a matter of days or weeks.

A rule different from that followed by either of these cases is that suggested by the Reporter for the Law of Property. It is that income shall begin at the time when the power effectively to convey the realty

\textsuperscript{14} Both \textit{supra} note 1.
\textsuperscript{15} 225 Mass. 595, 114 N. E. 862 (1917).
\textsuperscript{16} \textit{Supra} note 1.
becomes vested. It is based upon the theory that, while the testator intended income for the life beneficiary, he cannot be presumed to have intended income from unproductive property before the power effectively to convey such property is present.

A second problem arises when the life cestui dies before the trustee, in the exercise of his discretion as to the time of sale, has sold the realty. The Massachusetts court has refused to apportion the sale price under such circumstances on the theory that all the cestui's rights under the trust have ceased before the fund comes into existence. New York, on the other hand, apparently assumes what Massachusetts denies; namely, that the life cestui has a vested interest in this prospective income. In Matter of Pinkney, where successive life estates were provided for, the sales were made during the second tenancy. The court held that the part of the sale price allotted to income should be divided between the second tenant and the estate of the first on the ratio of their respective tenures to the entire period of delay. Such a holding is disadvantageous to the extent that it creates income for a life cestui no longer directly benefited by the creation. But this disadvantage is more than offset by the fact that it gives the cestui an eventual certainty of receiving some income, the only uncertainties being the exact time and amount of the receipt. He may be enabled to sell, or borrow upon the security of, this right, thus creating for himself actual income during the barren period of delay.

A third problem is that of interest rate. New York allows interest at the rate which the trustees could have realized from the fund had it been actually in existence. That, of course, will vary with circumstance and season, and though it attempts to approximate actual conditions it is burdened with the inconveniences of uncertainty and fluctuation. Certainty is desirable for the guidance of the trustee. A uniform fixed rate would be much more effective, despite the fact that it might be, at a given time, somewhat out of line with conditions in the securities market.

According to Furniss v. Cruikshank, Lawrence v. Littlefield cites compound interest without disapproval, though in the Furniss case

17 Ogden v. Allen, supra note 15.
18 Supra note 1.
19 Cases cited supra note 1. Massachusetts apparently follows the same rule. Edwards v. Edwards, supra note 7. The New York cases leave the rate to be fixed by the trial court; the Massachusetts case leaves it to be fixed by a master.
only simple interest was allowed because the life cestui asked for no more. Again considering the arbitrary character of the apportionment, the wisdom of compounding the interest seems extremely doubtful. Certainly if taxes during the period between conversion and sale are charged to corpus, only simple interest should be allowed.

That, in turn, raises the problem of allocating taxes. The cases say that taxes and carrying charges during the period of delay are chargeable to corpus. In Massachusetts apparently this is done by deducting them from sale price and apportioning the remainder. This does not amount to a complete reimbursement of corpus, but effects a distribution of the burden between income and principal, with the greater part of it falling, properly, upon income. The New York cases apparently apportion the sale price less costs of sale alone, leaving the taxes and carrying charges as permanent charges against corpus.

Where no apportionment is made the allocation of taxes to corpus, in so far as they are not met by whatever negligible income the property produces, is quite justifiable and is frequently done. And even where there is a conversion it is the policy of wisdom to advance funds from principal to meet taxes and carrying charges. But, in such cases, the sum should be treated merely as an advance. It is the general rule that where there is income it must meet taxes. By apportionment income is created, and no satisfactory reason appears...

It should be noted that if compound interest be allowed it raises the further problem of whether it should be calculated as compounding continuously or with periodical rests.

In Lawrence v. Littlefield, supra note 1, the court says the amounts apportioned shall equal the amount actually received upon sale. And in Furniss v. Cruikshank, supra note 1, the direction is to charge all taxes after conversion to principal. Quite obviously if such taxes be deducted from the sale price before apportionment, this is a refunding to, rather than a charging of, principal.

Spencer v. Spencer, 219 N. Y. 459, 114 N. E. 849 (1916), amended 220 N. Y. 654, 115 N. E. 1051; Matter of Vermilye, 100 Misc. 235, 166 N. Y. S. 326 (1917) (special intent also found in the will); Matter of Coombs, 62 Misc. 597, 116 N. Y. S. 1129 (1909). See also Sheffield v. Cooke, 39 R. I. 217, 98 Atl. 161, Ann. Cas. 1918E 961 (1916); Patterson v. Old Dominion Tr. Co., 149 Va. 597, 140 S. E. 810, 141 S. E. 759 (1927). The theory is that although there was no conversion the testator’s purpose was to provide support for the life tenant, and this purpose will be defeated by allowing income to be eaten up by taxes on unproductive estate. Where, however, the court finds that the testator intended his estate to be considered as a whole, and all taxes as a lump sum, all taxes must be met by income. In re Cornell’s Estate, 17 Misc. 680, 41 N. Y. S. 539 (1896) (though the amount involved in this case was relatively small), modified on other points in 15 App. Div. 285, 44 N. Y. S. 585 (1897), aff’d. as modified, 160 N. Y. 705, 57 N. E. 1129 (1899).
why it should not be charged with taxes, or why conversion should operate both to favor income by apportionment and to burden principal with tax expenditures. It seems to the writer that the correct mechanics would be to apportion the sale price less costs of sale alone, and then deduct from the income share, and credit to the share of corpus, the amount advanced for taxes and charges. As a counter credit to income account, interest on the advances should be allowed, because income from the rest of the trust has been reduced in proportion to the amounts advanced. This seems to be the most precise approximation of the relative burdens the several interests should bear.

Taxes and charges advanced during the time pending conversion were, by the New York court, charged to income. If in cases where there is no conversion, but some solicitude for the life cestui, such charges are left as permanent charges against principal, this holding seems likewise wrong. Taxes paid pending conversion are paid at a time when there is no actual income, and for which no income is subsequently created by apportionment. The situation is identical with that in which taxes are permanently charged to principal, and the same rule should be applied.

The proposed Uniform Act includes a proviso that the share allotted to income shall, in no case, exceed the amount by which the sale price exceeds the value of the property when it first became a part of the trust res. This proviso meets the objections voiced by corporate trust officers that they want no apportionment rule because of the great amount of unproductive realty in their estates which does not increase materially in value over periods of years. They fear that, in too many instances, apportionment will result in serious impairment of the inventory value of the fund. Such a limitation, however, is hardly desirable. Even leaving aside the consideration that the inventory value of land is but an arbitrary value, the limitation places the whole burden of a mistake in judgment on the part of the trustees upon income. It is in conflict with the idea that the testator intended that the life cestui and the remainderman should enjoy the same thing. And it is contrary to the principles set forth in Lawrence v. Littlefield, that case expressly denying importance to the fact that the land was eventually sold for a greater or less amount

Furniss v. Cruikshank, supra note 1. This problem is not presented by Lawrence v. Littlefield, supra note 1, as income was allowed to begin as of the testator's death, and there was no time "pending conversion."
than the inventory value. Further, when coupled with other provisions of the Act, the limitation is unsound. It is proposed, as suggested above, to charge all items, which would have been chargeable to income had the property been productive, to the share of income. To limit the gross share of income to the amount by which the property has increased in value will mean, in many cases, that income thus ascertained will be entirely offset by taxes and carrying charges, and that the life cestui will receive nothing. The essential purpose of apportionment will be thereby defeated.

The dilemma being between the denial of income on the one hand, and the impairment of a more or less arbitrary valuation of the corpus on the other, the best solution seems to be to allow apportionment regardless of the absence of any increment in value. A much less desirable alternative would be to restrict the application of the net accretion doctrine to those cases in which the Act has enlarged the application of apportionment; i.e., to those cases in which no conversion is found. The argument would be that where the testator has, in terms or by necessary implication, directed a conversion, he has manifested that his primary intent is to render the property productive. Hence the life cestui's interest should be preferred. In all other cases his intent can be argued to have been that income be created only to the extent that corpus is not thereby impaired, and the remainderman's interest should be preferred.25

The Act provides that sums advanced from principal shall be repaid with simple interest from the share assigned to income. Such a provision may be sound in legal life estate cases, for there the remainderman may have actually to make the advances from his own pocket. In the trust cases, however, it is fundamentally unsound. The remainderman has not lost the use of money. The fund is made whole before it comes into his possession. To allow him interest upon the advances is to direct an accumulation. In fact, as suggested above, the interest on the advances should rather be allowed to the life cestui, because it is he who has lost the income which would otherwise have been produced.

The other trust provisions of the Uniform Act are substantially in accord with the opinions expressed in this article. The proposals

25 If the inventory value limitation be retained as a rule of general application, the amount of taxes charged to delayed income might be reduced in proportion to the amount by which the limitation reduces such delayed income from the figure it would have reached had the method of calculation employed in Lawrence v. Littlefield, supra note 1, been employed.
of the Reporter for the Law of Property are likewise substantially in accord with the opinions herein expressed, save for the fact that he proposes to allow interest at the rate currently earned by productive realty, rather than a uniform fixed rate.

II. Unproductive Real Estate: (B) Acquired by Mortgage Foreclosure

A situation very similar to that where the unproductive property is part of the trust fund at the time of its creation is that where the trustees invest in a real estate mortgage, are forced to foreclose, buy the land to protect the estate, and eventually sell at a figure less than the total of the face of the mortgage, costs of carrying and accrued interest.

In New York and New Jersey the general rule is well settled. The sale price is apportionable on the ratio that the total amount of principal invested bears to the total amount of interest accrued, though the interest rate allowed in New York, at least, may not be as high as the rate prescribed by the mortgage. In Massachusetts, in Stone v. Littlefield, the court held that carrying charges on such property were chargeable to corpus, but the question of apportionment of sale price was not raised. In Pennsylvania there is a holding that all the sale price above the face value of the mortgage must go to income.

The mechanics of apportionment are, however, again troublesome, the chief question being that of taxes and carrying charges advanced from principal. The New Jersey case of Hagan v. Platt does not discuss the matter, but the figures given in the case indicate that no allowance was made for those charges in apportioning, and that they were left as permanent charges to corpus. The problem is not discussed by either Meldon v. Devlin or In re Myers' Estate New York cases, although in the latter, at least, carrying charges were advanced from principal.


151 Mass. 485, 24 N. E. 592 (1890).

In re Park's Estate, 173 Pa. 190, 33 Atl. 894 (1896). This, however, is not quite the same problem as apportionment. For a very peculiar case, where interest paid on a mortgage upon redemption was adjudged to be a part of principal, see Slocum v. Ames, 19 R. I. 401, 36 Atl. 1127 (1896).

Supra note 26.

Both supra note 26.
A dictum in *In re Marshall*, 31 another New York case, is more useful. There the life tenant was willing for all principal advanced to be returned, taking only the surplus. The Surrogate allowed this to be done, because interest at 5% would have been greater than the surplus. But he then remarks: “The income invested in the property is the interest which would accrue, subsequent to June 1, 1878, upon the principal locked up in the property; that is, the original amount of the mortgage, and the various amounts of principal paid out for taxes, assessments, etc., from time to time.” 32 The figures given in the case substantiate this. Interest apparently is not compounded. 32

Here again the advancement of sums from principal to meet carrying charges is entirely proper. 34 And the method of apportionment here adopted treats principal with more consideration than the method employed in the conversion cases; though even here income has been created without charging taxes directly to it. Yet the result is to some extent, at least, a reimbursement of principal at the expense of income. That interest should be allowed the life cestui upon these advances follows logically. In reality, he is only allowed income to the extent that principal is reimbursed.

With respect to the interest of deceased life cestuis the mortgage cases and the conversion cases have reached the same result, at least in New York. *In re Myers’ Estate* 35 allowed the estate of the cestui to share in the sale price. There are several possible reasons why

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31 *Supra* note 26.

32 88 N. Y. S. 550, 552.

33 In the late case of *In re Jackson’s Will*, 135 Misc. 329, 239 N. Y. S. 362 (1930), the amount of the mortgage was $9,000.00 and accrued interest, at the time of the trustee’s taking a deed to save the expense of the foreclosure, was $1,840.00. The property was held for nearly two years after foreclosure and then sold for $7,250.00. The court, purporting to follow Meldon v. Devlin, *supra* note 26, decreed that 9000/10840 of the sale price be allotted to principal and 1840/10840 be allotted to income. This departs from the dictum of *In re Marshall*, *supra* note 26, in that no mention is made of taxes and carrying charges, and income was apparently allowed no interest after foreclosure. It is not altogether clear whether taxes and carrying charges were advanced from principal or whether the property was productive during the period between foreclosure and sale. Assuming, however, that charges were advanced from principal, and that the property was unproductive, the method of apportionment used is decidedly less desirable than that suggested in the dictum in *In re Marshall*.

34 *Matter of Pitney*, 113 App. Div. 845, 99 N. Y. S. 588 (1906), aff’d. 186 N. Y. 540, 78 N. E. 1110; *Stone v. Littlefield*, *supra* note 27. But where the court interpreted “net income” given by the will as justification, such carrying charges were allocated to income. *In re Brooklyn Tr. Co.*, 92 Misc. 674, 157 N. Y. S. 547 (1915), aff’d. 173 App. Div. 948, 158 N. Y. S. 1109 (1916).

35 *Supra* note 26.
they have been treated differently in other respects, though neither of the reasons is a compelling argument for continuation of such treatment. In the first place, in the mortgage cases, definite figures are available as to the amounts of principal and income involved before apportionment is made, whereas in the conversion cases the apportionment itself determines the amounts termed principal and income. That which offers a convenient basis for calculation in the one case is the ultimate result in the other. And secondly, in the mortgage cases the property is regarded as essentially personalty at the time it becomes unproductive, and is not theoretically converted realty whose unproductivity antedates the trust.

Because of the impossibility of fixing a definite amount of principal investment before apportionment, except as such an amount may be fixed by an arbitrary estimate, it is not feasible to employ the mathematics of the mortgage cases in the conversion cases. It is possible, however, to employ the conversion method in both situations, though if the method of tax allocating adopted by the conversion cases be retained the change would be unwise. If proper adjustments, along the lines suggested above, be made for taxes and charges advanced from principal there is no compelling reason why the two situations should not be handled in the same manner. This uniformity of method would also bring with it, of course, the desirable uniform fixed interest rate. The Uniform Act wisely does not attempt to differentiate between the two situations. Section 12 is drawn in such terms as to cover both.

III. EXPENSES

The allocation of various expenses, without reference to the type of trust res, is rather decidedly a matter for individual cases, though there are certain generalities which are useful in the typical testamentary trust. The phrasing of each instrument is, of course, of cardinal importance, with particular attention being paid to such

96 Those cases termed the "mortgage cases" include only cases where the trustees invest in a mortgage and have to foreclose. There the property is personalty to begin with and is treated as remaining so. Where the trustees had a discretionary power of sale over realty, and there was no conversion, and they sold, taking a purchase-money mortgage, later having to foreclose, there was no apportionment of the eventual sale price. The property was regarded as having remained realty until the time of final sale. See Burnett v. Witschief, 96 N. J. Eq. 71, 126 Atl. 23 (1924). The life tenant was, however, allowed net yearly income on the land during the time when the mortgagor was in possession upon a basis of net yearly income during the time of possession by the tenant and the executors.
phrases as "net income" to ascertain whether, as supported or modified by other language, they indicate an intent to make all expenses chargeable to income account.

Taxes and Ordinary Carrying Charges

In general all ordinary taxes and carrying charges, with the exception of those discussed in the first part of this article, are charged to income. Interest on incumbrances is usually regarded as a carrying charge, but not always. Thus where the trustee borrowed money to buy land in order to protect the estate's interest in a partnership, and the land was afterward sold at a profit, interest on the loan was charged to corpus, even though in the same case taxes on unproductive real estate were charged to income. The logic of the holding is that it would be inequitable to burden income with the expense of enlarging the corpus.

Insurance premiums, usually classified as ordinary carrying charges, have met with a varying treatment. In New York, Matter of Albertson apparently charged such premiums, without discussion, to income; and Stevens v. Melcher charged them to income because part of the insurance was necessitated by clauses in incumbrances, thus making payment of the premiums comparable to the payment of mortgage interest, and because it did not appear that the remaining insurance covered more than the life cestui's interest. The case says nothing concerning what should be done about later payments, when the cestui's interest will be less valuable. But Peck v. Sherwood and Kirchner v. Kirchner both hold the premiums apportionable.

The authorities at large likewise reach conflicting results. Perhaps the best result is that reached by the Washington court in Stahl v. Schwartz. The rule there is that the premiums should be apportioned on the ratio of the benefits insured; that is, on the ratio of the life tenant's expectancy to the expectancy of the building or other

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88 113 N. Y. 434, 21 N. E. 117 (1889).  
89 152 N. Y. 551, 46 N. E. 965 (1897).  
90 56 N. Y. 615 (1874).  
91 71 Misc. 57, 127 N. Y. S. 399 (1911).  
92 Kearney v. Kearney, 17 N. J. Eq. 59 (1864) (where the court held premiums apportionable according to the respective interests insured); Grace v. Reed, 143 Miss. 427, 108 So. 799, 47 A. L. R. 516 (1926) (where premiums were charged to the life tenant); and note.  
93 81 Wash. 293, 142 Pac. 651 (1914).
property insured. Just how this is worked out does not appear, but the correct method should be first to ascertain, upon the basis of the comparative expectancies, the value of the life cestui's interest, and then charge income with that portion of the premium which, upon the ratio of the cestui's interest to the face of the policy, is necessary to provide insurance for that interest. The portion allocated to income by this method will, where premiums are annually recurrent, gradually decrease each year, as the cestui's expectancy shortens. The Uniform Act assigns premiums on the interests of both income and remainder to income. This perhaps has the advantage of simplicity, but takes no account of respective benefits.

There are also variations in the handling of taxes. The courts will charge taxes to principal where such an intent appears in the will. They will also charge the taxes on unproductive property to corpus, though this is not always done. Strong language is necessary to reach such a result; and even where exemption from taxation on specific property is given the life tenant, if the form of that property is changed the court may require the tenant to assume the tax burden. But taxes which are not annually recurrent, but are special taxes on certain transactions—such as the sale of the property at a profit—should be charged to corpus, even though termed an "income tax." This is the attitude taken by the Uniform Act.

**Assessments**

Special municipal assessments for improvements such as paving, sidewalks and sewers are not taxes in the ordinary sense, and are not to be charged to income merely because the will says that all taxes are so payable. But whether or not they are apportionable, and if

43 This and all further references to the Uniform Act refer to Section 13. Clarke v. Clarke, 145 N.Y. 476, 40 N.E. 220 (1895). And for cases where taxes were declared to be payable from the residuary estate, see Matter of Tracy, 179 N.Y. 501, 72 N.E. 519 (1904), and Matter of King, 183 N.Y. 440, 76 N.E. 584 (1905). But little short of positive direction will justify charging ordinary taxes to corpus. Woodward v. James, 113 N.Y. 346, 22 N.E. 150 (1889). See also Desraimes v. Desraimes, 72 N.Y. 154 (1878).

44 Cases cited supra notes 23 and 34. See also Hite v. Hite, supra note 6.

45 Patterson v. Vivian, supra note 2. There the testator's widow was given a life estate in the homestead free of taxes. She sold it, putting the money in trust, and the court held that she must pay taxes on the trust.

46 By In re Fargo's Estate, 68 Misc. 273 (1910), 72 Misc. 305 (1911), 125 N.Y.S. 768, "all items relating to the sale of real estate" are chargeable to principal. This is apparently broad enough to cover any "income tax," though it is not specifically enumerated with other items listed.

47 Chamberlin v. Gleason, 163 N.Y. 214, 57 N.E. 487 (1900).
so how, are questions entirely divorced from the will unless covered by specific language.

In the first place it should appear that the improvement is permanent in the sense that it may reasonably be expected to outlast the estate of the life beneficiary. There is a marked tendency to consider as permanent any improvement for which a special assessment is levied. Quite obviously this is not the case. A more preferable attitude is manifested in the Connecticut case of Appeal of Wor-din.50 There the court charged to income an assessment for asphalt pavement, saying: "... in the absence of evidence to show that this particular pavement had especial qualities of durability, the superior court might properly take judicial notice of the usual effect of time and use in our climate upon asphalt on the streets of a populous city. The life tenant is a man of middle age. The tables of mortality indicate that he may outlast the pavement, and the added value which it gives the land be entirely exhausted in increasing the income which he enjoys. Remaindermen are not ordinarily chargeable with conjectural and uncertain benefits which they may never receive."51

Assuming that the improvement for which the assessment is levied has been decided to be permanent, payment has been provided for, by the cases, in several ways. There are cases which: (1) charge the entire assessment to corpus, on the theory that income, because it is thereby decreased, bears a part of the burden;52 (2) charge the principal with the assessment, with an annual charge thereafter against income as interest;53 (3) decree apportionment, but do not specify in what manner it shall be made;54 and (4) apportion the assessment by means of the Northampton tables, on the ratio of the present values of the life estate and the remainder.55

50 71 Conn. 531, 42 Atl. 659, 71 Am. St. Rep. 219 (1899).
51 42 Atl. 659, 661.
52 Peltz v. Learned, 70 App. Div. 312, 75 N. Y. S. 104 (1902) (sewers and brick pavement); Sheffield v. Cooke, supra note 23 (sewer, grading and curbing); Spencer v. Spencer, supra note 23 (unspecified local improvements).
53 Plympton v. Boston Dispensary, 106 Mass. 544 (1871) (cost of opening new street); Wordin's Appeal, supra note 50 (dictum) (cost of paving). See also Chamberlin v. Gleason, supra note 49, and Stilwell v. Doughty, 2 Bradf. (N. Y.) 311 (1833), where the assessments were payable in installments, and the court charged the principal of the installments to corpus and the interest thereon, while the respective installments were maturing, to income. In the former case it was held that, since the tenant was 69, the question of whether he should continue to pay interest after the installment had been paid was unimportant.
54 Peck v. Sherwood, supra note 40.
55 Kirchner v. Kirchner, supra note 41.
At least eight states have statutes governing assessments which, while in terms referring to legal life estates, are presumably applicable to trust estates also. One of these, probably five of the others, and perhaps a seventh, are designed to adopt the method last listed above. The statutes, in the order referred to, are those of North Carolina, California, Idaho, Oklahoma, South Dakota, Montana and Ohio.

North Carolina provides that where assessments are levied for permanent improvements, such as "paving streets and sidewalks, laying sewer and water lines, draining lowlands, and permanent improvements of a like character," the assessment shall be paid by the life tenant and the remainderman "pro rata their respective interests in said real estate." It further provides that in calculating the respective interests the expectation of the life tenant shall be ascertained by the use of the "mortuary table, as near as may be justly and fairly done." This is the most specific of all the statutes, not only prescribing the procedure of apportionment, but also making some attempt to define "permanent improvements."

California, Idaho, Oklahoma, South Dakota and Montana, in identical statutes, are content with saying that the life tenant shall pay "a just proportion of extraordinary assessments benefiting the whole inheritance." The mechanics of apportionment are thus left largely to judicial selection, but it is probable that the proportions are intended to conform to the relative values of the estates. Ohio, upon petition by the life tenant, allows apportionment "in proportion to the relative value of the improvement to their estates, respectively, to be ascertained by the court on principles of equity." This statute differs from the others to the extent that it makes apportionment depend upon relative values of improvements rather than upon relative values of estates.

Louisiana, the eighth state, has the most peculiar statute on the subject, providing that where value is added to the property by an assessment "the usufructuary is bound to pay it, and shall be reim-
bursed by the owner at the termination of the usufruct, for the capital expended only.”

The method of apportionment on the ratio of the relative values of the estates, adopted by some of the cases and at least by the North Carolina statute, is fundamentally unsound. In the first place, it creates a tendency to disregard the question, which should be the primary one, of whether the improvement will probably outlast the life cestui. This is particularly true of the North Carolina statute because, by its enumeration of examples of improvements, it practically precludes, in those particular cases, inquiry into the probable duration of the improvement. And in the second place, even if the primary question be first decided, the method does not differentiate between cases in which the improvement will probably outlast the life cestui by one year and cases in which its duration will exceed that of the life estate by a number of years.

The method which should be employed, at least in trust estates, is as follows: (1) pay the assessment from corpus; (2) determine, from the date the assessment becomes a lien, the relative expectancies of the cestui and the improvement; (3) assign an amount, to be ultimately paid by income, which bears the same ratio to the whole assessment as the cestui’s expectancy bears to the improvement’s expectancy; (4) amortize over the period of the cestui’s expectancy, in equal annual installments and without interest, the amount so assigned to income; and (5) provide that, if the cestui outlive his expectancy, the annual installment continue to be deducted from income until the cestui die or the entire assessment be paid, whichever event shall first happen. The fourth and fifth provisions, regarding amortization, are adopted to minimize the arbitrary character of the use of the life tables.

The provisions of the Uniform Act are very similar to the suggestions outlined above. However, the Act retains the rule that apportionment shall be made on the ratio of the values of life estate and remainder in cases of real permanent improvements. It may be that this retention will require much judicial interpretation to determine whether a given improvement is “permanent,” or whether it is “not permanent,” but “reasonably expected to outlast the tenant’s estate.” There is no reason why the rule adopted in the latter class of cases should not apply to both classes. Further, it would be wise to include, in Sub-section (3) of Section 13 a provision for amortization in trust cases.
The proposals of the Reporter for the Law of Property are also similar to the suggestions herein. Like the Uniform Act, however, rather than apportionment directly upon the ratio of the expectancies of the life estate and the improvement, he proposes apportionment upon the ratio between the proportionate parts of the fee simple absolute constituted by the life estate and the improvement. The life tenant is to pay "the fractional part of the special assessment ascertained by dividing that per centage of an estate in fee simple absolute which the estate for life constitutes, by that per centage of an estate in fee simple absolute which the life of the improvement constitutes." Because the machinery available in the trust cases is not available in the legal life estate cases, amortization cannot be insisted upon in the latter.

**Improvements and Repairs**

Closely allied with the problem of assessments is the problem of permanent improvements other than those necessitated by municipal projects. On principle there should be no difference between the handling of the two situations, and yet there has been some in practice. Where the improvement consists of an entirely new building the usual procedure is to charge the cost to principal, on the theory that the entire cost is merely a reinvestment, and that to apportion would be, in effect, to set up a reserve for depreciation, a procedure not necessary when the asset was left by the testator. But where

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This rule extends also to cases where the expenditure is to put property left by the testator or purchased by the trustees into tenantable condition. Deckelman v. Braunsdorf, 84 Hun 476, 32 N. Y. S. 404 (1895); Smith v. Keteltas, 32 Misc. 111, 66 N. Y. S. 260 (1900), aff'd. 62 App. Div. 174, 70 N. Y. S. 1065 (1901); Greene v. Greene, 19 R. I. 619, 35 Atl. 1042, 35 L. R. A. 790 (1896). See also Jones v. Harsha, 233 Mich. 499, 206 N. W. 979 (1926). But see Jacobs v. Steinbrink, 164 App. Div. 715, 149 N. Y. S. 337 (1914), where, in a suit by the life cestui against the trustee and infant remainderman for contribution on improvements made to put the property in "tenantable and usable condition," the court denied relief because the cestui was under no duty to improve. It listed as exceptions to this ruling cases of: (1) completion of work begun by the donor; (2) municipal assessments; (3) property unproductive or untenantable when the trust is set up; and (4) lien encumbrances exceeding the income.
the life cestui is the active moving factor in having the structure built, and there is a discrepancy between the cost and value, the court may charge only the additional value to the principal.\textsuperscript{68} Even where the improvement is not so obviously a reinvestment, its cost is sometimes charged to corpus;\textsuperscript{67} but in other cases there is an apportionment.\textsuperscript{68} The writer sees no reason why the permanent improvement problem, in trust cases, should not be handled in identically the same manner as the assessment problem. The Uniform Act wisely combines the two.

Repairs, on the other hand, are ordinarily chargeable to income,\textsuperscript{69} and properly so. The distinction between permanent improvements and repairs is not by any means an easy one to draw, but it is not possible here to go deeply into the matter. Suffice it to say that regard should be had to the expectancy of the tenant, the primary benefit contemplated by the expenditure, and necessitation of the work by municipal ordinance or the order of an administrative board (not to be confused with assessments for municipal projects).\textsuperscript{70} None of these factors, however, is controlling. A distinction should also be noted between repairs and restoration, the latter being in the nature of permanent improvements.

One of the New York cases,\textsuperscript{71} in discussing repairs, makes an observation which has some interesting implications. The property had been leased as a cold storage warehouse, and alterations had been made to accommodate the tenant. At the expiration of the lease it was necessary again to alter the premises to secure another tenant. The expenses of this last alteration were charged to income because it was made to secure a better rental. In discussing this the court says:

\textsuperscript{68} Stevens v. Melcher, \textit{supra} note 64.
\textsuperscript{67} Greene v. Greene, \textit{supra} note 65; \textit{In re} Parr, 45 Misc. 564, 92 N. Y. S. 990 (1904); Matter of Heroy's Estate, 102 Misc. 564, 92 N. Y. S. 807 (1918). \textit{Cf.} Smith v. Nones, 121 Ky. 147, 89 S. W. 153 (1905), where it was held permissible to convey part of the corpus in return for services rendered in developing the rest of it.
\textsuperscript{69} Peck v. Sherwood, \textit{supra} note 40, where the costs of sidewalks and lighting rods were apportioned without discussion as to the exact method. Gould v. Gould, 126 Misc. 54, 213 N. Y. S. 286 (1925), where improvements of permanent character were held equally apportionable. Mulcahy v. Johnson, 80 Colo. 499, 252 Pac. 816 (1927), where improvements were held apportionable, at the discretion, in the first instance, of the trustee.
\textsuperscript{71} Cases cited, \textit{supra} notes 65 to 69 inclusive. No allowance is made to the life cestui for improvements made by a lessee. Stevens v. Melcher, \textit{supra} note 64.
\textit{In re} Parr, \textit{supra} note 67.
"It was a restoration which may well have been anticipated when the alterations were made, and have been provided for in the rent reserved. It was a proper case in which to have established a sinking fund out of the rents, sufficient to restore the premises at the end of the demised term to their original condition."2 The sinking fund idea may be sound, but will perhaps lead to unusual complications. Suppose that the life tenant dies after the sinking fund has been initiated, but before the end of the term. He presumably paid for the first alteration. If the money in the sinking fund, in the case put, falls into principal, he also must help to pay the cost of securing a better income to the owner of the next succeeding estate. If the money is paid over to his estate, that is of small comfort to him. The policy of wisdom, if the expenditure is so great as to require amortization, is to begin that amortization at the time the repairs become necessary and not before.

Expenses of Administration

Another class of expenses may be generally designated as legal and administration expenses. It includes court costs, attorneys' fees, trustees' commissions, and the expenses attendant upon accountings. Ordinarily court costs and attorneys' fees are taxed to corpus.7 But the court will also charge such costs in whole or in part to the interest of a party at fault in the bringing of the litigation.74 These rules are, of course, subject to variation where the court finds reason for such variation in the circumstances of the particular case or in the terms of the will.76
Trusted regular commissions on receipts and disbursements, whether statutory or fixed by the will, are charged respectively to the portions or accounts handled, unless direction to the contrary appears in the creating instrument. Compensations other than regular fees should follow the same rule, though ordinarily they are for the benefit of income, being for management services. The Uniform Act follows these general principles, except in so far as it places more of the burden of court costs upon income.

In New York the decisions as to expenses of accountings, in so far as consistency is concerned, have neither rhyme nor reason. Some cases charge such expenses to principal on the theory that the trust fund must bear the costs of its administration. Others tax the costs of the accounting to income. And still others apportion the cost, on the theory that it is for the benefit of both accounts. This latter seems to be preferable, because in the ordinary case the accounting will involve both principal and income transactions. But for the guidance of trustees, if for no other reason, uniformity in these rules is desirable. One method should be adopted, and if that method be apportionment, some uniform basis for the calculation should likewise be adopted. Probably that basis should be the relative number of transactions involving each account, rather than the relative amounts involved. The Uniform Act would solve the problem by allocating all such costs to income, which has the advantage of simplicity, but departs from the basis of relative benefits.

Finally, in the way of expenses, there are those in connection with reinvestment by the trustees. These include brokers' commissions, mortgage and transfer taxes, recording fees and similar disbursements. Directed $15,000.00 to be held in trust for A for life and at her death "said sum of $15,000.00 to be divided," the Surrogate construed this as a direction to keep the fund intact and held attorneys' fees payable from income.

In re Heist, supra note 73; In re Kelsey's Estate, 89 Misc. 701, 153 N. Y. S. 1095 (1915); In re Hopson's Will, 213 App. Div. 162, 201 N. Y. S. 760 (1923). For a variance caused by the language of the will see In re Haight's Will, 51 App. Div. 310, 64 N. Y. S. 1029 (1900).


In re Fargo's Estate, supra note 42.

In re Myers' Estate, supra note 26; In re Heist, supra note 73. The latter case apportions the cost equally between the two accounts. And see In re Kelsey's Estate, supra note 76, where $500.00 was paid to counsel on the accounting, and the court charged $125.00 to income and $375.00 to principal, calling it "a reasonable apportionment."
ments. In New York they are apparently chargeable to corpus, and this is both a logical and convenient rule.\textsuperscript{81} It violates to some extent, perhaps, the principle of relative benefits, which has been adhered to throughout this article, because the reinvestment may be made primarily for the purpose of increasing income. There are few such times, however, when the indirect benefit to principal is not as great as the direct benefit to income. Further, the money actually being handled is principal, and the reinvestment expenses stand upon much the same basis as trustees' commissions on principal. Add to these factors the facts that the charges are not usually excessive and that the rule has the advantages of simplicity and certainty, and its serviceability is apparent.

Massachusetts charges such expenses to income.\textsuperscript{82} This is also simple and certain, but in reality burdens income with the cost of handling the principal, which in many cases is hardly proper. Rhode Island charges the expenses upon a basis of relative benefits; or rather upon a basis of relative benefits intended to be effected when the reinvestment is made.\textsuperscript{83} The logic of this rule is somewhat outweighed by the considerations advanced above. The Uniform Act follows the New York rule.

\textsuperscript{81} In re Fargo's Estate, \textit{supra} note 48; Gould v. Gould, \textit{supra} note 68.
\textsuperscript{82} Jordan v. Jordan, \textit{supra} note 7.