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ANNUITIES - SATISFACTION OF PRIOR DEFICIENCIES FROM INCOME SURPLUSAGES OF SUBSEQUENT YEARS

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RECENT DECISIONS

ANNUITIES — SATISFACTION OF PRIOR DEFICIENCIES FROM INCOME SURPLUSAGES OF SUBSEQUENT YEARS — Testatrix left her estate in trust for the purpose of paying certain sums of money annually to named beneficiaries. In a codicil to her will, she provided that in case there was insufficient income to meet expenses and pay all annuities stated, certain of the beneficiaries were to be preferred. Deficiencies occurred so that all sums were not paid, but subsequently there was surplus income which the trustees desired to apply to the prior deficiencies. *Held*, one justice dissenting, that the surplus after paying the annuities for the present year could be applied to the deficiencies which had occurred previously since testatrix showed no clear intention that arrearages should not be made up from subsequent income surplusages; rather her intention was that the annuitants should have the stated sums. *In re Lowrie's Estate*, 294 Mich. 298, 293 N. W. 656 (1940).

It must be recognized that in the usual case the creator of an annuity will not contemplate any possibility of deficiencies, thinking always that his estate is and will remain sufficient to carry out whatever he has provided.¹ Thus in case of deficiency it remains for the court to decide what shall be done. An annuity made payable from income may be treated in one of the following ways: (1) it may be charged to the income of each year only and to no other source; (2) it may be charged to the income generally, but limited to the time during which the annuity is accruing, i.e., in case of a life annuity, charged to the income during the life of the annuitant, and if not paid during this limited time, deemed lost; (3) it may be charged to the income generally until completely and fully paid; or (4) it may be charged to the income generally and to the corpus as well.² The immediate problem presented by the principal case is whether the annuity was chargeable to the income of each year only or to income in years subsequent to the one in which a deficiency arose. No point is raised explicitly as to whether one of the annuitants could have a vested right to the annuity which would survive his death.³ In applying the presumption that testatrix in the absence of clear evidence to the contrary intended annuitants to be able to

¹ It is suggested at the outset that a carefully drafted article in the agreement or the will creating the annuity expressing what is to be done in case of deficiencies would avoid most of this litigation.

² For a consideration of the ways in which an annuity may be charged, see *Re Rose*, 113 L. T. 142 (1915); and L.R.A. 1917E 580, which collects the cases up to the date of publication and considers carefully problems of charging the annuity against income or against corpus; see also comment in 35 ILL. L. REV. 311 (1940).

³ On this particular point, see cases collected in L. R. A. 1917E 580 at 596. The cases seem to follow a principle of law to the effect that unless there is an express or implied provision to the contrary, the annuitant has a right to have the annuity paid out of income surplusages in years subsequent to the termination of the annuity. From the position the Michigan court took in the principal case, it seems likely that it would have allowed payment for past deficiencies to the personal representative of an annuitant who had died.

reach subsequent income surplusages, the majority follows the generally accepted view.⁴ This approach appears reasonable when it is considered that the relationship between the annuitant and the settlor of the annuity is usually close.⁵ Commonly they are bound by blood or marriage or by ties of friendship or loyalty of long service, and hence a moral duty often arises, especially when the annuity is set up to secure the support of the annuitant. In view of this, it would seem that the court's analysis that testatrix intended the annuitant to have the complete annual sum is correct. Courts deny the application of later income surplusages to prior deficiencies where it appears either expressly or by necessary implication that the testator intended that only the annual income should be used to pay the annuity.⁶ Such an intention may be found where testator provides that annuities should be paid from the net income after which the surplus net income in any year is to go to charity, the intention being drawn from the fact that all the income of each year is specifically divided and no surplus is contemplated.⁷ The same is true if the residue is not made subject to the annuity.⁸ Conversely, where the residue is made subject to the annuity, it would seem that the annuity should be payable out of subsequent surplus.⁹ The dissenting

⁴ Reed's Estate, 236 Pa. St. 572, 85 A. 15 (1912), is a leading case. It seems that all the cases can be reconciled under this view, the problem then becoming whether there is clear evidence of an intent to the contrary. See L. R. A. 1917E 580 at 591, where many cases are collected. Possibly the result will be different where it is established by a will, since the method of evolving the intent is different. Veazie v. For-saith, 76 Me. 172 (1884).

⁵ Although the cases do not specify this as a reason for the presumption, it is certainly true in the usual annuity case. See 35 ILL. L. REV. 311 (1940) where the relationship of settlor to beneficiary is considered as bearing on the right to invade the corpus.

⁶ Re Rose, 113 L. T. 142 (1915); Appeal of Brewster, (Pa. 1888) 12 A. 470; Shupp v. Gaylord, 103 Pa. St. 319 (1883); Casamaijor v. Pearson, 8 Cl. & F. 69, 8 Eng. Rep. 27 (1841). These and other cases are collected in L. R. A. 1917E 581 at 591 et seq.

⁷ Brooks v. Attorney General, 266 Mass. 161, 165 N. E. 4 (1929), where the surplus was to go to charity. See also: Appeal of Brewster, (Pa. 1888) 12 A. 470 (provision that excess income in any year should go to pay off encumbrances and then go into corpus); In re Pierce, 56 Wis. 560, 14 N. W. 588 (1883) (provision for an annuity to be taken from proceeds "of my said farm each and every year"). See also Comstock v. Comstock, 78 Conn. 606, 63 A. 449 (1906); Shupp v. Gaylord, 103 Pa. St. 319 (1883). In these cases testator provided either that all income for each year should be disposed of or that only the income in the year for which the annuity was to be paid should be used.

⁸ In Casamaijor v. Pearson, 8 Cl. & F. 69, 8 Eng. Rep. 27 (1841), the annuitants were expressly limited to funds invested and the surplus income and corpus were to go to named residuary legatees. But see 4 BOGERT, TRUSTS AND TRUSTEES 2358, n. 82 (1935), where it is said that this case rested on the fact that annuitants had failed to force a sale of land and the investment of proceeds as the will provided, which view is adopted by the majority of the court in the principal case. For further cases, see L. R. A. 1917E 580 at 595.

⁹ In Reed's Estate, 236 Pa. 572, 85 A. 15 (1912), testator provided that *A* should have the first \$8000 and then a like amount was to go to *B* if the income was

judge in the principal case, although granting the basic presumption of intention, thought that the annuity for each year was meant to be paid out of income from that year only. This does not seem unreasonable because testatrix did contemplate deficiencies since she provided that in such case certain beneficiaries should be preferred,¹⁰ and it is not amiss to argue that because of such expression she intended this to be the only way to handle deficiencies. Thus there is a sound argument for the position that the income from each year was to be the only source for paying annuities for that year.

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sufficient, followed by equal division of any excess. In any event, *A* was to receive all the income accruing from the estate until he received the stated annuity. In *Booth v. Coulton*, L. R. 5 Ch. App. 684 (1870), certain annuities were provided and "subject as aforesaid" trustees were to make further disposition of the annual rents and profits. In *Pitt v. Lord Dacre*, L. R. 3 Ch. Div. 295 (1876), the residue of the estate was given subject to the payment of the annuities. The particular wording is not of importance, so long as it clearly expresses or implies that the residue is given subject to the payment of the annuity.

¹⁰ Testatrix's codicil provides, in the principal case, viz.: "L. In the event that the income from said trust fund after the payment of expenses and general upkeep, fails to be sufficient to make payments . . . said trustee shall first pay . . . [naming certain beneficiaries] . . . and shall then prorate the remaining income between the other beneficiaries . . . in proportion to the sums payable annually to each of said persons." 294 Mich. at 300.