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PROBATE ACCOUNTING

After the original promulgation of the Uniform Principal and Income Act there appeared to be a split of authority on the question of whether the rules of the Act were intended to apply to the conduct of the executor during the probate of an estate. Though there have been few decisions on this question, those that have been rendered have come to opposite conclusions. On the one hand, the Oregon supreme court, in the case of *In re Feehley's Estate* held that the Uniform Act is not applicable to estates in probate. In so holding, the Oregon court relied upon a comment in the introductory portion of the original Uniform Act. With an equally summary approach, the supreme court of Alabama has held that the Uniform Act does apply to estates in probate. In the case of *Frye v. Community Chest*, the court stated:

Here is an Alabama will disposing of Alabama property. A court of equity in Alabama has charge of the estate, charged with the responsibility of construing the will, and making a disposition of the estate protecting the interests of legatees under the will. A new statute in Alabama prescribes the method of ascertaining of principal and income as between life tenants and remaindermen. Under this holding, it can be seen that the Alabama court considers that the Uniform Act is applicable to estates in probate in certain cases. It speaks of the situation where there is a life tenant and remainderman. This is an indication that the Act does apply to this situation but not to the situation where there has been a direct gift.

The holding in *Frye* poses an immediate question. If the Act does apply to a legal life estate situation, does the period of probate continue until the death of the life tenant? If the Act applies here, there should be a method of supervision to protect the interests of the remainderman, and to prevent the life tenant from wasting the estate. In *Frye*, the court answered the question by holding that the life tenant would have the property with the right to use the income for her own purposes but with a trust imposed upon the principal or corpus of the estate for the benefit of the remainderman. The testator had stated that the life tenant would take without bond. The life tenant was an elderly woman who was not a resident of Alabama. The court gave this alternative:

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1 179 Ore. 250, 170 P. 2d 757 (1946).
2 179 Ore. 250, 170 P. 2d 757, 762 (1946): “Considerable demand for legislation on this subject came from several sources, particularly from trustees who were embarrassed in discharge of their fiduciary duties.”
3 241 Ala. 591, 4 So. 2d 140 (1941).
4 4 So. 2d at 147.
The proper rule is to give the life tenant an election to give a bond with local sureties, submitting the obligors to the jurisdiction of the court, conditioned to account for and deliver the principal of the estate as equity shall require; and if the life tenant elects not to give bond and assume the responsibility of managing the trust property, the funds should be paid into court and committed to a trustee of the appointment of the court, the income to be paid over to the life tenant from time to time as the court shall decree, and the corpus held for the remainderman.\(^5\)

The court held that this same rule should apply in the case of a legal life estate situation as in the case of a trust.\(^6\)

In Wisconsin, in the case of a legal life estate with remainder conditioned upon survival of named remaindermen it appears that the period of probate was extended:

At the time these proceedings were commenced the estate was still before the county court. Its jurisdiction still extended to "all matters relating to the settlement of" the estate. \(\ldots\)\(^7\)

In the Dolph case, the testator had died in 1918 and the action had been brought in 1951 to construe the judgment of 1918 and to further construe the will. This was after the death of the life tenant.

In *Estate of Larson*\(^8\) the Wisconsin court had before it a case involving a legal life estate. The court held:

The life tenant is a trustee in the sense that he cannot injure or dispose of the property to the injury of the rights of the remainderman but he differs from a pure trustee in that he may use the property for his exclusive benefit and take all the income and profits.\(^9\)

If the life tenant is a quasi-trustee for the benefit of the remainderman, it should follow that he or she continues subject to the jurisdiction of the county court, in probate, until the termination of the life estate.

The original question of the applicability of the Uniform Act to estates in probate appears to have been solved by the Commissioners on Uniform State Laws by their amendment to the proposed Uniform Act promulgated in 1958.\(^10\) This section, entitled "Disposition of Probate Income by Executors and Testamentary Trustees" demonstrates the intent of the Commissioners that the Uniform Act is to be applicable to estates in probate and to govern the conduct of the executor during that period. However, to date only three states have adopted the 1958 amendment.\(^11\) If the question were to come before the courts

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\(^{5}\) 4 So. 2d at 148.

\(^{6}\) 4 So. 2d at 147.

\(^{7}\) Will of Dolph, 260 Wis. 291, 295-296, 50 N.W. 2d 448 (1951).

\(^{8}\) 261 Wis. 206, 52 N.W. 2d 141 (1952).

\(^{9}\) Id. at 211, 52 N.W. 2d at 143.

\(^{10}\) 9B Uniform Laws Annotated, *Uniform Principal and Income Act§3-A*; Wis. Stats. §231.40(3a) (1961).

\(^{11}\) Wisconsin, Vermont, and Colorado.
of these states the conclusion would seem to be that the Act would be held applicable to estates in probate. In the remainder of jurisdictions, the logic of the Alabama court in *Frye*\(^\text{12}\) appears to be the preferable approach.

In this article an attempt will be made to point out certain problems in the application of the Uniform Act as it has been adopted in Wisconsin,\(^\text{13}\) and to indicate possible solutions to these problems. Also, effort will be made to point out where Wisconsin's statute has changed the common law as it existed in Wisconsin prior to the adoption of the Act.

The problems of the executor arise at different times. Problems of apportionment arise when the original inventory is to be filed after the death of the testator. Problems of allocation, both of income from property in the hands of the executor during the period of probate and of expenses of administration, as well as liabilities of the estate, arise during the period of probate. Problems of apportionment arise once again at the time for filing the final account of the executor at the close of probate.

I. INVENTORY ACCOUNTING PROBLEMS

At common law the executor would list an article as an asset of the estate or not, depending on the type asset received by him after the death of the testator. Here we will consider some typical assets and point out how, if at all, the common law has been changed by the Wisconsin Uniform Principal and Income Act.

At common law rent from real property was not apportionable.\(^\text{15}\) This rule was not followed completely in Wisconsin since the Wisconsin court has held that rent may be apportionable when the intent of the testator as found in the will indicates that it is to be apportioned.\(^\text{16}\) Under the general rule rent was considered as payable when due and not as accruing from day to day. Therefore, if rent were due on the first day of the month for the entire month in advance and the testator died on the third day of the month, but prior to the actual payment of the rent, the rent when paid would be an asset of the estate. The devisee of the land would have no claim to the rent or a part thereof for the month in which the testator died.

Whether or not the common law rule is changed by the Act depends on the interpretation to be given section 231.40(4). This section provides:

\(^{12}\) Supra note 3.

\(^{13}\) Wis. Stat. §231.40 (1961).


\(^{15}\) ATKINSON, WILLS §116 (2d ed. 1953). 32 AM. JUR. LANDLORD AND TENANT §454 (1941).

\(^{16}\) Estate of Hemphill, 157 Wis. 331, 147 N.W. 1089 (1914).
Whenever a tenant shall have the right to income from periodic payments, which shall include rent, interest on loans, and annuities, but shall not include dividends on corporate shares, and such right shall cease and determine by death or in any other manner at a time other than the date when such periodic payments should be paid, he or his personal representative shall be entitled to that portion of any such income next payable amounts to the same percentage thereof as the time elapsed from the last due date of such periodic payments to and including the day of the determination of his right is of the total period during which such income would normally accrue. The remaining income shall be paid to the person next entitled to income by the terms of the transaction by which the principal was established. But no action shall be brought by the trustee or tenant to recover such apportioned income or any portion thereof until after the day on which it would have become due to the tenant but for the determination of the right of the tenant entitled thereto. The provisions of this subsection shall apply whether an ultimate remainderman is specifically named or not. Likewise when the right of the first tenant accrues at a time other than the payment dates of such periodic payments, he shall only receive that portion of such income which amounts to the same percentage thereof as the time during which he has been so entitled is of the total period during which such income would normally accrue; the balance shall be a part of the principal.

The first part of this section assumes a tenant presently entitled to periodic payments whose right terminates, by death or otherwise. It provides for apportionment of rent between this tenant, or his estate, and a successor tenant or remainderman according to who is next entitled to the income under the instrument creating the interest.

The last sentence of section 231.40 (4) provides that when the right of the first tenant accrues, then there shall be apportionment of income as well. The statute poses the question of who is a tenant and when does the right of the first tenant accrue.

Section 231.40 (1) (c) defines tenant as "the person to whom income is presently or currently payable, or for whom it is accumulated or who is entitled to the beneficial use of the principal presently and for a time prior to its distribution..." This definition would include a legal life tenant or an income beneficiary of a testamentary trust. But this section gives no indication as to the time from which the tenant is entitled to income. Nor does section 231.40 (4) purport to specifically determine this question.

Absent a specific determination of any question under the Act it must be assumed that local law prior to the Act governs and determines the question. In Wisconsin, when realty was devised, the devisee was entitled to title and possession immediately, and the executor could have possession only for the purposes of sale to pay any liabilities when the personal estate was insufficient to cover the entire liabilities.
of the testator and the executor in his representative capacity.17 But for this exception the devisee would be entitled to income from the date of the death of the testator. The Reiman case did not distinguish in its rule between the devisee of an absolute interest, a legal life tenant, or an income beneficiary of a testamentary trust. The court spoke only of the devisee.

If it can be said that Reiman case holds that, when the executor needs the reality to pay liabilities, he will sell the reality and pay the liabilities with the proceeds, keeping the income for the person entitled, then it appears that the devisee, as used in Reiman, would be entitled to income from the date of the death of the testator, even that income from property used to pay the liabilities. This appears to be the holding of the case:

In Riedl v. Heinzl (1942), 240 Wis. 297, 3 N.W. (2nd) 366, it was held that an administrator may sell the real estate of deceased when the available personal estate is insufficient to pay the expenses of administration, the funeral expenses, and debts of the deceased, or if the sale of the personal property would be inimical to the interests of the estate, or if the sale of the real estate would be for the best interest of the estate.18 While there is language in the case which indicates, that the rents from reality are what must be used to pay liabilities, it seems that the actual holding of the Reiman case is that the reality itself is what must be used.

This holding appears to be in accord with the Act. For, while the Act does not generally purport to define from what time the income beneficiary, or life tenant is entitled to income, section 231.40 (3a) does indicate that the net probate income to be distributed by the executor does include the product of the property used by him to pay liabilities.19 This section seems to indicate that the life tenant or income beneficiary of this property has the right to income from the date of the death of the testator, despite the fact that the property itself has been sold to pay liabilities.

If the legal life tenant or the income beneficiary is entitled to rental income from the date of the death of the testator so that the last sentence of section 231.40 (4) would be applicable, rent may be apportionable, and only so much of the rent which would be attributable to that portion of the month prior to the testator’s death would be listed as an asset of the estate in the inventory. The remainder would be income to go to the life tenant or income beneficiary.

Interest, at common law, on debts due to a decedent is apportion-

17 Estate of Reiman, 272 Wis. 378, 75 N.W. 2d 564 (1956).
18 Id. at 385-386, 75 N.W. 2d at 568.
19 Wis. Stat. §231.40(3a) (b) 2 (1961).
20 ATKINSON, WILLS §135 (2d ed. 1953).
as of the testator’s death, such interest would be apportionable at that time. If the statute, section 231.40 (4), is applicable here, there would be no change in the law, since the common law permits apportionment of interest. Though legal title to personalty passes to the personal representative and not to the legatee at the death of the testator, this fact does not preclude the legatee from being entitled to income from the personalty since the title of the personal representative is the bare legal title with the beneficial title in the legatee. The problem of when the right to income accrues to the legatee of personalty will be taken up in the next section of this article.

Cash dividends on corporate shares, at common law, were not apportionable. The owner of the stock on the date of declaration was entitled to the dividend even though it was declared payable at a future date. Dividends on shares held by a decedent at the time of his death, declared prior to his death, though payable at a date which is after his death would be an asset of the estate except in those situations where the corporation had made the dividend payable to stockholders of record on a specific date. If this had been done and the testator had been the owner of the stock on the date of declaration and on the record date, the dividend would be an asset of the estate. Dividends declared after the testator’s death, or those declared before his death but payable to stockholders of record on a date which is after his death would not be an asset of the estate.

Therefore, if a testator made a specific bequest of stock, the legatee, whether an absolute legatee, a life tenant, or an income beneficiary of a testamentary trust, would be entitled to dividends declared after the testator’s death or declared payable to stockholders of record on a date which is after the testator’s death. If the bequest of stock were a general bequest, such bequest could be satisfied out of the general estate and the legatee would be entitled to the stock determined by the executor to be transferred to him in satisfaction of the bequest. If the testator bequeathed 500 shares of X stock to A and at the death of the testator there is no stock X in the estate, the executor will be made to acquire stock X. The legatee will be entitled to the stock and the income from it from the date that the court determines.

The Act provides in section 231.40 (5) (e) that:

... the date when a dividend accrues to the person who is

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21 33 C.J.S. Executors and Administrators §299 (1942).
22 18 C.J.S. Corporations §470(b), at 1121-1122 (1939). Some jurisdictions allowed the corporation to determine who would be entitled to dividends by making them payable to stockholders of record on the date determined as the payment date. Others did not allow the corporation to make this determination. It appears to be the majority rule that the corporation could so determine who would get dividends.
23 Will of Blomdahl, 216 Wis. 590, 257 N.W. 152 (1935).
24 Id. at 595, 257 N.W. at 153.
entitled to it shall be held to be the date specified by the corporation as the one on which the stockholders entitled thereto are determined, or in default thereof, the date of the declaration of the dividend.

It will be noted that the statute uses the term "person who is entitled" and not the term "tenant." This is significant to the extent that either the estate of the testator or the life tenant or trust income beneficiary might be entitled to the dividend depending on who is the owner of stock entitled to dividends on the date specified by the corporation, or in default thereof, on the date of the declaration of the dividend. It appears that the Act does not change the law. It does not provide for apportionment of any dividend. It adopts the rule of the common law that the dividend is payable to the owner of the stock on the date of declaration or the owner of the stock on the date of record specified by the corporation. This rule appears to have been the better one at common law.

Apportionment of annuities, in the view of the writer, can only be a problem to the executor when the testator was entitled to payments under an annuity for a term certain with the right to provide by will who would be entitled to payment under the annuity for the remainder of the term. In such case, if the testator dies at a time other than the time for payment, the question of apportionment by the executor will arise. At common law, annuities were not apportionable. Under the Act annuities may be apportionable. Therefore, under the annuity for a term certain which allows the testator to provide by will the person to whom the payments for the remainder of the term are to be made in case of his death prior to the end of the term, under the common law the executor would not list any payments for the current period under the annuity as an asset of the estate. These would belong to the person entitled, under the will, to receive the payments for the remainder of the term. Under the Act, if section 231.40 (4) is applicable, the executor would list so much of the payment for the current period, though not yet due or payable, as the

25 Wis. Stat. §231.40(5) (e) (1961). While the section uses the words "person who is entitled" rather than the term "tenant" no reason has been found for holding that, as to the legatee of the stock, this section would be applicable to any other situation than where there is a legal life estate of a testamentary trust created.

26 C.J.S. Annuities §6a(1), at 1383 (1936), provides that "[a]t common law, subject to certain exceptions noted in §6a(2) (not applicable here), annuities were not apportionable." While this section does not give a rule to specifically cover the situation with which we are dealing, nothing has been found that would indicate an exception of this situation from the rule.

27 Annuities are governed by Wis. Stat. §231.40 (4) (1961). If the last sentence of this section can be held to require apportionment at the death of the testator, then the annuity payment for the period during which the testator died would be apportioned between the estate of the testator and the life tenant or income beneficiary of a trust created by the will with the annuity as corpus.
amount of time elapsed from the beginning of the current period to
the death of the testator bears to the total current period.

Under the common law, the annuity itself would become an asset
of the estate. Under the Act this rule does not appear to be changed
as section 231.40 (4) applies only to payments. Therefore, there
being no other section of the Act which applies, the common law
would govern. The annuity would be an asset of the estate. Payments
would be apportionable.

II. INCOME RECEIVED DURING PROBATE

During the period of probate the executor will be collecting receipts
from assets of the estate in his possession. There are questions to be
determined at this point as to what should be done with these receipts.
In making the proper determination the executor will be aided by
the Act.

The first question to be answered is to what receipts is the executor
entitled. Involved here is an apparent broadening of the application
of the Act. We have taken as a basic assumption in Part I that the
Act only applies to situations where there was a testamentary trust
or a legal life estate created. However, the section of the Act which
deals with income during the period of probate is not limited to such
situations. It is entitled Disposition of Net Probate Income by Execu-
tors and Testamentary Trustees. Subsections (b) 1 and (b) 2 of
section (3a) provide:

1. He [the executor] shall ascertain the amount of property
received by him which is the product of the property which
passed to him by the will . . .
2. He shall include in the amount so ascertained the product
of property used by the executor to discharge liabilities of the
testator, or of the executor in his representative capacity, in-
cluding debts, claims, taxes, expenses of administration, legacies
payable in money and interest thereon . . .

Subsection 1 appears to indicate that the executor shall include all
of the receipts from all the property which passed to him by the will.

Nothing in the notes published by the Commissioners on Uniform
State Laws indicates what was meant to be covered by the use of the
phrase “property which passed to him by the will.” However, Pro-
fessor Bogert, one of the drafters of section (3a), elsewhere has de-

“probate income” is a phrase used by the courts to describe
receipts from personalty held by an executor which come into
his hands during the period between his qualification and his

28 3 C.J.S. Annuities §3b(2) (1936).
29 Supra note 10.
payment or delivery of the assets of the estate to the legatees.\textsuperscript{30}
(Emphasis added.)

By way of footnote, Prof. Bogert states that "it is assumed that realty
passes directly to the devisee and not through the executor."\textsuperscript{31} Ap-
parently the Act was not intended to cover the problems which arise
concerning rent from real property held by the testator at the time of
his death with the possible exception of rent from real property used
by the executor to satisfy liabilities. This problem will be treated below.

At common law, title to real property passed directly to the
devisee or to the heirs.\textsuperscript{32} The executor was not entitled to take possess-
ion of the real estate of the deceased unless the same was necessary
for the payment of the liabilities of the deceased or of the estate.\textsuperscript{33}
Section (3a) (b) 1 speaks of the product of property which passed
to the executor by the will. This has been defined to include receipts
from personalty. Therefore, the executor only considers the receipts
from personalty under (3a) (b) 1. There is nothing in the Act that
indicates that the rule as to title to realty has been changed from the
common law.

Regarding the right to possession of the realty, the common law,
as indicated above, gave the executor the right to possession only when
the realty was needed for the satisfaction of the liabilities of the de-
ceased or of the estate. The only modification of this principle in
Wisconsin is in the form of two statutes which appear to give the
executor the right to possession of the realty under all circumstances.\textsuperscript{34}
Section 312.04 provides that:

The executor or administrator shall have a right to the pos-
session of the real estate of his decedent . . . and may receive
the rents and profits thereof until the estate shall be settled, or
until delivered by order of the court, to the heirs or devisees,
and he shall keep in good tenantable repair all buildings and
fences thereon which are under his control.

Section 310.14 provides that:

Personal representatives . . . shall collect and possess all the
decedent's personal estate . . . ; inventory and have appraised all
the decedent's estate; collect all income and rent from such
estate of which they have custody; preserve such state . . .

The Wisconsin court has interpreted section 312.04 to include the
common law rule.\textsuperscript{35} However, looking at section 310.14 a question

\textsuperscript{30} Bogert, \textit{The Disposition of Probate Income: Recent Developments}, 35 \textit{Notre Dame Lawyer} 175, at 175 (1960).
\textsuperscript{31} Id. at 175 n. 1.
\textsuperscript{32} 3 \textit{American Law of Property} §14.6 (Cosner Edit. 1956).
\textsuperscript{33} Id. at 574.
\textsuperscript{34} Wis. Stat. §§312.04, 310.14 (1961).
\textsuperscript{35} Estate of Reiman, 272 Wis. 378, 75 N.W. 2d 574 (1956) and cases therein cited.
arises as to whether the executor should not have the right of possession of the realty of the estate. That statute requires the personal representative to possess the personal estate; to inventory and have appraised all of the estate; to collect rents from the estate of which they have custody; and to preserve such estate. If such estate refers back to the first clause of the statute the proper meaning is that such estate means the personalty. However if such estate refers back to the clause which speaks of inventory and appraisal, the proper meaning includes personalty and realty. If the executor is to preserve the entire estate as a matter of duty, which the latter interpretation appears to indicate, then he should have the right to possession of the realty. This appears to the writer to be a consistent and proper interpretation of the two statutes.

Whether or not the executor does have a right to possession of the realty in any given case could make a difference under the Act. The Act does not purport to determine when the executor can take possession of realty so, presumably, the local law would govern and as was just pointed out, in Wisconsin this would be when the realty was necessary to satisfy liabilities. However, under section 231.40 (3a) (b) 2 the Act does provide that the executor shall include in his computation of net probate income "the product of property used by the executor to discharge liabilities of the testator, or of the executor in his representative capacity. . . ." It must be noted that this subsection does not require that the product of property considered by it be the product of property which passed to the executor by the will. With this change in language from subsection (b) 1 it is possible that the Act was meant to provide that the executor is to include in his computation of net probate income the rent from real property, which property had been used by him to satisfy the liabilities of the deceased or of the estate. It is also possible to say that, despite the language change between these two subsections, the whole of section (3a) involves the computation of net probate income which has been defined as the product of personalty. Under the second of these two interpretations, the executor would not include in his computation of net probate income any rent from realty, whether used by him to satisfy liabilities or not.

Under the first of these two interpretations, the disposition of the rent from realty used to pay liabilities would be governed by the remaining subsections of section (3a) which will be discussed below. Under the second of these two interpretations the rent from such realty would go to the person entitled to receive it under the will without regard to the computation of net probate income under section (3a).

In the case of an absolute gift, the rent would go to the devisee; in the case of a legal life estate the rent would go directly to the life
tenant; in the case of the testamentary trust it must be assumed that
the rent would go to the executor to be held by him until the appoint-
ment of the trustee, and then turned over to him intact. The executor
would have no claim to such rent for the purposes of the estate.
Therefore, he would not consider it in the computation of net pro-
bate income. Although no cases have been found on this question
where a testamentary trust is involved, it would seem to be the
best method of operation for the executor to collect this rent and
hold it for the trustee as devisee.

As to personal property and the receipts from that property during
the probate period, the Act appears to comprehend all of the personal
property of the estate, even that which passes by absolute gift. Under
the common law the title to personalty was in the executor. Therefore,
he was entitled to the income from that property and was required
to manage the estate property, to pay the liabilities, and to distribute
the estate according to the will under the direction of the court of pro-
bate. In certain respects the Act changes some of the rules of conduct
for the executor. In the remainder of this section we will treat these
problems and indicate where the rules have been changed by the Act.

Once it has been determined to what receipts the executor is
entitled, the second problem is what to do with them. As to receipts
from property specifically bequeathed or devised as an absolute gift,
no problem arises as to whether the receipt is principal or income.
It is income.

Under section 231.40 (3a) the executor begins to determine the
net probate income by ascertaining the product of the property which
passed to him by the will. Section (3a) (b) 1, as indicated above,
applies to income from personal property; and, since under the com-
mon law, the executor obtained title to personal property the Act
does not change the rule. In addition to the product of such property
the executor must include in his computation of net probate income
the product of property used to pay liabilities of the decedent or
of the executor in his representative capacity. And, as indicated
above, this might include the rent of realty used to pay liabilities.

Included in the liabilities referred to in this subsection are: "debts,
claims, taxes, expenses of administration, legacies payable in money
and interest thereon." This listing of what is meant by liabilities was
an addition to the Uniform Act that Wisconsin made when it adopted
the Act. Wisconsin also modified the Act in section 231.40 (3a) (b) 4:

38 C.J.S. Executors and Administrators §299 (1942).
39 Wis. Stat. §231.40(3a) (b) (1961).
38 Supra note 36.
39 Supra note 36.
40 Ibid.
From the amount so determined he shall deduct a) all income taxes paid thereon by the executor except taxes on capital gains, b) interest on all legacies payable in money, c) that share of the expenses of administration which is properly payable out of probate income. ... (Italics indicate Wisconsin addition to the Uniform Act.)

This section, by its modification, indicates an apparent conflict within the Wisconsin Act. By section (3a) (b) 2 the executor is required to include in his computation of net probate income the product of property used by the executor to pay "legacies payable in money and interest thereon." Yet, in section (b) 4 he is required to deduct from probate income "interest on all legacies payable in money..." The provision of (3a) (b) 2 appears to be the statement of the rule as it was prior to the adoption of the Act in Wisconsin. The addition to section (3a) (b) 4 appears to be in conflict then, with the intent of the Uniform Act and with the Wisconsin law prior to the Act.

Section (3a) (b) 3 indicates that, after determining the product of property as defined above, which will be used in the computation of net probate income, the executor is to determine how much of the product is principal and how much is income under the other provisions of the Act. The change in Wisconsin law here involves, e.g., cash dividends from corporate stock. This change will be treated in the next article.

In section 231.40 (3a) (b) 4 there are two articles which appear. The first, as mentioned above, is the effect to be given the provision that interest on legacies payable in money is to be deducted in the computation of net probate income from the sum of the product of property considered in this computation. As was indicated above, this provision appears to be in conflict with that part of (3a) (b) 2 which provides that the product of property used in the satisfaction of legacies payable in money and interest thereon is to be considered in the determination of net probate income. This latter section, as indicated above, seems to be in accord with prior case law in Wisconsin, and it would therefore seem to be the interpretation which should be given to the Act considered as a whole.

The second problem in (3a) (b) 4 is that provision which allows for the deduction of any expenses of administration properly payable out of probate income. The Uniform Act does not speak specifically of what assets are to bear the burden of an executor's expenses of

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42 Supra note 39.
43 Wis. Stat. §231.40(3a) (b) 4 (1961).
44 Estate of Hoehnen, 233 Wis. 645, 290 N.W. 137 (1940).
45 Supra note 43.
46 Wis. Stat. §231.40(3a) (b) 4(c) (1961).
administration, as between principal and income. Therefore, it must be assumed that local law is still the rule. In Wisconsin the rule was that all expenses of probate administration were payable out of the principal. We will consider this question further in the next section of this article. It can be seen from this rule that the provisions of section (3a) (b) 4 (c) has no effect in Wisconsin.

The result of our consideration of (3a) (b) 4 appears to be that in the computation of net probate income, the executor will include the product of property which passed to him by the will plus the product of property used by him in satisfying the liabilities of the deceased or of himself in his representative capacity (possibly including rent from realty used for this purpose); and from this he will deduct any income taxes upon these items of income except capital gains tax.

Section (3a) also provides for the distribution of net probate income. In this regard there are found changes from the existing law in Wisconsin. (3a) (c) 1 provides that at the time of distribution the executor:

1. Shall pay over to the trustee of any trust or other legatee to whom specific property other than money is bequeathed the net probate income of such property . . .

Since the rule at common law was that a specific legatee was entitled to income from the date of the death of the testator the Act does not change the rule as to a direct bequest of specific property. Nor does it change the rule as to a specific sum of money, for the rule here was that the legatee was entitled to interest from the time of the end of administration. Nor does it change the rule as to specific property bequeathed in trust since the bequest of income was considered, at common law, to be a bequest separate from that of the principal or corpus of the trust.

This section could be interpreted to include in " . . . other legatee to whom specific property other than money is bequeathed . . ." a life tenant of a bequest of specific property. Whether or not the wording of the statute was meant to include a legal life tenant appears to make little difference, for even if the right of the life tenant were to be determined under existing law the result would be the same in Wisconsin since the life tenant of specific property had a right to it from .

47 WIS. STAT. §231.40(8) (1961) provides for expenses-Trust Estates; but this section does not help determine from what funds the executor is to pay his expenses of probate administration of other liabilities.
48 Estate of Wells, 156 Wis. 294, 144 N.W. 174 (1914).
49 WIS. STAT. §231.40(3a) (b) 4(a) (1961).
50 3 SCOTT, TRUSTS §234.1 (1956).
51 Id. §234.2.
52 Id. §234.4.
the date of the death of the testator. And, if he were entitled to possession, he would also be entitled to the income.

Section (3a) (c) 2 provides for the payment of net probate income to: 1) a residuary trustee; 2) a legal life tenant of the residue or a part thereof; 3) a legatee of an absolute interest in a portion of the residue; 4) a trustee of a sum of money created by the will but not payable out of the residue, “in pro rata shares, in accordance with the respective values of the property bequeathed or given in trust at the death of the testator as determined by the executor.” The common law rule was that the income beneficiary of a residuary trust, the life tenant of the residue, of the legatee of an absolute interest in the residue was entitled to income from the date of the death of the testator of the clear residue as afterward ascertained. Considering the computation of net probate income under the Act, we note that section (3a) (b) 2 includes in that computation “the product of property used by the executor to discharge liabilities of the testator, or of the executor in his representative capacity . . .” Thus it appears that the Act modifies the rule of Lietsch in that the income beneficiary is entitled to income not only of the clear residue as afterwards ascertained, but also to a pro rata share of income from property sold by the executor to pay liabilities, which property, but for its use for these purposes, would have been a part of the residue. Under the cases, the product of this property would have been added to the principal.

Section (3a) (c) 2 also provides that the beneficiary of a sum of money under a trust created by the will, but not payable out of the residue is entitled to net probate income. This also is a change in Wisconsin law. The Wisconsin court had made a distinction between income beneficiaries under residuary trusts and those under general pecuniary trusts. In Will of Lietsch the court had held that the income beneficiary of a residuary trust was entitled to the income of the clear residue as afterward ascertained from the date of the death of the testator; while in Will of Barrett the court had held that the income beneficiary of a general pecuniary trust was not entitled to interest until one year after the death of the testator. In so holding, the court relied upon the general rule that general bequests

63 Golder v. Littlejohn, 30 Wis. 344, (1872) held that if the bequest is specified, the life tenant had immediate right to possession of the property of the bequest. While later cases such as In re Estate of Cobeen, 270 Wis. 545, 72 N.W. 2d 324 (1955) indicate that the court will impose a constructive trust on the property for the protection of the interests of the remainderman, nothing in Cobeen indicates that there has been a change in the time from which the life tenant has a right to possession as was stated in Littlejohn.

64 Will of Lietsch, 185 Wis. 257, 201 N.W. 284 (1924).

65 Since under the Lietsch case, the income beneficiary would be entitled to the income from the clear residue, the conclusion follows that any income from property used to satisfy liabilities, under this rule, would be a part of corpus.

66 Supra note 54.

67 173 Wis. 313, 181 N.W. 220 (1921).
do not bear interest until one year after the death of the testator, and
did not apply the rule as to trusts that the bequest of income in trust
is a separate bequest and should be given to the income beneficiary
from the date of the death of testator. The Act, on the other hand,
makes it the rule in all of these situations that income, net probate
income, belongs to the legatee, the life tenant, or the income beneficiary
of a residuary trust or of a general pecuniary trust. The rule of
Barrett appears to be changed and that of Lietsch appears to be
modified to include the income from property which would otherwise
have been a part of the residue but for the fact that it was sold to
satisfy liabilities.

Section (3a) (e) provides that “(a) testamentary trustee who re-
ceives net probate income from an executor shall treat it as income of
the trust for which he is acting.” This provision spells out the require-
ment that when the trustee receives net probate income from the
executor it is to be considered as income and not as an addition to
corpus of the trust. This indicates that the trustee will not be limited
by the rules of either the Lietsch or Barrett cases, but that the income
beneficiary will be entitled to all of those receipts which the executor
has received as net probate income, whether the trust be of specific
property, or residue, or a general pecuniary trust.

Section (3a) (c) 3 merely provides that the share of net probate
income due to any legatee or trustee shall be reduced by an amount
equal to that attributable to the property he received as a partial dis-
tribution. This is merely a statement that the legatee or trustee is not
entitled to more income than that from the property bequeathed to
him as legatee or trustee by the will.

III. LIABILITIES

In the preceding section we referred to the problems involved
for the executor in determining from what assets liabilities are to be
paid as these problems related to the determination of net probate
income. Here we will consider the problems involved in charging
expenses more completely.

There are two main problems here. The first is what assets bear
the burden of liabilities. The second is whether, in a legal life estate
or testamentary trust situation, these liabilities are to be charged
against corpus or against income. The liabilities with which we will
be concerned are those enumerated in section 231.40 (3a) (b) 2 of
the Wisconsin Act: debts, claims, taxes, expenses of administration,
and legacies payable in money and interest thereon.

The Wisconsin rule has long been that these liabilities are borne
by the residue.58 This is so despite the existence of a statutory scheme

58 In re Bradley’s Will, 123 Wis. 186, 101 N.W. 393 (1904).
of abatement which was in existence at the time of Bradley in substantially the same language as it is today under sections 313.26-313.28. By this scheme it is provided that if the testator indicates in his will what assets are to bear the burden of liabilities, these assets must first be used for this purpose. If these assets are insufficient, or if no direction was given by the testator, then any intestate property must be used. If this property proves insufficient, then general and specific bequests must be abated. In the statutory scheme there is no mention of the abatement of residue. However, in Bradley, and in subsequent cases, the Wisconsin court defined residue to be that which remains after the payment of all claims against the estate: “Before the residue exists for assignment or apportionment, all debts and burdens have necessarily and by the very force of the terminology been paid, and do not exist.” It appears that, unless the testator specifically indicates what assets are to bear the burden of liabilities, or if the property charged with the liabilities is not sufficient, any property disposed of by the residuary clause of the will must be used to pay liabilities before the abatement of general and specific legacies in Wisconsin. And, if residue is to be defined to be that property disposed of by the will which remains after the payment of liabilities it matters not that residue is not mentioned in the statutory scheme for abatement. For, before the statutory scheme can become effective, other than as to property charged by the will with liabilities and as to intestate property, that which would be residue must first be used for such payment.

As to the second problem, whether, in a legal life estate or testamentary trust situation, the principal or income is to bear the burden of the liabilities, it has been the rule in Wisconsin that these are to be paid out of the principal. Under the Act there is no specific provision for the payment of liabilities. Section 231.40 (3a) (b) 4 indicates that in his computation of net probate income the executor shall deduct from the “product of property” which he is to use in his computation “that share of the expenses of probate which is properly payable out of probate income.” However, as we have seen, these expenses, and the other liabilities, are payable out of principal. Section (3a) (b) 2, while providing that the product of property used to pay liabilities is to be included in the computation of net probate income, does not specifically provide that these liabilities are to be paid

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60 Wis. Stat. §313.27 (1961).
62 Supra note 58, at 191.
63 Supra note 48.
out of principal. Therefore, the local law must be assumed to govern. And, in Wisconsin, the liabilities are payable out of principal.64

A question which remains concerning liabilities is out of what funds are the various death taxes to be paid. These taxes include the federal estate tax and the state inheritance tax. In turn, this question is divided into two parts: tax on probate assets, and tax on non-probate assets.

The federal estate tax, where the estate is over the $60,000 exclusion, falls upon the assets determined by state law. "Under Wisconsin law the entire federal estate tax is paid from the residue of the estate even though it may be computed on all the property of the decedent."65

The federal estate tax on non-probate assets, such as life insurance policies and assets over which the testator has a power of appointment, whether exercised or not, though paid by the executor out of residue under the principle stated above, are recoverable by the executor from the beneficiary of the insurance66 or from the person who receives the property over which the testator had the power of appointment,67 unless the will provides to the contrary. The federal estate tax on jointly held property is paid out of the residue of the probate estate:

In the absence of a clear indication of contrary intent the burden of paying the death taxes is left where the law places it. In Wisconsin the law has placed the burden of paying the federal estate tax on joint property on the residium of the probate estate.68

The Wisconsin court also held that "The Wisconsin inheritance tax is not a tax upon property but upon the right to receive property."69 Thus, unless a contrary intent appears in the will, the burden of the inheritance tax must rest upon the person who is entitled to receive the property.

However, the testator can direct that certain assets shall bear the burden of these taxes. In Will of Cudahy,70 the court held that a direction in the testator's will that:

I direct that my just debts, funeral expenses and all inheritance, estate, and succession taxes be paid by my executor.71
was sufficient direction to shift the burden of the state inheritance tax onto the residue:

Direction for payment of the tax, accompanied as it is by the direction to pay debts and funeral expenses which in any case are payable before the computation of the residue, followed by disposition of the residue, indicates that the testator intended to dispose of the residue subject to diminution of these items. We indicate the decision in the Cudahy case to show that if it is desired that property pass to the devisee or legatee without being diminished by the amount of the inheritance tax, provision must be made in the will. This provision must be at least as clear as the provision in Cudahy that the testator intends that the burden of the tax is to be shifted. There is nothing in the Act which changes this situation. The burden of the tax is controlled by the local law as just outlined.

IV. ACCOUNTING PROBLEMS

At the time of filing the final account the problems of the executor are similar to those discussed as inventory accounting problems. Wisconsin Statutes 313.13 requires the executor to file a final account:

Within 15 months after the issuance of letters testamentary or of administration, every executor or administrator shall file with the county court . . . the final account of administration and petition for the assignment of the residue of the estate ...

Section 317.01 provides that the executor shall be charged with all of the personal property which has come into his possession, all interest, profit and income which comes to him from the estate and proceeds from the sale of realty.

In preparing the final account the executor will determine what is to be listed as principal and what as income as he did at the inventory stage. The liabilities will be charged against the principal account under the rule of the Wells case, except income taxes which must be borne by the income itself under the provision of section (3a) (b) 4 (a) of the Act. Thus, the executor will supply the court with an account of the estate up to the time for distribution, and will be prepared to turn over to the trustee of any part of the estate the assets of his trust properly classified as corpus or as income. This will enable the trustee to assume immediate and orderly control of the trust estate.

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72 Ibid.
73 Supra note 48.