

Title

When a current trust beneficiary is temporarily lacking: What should be done with income accruing during hiatus?

Text

Section 8.41 of *Loring and Rounds: A Trustee's Handbook* (2020), transcribed in its entirety in the appendix below, suggests a number of default possibilities including (1) imposing a resulting trust upon income that accrues during the hiatus, (2) accumulating income for distribution to future current beneficiaries, (3) and immediately booking the income to principal. The Uniform Fiduciary Income and Principal Act (2018) (UFIPA), specifically § 404(5) (“receipts not normally apportioned”), opts for immediately booking income to principal. Section 404(5), unsupported and un-flagged by any official commentary, has been secreted deep in the bowels of UFIPA and, what is worse, surrounded by content that is only tangentially related. Lots of traps for the unwary trustee in all this codification.

Appendix

§8.41 What Is to Be Done with Net Income When There Is No Current Beneficiary Due to a Gap in the Dispositive Terms of the Trust? [from *Loring and Rounds: A Trustee's Handbook* (2020)]

On July 1, A enfeoffs B and his heirs to the use of C and his heirs beginning on August 1. The legal estate is in B before and after August 1. There is a resulting use in A in fee for the period of a month and on August 1 the use springs up in favor of C. Thus, a use could be created to commence in futuro. Such a use was called a springing use.¹

Assume that, for whatever reason, there is no express provision in a trust's governing instrument for the disposition of a portion or all of the net income earned on the trust property. Assume also that terminating the trust by acceleration² would not comport with the settlor's intent. Perhaps a member of the class of current income beneficiaries has just died, each member being entitled to a pro rata share of the net income stream.³ Or perhaps there is no current beneficiary at all because of scrivener error. Maybe the only designated current beneficiary has disclaimed his or her equitable interest and there is no alternate provision for the disposition of net income. In any event, the trustee is in a quandary as to how to handle a portion or all of the net income that is being and will be generated during the remainder of the trust's duration. Here are the possibilities:

- In the case of the death of a member of a class of current beneficiaries, that member's share of the net income stream going forward is distributed to his or her probate estate⁴ (or to his or her issue pursuant to an applicable antilapse statute⁵), until such time as the trust terminates; or in the alternative, there is a reallocation going forward, each member living from time to time receiving pro rata shares of the entire net income stream, until the trust terminates.⁶ One court in the absence of express direction has

¹Cornelius J. Moynihan, *Introduction to the Law of Real Property* 175 (2d ed. 1988).

²See generally §8.15.47 of this handbook (acceleration [of vested and contingent equitable remainders] doctrine).

³See generally 3 Scott & Ascher §14.10.

⁴See generally 3 Scott & Ascher §14.10.

⁵See generally §8.15.55 of this handbook (antilapse [the trust application]).

⁶See generally 3 Scott & Ascher §14.10.

inferred from the particular trust's general dispositive scheme that the settlor upon the death of a class member would have wanted that member's share of the income stream to pass to the member's issue rather than accumulate or shift to the surviving class members.⁷

- In the case of the death of the last survivor of a class of current beneficiaries that may in the future receive additions by birth or otherwise, net income is accumulated for distribution to any new members who may materialize.
- The net income as earned is accelerated to the remaindermen, if their interests are vested; or to the presumptive remaindermen, if their interests are contingent.⁸
- The net income is accumulated and/or added to principal for ultimate distribution to the actual remaindermen at the time the trust terminates.⁹
- The net income as earned reverts upon a resulting trust¹⁰ to the settlor, or the settlor's probate estate.¹¹ Once the trust terminates, the equitable interest springs up in favor of the remaindermen. The subject of springing equitable executory interests is taken up in §8.15.80 of this handbook.

“In these various situations the result is to be determined in accordance with what would presumably have been the intention of the...[settlor]...”¹² A court will attempt to divine his or her intention from the terms of the trust considered in their totality, taking into account such factors as whether the interests of the remaindermen are indefeasibly vested and whether the remaindermen, presumptive or otherwise, are relatives of the settlor. In the case of the death of a member of a class of current beneficiaries, there is probably a default presumption that the net income going forward is reallocated among the members, if any, who are living from time to time:

This is clear enough when the settlor has given the income to a “floating” class of beneficiaries, membership of which is to be determined each time there is a payment of income. The same result obtains, however, even if the settlor has not treated the beneficiaries as a class, since the ordinary inference is that the settlor intends to create cross remainders among income beneficiaries. It is immaterial whether the settlor has named the income beneficiaries as a group or individually. It is also immaterial whether they are to take “in equal shares.”¹³

The Restatement (Third) of Property (Wills and Other Donative Transfers) whenever possible would have the terms of a trust construed against its settlor and his successors should there be a gap in the provisions governing the disposition of the trust's income stream.¹⁴ “Nevertheless, when the disposition is more complex, and it appears the gap was not anticipated by the transferor, there is a basis for implying a future interest by construction if doing so furthers the transferor's overall dispositive plan.”¹⁵ This “implying a future interest by construction” is in keeping with the Restatement (Third)'s general

⁷See *Dewire v. Haveles*, 534 N.E.2d 782 (Mass. 1989).

⁸See generally 3 Scott & Ascher §14.10; 6 Scott & Ascher §41.2.1.

⁹See, e.g., Uniform Fiduciary Income and Principal Act (2018) (UFIPA) § 404(5) (providing that “net income received in an accounting period during which there is no beneficiary to which a fiduciary may or must distribute income” shall be allocated to principal). See generally 3 Scott & Ascher §14.10; 6 Scott & Ascher §41.2.1.

¹⁰See §4.1.1.1 of this handbook (the resulting trust and the vested equitable reversionary interest); 6 Scott & Ascher §41.2.1.

¹¹See generally 3 Scott & Ascher §14.10; 6 Scott & Ascher §41.2.

¹²4 Scott on Trusts §412; 6 Scott & Ascher §41.2.1.

¹³3 Scott & Ascher §14.10.

¹⁴See Restatement (Third) of Property (Wills and Other Donative Transfers) §26.9.

¹⁵Restatement (Third) of Property (Wills and Other Donative Transfers) §26.9 cmt. a.

unmindfulness of the resulting trust and the vested equitable reversionary property interest that it procedurally supports. The resulting trust is nowhere to be found in the Restatement (Third)'s index, and all but ignored in the main text. Still, the owner of a vested equitable reversionary interest incident to a trust relationship has property rights that are as deserving of constitutional protection as are any legal property rights he may possess.¹⁶ Accordingly, a court should eschew the retroactive "implication" of a future interest via the novel rule of construction.

¹⁶*See generally* §8.15.71 (the constitutional implications of retroactively applying new trust law).