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Decedents' Estates And Trusts—Payments to Estate Beneficiaries Behind the Iron Curtain

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The Osborne rule, they claim, is based on the presumption that the settlor intended to confer every benefit upon the income beneficiary since normally the life beneficiary is the principal object of the settlor's bounty. They also point out that "Capital, capital surplus, and earned surplus are merely bookkeeping entries on the records of the *corporation.* They cannot govern the substantive rights of those interested in a *trust.* What is capital to the corporation, may be income to the trust, and what is income to an ordinary shareholder may be corpus to a trust shareholder."[30]

This was rejected by the majority of the Court which felt that the Osborne rule was designed as a safeguard on the rights of principal and a limitation on the rights of income. Even though a corporation may have sufficient earnings subsequent to the creation of the trust to cover the distribution, the nature and source of the dividend must be considered and the court will not assume the distribution come from earned surplus. For example, extraordinary distributions of corporate property acquired by the corporation before the creation of the trust or a distribution of earnings accumulated before the trust was created should go to trust principal. On the other hand, when *earned surplus* is capitalized and stock issued, this stock may be allocated to income on the theory that the stock dividend is in essence a distribution of earnings even though the earnings are being retained in the corporation. This rule is advantageous to the income beneficiary in that it gives him a proportionate interest in all the capital assets; and it is also possible for the value of the stock distributed to be greater than the earnings capitalized. Also where the trustee has a slight majority of the voting stock giving him control of the corporation, it would be possible by allocating a stock dividend to income to shift the control of the corporation away from the trustee. Therefore, the rule should be limited to its present application.

In the instant case, since the applicability of the Osborne rule was not put in issue by the parties, the result reached by the majority is justified. However, the fundamental difficulty lies in the acceptance of the rule itself regardless of which interpretation it is given. The New York Legislature recognized the fact when it passed Section 17(a) of the Personal Property Law. Unfortunately, this only covers extraordinary dividends of stock to trusts created after 1926. It is submitted that if the applicability of the Osborne rule comes squarely before the court it should be overruled in favor of a rule more in line with the present legislative declaration.

PAYMENTS TO ESTATE BENEFICIARIES BEHIND THE IRON CURTAIN

In re Geiger's Estate[31] was an appeal from a refusal to release funds from an estate for the purpose of sending relief packages to estate distributees in

30. Id. at 23, 194 N.Y.S.2d 481 (dissent).

31. 7 N.Y.2d 109, 195 N.Y.S.2d 831 (1959), a 5-2 decision, the minority dissenting to both the holding denying the assignment and the refusal of a hearing to permit release of the funds for the beneficiaries.

Hungary. Section 269 of the then Surrogate's Court Act stated in effect that where it shall appear that a beneficiary would not have the use of the money or property due him the Surrogate may direct that it be paid into court.[32] The Surrogate on being presented with this case took judicial notice of the situation in Hungary and stated that he "[did] not believe it likely that the beneficiaries would have use or control of the property . . ." and further that "The courts do not favor purported assignments of funds payable to iron-curtain country nationals and have labeled them attempts to circumvent section 269 of the Surrogate's Court Act."[33]

It appears that this Surrogate, as others,[34] feared that had he released the funds they would "ultimately percolate in a roundabout way into the country behind the iron curtain" to the benefit of the country,[35] and not the individual. The Appellate Division,[36] and the Court of Appeals,[37] affirmed, fortified in all probability by a deference to the Surrogate's discretion. The minority felt that the Surrogate had abused his discretion in taking judicial notice of the situation without affording the petitioner a hearing and a chance therein to show that the money would inure to the benefit of the distributees.

Section 269 has been amended since this case by the addition of Section 269(a)(2),[38] which places the burden in a questionable case on the person seeking the funds to show that the alien beneficiary will receive the benefit, use or control of the money. The Legislature appears to have accepted the viewpoint of the Surrogate in the present case and solidified it into a statute. But in so doing they seem to have limited somewhat the discretion of the Surrogate, since now he would appear precluded from releasing the funds where the distributees do not justify such a release by a preponderance of the evidence.

There was also involved an appeal by the attorney individually to obtain enforcement of an assignment of 25% of the beneficiaries' share of the estate for legal services rendered. The Court of Appeals ruled that the attorney could not recover on the assignment since it was an assignment of the shares over which the distributees had no control. But, the Court did indicate that on a proper proceeding a reasonable fee chargeable against the fund might be obtainable for services rendered.[39]

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32. N.Y. Surr. Ct. Act § 269 (now § 269(a)(1)).
33. 12 Misc. 2d 1043, 1044, 175 N.Y.S.2d 588, 589 (Surr. Ct. 1958).
34. In re Braier's Estate, 305 N.Y. 148, 111 N.E.2d 424 (1953); In re Siegler's Will, 284 App. Div. 436, 132 N.Y.S.2d 392 (3d Dep't 1954); In re Herz' Will, 7 Misc. 2d 217, 163 N.Y.S.2d 349 (Surr. Ct. 1957); In re Perlinsky's Estate, 202 Misc. 351, 115 N.Y.S.2d 549 (Surr. Ct. 1952); In re Getream, 200 Misc. 543, 107 N.Y.S.2d 225 (Surr. Ct. 1951); In re Alexandroff, 183 Misc. 95, 47 N.Y.S.2d 334 (Surr. Ct. 1944) (Surrogate Foley).
35. In re Getream, 200 Misc. 543, 544, 107 N.Y.S.2d 225, 226 (Surr. Ct. 1951).
36. 7 A.D.2d 1004, 185 N.Y.S.2d 227 (2d Dep't 1959). Unanimous on denying the releasing of funds to the distributees in Hungary and 3-2 on denying the 25% assignment to the local attorney.
37. Supra note 31.
38. N.Y. Surr. Ct. Act § 269(a)(2) as amended N.Y. Sess. Laws 1960, ch. 975.
39. See N.Y. Surr. Ct. Act § 231(b).