The American College of Trust and Estate Counsel

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ACTEC

STUDIES

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Study 18:

Equitable Adjustments

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Equitable Adjustments

	Alabama	Alaska	Arizona [3]	Arkansas [5]	California
1. When a fiduciary elects to treat estate administration expenses or losses as income tax deductions instead of estate tax deductions, is an adjustment:					
a. required?	no	no	no[4]	no	yes[9]
b. made as a matter of practice?	no	no	no	no[6]	yes[9]
2. When income beneficiaries are taxable on D.N.I. which has been reduced by principal charges and in the same year there are items of income attributable to corpus which do not receive the benefit of a deduction for these principal charges, is an adjustment:					
a. required?	no	no	no[3]	no	no
b. made as a matter of practice?	no	no	no	no[6]	no[10]
3. When a trustee pays income tax on estate taxable income transferred to trust principal in the form of a corpus distribution, and the associated (state law) accounting income is later distributed to the income beneficiaries of a trust, is an adjustment:					
a. required?	no	no	no	no	no
b. made as a matter of practice?	no	no	no	no[6]	no[11]
4. In other situations, when a distribution of principal carries out D.N.I. subjecting the recipient to tax on income which is enjoyed by others, is an adjustment:					
a. required?	no	no	no	no	no
b. made as a matter of practice?	no	no	no	no[6]	no
5. When an estate tax valuation date election produces a greater estate tax and a higher income tax basis and thus less potential capital gain (or ordinary income) on a future disposition of property, is an adjustment:					
a. required?	no	no	no	no	no[12]
b. made as a matter of practice?	no	no	no	no[6]	no
6. When there is a non-pro rata distribution from an estate, so that low basis assets are distributed to one beneficiary and high basis assets are distributed to another, is an adjustment:					
a. required?	no	no	no	no	no
b. made as a matter of practice?	no	no	no	no[7]	no
7. When a fiduciary who is receiving benefits under a qualified plan does not represent the party in interest who bears the estate tax, what duty is there for the fiduciary to consider or adjust for an increase in the estate tax burden occasioned by an election to take the distribution in a lump sum?					
a. none	NR	X	X	X	
b. see footnote		[2]		[6]	[13]
8. When, as a result of the realization of a capital gain by a grantor trust, the settlor becomes liable for the tax in his taxable year in which the gain is realized, is an adjustment:					
a. required?	no	no	no	no	no
b. made as a matter of practice?	no	no	no	no	no
9. Are there any other similar inequities for which adjustment is required to be made or is made as a matter of practice?					
a. no	X	X	X	X	X
b. yes					
c. see footnote					
10. What is the practice in your jurisdiction in making provision in the instrument regarding equitable adjustments?					
a. required?					
b. prohibited					
c. the fiduciary may be given discretion to make or not to make adjustments		X		X[8]	

d. the fiduciary may determine conclusively the details of each adjustment (if acting reasonably)					X
e. none	X[1]	X	X		X

Key: X - Answer applies NA - Not applicable NR - No response

Equitable Adjustments

	Colorado	Connecticut	Delaware	District of Columbia	Florida
1. When a fiduciary elects to treat estate administration expenses or losses as income tax deductions instead of estate tax deductions, is an adjustment:					
a. required?	no	no	no	no	yes[28]
b. made as a matter of practice?	no[14]	no[19]	no	no[25]	no
2. When income beneficiaries are taxable on D.N.I. which has been reduced by principal charges and in the same year there are items of income attributable to corpus which do not receive the benefit of a deduction for these principal charges, is an adjustment:					
a. required?	no	no	no	no	no
b. made as a matter of practice?	no	no	no	no[25]	no
3. When a trustee pays income tax on estate taxable income transferred to trust principal in the form of a corpus distribution, and the associated (state law) accounting income is later distributed to the income beneficiaries of a trust, is an adjustment:					
a. required?	no	no	no	no	no
b. made as a matter of practice?	no[14]	yes[20]	no	no[25]	no
4. In other situations, when a distribution of principal carries out D.N.I. subjecting the recipient to tax on income which is enjoyed by others, is an adjustment:					
a. required?	no	no	no	no	no
b. made as a matter of practice?	no[14]	no[21]	no	no[25]	no
5. When an estate tax valuation date election produces a greater estate tax and a higher income tax basis and thus less potential capital gain (or ordinary income) on a future disposition of property, is an adjustment:					
a. required?	no	no	no	no	no
b. made as a matter of practice?	no[14]	no	no	no[25]	no
6. When there is a non-pro rata distribution from an estate, so that low basis assets are distributed to one beneficiary and high basis assets are distributed to another, is an adjustment:					
a. required?	no	no	no	no	no
b. made as a matter of practice?	no[15]	no	no[23]	no[25]	no
7. When a fiduciary who is receiving benefits under a qualified plan does not represent the party in interest who bears the estate tax, what duty is there for the fiduciary to consider or adjust for an increase in the estate tax burden occasioned by an election to take the distribution in a lump sum?					
a. none		X		X	X
b. see footnote	[16]	[22]	[24]		
8. When, as a result of the realization of a capital gain by a grantor trust, the settlor becomes liable for the tax in his taxable year in which the gain is realized, is an adjustment:					
a. required?	no	no	no	no	no
b. made as a matter of practice?	no	no	no	no[25]	no
9. Are there any other similar inequities for which adjustment is required to be made or is made as a matter of practice?					
a. no		X	X		NA
b. yes	X			X	NA
c. see footnote	[17]			[26]	
10. What is the practice in your jurisdiction in making provision in the instrument regarding equitable adjustments?					
a. required?					
b. prohibited					
c. the fiduciary may be given discretion to make or not to make adjustments	X[18]	X[19]	X	X[27]	X

d. the fiduciary may determine conclusively the details of each adjustment (if acting reasonably)	X				
e. none					

Key: X - Answer applies NA - Not applicable NR - No response

Equitable Adjustments

	Georgia	Hawaii	Idaho	Illinois	Indiana
1. When a fiduciary elects to treat estate administration expenses or losses as income tax deductions instead of estate tax deductions, is an adjustment:					
a. required?	no	no	no	no	no
b. made as a matter of practice?	yes[29]	no[30]	no[31]	no[35]	no
2. When income beneficiaries are taxable on D.N.I. which has been reduced by principal charges and in the same year there are items of income attributable to corpus which do not receive the benefit of a deduction for these principal charges, is an adjustment:					
a. required?	no	no	no	no	no
b. made as a matter of practice?	no	no	no[31]	no[35]	no
3. When a trustee pays income tax on estate taxable income transferred to trust principal in the form of a corpus distribution, and the associated (state law) accounting income is later distributed to the income beneficiaries of a trust, is an adjustment:					
a. required?	no	no	no	no	[40]
b. made as a matter of practice?	no	no	no[32]	no[35]	[40]
4. In other situations, when a distribution of principal carries out D.N.I. subjecting the recipient to tax on income which is enjoyed by others, is an adjustment:					
a. required?	no	no	no	no	no
b. made as a matter of practice?	no	no	no[32]	no	no
5. When an estate tax valuation date election produces a greater estate tax and a higher income tax basis and thus less potential capital gain (or ordinary income) on a future disposition of property, is an adjustment:					
a. required?	no	no	no	no	no
b. made as a matter of practice?	no	no	no[32]	no	no
6. When there is a non-pro rata distribution from an estate, so that low basis assets are distributed to one beneficiary and high basis assets are distributed to another, is an adjustment:					
a. required?	no	no	no	no	yes[41]
b. made as a matter of practice?	no	no	no[32]	no[36]	
7. When a fiduciary who is receiving benefits under a qualified plan does not represent the party in interest who bears the estate tax, what duty is there for the fiduciary to consider or adjust for an increase in the estate tax burden occasioned by an election to take the distribution in a lump sum?					
a. none	X	X	X	X	X
b. see footnote			[32]	[37]	
8. When, as a result of the realization of a capital gain by a grantor trust, the settlor becomes liable for the tax in his taxable year in which the gain is realized, is an adjustment:					
a. required?	no	no	no	no	no
b. made as a matter of practice?	no	no	no[32]	no	no
9. Are there any other similar inequities for which adjustment is required to be made or is made as a matter of practice?					
a. no	X	X	X		X
b. yes				X	
c. see footnote			[33]	[38]	
10. What is the practice in your jurisdiction in making provision in the instrument regarding equitable adjustments?					
a. required?					
b. prohibited					
c. the fiduciary may be given discretion to make or not to make adjustments	X	X	X[34]	X[39]	X[42]

d. the fiduciary may determine conclusively the details of each adjustment (if acting reasonably)					
e. none					

Key: X - Answer applies NA - Not applicable NR - No response

Equitable Adjustments

	Iowa	Kansas[46]	Kentucky	Louisian	Maine
1. When a fiduciary elects to treat estate administration expenses or losses as income tax deductions instead of estate tax deductions, is an adjustment:					
a. required?	no	no	no	no	no
b. made as a matter of practice?	no	no	yes	no[50]	no
2. When income beneficiaries are taxable on D.N.I. which has been reduced by principal charges and in the same year there are items of income attributable to corpus which do not receive the benefit of a deduction for these principal charges, is an adjustment:					
a. required?	no	no	no	no	no
b. made as a matter of practice?	no	no	no	no[50]	no
3. When a trustee pays income tax on estate taxable income transferred to trust principal in the form of a corpus distribution, and the associated (state law) accounting income is later distributed to the income beneficiaries of a trust, is an adjustment:					
a. required?	no	no	no	no	no
b. made as a matter of practice?	no[43]	no	no	no[50]	no
4. In other situations, when a distribution of principal carries out D.N.I. subjecting the recipient to tax on income which is enjoyed by others, is an adjustment:					
a. required?	no	no	no	no	no
b. made as a matter of practice?	no	no	no	no[50]	no
5. When an estate tax valuation date election produces a greater estate tax and a higher income tax basis and thus less potential capital gain (or ordinary income) on a future disposition of property, is an adjustment:					
a. required?	no	no	no	no	no
b. made as a matter of practice?	no	no	no	no[50]	no
6. When there is a non-pro rata distribution from an estate, so that low basis assets are distributed to one beneficiary and high basis assets are distributed to another, is an adjustment:					
a. required?	no	no	yes[47]	no	no
b. made as a matter of practice?	no	no	no	no[51]	no
7. When a fiduciary who is receiving benefits under a qualified plan does not represent the party in interest who bears the estate tax, what duty is there for the fiduciary to consider or adjust for an increase in the estate tax burden occasioned by an election to take the distribution in a lump sum?					
a. none	X	X	X	X	X
b. see footnote			[48]		
8. When, as a result of the realization of a capital gain by a grantor trust, the settlor becomes liable for the tax in his taxable year in which the gain is realized, is an adjustment:					
a. required?	no	no	no	no	no
b. made as a matter of practice?	no	no	no	no	no
9. Are there any other similar inequities for which adjustment is required to be made or is made as a matter of practice?					
a. no		X			X
b. yes	X		X	X	
c. see footnote	[44]		[49]	[50]	
10. What is the practice in your jurisdiction in making provision in the instrument regarding equitable adjustments?					
a. required?					
b. prohibited				X[50]	
c. the fiduciary may be given discretion to make or not to make adjustments	X	X	X		

d. the fiduciary may determine conclusively the details of each adjustment (if acting reasonably)	X[45]	X	X		
e. none					X

Key: X - Answer applies NA - Not applicable NR - No response

Equitable Adjustments

	Maryland	Mass'setts	Michigan	Minnesot	Mississip
1. When a fiduciary elects to treat estate administration expenses or losses as income tax deductions instead of estate tax deductions, is an adjustment:					
a. required?	yes[52]	no	no	no	NA
b. made as a matter of practice?		yes	no	no	no[58]
2. When income beneficiaries are taxable on D.N.I. which has been reduced by principal charges and in the same year there are items of income attributable to corpus which do not receive the benefit of a deduction for these principal charges, is an adjustment:					
a. required?	no	no[54]	no	no	no
b. made as a matter of practice?	no	no[54]	no	no	no
3. When a trustee pays income tax on estate taxable income transferred to trust principal in the form of a corpus distribution, and the associated (state law) accounting income is later distributed to the income beneficiaries of a trust, is an adjustment:					
a. required?	no[53]	no[54]	no	no	no
b. made as a matter of practice?	yes	no[54]	no	no	no
4. In other situations, when a distribution of principal carries out D.N.I. subjecting the recipient to tax on income which is enjoyed by others, is an adjustment:					
a. required?	no	no	no	no	no
b. made as a matter of practice?	no	no	no	no	no
5. When an estate tax valuation date election produces a greater estate tax and a higher income tax basis and thus less potential capital gain (or ordinary income) on a future disposition of property, is an adjustment:					
a. required?	no	no	no	no	no
b. made as a matter of practice?	no	no	no	no	no
6. When there is a non-pro rata distribution from an estate, so that low basis assets are distributed to one beneficiary and high basis assets are distributed to another, is an adjustment:					
a. required?	no	no	no	no	no
b. made as a matter of practice?	no	no[55]	no[57,57a]	no	no
7. When a fiduciary who is receiving benefits under a qualified plan does not represent the party in interest who bears the estate tax, what duty is there for the fiduciary to consider or adjust for an increase in the estate tax burden occasioned by an election to take the distribution in a lump sum?					
a. none	X	X	X	X	X
b. see footnote		[56]			
8. When, as a result of the realization of a capital gain by a grantor trust, the settlor becomes liable for the tax in his taxable year in which the gain is realized, is an adjustment:					
a. required?	no	no	no	no	no
b. made as a matter of practice?	no	no	no	no	no
9. Are there any other similar inequities for which adjustment is required to be made or is made as a matter of practice?					
a. no	X	X	X	X	X
b. yes					
c. see footnote					
10. What is the practice in your jurisdiction in making provision in the instrument regarding equitable adjustments?					
a. required?					
b. prohibited					
c. the fiduciary may be given discretion to make or not to make adjustments	X		X	X	X

d. the fiduciary may determine conclusively the details of each adjustment (if acting reasonably)					
e. none		X			

Key: X - Answer applies NA - Not applicable NR - No response

Equitable Adjustments

	Missouri	Montana[62]	Nebraska	Nevada	New Hampshire[66]
1. When a fiduciary elects to treat estate administration expenses or losses as income tax deductions instead of estate tax deductions, is an adjustment:					
a. required?	no	no	no	no	no
b. made as a matter of practice?	no[59]	no	no	no[65]	no
2. When income beneficiaries are taxable on D.N.I. which has been reduced by principal charges and in the same year there are items of income attributable to corpus which do not receive the benefit of a deduction for these principal charges, is an adjustment:					
a. required?	no	no	no	no	no
b. made as a matter of practice?	no[59]	no	no	no[65]	no
3. When a trustee pays income tax on estate taxable income transferred to trust principal in the form of a corpus distribution, and the associated (state law) accounting income is later distributed to the income beneficiaries of a trust, is an adjustment:					
a. required?	no	no	no	no	no
b. made as a matter of practice?	no[59]	no	no[63]	no[65]	no
4. In other situations, when a distribution of principal carries out D.N.I. subjecting the recipient to tax on income which is enjoyed by others, is an adjustment:					
a. required?	no	no	no	no	no
b. made as a matter of practice?	no[60]	no	no	no[65]	no
5. When an estate tax valuation date election produces a greater estate tax and a higher income tax basis and thus less potential capital gain (or ordinary income) on a future disposition of property, is an adjustment:					
a. required?	no	no	no	no	no
b. made as a matter of practice?	no	no	no	no[65]	no
6. When there is a non-pro rata distribution from an estate, so that low basis assets are distributed to one beneficiary and high basis assets are distributed to another, is an adjustment:					
a. required?	no	no	no	no	no
b. made as a matter of practice?	no[61]	no	no[64]	no[65]	no
7. When a fiduciary who is receiving benefits under a qualified plan does not represent the party in interest who bears the estate tax, what duty is there for the fiduciary to consider or adjust for an increase in the estate tax burden occasioned by an election to take the distribution in a lump sum?					
a. none	X	X	X		X
b. see footnote				[65]	
8. When, as a result of the realization of a capital gain by a grantor trust, the settlor becomes liable for the tax in his taxable year in which the gain is realized, is an adjustment:					
a. required?	no	no	no	no	no
b. made as a matter of practice?	no	no	no	no[65]	no
9. Are there any other similar inequities for which adjustment is required to be made or is made as a matter of practice?					
a. no	X	X	X		X
b. yes					
c. see footnote				[65]	
10. What is the practice in your jurisdiction in making provision in the instrument regarding equitable adjustments?					
a. required?					
b. prohibited					
c. the fiduciary may be given discretion to make or not to make adjustments	X		X	[65]	X

d. the fiduciary may determine conclusively the details of each adjustment (if acting reasonably)				65	
e. none		X			

Key: X - Answer applies NA - Not applicable NR - No response

Equitable Adjustments

	New Jersey	New Mexico[69]	New York	North Carolina	North Dakota
1. When a fiduciary elects to treat estate administration expenses or losses as income tax deductions instead of estate tax deductions, is an adjustment:					
a. required?	no[67]	no	yes[70]	no	no
b. made as a matter of practice?	no	no	yes[70]	no[77]	no
2. When income beneficiaries are taxable on D.N.I. which has been reduced by principal charges and in the same year there are items of income attributable to corpus which do not receive the benefit of a deduction for these principal charges, is an adjustment:					
a. required?	no	no	no[71]	no	no
b. made as a matter of practice?	no	no	no[71]	no[77]	no
3. When a trustee pays income tax on estate taxable income transferred to trust principal in the form of a corpus distribution, and the associated (state law) accounting income is later distributed to the income beneficiaries of a trust, is an adjustment:					
a. required?	no	no	yes[72]	no	no
b. made as a matter of practice?	no	no	yes[72]	no[77]	no
4. In other situations, when a distribution of principal carries out D.N.I. subjecting the recipient to tax on income which is enjoyed by others, is an adjustment:					
a. required?	no	no	no	no	no
b. made as a matter of practice?	no	no	no	no	no
5. When an estate tax valuation date election produces a greater estate tax and a higher income tax basis and thus less potential capital gain (or ordinary income) on a future disposition of property, is an adjustment:					
a. required?	no	no	no	no	no
b. made as a matter of practice?	no	no	no	no[78]	no
6. When there is a non-pro rata distribution from an estate, so that low basis assets are distributed to one beneficiary and high basis assets are distributed to another, is an adjustment:					
a. required?	no	no	no	no	no
b. made as a matter of practice?	no	no	no[73]	no[79]	no
7. When a fiduciary who is receiving benefits under a qualified plan does not represent the party in interest who bears the estate tax, what duty is there for the fiduciary to consider or adjust for an increase in the estate tax burden occasioned by an election to take the distribution in a lump sum?					
a. none	X	X	X	X	X
b. see footnote				[80]	
8. When, as a result of the realization of a capital gain by a grantor trust, the settlor becomes liable for the tax in his taxable year in which the gain is realized, is an adjustment:					
a. required?	no	no	no	no	no
b. made as a matter of practice?	no	no	no[74]	no	no
9. Are there any other similar inequities for which adjustment is required to be made or is made as a matter of practice?					
a. no	X	X		X	X
b. yes					
c. see footnote			[75]	[81]	
10. What is the practice in your jurisdiction in making provision in the instrument regarding equitable adjustments?					
a. required?					
b. prohibited					
c. the fiduciary may be given discretion to make or not to make adjustments	X[68]	X	X	X	X

d. the fiduciary may determine conclusively the details of each adjustment (if acting reasonably)		X	X[76]	X	
e. none					

Key: X - Answer applies NA - Not applicable NR - No response

Equitable Adjustments

	Ohio	Oklahoma	Oregon	Penns'vnia	Rhode Island
1. When a fiduciary elects to treat estate administration expenses or losses as income tax deductions instead of estate tax deductions, is an adjustment:					
a. required?	no	no	no	no[88]	no
b. made as a matter of practice?	no[82]	no	yes[85]	no[88]	yes[95]
2. When income beneficiaries are taxable on D.N.I. which has been reduced by principal charges and in the same year there are items of income attributable to corpus which do not receive the benefit of a deduction for these principal charges, is an adjustment:					
a. required?	no	no	no	no	no
b. made as a matter of practice?	no	no	no	no[89]	no
3. When a trustee pays income tax on estate taxable income transferred to trust principal in the form of a corpus distribution, and the associated (state law) accounting income is later distributed to the income beneficiaries of a trust, is an adjustment:					
a. required?	no	no	no	no[90]	no
b. made as a matter of practice?	no	no	yes[85]	no	yes[96]
4. In other situations, when a distribution of principal carries out D.N.I. subjecting the recipient to tax on income which is enjoyed by others, is an adjustment:					
a. required?	no	no	no	no[91]	no
b. made as a matter of practice?	no	no	yes[85]	no[91]	yes[97]
5. When an estate tax valuation date election produces a greater estate tax and a higher income tax basis and thus less potential capital gain (or ordinary income) on a future disposition of property, is an adjustment:					
a. required?	no	no	no	no[92]	no
b. made as a matter of practice?	no	no	no[86]	no[92]	no
6. When there is a non-pro rata distribution from an estate, so that low basis assets are distributed to one beneficiary and high basis assets are distributed to another, is an adjustment:					
a. required?	no	no	no	no	no
b. made as a matter of practice?	no[83]	no	no[86]	no	no
7. When a fiduciary who is receiving benefits under a qualified plan does not represent the party in interest who bears the estate tax, what duty is there for the fiduciary to consider or adjust for an increase in the estate tax burden occasioned by an election to take the distribution in a lump sum?					
a. none	X	X	X		X
b. see footnote				X[93]	
8. When, as a result of the realization of a capital gain by a grantor trust, the settlor becomes liable for the tax in his taxable year in which the gain is realized, is an adjustment:					
a. required?	no	no	no	yes[94]	no
b. made as a matter of practice?	no	no	no	yes[94]	no[98]
9. Are there any other similar inequities for which adjustment is required to be made or is made as a matter of practice?					
a. no	X		X	X	X
b. yes		X			
c. see footnote		[84]			
10. What is the practice in your jurisdiction in making provision in the instrument regarding equitable adjustments?					
a. required?					
b. prohibited					X[99]
c. the fiduciary may be given discretion to make or not to make adjustments	X		X[87]	X	

d. the fiduciary may determine conclusively the details of each adjustment (if acting reasonably)			X	X	
e. none		X			

Key: X - Answer applies NA - Not applicable NR - No response

Equitable Adjustments

	South Carolina	South Dakota	Tennessee	Texas[104]	Utah
1. When a fiduciary elects to treat estate administration expenses or losses as income tax deductions instead of estate tax deductions, is an adjustment:					
a. required?	no	no	no	no	no
b. made as a matter of practice?	no	no	no	no	no
2. When income beneficiaries are taxable on D.N.I. which has been reduced by principal charges and in the same year there are items of income attributable to corpus which do not receive the benefit of a deduction for these principal charges, is an adjustment:					
a. required?	no	no	no	no	no
b. made as a matter of practice?	no	no	no	no	no
3. When a trustee pays income tax on estate taxable income transferred to trust principal in the form of a corpus distribution, and the associated (state law) accounting income is later distributed to the income beneficiaries of a trust, is an adjustment:					
a. required?	no	yes	no	no	no
b. made as a matter of practice?	no	no	no	no	no
4. In other situations, when a distribution of principal carries out D.N.I. subjecting the recipient to tax on income which is enjoyed by others, is an adjustment:					
a. required?	no	yes	no	no	no
b. made as a matter of practice?	no	no	no	no	no
5. When an estate tax valuation date election produces a greater estate tax and a higher income tax basis and thus less potential capital gain (or ordinary income) on a future disposition of property, is an adjustment:					
a. required?	no	yes	no	no	no
b. made as a matter of practice?	no	no	no	no	no
6. When there is a non-pro rata distribution from an estate, so that low basis assets are distributed to one beneficiary and high basis assets are distributed to another, is an adjustment:					
a. required?	no	no	no	no	no
b. made as a matter of practice?	no	no	no	no	no
7. When a fiduciary who is receiving benefits under a qualified plan does not represent the party in interest who bears the estate tax, what duty is there for the fiduciary to consider or adjust for an increase in the estate tax burden occasioned by an election to take the distribution in a lump sum?					
a. none	X		X	X	X
b. see footnote		X[101]	[103]		
8. When, as a result of the realization of a capital gain by a grantor trust, the settlor becomes liable for the tax in his taxable year in which the gain is realized, is an adjustment:					
a. required?	no	no	no	no	no
b. made as a matter of practice?	no	no		no	no
9. Are there any other similar inequities for which adjustment is required to be made or is made as a matter of practice?					
a. no	X		X	X	X
b. yes		X			
c. see footnote		X[102]			
10. What is the practice in your jurisdiction in making provision in the instrument regarding equitable adjustments?					
a. required?					
b. prohibited					
c. the fiduciary may be given discretion to make or not to make adjustments	X[100]		X[103]		
d. the fiduciary may determine conclusively the details of each adjustment (if acting reasonably)	[100]				
e. none		X		X	X

Key: X - Answer applies NA - Not applicable NR - No response

Equitable Adjustments

	Vermont	Virginia	Washington	West Virginia
1. When a fiduciary elects to treat estate administration expenses or losses as income tax deductions instead of estate tax deductions, is an adjustment				
a. required?	no	no	yes[108]	no
b. made as a matter of practice?	no	no	yes[109]	no
2. When income beneficiaries are taxable on D.N.I. which has been reduced by principal charges and in the same year there are items of income attributable to corpus which do not receive the benefit of a deduction for these principal charges, is an adjustment:				
a. required?	no	no	no	no
b. made as a matter of practice?		no	no	no
3. When a trustee pays income tax on estate taxable income transferred to trust principal in the form of a corpus distribution, and the associated (state law) accounting income is later distributed to the income beneficiaries of a trust, is an adjustment:				
a. required?	no	no	no	no
b. made as a matter of practice?	no	no	no	no
4. In other situations, when a distribution of principal carries out D.N.I. subjecting the recipient to tax on income which is enjoyed by others, is an adjustment:				
a. required?	no	no	no	no
b. made as a matter of practice?	no	no	no	no
5. When an estate tax valuation date election produces a greater estate tax and a higher income tax basis and thus less potential capital gain (or ordinary income) on a future disposition of property, is an adjustment:				
a. required?	no	no	no	no
b. made as a matter of practice?	no	no	no	no
6. When there is a non-pro rata distribution from an estate, so that low basis assets are distributed to one beneficiary and high basis assets are distributed to another, is an adjustment:				
a. required?	no	no	no[110]	no
b. made as a matter of practice?	no	no[105]	no	no
7. When a fiduciary who is receiving benefits under a qualified plan does not represent the party in interest who bears the estate tax, what duty is there for the fiduciary to consider or adjust for an increase in the estate tax burden occasioned by an election to take the distribution in a lump sum?				
a. none	X	X	X	X
b. see footnote				
8. When, as a result of the realization of a capital gain by a grantor trust, the settlor becomes liable for the tax in his taxable year in which the gain is realized, is an adjustment:				
a. required?	no	no	no	no
b. made as a matter of practice?	no	no	no	no
9. Are there any other similar inequities for which adjustment is required to be made or is made as a matter of practice?				
a. no	X		X	X
b. yes		X		
c. see footnote		[106]	[111]	
10. What is the practice in your jurisdiction in making provision in the instrument regarding equitable adjustments?				
a. required?				
b. prohibited				
c. the fiduciary may be given discretion to make or not to make adjustments		X[107]	X	X
d. the fiduciary may determine conclusively the details of each adjustment (if acting reasonably)		X		
e. none	X			X

Key: X - Answer applies NA - Not applicable NR - No response

Equitable Adjustments

	Wisconsin	Wyoming[113]
1. When a fiduciary elects to treat estate administration expenses or losses as income tax deductions instead of estate tax deductions, is an adjustment		
a. required?	no	no
b. made as a matter of practice?	no	no
2. When income beneficiaries are taxable on D.N.I. which has been reduced by principal charges and in the same year there are items of income attributable to corpus which do not receive the benefit of a deduction for these principal charges, is an adjustment:		
a. required?	no	no
b. made as a matter of practice?	no	no
3. When a trustee pays income tax on estate taxable income transferred to trust principal in the form of a corpus distribution, and the associated (state law) accounting income is later distributed to the income beneficiaries of a trust, is an adjustment:		
a. required?	no	no
b. made as a matter of practice?	no	no
4. In other situations, when a distribution of principal carries out D.N.I. subjecting the recipient to tax on income which is enjoyed by others, is an adjustment:		
a. required?	no	no
b. made as a matter of practice?	no	no
5. When an estate tax valuation date election produces a greater estate tax and a higher income tax basis and thus less potential capital gain (or ordinary income) on a future disposition of property, is an adjustment:		
a. required?	no	no
b. made as a matter of practice?	no	no
6. When there is a non-pro rata distribution from an estate, so that low basis assets are distributed to one beneficiary and high basis assets are distributed to another, is an adjustment:		
a. required?	yes[112]	no
b. made as a matter of practice?	yes[112]	no
7. When a fiduciary who is receiving benefits under a qualified plan does not represent the party in interest who bears the estate tax, what duty is there for the fiduciary to consider or adjust for an increase in the estate tax burden occasioned by an election to take the distribution in a lump sum?		
a. none	X	X
b. see footnote		
8. When, as a result of the realization of a capital gain by a grantor trust, the settlor becomes liable for the tax in his taxable year in which the gain is realized, is an adjustment:		
a. required?	no	no
b. made as a matter of practice?	no	no
9. Are there any other similar inequities for which adjustment is required to be made or is made as a matter of practice?		
a. no	X	X
b. yes		
c. see footnote		
10. What is the practice in your jurisdiction in making provision in the instrument regarding equitable adjustments?		
a. required?		
b. prohibited		
c. the fiduciary may be given discretion to make or not to make adjustments	X	X
d. the fiduciary may determine conclusively the details of each adjustment (if acting reasonably)	X	
e. none		

Key: X - Answer applies NA - Not applicable NR - No response

NOTES

ALABAMA

Ephriam Taylor Brown, Jr.
Birmingham
December 20, 1994

1. While there appears to be no general practice with respect to making any adjustments, some of the more sophisticated attorneys and corporate fiduciaries will make adjustments in certain instances. Instruments drawn by more experienced practitioners give fiduciaries discretion to make adjustments, but the vast majority of instruments have no such provisions.

ALASKA

Trigg T. Davis
Anchorage
June 13, 1995

2. No adjustment appears to be required. It is not common practice to make adjustments absent a provision in the governing instrument either requiring or authorizing them.

ARIZONA

Robert J. Rosepink
Scottsdale
January 5, 1995

3. ARIZ. REV. STAT.§14-7402A (Arizona's Revised Uniform Principal and Income Act) states that a trust shall be administered "with due regard to the respective interests of income beneficiaries and remaindermen." In addition, if the trust instrument does not provide for allocation of receipts and expenditures and such allocation is not provided for by statute, the trustee must consider what is fair and reasonable to both income and principal beneficiaries and must act as a prudent man would when managing the property of others.

4. ARIZ. REV. STAT.§ 14-3715 (Uniform Probate Code) allows a personal representative to allocate items of income or expense either to estate income or principal as permitted or provided by law. Ordinarily, no adjustment is made.

ARKANSAS

William D. Haught
Little Rock
January 14, 1995

5. The Arkansas Uniform Principal and Income Act contains some general language giving a fiduciary latitude in the way he charges receipts and expenditures to achieve equity between the income and principal interests. Arkansas recognizes a fiduciary's duty of impartiality between multiple or successive trust beneficiaries. *Alexander v. Alexander*, 262 Ark. 612,561 S.W.2d 59 (1978). In the absence of a provision contained in the governing instrument concerning equitable adjustments, the duty of a fiduciary to make such adjustments as a result of tax elections is unclear.

6. No adjustment appears to be required. It is not common practice to make adjustments absent a provision in the governing instrument either requiring or authorizing them.

7. ARK. CODE ANN. §28-53-204 dealing with distribution of assets in satisfaction of a pecuniary marital deduction provision in kind at federal estate tax values or any values other than date of distribution or allocation ones, requires that the assets be fairly representative of appreciation and depreciation.

8. It is fairly common to include some provisions in the governing instrument regarding equitable adjustments. The usual approach is not to require such adjustments, but rather to authorize the fiduciary to make them, in its discretion.

CALIFORNIA

William E. Ferguson
La Jolla
January 20, 1995

9. Principal must be made whole if administration expenses are taken as income tax deductions. *Estate of Bixby*, 140 Cal. App. 2d 326, 295 P.2d 68 (1956). Generally there is no adjustment made for losses except those deductible for estate tax purposes.

10. Some practitioners believe that a "Bixby" type of adjustment should be made.

11. Despite the absence of clear authority, under Cal. Probate Code §§16300-16315 (The Revised Uniform Principal & Income Act), it is arguable that tax paid by a trustee is on "ordinary income." See *Estate of de Laveagea*, 50 Cal. 2d 480, 326 P.2d 129 (1958). While probate income may be determined in the estate, the trustee also has power to determine net income. However, there are lawyers who do not follow these practices, while under the Bixby rationale (see footnote 9) an equitable adjustment is necessary to prevent corpus depletion.

12. While no adjustment is generally made in practice, if the fiduciary is also the beneficiary, California courts would probably require an adjustment, although if the election is made by an independent fiduciary, the ultimate decision is uncertain.

13. Cal. Probate Codes §§20110, *et seq*.

COLORADO

James H. Turner
Denver
February 6, 1995

14. Some fiduciaries will make a "Bixby-Warms Adjustment" in this situation to make principal whole (see Howard Parks, *Probate and Practice Manual*), although it is of dubious value to have done this, absent specific provision authorizing or directing the personal representative to achieve the greatest tax savings. However, others make no adjustment, since most instruments do not require any adjustment for this, and instead take the various brackets (estate tax, estate's income tax and beneficiary's income tax into consideration when deciding where to take the elective deductions.

15. Although non-pro rata distributions are now authorized to be made by statute (C.R.S. 1973, 15-1-804)(2)(u) as amended by Section 20, House Bill 1230, 1979) effective for estates of persons dying on or after July 1, 1979, a fiduciary has a duty "to act reasonably and equitably with due regard for his obligations and responsibilities toward the interests of beneficiaries and creditors, the estate or trust involved and the purposes thereof, and with due regard for the manner in which men of prudence, discretion, and intelligence would act in the management of the property of another." Any non-pro rata distribution would place a burden on the fiduciary to satisfy the beneficiaries or the Court that he had acted properly. Non-pro rata distributions are generally not made, unless the beneficiaries request it, or where tax situations might warrant it (getting low basis stock to a charity). These distributions open up all kinds of problems, including possible gift tax consequences.

16. It is appropriate to consider the tax consequences resulting from the elections available to the trustee of a distribution from a qualified plan. If the fiduciary is receiving the benefits in his individual capacity, there would be a duty on him to make the principal whole by virtue of the increase in the estate tax, since he has a conflict. Better the named fiduciary should waive acting as such. On the other hand, if they are received by the fiduciary in his fiduciary capacity, then presumably he would make the election that is in his best interest, regardless of estate tax. If the fiduciary makes the election less favorable to him, then the personal representative might agree to some equitable adjustments.

17. Some fiduciaries regard income in respect of a decedent as principal to be retained, whereas others make distribution of it to income beneficiaries. If any distinction can be made in this treatment, it seems to rest upon the amount involved. Small amounts tend to be treated as income, larger amounts as principal.

18. C.R.S. 1973, 15-1-405(2) states: Absent any law or direction in the instrument to the contrary, the fiduciary shall determine income and principal "in accordance with what is reasonable and equitable in view of the interests of those entitled to income as well as those entitled to principal."

C.R.S. 1973, 15-1-804(2)(s) grants to fiduciaries the specific power "to determine all matters of estate and trust accounting as the fiduciary deems to be proper and equitable."

C.R.S. 1973, 15-1-804(2)(u) grants to the fiduciary the specific power to make non-pro rata distributions in accordance with language cited above, but again the exercise of both these latter powers is subject to the fiduciary's duty to act reasonably and equitably in the manner stated above.

The following are examples of provisions used in granting powers to fiduciaries in wills and trust agreements:

"Determine what is income and what is principal, and all other accounting matters, not otherwise controlled by statute."

"Set aside from income reserves for taxes, assessments, . . ., and for equalization of payments to or for beneficiaries."

"Make elections which are available under any tax law in accordance with the fiduciary's judgment as to the best interests of the beneficiaries as a group,. . . and offsetting adjustments, if any, to income and principal accounts or to distributive shares shall be made solely in the discretion of the fiduciary."

CONNECTICUT

Martin Wolman
Hartford
January 6, 1995

19. Connecticut's Fiduciary Powers Act includes as one of the powers which may be incorporated by reference in a will or trust instrument an authorization to make various tax elections dealing with the alternate valuation date and the deduction of administration and other expenses, without being required to make any adjustments between income and principal or between the property interests passing to any beneficiaries which may be affected on account of these elections, except that where one or more residuary legatees of a will containing preresiduary marital or orphans deduction formula is a charity, and the fiduciary elects to treat administration and other expenses wholly or partly as income tax deductions, thus increasing the federal estate taxes, an amount equal to the difference in the estate taxes shall be reimbursed to principal from income. (CONN. GEN. STAT. §45a-234(35)(B).

20. Adjustment ordinarily made where amounts involved are substantial, with manner and timing varying. Income may

be used to reimburse principal over a period of time to minimize distortion to income.

21. In rare instances, unequal principal distributions have been intentionally made to pass estate income to a low bracket beneficiary, with an adjustment made by having higher bracket beneficiaries reimburse the lower bracket one by the amount of the increase in the lower bracket beneficiary's tax.

22. Connecticut's Fiduciary Powers Act (CONN. GEN. STAT. §45a-234(35)(G), which may be incorporated by reference, permits various tax elections with respect to qualified plans, but makes no provision for equitable adjustments.

DELAWARE

Thomas P. Sweeney
Wilmington
January 12, 1995

23. A non-pro rata distribution would not be made, absent an agreement by the beneficiaries concerning the distribution.

24. Prevailing local practice would require the fiduciary to consider the tax consequences of any election and to act impartially, with a view to a minimization of tax for all beneficiaries.

DISTRICT OF COLUMBIA

Doris Blazek-White
District of Columbia
January 19, 1995

25. If unusual circumstances seem to warrant it, equitable adjustments may be made in certain cases, but the usual practice is not to make equitable adjustments.

26. A somewhat unusual adjustment, known as the Slocum adjustment, ". . . requires, by reason of estate assets being used to pay debts, legacies, administration expenses and taxes, that a portion of estate net income be transferred from income to principal unless waived . . ." (as frequently done) in the instrument.

27. While no standard practice exists, most instruments are either silent or tacitly permit equitable adjustments in the discretion of the personal representative.

FLORIDA

James I. Ridley
Fort Lauderdale
June 13, 1995

28. Florida case law recognized that a Warms-type adjustment should be made under certain circumstances. *In re Kent's Estate*, 23 Fla. Supp. 133 (Palm Beach County Judge's Court 1964). *In re Veith's Estate*, 26 Fla. Supp. 145 (Dade County Judge's Court 1965). (Not reported elsewhere). But see *Williams v. Harrington*, 460 So. 2d 533 (Fl. 2nd DCA 1984), refusing to give an equitable adjustment to a surviving spouse whose elective share was paid in year when no other distributions were made and under IRC was required to report entire DNI of the estate. The court pointed out that the election was made by the surviving spouse, not the personal representative. Fla. Stat. §§737.402 and .403 allow for the severance of one trust, into two or more separate and identical trusts or the consolidation of several trusts into one trust having similar terms. Trustee may consider differences in federal tax attributes with respect to trust administration, distribution and making tax elections.

GEORGIA

Benjamin T. White
Atlanta
January 11, 1995

29. Although there is some practice of transferring from income to principal an amount equal to the additional estate tax incurred by reason of the non-deduction of expenses on the estate tax return at the time of the final distribution, some fiduciaries would do so only where there are conflicting interests and with the advice of counsel or with consent of all beneficiaries.

a. It is probably safe to assert that the majority of Georgia attorneys are simply unaware of the problem.

b. In general, Georgia probate law is relatively unsophisticated, primarily because of the ability of Georgia testators to remove their estates from direct court supervision of any sort by testamentary provisions relieving executors and trustees from all reporting requirements; and it is the all but universal practice of attorneys so to provide. Also, it is the exception, rather than the rule, for a Georgia Probate Judge to have legal training, so that even where no relief is given, court oversight of the acts of fiduciaries does not necessarily provide any guidance in matters of this complexity.

c. It is the practice of the more sophisticated attorneys to provide the widest possible discretion to executors and trustees to make, or to refrain from making, equitable adjustments; and, since the models for most

Georgia wills and trusts are drawn from form books written for the major banks by the most sophisticated of our estate planners, this practice has become general.

d. In general, manipulation of Subchapter J to achieve optimum tax consequences is a rarity in estate administration in Georgia, so that the necessity for equitable adjustments arising from such action is equally rare.

HAWAII

Elliot H. Loden
Honolulu
August 11, 1995

30. Adjustments are made where the amount involved is sufficient so that someone would object if no adjustment is made.

IDAHO

Loren C. Ipsen
Boise
July 7, 1995

31. There is no reported Idaho case law requiring a *Warms* adjustment.

32. Idaho Code §68-1002(a)(3) (Uniform Principal & Income Act) authorizes the fiduciary to act "in accordance with what is reasonable and equitable in view of the interests of those entitled to income as well as of those entitled to principal, and in view of the manner in which men of ordinary prudence, discretion and judgment would act in the management of their own affairs."

33. In practice, the fiduciaries polled are hesitant to make equitable adjustments and, if proposing to do so, would generally seek court approval of such adjustments.

34. It is not uncommon to include a clause in the instrument granting the fiduciary broad authority in making tax elections and allocating items to principal and income, and denying affected beneficiaries any right of recoupment.

ILLINOIS

Donald M. Schindel
Chicago
December 30, 1994

35. Absent a provision excusing adjustments, a Warms Adjustment would probably be recognized for administration expenses taken as income tax deduction. James, *Illinois Probate Law & Practice*, 1975 Pocket Parts §§43.104(b) and 289.8, since beneficiaries in a particular class are considered entitled to equal treatment. *In re Estate of Comiskey*, 24 Ill. App. 2d 199, 164 N.E.2d 535 (1960). Since estate administration expenses (as opposed to regular expenses not relating to estate settlement) are chargeable from principal (760 ILCS 15/6), there seems to be consensus that principal beneficiaries should receive the benefit of the tax deduction attributable to these expenses. Tax Reform Act of 1986 (with lower income tax than estate tax rates) will cause more estates to deduct administration expenses on the estate tax return, except in certain non taxable estates.

36. Such a non-pro rata distribution would have to be authorized by instrument or agreed to by beneficiaries. If authorized, no adjustment is probably required in the absence of a clear abuse of discretion and ascertainable damages, while if not authorized, an aggrieved beneficiary could complain.

37. A fiduciary should either obtain an agreement or court instructions. See *Roe v. Farrell*, 69 Ill. 2d 525, 372 N.E. 2d 662 (1978), which establishes equitable apportionment for nonprobate assets in Illinois.

38. Adjustments are often made if a distribution is made to a low income bracket residuary legatee in a year of high D.N.I. and to a wealthy legatee in a short final year of an estate with low D.N.I. (or excess deductions).

39. Adjustments are almost excused or prohibited by will. Even when they are not, none are usually made except in rare adverse interest cases involving large sums or as part of sophisticated postmortem estate planning.

INDIANA

Stephen J. Williams
Fort Wayne
April 1, 1996

40. Absent a contrary provision in the governing instrument (I) income during administration represents corpus of the probate estate [IC 29-1-17-7], and (ii) estate D.N.I. which is distributed to a trustee represents principal for trust accounting purposes [IC 30-4-5-3]. An equitable adjustment is presumably required if estate distributions are unduly delayed to the detriment of an estate distributee or income beneficiary of a trust.

41. The fiduciary is required to make a fair and equitable allocation of unrealized gain or loss in distributing an estate [IC 21-1-17-1(b)] or a trust [IC 30-4-3-3(d)].

42. It is the reporter's belief that the vast majority of attorneys in Indiana do not address the issue of equitable adjustments, although the more sophisticated attorneys and fiduciaries will make adjustments in specific situations. Certain instruments prepared by knowledgeable attorneys will either give the fiduciary discretion to make adjustments or relieve the fiduciary of any obligation to make adjustments, but instruments containing such provisions are an exception to the rule. If challenged in an appropriate situation, it is the reporter's

belief that equitable relief (from the failure to make adjustments) may be available.

IOWA

Charles E. Harris
Des Moines
January 9, 1995

43. Trapped income is allocated to principal and taxes are paid out of it without adjustment.

    a. A fiduciary should obtain beneficiary consents or seek court approval after court ordered notice to all beneficiaries.

44. Problems are beginning to arise when § 2032A property is distributed.

45. Many practitioners give the Trustee not only discretion in making elections and adjustments but also indicate that the decision of the Trustee shall be final.

KANSAS

Willard B. Thompson
Wichita
March 5, 1996

46. While practices and customs vary from community to community, it is not uncommon for instruments to contain provisions giving the fiduciary discretion to make or not make equitable adjustments and providing that the fiduciary shall not be liable to any interested party in the good faith exercise or nonexercise of his discretion.

    It appears that it is not a common practice in the State to make equitable adjustments unless there is a provision in the instrument which expressly requires or authorizes it.

KENTUCKY

John T. Bondurant
Louisville
January 12, 1995

47. May be said to be required by an extension of the holdings in *Pitts v. Estate of Gilbert*, 672 S.W. 2d 70 (1984), and *Hurst v. First Kentucky Trust Company*, 560 S.W.2d 819 (1978), but seldom, if ever, is any adjustment made in these circumstances and few, if any, trust officers in Kentucky appear to be concerned about it.

48. Perhaps no such duty exists (see *Brodie v. DeVatz*, 556 S.W.2d 444 (1977). However, a fiduciary must deal fairly and impartially with all beneficiaries. *Hurst v. First Kentucky Trust Company*, 560 S.W.2d 819, 821 (Ky. 1978); *McBride v. McBride*, 262 Ky. 452, 90 S.W.2d 736, 741 (1936). This rule dictates that adjustments be made whenever inequities would otherwise result.

49. A fiduciary must deal fairly and impartially with all beneficiaries. *Hurst v. First Kentucky Trust Company*, 560 S.W.2d 819, 821 (Ky. 1978); *McBride v. McBride*, 262 Ky. 452, 90 S.W.2d 736, 741 (1936). This rule dictates that adjustments be made whenever inequities would otherwise result.

LOUISIANA

Jerome J. Reso, Jr.
New Orleans
May 31, 1995

50. Theoretically a Louisiana testator, with one exception, needs to provide in his will each decision his executor will make. If he does, this will negate the need for any equitable adjustment arising from following the testator's directions. Instruments usually do not give explicit directions to executors but do provide the exact property interest which an heir or legatee is to receive. Granting the executor discretion would run afoul of Article 1520 of the Louisiana Civil Code, which provides:

    "Substitutions are and remain prohibited, except as permitted by the laws relating to trusts."

    "Every disposition not in trust by which the donee, the heir, or legatee is charged to preserve for and to return a thing to a third person is null, even with regard to the donee, the instituted heir, or the legatee."

    Also such discretion would run afoul of Article 1573 of the Louisiana Civil Code, which provides, as amended:

    "The custom of willing by testament, by the intervention of a commissary or attorney in fact, is abolished."

    "Thus the institution of heir and all other testamentary dispositions committed to the choice of a third person are null, even should that choice have been limited to a certain number of persons designated by the testator. However, if the testator has designated the *quantum* or value of his estate which he bequeaths to a legatee either by formula or by specific sum, he may expressly delegate to his executor the authority to select assets to satisfy the *quantum* or value."

    There is no Louisiana jurisprudence construing the executor's power under Article 1573 to select assets. However, the general fiduciary obligations of an executor may require a balancing of the respective interests of beneficiaries, including considerations of any possible inequities.

    The Louisiana Trust Code provides specific instances where shifting of principal interests are permitted, but other than in these specific cases, each interest in principal of an heir or legatee must be ascertainable and vested at the instant of death. In addition, Article 1521 of

the Louisiana Civil Code permits a 90-day survivorship clause. The safe method is still to provide that each residuary legatee, for example, is to receive his undivided interest in each asset in the residual estate, or on the contrary to specify exactly which assets each legatee is to receive. Alternatively, under the revision of Article 1573 of the Louisiana Civil Code, a testator can specify the *quantum* or value of the estate and delegate the asset selection authority to his executor.

A number of Louisiana attorneys, however, do provide in testaments that executors have certain discretion in making tax elections.

Although a trust may provide for the allocation of receipts and expenditures between income and principal beneficiaries, the trust may also vest the trustee with such allocation discretion. However, the trustee is required to exercise this power reasonably and equitably in accordance with a prudent person standard. LA R.S. 9:2142-2143. In the absence of such provisions, state law provides a method of allocation similar to provisions in other states. In general, the Trust Code provides that ordinary expenses incurred in connection with the administration, management or preservation of trust property be charge against income, including taxes, depreciation and one-half of the trustee's regular compensation. Extraordinary expenses, capital gains taxes and one-half of the trustee's compensation is charged to trust principal. LA R.S. 9:2156.

51. A non-pro rata distribution would not be permitted to occur except with concurrence of all parties (in which case an exchange takes place) or pursuant to a delegation by the testator to the executor as provided in Article 1573 of the Louisiana Civil Code. In the later case, not decision or statute specifically requires an equitable adjustment. However, the fiduciary obligation of an executor may require a balancing of the respective interests of beneficiaries, including considerations of any possible inequities.

MAINE

Philip C. Hunt
Portland
December 28, 1994

No notes.

MARYLAND

Mannes F. Greenberg
Baltimore
February 14, 1995

52. Maryland Statutes, Estates & Trusts, § 11-106(a), requires reimbursement of principal from income when there is an election to treat administration expenses as either income or estate tax deductions, unless the instrument provides otherwise. However, § 11-106(b) specifies the adjustment is unnecessary where a maximum marital deduction provision exists in an instrument, whether the marital gift is increased by an election to take administration expenses as income tax deduction or because of an alternate valuation date election.

53. This assumes that Maryland Statutes, Estates & Trust, § 14-210 (the Uniform Principal and Income Act) does not cover the particular situation.

MASSACHUSETTS

Marion R. Freemont-Smith
Boston

54. *New England Merchants National Bank v. Converse*, 373 Mass. 639 (1977), held that no such adjustment was required to be made by a fiduciary. The court observed that is not the usual practice of Massachusetts fiduciaries to do so. The court also stated, however, that its decision is not intended to question such adjustments made by a fiduciary in accordance with its own established practice, or an adjustment made for the first time by a fiduciary "on some intelligent basis." There is no rule requiring such an adjustment nor is one made as a matter of practice. The consensus of those practitioners polled was that the problem should be avoided by proper drafting.

55. Practice of the responding firm is to make only pro rata distributions.

56. Whether any such duty exists was not ascertainable.

MICHIGAN

Leonard J. Prekel
Troy
January 13, 1995

57. In case of non-rata distributions, some practitioners follow a practice of submitting the plan of final distribution (including disclosure of potential tax consequences occasioned by differences in basis for tax purposes) to beneficiaries for approval. Corporate fiduciaries customarily follow such a practice.

57a. Corporate fiduciaries may invest in mutual funds they maintain. The fees and expenses of mutual funds by law are all charged to income. One Detroit area bank follows the practice of reimbursing the income beneficiary for the principal element of such expenses. The amount of the reimbursement is determined after an analysis of the expenses charged to income.

Ross A. Sussman
Minneapolis
October 8, 1996

MINNESOTA

No notes.

MISSISSIPPI

Lauch M. Magruder, Jr.
Jackson
January 26, 1995

58. Expenses or losses are payable from estate income and any net income remaining is distributable to the beneficiaries.

MISSOURI

John E. Dooling
St. Louis
October 1, 1996

59. No consensus or practice, majority of those polled believe no adjustment necessary.

60. Problem frequently avoided by making equalizing distributions to all beneficiaries or by timing distributions to ameliorate the income tax burden. If not, no adjustment thought necessary. Furthermore, in Missouri, under *Bohan*, 456 F.2d 851 (8th Cir. 1972), a partial distribution of principal to a residuary legatee does not carry D.N.I. with it, Treasury regulations to the contrary notwithstanding. Occasionally, one court has requested that adjustments be made.

61. Absent a contrary provision or an agreement of the parties, each asset is distributed pro rata, and this is required by metropolitan probate courts.

MONTANA

Walter S. Murfitt
Helena
December 22, 1994

62. Questions of this nature are rarely considered and are of little concern to practitioners.

NEBRASKA

Nick R. Taylor
Omaha
September 4, 1996

63. The normal practice is for the tax to be paid from trust principal, with amount of the trapped income, net of the income tax thereon, allocated to principal with no adjustment.

64. Better practice is to at least have knowing consent of all beneficiaries and/or negotiated adjustment among beneficiaries.

NEVADA

Robert E. Armstrong
Reno
April 5, 1996

65. The only Nevada law related to this issue is the case of *Humane Society of Carson City v. First National Bank of Nevada*, 92 Nev. 474, 533 P.2d 963(1976), which holds generally that a trustee's exercise of discretion is subject to review only where such discretion is exercised in an abusive manner. There is no other Nevada statute or case law more directly on point. In order to guard against the possibility that cases from other jurisdictions (such as the California case of *Estate of Bixby*, 140 Cal. App. 2d 326, 295 P. 2d 68(1956) may be persuasive to suggest that fiduciaries in Nevada should be required to make such adjustments absent language in the governing instrument to the contrary, it is customary as a drafting approach to give the fiduciary broad powers of discretion which permit, but do not require, the fiduciary to make such adjustments. Such language in the governing instrument will most likely be controlling except in a situation where the fiduciary is also a beneficiary and unreasonably exercises discretionary powers in a manner benefitting only himself or herself at the expense of other beneficiaries.

NEW HAMPSHIRE

Robert P. Bass, Jr.
Concord
June 13, 1995

66. New Hampshire currently has no statutory or common law authority imposing a duty of impartiality when determining the rights of income beneficiaries and remaindermen. Although the Uniform Principal and Income Act, N.H. REV. STAT. ANN. §464-B, did determine the respective interests of income beneficiaries and remaindermen both in the administration of estates and the administration of trusts, the Act was only in effect from June 27, 1990 to May 18, 1992. Therefore, fiduciaries have broad discretion over the matter in the absence of a governing instrument provision requiring equitable adjustments. The exercise of this discretion should be safe from beneficiary challenge or surcharge action to the extent it is reasonably and consistently exercised.

NEW JERSEY

Howard G. Wachenfeld
Newark
December 21, 1994

67. In accounting actions, a New Jersey court rule, 4:87-3(b)(5), requires a statement of "allocation" where principal expenses have been taken as income tax deductions, but there is no indication of just what, if any, adjustments would be required. No statute, case or rule

requires any adjustment to be made. The prevailing practice (with, however, some dissents) is that no adjustments are made.

68. While most practitioners give broad discretion, allowing fiduciaries to make one or more of the various elections, they then indicate that there is to be no adjustment between income and principal because of any such election.

NEW MEXICO

Robert M. St. John
Albuquerque
December 20, 1994

69. There is neither case law nor statutory provisions on point. A customary practice in drafting documents is to give broad powers of discretion to the fiduciary.

NEW YORK

John J. Barnosky
Uniondale
April 22, 1996

70. Beneficiaries receiving income tax benefits must reimburse principal in an amount equal to the additional estate taxes payable because of an executor's election under *Matter of Warms*, 140 N.Y.S. 2d 169 (Surr. Ct. N.Y. Co. 1955), as codified in N.Y.E.P.T.L. § 11-1.2(a). A provision in the instrument to the contrary may override this requirement.

71. Several cases are inconclusive as to whether an adjustment is actually required, leaving the picture somewhat confused; thus New York fiduciaries tend not to make such adjustment as a matter of practice even when the instrument contains a provision allowing apportionment of taxes between principal and income. *Matter of Dick*, 29 Misc. 2d 648, 218 N.Y.S. 2d 182 (Surr. Ct. N.Y. Co. 1961); *Matter of Adler*, N.Y.L.J. June 21, 1974 p. 15 (Surr. Ct. N.Y. Co.); *Matter of Lecompte*, 52 and *Matter of Pross*, 90 Misc. 2d 895, 396 N.Y.S. 2d 309 (Surr. Ct. West. Co. 1977).

72. *Mater of Holloway*, 68 Misc. 2d 361, 327 N.Y.S. 2d 865(Surr. Ct. Nassau Co. 1972) *reversing on rehearing*, 67 Misc. 2d 132, 323 N.Y.S. 2d 534 (Surr. Ct. Nassau Co. 1971) first imposed such an adjustment, although *Matter of Coe*, 80 Misc. 2d 374, 363 N.Y.S. 2d 265(Surr. Ct. Nassau Co. 1975), did not give it retroactivity. The adjustment requires reimbursement of principal by income beneficiaries in an amount equal to income taxes payable when a principal distribution carries out taxable income from an estate. Prior to these decisions, many New York fiduciaries followed the practice of making this adjustment, and it is now almost universally followed although there has been no codification of its rule.

73. Absent authorization in the instrument, or consent of the beneficiaries, New York fiduciaries generally seek to avoid making non-pro rata distributions from an estate. *Matter of Mann*, 4 Misc. 2d 387, 152 N.Y.S. 2d 348 (Surr. Ct. N.Y. Co. 1956), held that the power to distribute in kind is limited by the obligation to deal fairly and equitably with all legatees.

74. N.Y.E.P.T.L §7-1.11 permits distribution by a fiduciary of the capital gains tax paid by the grantor. This statute was enacted in response to *Matter of Cowen*, N.Y.L.J. (February 13, 1964 p. 16), and *Matter of Goldman*, N.Y.L.J. (April 7, 1964 p. 13), which directed reimbursement from the trust of the grantor for capital gains taxes paid by him on gains taxable to him but allocable to corpus, where the instrument was silent with respect to reimbursement. The courts shifted the tax burden from the settlor to the corpus, which actually benefitted by the gains under equitable principles. The statute was the enacted to provide that a trustee of an express trust may reimburse the settlor from corpus from any income taxes paid by him on any portion of the corpus, unless the instrument provides to the contrary or there is a vested remainder passing to a charity or other named entities.

75. N.Y.E.P.T.L. § 11-1.2(B)(1) provides that, in the absence of a controlling will provision, no adjustment need be made where (I) a marital deduction bequest is incresed by an election to deduct expenses for income tax (rather than estate tax) purposes, and (ii) such a bequest is increased or decreased by a valuation date election. Many New York wills do not mandate adjustments in these situations and some wills specifically prohibit such adjustments. The valuation date issue addressed in the above section is related to the issue raised by Question No. 5, above; i.e., the valuation date election will often affect the amount of estate tax and the income tax basis of inherited property as well as the size of the marital deduction bequest. While the statute does not address the estate tax or basis questions, they are really just corollaries of the "size-of-the-marital-share" issue, and the statute clearly resolves the latter in favor of no adjustment, in the absence of a contrary direction from the testator.

Prior to 1982, a series of New York cases had considered the question of how income taxes, either on ordinary income or capital gains, should be charged as between charitable and noncharitable interest during estate and trust administration; *i.e.*, whether such taxes should be treated as administration expenses and thus be shared ratably by all beneficiaries or whether an adjustment should be made to exonerate the charitable interests from taxation. The only case requiring adjustment of this sort was *Matter of Eidlitz*, 21 Misc. 2d 218, 192 N.Y.S. 2d 711 (Surr. Ct. N.Y. Co. 1959), but a later case, *Hewlett*, 77 Misc. 2d 38, 352 N.Y.S. 2d 406 (Surr. Ct. Nassau Co. 1974), disapproved of the Eidlitz result and indicated that no such adjustment should be made in the absence of

legislative action. See also *Matter of Hanover Bank*, N.Y.L.J., May 12, 1969 p.2 (no adjustment). In 1982, the New York E.P.T.L. § 11-2.1(d)(2) was amended to provide that any amount allowed as a tax deduction for income payable to a charitable organization must be paid, without diminution for taxes, to the charity entitled to receive such income.

A court in 1994 declined to allow an equitable adjustment as a result of the Executor's allocation of the testator's $1 million exemption from Generation Skipping transfer tax, finding that equitable adjustments are not required if too complicated, expensive or time consuming, or where the perceived inequity is minimal. *Matter of Jacobs*, 161 Misc. 2d 741, 614 N.Y.S. 2d 866 (Surr. Ct. N.Y. Co. 1994). While the courts are generally reluctant to give advice as to whether an adjustment should be made, if there is a "glaring injustice," the court will direct an adjustment. *Matter of Davies*, 148 Misc. 2d 37, 559 N.Y.S. 2d 933 (Surr. Ct. N.Y. Co. 1990). *Davies* involved a Qualified Sub-Chapter S Trust (QSST). The court determined that an extraordinary dividend should be allocated to income rather than principal, to enable the income beneficiaries to pay the tax on the sale of a substantial portion of the corporation's capital assets rather than have the income beneficiaries revoke their Sub-Chapter S Corp. election, which would result in additional taxes to the trust, payable out of principal.

76. Most forms provide that the determinations are to be made in the fiduciary's sole and/or absolute discretion without explicitly imposing a standard of reasonableness. This appears to limit the grounds for objections by beneficiaries to lack of good faith. See *Scott on Trusts* (3rd Ed.), §187.2; *Matter of Bacus*, 106 Misc. 2d 463, 434 N.Y.S. 2d 106 (Surr. Ct. Nassau Co. 1980); *Matter of Iecompt*, supra. The New York courts have been receptive to requests by fiduciaries for guidance in exercising discretionary tax elections and equitable adjustments, particularly in cases involving conflicts of interest. *Matter of Rappaport*, 121 Misc. 2d 447, 467 N.Y.S. 2d 814 (Surr. Ct. Nassau Co. 1983); *Matter of Fales*, 106 Misc. 2d 419, 431 N.Y.S. 2d 763 (Surr. Ct. N.Y. Co. 1980).

NORTH CAROLINA

Brian F. D. Lavelle
Asheville
February 17, 1995

77. In exceptional situations of obvious inequities (uncommon occurrences), adjustments are made to remedy the inequity.

78. Some fiduciaries make no adjustment because they consider the capital gains tax to be one on principal.

79. Pro rata distributions are made unless the instrument provides otherwise or the beneficiaries agree. In such cases no adjustments are made on account of the non- pro rata distributions.

80. See N.C.G.S. § 28A-27-1, Apportionment of Federal Estate Tax, applies to any wills executed on and after October 1, 1986. For a will executed before then, if as a result of an election, plan benefits were includible for estate tax purposes and the instrument had no tax allocation clause, the proceeds could be subject to contribution for their proportionate share of federal and North Carolina death taxes. See *First National Bank of Shelby v. Dixon*, 38 N.C. App. 430, 248 S.E.2d 416 (1978).

81. Where an inequity is of consequence, an adjustment will be made.

NORTH DAKOTA

Robert E. Rosenvold
West Fargo
February 6, 1996

No notes.

OHIO

Wiley Dinsmore
Cincinnati
December 20, 1994

82. There is no uniform practice, since most instruments deal with this point. Because of the weight of authority in other jurisdictions and because it is "good estate planning," if an adjustment is made, the amount equal to the increase in estate tax resulting from taking expenses as income tax deductions would be transferred from income to principal. However, no such election would be made if the marital share would be increased and the decedent leaves a second wife and children by a first wife. If, however, there is a compatible family situation and expenses are utilized as income tax deductions, B trust income would be transferred to principal.

83. Corporate fiduciaries would not make non-pro rata distribution and would only consider such a distribution if it was approved by the trust committee of the bank and then only if the disparity in basis was small (less than 10%).

OKLAHOMA

Lloyd G. McAlister
Edmond
September 14, 1995

84. The fiduciary tax return in Oklahoma follows the same procedure as the federal fiduciary. The only exception is

the exemption of $600.00 which is not authorized in Oklahoma and must be added back to the Oklahoma return.

OREGON

Joseph J. Hanna, Jr.
Portland
September 1, 1996

85. Adjustment would be made where the amount is substantial.

86. No, but such a distribution would generally not be made without the consent of the beneficiary adversely affected.

87. Fiduciary usually given discretion to determine whether or not to make adjustment, except that instrument may require adjustment where marital or charitable deduction would be adversely affected by the election made.

PENNSYLVANIA

Robert L. Freedman
Philadelphia
February 21, 1997

88. *Bell Estate*, 7 Pa. Fid. Rep. 1(O.C. Chester Co. 1956), *aff'd on another issue*, 393 Pa. 623 , 144 A.2d 843 (1958), an Orphan's Court judge followed the "trend of thought" (particularly as illustrated by California authority) that equity between the parties required that principal be compensated by income for the increase in federal estate tax. Absent controlling appellate court authority, most lawyers seem not to follow *Bell*, recongizing, however, that in the case of antagonism between the income and principal interests, a court would be likely to make an equitable adjustment in the resolution of a dispute.

89. *Rice Estate*, 8 Pa. D.&C.2d 379, 6 Pa. Fid. Rep. 225 (O.C. Montgomery Co. 1956), held that equiable principles required income to reimburse principal for a capital gains tax which would not have been payable had principal charges been deductible against capital gains. Such adjustments are not normally made absent antagonism among beneficiaries.

90. Absent any Pennsylvania authority on the subject, the more knowledgeable practitioners and institutions use trapping distributions to spread income among beneficiaries (including trusts) to minimize overall income taxes and allow the income tax burden to fall on principal.

91. If the governing instrument is silent, most practitioners and institutions use care in timing principal and income distributions to avoid inequitable results. *Salesky Estates*, 15 Pa. Fid. Rep. 213 (O.C. Montgomery 1965), required an adjustment (equal to lesser of the estate's income tax savings or the distributee's tax burden) where a wife elected to take against a will and received a principal distribution which carried out D.N.I. The principle of *Salesky Estates* was reaffirmed and applied in *Dorrance Estate*, 13 Pa. Fid. Rep. 2d 34 (D.D. Montgomery 1992), even though the amont of the elective share was the result of negotiations between the parties.

92. Note, however, that the widow in *Smith Estate*, 29 Pa. Fid. Rep. 175 (O.C. Montgomery 1979), was partially disqualified from acting as executrix because of a conflict of interest in this area. She had elected against the will and the estate contained stock that had a low date of death value but a substantially higher value when sold one-and-a-half years later. On petition by the residuary beneficiaries, the court appointed an administrator *pro tem* for the sole purpose of negotiating and settling the federal estate and state death taxes pertaining to the valuation of that stock.

93. If there is no tax clause in the instrument, query whether the use of the work "equitably" in Section 3702 of the Probate, Estates and Fiduciaries Code authorizes the court to require an adjustment. It provides that "... the Federal estate tax shall be apportioned equitably among all parties interested in property includible in the gross estate for Federal estate tax purposes in proportion to the value of the interest of each party..." 20 Pa. Cons. Stat. Section 3702(a) (1982).

94. A grantor of an irrevocable 1910 trust obtained reimbursement from the trust for her capital gains tax. *French Trust*, 61 Pa. D.&C.2d 654, 23 Pa. Fid. Rep. 296 (O.C. Philadelphia 1963). The court held that equity required a reimbursement but, for administrative convenience, measured the reimbursement by the capital gains tax the trust would have paid had it been taxable on the gain. *Accord Doughty Trust*, 6 Pa. Fid. Rep. 2d 260 (O.C. Montgomery 1985).

RHODE ISLAND

James H. Barnett
Providence
May 10, 1995

95. Only where large amounts are involved is an adjustment made, usually after consultation with counsel.

96. The "Holloway" adjustment is sometimes made before the executor closes the estate, usually when the executors and the trustees are the same. See also *Rhode Island Hospital Trust Co. v. Sanders*, 84 R.I. 347 (1956).

97. *Rhode Island Hospital Trust Co. v. Sanders*, 84 R.I. 347 (1956), would probably be interpreted as requiring an adjustment, since it held that a charitable beneficiary with share of residue received estate income without reduction for federal income taxes on accumulated estate income where there were other common noncharitable beneficiaries. The adjustment would be made only if the amount were material.

98. Lower courts have approved an adjustment in an accounting under which trust principal reimburses the grantor at least for a portion of the tax incurred by him.

99. In estates over about $1,000,000 the instrument is often drafted so that an adjustment is required. Usually the instrument provides that no adjustment is to be made. In some cases discretion is conferred on the fiduciary with respect to an adjustment.

SOUTH CAROLINA

Robert M. Kunes
Charleston
February 20, 1997

100. Absolute discretion is frequently given in South Carolina wills. However, adjustments to compensate for the consequences of tax decisions or elections are not presently being made as a matter of practice. Apparently, the inequities which result from these tax decisions and elections are largely being ignored.

SOUTH DAKOTA

Thomas H. Foye
Rapid City
December 31, 1994

101. On the infrequent occasions when any of these issues arise, each lawyer or fiduciary decides them on a case by case basis.

102. See SDCL 55-13-2 (a section of the Uniform Principal and Income Act) requiring a trustee to administer the trust in accordance with what is reasonable and equitable in view of the interests of those entitled to income as well as of those entitled to principal.

TENNESSEE

Robert L. McMurray
Cleveland
December 20, 1994

103. Due to lack of statutory authority to make an adjustment, Tennessee practitioners and fiduciaries appear to be reluctant to do so. Absolute discretion is frequently given in Tennessee wills. However, adjustments to compensate for the consequences for tax decisions or elections are not presently being made as a matter of practice and any resulting inequities are largely being ignored.

TEXAS

John L. Hopwood
Houston
January 12, 1995

104. Equitable adjustments are made very infrequently. Situations arising which would lead to these being necessary are generally avoided by knowledgeable practitioners and overlooked by the rest.

UTAH

David E. Salisbury
Salt Lake City
December 29, 1994

No notes.

VERMONT

David A. Otterman
Barre
January 20, 1995

No notes.

VIRGINIA

Charles C. Webb
Richmond
June 20, 1995

105. An adjustment is sometimes made as a matter of practice, but usually under agreement among the affected beneficiaries.

106. The effect of making, or not making, the Qualified Terminable Interest Property election (under Section 2056(b)(7) of the Internal Revenue Code) on the interests imposed with the burden of paying the federal estate tax has resulted in adjustments in some cases made as a matter of practice. The executor has statutory protection, if he makes the Q-TIP election in good faith and does not act imprudently. Virginia Code Section 64.1- 57.2; see also Section 64.1-57(6). Where the will directs the executor to pay all taxes imposed on account of a testator's death, taxes on Q-TIP property are construed not to be included in such a direction. Virginia Code Section 64.1-66.1. Before July 1, 1986 the Virginia estate tax on Q-TIP property of a deceased spouse was apportioned according to its value, but the statute was changed as of that date to conform to the approach of Internal Revenue Code Section 2207A(a). Virginia Code Section 64.1-161.

107. Powers of administration detailed in Section 64.1-57 of the Code of Virginia are commonly incorporated by reference in wills by Virginia draftsmen. Subsection (1)(s) includes authority to make any election under any tax law, including, but not limited to, elections as to the timing of the payment of any tax, the valuation of property subject to tax, the alternative use of deductions and elections permitted under enactments after the date of execution of the will. If such powers are not included in the will, they may be granted to the executor (or to the administrator of an intestate estate) by the court. Virginia Code Section 64.1-57.1.

WASHINGTON

Stanbery Foster, Jr.
Seattle
June 7, 1995

108. R.C.W. 11.104.050(1) provides:

> The principal shall be reimbursed from income for any increase in estate taxes due to the use of administration expense that were paid from principal as deductions for income tax purposes.
>
> This provision may be overridden by the decedent's will or by court order. The statute is effective as of January 1, 1985.

109. As a result of the enactment of R.C.W. 11.104.050(1), practitioners probably will not draft will provisions to override the statute.

110. See RCW 11.98.070(15), which is effective as of January 1, 1985, and which provides that the non-pro rata allocation may be made "without any obligation to make an equitable adjustment."

111. Elections by the fiduciary under Sections 2056(b)(7) and 2056A of the Internal Revenue Code may benefit the fiduciary personally, and the fiduciary has no duty to reimburse any other person interested in the election, to treat interested persons impartially, or to make an equitable adjustment with respect to any such election. R.C.W. 11.108.025.

WEST VIRGINIA

Charles B. Stacy
Charleston
February 8, 1995

No notes.

WISCONSIN

John T. Bannen
Milwaukee
January 7, 1995

112. See Wis. Stat. 863.19.

WYOMING

Joseph F. Maier
Cheyenne
December 21, 1994

113. Wyoming has adopted the 1962 Revised Uniform Principal and Income Act in a slightly modified form. §§2-3-601-2-3-614. The Revised Principal and Income Act would govern the determination of what is income and what is principal, and whether expenses are to be charged to principal or income relative to estate and trust accounting, regardless of whether a given deduction was taken on the estate tax return or income tax return.

However, while §2-3-605(a) requires expenses of administration of estates to be charged to principal §2-7-802 of the probate code requires these expenses to be paid first from income, and if income is insufficient, from principal. Any claim for an equitable adjustment would have to be made with these conflicting provisions in mind relative to an estate.

Knowledgeable practitioners draft provisions dispensing with the need for adjustments and granting the fiduciaries discretion to handle these questions; most practitioners overlook these questions in practice. The question of whether there should be an "equitable adjustment" has never arisen in any Wyoming case.

