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Common Pitfalls When Using the Term "*Per Stirpes*"

A useful reminder of how to use boilerplate thoughtfully and intentionally.

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A testator has multiple ways to allocate shares in the estate among their descendants. The default rule for intestate transfer in many jurisdictions is to allocate the estate among descendants *per stirpes*, a Latin term meaning "by roots." This allows the shares to be divided fairly among multiple generations of descendants when some descendants may have predeceased the decedent. In a written will or other beneficiary designation, a class of beneficiaries can be identified as taking "*per stirpes*" to achieve the same result. Since there may be new or additional descendants after the date on which a will was drafted, using the designation "*per stirpes*" has the advantage of covering a wide range of outcomes fairly without needing to amend or redraft the estate plan each time a descendant is born or dies.

Which *Per Stirpes* Are You Using?

While this succinct phrase appears to provide a straightforward drafting solution, there are several common mistakes that a drafter can make when using the term "*per stirpes*" in a will that could create a result contrary to what the testator intended. For starters, there are two main variations of the *per stirpes* rule: "strict *per stirpes*" or "classic *per stirpes*" and "modern *per stirpes*" or "modified *per stirpes*." These are sometimes respectively referred to as English and American *per stirpes*.

In determining the proper number of shares using strict *per stirpes*, the estate is divided into shares at the generation nearest the decedent. For example, if a will stated "to my descendants, *per stirpes*," the estate would be divided into the primary shares at the children generation. The number of the primary shares would be equal to the number of children then alive at the decedent's death plus the number of children who predeceased the decedent, if that child has descendants who survived the decedent. If a child predeceased the decedent and did not have any descendants of his own, that child would be disregarded in determining the number of shares. If a predeceased child of the decedent had descendants of his own, that deceased child's share would be further divided into sub-shares for that child's descendants.[1]

Modern *per stirpes* follows the same rules, except the primary shares are distributed at the generation nearest to the decedent that has any living descendants. So, in the case where a decedent has predeceased children who have then-living descendants, the primary shares would be split at the level of

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the decedent's grandchildren, since that is the generation nearest to the decedent that has living descendants.[2] This different starting point effectively redistributes the estate *per capita* among first living generation rather than dividing one generation above, and can create a very different result than what would occur with strict *per stirpes*.

Learning the meaning of the terms themselves is crucial and can save a lot of headache and turmoil down the road when the estate plans need to be administered due to the death of a testator.

Both variations of *per stirpes* distribution can be distinguished from a "*per capita*" distribution, or "by the head" distribution, although *per capita* has its own tricky issues. A traditional distribution to descendants *per capita* means that each surviving descendant takes an equal share without regard to generation.[3] For example, if a decedent's will stated "to my descendants, *per capita*," and the decedent was survived by one child and two grandchildren of a predeceased child, the estate would be divided into three equal shares with 1/3 to the child and the two grandchildren. However, there would be a different result had the will stated "to my children, *per capita*." Unlike with *per stirpes*, a *per capita* distribution to the children of a decedent would cause any predeceased child's share to lapse and not pass to that predeceased child's children.

There are similarities between modern *per stirpes* and *per capita* distribution when there is at least one predeceased generation between the decedent and the then-living descendants. If we were to look at an example where a decedent has predeceased children that were survived by their own children, under a *per capita* distribution, the primary shares would be split at the level of the decedent's grandchild and they would receive an equal share of the estate. Because modern *per stirpes* is effectively *per capita* at the generation nearest to the decedent that has any living descendants, it is also sometimes called "per capita with representation."[4]

As a drafting attorney, learning the meaning of the terms themselves is crucial and can save a lot of headache and turmoil down the road when the estate plans need to be administered due to the death of a testator. Throughout history, courts have been tasked to interpret language in wills as to whether a testator intended for his estate to pass *per stirpes* or *per capita*. In *First Union Tr. & Sav. Bank v. Marshall*, an Illinois Appellate Court reversed and remanded a decision that interpreted the following language as *per stirpes:*

> All the rest, residue and remainder of such property, including any lapsed bequests, shall be divided in equal parts among the nephews and nieces of my said husband, then living, and the children or children of children, if any, of such as may be dead, per capita and not *per stirpes*.[5]

The Illinois Appellate Court stated that although Illinois law favors *per stirpes* over *per capita*, without evidence that this was a scrivener's error of transposing the two phrases, the Court must interpret the will as stated. The decedent was survived by seven nephews and nieces, ten children of four predeceased nephews and nieces, and two grandchildren of such predeceased nephews and nieces. If the decision to apply *per stirpes* stood, the estate would be "divided among these 19 persons in the following proportions: Seven-elevenths to the seven living nephews and nieces in equal parts and four-elevenths equally among 10 children and two grandchildren of deceased nephews and nieces." However, the Court held that with the inclusion of the phrase 'per capita and not *per stirpes*,' the decedent intended for her estate to pass equally to the named persons. This ruling resulted in the distribution of the residue in nineteen equal parts, with one part to each of the seven nephews and nieces, one part to the ten children of the predeceased nephews and nieces, and one part to each of the two grandchildren.

What happens when a will does not contain either phrase, *per stirpes* or *per capita?* In *Tillman v. O'Briant*, the Court had to interpret a will that did just that.[6] Instead of

1 RESTATEMENT (THIRD) OF PROPERTY (WILLS & DON. TRANS.) section 2.3(d) (1999).

2 *Id.* section 2.3(e).

3 Halbach, *Issues About Issue: Some Recurrent Class Gift Problems*, 48 MO. L. REV. 333, at 350 (1983).

4 RESTATEMENT (THIRD) OF PROPERTY (WILLS & DON. TRANS.) section 2.3(e).

5 270 Ill. App. 508 (Ill. App. Ct. 1933).

6 18 S.E.2d 131 (N.C., 1942)

7 *Id., citing Waller v. Forsythe*, 62 N.C. 353 (1868); *Harris v. Philpot*, 40 N.C. 324 (1848) and *Bryant v. Scott*, 21 N.C. 155, 28 Am.Dec. 590 (1835).

8 RESTATEMENT (THIRD) OF PROPERTY (WILLS & DON. TRANS.) section 2.3 at Statutory Note 1, Comment d and e.

9 *Id.* section 2.3 at Statutory Note 1, Comment d.

10 *Id.*

11 *Id.* section 2.3 at Statutory Note 2, Comment e.

12 Original U.P.C. section 2-103.

13 RESTATEMENT (THIRD) OF PROPERTY (WILLS & DON. TRANS.) section 2.3 at Statutory Note 3, Comment f.

calling for a distribution, *per stirpes* or *per capita*, the will instead stated:

> Item 3. I direct that my 'Will Clayton Place'... shall be sold and the proceeds divided equally between Maggie Rhew's children and Lou Bettie O'Briant and Dewey Yarboro.

Maggie Rhew was a deceased daughter of the testator and was survived by seven children. Lou Bettie O'Briant was the only daughter of another deceased daughter of the testator. Dewey Yarboro, who the testator treated as a foster son, had assigned all of his interest in the property to Lou Bettie O'Briant. As you can see by these facts, it was obvious why Lou Bettie O'Briant argued for determination that the testator intended for this property to pass *per stirpes*. Lou Bettie's distribution would have been a 2/3 interest in the proceeds of the property under a *per stirpes* distribution, consisting of her initial 1/3 interest plus the 1/3 interest that Dewey assigned to her. The other 1/3 would be further divided among Maggie Rhew's seven children. However, under a *per capita* distribution, the proceeds of the property would be distributed equally in 1/9 interests between the seven children of Meggie Rhew and with two shares to Lou Bettie, leaving Lou Bettie with a 2/9 interest in the proceeds of the property instead. The Court stated that "[t]he general rule is, that an equal division among designated legatees means a per capita distribution, unless a contrary intent appear."[7] Since the Court did not find sufficient evidence that the testator intended for a *per stirpes* distribution of the property, the property distributed *per capita*.

In both cases, *First Union Tr. & Sav. Bank* and *Tillman*, attorneys can see just how important it is to draft an estate plan for a client that expressly matches what the client is intending for their property after their death. Including vague or ambiguous language can cause property to potentially be distributed in a way that was unintended and cause headaches and lawsuits down the road. *Tillman* especially illustrates just how different the percentages of the distributions can be when a court applies *per capita* distribution instead of *per stirpes*.

Not only is having a full understanding of these terms important, knowing the laws of the state that will apply to an estate plan is also crucial since the application of strict or modern *per stirpes* will impact the disposition of an estate. Practitioners need to be aware of which interpretation their jurisdiction will favor since there are two common methods of determining *per stirpes* distribution that can vary in their result. While many states in the United States use strict *per stirpes* for intestate succession or describe a strict *per stirpes* system by statute, others have adopted modern *per stirpes* as the default, either by statute or caselaw.[8]

The states that actually use the term *per stirpes* in their statutes and follow strict *per stirpes* are: Delaware, Florida, Georgia, Illinois, Iowa, Kentucky, and Tennessee.[9] The states that do not use the term *per stirpes* in the body of statue but seem to describe strict *per stirpes* are: Connecticut, Kansas, Maryland, Mississippi, Oklahoma, Rhode Island, South Dakota,

and Wyoming.[10] The states that follow the modern approach to *per stirpes* are: Arkansas, Indiana, Ohio, Massachusetts, Missouri, Nevada, Pennsylvania, Texas, Vermont, Washington, and Wisconsin.[11]

A few states have adopted the Original Uniform Probate Code. It provides that when an estate involves more remote descendants, that the "estate is divided into as many shares as there are surviving heirs in the nearest degree of kinship and deceased persons in the same degree who left issue who survive the decedent, each surviving heir in the nearest degree receiving one share and the share of each deceased person in the same degree being divided among his issue in the same manner."[12] Those states are Alabama, California, Idaho, Maine, Minnesota, Nebraska, New Hampshire, New Jersey, Oregon, and South Carolina.[13]

The Revised Uniform Probate Code changed the provisions for dividing the shares of an estate among the surviving descendants. The Revised Uniform Probate Code will divide an estate:

> into as many equal shares as there are (i) surviving descendants in the generation nearest to the decedent which contains one or more surviving descendants and (ii) deceased descendants in the same generation who left surviving descendants, if any. Each surviving descendant in the nearest generation is allocated one share. The remaining shares, if any, are combined and then divided in the same manner among the surviving descendants of the deceased descendants as if the surviving descendants who were allocated a share and their surviving descendants had predeceased the decedent.[14]

The states that have adopted this approach are: Alaska, Arizona, Colorado, Hawaii, Michigan, New Mexico, Utah, West Virginia, New York, North Carolina, and North Dakota.[15]

A few jurisdictions have statutes that are harder to classify as a particular type. If working with a client with a *per stirpes* question in any of the following jurisdictions, it would be wise to consult a local attorney: the District of Columbia, Louisiana, and Montana.[16]

"*Per stirpes*" is "a descriptor about how to allocate a gift among a class of beneficiaries—descendants."

Defining what is meant by the term in the will or trust document can avoid ambiguity in the administration of an estate. Specifying whether the document means strict or modern *per stirpes* when that phrase is employed, and when the initial split is determined can help to ensure the desired outcome.

"*Per Stirpes*" Must Be Used for a Class of Descendants

One common misunderstanding about the use of the term "*per stirpes*" is that it is simply a shorthand term that can be used to name contingent beneficiaries in any context. For example, a will could direct "to my brother and sister, *per stirpes*" intending to mean that shares of the estate should be allocated to the named siblings' children *per stirpes* in the event that one or both of the named individuals have predeceased the testator. However, this usage only introduces ambiguity, since "*per stirpes*" is "a descriptor about how to allocate a gift among a class of beneficiaries—descendants."[17]

In the construction "to my brother and sister, *per stirpes*", suppose that the brother has predeceased and has two living children. Should the brother's share be divided between his children, or should the entire gift be allocated to the sister as the sole member of the class "brother and sister"? To avoid ambiguity, this gift to siblings could be rewritten as a distribution "to the descendants of my mother, *per stirpes*." Similarly, a gift "to Josh Brown, *per stirpes*," is incorrect. Josh Brown is a specific person, and not a class of people. Instead, proper use to achieve the desired result would be "to Josh Brown, or if he is not living, then *per stirpes* to his descendants." A drafter can avoid this type of ambiguity by always remembering that the term "*per stirpes*" should only be used to refer to a class of descendants or issue.

In the case of *In re Green*, drafting attorneys can learn a hard lesson about what misfortune occurs when the term *per stirpes* is used without a properly defined class of descendants.[18] The testatrix, Lessie Odessie Green, included the following language in her will, with the italicized language indicating a handwritten addition:

> I give all my estate to my husband. In the event that my said husband shall predecease me or fails to survive me for sixty (60) days, I give

14 Revised U.P.C. section 2-106.

15 RESTATEMENT (THIRD) OF PROPERTY (WILLS & DON. TRANS.) section 2.3 at Statutory Note 4, Comment g.

16 *Id.* section 2.3 at Statutory Note 5.

17 Albee, *Per Stirpes — The Good, the Bad, and the Ugly*, ELDERCOUNSEL BLOG, https://blog.eldercounsel.com/per-stirpes-the-good-the-bad-and-the-ugly

18 *In re Green*, 2003 WL 22037330 (Tenn. Ct. App. Aug. 29, 2003)

19 *Benadom v. Colby*, 567 A.2d 463 (Md. App., 1989).

> all my estate to my children, if any, who survive me in equal shares, *per stirpes*. If I am survived by neither my husband, nor children, then I give my estate to: *Grandchildren in equal shares* to be his/her/theirs in equal shares or their survivor.

The Court noted that the use of the term *per stirpes* after the language 'to my children, if any, who survive me in equal shares' creates an inconsistency in how the estate should be distributed. The Court went on to state that this language of 'to my children, if any, who survive me in equal shares' instead creates a *per capita* distribution of the estate. This technical misuse of the term *per stirpes* and contrariness to the remaining language of the will, led the court to hold that Lessie Odessie Green's intent was for a *per capita* distribution, equal shares to her children who survived her.

In a similar case that contained contradictory language, *Benadom v. Colby*, Maryland courts had to interpret the language contained in a trust document that was drafted by a non-practicing lawyer.[19] Besides containing numerous misuses of other legal terms, the document also contained the following contradictory language concerning the income of the trust:

> Upon his [the settlor's] death same shall be payable thereafter one-half to his wife Clara Miles Hodson, if she survives him, the other half to go to said Mrs. Mary King Hodson Brown, if living, and upon her death such income shall revert to her lawful children, Alice Hodson Brown, Lillian Brown Berg, Doris Brown and Donaldine Brown, and her other lawful children, if any, *per stirpes*, during their lives, and upon their respective deaths, if during the continuance of said Trust, shall revert to said Trust estate, and be thenceforth a part thereof[.]

The question the Court had to answer was whether the income of the trust reverted back to the trust after the death of Mary King Hodson Brown's children or if the income continued *per stirpes* down the family line of Mary King Hodson Brown. The Trustees of the trust argued that the express provision that the income revert back to the trust after the death of the four named children of Mary King Hodson Brown and any other 'lawful children, *per stirpes*' actually meant that each child's share of the income of the trust should revert back after his or her death. The trial court agreed. On appeal, the further removed descendants of Mary King Hodson Brown instead argued that the inclusion of the term *per stirpes* demonstrates that the testator's "obvious intent [was] to benefit his family through successive stirpital interests." The appellate court agreed with the trial court's reasoning "that the ordinary words 'respective deaths" must be "given precedence over an intention derived from an obvious misuse of a technical term [*per stirpes*]." Therefore, the income reverted back to the trust at the children's deaths instead of continuing down the family line.

Both *In re Green* and *Benadom* show drafting attorneys how the inclusion of words and certain phrases can have possible unintended consequences. The intention behind using "*per stirpes*" is to account for the death of a beneficiary without having to revise estate documents with each birth or death of a descendant. Using "to my descendants, *per stirpes*" instead of "to my children" can avoid the situation in which children of a testator's predeceased child could be disinherited unintentionally. Unfortunately, adding additional descriptors to the class of descendants can reintroduce ambiguity that could result in unintentional disinheritance, even when using "*per stirpes*." For example, a gift made "to my then-living descendants *per stirpes*" could be interpreted to exclude any predeceased children, which would then exclude the testator's grandchildren despite the use of "*per stirpes*." When it comes to *per stirpes*, less is often more.

As in *In re Green*, even using language that might seem at first to have a clear intent, such as "to my children in equal shares, *per stirpes*", introduces ambiguity because "equal shares" and "*per stirpes*" are two different methods of allocating a gift among the class of descendants. Knowing how and when to use the term *per stirpes*, and remembering that it should always be used only with reference to a class, will help to ensure that an estate plan is drafted properly and clients' estates will be distributed in the intended way with no ambiguity or room left for disagreement, at least on this issue. ■