

Title

Parsing “to my issue in equal shares per stirpes” in trust instruments

Summary

The phrase “to my issue per stirpes” in a trust instrument, at least in the typical fact pattern, will call for the creation of a constellation of shares not all of which are of equal value. Thus, the phrase “to my issue in *equal shares* per stirpes” is unfortunate. How the courts, the legislatures, and the restatements have been making sense of the conjoining of the two contradictory phrases is taken up in §5.2 of *Loring and Rounds: A Trustee’s Handbook* [pages 311 to 313 of the 2018 Edition.]. The relevant content of §5.2 is reproduced in its entirety below.

Here is how one Texas court only last year (December 2017) rationalized such a conjoining: “We reverse and remand because the trust instrument’s distribution of the trust estate upon termination ‘in equal shares per stirpes’ contemplates a distribution to the remainder beneficiaries based on their deceased ancestors’ shares. Because the beneficiaries descend from three siblings, the trust instrument directs that the trust estate initially must be divided into three shares: the beneficiaries shares are computed based upon the 1/3 interest of each of the three siblings from whom the beneficiaries descended.” In other words, for computation purposes the *initial division* is into three shares that are equal in value. See *Archer v. Moody*, No. 14-15-00945-CV, 2017 Tex. App. LEXIS 11642 (Tex. App.--Houston [14th Dist.] December 14, 2017, no pet. history).

The Text

[Excerpted from §5.2 of Charles E. Rounds, Jr. and Charles E. Rounds, III, *Loring and Rounds: A Trustee’s Handbook* [pages 311-313 of the 2018 Edition]

The inherently and patently contradictory phrase *issue in equal shares by right of representation* should be avoided at all costs.²⁴ A trustee unable to avoid administering such a provision will need guidance from the court. Somehow, the concept of representation with its inherent potential for effecting unequal distributions among the members of a class of issue needs to be harmonized with the equality requirement, “or one of them must be rejected and given no effect.”²⁵ It may well be that the phrase *in equal shares* refers to equality among the stocks (“stirpes”²⁶), with the term *by right of representation* referring to the proportions that eligible issue within each stock (“stirps”) take.²⁷ This interpretation makes particular sense when distribution to the issue of designated individuals is called for, rather than to the issue of a single individual, *e.g.*, the issue of the settlor.²⁸ A provision that couples two or more

²⁴See generally U.S. Trust, *1992 New York Trusts and Estates Legislation: Meanings of Per Stirpes and In Equal Shares per Stirpes*, Practical Drafting 2939–2972 (1992).

²⁵*Bradlee v. Converse*, 318 Mass. 117, 118, 60 N.E.2d 345, 346 (1945).

²⁶*Stirps* is singular; *stirpes* is plural. *Stirps* is Latin for stem or stock. In legal parlance *stirps* means the branch of a family, *e.g.*, a child and his or her descendants. According to the Oxford English Dictionary, the adjectival form of *stirps* is stirpal, *e.g.*, a stirpal share.

²⁷See, *e.g.*, *In re Will of Lewis*, 434 S.E.2d 472 (Ga. 1993).

²⁸See, *e.g.*, *Estate of Harrison*, 456 Pa. Super. 114, 689 A.2d 939 (1997) (holding that equal shares meant equality among family groupings, with each family grouping being headed by a son of the settlor,

classes, for example, *equally to my children and the children of my deceased children*, also should be avoided.²⁹ It could mean that all take *per capita*.³⁰ Or it could mean that the children share equally 50 percent and the children of deceased children share equally 50 percent, or perhaps that all take *per stirpes*.³¹ The phrase to *X and her children* is particularly unfortunate. One court confronted with such a phrase saw three possible interpretations, “namely (a) that ... [X]... takes a fee simple absolute to the exclusion of her children, either on the theory that the words ‘and to her children’ are words of limitation, or that the word ‘or’ was intended for the word ‘and’ and that the gift to the children was substitutional; (b) that ... [X]... takes a life estate with remainder on her death to her children, as similar devises or grants have been interpreted in other jurisdictions, notably Pennsylvania; and (c) that ... [X]... and her two children are tenants in common, each having an undivided one-third interest in the property.”³² And there is a fourth possible interpretation not mentioned by the court: that *X* takes 50 percent and her children share the other 50 percent.

Even without the reference to equal shares, a provision calling for distribution to someone's issue *by right of representation* or *per stirpes* may be ambiguous under certain circumstances, such as when the first generation of issue below that person dies before the time set for distribution. Let us take the following situation: The person has two children, *A* and *B*, both of whom have predeceased. *A* had one child (*X*) and *B* had two children (*Y* and *Z*). Do *X*, *Y*, and *Z* start the stocks (“stirpes”) and share one-third each? Or do we begin at the level of *A* and *B*, giving *X* one-half and leaving *Y* and *Z* to share one-quarter each? The Restatement of Property Section 301, comment h, suggested that where the intent of the settlor was unclear, the stocks (“stirpes”) began at the first generation where there was a living member at the time set for distribution. Thus, in our case, *X*, *Y*, and *Z* would have shared equally.³³ The Restatement (Second) of Property (Wills and Other Donative Transfers) Section 28.1(3), on the other hand, would start the stocks at the level of *A* and *B*.³⁴ Under the Uniform Probate Code if the term *per stirpes* is employed, the stocks (stirps) are determined at the level of *A* and *B*,³⁵ but not if the term *by right of representation* is

not necessarily equality within each family grouping); *Trust Estate of Dwight v. Keolanui*, 80 Haw. 233, 909 P.2d 561 (1995) (the issue being of designated individuals and the designated individuals being the heads of their respective family groupings, the equality requirement applied among the family groupings but not necessarily within each family grouping); *Bradlee v. Converse*, 318 Mass. 117, 60 N.E.2d 345 (1945) (where provision is for the issue of designated individuals, the equality is among the stirpes, not necessarily within each stirps).

²⁹*Cf.* Restatement of Property §303(2) (construing an outright gift to a person and his or her “family”).

³⁰*Boston Safe Dep. & Trust Co. v. Doolan*, 307 Mass. 233 (1940).

³¹*See generally* 96 C.J.S. Wills §708. *See also* Restatement (Second) of Property (Wills and Other Donative Transfers) §28.5(1).

³²*In re Parent's Will*, 240 N.Y.S.2d 558 (1963) (holding that the mother and her children each took a one-third undivided interest as tenants in common).

³³Restatement of Property §301 cmt. h. The comment to §2.3 of the Restatement (Third) of Property (Wills and Other Donative Transfers) refers to the situation in which *X*, *Y*, and *Z* share equally as *per-capita-with-representation* or *modified per stirpes*. One also sees the term *modern per stirpes*. The situation in which *X* would get one-half is referred to as *strict per stirpes* or *English per stirpes*.

³⁴“Even though the possible takers under a gift to ‘issue’ include primarily descendants of every degree of relationship to the designated person, the conclusion is justified that the average donor does not intend that descendants in a lower degree of relationship to the designated person are to share equally with persons in a higher degree of relationship to the designated person.” Restatement (Second) of Property (Wills and Other Donative Transfers) §28.2 cmt. a. *See also* *Weller v. Sokol*, 271 Md. 420, 318 A.2d 193 (1974). *See, e.g., Boston Safe Dep. & Trust Co. v. Goodwin*, 59 Mass. App. Ct. 270, 795 N.E.2d 581 (2003).

³⁵UPC §2-709(c).

employed.³⁶ Because the law is unsettled in this area, the prospective trustee will want the matter of “where to start the stocks” adequately addressed in the governing instrument.

³⁶UPC §2-709(b).