planning matters

PRACTICAL INSIGHTS INTO ESTATE PLANNING & WEALTH PRESERVATION

INSIDE FOR SPRING 2019

Funeral & Disposition Representative • Basic Estate Planning Terminology

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funeral & disposition representative

In Re: Estate of Travers

by Mary Patricia Magee, Esq.

A recent decision from the Morris County Chancery Division, Probate Part, serves as an important reminder to not only think about the final disposition of your remains, but to communicate those thoughts to the significant people in your life. In an unpublished opinion, *In the Matter of the Estate of John E. Travers, Jr.* (New Jersey Superior Court, Morris County, Docket No. P-2253-2017, 2/19/2019) (hereinafter *"Travers"*), the Court addressed the question of who may control the disposition of a decedent's remains when the decedent has not expressed his intentions in this regard. The Travers case contained no significant legal principles, nor did it break new ground in the estate planning field. It did, however, highlight the importance of specifying the person who should be in charge of your final arrangements and the disposition of your remains.

In this case, Mr. Travers was 22, single and had no children. He had no will and had made no direction regarding his funeral or the disposition of his remains. He was survived by his mother and father, his closest blood relations. His parents were divorced. His father felt strongly that Mr. Travers should be buried, and his mother thought he should be cremated. This disagreement took them to the Superior Court of New Jersey, where the Chancery Judge was called upon to decide the question.

The Court began its inquiry with an examination of the New Jersey law that allows for the appointment of a funeral and disposition representative. New Jersey Statute 45:27-22 provides that a decedent may specify who is to be entrusted with funeral arrangements and the disposition of bodily remains. *See* N.J.S. 45:27-22.a. This direction must be in a will. If the decedent has not left a will that includes such an appointment, the statute sets forth the order of priority of the persons entitled to control the funeral and the disposition of remains as follows:

1. the surviving spouse or civil union or domestic partner
2. a majority of the surviving adult children
3. the surviving parent or parents
4. a majority of the brothers and sisters
5. other next of kin according to the degree of relationship with the decedent
6. if no next of kin, any other person acting on a decedent's behalf. *Id.*

As noted, Mr. Travers did not have a will, and had no spouse and no children. Therefore, his parents had equal statutory standing to make decisions about his funeral and the disposition of his remains. What happens in situations where, as here, people of equal standing are in stark disagreement, and each of them seeks to control the disposition of the remains? The Court in *Travers* attempted to ascertain the decedent's probable intent with respect to this question. Although the decedent did not leave a will, the Court noted four factors to be considered in resolving a dispute over funeral arrangements or dispositions of remains:

- The decedent's wishes as expressed through communications with another, to the extent decedent made such communications;
- The person with a closer relationship with the decedent, who is in a better position to determine the decedent's desires and expectations;
- The person more likely to follow the decedent's religious beliefs and/or cultural practices; and
- The person to be appointed administrator of the estate, thus being in the position of assessing the estate's ability to pay expenses, or arranging for alternative funding to do so. *Id.*

During the testimony of the parties, the Court was persuaded the father had the closer relationship with his son and that he appeared to have a better understanding of the son's likely wishes, based on several factors outlined in the case. The Court, therefore, granted the father's petition to control the disposition of his son's remains.

In the majority of traditional family situations, the written appointment of a funeral and disposition representative may not be necessary. For example, in the case of a married couple, the spouse will be given priority. In the case of a parent with no spouse whose children all agree, a majority of the children will decide. However, in those cases where families are not all "on the same page" with respect to the funeral and the disposition of a decedent's remains, it is well worth the time and effort to leave a will clearly indicating the decedent's wishes in this regard. Absent a will, a written statement signed and dated by the decedent (and ideally, witnessed by disinterested parties), may stand as evidence of the decedent's intent, to which New Jersey courts will accord great weight.

In *Travers*, a great deal of emotional distress was caused, and significant expenses were incurred, to resolve a situation that could have been taken care of easily by the decedent with an appropriate designation in a will.

some basic estate planning terminology

David G. Hardin, Esq.

One of the hallmarks of estate planning is the use of terms of art in legal documents. Terms of art are often encountered in a will or revocable trust. This article will discuss the Latin phrase "*per stirpes*" and related concepts in the context of estate distributions to beneficiaries.

A. Per Stirpes

The term "*per stirpes*" literally means "by roots or stocks."[1] In the context of a disposition in a will or trust, the term is frequently used, for example, as part of a distribution to "surviving descendants, *per stirpes*." The term is defined in New Jersey law as follows:

> If a governing instrument requires property to be distributed "*per stirpes*," the property is divided into as many equal shares as there are: (1) surviving children of the designated ancestor; and (2) deceased children who left surviving descendants. Each surviving child is allocated one share. The share of each deceased child with surviving descendants is allocated in the same manner, with subdivision repeating at each succeeding generation until the property is fully allocated among surviving descendants.[2]

While the definition is certainly accurate, the "*per stirpes*" concept is most readily understood in terms of the following illustration, where D represents the decedent, X, Y and Z represent D's children, and 1, 2 and 3 represent D's grandchildren. **(See chart below.)**

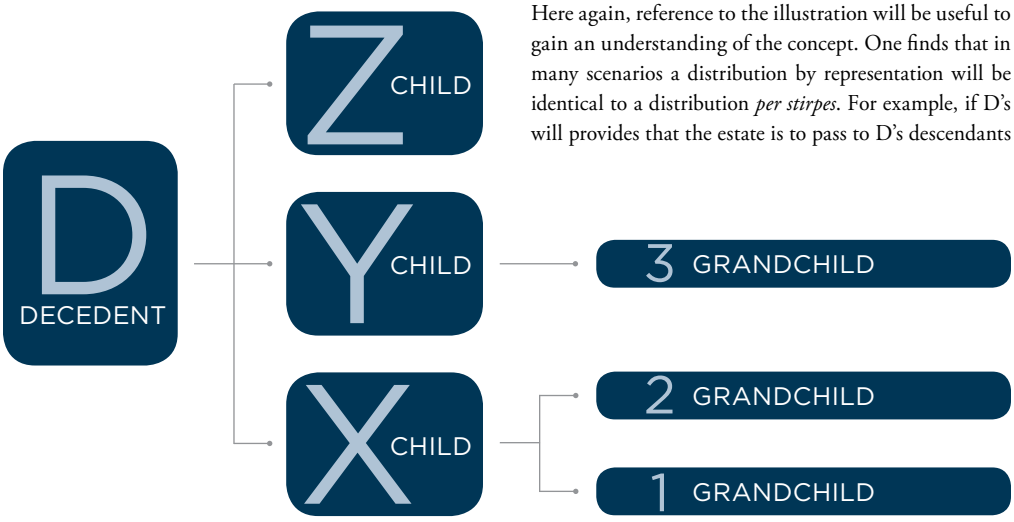
If D's will provides that the estate is to pass to D's descendants per stirpes, and all three of D's children are alive, each would take a one-third interest. That's relatively straightforward. Now, if D's child X is deceased and Y and Z are alive, X's children 1 and 2 would split a one-third interest, and Y and Z would each receive a one-third interest. Continuing with the various scenarios, if D's child Y is deceased, and X and Z are alive, Y's child 3 would receive a one-third interest, and X and Z would each receive a one-third interest. And, if D's child Z is deceased and X and Y are alive, X and Y would each receive a one-half interest. Lastly, if X and Y are deceased, and Z is alive, 1 and 2 would split a one-third interest, 3 would receive a one-third interest, and Z would receive a one-third interest. Given the various permutations, one can understand why the term "per stirpes" is universally adopted in estate planning documents; it incorporates all of the various scenarios into a simple two-word phrase.

B. By Representation

An alternative to a "*per stirpes*" distribution in a will or trust is a disposition to "surviving descendants by representation" or "per capita at each generation." The concept is similarly defined in a New Jersey statute, as follows:

> If an applicable statute or a governing instrument requires property to be distributed "by representation" or "per capita at each generation," the property is divided into as many equal shares as there are: (1) surviving descendants in the generation nearest to the designated ancestor which contains one or more surviving descendants; and (2) 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 designated ancestor.[3]

Here again, reference to the illustration will be useful to gain an understanding of the concept. One finds that in many scenarios a distribution by representation will be identical to a distribution *per stirpes*. For example, if D's will provides that the estate is to pass to D's descendants by representation, and all three of D's children survive, each of X, Y and Z would take a one-third interest. Similarly, if D's child X is deceased and Y and Z are alive, X's children 1 and 2 would each split a one-third interest, and Y and Z would each receive a one-third interest. It is also the case where D's child Y is deceased, and X and Z are alive: Y's child 3 would receive a one-third interest, and X and Z would each receive a one-third interest. The difference becomes clear, however, if X and Y are both deceased, and Z is alive, in which case Z would receive a one-third interest and 1, 2 and 3 would divide a two-thirds interest equally among them. The critical distinction between a disposition *per stirpes* and a disposition by representation stems from the fact that in a *per stirpes* distribution, each beneficiary takes through the parent, and in a distribution by representation, every beneficiary at the same generational level receives an equal interest. To summarize, each child would take an equal interest to every other child; every grandchild receiving a share would take an equal interest to every other grandchild; and so on down the generations. Distributions by representation or per capita at each generation are often paraphrased by the expression, "equally near, equally dear."



C. Per Capita

The last option is a disposition "*per capita*," which is defined under New Jersey law as follows:

> If a governing instrument requires property to be distributed "per capita," the property is divided to provide equal shares for each of the takers, without regard to their shares or the right of representation.[4]

In a *per capita* distribution, if D's will leaves his estate to his "surviving descendants *per capita*," and D's children X, Y and Z, and D's grandchildren, 1, 2 and 3, all survive D, then each of X, Y and Z, and 1, 2 and 3, would receive an equal one-sixth interest in D's estate. If any of them was deceased, the others would each receive an equal one-fifth share.

Whichever option is preferred, care should be taken to be certain that the wishes of the testator are properly expressed. Otherwise, the result could be an unintended disposition of the estate, or litigation to determine the testator's intent.

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[1] *Black's Law Dictionary (West 5th ed. 1979) at 1030*

[2] *N.J.S. 3B:1-2*

[3] *Id.*

[4] *Id.*

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