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Wills -- Per Stirpes or Per Capita Division

Morton L. Union

a defendant the one most responsible financially, or to bring action against all as joint defendants, thus increasing the probability of collection of any damages, and in many cases preventing circuity of actions.[28] Such a principle is recognized in negotiable instruments law in actions by a holder against prior parties,[29] and in real property law in actions by a grantee against all prior grantors for breach of certain covenants contained in the prior deeds.[30]

The abandonment of the privity requirement, in addition to greatly aiding an injured plaintiff, might have the incidental but desirable effect of forcing greater care by the manufacturer, and greater discrimination and inspection in selection of the product by the middleman and retailer.

WALKER Y. WORTH, JR.

Wills—Per Stirpes or Per Capita Division

The difficult problem of determining the dispositive intent expressed in an ambiguous will has reappeared in North Carolina. The testator, in a will prepared by a layman, directed that "the remainder of my estate is to be equally divided among my legal heirs, including said Myrtle Coppedge Bunn, equally, share and share alike as provided by laws of North Carolina." A brother, a half brother, eleven children of a deceased brother and a deceased sister, and two children of a deceased nephew were involved in the action to determine if the estate was to be divided *per capita* or *per stirpes*. *Held* (one justice dissenting) that the estate should be divided into fifteen equal shares, a *per capita* distribution.[1]

Courts have been called on many times to interpret wills using similar language. As a result, certain phrases have been singled out as being indicative of the testator's intention. As a general rule, a per capita division is favored unless the will shows a contrary intent.[2] When

[28] If action is brought against the manufacturer in the first instance circuity is prevented since there will be no possibility of a purchaser-retailer action, retailer-wholesaler action, and wholesaler-manufacturer action. Or if all are joined, circuity may be avoided by the retailer or wholesaler obtaining a judgment over against the manufacturer in the same suit.

[29] 8 AM. JUR., Bills and Notes §942 (1938).

[30] Wiggins v. Pender, 132 N. C. 628, 634, 44 S. E. 362, 364 (1903) quoting with approval from Spencer's Case, 1 Smith, L. C. (9th ed.) 174: ". . . [the] covenant of warranty binds the original grantor and his personal representatives to the owner of the land, and any owner during whose possession a breach occurs can sue any or all previous covenantors . . ."; 14 AM. JUR., Covenants, Conditions and Restrictions §50 (1938).

[1] Coppedge v. Coppedge, 234 N. C. 173, 66 S. E. 2d 777 (1951) Justice Johnson, dissenting, was of the opinion that the will should be construed to require a *per stirpes* distribution. *Id* at 178, 66 S. E. 2d at 781.

[2] Burton v. Cahill, 192 N. C. 505, 135 S. E. 332 (1926); *Ex parte* Brogden, 180 N. C. 157, 104 S. E. 177 (1920); Howell v. Tyler, 91 N. C. 213 (1884); Britton v. Miller, 63 N. C. 268 (1869); Bryant v. Scott, 21 N. C. 155 (1835); 69 C. J. §1312 (1951).

such phrases as "to be equally divided," "share and share alike," etc., are the only indications in the will as to how the estate is to be apportioned, they normally import a desire that each individual take an equal share.[3] However, they can just as easily be interpreted to mean an equal division among classes[4] particularly where the beneficiaries stand in unequal degrees of relationship.[5] Use of the words "legal heirs" points to a *per stirpes* distribution according to the intestate succession laws;[6] but, the coupling of expressions of equality with these words changes the presumption to favor giving each individual the same share.[7]

A general reference in the will to the intestacy statutes, for example, "according to the laws of the state," in the situation where those claiming are of unequal degrees of kinship to the testator, indicates a desire to have the beneficiaries take by classes.[8] Here again, expressions of equality change this presumption to support a *per capita* apportionment.[9] Irrespective of the use of such phrases, that desire which seems to predominate throughout the entire instrument,[10] as related to the surrounding circumstances which may have influenced the testator at the time it was written,[11] will be the decisive factor.

The problem of construing wills containing various combinations of the foregoing phrases has been faced many times in North Carolina. As might be expected, there has never been any one will presented to our court which contained all of the prominent features of the instrument in the instant case. At first glance, the decision allowing each of the interested parties to take the same portion seems to be a reiteration of

[3] Re Rauschenplaut, 212 Cal. 33, 297 Pac. 882 (1931); Dollander v. Dhaemers, 297 Ill. 274, 130 N. E. 705 (1921); Tillman v. O'Briant, 220 N. C. 714, 18 S. E. 2d 131 (1942); Burton v. Cahill, 192 N. C. 505, 135 S. E. 332 (1926); *In re* Asby, 232 Wis. 481, 287 N. W. 734 (1939).

[4] Raymond v. Hillhouse, 45 Conn. 467, 29 Am. Rep. 688 (1878); Runyan v. Rivers, 99 Ind. App. 680, 192 N. E. 327 (1934); Freund v. Schilling, 222 Mo. App. 901, 6 S. W. 2d 678 (1928); Burgin v. Patton, 58 N. C. 425 (1860); Rogers v. Brickhouse, 58 N. C. 301 (1860).

[5] Murphy v. Fox, 334 Ill. App. 7, 78 N. E. 2d 337 (1948); Bear v. Pitzer, 131 W. Va. 374, 47 S. E. 2d 219 (1948).

[6] Stephens v. Clark, 211 N. C. 84, 189 S. E. 191 (1936); 69 C. J. §1316.

[7] Dennis v. Shirley, 212 Ky. 114, 278 S. W. 691 (1925); Doherty v. Grady, 105 Me. 36, 52 A 869 (1908); Wooten v. Outland, 226 N. C. 245, 37 S. E. 2d 682 (1946).

[8] Old Colony Trust Co. v. Lothrop, 276 Mass. 469, 177 N. E. 675 (1931); In re Ware, 173 Misc. 316, 17 N. Y. S. 2d 693 (1940); Croom v. Herring, 11 N. C. 393 (1826).

[9] Proctor v. Lacy, 263 Mass. 1, 160 N. E. 441 (1928); 57 AM. JUR. §1229 (1948).

[10] In re Carrol, 62 Cal. App. 2d 798, 45 P. 2d 644 (1944); MacGregor v. Roux, 198 Ga. 520, 32 S. E. 2d 289 (1944); Patchell v. Groom, 158 Md. 10, 43 A. 2d 32 (1945); House v. House, 231 N. C. 218, 56 S. E. 2d 695 (1949); Schaeffer v. Haseltine, 228 N. C. 484, 46 S. E. 2d 463 (1948).

[11] Shackelford v. Kauffman, 263 Ky. 676, 93 S. W. 2d 15 (1936); In re Thompson, 202 Minn. 648, 279 N. W. 574 (1938); House v. House, 231 N. C. 218, 56 S. E. 2d 695 (1949); Schaeffer v. Haseltine, 228 N. C. 484, 46 S. E. 2d 463 (1948); Ward v. Ottley, 166 Va. 639, 186 S. E. 25 (1936).

the prevailing rule in this jurisdiction.[12] Perhaps, however, a more detailed survey is necessary.

In nearly all of the cases cited as applying the general rule, an equal division was indicated among those who were specifically named in the will,[13] and in two instances all the beneficiaries who were to take equally stood in the same degree of relationship to the testator.[14] These cases required no outside reference to the statute of distributions or canons of descent to determine who was to share the estate. It was obvious who the testator intended should take equal shares; whereas, in the present case, the beneficiaries were referred to only as "legal heirs."

There have been occasions when an outside reference was necessary. The first time this situation arose, the phrase "equally divided between my legal heirs" was construed as directing a *per capita* distribution among those standing in unequal degrees of relationship to the testator.[15] It might be noted that two subsequent cases involving similar language and circumstances held directly contra to this decision.[16] Then, in the

[12] "The general rule in this jurisdiction is to the effect that where an equal division is directed among heirs, or a class of beneficiaries, even though such class of beneficiaries may be described as *heirs* of deceased persons, *heirs* or *children* of living persons, the beneficiaries take *per capita* and not *per stirpes*." Wooten v. Outland, 226 N. C. 245, 37 S. E. 2d 682 (1946).

[13] Stowe v. Ward, 10 N. C. 604 (1824) ("be as equally divided amongst the heirs of my brother, John Ford, the heirs of my sister, Nanny Stowe, the heirs of my sister, Sally Ward, deceased, and nephew, Levi Ward"); Bryant v. Scott, 21 N. C. 155 (1835) ("to be equally divided among the persons hereafter named" and then went on to name them); Hastings v. Earp, 62 N. C. 5 (1866) ("to be equally divided amongst all of the legatees named in the will, except the Masons," where the legatees had been previously named); Waller v. Forsyth, 62 N. C. 353 (1866) ("to be equally divided between the children of the said Nancy Waller and my sons, William and John"); Britton v. Miller, 63 N. C. 268 (1869) ("to the children of my brother, Stephen W. Britton, and of my sister, Mary Miller . . . to them and their heirs forever"); Culp v. Lee, 109 N. C. 675, 14 S. E. 74 (1891) (the "surplus shall be equally divided and paid over to Phillip J. Russell, Miss Mary Russell and the children of my niece, Martha . . . in equal portion, share and share alike"); Everett v. Griffin, 174 N. C. 106, 93 S. E. 474 (1917) ("the proceeds . . . shall be equally divided between all my children"); Legett v. Simpson, 176 N. C. 3, 96 S. E. 638 (1918) ("to the lawful children of my nieces, Elizabeth Bateman and Charlotte Baxter"); *Ex parte* Brogden, 180 N. C. 157, 104 S. E. 177 (1920) ("to be equally divided between my two sisters' children" and then specifically named those children); Burton v. Cahill, 192 N. C. 505, 135 S. E. 332 (1926) ("to said Annie L. Burton and Katie L. Cahill and their children"); Tillman v. O'Briant, 220 N. C. 714, 18 S. E. 2d 131 (1941) ("the proceeds divided equally between Maggie Rhew's children and Lou Bettie O'Briant and Dewey Yarboro"); Wooten v. Outland, 226 N. C. 245, 27 S. E. 2d 682 (1946) ("to be equally divided among the heirs of Uncle Gus Moseley, Uncle Lam Moseley, Aunt Florence Patrick, Aunt Laune Jackson and Aunt Darlie Kilpatrick").

[14] Shull v. Johnson, 55 N. C. 202 (1855); Hill v. Spruill, 39 N. C. 244 (1846).

[15] "It is also my will . . . [that] the proceeds [be] equally divided between my legal heirs." The statute of distributions was used as a guide for the sole purpose of determining who were the "legal heirs." The phrase "equally divided" was held to direct the manner of apportionment of the estate. Freeman v. Knight, 37 N. C. 72 (1841).

[16] In Rogers v. Brickhouse, 58 N. C. 301 (1860) ("to be equally divided among his heirs at law"); and in Burgin v. Patton, 58 N. C. 425 (1860) ("to be equally divided amongst my heirs except John Burgin"), a *per stirpes* distribution was ordered.

next opinion on this exact problem, these two cases were completely ignored and once again a *per capita* apportionment was ordered.[17] Only one early case involved a direct reference to the intestate succession laws,[18] but the phrasing so clearly indicated that statutory apportionment was to be followed that it can hardly be considered as in point here.

Purely as a matter of grammatical construction, the correct interpretation of the clause involved in the principal case[19] would seem to be that urged by the dissenting opinion.[20] This is emphasized by the fact that the clause, read as it is written, seems to demand that reference be made to the intestate succession laws to determine both the question of *who* takes (i.e., who are the "legal heirs") and the question of *what share* is to be taken. The majority opinion reads the clause to mean that reference is to be made to the intestate succession laws to determine only the question of who are the "legal heirs," which seems to take the phrase, "as provided by laws of North Carolina," out of context. This is particularly so in view of the fact that our court has previously held that the words "legal heirs" standing alone mean the same thing as "legal heirs as provided by the laws of North Carolina." From this technical standpoint, the better view would probably be that the intestate succession laws should be controlling to demand a *per stirpes* distribution in this situation.

Perhaps the obvious answer to all of this is that these technicalities just do not apply. More than likely, the layman drawing this will utilized the phrase "as provided by laws of North Carolina" only to give the will what he might think of as "legal dignity." After all, here was a man who probably knew nothing whatsoever about the legal distinctions set forth in our intestate succession laws. He probably never heard the words *per capita* or *per stirpes*. If it can be said that the technical construction given this will by both the majority and dissenting opinions is not the controlling factor, then one more important consideration favoring a stirpital distribution remains.

Under ordinary circumstances, it would not be probable that the average person would intend that his grandnephew should have the same

[17] In Hackney v. Griffin, 59 N. C. 381 (1863) the court agreed with Freeman v. Knight 37 N. C. 72 (1841) and held that "to be equally divided between all my legal heirs" directed a *per capita* division of the estate. It is interesting to note that Justice Battle, who wrote the opinions in Rogers v. Brickhouse, 58 N. C. 301 (1860) and Burgin v. Patton 58 N. C. 425 (1860), and who was still a member of the court, did not dissent in Hackney v. Griffin. For a more complete discussion, see Long, *Class Gifts in North Carolina*, 22 N. C. L. REV. 297, 320 (1944).

[18] ". . . to be divided among all my legal heirs, agreeable to the statute of distributions of intestates' estates," Croom v. Herring, 11 N. C. 393, 394 (1826).

[19] ". . . to be equally divided among my legal heirs . . . equally, share and share alike as provided by laws of North Carolina." Coppedge v. Coppedge, 234 N. C. 173, 176, 66 S. E. 2d 777, 781 (1951).

[20] Coppedge v. Coppedge, 234 N. C. 173, 178, 66 S. E. 2d 777, 781 (1951).

share of his estate as his brother.[21] Yet, that is the result reached by the majority. It would seem more probable, in view of "the degree of consanguinity to the testator," that each class of beneficiaries instead of each individual was to have an equal share. In the case of an ambiguous will where sufficient evidence was not available as to the testator's true intention, would it not be better to allow this objective standard to prevail?

Because of the many factors which can influence the drawing of a will of this character, and the resulting difficulty in construing it, perhaps both the majority and dissenting view can be justified. By this decision, it would seem that where the phrase in question contains expressions of equality, a *per stirpes* distribution will be reached only if there is explicit language indicating such an intent.

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Wills—Requirement of Signatory Intent

Testator's attested will, written entirely in the hand of one of the witnesses thereto, was offered for probate. Her name appeared only twice in the instrument, thus:

"Will of Hannah Williams, Sr.
Garysburg, North Carolina.
". . . [Provisions of Will].
"We certify that Hannah Williams, Sr., was in her sound mind.
". . . [date].
[Signatures of Witnesses]"

The scrivener-witness testified that he "put it [the name at the top] in there to identify who she [testator] was and where she lived." The court held the name appearing at the top to be a sufficient "signing," and declared the instrument a valid will.[1]

The original Wills Act[2] in England did not require that the will be signed by the testator if it was properly reduced to writing.[3] Later, the Statute of Frauds[4] provided that the will be "signed by the party so devising the same or by some other person in his presence and by his express directions." *Lemayne v. Stanley*[5] interpreted this to mean that

[21] "Where the question is in the balance of doubt, the doubt is to be resolved in favor of a taking *per stirpes* rather than *per capita*. One reason for this preference is that such a taking is in accord with the laws of descent and in accord with the natural instinct of testators." Claude v. Schutt, 211 Iowa 117, 233 N. W. 41 (1930), cited in dissenting opinion in Coppedge v. Coppedge, 234 N. C. 173, 179, 66 S. E. 2d 777, 781 (1951).

[1] In re Will of Hannah Williams, 234 N. C. 228, 66 S. E. 2d 902 (1951).
[2] 32 Hen. VIII c. 1 (1540).
[3] Brown v. Sackville, 1 Dyer 72a (1553).
[4] 29 Car. II c. 3 §5 (1677).
[5] 3 Lev. 1 (1681).