



TAX MATTERS

Why every word in your will can matter

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I remember playing golf with my grandfather years ago. I teed up the ball and hit it 250 yards – in the wrong direction. The ball went into the woods and not anywhere near the green. I threw my club in frustration. “Tim, no one is perfect,” Grandpa said. “Just spend a little more time at the driving range tomorrow because practice makes perfect,” he continued. No one is perfect, but practice makes perfect? I was always confused by those words.

It’s one thing to use confusing language on the golf course. It’s another to be confusing when you’re drafting your last will and testament. Let me share a true story about two short words in a will that nearly tore apart a family. We can all learn something here.

The story

Mr. D passed away some years ago and was survived by his wife. They had two children, their son, J, and daughter, M. Both J and M were married with kids. In his will, Mr. D left a life interest in his assets to his wife, Mrs. D, but following her death the balance, or residue, of his estate was to be left “equally, between my son J, and daughter M, *per stirpes*.”

Now, allow me to digress for a minute. “*Per stirpes*” is a Latin term that is commonly used in a will. An estate is distributed *per stirpes* if each branch of the family is entitled to an equal share. For example, if you have two children, A and B, and leave your assets to your descendants in equal shares *per stirpes*, then one half of your estate will go to each of your children. But suppose Child A predeceases you; Child A’s half will go to his or her children (your grandchildren) to be divided among them equally (as opposed to Child A’s half going to your surviving child, Child B).

Here’s the problem: The term *per stirpes* was used incorrectly in Mr. D’s will. The term implies the possibility of an intergeneration gift (i.e. a gift to the grandchildren). It’s improper to use the term in conjunction with naming specific first-generation children – that is, J and M – as beneficiaries alone. After Mr. D died, his son J passed away – before Mrs. D passed away. J’s will named his wife, S, as the sole beneficiary of his estate. What do you think happened to the share of Mr. D’s estate that was to be inherited by J after his mother died? As the story goes, three parties fought over that inheritance.

J’s kids wanted the inheritance that their father would have received under the argument that Mr. D’s intention, by use of the words *per stirpes*, was to leave that share to them in the event their father had passed away. J’s wife, S, wanted the inheritance under the argument that J’s share of his father’s estate had vested in him (he had a right to those assets – subject to his mother’s life interest) and that the words *per stirpes* should be disregarded since they were used improperly in the will. This, of course, would mean that S would inherit the assets because J left his entire estate to her. Finally, J’s sister, M, wanted the inheritance. She too argued that the words *per stirpes* should be disregarded, but she also argued that Mr. D’s assets had not vested in J at the time of her father’s death, which would mean she should inherit the assets.

The decision

The judge reviewed a case called *Lau v. Mak Estate* from 2004 that dealt with a similar set of facts. In that decision, the court held that no meaning should be given to the term *per stirpes* when used incorrectly. But in the case of Mr. D’s family, the judge reviewed Mr. D’s will in full to gain an appreciation of the context in which the term was used and, along with other evidence, the judge

concluded that there was an attempt by Mr. D to use the term *per stirpes* properly to benefit his grandchildren. On appeal, the Court of Appeal upheld the decision.

The moral

A couple of thoughts come to mind here. First, the wording of your will needs to be precisely correct or you run the risk of family disputes. So, forget about those do-it-yourself wills and hire a good lawyer – who specializes in estate planning – to prepare your will. Next, ensure your will contemplates your beneficiaries predeceasing you and contains proper language to deal with your estate in that event.

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