

How Inheritance Gets Complex When Children Predecease Parents

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April 4, 2018

In US law, ensuring one's wishes are carried out in transferring wealth to subsequent generations can be complex in cases, for example, where a child dies before his or her parents. The author of this item examines the issues involved.

As readers are well aware, inter-generational and intra-generational wealth transfer issues are some of the hottest, if not the hottest questions facing the private client wealth advisory at present. One issue that may not readily spring to mind because of it being such an uncomfortable topic is what happens if a child predeceases their parent. Neil V Carbone, NYC-based partner at US law firm KattenMuchinRoseman, considers such matters. (Carbone concentrates his practice in trust and estates law, with a focus in estate planning, administration and litigation. His clients include high net worth individuals and individual and corporate fiduciaries.) The editors of this news service are pleased to share these views with readers; those who wish to respond can email tom.burroughes@wealthbriefing.com The editors of this news service don't necessarily endorse the views of all guest contributors.

You have decided that, if you are not survived by a spouse, you will leave property to your surviving descendants, i.e., your children, grandchildren and great-grandchildren, etc., commonly referred to by the legal term "issue." A disposition to your issue is generally straightforward if all of your children survive you and you want to benefit them equally. It gets complicated, however, when children predecease leaving their own children.

If one child predeceases leaving issue, most people will want that predeceased child's share to pass down to his or her own issue. Opinions will differ, however, on how to dispose of the shares of two or more predeceased children, with some people wanting to treat each branch of descendants equally and others preferring to treat the members of each generation equally. The "right" way to handle this situation depends on your individual wishes. To help determine your wishes, it is important to understand the meaning of the terms "by representation," "per stirpes" and "per capita" as they relate to dispositions to issue in New York.

By representation

We will consider distribution by representation first because it is the current statutory default in New York. If you die without a will or with a will that you executed on or after September 1, 1992 and did not specify otherwise, a disposition to your surviving issue will be made by representation.

In a distribution by representation, the members of each generation will be treated the same, although the various generations may be treated differently. In other words, all of your surviving children will receive the same fractional share of your estate and all of your grandchildren whose parents are deceased will receive the same fractional share of your estate. The concept is based upon the supposition that a person would want to provide equal sharing among descendants in equal degree of consanguinity. If one predeceased child has more children than another predeceased child, the division between the branches of the family will be lopsided.

A distribution to surviving issue by representation would work as follows. Your property would be divided into as many equal shares as there are (i) surviving members in the nearest generation of your descendants which contains one or more surviving members and (ii) deceased members in that same generation who left their own surviving issue. The nearest generation of your descendants generally will be your children, but if all of them predecease you, it will be your grandchildren, etc. One share will be allocated to each surviving member in such

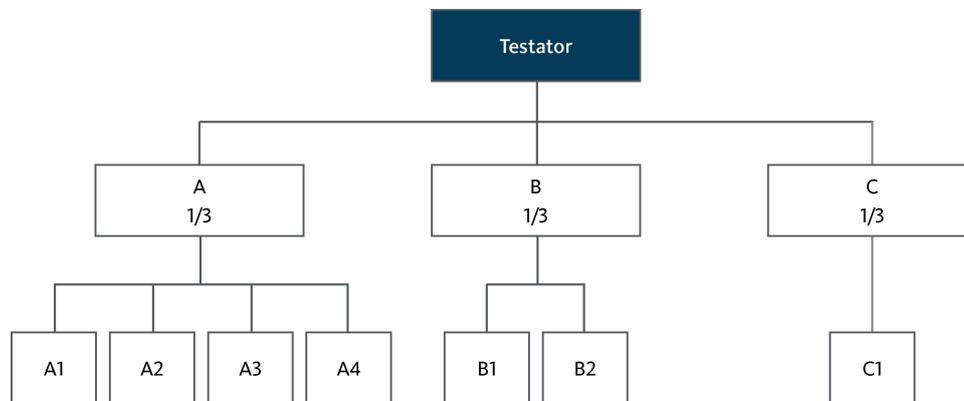
nearest generation. If there is one deceased member in such nearest generation who left surviving issue, one share will be allocated to that deceased member and that share will be further divided in the same manner into equal shares for that deceased member's surviving issue. If there is more than one deceased member in the nearest generation who left surviving issue, the shares allocated to those deceased members will first be combined and then divided into equal shares among the surviving children of the deceased members. There will be one equal share for each child of those deceased members who either survive or left surviving issue.

These concepts are best demonstrated by example. For purposes of the following examples, assume that you have three children, A, B and C, and that A has four children, B has two children and C has one child.

All children survive

If you are survived by all three of your children, your property will be divided into equal shares at the level of your children and A, B and C will each take 1/3 of your property.

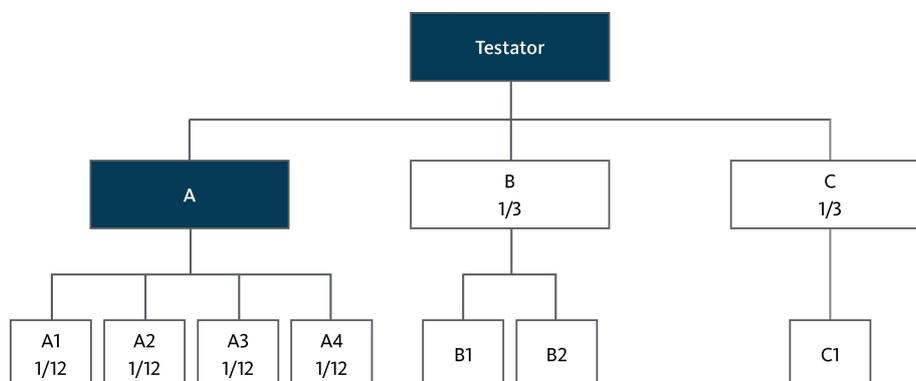
Figure 1



One child predeceases

If A predeceases you and you are survived by A's four children, by B and by C, then your property will still be divided into equal shares at the level of children because that is the nearest generation below you which contains a surviving member. Your property will therefore be divided into three equal shares, one for A's children and one for each of B and C. B and C will each take 1/3 of your property. The 1/3 share that A would have received had he survived will be divided equally among A's four children, with each taking 1/12 of your property.

Figure 2

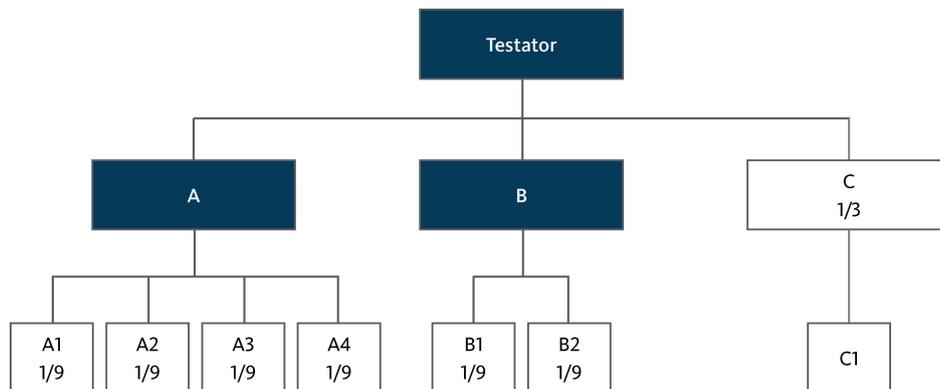


More than one child predeceases

If both A and B predecease you and you are survived by A's four children, by B's two children and by C, then your property will be divided into equal shares at the level of children, the nearest generation below you which

contains a surviving member. Your property will be divided into three equal shares, one for A's children, one for B's children and one for C. C will receive his $\frac{1}{3}$ share and the other two shares will be combined and then divided into equal shares for A's children and B's children. Since A has four children and B has two children, there will be six shares and each grandchild will take $\frac{1}{9}$ of your total property (i.e., $\frac{1}{6}$ of the combined $\frac{2}{3}$). The result is that each surviving grandchild will receive an equal share, with the share that otherwise would have gone to B had he survived being diluted because A had more children than B.

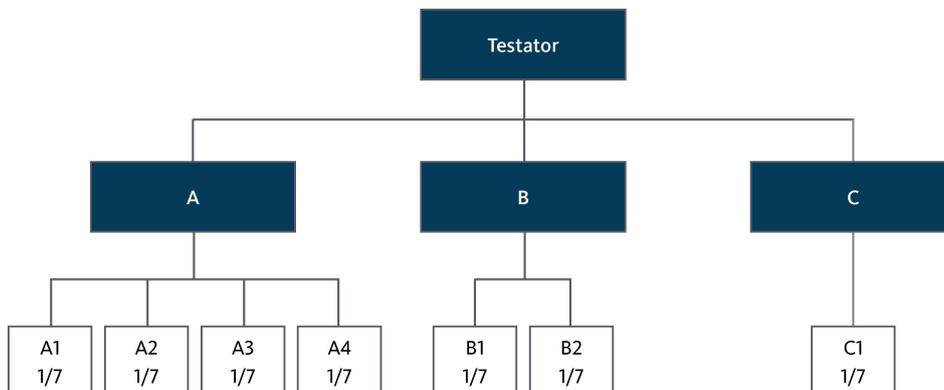
Figure 3



All children predecease

If all three children predecease you and you are survived by A's four children, by B's two children and by C's child, your property will be divided into equal shares at the level of grandchildren, as that will be the nearest generation below you which contains surviving members. In this case, each of your grandchildren will take a $\frac{1}{7}$ share of your property and the share that would otherwise have gone to B and C had they survived will be diluted by the fact that A had more children than they did.

Figure 4



Per stirpes

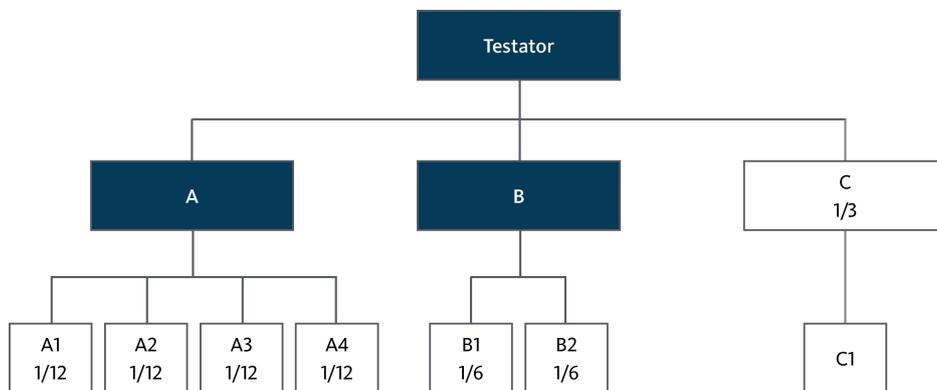
The term *per stirpes* is Latin and means "by the stock" or "by the root." In a *per stirpital* distribution, each branch of descendants is treated the same but the members of each generation may not be. It is based on the assumption that a child who survived a parent would leave his or her share equally to his or her own children and the belief that an unnatural order of deaths should not alter this result.

A distribution to surviving issue *per stirpes* would work as follows in New York. Your property would be divided into as many equal shares as there are (i) surviving members in the nearest generation below you which contains one or more surviving members and (ii) deceased members in that same generation who left their own surviving issue. One share will be allocated to each surviving member in such nearest generation and one share will be allocated to each deceased member in that generation who left surviving issue for further division.

The result in a *per stirpital* distribution will be the same as in a distribution by representation in the case where all of your children survive you (each child will take an equal share as in Figure 1, above), in the case where one of your children predeceased leaving issue (each surviving child will take an equal share and the share allocated to the predeceased child will be further divided among his or her own children as in Figure 2, above) and, in New York, in the case where none of your children survive you but your grandchildren survive you (each grandchild will take an equal share as in Figure 4, above).

The similarity between distributions by representation and *per stirpes* ends when at least one child survives and more than one child predeceases leaving issue. Assume that both A and B predecease you leaving issue and that C survives you. In a distribution *per stirpes*, after the initial division into three equal shares, C takes his 1/3 share of your property, A's 1/3 share will be divided equally among his four children so each of A's children will take 1/12 of your property, and B's 1/3 share will be divided equally between his two children so each of B's children will take 1/6 of your property. While the three branches of the family are treated the same in that each shares in 1/3 of your property, the grandchildren from the two predeceased children are not treated the same. Unlike in a distribution by representation, the share that otherwise would have gone to B had he survived is not diluted by the fact that A had more children than B.

Figure 5



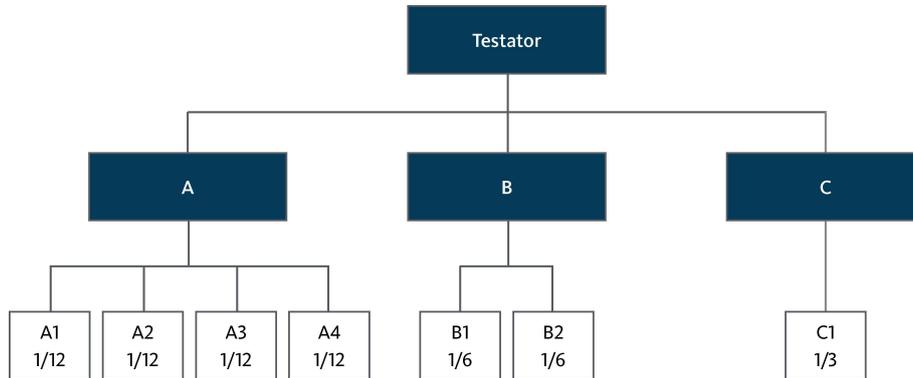
Distribution *per stirpes* was the statutory default for dispositions to issue at different generational levels in New York from April 30, 1921 until September 1, 1992, when the default changed to by representation. If you die with a will that you executed before September 1, 1992 and did not otherwise specify, a disposition to your issue will be made on a *per stirpital* basis if your issue fall into different generations, e.g., children and grandchildren from a predeceased child.

It should be noted that New York's approach to a *per stirpital* distribution is modified from the traditional approach. Under New York's approach, the division of property into equal shares starts at the nearest generation below which contains at least one surviving member. That means that if all your children predecease you leaving their own children, your property will be divided at the generation of grandchildren and each of your surviving grandchildren will take an equal share, regardless of the fact that you may have more grandchildren from one child than from another child. See Figure 4, above. It is based on the assumption that, once a person's children are all dead, the person would be inclined to treat his or her grandchildren equally because they are descendants in equal degree of consanguinity.

In contrast, under the traditional approach, the division of property into equal shares starts at the level of children, whether or not any children survive. Going back to our example, your property would be divided at the generation of children into three equal shares, one for each of A, B and C. A's share would be divided equally among his four children, B's share between his two children and C's share would go to C's child. The result would be that each of A's children would take 1/12 of your property, each of B's children would take 1/6 of your property and C's child would take 1/3 of your property.

Many New Yorkers prefer the more traditional approach to *per stirpital* distribution (in which grandchildren from a predeceased child take only the share their parent would have received had the parent survived). If you prefer that approach, you must include an instruction in your will or trust agreement that the division into shares for each branch of descendants is to take place at the level of your children even if all of your children predecease you.

Figure 6

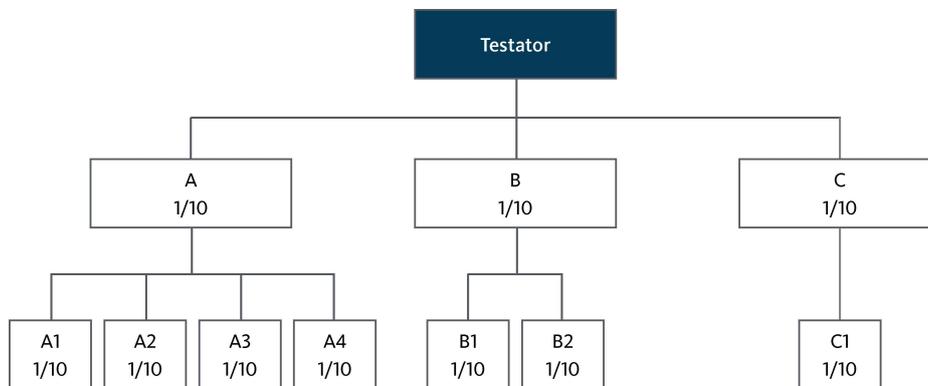


Per capita

The term *per capita* is Latin and it means “by the head.” When property is distributed in a *per capita* fashion, each person takes, in his or her own right, an equal share of the property. In a distribution to your surviving issue *per capita*, your property would be divided into equal shares among all of your surviving descendants regardless of their generational level. That means that each child will receive the same share as each grandchild and each great-grandchild.

Under our example, if you are survived by all three children and all seven grandchildren, your property would be divided into ten equal shares, with each descendant taking a 1/10 share.

Figure 7



The result would be that A's branch of the family would take a much larger share than the other branches, even though A would personally receive much less than under the other distribution methods.

Although a distribution to “issue” was presumed to be *per capita* under New York's common law, this presumption was abolished in 1921. Because of its potential to create a lopsided division of property among the family lines and across generations when different generations are involved, distribution on a purely *per capita* basis is very seldom used.

Conclusion

Whatever your intentions may be with respect to the distribution of your property to your issue, your will or trust agreement should contain the necessary terms and instructions to meet them. Knowing the meaning and effect of those terms is critical to making sure that your wishes are carried out.