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The Meaning of Issue

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Hungary to be perpetually invested by the officers of the town, the proceeds of the fund to be used exclusively for the benefit of the poor at Christmas time. The court had no confidence that the trust would be faithfully administered and ordered the executors to hold the sum pending further directions.

In another New York case the Hungarian consul presented a certificate asserting that the beneficiaries would receive the property in question less certain specific charges. The court declared that in normal times a consul’s certificate would be accepted, but that these are not normal times, and the court ordered the property to be held in trust.15

These cases illustrate the approach taken by the courts of other states with similar legislation.

The new legislation fills a need, and it is well that we have recognized this need. The happiest state of facts would be one in which the necessity for this legislation did not exist, and all governments allowed persons to receive and hold and enjoy property without confiscation and without exorbitant penalties and taxes. But such is not the case today. Some persons would reject the right of an individual to take property by succession, and advocate that one’s property should escheat to the state upon his death. This theory has never been favored in the United States. The statute is worded broadly enough to apply to any country where such conditions exist. There remain questions which will have to be answered either by judicial decision or by additional legislation. But Ohio has taken a wise, firm step forward.

ALFRED L. MARGOLIS

The Meaning of “Issue”

Issue is a simple word, but like many simple words it lends itself equally well to different legal meanings. Thus in conveyances of both land and personal property “to issue” the problem of designating those who are actually entitled to share in the division of the property has frequently arisen. Because the disposition of property often turns upon the definition given this word it is vital that counsel in drafting any instrument in which the word issue is used recognize the different interpretations placed upon it by the various courts of this country. Failure to do this, as will be seen later, could result in unnecessarily defeating the intent of a grantor or testator. Moreover, since this word is so commonly used in statutes, wills and deeds, it should have a definite and uniform meaning in any given state. Such a definition can best be supplied by the legislature. It is the purpose of this note to examine the various interpretations which have been

given the word *issue*, either by statute or by judicial construction, and to advocate legislation which will bring Ohio into line with the better rule of division when a gift is made “to issue.”

According to the almost unanimous expressions of courts in the United States the word *issue* unmodified by the context of a deed or a will is held to designate the lineal offspring, in every degree, of the person to whose issue the gift is made.¹ However, the determination of who are designated by the word *issue* is only a small step in disposing of the problem. The next and very controversial step is to determine whether distribution is to be per stirpes or per capita.²

Under the influence of the English decisions³ most American jurisdictions adopted the common law rule and construed a “gift to issue” to raise a presumption that a per capita distribution was intended.⁴ Thus a gift “to the issue of A” carried the property to all the descendants of A per capita. This resulted in permitting descendants in every degree to take equal shares in competition with their parents.

² "Per capita" is a term derived from the civil law. It denotes that method of dividing an estate by which an equal share is given to each of a number of persons, all of whom stand in equal degree to the decedent or donor without reference to their stocks or the right of representation.
³ "Per stirpes," a term also derived from the civil law, denotes that method of dividing an estate in which a class or group of distributees take the share to which the deceased would have been entitled, taking thus by their right of representing such ancestor, and not as so many individuals.
⁴ The English courts adopted a per capita rule of construction for two reasons. The first reason, which is of historical interest only, is found discussed in 5 A.L.R. 195. The second reason was that a bequest to the issue of a man was a bequest to a class. All persons living at the time the bequest took effect, who were within the designated class, took equally. If the word "issue" were to be given the limited meaning of "children," then all the children living at that time would take per capita, but children of deceased children, not being in the class, would take nothing. If, however, the word "issue" was given the meaning of descendants of every degree, then all that were within the designation of the class would share equally. As the right did not come through the parent but to the grandchild directly as an original object of the bequest, because of its being one of the class designated, the grandchild would take per capita, and without regard to stock.
⁵ The following language of Judge Andrews in Soper v. Brown, 136 N.Y. 244, 32 N.E. 768 (1892) has been often quoted by the courts: "It is settled that under a gift to issue, where the word is used without any terms in the context to qualify its meaning, the children of the ancestor and the issue of such children, although the parent is living, as well as the issue of deceased children, take in equal shares per capita and not per stirpes, as primary objects of the disposition."
Because such a construction was often believed to reach an inequitable result, bitter criticism was frequently expressed by judges who felt themselves bound by such a rule of division. The Rhode Island Supreme Court once stated:

It is apparent that courts generally have a strong feeling that, in directing the distribution per capita of a gift to issue, they may be defeating the real intention of the testator where such distribution will result in giving to issue of a more remote generation an equal share with those of a nearer generation. In a Tennessee case it was pointed out that the per capita rule has been followed in this country only because courts "have continued a definition of the word issue which the courts of England adopted with reluctance."

As a result the courts have been astute to discover from the context of a deed or will some "faint glimpse" of stirpital intention. The reasoning of the courts seemingly proceeds in this manner: Standing alone, a gift "to issue" will be given a certain meaning by the law, but this will be done only in obedience to a presumed intent. If by the light reflected from other provisions in the will or deed a different intent is discoverable, the reason for the rule fails and a different, more desirable result is reached.

Thus, although some courts continued to give lip-service to the common law rule, they so readily seized upon the slightest opportunity to interpret certain words and phrases as indicating that a stirpital distribution was intended by the donor or testator that the exception soon began to swallow the general rule. Even more progressive courts have gone so far as to reject the undesirable common law rule and have in its place adopted the preferable rule of construction first expounded by the courts of Massachusetts.

The Massachusetts courts at an early date found a way to escape the embarrassment endured by those judges who felt compelled to follow the common law rule of division. This was accomplished by adopting a stirpital rule of division. Such a rule of construction permitted issue or descendants of unequal degree of consanguinity to share together only when

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7 Lea v. Lea, 145 Tenn. 693, 237 S.W.2d 59 (1922).
8 In re Child, 58 N.Y.S.2d 888 (1945). The generality of the word "issue" may be reduced if the testator or grantor explains that he means something other than the common law interpretation given this word, as, for instance, that he meant "children" by the use of the word "issue" coupled with "father," or "mother" or "parent."
the ancestor or ancestors of those standing in remoter degree of relationship were dead and then only to the extent that their immediate ancestor would have taken. Thus in Massachusetts the courts construe a gift "to issue" in a will or deed, where its meaning is unrestricted by the context, as raising a presumption that a stirpital division is intended.

Believing this to be the more equitable rule many courts when faced with this problem have chosen to follow the Massachusetts rule.11 Consequently, in 1932, after analyzing the gradual departure from the common law rule, either by statute or by the giving of a stirpital judicial construction to the word issue, the Supreme Court of Pennsylvania established for that commonwealth the rule that, where such word is unexplained in the context of the instrument, children do not take concurrently or per capita with their parents, but take per stirpes.12 It is of interest to note that, in so holding, the Supreme Court of Pennsylvania departed radically from an earlier decision13 which had bound the courts of the commonwealth to a per capita rule of construction in this situation.

So, too, by judicial decision Illinois has adopted the Massachusetts rule of construction.14 In still other states, where the courts have felt themselves bound, under the principle of stare decisis, to follow the less desirable common law rule, statutes have been enacted to abolish the per capita rule of division. Thus in 1921, New York enacted the following statute to put into effect the Massachusetts rule:

If a person dying after this section takes effect shall devise or bequeath any present or future interest in real or personal property to the "issue" of himself or another, such issue shall, if in equal degree of consanguinity to their common ancestor, take per capita, but if in unequal degree, per stirpes, unless a contrary intent is expressed in the will.15

Ohio, however, has continued to adhere to the old common law presumption. As recently as 1954 the Cuyahoga County probate court held that testator's great-grandchild should share equally in the distribution of her estate with her grandchildren, even though the parents of the former were still living.16 Numerous Ohio decisions were cited in support of the rule adopted by the court.17 Cases from several other jurisdictions were

11 The Pennsylvania Supreme Court in Mayhew's estate, 307 Pa. 84, 160 Atl. 724 (1932), remarked that the only courts which it had found which still followed the common law rule were those of New Jersey.
12 In re Mayhew, 307 Pa. 84, 160 Ad. 724 (1932).
14 Wyeth v. Crane, 342 Ill. 545, 174 N.E. 871 (1931).
15 N.Y. DECEDENT ESTATE LAW § 47 (a).
17 Cochrel v. Robinson, 113 Ohio St. 526, 149 N.E. 871 (1925); Welles v. Pape,
also cited in an attempt to show that Ohio followed the rule prevailing in a majority of the states.  

Whether or not this is actually the majority rule today is questioned by many authorities. But regardless of the answer to this question, it is more significant to note that Ohio’s neighbors — Pennsylvania, Illinois, and New York — all follow the Massachusetts rule. Because of the high degree of inter-relationship among the citizens of these important industrial states, it would be desirable to have the same rule of construction followed in each state.

Certainly a stirpital rule of division is preferable. First, it is more in accord with the theory upon which intestate succession statutes are framed. When the will or deed is silent the descent statutes could quite properly supply the rule of distribution. Furthermore, it is believed by most judges and writers who have had occasion to study the matter that a stirpital construction most often accords with the settlor or donor’s intention. In addition, the inherent fairness of such a rule of construction has appealed to both the courts and the legislatures of many states.

For these reasons it is submitted that Ohio should adopt a stirpital rule of construction in this situation.

Since the courts of this state have shown their reluctance to adopt the Massachusetts rule the following statute is proposed to achieve this result:

**MEANING OF "ISSUE" AND "DESCENDANTS" WHEN USED IN CONVEYANCES BY WILL OR BY DEED.**

Unless a different intention is expressed in the statute, will, or deed, when the "issue" or "descendants," of a designated person, including a grantor or testator, are referred to as a class in a statute or included among or excluded as a class from the beneficiaries of a conveyance, either by will or by deed, the word "issue" or "descendants" means:

(a) those persons who are the lawful lineal descendants of the designated person, except lineal descendants of living lineal descendants; and

(b) children adopted, persons designated as heirs, the persons legiti-

63 Ohio App. 432, 27 N.E.2d 169 (1940); Watson v. Watson, 34 Ohio App. 311, 171 N.E. 257 (1929).

8 Northern Trust Co. v. Wheeler, 345 Ill. 182, 177 N.E. 884 (1931); Mazziotto v. Safe Deposit & Trust Co., 180 Md. 48, 23 A.2d 4 (1941); Schmidt v. Jewett, 195 N.Y. 486, 88 N.E. 1110 (1909); Ridley v. McPherson, 100 Tenn. 402, 43 S.W. 772 (1897). The court erroneously included New York among those states following the common law view and in support cited a decision rendered by the court of that state prior to New York’s adoption of the Massachusetts rule by statutory enactment.

18 See Simes, Future Interests (1951); Annot. 13 A.L.R.2d 1023, 1048.

19 See Ohio Rev. Code § 2103.06. This statute is based upon a stirpital theory of distribution.

20 See Simes, Future Interests 325 (1951) and the cases cited in footnotes 5 and 6.