

**Steve Leimberg's Estate Planning
Email Newsletter Archive Message #2633**

Date:29-Mar-18

Subject: Marc Soss on Archer v. Moody - How Different Courts Interpret “In Equal Shares Per Stirpes”

“In Archer v. Moody, the issue of “in equal shares per stirpes” was contested by and among the three grandchildren of W.L. Moody, III. The dispute focused on the legal issue of “how to calculate the fractional shares of the trust estate allocable to the remainder beneficiaries when the trust terminated in 2014.” The Court of Appeals, in over-turning the Galveston County Probate Court's final judgment interpreting the trust instrument which directed a per capita distribution of the trust estate to the remainder beneficiaries upon the trust's termination and applied a per stirpes distribution to the descendants of a deceased remainder beneficiary, held the distribution to the remainder beneficiaries would be based upon their one-third (1/3) shares and not on their deceased ancestors' shares. What may seem obvious to most may not be obvious to all.”

Marc Soss provides members with his analysis of *Archer v. Moody*.

Marc Soss' practice focuses on estate planning; probate and trust administration and litigation; guardianship law; and corporate law in Southwest Florida. Marc is a frequent contributor to [LISI](#) and has published articles in the Florida Bar, Rhode Island Bar, North Carolina Bar, Association of the United States Navy and Military.Com. Marc also serves as an officer in the United States Naval Reserve.

Here is Marc's commentary:

EXECUTIVE SUMMARY:

In *Archer v. Moody*,ⁱ the issue of “in equal shares per stirpes” was contested by and among the three grandchildren of W.L. Moody, III. The dispute focused on the legal issue of “how to calculate the fractional

shares of the trust estate allocable to the remainder beneficiaries when the trust terminated in 2014.” The Court of Appeals, in over-turning the Galveston County Probate Court's final judgment interpreting the trust instrument which directed a per capita distribution of the trust estate to the remainder beneficiaries upon the trust's termination and applied a per stirpes distribution to the descendants of a deceased remainder beneficiary, held the distribution to the remainder beneficiaries would be based upon their one-third (1/3) shares and not on their deceased ancestors' shares. What may seem obvious to most may not be obvious to all.

COMMENT:

W.L. Moody, Jr. (“Bill”) created a trust in 1934 and funded it with a 15,000-acre ranch located near Junction, Texas. The terms of the trust provided that upon the death of his last surviving grandchild, which was William Lewis Moody, IV (“Moody IV”), that the trust would terminate and be distributed pursuant to Article III as follows: “. . . [T]he Trustee shall, upon the termination of the Trust, distribute the Trust Estate in equal shares per stirpes to the then living grandchildren of William Lewis Moody, IIIⁱⁱ, and the surviving issue of his deceased grandchildren.” Moody IV passed away in 2014 survived by four (4) children (Janice Moody, Linda Moody, Elizabeth Moody, and W.L. Moody, V) and two (2) siblings, Edna Moody and Virginia Moody, each of whom had two (2) children. In total, Moody III had eight (8), grandchildren.

On Moody IV’s death, his immediate family members interpreted the terms of the trust to require distribution equally among the remainder beneficiaries with each receiving a one-eighth (1/8) undivided interest. In contrast, Edna and Virginia Moody’sⁱⁱⁱ immediate family members interpreted the trust to require distribution in one-third (1/3) equal shares among the heirs of Edna Moody, Virginia Moody, and Moody IV. This interpretation would result in the following distribution: Edna and Virginia Moody’s heirs would each receive a one-sixth (1/6) undivided interest from their one-third (1/3) shares (1/3 multiplied by 2 heirs); and with Moody IV’s heirs each receiving an undivided one-twelfth (1/12) share in the trust estate (1/3 multiplied by 4 heirs).

On competing motions for summary judgment, the Probate Judge ruled in favor of Moody IV’s heirs and that each beneficiary would receive an equal

one-eighth (1/8) undivided interest in the trust estate. Edna and Virginia Moody's heirs then appealed the ruling as to whether the grandchildren should be treated equally (1/3 share each) or per capita (1/8 each). On appeal, the Appellate Court was tasked with determining the meaning of the phrase "in equal shares per stirpes" under Article III of the trust.

On Appeal, Edna and Virginia Moody's heirs argued that the term "Per Stirpes" is defined as "[p]roportionately divided between beneficiaries according to their deceased ancestor's share." Per stirpes, Black's Law Dictionary (10th ed. 2014). In contrast, the Moody IV's heirs referenced and relied upon the verbiage contained in Article II of the trust which "mandated an equal per capita distribution of the trust's net income to Edna Moody, Virginia Moody, and Bill Moody while living."

In reaching its ultimate determination the Appellate Court relied upon the following:

(a) The Restatement (Second) of Property for the proposition that "a per stirpes class distribution requires a distribution by ancestor: If a gift is made to the 'grandchildren' of a designated person 'per stirpes,' the described class members stem from different children of the designated person. In such case, the words 'per stirpes' suggest an initial division of the subject matter of the gift into shares, one share for the children of each child of the designated person, thereby overcoming the per capita division otherwise called for by the rules of this section."

(b) *In re Hickey's Estate*, 73 N.Y.S.2d 508, 511, 516 (N.Y. Sur. Ct. 1939) under which a will devised an estate to "the children of my said daughter, [name], and the children of my said son, [name], . to be divided between them equally, per stirpes;" and the court held that devise distributed the estate so that "one half share [of the estate] shall be maintained among the children of each group" (emphasis in original)).

(c) The Texas Practice Guide of Wills, Trusts and Estate Planning § 4:241 (2016) example: F leaves Blackacre to the children of A, B, and C, per stirpes. A has one child, B has two children, and C has three children. Thus, Blackacre will be divided into three equal parts, one share for each of the A, B, and C's children. A's children will receive one share or one-third of Blackacre. B's children will receive jointly one share, or one-sixth each, of Blackacre. C's children will receive jointly one share, or one-ninth each, of Blackacre.

(d) The unambiguous trust language that expressed the settlor's intent makes it unnecessary to construe the instrument because it speaks for itself.

(e) Article II and Article III of the trust utilize different verbiage to express the settlor's intent.

Conclusion

In reversing the Galveston County Probate Court's final judgment interpreting the trust instrument the Appellate Court concluded: "Article III's operative phrase 'in equal shares per stirpes' requires an initial division of the trust estate in thirds among W.L. Moody, III's three children; W.L. Moody, III's grandchildren share equally in the 1/3 share of the sibling from whom they are descended."

HOPE THIS HELPS YOU HELP OTHERS MAKE A POSITIVE DIFFERENCE!

Marc Soss

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CITES:

Lesikar v. Moon, 237 S.W.3d 361, 366 (Tex. App.—Houston [14th Dist.] 2007, pet. Denied; *Parker v. Parker*, 131 S.W.3d 524, 531 (Tex. App.—Fort Worth 2004, pet. denied); see also *Kettler v. Atkinson*, 383 S.W.2d 557, 561 (Tex. 1964) (“[t]his court is not disposed to rewrite the will of the testatrix”); *Hurley v. Moody Nat'l Bank of Galveston*, 98 S.W.3d 307, 310-11 (Tex. App.—Houston [1st Dist.] 2003, no pet.); *PopCap Games, Inc. v.*

MumboJumbo, LLC, 350 S.W.3d 699, 708 (Tex. App.—Dallas 2011, pet. Denied; *Nowlin v. Frost Nat'l Bank*, 908 S.W.2d 283, 286 (Tex. App.—Houston [1st Dist.] 1995, no writ); *Jewett v. Capital Nat'l Bank of Austin*, 618 S.W.2d 109, 112 (Tex. Civ. App.—Waco 1981, writ ref'd n.r.e.) *Rekdahl v. Long*, 417 S.W.2d 387, 389 (Tex. 1967); Restatement (Second) of Prop.: Donative Transfers § 28.1 cmt. i. (1988); Texas Practice Guide of Wills, Trusts and Estate Planning § 4:241 (2016); *In re Hickey's Estate*, 73 N.Y.S.2d 508, 511, 516 (N.Y. Sur. Ct. 1939)

CITATIONS:

i No. 14-15-00945-CV, 2017 Tex. App. LEXIS 11642 (Tex. App.—Houston [14th Dist.] December 14, 2018).

ii W.L. Moody, III's grandchildren: David Myrick, Edna Archer, Virginia Beardsley (deceased and survived by Haden Beardsley), Sarah Kathryn Pacheco, Janice Moody, Linda Moody, Elizabeth Moody, and W.L. Moody, V (deceased).

iii Edna Archer, Sarah Kathryn Pacheco and Haden Beardsley (the son of Virginia Moody's other daughter, who is deceased.)