

The use of legal terms when naming beneficiaries

Advisors often ask clients what they would like to see happen to their assets when they pass away. In family situations involving children, parents will frequently say, if we have both died, divide it all equally amongst our children. But it's not that simple. What happens to a particular child's share should that child predecease the parents?

Is that share to be divided amongst the surviving siblings? Is that share to be given to the deceased child's children if (s)he has any? Is that share to form part of the deceased child's estate and dealt with either under a valid will or the laws of intestacy? What about spouses of your children? Is there a desire to leave them any part of the asset under question? What if the asset is a life insurance policy, an insurance-based investment or a registered savings plan? These policies can have named beneficiaries and the proceeds may be divided up differently than assets passing through a will. Is that the intent?

Naming beneficiaries for a life insurance policy, insurance-based investment or registered savings plan can be complicated because you cannot predict with certainty what will happen, when it will happen and how it will affect a particular beneficiary designation. The standard forms and applications that institutions offer may not have enough room to capture the wording required to describe how the proceeds will be distributed depending on the various permutations and scenarios that may occur.

There are several legal terms that are often used as a "short form" to describe how an owner may wish to distribute his or her assets on death.

"Issue" when used by itself traditionally means all of the lineal descendants of a person, which could include children, grandchildren and great grandchildren — both biological and formally adopted.

What about blended family situations involving step-children who have been raised since childhood by the step parent? Traditionally, they would not be considered "issue" of that step parent. What does the law say in a particular province? What is the intent of the owner?



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The more you read about this, the more complicated the whole matter may become. Then there is the use of other legal terminology.

“Per stirpes” distribution — if a parent’s beneficiary designation says “leave the proceeds to my issue who survive me in equal shares per stirpes”, traditionally that means each child of the deceased parent gets an equal share of the proceeds if all the children survive the parent. In the event a child predeceases the parent, his or her share is divided equally amongst his or her children who survive the parent (their grandparent) and if any of those grandchildren predecease their grandparent, the deceased grandchild’s share is divided equally among his or her children who survive the grandparent (their great grandparent) and so on.

“Per capita” distribution — if a parent’s beneficiary designation says “leave the proceeds to my children who survive me in equal shares per capita”, traditionally that means each child of the deceased parent gets an equal share of the proceeds and in the event a child predeceases the parent, the deceased child’s share is divided equally amongst his or her surviving siblings.

These terms are frequently not used correctly to convey their traditional meaning when naming beneficiaries, which can create confusion as to what the testator intended. This has led to frequent battles in and out of court after the testator has died about the interpretation of the testator’s true wishes. Blame for the confusion may fall on the:

- lawyer drafting the will,
- the advisor working with a client to draft beneficiary designations for a life insurance policy, insurance based investment or registered savings plan
- the parent who chose a “do it yourself” approach when:
 - drafting or changing a will and/or
 - naming or changing beneficiaries on a life insurance contract, insurance based investment or registered savings plan

It’s important to be precise. The challenge with using these three legal terms is that they have precise meanings when used in the traditional way, but this may not reflect the testator’s intentions, and could result in distributions that are precisely wrong. On the other hand, improper use of these terms or other ambiguous language may result in delays in distributing assets and disputes over who is entitled to get the assets or share of assets.

Take-aways

1. Retain the services of a lawyer who specializes in wills and estate planning to prepare your will.
2. Make sure your will contemplates scenarios where your beneficiaries predecease you and contains clear, proper language to deal with what happens to their shares of the estate in that event.
3. Use the same type of clear, proper language when appointing beneficiaries and contingent beneficiaries on life insurance policies, insurance based investments and registered savings plans in case a primary beneficiary predeceases you.
4. Some lawyers recommend that these three legal terms not be used in drafting wills or setting up beneficiary designations.¹
5. Sit down with a lawyer and discuss the idea of setting up a separate document that describes in plain language with perhaps diagrams, just how assets are intended to flow down to beneficiaries and through generations.
6. The longer the potential list of beneficiaries and the less clearly they are identified, the longer a settlement will take.
7. Short and simple may not accurately describe your intentions. An incorrect use of a legal term may cause more confusion and trigger disputes and litigation that the user intended to avoid.
8. Periodically stress test the way you have set up the distribution to make sure it continues to operate the way you intend. Children and grandchildren may enter or leave the picture. Some may have special needs; they may be minors or may not be able to handle money responsibly.

¹ Beware the Words Issue per stirpes and per capita; Dec. 26, 2012
What litigators look for in will drafters' files, Nov. 17, 2014
Designating beneficiaries using per stirpes or per capita; Oct. 2, 2017

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