#L-604 6/9/82

Memorandum 82-73

Subject: Study L-604 - Probate Law (Pretermission)

Introduction

Pretermission statutes generally provide an intestate share for a child (and sometimes a grandchild) of the testator omitted from the testator's will where it does not appear from the will that the omission was intentional. California has a broad pretermission statute (Prob. Code §§ 90-91, set forth in Exhibit 1 to this Memorandum), while the UPC has a narrow one (UPC § 2-302, set forth in Exhibit 2 to this Memorandum).

At the last meeting, the Commission considered the staff recommendation to replace the California pretermission statute with a modified UPC section. The Commission requested the staff to give further consideration to the following problems:

(1) Instead of giving an intestate share to an omitted child, would it be preferable to give a share comparable to shares given to other children by the decedent's will?

(2) Is it worth keeping the exception which provides for no share to an omitted child when the testator has devised substantially the whole estate to the child's other parent?

(3) Does the statute permit extrinsic evidence that the testator's omission to provide for the child was intentional? Should such evidence be permitted?

First discussed below is the question of whether the pretermission statute should be wholly replaced by the Commission-recommended family maintenance scheme. Then the foregoing three problems are discussed.

In View of Family Maintenance, Should We Keep a Pretermission Provision?

The main problem with the pretermission provision is that it is arbitrary and inelastic: It gives the omitted child an intestate share which may be more or less than the child needs, and will usually be larger than the shares left by the will to other children. As a result, a number of commentators have recommended replacing the pretermission statute with a flexible family maintenance scheme permitting a discretionary support award out of the estate for children. See, e.g., Mathews, Pretermitted Heirs: An Analysis of Statutes, 29 Colum. L. Rev. 748,

768-70 (1929); Niles, Probate Reform in California, 31 Hastings L.J. 185, 198-200, 217 (1979). This was what the Bennett Commission recommended to the Legislature in New York.

Since the Commission has already approved a family maintenance scheme for inclusion in its recommended legislation, it would seem that the pretermission statute is unnecessary and can only produce disruptive results. It is true that the pretermission statute protects an omitted child who is an able bodied adult (if the child is otherwise entitled to an intestate share), while the family maintenance proposal does not. However, in such a case the testator has had at least 18 years to revise the will to include such a child, so we may assume that this case will arise infrequently.

If it were certain that the family maintenance proposal would survive the legislative process and remain in any statute ultimately enacted, the staff would recommend deleting the pretermission provision entirely. However, no state has yet adopted a family maintenance provision. Since the family maintenance proposal may not survive, perhaps we should include a modern pretermission provision in the proposed legislation. What is the Commission's view?

What Share for Omitted Child?

Both California law and the UPC give an intestate share to the omitted child. There are two problems with giving an intestate share:

(1) Under the intestate succession portion of the Commission's recommendation, if the decedent is married at death and all of his or her children are of the present marriage, the child's intestate share will be zero because in this case all of the community property and all of the decedent's separate property will pass to the surviving spouse. See proposed Section 220.020. Only if the decedent is unmarried at death, or is married but has children of another union, will the decedent's children have an intestate share. This proposed change in intestate succession law will have the collateral effect of reducing the value of the pretermission statute as a protective device unless some other criterion for determining the share of a pretermitted child is used.

(2) The second problem with giving an omitted child an intestate share is that it is arbitrary and will often disrupt the testator's estate plan. An intestate share will usually be larger than the shares

left by the will to other children, particularly since the other children must contribute to the share provided for the omitted child. An intestate share will be most disruptive in the case of the complex will such as where trusts or other limited interests are involved; carefully thought-out tax planning may be ruined. See Touster, Testamentary Freedom and Social Control--After-Born Children, 7 Buffalo L. Rev. 47, 48-50 (1958) (attached to this Memorandum as Exhibit 3).

According to the Touster article (Exhibit 3), the Pennsylvania pretermission statute computes the intestate share only on that portion of the estate not left to the surviving spouse. Id. at 53-54. Although this is probably more consistent with the testator's intent than computing the intestate share out of the whole estate and thereby frequently diminishing the surviving spouse's share as does existing California law and the UPC, this scheme still has the two basic problems mentioned above: Under the Commission's recommendation the intestate share will often be zero, and, since a child named in the will must contribute to the omitted child's share, the omitted child will still frequently take a larger share than a named child. Id. at 54.

South Carolina abandons the intestate share as the measure of the omitted child's share, instead giving the omitted child "an equal share" of the property given to any other child or children. Id. According to Touster, this is superior to the Pennsylvania scheme since it is more likely to carry out the testator's intent. Id. The South Carolina scheme would meet the two objections that the intestate share will often be zero under the recommended legislation, and that the intestate share will usually give the omitted child a larger share than mentioned children. However, there are still problems with the South Carolina scheme:

(1) If all of the testator's children are born after the making of the will, none would be mentioned in the will and the pretermission statute would afford no protection, despite the fact that according to Touster this is the very situation which presents the most urgent demand for protection. Id. at 54.

(2) If the will makes specific monetary gifts to the children, there is a greater likelihood that the pretermission statute will thwart the testator's intent, since the specific gifts will be redistributed among the named and omitted children. Id. at 54-55.

(3) In the case of the complex will, the South Carolina scheme is just as disruptive as giving an intestate share. Id. at 55-57. Thus where the will gives unequal shares to children or provides for a trust, life estate, defeasible gifts, gifts for a specific purpose (e.g., for the child's college education), gifts in appreciation of the child's special qualities or exertions, or gives a power to appoint or consume, the South Carolina scheme is difficult to administer. Id.

The difficulty of drawing a pretermission statute which will not in some cases produce undesirable results commends a discretionary scheme like the family maintenance statute discussed above. However, if some sort of mechanical test for determining the share of the omitted child is to be adopted, the South Carolina scheme seems preferable to the intestate share, particularly in view of the Commission-recommended revisions to the intestate succession statute. Accordingly, the staff has revised the UPC pretermission section (set out below) to use a scheme similar to the South Carolina system for determining the omitted child's share. Instead of providing for an "equal" share with other children (whatever that means) as does the South Carolina statute, the draft section provides for a share based on the average of the shares given to other children. Although this is not a perfect solution, it does provide a method for dealing with the complex will situation.

Whole Estate Devised to Omitted Child's Other Parent

Adoption of the South Carolina scheme makes it unnecessary to have a special exception providing no share for the omitted child when substantially the whole estate is devised to the child's other parent. In such a case, the shares of mentioned children will be nothing, and the omitted child will therefore be entitled to no share under the South Carolina system. If mentioned children are given small specific gifts, the omitted child will be entitled to a similarly small share. The staff has therefore deleted the exception from the draft section.

Admission of Extrinsic Evidence to Show Omission Was Intentional

Both California law and the UPC protect the omitted child unless the child is provided for by advancement or settlement outside the will, or unless it appears from the will that the omission was intentional. The California statute, requiring that the testator's intent to omit must appear "from the will" has been construed to permit the admission of extrinsic evidence to show that the testator did not intend to omit

the child, but not to permit such evidence to show that the omission was intentional. See Estate of Smith, 9 Cal.3d 74, 507 P.2d 78, 106 Cal. Rptr. 774 (1973); 7 B. Witkin, Summary of California Law Wills and Probate §§ 11-12, at 5533-35 (8th ed. 1974). This rule is a departure from the general rule which permits surrounding circumstances to be considered to explain an ambiguous will. If the words "from the will" were deleted from the statute, general rules for construction of a will would apply, and surrounding circumstances could be used to show intent to omit as well as lack of intent to omit. This would be consistent with treating the pretermission statute as a protection against the testator's forgetfulness, rather than as a means to further the social policy against disinheritance of children.

The staff has not continued the limitation that the testator's intent be limited to an intent that appears "from the will." Does the Commission approve this revision?

Staff Draft of Pretermission Statute

The following draft of a pretermission statute uses the language of UPC Section 2-302, modified in several respects, including a provision for determining the omitted child's share by reference to the average of the shares of other children. Strikeout and underscore indicate the revisions to the UPC language.

§ 254.020. Pretermitted children

254.020. (a) If a testator fails to provide in his or her will for any of his or her children born or adopted after the execution of ~~his~~ the will, the omitted child receives a share in the estate equal in value to ~~that which he would have received if the testator had died intestate~~ the average of the amounts received under the will by the testator's other children after the apportionment provided in subdivision (c) has been made, unless one of the following is established :

(1) ~~it appears from the will that the omission was intentional~~ ; The testator's failure to provide for the child by will was intentional and that intent appears from the will or is shown by statements of the testator or by other evidence .

~~(2) when the will was executed the testator had one or more children and devised substantially all his estate to the other parent of the omitted child;~~

~~(3)~~ the (2) The testator provided for the child by transfer outside the will and the intent that the transfer be in lieu of a testamentary provision is shown by statements of the testator or from the amount of the transfer or other evidence.

(b) If at the time of execution of the will the testator fails to provide in ~~his~~ the will for a living child solely because ~~he~~ the testator believes the child to be dead or is unaware of the

birth of the child , the child receives a share in the estate equal in value to ~~that which he would have received if the testator had died intestate~~ the average of the amounts received under the will by the testator's other children after the apportionment provided in subdivision (c) has been made .

(c) In satisfying a share provided by this section, the ~~devises made by the will abate as provided in Section 3/902~~ share shall first be taken from the estate not disposed of by the will, if any. If that is not sufficient, so much as may be necessary shall be taken from all the devisees in proportion to the value they may respectively receive under the will, unless the obvious intention of the testator in relation to some specific devise or other provision in the will would thereby be defeated; in such case, the specific devise or other provision may be exempted from such apportionment, and a different apportionment, consistent with the intention of the testator, may be adopted .

Comment. Subdivisions (a) and (b) of Section 254.020 supersede former Section 90, and are drawn from Uniform Probate Code Section 2-302 and from Sections 21-7-450 and 21-7-460 of the Code of Laws of South Carolina. Unlike former Section 90, Section 254.020 gives the omitted child a share equal in value to the average of the shares received by the testator's other children, rather than giving an intestate share.

Unlike former Section 90, Section 254.020 does not protect an omitted child living when the will was made unless the omission is solely because the testator mistakenly believed the child to be dead or was unaware of the birth of the child. When the omission is not based on such mistaken belief, it is more likely than not that the omission was intentional. See Evans, Should Pretermitted Issue Be Entitled to Inherit?, 31 Calif. L. Rev. 263, 265, 269 (1943); Niles, Probate Reform in California, 31 Hastings L.J. 185, 197 (1979).

Unlike former Section 90, Section 254.020 does not protect omitted grandchildren or more remote issue of a deceased child of the testator. If the testator's child is deceased at the time the will is made and the testator omits to provide for a child of that child (i.e., the testator's grandchild), the omission would seem to be intentional in the usual case. If the testator's child is living when the will is made, is a named beneficiary under the will, and dies before the testator leaving a child or children surviving, the testator's grandchild will be protected by the anti-lapse statute (Section 204.330) which substitutes the deceased child's issue.

Unlike former Section 90, paragraph (1) of subdivision (a) of Section 254.020 does not require that it appear "from the will" that the omission was intentional. Thus, surrounding circumstances including statements of the testator may be considered to show that the omission was intentional when the language of the will is doubtful, as well as to show that it was unintentional. This changes the contrary rule enunciated in Estate of Smith, 9 Cal.3d 74, 79-80, 507 P.2d 78, 106 Cal. Rptr. 774 (1973) (extrinsic evidence inadmissible to prove intent to disinherit).

Subdivision (c) of Section 254.020 continues the substance of former Section 91. See also Sections 100.090 ("devise" means testamentary disposition of real or personal property), 100.100 ("devisee" means a person designated in a will to receive a devise).

Respectfully submitted,

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EXHIBIT 1

§ 90. Omitted children and grandchildren

When a testator omits to provide in his will for any of his children, or for the issue of any deceased child, whether born before or after the making of the will or before or after the death of the testator, and such child or issue are unprovided for by any settlement, and have not had an equal proportion of the testator's property bestowed on them by way of advancement, unless it appears from the will that such omission was intentional, such child or such issue succeeds to the same share in the estate of the testator as if he had died intestate.

§ 91. Omitted children and grandchildren; sources of share; apportionment

The share of the estate which is assigned to a child or issue omitted in a will, as hereinbefore mentioned, must first be taken from the estate not disposed of by the will, if any; if that is not sufficient, so much as may be necessary must be taken from all the devisees or legatees, in proportion to the value they may respectively receive under the will, unless the obvious intention of the testator in relation to some specific devise or bequest, or other provision in the will, would thereby be defeated; in such case, such specific devise, legacy or provision may be exempted from such apportionment, and a different apportionment, consistent with the intention of the testator, may be adopted.

EXHIBIT 2

UPC Pretermission Section

Section 2-302. [Pretermitted Children.]

(a) If a testator fails to provide in his will for any of his children born or adopted after the execution of his will, the omitted child receives a share in the estate equal in value to that which he would have received if the testator had died intestate unless:

(1) it appears from the will that the omission was intentional;

(2) when the will was executed the testator had one or more children and devised substantially all his estate to the other parent of the omitted child; or

(3) the testator provided for the child by transfer outside the will and the intent that the transfer be in lieu of a testamentary provision is shown by statements of the testator or from the amount of the transfer or other evidence.

(b) If at the time of execution of the will the testator fails to provide in his will for a living child solely because he believes the child to be dead, the child receives a share in the estate equal in value to that which he would have received if the testator had died intestate.

(c) In satisfying a share provided by this section, the devises made by the will abate as provided in Section 3-902.

COMMENT

This section provides for both the case where a child was born or adopted after the execution of the will and not foreseen at the time and thus not provided for in the will, and the rare case where a testator omits one of his existing children because of mistaken belief that the child is dead.

Although the sections dealing with advancement and ademption by satisfaction (2-110 and 2-612) provide that a gift during lifetime is not an advancement or satisfaction unless the testator's intent is evidenced in writing, this section permits oral evidence to establish a testator's intent that lifetime gifts or nonprobate transfers such as life insurance or joint accounts are in lieu of a testamentary provision for a child born or adopted after the will. Here there is no real contradiction of testamentary intent, since there is no provision in the will itself for the omitted child.

To preclude operation of this section it is not necessary to make any provision, even nominal in amount, for a testator's present or future children; a simple recital in the will that the testator intends to make no provision for then living children or any the testator thereafter may have would meet the requirement of (a) (1).

Under subsection (c) and Section 3-902, any intestate estate would first be applied to satisfy the share of a pretermitted child.

This section is not intended to alter the rules of evidence applicable to statements of a decedent.

EXHIBIT 3

Touster,

TESTAMENTARY FREEDOM AND SOCIAL CONTROL—AFTER-BORN CHILDREN, 7 Buffalo L. Rev. 47 (1958).

By SAUL TOUSTER*

PART II: SOME BASIC PROBLEMS AND SOME NEW APPROACHES

In the first part of this article,[97] the author reviewed the background of after-born children statutes which provide that a child born to a testator after he makes his will, and who is left unprovided for in the will or by settlement outside the will, can recover its intestate share from testator's estate. It was indicated that, although the significant and articulated reason behind these statutes was to carry out and sustain testamentary intent by curing a mistake upon which the intent was based, the courts have in some measure been moved by the social purpose of protecting children against disinheritance. In a close examination of the judicial experience under the New York statute, the view was expressed that no realistic inferences could be drawn concerning the testator's intent without an inquiry—which most of these statutes prevent—into the family situation at the time the will was made, the dispositive scheme expressed in the will, and the family situation at the time of the testator's death. In determining whether an after-born child has been mentioned or provided for in a testator's will, the New York courts have avoided looking to any such relevant material, deciding the issue only by reference to the language of the will: if the after-born child comes within a class "mentioned" in the will, it is under all circumstances barred from the remedy provided by the statute. Although the Court of Appeals in the *Faber*[98] case broadened the inquiry to include certain family factors, when determining whether a particular transaction constituted a "settlement" that would bar the after-born child under the statute, the statutory remedy, it was pointed out, made it impossible to achieve results consistent with what might be inferred to be testator's intent or with what might be considered the social or moral claims of the family unit. The after-born child, under these statutes, takes either his intestate share or nothing, depending on whether he is barred by mention or provision in the will or settlement outside the will. It is this either-or operation of the statute which creates some of the basic problems requiring solution.

SOME BASIC PROBLEMS

Two of the anomalies of the statute, in terms of ascertaining testamentary in-

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97. 6 BUFFALO L. REV. 251-282 (1957).

tent, have already been discussed in Part I. For present purposes, they can be illustrated by the following case:

> A testator with two living children leaves his entire estate to his wife, but if she does not survive him then to these two children by name.[99] In addition to the two named children, an after-born child survives testator.

The results in this case will be consistent with or defeat probable testamentary intent depending upon the fortuitous fact of whether or not the wife survives the testator. If she survives the testator, the after-born child will take an intestate share under the statute against its mother, to the exclusion of the other two named children, and contrary to any inference that may be drawn concerning testator's probable intent. If, on the other hand, the wife fails to survive the testator, the after-born child will take a statutory share which, under the facts, would result in equal provision for the children—this being in line with what the testator probably intended. If, in this example, the testator by some means outside his will, say by insurance, conferred equal benefits on each of his three children, the issue would turn on whether this bounty provided for and thus barred the after-born child: if the child were barred, the two living children named in the will would secure a preference over the after-born child, if the wife did not survive the testator. For then they would receive not only their extra-testamentary benefits but the entire estate under the will, and the after-born child would be excluded, although the testator by making equal non-testamentary gifts to all three children may be said to have intended a similar equal distribution of his estate.

The technical operation of the statute causes the most inequitable and unnecessarily harmful results by (1) the contrasting treatment of after-born children and children living at the time of the will, and (2) its disruptive impact upon testamentary plans, especially those involving trusts or other limited interests. With respect to the former, consider the following example:

> The testator with a living child, A, leaves one-half his estate to his wife, a $9,000 bequest to a charity, and the remainder to child A. He dies survived by his wife, child A and child X, an after-born child. The net estate is $90,000.

Under this example, child X, taking his intestate share of the estate as an after-born child under the statute, would receive one-third, or $30,000. The shares of the wife, the charity and child A would accordingly be reduced to contribute to X's statutory share, so that the wife would receive $30,000 ($45,000 reduced

98. 305 N.Y. 200, 111 N.E.2d 883 (1953). See Part I, *supra*, at note 82 *et seq.*

99. Throughout the examples used, the qualification "by name" is added to dispel the notion of a class gift which might be construed as "mentioning" and thereby barring the after-born child under the statute.

by $15,000), the charity would receive $6,000 ($9,000 reduced by $3,000), and child A would receive $24,000 ($36,000 reduced by $12,000). Without considering the comparative claims of a spouse or strangers, it is clear that the after-born child X by taking an unreduced intestate share is preferred over the living child A whose share under the will must be proportionately reduced by its contribution to X's share.

This example may be generalized into the following startling rules: As a class, after-born children will always be preferred over living children as a class, whenever the testator has made any testamentary provision for persons other than distributees.[100] Living children (child A in our example), will never be on a par with an after-born child, unless the testator leaves his entire estate to those who would take by intestacy—that is, children and spouse. We may state these harsh rules in different terms: Whenever the testator, in his will, leaves his living children as a class less than what would be their intestate shares, or while leaving them the equivalent of their intestate shares makes a testamentary gift to strangers, in either event—probably the vast majority of cases—the after-born children are preferred over those living at the time of the will.

Let us now turn to another contingency which demonstrates the interplay of our statute with the statutory share of the spouse: Suppose a testator provides a statutory minimum for his spouse to prevent her electing against the will, and an after-born child, taking its statutory share, thereby reduces the testamentary provision for the spouse to less than the minimum. It is hardly surprising that the New York courts have held that the spouse may, in these circumstances, elect against the will, to assure herself of her statutory minimum.[101] This would not offend the testator's scheme if he had provided for an outright gift since the spouse would be taking the same amount either under the will or by election. Where, however, in the more common case, the testator establishes a marital

100. For more detailed description of this result of the statutes in operation, see Mathews, *Pretermitted Heirs: An Analysis of Statutes*, 29 COLUM. L. REV. 748, 757-760 (1929). The qualification is made here that the after-born children are preferred *as a class* only; for there may be cases where a living child is preferred although living children as a class are not. For example: A testator with three living children leaves all his estate to one child and dies survived by these three children and an after-born child. The after-born child's intestate share will be one-quarter of the estate, the child named in the will receiving three-quarters of the estate.

101. Matter of Wurmbrand, 194 Misc. 203, 86 N.Y.S.2d 705 (Surr. Ct. 1949) *aff'd*, 275 App. Div. 915, 90 N.Y.S.2d 686 (1st Dep't 1949); and Matter of Vicedomini, 285 App. Div. 62, 136 N.Y.S.2d 259 (2d Dep't 1954), *modifying* 195 Misc. 1057, 91 N.Y.S.2d 472 (Surr. Ct. 1949). In both cases a childless testator left half of his estate to his spouse and half to collaterals; an after-born child took his intestate share under the statute, or two-thirds of the estate; this reduced the spouse's interest under the will to below one-third and therefore she was held entitled to elect a one-third share against the will. Thus nothing was left to the collaterals who were beneficiaries under the will.

trust, it can be seen how the statute's operation violates the testator's intent as expressed in his will. The following examples[102] will illustrate this:

> A testator with living children wants to give his wife the minimum required by law. He therefore leaves by will one-third of his estate in trust for her for life, the remainder of the trust and the balance of the estate to named children and collaterals. He is survived by his wife and children, including an after-born child taking under the statute.

In this case, the after-born child by taking his intestate share, whatever its amount, will reduce the trust for the wife to less than the statutory minimum and thus allow her to take by election one-third the estate absolutely. This will be true, as can be seen, whether or not there are living children. For, so long as the wife's trust must contribute anything to the statutory share of an after-born child, it will fall below the minimum required to prevent an election. In the following example, the disruptive impact of the statute will be even more drastic:

> Testator with one living child, to secure the maximum advantages under the Federal estate tax laws, provides in his will for a marital trust for his wife of one-half his estate, leaving the other half in trust for the named living child. He is survived by his wife, the named living child and an after-born child taking under the statute.

Here, by the invasion of the after-born child, the marital trust will be reduced to one-third the estate limiting thereby its tax advantage. And if the marital trust were less than one-half, the resulting invasion would leave the wife with less than one-third, and thus give her a right to elect. When we consider how many testamentary plans are dependent upon trust provisions to fulfill various of the testator's objectives, we can readily visualize how destructively the statute may operate in a particular case.

As has been pointed out previously, the main reason for the statute's failure is that it is only partially sound in terms of presumed intention—although we may presume that a testator would have intended to provide for a pretermitted child, there is no basis to presume he would have given the child its intestate share.[103] Moreover, it should be apparent that in allowing an after-born child to take against its own parent, i.e., the testator's spouse, the statute runs counter to what is a common practice of testators to leave all or most of their estate to a spouse in the expectation that under this arrangement the children, whether living at the time or after-born, will be cared for. In large measure the basic problems of the statute stem from the "either-or" remedy; but this, in turn, stems from the

102. In the discussion following these examples (as in the previous material), the New York law with respect to a spouse's right of election is assumed. See N.Y. DEC. EST. LAW §§18, 83.

103. See Part I, *supra*, at note 92.

failure of the statute to take into consideration (1) the testator's dispositive scheme as a guide to his intention; or (2) the justifiable confidence reposed in a spouse to care for and provide for their children. How solve these problems of the statute within a system of testamentary freedom? A number of new statutory approaches have been taken which attempt solutions.

THE TEXAS STATUTE

One of the first and most promising approaches was made in Texas by a proviso added in 1931 to its statute. The original Texas statute had two separate provisions, one applicable where the testator at the time he made his will had children living, and the other where no child was living when the will was made.[104] In the former case, the after-born child was entitled to his intestate share; in the latter, where all the children were after-born, the will was deemed revoked unless the after-born child or children died before reaching the age of twenty-one without having married. This conditional limitation was apparently inserted to cover the case of the sole after-born child dying in infancy, a contingency which plainly does not require the complete voiding of the testator's dispositive plan. In general, both statutes operated pretty much the way other statutes did which do not distinguish between a testator who at the time of making his will has living children and one who does not.[105] Recent amendments, however, have added to both statutes the following proviso:

> "provided, however, that where a surviving husband or wife is the father or mother of all of testator's children, exclusive of adopted children, and said surviving husband or wife is the principal beneficiary in said testator's last will and testament, to the entire exclusion by silence or otherwise, of all of said testator's children, then and in that event the foregoing provision of this Section shall not apply nor be considered in the construction of said last will and testament."[106]

What this proviso does is to acknowledge the social basis of the statute by making a certain kind of inference as to the testator's intent. By denying the statute's remedy where a testator leaves the principal part of his estate to his spouse, the legislature is concluding that this would have been testator's disposition had he considered the possibility of future children; and to the extent that this

104. TEXAS CODE, Arts. 8291, 8292, 8293.

105. For a detailed review of the operation of the statutes in states distinguishing these two family situations, see Mathews, *op. cit. supra*, note 100, pp. 753 *et seq.* Although the statutes distinguish these two situations, no significant difference flows from the fact the testator had, or had not, living children when he made his will. In general, the same types of facts regarding provision for the after-born child can bar the operation of the statute in either event.

106. Added in 1931 to statute covering situation where child living at time of will (TEXAS CODE, Arts. 8291, 8292); added in 1949 where no child living at time of will (*Ibid.*, Art. 8293). Since reenacted, and amended in minor details, in TEXAS PROBATE CODE, §§66 and 67 (1955).

legislative "finding" of the testator's intent may be wrong, the legislature can still rely on the fact that the surviving spouse, being the parent of the after-born children, will care for them appropriately. Of course this inference regarding the testator's intent is a sound one only where he has left the principal part of his estate to a spouse at a time when he had other children; it is less convincing where he had no children. In the latter case, we do not know how he would have treated his children; even so, it must be conceded that the policy of relying upon the usual motivations of a spouse provides an adequate basis for barring the operation of a statute which would seriously upset a testamentary plan. To this extent, the proviso appears to accept somewhat more openly the social objectives of these statutes which, up to now, the legislatures and courts have left unstated.

Although the approach of the Texas proviso is sound, looking as it does to the testator's dispositive scheme as a guide for its application, its operation leaves much to be desired. Where there are both after-born children and children who were living at the time of the will, there seems to be no reason to require that the surviving spouse be the parent of "*all* of testator's children." It would seem sufficient protection for the after-born child if the surviving spouse receiving the principal part of the estate is the parent merely of such after-born child. But there are more serious objections. Why require for the operation of the proviso, the "entire exclusion . . . of all of said testator's children?" Does a nominal bequest or a keepsake left to a living child make the proviso inoperative?[107] Apparently. But assuming this problem were corrected, there remains an objection to the very core of this approach.

The proviso will operate or not depending upon whether the surviving spouse is found to be "the principal beneficiary" of the testator's estate. If, in a doubtful case, a court holds the spouse to be the *principal* beneficiary, the after-born child takes nothing; if it holds to the contrary, the statute operates and the child takes its intestate share (or the will is conditionally revoked). And yet, to the extent that the testator has left property to a spouse at all, it should normally be considered partly out of consideration for the children of the marriage. Thus, in the usual situation, the "either-or" result, under the proviso, does not conform to testator's intent. There is a second consideration: in view of the grave consequences of its application, the statute puts a high premium on litigating the question of whether the spouse was "the principal beneficiary." The Model Probate Code, which is modelled on the Texas statute, does little to cure this since its proviso depends on whether a testator who had living children left "substan-

107. See Miller, *Changes in the Law of Wills*, in Proceedings, Texas Probate Code Institute, Texas Law School, pp. 24-29 (1955) for a description of the development of the proviso and some critical comments.

tially all his estate to his surviving spouse."[108] The same fateful "either-or" result will follow the eventual judicial determination of whether a spouse was left "substantially all" of testator's estate.

THE PENNSYLVANIA STATUTE

Instead of using the provision for the spouse to qualify the right itself, it would be more in keeping with our inferences as to testamentary intent to use the spouse's provision to qualify the *quantum* of the right. If we assume that the testator intended the spouse's share to be for general family protection, then it would be reasonable to keep that share completely immune from any claim by an after-born child; accordingly if, under certain circumstances, the statute gives the child a right to some of the estate, let him recover this part from legatees other than the surviving spouse who is his parent. Under the Texas and Model statutes, if the surviving spouse takes a large share under the will, but it is something less than the "principal" share, or "substantially all," the after-born child takes under the statute, usually to the real disadvantage of the spouse and in violation of the testamentary scheme. The Pennsylvania Wills Act of 1947 has, to a rather limited extent, recognized this. To protect the surviving spouse's share, it provides that an after-born child taking under its statute

> "shall receive out of the testator's property not passing to a surviving spouse, such share as he would have received if the testator had died unmarried and intestate owning only that portion of his estate not passing to a surviving spouse."[109]

Under this statute any part of the estate going to the surviving spouse—which, of course, may be less than "substantially all"—will be saved to the spouse. In addition, the provision for the spouse, by not qualifying the right of the after-born child, still leaves him free to recover his statutory share proportionately from legatees other than the spouse. We may note, however, the failure of the statute to require that the surviving spouse be the parent of the after-born child; only in such event, is it safe to assume that the testator is providing indirectly for the child. Subject to this reservation, the Pennsylvania statute seems preferable to

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108. Section 41 (a) of the MODEL PROBATE CODE reads as follows:

> "When a testator fails to provide in his will for any of his children born or adopted after the making of his last will, such child, whether born before or after the testator's death, shall receive a share in the estate of the testator equal in value to that which he would have received if the testator had died intestate, unless it appears from the will that such omission was intentional, or unless when the will was executed the testator had one or more children known to him to be living and devised substantially all his estate to his surviving spouse."

Printed in Simes and Basye, *Problems in Probate Law*, Michigan Legal Studies, (1946).

109. PA. STAT. ANN. (Purdon) tit. 20, §180.7 (4) (1950).

the Texas or Model statutes, being as it is more consistent with probable testamentary intent.

None of these statutes, however, attempts to cure the inequitable treatment of children living when the will was made—their interests under the will must always contribute to make up the after-born child's intestate share. We may illustrate the resulting inequities by an example arising under the Pennsylvania statute. Suppose a testator left one-half of his estate to his wife, and divided the remaining one-half between an only child and a charity. An after-born child would, under the statute, be entitled to his intestate share (one-half) of the part not passing to the surviving spouse; and this share would be made up from the shares going to the living child and the charity. Again, to the extent that a non-distributee has an interest under the will, the statute discriminates against the living child in favor of the after-born child.

The South Carolina Statute

The statute of South Carolina not only attempts to assure equality in the treatment of living and after-born children, it also uses the testamentary provisions for living children as a guide to determine how the testator would have treated after-born children. Under the provisions of the South Carolina statute the unprovided-for after-born child

> "shall be entitled to an equal share of all real and personal estates given to any other child or children, who shall contribute to make up such share or shares according to their respective interests passing to them under such will."[110]

To a limited degree, this statute represents a step forward in its use of a realistic guide to the testator's probable treatment of his after-born child. However, by making the statute operative only where there are living children who receive gifts, it refuses intervention in the situation which presents the most urgent demand for social protection, i.e., where *all* the children are after-born, the testator having made his will when no children were living. But if we put this objection aside and observe only how the statute works when there are living children, we must conclude that the statute operates equitably depending upon rather arbitrary features of the will. If the living children are left interests determined by percentages of the estate, then the after-born child's equal sharing in these benefits will probably be consonant with the testator's intent. Thus, where a testator leaves half of his estate to two named children, it may be thought that he assigned this half of his estate to his children's collective interest and that, had he contemplated the future child, he would have included that child

110. S. C. Code §§19-235,-236 (1952).

within such a gift. Where, however, the provisions made for the living children are stated in monetary amounts, the spreading of these gifts among the legatee-children and the after-born child are likely to violate the testator's probable intent. For example: a testator leaves $15,000 to an only living child and there are two after-born children; under the statute each child will receive $5,000, which is not very close to testator's intention. Moreover, whenever strangers take as legatees, there is no reason to allow their shares under the will to remain immune while the living children alone bear the burden of contributing to the after-born child's share. To this extent, the South Carolina statute seems to deal less equitably with the family unit than the conventional statute.

THE PROBLEM OF COMPLEX WILLS

One of the problems implicit in the South Carolina statute is that the after-born child's "equal share" in gifts left to the living children becomes surprisingly ***unequal*** under the normal complexities of will dispositions. How, under this statute, do we deal with a testator, with three living children, who disinherits child A, leaves a small bequest to child B, and a large bequest to child C? The after-born child X will come in to share the bequests—but in what proportions? Since there are four children, he probably will take one-quarter from the bequests to B and C. It is not likely that he would be permitted to take half of each—for then he would not be sharing equally, but would in fact be preferred. And yet, how close can this result be said to be to testator's probable intent? Suppose further that the gift to child B was a life estate defeasible upon marriage, or a trust in which the principal vests upon reaching certain ages or upon marriage. How does child X share in this gift? Under what conditions? It would probably be said that the testator would have intended a similarly conditioned gift for the after-born child. But can this be a reasonable inference when testator has disinherited child A and given a large outright gift to child C? We are obviously faced with problems of motivation which, under our system of inheritance, cannot be explored. And under the South Carolina type of statute, further questions remain unanswered: Does the after-born child share in a gift left to a child for a specific purpose peculiar to that child, e.g., a gift for the child's college education? Can special conditions in a gift carry over from the child named in the will to the after-born child who has come in to share the gift, e.g., a gift made defeasible upon marriage outside a specified church? Does the after-born child share in a gift made to a child in appreciation of special qualities or exertions, e.g., for A's kindness or services in the family household?

The problems of the complex will not only affect the relative treatment of children under the South Carolina statute, but even the testamentary scheme under the Pennsylvania statute whose very object was both to give "ample protection to the child and [to] avoid frequent occasions for disruption of well

laid plans."[111] As already noted, under the latter statute the interests "passing to a surviving spouse" are immune from any claim by an after-born child. Consider the application of this clause to a complex will which creates a trust for a spouse, trusts for living children, with cross-remainders to the children or the spouse. What interest is deemed "passing" to the spouse? Where she has a life interest terminable upon re-marriage, how does the child share in the corpus of the fund? Does the child take a presently valued interest in the remainder, computed on the basis of life expectancy and re-marriage tables? If so, will this not reduce the spouse's life interest by reducing corpus? The alternative would be for the child to wait out the happening of the event, the spouse's death or re-marriage, and then take a proportionate share of the remainder as it vests in enjoyment. This apparently has been the approach in Pennsylvania.[112] But does not this suspension of the statutory interest run counter to one of the underlying policies in the statute, namely, to provide care or support for children who, being after-born, are likely to be the youngest in the family? A more difficult problem is presented where the spouse is a remainderman after a life interest in a stranger. How does the after-born child recover from this interest? Does he take from corpus a presently valued equivalent of the stranger's life interest, or does he merely share in income during the existence of the life estate? The latter is probably the better solution since many interests terminable on various contingencies are incapable of actuarial conversion into present values. Even more difficult problems are presented where the spouse is given (a) a power to consume; or (b) a power to appoint; or (c) an interest which will vest only in the spouse's estate and not be itself enjoyed by the spouse. In these cases, how are we to treat the property involved? Shall it be deemed "passing to" the spouse or not, for the purposes of the statute? As soon as we attempt to answer these questions, we realize how far we have gone in doing something which, under our present system, courts are so aghast at doing—that is, what they describe when they say: "We are not here to make a new will for the testator." There is no doubt that a statute such as Pennsylvania's does just that, and it does so in order to approximate equitably what testator would have intended had he forseen the possibility of future children. And yet, if we are to go so far in remaking the testator's will, in the light of inferences drawn from the limited information available within the four corners of the will, should we not more properly ask what the testator would have intended, not if he had forseen future children, but if he had been aware of the very nature of his misapprehension, if *he* had known what the court

111. Advisory Commission's comment, Anno., *supra*, note 109. The Commision considered the new statute "a distinct improvement" over the previous statute, which resembled New York's.

112. See In re Fownes Estate, 82 Pa. D. & C. 518 (1953). One hopes that the Pennsylvania courts will not be faced with the multiplicity and complexity of dispositions which the Internal Revenue Code and Regulations has had to deal under the estate tax marital deduction, which is expressed in terms of "any interest in property which *passes*" to a surviving spouse. INT. REV. CODE OF 1954, §2056.

now knows with his family situation before it?[113] As has been pointed out before, under most circumstances no realistic inference as to how a testator would have treated an after-born child can be drawn from the facts existing at the time the will is made—certainly not as to the amount of the provision he would have made.[114] And yet this is what is attempted by the legislative presumption implicit in the statute, that testator (under the usual statute) would provide an intestate share, or (under the Pennsylvania statute) an intestate share of the estate not passing to the spouse.[115]

The problems cannot be minimized in the belief that the more complex a will the more likely the drafting attorney will remind the testator to mention or make provision for future children and thus avoid the statute. Unfortunately, this has not been the case; and the already large volume of litigation under these statutes will likely increase with the modern tendency toward multiple marriages and their consequence—new sets of children born to testators, often late in life. In the circumstances, new solutions, more flexible than those in the foregoing statutes, will have to be sought.

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113. To some extent the testator who is not aware of the possibility of future children when he makes his will resembles the testator who destroys his will upon a mistaken assumption. In the latter case we have what is called dependent relative revocation, and we often save the testator from his mistaken act. As Professor Warren stated the standard: "The inquiry should always be: What would the testator have desired had he been informed of the true situation? And there is no objection to going fully into parol evidence to ascertain his attitude, for one is not varying a writing but an act." Warren, *Dependent Relative Revocation*, 33 HARV. L. REV. 337, 345 (1920). Putting aside the latter point about varying a writing, might we not call the situation of the unforeseen after-born child a case of "dependent relative execution" and inquire into what testator would have desired had he been informed of the true situation—which must be the situation at his death? The question, it would seem, must remain rhetorical.

114. Consider the case of a posthumous child for whom testator had no chance to provide. If such child were born blind, can we say the testator would have provided for it in the same manner as for a healthy child?

115. Another way in which the after-born child statutes generally disrupt testamentary dispositions is in their effect upon the administration of the estate. Since each of the legatees and devisees must contribute proportionately to make up the share of the after-born child, each gift must abate, and nominal or memento gifts must bear a burden which testator could not reasonably have intended. In some states, an even more destructive form of abatement obtains; contribution to the after-born child's share being required first from residuary gifts which are most likely for the benefit of those closest to the testator. For a complete breakdown of the types of provisions applicable to both abatement and contribution to the after-born child, see notes to section 184, MODEL PROBATE CODE, *op. cit. supra*, note 108, pp. 360-365. The Alabama statute tries to do what the basic Pennsylvania statute does by requiring all legacies to be used up in contributing to the pretermitted child before he can reach residuary legacies to either the spouse or other children. ALA. CODE tit. 61 §11 (1940). The effectiveness of this scheme is limited in the important instances that the spouse and other children are the principal beneficiaries under the will. Nor is it reasonable to think that the spouse's share should be protected only when it is a residuary gift.