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Wills -- Pretermission Statute -- Sufficiency of Life Insurance As Provision for After-Born Child

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In the principal case the same reasoning was followed as the revocation provision was said to "carry with it the thought that whatever is done to effect a revocation must be done in the lifetime of the settlor." The court found no language authorizing the revocation of the trust agreement by will, or from which an inference to that effect could be drawn.

Conversely, where the settlor reserves a power to revoke only by will, an attempted revocation during his lifetime is ineffective as it is not in accord with the mode specified by the reserved power of revocation.

A third situation exists where a power of revocation is reserved without specifying the manner in which it is to be exercised. An example of this type of reserved power in its simplest form is "this trust shall be revocable." It seems that this would allow the settlor to exercise his reserved power in any manner which clearly evidences his intention to revoke.

In the cases where a settlor attempts to revoke an inter vivos trust by his will, or by an act during his life, and fails because he has not reserved the power to revoke in the manner attempted, his latest intention has been thwarted. The remedy, however, was within the grasp of the original draftsman. The settlor should be instructed as to his right to reserve a power to revoke by an inter vivos transaction or by his will. If the settlor is uncertain at the time as to which mode he will in the future prefer to exercise, the draftsman, by clear and concise language, should include both modes in the reserved power of revocation. This would leave no possibility of ambiguity. By the use of this method the settlor's intent as to the mode of future revocations could be effectuated, and the courts would be spared the troublesome problem of interpreting such agreements.

J. C. JOHNSON, JR.

Wills—Pretermission Statute—Sufficiency of Life Insurance As Provision for After-Born Child

Under the North Carolina pretermission statute, children born after

1 N. C. GEN. STAT. §§31-45 (1943); "Children born after the making of the parent's will, and whose parent shall die without making any provision for them, shall be entitled to such share and portion of the parent's estate as if he or she had died intestate, and the rights of any such after-born child shall be a lien on every part of the parent's estate, until his several share thereof is set apart in the manner prescribed in §§28-153 to 28-159."
the making of the parent's will, for whom no provision is made, are entitled to share in the testator's estate as if he had died intestate. Recently in *Williamson v. Williamson* the question was raised as to whether the procurement of a life insurance policy, naming as beneficiary a child born after the execution of the parent's will, constituted the making of "any provision" for such child within the meaning of the statute.

Under the facts of this case, the testator had one child living at the time he executed a will devising his entire estate to his wife, but subsequently another child was born to the testator. Neither child was mentioned nor provided for in the will. Later, however, the testator procured a double indemnity life insurance policy under which the two children were named as beneficiaries and each received $4,000 at his death. The court, interpreting the statute, held that the benefits of the policy did not constitute a provision for the after-born child. Had the case not been decided on other grounds, the court would have reached the absurd result of permitting the after-born to receive an intestate share in the parent's estate to the exclusion of the other child.

In the instant case, the court based its decision on the earlier case of *Sorrell v. Sorrell*, stating that the facts of both were on "all fours." Yet, upon examination the two cases seem to be distinguishable. In the principal case, the testator had a natural child living at the execution of his will, while in the *Sorrell* case the testator had no children at the time the will was executed, but later adopted one child prior to the birth of another. Thus in the latter case, the facts strongly support the contention that the testator did not entertain any idea whatsoever of children at the time he executed his will. In the *Williamson* case, however, it is arguable that since the testator was cognizant of his living child upon execution of the will, his intention was to exclude or disinherit all his children as a class.

Some jurisdictions, when presented a fact situation similar to the instant case, have reached this result in construing their pretermisison statutes. Still, it must be noted that in

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2. *Leonard v. Enochs*, 17 S. W. 437, 438 (Ky. 1891) ("... it would be an anomaly to hold that all the testator's living children—infants and all—were intentionally excluded as a class in the interest of the testator's wife, and the child thereafter born, by reason of the accidental time of its birth, was not intentionally omitted").
jurisdictions so holding, the pertinent statutes are more susceptible to such interpretation than is the North Carolina statute.\(^6\)

Even if it be conceded that the two cases are not distinguishable and the statutes of other jurisdictions more clearly permit the disinheritance theory, why has the North Carolina Supreme Court held that the benefits of an insurance policy are not an adequate provision for after-born children? In the principal case, the court speaks of the inherent unsuitability of life insurance as a provision because of its indirectness as *ex parentis provisione* since it is not of reasonable substance and

\(^6\) See notes 1 and 5 *supra*.
value *in present* but only a possibility which must be fed to be kept alive. This precise point has been raised in the New York court. That court has held that although the possibility of the after-born child receiving the benefit of a provision is wholly contingent, it is still a sufficient provision to prevent the operation of the pretermission statute.  

In construing a statute very similar to the North Carolina statute, the New York Court of Appeals reasoned that since a testator may meet the possibility of after-born children by mere mention or a very general provision in the will, as is also the law in North Carolina, "it would be somewhat idle, if not inconsistent, to hold that in order to be effective as a 'provision' a bequest or devise must be vested, certain and adequate." Accordingly, that jurisdiction has liberally interpreted its statute so as not to defeat the intention of the testator and has held that an after-born child, not mentioned in the will, is provided for within the meaning of the statute by life insurance, trust, and Totten trust.

Both the language in early North Carolina cases declaring the purpose of the statute, and a "plain-meaning" interpretation thereof, lead to the conclusion that the court could well have reached the New York view in the principal case. The court has stated that the statute was not designed to control a parent as to the provision he should make, and that it was only intended to apply when the omission to provide for

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8. N. Y. DECEDEENT ESTATE LAW §26: "Whenever a testator shall have a child born after the making of a last will, either in the lifetime or after the death of such testator, and shall die leaving such child, so after-born, unprovided for by any settlement, and neither provided for, nor in any way mentioned in such will, every such child shall succeed to the same portion of such parent's real and personal estate, as would have descended or been distributed to such child, if such parent had died intestate, and shall be entitled to recover the same portion from the devisees and legatees, in proportion to and out of the parts devised and bequeathed to them by such will." *In re Bryant's Estate*, 121 Misc. Rep. 102, 201 N. Y. Supp. 60 (1923) (court construed the word "settlement" as meaning "to provide for" or "to make provision for").


an after-born child was from inadvertence or mistake.\textsuperscript{14} Also it has been said that such provision as contemplated by the statute may be made for the child by the parent either by will, gift, or by settlement, before, contemporaneous with, or after the will is made.\textsuperscript{15} Further, the use of the term "any provision" in the statute would seem to furnish the basis for a holding by the court that the benefits of an insurance policy are a sufficient provision within the meaning of the statute.\textsuperscript{16} Nevertheless, the court has continued to adhere to a strict construction of the statute, thereby defeating its purport and intent. Although it has been stated that the adequacy of the provision is not to be determined by the court but by the testator,\textsuperscript{17} it appears that the North Carolina Supreme Court has in effect determined that insurance is not an adequate provision under the pretermission statute.

As the court in the principal case expressed its obligation to stare decisis, it would seem that a statutory amendment is necessary to alleviate the harsh result and the strict interpretation that has developed in construing the after-born statute. Such action is desirable if the original purpose and intent of the statute are to be effectuated. The following statutory amendment is proposed:

Children born or adopted after the making of the parent's will, and whose parent shall die without making any provision for them \textit{whatsoever in such will or otherwise or without indicating in such will an intent to exclude them therefrom}, shall be entitled to such share and proportion of the parent's estate as if he or she had died intestate, and the rights of any such after-born child shall be a lien on every part of the parent's estate, until his several share thereof is set apart in the manner prescribed in §28-153 to 28-158.\textsuperscript{18}

\textbf{DAVID L. STRAIN, JR.}

\textsuperscript{14} Flanner v. Flanner, 160 N. C. 126, 75 S. E. 936 (1912); Thompson v. Julian, 133 N. C. 309, 45 S. E. 636 (1903); Meares v. Meares, 26 N. C. 192 (1843).

\textsuperscript{15} Flanner v. Flanner, 160 N. C. 126, 75 S. E. 936 (1912).

\textsuperscript{16} See Meares v. Meares, 26 N. C. 192, 197 (1843) ("... the statute only provides for the case where the parent dies without having made provision for the child, which means, without making \textit{any} provision ..." [italics supplied]).

\textsuperscript{17} King v. Davis, 91 N. C. 142 (1884); Meares v. Meares, 26 N. C. 192 (1843).