Kentucky Law Journal

Volume 41 | Issue 3 Article 10

1953

Failure to Mention Afterborn Children in Will Made While Wife is Pregnant as Showing Intent to Disinherit

Myer S. Tulkoff
University of Kentucky

the principles of law heretofore thought applicable to these cases will no longer be controlling. It was there said that:

> ". . . a tax does not cease to be valid merely because it regulates, discourages, or even definitely deters the activities taxed. . . . The principle applies even though the revenue obtained is obviously negligible, . . . or the revenue purpose of the tax may be secondary . . . . Nor does a tax statute necessarily fall because it touches on activities which Congress might not otherwise regulate."[27]

This language would seem to indicate that future tax statutes will be held constitutional regardless of their regulatory effect, even though the revenue purpose is merely secondary, provided the statute is labelled a tax. Although it is true that the actual decision of the case was much narrower than the opinion indicates, it should at least show that the present trend is to extend the use of the taxing power as a regulatory device, and that the Supreme Court is not yet ready to draw the line which must undoubtedly exist if the taxing power of congress under the Federal Constitution is not to be used to destroy the federal system.*

JOHN K. LEOPARD

FAILURE TO MENTION AFTERBORN CHILDREN IN WILL MADE WHILE WIFE IS PREGNANT AS SHOWING INTENT TO DISINHERIT

Most civilized nations give a person the privilege of disposing of his property by will. In Anglo-American countries this freedom of testation is permitted with fewer restrictions than in civil law countries.[1] For example, in the continental countries, regardless of the wishes of the testator, the children, spouse, and parents take forced shares of which they usually cannot be deprived.[2] But in England and America, the survivors are not so protected and may generally be disinherited by the decedent.[3]

There are statutes in the United States, however, designed to prevent under some circumstances, unintentional disinheritance of children not mentioned in a will. In six states statutes declare that wills made during marriage are revoked by the birth of issue there-

[27] *Id.* at 44.

* Since this note was written the Bookie Tax has been upheld by the Supreme Court of the United States in *United States* v. *Karhriger*, 78 S. Ct. 510 (March 9, 1953).

[1] ATKINSON, WILLS 95 (1937).
[2] *Id.* at 8.
[3] *Ibid.*

after.[4] In most jurisdictions the statutes do not provide for revocation,[5] but instead provide that a child born after the making of a will may take his intestate share of the estate regardless of the will.[6] The policy supporting these statutes is the prevention of unintentional or inadvertent disinheritance or as has been stated, "to guard and provide against such testamentary thoughtlessness and lack of vision as prevent a testator from contemplating the possibility of afterborn children and taking such possibility into account in framing a scheme for the testamentary disposition of his property."[7]

The typical situation giving rise to the operation of the so-called pretermitted child statutes arises where a testator executes a valid will and subsequent to its execution his wife gives birth to issue which are unprovided for in the will. Under a majority of statutes the after born child inherits that portion of the testator's estate, both real and personal, that he would have taken had his parent died intestate.[8] This share is generally provided by means of contribution among those who inherit under the will.

Usually these statutes clearly set out the situations in which afterborn children are not to be protected. In all American jurisdictions the testator may avoid operation of the statutes by expressly providing in his will for any afterborn children. In over half the states a settlement outside the will is sufficient to prevent the afterborn child from taking his intestate share. Also, in most states, an express statement in the will of an intent to disinherit the afterborn child will be equally effective.[9]

In Kentucky, as in other states, the effect of the statute in favor of afterborn children[10] can be avoided by providing for them in the will,[11] or by an express statement that they shall take nothing,[12] as well as by a settlement outside the will during the testator's lifetime.[13]

If a testator fails to provide for an afterborn child in his will and at the same time does not expressly disinherit it, an ambiguity arises

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[4] 2 CONN. GEN. STAT. c. 341, sec. 6956 (1949); GA. CODE sec. 113-408 (Park, 1933); 3 IND. STAT. ANN. sec. 7-303 (Burns, 1933); KANS. GEN. STAT. ANN. sec. 50-610 (1949); LA. CIV. CODE ANN. art. 1705 (Dart, 1945); 1 N. J. REV. STAT. sec. 3:2-15 (1937).

[5] ATKINSON, WILLS 95 (1937).

[6] Robert E. Mathews, *Pretermitted Heirs: An Analysis of Statutes*, 29 COL. L. REV. 748 *et seq.* (1929).

[7] McLean v. McLean, 207 N. Y. 365, 371, 101 N.E. 178, 179 (1913).

[8] Mathews, *supra*, note 6, at 749.

[9] *Id.* at 72.

[10] KY. REV. STAT. sec. 394.380 (1948).

[11] Porter v. Porter's Ex'r., 120 Ky. 302, 86 S.W. 546 (1905).

[12] Logan v. Bean's Adm'r., 120 Ky. 712, 87 S.W. 1110 (1905).

[13] See provisions of KY. REV. STAT. sec. 394.380 (1948).

with respect to the testator's intention. By his failure to provide for the child it can be said that the testator intends to disinherit him. On the other hand, it can just as well be argued that failure to expressly disinherit the child shows an intention not to do so. This ambiguity has been resolved by the above mentioned statutes in favor of the afterborn child. The presumption under these statutes is that failure to mention afterborn children is by oversight or inadvertence because of the failure of the parent in not providing for a contingent situation.[14] This presumption can be overcome if it can be shown that the failure to mention the child was not pure oversight, but was the result of an actual intent for such after born children not to inherit. The question then arises as to how the intent of the testator to disinherit the child can be shown, other than by express exclusion in the will, so as to avoid operation of the statute. The answer lies in the use of extrinsic evidence to show the testator's intent.[15]

Extrinsic evidence that may show the testator's intent to disinherit is the pregnancy of the testator's wife at the time of the execution of the will coupled with a failure to make a provision for that child. It is submitted that in this situation an intent to disinherit the child is manifested even though the testator does not expressly so sate in his will. As an illustration, testator executes his will on October 1, in which he leaves all his property to his wife, remainder at her death to his brother. On November 1, of that year, testator's wife gave birth to a child. By implication, that child is disinherited. This is true even though the testator did not expressly disinherit the child in the will. The validity of this argument is not hampered by the policy behind the pretermitted child statutes already mentioned which is to protect afterborn children from unintentional or inadevertent disinheritance. It is easy to understand that in executing a will a testator may not foresee a child being born two years hence; but can it be said that he omits to provide for a child because of lack of vision or by inadvertence, when he knows his wife is presently pregnant?

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[14] Christian v. Carter, 193 N.C. 537, 137 S.E. 596 (1927).

[15] "The decisions are not in accord as to the admissibility of extrinsic evidence to show whether or not the omission of a testator to provide for his child was intentional, thereby avoiding the application of the pretermission statute. This lack of accord is due in part . . . to the difference in terminology of the various statutes.

"It would appear that under the majority of the pretermission statutes extrinsic evidence is admissible to show whether the testator intended to omit provisions for his child or children." 170 A.L.R. 1379 (1947).

For a more extended discussion of the admissibility of extrinsic evidence to show a testator's intention as to omission or disinheritance of children, see the annotation in 94 A.L.R. 209 *et seq.* (1935).

In the Illinois case of *Hedlund* v. *Miner*,[16] the court evidently failed to look to the underlying policy behind the pretermitted child statutes when it did not find an intention to disinherit in such a situation. There, the testator, who had no children, but was shortly expecting the birth of a child, executed a will in which he devised all his estate to his wife. One month later, a daughter was born to him. After the testator died the child was held entitled to an interest in his estate. The appellant, in an attempt to avoid the statute,[17] contended that the testator gave all of his property to his wife, well knowing of the pregnancy when he executed his will and that this manifested "his intention to disinherit his child about to be born and exclude it from receiving any portion of his estate."[18] However, the court did not approve of this contention.

In other cases it has been held that the failure of the testator to mention the child with which his wife is pregnant is not indicative of an intent to disinherit that child and thus an application of the pretermitted child statute is not avoided. The theory followed in many of these cases is that the clear and unambiguous terms of the statute are not affected by the existence of the condition of pregnancy.[20]

There are cases, however, where the single fact of pregnancy coupled with omission to mention the child has been held to be sufficient to show an intention to disinherit. Thus, in an early Massachusetts case,[21] the testatrix gave birth to a child one month after she executed her will in which she devised all her property to her husband. The child sought his portion of the mother's estate under the pretermitted child statute then in force.[22] The court held that the failure to mention the child was an intentional disinheritance. Finding this intention from the single fact of pregnancy when the will was executed, the court said:

> "There is nothing in this will, except the fact of the omission, which indicates a purpose not to provide for her son. But the relation of the testatrix to the objects of her bounty and to the child for whom provision is omitted, as well as her intelligence, and the circumstances under which the will is made, are all proper matters for consideration. . . . The judge might well find that the fact that the testatrix was so soon to be delivered of her first child must have been in her mind when the will was made, and could not have been forgotten.

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[16] 395 Ill. 217, 69 N.E. 2d 862 (1946).
[17] ILL. REV. STAT. c. 3, sec. 199 (1945).
[18] *Supra* note 16 at —, N.E. at 867.
[19] McCrum v. McCrum, 141 App. Div. 83, 125 N.Y.S. 717 (1910).
[20] McCrum v. McCrum, 141 App. Div. 83, 125 N.Y. S. 717 (1910); see also Chicago, B. & Q.R. Co. v. Wasserman, 22 F. 872 (1885).
[21] Peters v. Siders, 126 Mass. 135 (1879).
[22] MASS. GEN. STAT., c. 92, sec. 25 (1932).

> There is no suggestion of any mistake of fact or law, or any ignorance on the part of the testatrix, or any oversight of the scribe, as the cause of the omission."[23]

In a similar situation the Tennessee court[24] held that the child was disinherited by "unavoidable inference" or by "necessary implication", by construing the will in the light of "existing facts and surrounding circumstances," namely, the fact that the testatrix was pregnant when she executed her will.[25]

There is another line of cases in accord with the cases just discussed, however, they contain the additional factor that when the testator executed his will, he not only failed to provide for a child with which the wife was then pregnant, but also omitted mentioning his children then living. The fact that the living child is not provided for strengthens the case for finding "from all the facts and circumstances" when the will is executed, an intention to disinherit the after born child.

In the Kentucky case of *Leonard* v. *Enochs*[26] the testator willed his estate to his wife. At the time he executed his will he had one child living and his wife was pregnant with another child. This daughter, born two months after testator's death, later claimed her intestate share of her father's estate under the pretermitted child statute in Kentucky.[27] The testator in his will had never expressly stated that the child should not take and yet the court refused to apply the statute for her benefit. The court found an intention to exclude the claimant by virtue of the fact that the testator did not bequeath or devise any property to his then living child. The court stated:

> "It makes no difference in what form such intention may be expressed in the will; it may be by direct words of exclusion or it may be plainly seen from the whole will that the testator intended to exclude the afterborn child, and if thus seen it is 'expressly excluded by the will'. Does such intention appear from the will? We think it does. . . . Now, as said, the living child not having been expressly

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[23] *Supra* note 21 at 138.

[24] King v. King, 166 Tenn. 115, 59 S.W. 2d 510 (1933).

[25] S.W. at 512. Also see Reaves v. Hager, 101 Tenn. 714, 50 S.W. 760 (1899) and Lindsley v. Lindsley, 98 R.I. 85, 197 Atl. 98 (1938), where the testator executed his will two months and thirteen days before the expected birth of his first child. It made no provision for children who might be born afterwards, but left all of his property to his wife. The court stated that there is a presumption that a testator's omission of his children from his will is accidental and not intentional but that such a presumption could be rebutted. Here the presumption was held rebutted by the evidence that the testaor expressed his intention, in conversation with his wife, to leave all his property to her by will, when he "knew and talked with her about the expected birth of her first child." Atl. at 99.

[26] 92 Ky. 186, 17 S.W. 437 (1891).

[27] GEN. STAT. sec. 25, c. 113 at the time this case was decided. It is now KY. REV. STAT. sec. 394.380 (1948).

> excluded by name, but clearly, expressly excluded by the content of the will . . . does it not follow that the afterborn child was likewise intentionally, expressly excluded from the provisions of the will? We think it was."[28]

Thus, the Kentucky Court felt that it found an intent to disinherit expressly stated in the will and therefore did not need to resort to extrinsic evidence to determine the testator's intention.

An Illinois case[29] puts more emphasis on the fact that the wife was pregnant when testator executed his will. In addition to this prospective child he had two living children, but gave all his property to his wife, and made no provision or reference concerning children, present or afterborn. This will was construed as disinheriting a son born two months after the will's execution. The court stated that it was not reasonable to believe that the testator intended to exclude his two infant children, who were living with him when the will was executed, and not at the same time exclude another child to be born within two months thereafter.[30]

A few courts have taken a contrary view. In a New York case,[31] the testator had two children living at the time of the execution of his will and his wife was pregnant with another child. He left all of his property to his wife, failing to mention the children. The court held that the afterborn children were entitled to the benefit of the statute for pretermitted issue.[32] Counsel opposing this holding tried to argue that it was permissible to spell out of the will itself, coupled with the fact that the testator did not make a new will upon birth of the afterborn children, an intention to leave nothing to afterborn children, as well as to the children in being at the time he executed his will. The court declared that this argument ". . . goes down before the statutes and the decision under it."[33] However, there was a strong dissenting opinion.

In conclusion, it is arguable that when a testator executes his will and fails to provide for a child with which his wife is known to be pregnant that the more correct view would be to hold the child impliedly disinherited. After all, the policy behind the pretermitted child statute is to prevent unintentional disinheritance caused by the testa-

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[28] *Supra* note 26 at 188, S.W. at 438.

[29] Hawhe v. Chicago & Western Indiana Ry. Co., 165 Ill. 561, 46 N.E. 240 (1897).

[30] N.E. at 242. See also Fleming v. Phoenix Trust Co., 162 Tenn. 511, 39 S.W. 2d 277 (1931); Froehlich v. Minwegan, 304 Ill. 462, 136 N.E. 669 (1922).

[31] Udell v. Stearns, 125 App. Div. 196, 109 N.Y.S. 407 (1908).

[32] 2 REV. STAT. (1st ed.) p. 65, pt. 2, c, tit. 1, sec. 49 as amended by c. 22, p. 40, Laws of 1869.

[33] *Supra* note 31 at 408.

tor's failing to foresee birth of future children.[34] It is not likely that he fails to foresee this possibility when his wife is presently pregnant, but rather, it would be well to consider human nature and realize that most people, while a wife is pregnant, do plan for the child's future. Besides, it may be urged, as in the case of a will executed without provision for living children, that the testator is in effect providing for the children by leaving his estate to those whom he knows will provide for the children. It has already been seen that the pretermitted child statute is avoided if provision for the child is made in the will.[35] It also must be remembered that, in the absence of statute,[36] testator's living children unprovided for in the will are not protected; it is arguable that a child about to be born should fall in the same class.

However, it can be said that it is difficult in this situation to predict with any degree of certainty whether or not a particular court will imply an intent to disinherit a child so as to avoid application of the pretermission statute of a state if a man executes his will while his wife is pregnant and fails to provide for the child. In order to avoid an unintended or unjust result the draftsman should take into consideration the possibility of children being born after execution of the will and should either expressly provide for the contingency of afterborn children or should expressly state that such children will not take under the will. Only in this way can any certainty be injected into the already complex field of determining a testator's intent.

MYER S. TULKOFF

[34] *Supra* note 7 at 371, N.E. at 179. See also *supra* note 6 at 750.
[35] *Supra* note 11.
[36] ATKINSON, WILLS 94.