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Testamentary Freedom and Social Control—After-Born Children: Part I: The New York Experience

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TESTAMENTARY FREEDOM AND SOCIAL CONTROL — AFTER-BORN CHILDREN

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PART I: THE NEW YORK EXPERIENCE

INTRODUCTION

The supremacy of the legislature has become such an accepted fact in the area of private law that it is not uncommon to find the courts expressly acknowledging the fact, even where the legislature has been silent, by advising litigants, despite the justice of their cause, to seek their remedy from the legislature. And where the creative judicial instincts cannot so easily be repressed, nor find outlet in the mere volume of judicial business, they are often forced to express themselves in terms of statutory construction—a fiction whereby the court gets down to the real work of weighing policy and reflecting social values but does so in the name of the legislature. As we all know, the putative father is not always the real one.

In a field of law such as that of inheritance, where the social policies involved have been relatively stable, being founded as they are mainly upon the family structure, which is slow to change in any society, we often find the legislature setting down rather broad rules and leaving to the courts their application without great concern over possible "judicial legislation". This may be merely the traditional role of the courts in the private law fields, to handle the infinite number of complex and often unforeseeable fact situations. But there seem to be other elements as well at play here. The often conflicting values which go into a system of inheritance appear to be unstated, or subsumed, and it is thought better that they resolve themselves, however laboriously, in case law rather than in the legislative halls. This seems true especially where these values involve many unconscious forces which cannot be too accurately, or publicly, stated, as they do in the family area but may not in others. It may be that society would prefer to allow broad and relatively dark areas in which courts may browse and consider what are acknowledgedly extra-legal factors in rendering justice for the "deserving" or "undeserving" litigants.[1] In addi-

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1. An example of this may be found in cases dealing with testamentary capacity, where the courts place a high value—though at times unconsciously—upon how deserving are the objects of testator's bounty under the will, or under intestacy. See Green, *Proof of Mental Incompetency and the Unexpressed Major Premise*, 53 YALE L. J. 271 (1944).

tion, the broad lines may be required by the fact that the law in this area must be arbitrary in some degree—such as the percentages of distribution in intestacy —but it cannot be acknowledged to be so, for society so depends on the stability and certainty of these arbitrary standards that it comes to think of them as "natural" and invested with an almost magical necessity. Most likely all of these elements come into play and continue to do so within the basic system of inheritance until significant changes occur in the source area of the law —the structure of the family and society's attitudes toward it—at which time the problem again becomes a legislative one and the policies and values must be exhumed, articulated, weighed and contested until a new solution is arrived at consonant with the new facts of family life. But until such time as a new legislative solution is arrived at, the courts will be forced to struggle with facts which, because of the changed social situation, take on a new color and cannot be adequately resolved in terms of the old solution.

Such a judicial struggle recently took place in the Court of Appeals of New York in *Matter of Shupack*.[2] In 1930 New York abolished dower and curtesy and substituted therefor a right of election whereby the surviving spouse could take an intestate share of the estate, up to one-half, against the provisions of the will. The main objects of this legislation appear to have been (i) the removal of restraints on realty to give it the liquidity and ease of disposition characteristic of personality, and (ii) to afford some protection to a surviving spouse against disinheritance.[3] In the *Shupack* case, the testator left almost his entire estate in the form of stock in wholly-owned corporations to be divided, in trust, one-third for his wife for life with remainder to his children, and one-third each for two children until they reached majority at which time each child was to receive the principal. Under the statute[4] the widow could not elect against the will "where the will contains . . . a provision for a trust for [her] for life of a principal equal to or more than . . . her intestate share." Although the trust of one-third was equal to her intestate share, she claimed the right to elect on the ground that, as a holder of a minority interest in the closed corporations, the trust for her life was illusory—since, being at the mercy of the majority for the declaration of dividends, she had no assurance of any income at all during her lifetime. The Court, by a five to two vote, denied her claim, on the ground that the testator had "fully complied with the demands of the statute" in setting up the trust and that the widow cound not complain of the "character of the property left."[5] The minority supported the widow, feeling that the statute was "remedial" and "viewed

2. 1 N. Y. 2d 482, 136 N. E. 2d 513 (1956).
3. For the background and steps taken to effectuate the new statutory scheme, see COMBINED REPORTS OF THE DECEDENT ESTATE COMMISSION (1933).
4. N. Y. DECEDENT ESTATE LAW §18(d); under the provisions of §83 for distribution in intestacy, a surviving spouse is entitled to one-third of the decedent's estate where he has left children or their representatives surviving.
5. I N. Y. 2d at 487, 488, 136 N. E. 2d at 515, 516.

in that light, the 'trust', as used in [the statute], must be deemed to refer to one which is substantially beneficial to such spouse . . . [I]n order to effect the purpose of providing support of the surviving spouse for life, it must constitute the substantial equivalent of such spouse's intestate share."[6] Although the court's disagreement expresses itself in the form of statutory construction, the majority looking to the literal language and the minority to what it considered the purpose behind it, the problem should perhaps be considered more in terms of the judiciary versus the legislature rather than strict versus broad constructionist. The majority cannot be said to be ignorant of the policies behind the statute, but it seems to feel that these policies are not too clearly expressed in what now appears as only a tentative solution to broader problems of family relationships. One can almost hear the majority asking: If we go into one policy, that of support of a surviving spouse, are we merely to weigh this against the policy of testamentary freedom which here expresses itself in the right of a testator to leave the kind of property he wants to? If so, what of all the other "legislative" issues that are relevant here? If support is the critical element, may we consider whether the spouse was in fact dependent on the testator? Whether he did not leave her adequately provided for outside the will, by insurance perhaps? Whether she was the mother of the surviving children so that her support could be considered as favorable to the family unit? The minority, by taking one of many policies behind the statute, may be said to distort it, and certainly to close its eyes to what would be logically relevant material.[7] One senses that the majority felt that it could not evaluate social policy on what was really a legislative level and so would stick to the language of the statute, rather literally, within the old solution of testamentary freedom.

An evaluation on a legislative level, in the hopes of coming to some new solution, would have to ask some general questions and answer them by inquiry into how far social changes have affected the values which have, up to now, been subsumed in our inheritance laws. Taking the questions outside the rhetoric of testamentary freedom, they might be stated generally as: Shall a

6. *Id.*, at 491, 136 N. E. 2d at 518. For a comment on some other features of this case, see Comment, *The Widow's Share Evaluated,* elsewhere in this issue, *infra.*

7. The statute involves many other elements beside the surviving spouse's dependence upon the deceased; there is the notion that the wife contributes to the family wealth by her services in the home which frees the husband to pursue wealth-accumulating activities; that the spouse represents the surviving head of the family and that by providing for the spouse, children are thereby protected; that the wife's share is a return to her of property she or her family contributed to the marriage by gift or dowry. The final argument against the support factor as being the dominant one, is that husbands were given rights under the statute equal to wives. For interesting discussions of such theories relating to inheritance, see Cahn, *Restraints on Disinheritance,* 85 U. PA. L. REV. 139 (1936), RHEINSTEIN, THE LAW OF DECEDENTS' ESTATES 57-74 (2d ed. 1955) and MECHEM & ATKINSON, WILLS AND ADMINISTRATION, Introduction (4th ed. 1954).

testator's relatives be protected after his death, or only those dependent upon him? If so, for how long, and in what manner? And these questions would have to be weighed in the light of the social changes which have forced the questions upon us anew: Changes in the family itself—divorces, multiple marriages, longer life expectancy, the breaking up of the multi-generational household;[8] changes in the forms freely available to provide for a family after death —insurance, pension rights, intervivos truts, bonds or bank deposits payable on death;[9] changes in the social attitudes toward and the guarantees against dependents being left destitude—social security and other welfare legislation; and changes in taxes, with which death has long been allied. Thus we might say that the court in the *Shupack* case, although willing to do the hard work of weighing policy and reflecting social values where the broad lines laid down by the legislature are generally consonant with social realities, declines to do so where new elements (which are not even subsumed in the old solution) enter the situation.

The old solution which served the common law for about 250 years in the field of inheritance might be described as follows: a man is generally free to dispose of his property on death as he sees fit, without regard to the family obligations he had while alive, by executing a document called a will according to a prescribed ritual; if he does not execute such a document, his property will be divided in various mathematical proportions (which society feels are roughly fair) among his closest relatives, without regard to their situations of dependence or merit, as they relate to each other or the deceased. Although this solution may indicate in its statement a disregard of family dependency as a value, this value is on the contrary subsumed in the solution and may be thought of as its foundation. For it is only where society can rely without second thought upon the natural inclinations and motivations of a man to acquit himself of his family duties, that it feels free to let him dispose of his property as he wishes. Where, however, these natural inclinations have weakened, mainly because other institutions have replaced the family in fulfilling various needs, then society has to take a more direct role in controlling testamentary dispositions. And when it does, what was previously subsumed will be articulated, as there is a search for a new solution. In this search there

8. See, *e.g.*, Cavers, *Change in the American Family and the "Laughing Heir,"* 20 IOWA L. REV. 202 (1935), where the author points out the reduced social value placed upon collaterals in the modern American family. Guest, in *Family Provision and the Legitima Portio*, 73 L. Q. REV. 74, 80 (1957), observes that ties of the "kinship group," including collaterals, have similarly loosened in England but continue with great strength in France.

9. The policies in favor of recognizing the common use of such dispositions on death are often strong enough to lead the legislature to exempt them from the requirements of the statute of wills even where they are testamentary in character. See, *e. g.*, N. Y. PERSONAL PROPERTY LAW §24a, exempting transfers under pension, retirement, death benefit, stock-bonus and profit-sharing plans. For policy discussion, see N. Y. LAW REVISION COMMISSION REPORT, RECOMMENDATIONS AND STUDIES 163-185 (1952).

is a need to find out how the old solution worked when confronted with "unnatural" situations, testators who did not do what was expected of them; how, in short, the system of testamentary freedom fared where there was an acknowledged need to control it in the interests of carrying out socially accepted duties.

This article directs itself to an inquiry into such an area: the statutory protection from inadvertent disinheritance afforded children born after a parent has made a will. Although on its face, this appears as a limitation on testamentary freedom, it may be construed—as will appear later—as a technique for reinforcing or preserving testamentary freedom by curing a disposition based upon a mistake as to family situation and carrying out a more probable intention than appears in the will. The problem of the *Shupack* case may be stated in terms of testamentary freedom versus family duty but, as was above indicated, these are only two of a number of values which come into play when the property and family relations between spouses are in issue.[10] To the extent that the after-born child statutes afford protection most often to minor children who are dependent on the testator, however, the dichotomy of testamentary freedom versus family duty becomes more sharply expressed and illuminated in the judicial construction of this legislation.

HISTORICAL BACKGROUND

Before proceeding with the analysis it would be helpful to see the historical background to the old solution of testamentary freedom. Since the development of law in the American colonies was contemporaneous with the freeing of the common law from medieval restraints in England, and because of the special frontier conditions in the colonies—the absence of a feudal tradition, the free availability of land, the productivity of land being determined more by owner use than tenant use—the American laws of inheritance might be thought of somewhat misleadingly as bursting forth unencumbered and free.[11] So much so, it would seem, that American courts have thought of testamentary freedom not only as a natural almost political right, but a natural condition of all law as well.[12] But, of course, this era of testamentary freedom that characterized the common law, in England as well as the United States, is of relatively late origin, representing a small part of the sweep of the Common Law over the centuries of its growth, and in a larger context appears as an institution peculiar to Western civilization.

10. See note 7 *supra.*

11. For a detailed description of the impact of colonial conditions on the development of one part of the law in this area, see Andrews, *The Influence of Colonial Conditions as Illustrated in the Connecticut Intestacy Law,* I SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 431 (1907).

12. Professor Hurst in his recent LAW AND THE CONDITIONS OF FREEDOM IN NINETEENTH-CENTURY UNITED STATES (1956) describes the American idea of property as being developed in terms of political rights. (pp. 8 *et seq.*)

Although feoffments to uses were commonly employed to evade the feudal limitation upon testamentary devises, it was not until 1540, only five years after this technique was abolished by the Statute of Uses, that the landed gentry won the right to free testamentary disposition of land. And this right was limited to the extent of widow's dower, which was not abolished in England until 1833, and which has continued for a longer time in many American jurisdictions. As to personalty, there is a similar development: under administration of the ecclesiastical courts, the widow and children had an absolute right to a share in the testator's estate, similar to the *legitim* of the Civil Law, which could not be destroyed by will; and although this right tended to disappear by the sixteenth century it held on in such important places as York until 1692, Wales until 1696 and London until 1724, and was maintained as local custom in a few places until the middle of the nineteenth century.[13] Still, in general, it can be said, that in the modern era the development had been toward complete testamentary freedom in the countries of the Common Law while the system of forced shares continued in Civil Law countries to the present day. How account for this? It cannot be explained as some would like by the notion that it was part of the Anglo-American development of democratic institutions; for testamentary freedom has not appeared as a necessary, nor under all conditions a desirable, feature of a democratic society. Although Locke might have considered this freedom an inherent part of the right of ownership, the French liberals and revolutionaries attacked it (especially as it created entails) as conducive to aristocratic license and despotism, and used a strict system of forced heirship after the Revolution to assure a more equal distribution of estates among children.[14] And, of course, the continuation of a Civil Law scheme in Scotland and Louisiana has not inhibited democracy. One might formally ascribe the special development in England to the general ascendancy from the sixteenth century of the Common Law over Civil Law influences,[15] but one would still wonder why the Common Law retained some Civil Law ideas of equal distribution, such as the theory of advancements and hotchpot,[16] and not others. Probably the most persuasive reasons advanced are based on the respective economic developments of England and the Continent. Professor Rheinstein approaches it from the rather formal view of the requirements of probate in a system of forced heirship:

> "Most probably the rights of 'legitim' became unpopular in consequence of the English overseas expansion which began to take place

13. For the foregoing historical development, see ATKINSON, WILLS Ch. 1 (2d ed., 1953); Guest, *op. cit. supra*, note 8; and Cahn, *op. cit. supra*, note 7.

14. McMurray, *Liberty of Testation and Some Modern Limitations Thereon*, 14 ILL. L. REV. 96 (1919); RHEINSTEIN, *op. cit. supra*, note 7 at p. 29.

15. See Maitland, *English Law and the Rennaisance*, I SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 168 (1907).

16. See Scrutton, *Roman Law Influence in Chancery, Church Courts, Admiralty and Law Merchant, id.* at 212.

> at the same period. The settlement of a decedent's estate could be seriously delayed when it became necessary to communicate, without regular mails, fast ships, telegraph or radio, with a son who had gone overseas and the mere establishment of whose whereabouts might take months or years of inquiry."[17]

Max Weber, the great German sociologist, was probably more correct when he ascribed the Common Law tendency to more basic economic and social factors that combined in England—the country had an expanding commercial economy and was ruled by a landed gentry.[18]

In any event, the development of testamentary freedom was so powerful, and so obscured alternative approaches, that Kent at the beginning of the nineteenth century, when adverting to the duty of a parent to provide for the future welfare of his children, recalled that "this duty is not susceptible of municipal regulations . . . A father may, at his death, devise all his estate to strangers, and leave his children upon the parish; and the public can have no remedy by way of indemnity against his executor. 'I am surprised,' said Lord Alvaney, 'that this should be the law of any country, but I am afraid it is the law of England.' "[19]

Although colonial conditions tended to sustain the principle of testamentary freedom, the impulses toward social equality and justice—perhaps, as among French democrats—tended toward a limitation upon that freedom. It

17. *Op. cit. supra,* note 7, pp. 59-60.

18. "Complete, or nearly complete, liberty of testation, is only recorded twice: as to Republican Rome and as to English law; in both cases for expanding nations ruled by a landed gentry. Today the most important territory recognizing liberty of testation is the territory of greatest economic opportunities: the United States." Quoted in Nussbaum, *Liberty of Testation,* 23 A.B.A.J. 183 (1937). See also HURST, *supra,* note 12, who develops a similar idea as to the United States in Chapter 1, *The Release of Energy.*

19. II COMMENTARIES *203 (12th ed. 1861). Although there was some question as to whether a parent was at early common law responsible for the support of his minor children (see, TIFFANY, PERSONS AND DOMESTIC RELATIONS, §§114-115 (1896)), in all modern jurisdictions this obligation has been imposed by statute. However, in all states today, except Maine, this obligation dies with the parent, so that his estate cannot be held to pay for the support of minor dependent children. See *Rice v. Andrews,* 127 Misc. 826, 217 N. Y. Supp. 528 (Sup. Ct. 1926) for case in point; see also Laube, *The Right of a Testator to Pauperize his Helpless Dependents,* 13 CORNELL L. Q. 559 (1928) for severe criticism of this development. Even where the parent leaves a dependent child so destitute that it requires public assistance, in New York State the parent or his estate is liable to reimburse the state welfare agency only for assistance given during the life of the parent, that is, during the period the law conceives of his obligation as being in force. N. Y. SOCIAL WELFARE LAW §§101, 104. Although the law may abhor the disinheritance of children, it must be added that it seems to cherish the *right* to do so. One area where the law's policy against disinheritance—if it can be called a policy—may be effective is in the broad construction of class gifts so as to include as many children as reasonably possible and so prevent disinheritance. See, Cooley, *What Constitutes a Gift to a Class,* 49 HARV. L. REV. 903 (1936) and Casner, *Class Gifts to Others than "Heirs" or "Next of Kin"—Increase in the Class Membership,* 53 HARV. L. REV. 207 (1939).

might be said that freedom impulses and equality impulses were in conflict especially where the social need for protection seemed most demanding, that is for dependent children. A resolution to the conflict came in some measure in statutes designed to protect children born after a will from inadvertent disinheritance, the testator remaining free to do so intentionally.[20] The history of these statutes and their sources in social conscience is exemplified by the class of children they sought to protect.[21] The first statutes protected only posthumous children whom the testator could not always be expected to provide for and who, being infants, needed the most social protection. The next statutes protected children who were born after the testator made his will, where he had no children living at the time, it being thought that under such circumstances disinheritance was likely the result of the testator's failure at the time he made his will to contemplate the possibility of having future children. After that it was a short jump to protecting all children born after a will was made, whether or not testator had living children when he made his will.[22] Despite the social impulses that went into this limited invasion of testator's freedom, the statutes were rationalized in terms of carrying out the testator's presumed intent, or curing a mistake on which his intent was based, and so to lead the lawmakers to conclude that it was no invasion at all.

20. Daggett in TWO CENTURIES' GROWTH OF AMERICAN LAW (1901) writes: "These statutory provisions for the protection of children are a logical outgrowth of the abolition of primogeniture in America." (p. 188) Perhaps, it would have been more exact to say that these statutes are a product of the same equality tendencies which led to the abolition of primogeniture.

21. For this history, and an excellent review of all these statutes, see Mathews, *Pretermitted Heirs: An Analysis of Statutes,* 29 COLUM. L. REV. 748 (1929). See also Dainow, *Inheritance by Pretermitted Children,* 32 ILL. L. REV. 1 (1937). In England, a condition of almost complete testamentary freedom continued until the Inheritance (Family Provision) Act of 1938 which allowed the court to make provision for certain dependent relatives of the testator, a system which has been established in a number of the Commonwealth countries. For an excellent review of this approach, see Laufer, *Flexible Restraints on Testamentary Freedom—A Report on Decedents' Family Maintenance Legislation,* 69 HARV. L. REV. 277 (1955).

22. Many states have since extended their statutes to protect, as well, children living at the time the will was made, adding to its terms language such as, "if it appears the omission was occasioned by accident or mistake," or, "unless it appears the omission was intentional." (See CALIF. PROBATE CODE §90 for use of the latter type language, and MICH. STAT. ANN. §27.3178 (83) (1943) for the former). The theory of these statutes is that the omission results from a mistake rather than, as in the after-born statutes, a failure to contemplate the possibility of future children. See Bordwell, *Statute Law of Wills,* 14 IOWA L. REV. at 174-177 (1929). In general these statutes provide, by their terms, methods of avoidance—that is, of rebutting a presumption of inadvertence or of showing the omission was intentional—similar to those provided in the after-born child statutes. In general, they operate pretty much the way after-born child statutes operate, results depending more on whether extrinsic evidence is admissible to prove testator's intent than on the particular language of the statute. *But cf.* Mathews, *op. cit. supra,* note 21, at 752, where it is suggested that the language of the statute, "unless it appears the omission was intentional", shifts the burden of proving the accidental nature of the omission on the child. However, a number of states avoid this problem by requiring the determination of intent be based on the will alone. (*E. g.,* California Probate Code, *supra*).

The statutes did not assure children of any particular share of a parent's estate, as the *legitim* of the Civil Law did;[23] nor did they prevent the disinheritance of children who might thereby become public charges. They were designed, it was said, merely to cure testamentary oversights and to allow pretermitted children to take their intestate shares of a parent's estate only when the circumstances were such that a legislative inference could be drawn that a child was left unprovided for only through inadvertence.

THE NEW YORK STATUTE

The New York statute, based on earlier Virginia statutes, was enacted in 1830 to make "a just provision . . . for a probable oversight" by a testator while avoiding the consequences of an entire revocation of the will based on changed circumstances.[24] Although there was at the time some doubt as to what circumstances occurring after the will would at Common Law work an implied revocation, the revisers accepted the view that only a subsequent marriage and birth of issue together so revoked a will.[25] To the extent that the statute provided, in effect, a partial revocation of a will by the mere subsequent birth of issue, it might be considered in derogation of Common Law, but this does not seem to be the sense of the revisers, whose approach was that "some legislative declaration seems expedient" on what was considered somewhat of an open question. Indeed, no court in New York construing the statute has limited its scope on the ground it was in derogation of Common Law; for even without the historical doubt, this canon of construction could easily have been countered by the, at times, equally superficial canon that a remedial statute, which this was, should be broadly construed. As will appear in the later discussion, the courts have worked less with formal canons of construction and more in a context of values giving testamentary freedom a dominant place, while trying to contain its social misuse in select cases. The statute, in almost the exact language of the original enactment, now section 26 of the Decedent Estate Law, reads as follows:

> "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

23. For a general comparison of the Civil Law and Common Law approaches to inheritance and testation, see, BUCKLAND & MCNAIR, ROMAN LAW AND COMMON LAW (1936).

24. See REVISER'S REPORT & NOTES, Appendix to REV. STAT. OF N. Y. (1836); Reviser's note of 1828 to original §56, later enacted as §49, REV. STAT., Part II, c. VI, Title I.

25. See discussion of this point and resolution of doubts by Kent in *Brush v. Wilkins*, 4 Johns. Ch. (N. Y.) 506 (1820). The revisers provided a separate statute for revocation of the will when there was a subsequent marriage *and* birth of issue. REV. STAT. §43, Part II, c. VI, Title I (1830), which later became §35 of the N. Y. DECEDENT ESTATE LAW.

> 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."[26]

The courts, in construing the statute, were very quick to disavow—for the legislature—any intent to control testamentary freedom, recognizing as they did the difference between the Civil Law approach and that of the statute whose object was "not to secure equality of ditribution, but to guard against unintentional disinheritance."[27] This is clearly expressed by the Court of Appeals in *McLean v. McLean* in language which has become authoritative:

> "The fundamental object of the statute, which has been quoted is to guard and provivde against such testamentary thoughtlessness and lack of vision as prevent a testator from contemplating the possibility of after-born children and taking such possibility into account in framing a scheme for the testamentary disposition of his property. For reasons which at once commend themselves to our sense of justice it has been determined, and by statute provided, that if a testator does thus overlook and fail to consider the possibility and claims of those who, if born, will be the natural objects of his bounty, the law will provide for them in the distribution of his estate outside of the terms of his will. But, on the other hand, it has never been held or assumed, in this state at least, that it was the intention of the legislature by this statute to compel, regulate or control testamentary provision even by a parent for children, provided that in the disposition of his property he looked into the future and foresaw and took into account its possibilities in the way of after-born children and the only proof necessary or permitted to establish sufficient testamentary conception in any case is the requirement in the alternative of mention or provision which has been quoted."[28]

As Professor Mathews expressed it, the Civil Law approach prevents disinheritance as violative of "a social duty to provide for the family, in particular, for issue", while the American legislatures seek "to protect the disinherited

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26. The Statute's history is brief. It was enacted in 1830 (REV. STAT., *supra*, note 24) as applying only to a father's will; after the privilege of making a will was granted to married women by L. 1867, c. 782, the text of the re-enacted statute (L. 1869, c. 22) refers to "parent" instead of "father". By L. 1955, c. 255, a new paragraph was added to the section, as follows:

> "The right of a child born after the making of a last will shall be subject to a valid power of sale expressed in the will of the testator or implied therein pursuant to the provisions of section thirteen of this chapter."

This addition is noted in 22 BROOKLYN L. REV. 143 (1956) and 24 FORDHAM L. REV. 502 (1955).

27. *Wormser v. Croce*, 120 App. Div. 287, 289, 104 N. Y. Supp. 1090 (1st Dep't 1907).

28. 207 N. Y. 365, 371, 101 N. E. 178, 179 (1913).

children only so far as they deem it consistent with the presumed intent of the testator."[29]

Although the statute is based upon a presumption of the testator's intent, it does not open the door to a general inquiry into his actual state of mind with respect to the after-born children[30] or allow inferences to be made from the dispositive scheme expressed in his will. The statute establishes a presumption, in the name of testator's intention, in order to protect the after-born children; and at the same time it sets down those methods by which the presumption may be rebutted: by provision or mention in the will, or provision by settlement. These methods are viewed by the courts as exclusive. In the language of the *McLean* case, only proof as to these matters are "permitted to establish sufficient testamentary conception" as to the possibility of having after-born children to avoid the statute's operation. This is true even in the face of an express finding, based on extrinsic evidence, that the testator intended to disinherit the after-born child. Although the statutory methods of avoidance are expressed in terms of "provision" for the child, the courts have construed this to mean not a provision which will in fact be enjoyed by the child, or used for its support, but only such provision as will rebut the idea that testator omitted the child through oversight.

The main questions which have come before the courts under the statute, and which in their handling have reflected the conflicting values above discussed, are: (1) What "children" come within the protection of the statute? (2) What constitutes a "mention" or provision in a will that avoids the operation of the statute? (3) What constitutes a provision by way of "settlement" outside the will which avoids the statute?

1. *Children within the scope of the statute*

Since the first concern of the legislature was with protecting posthumous children whom a testator was likely to leave unprovided for, the statute expressly includes them within its protection by speaking of "a child born after the making of a last will, either in the lifetime or *after the death of such testator.*"

29. *Op. cit. supra,* note 21, at p. 748-749.

30. Although the admission of parol evidence bearing on testamentary intent under these statutes has been favored (*e.g.,* Evans, *Should Pretermitted Issue Inherit?,* 31 CALIF. L. REV. 263, 269 (1943)), it is probably sounder practice to exclude such evidence for all the reasons that it is excluded in the construction of wills generally. A glance at the cases admitting parol evidence and searching for a specific intent, outside the terms of the will or the limited family situation, will show the uncertainty, confusion and contrariness of the decisions rendered. See Annots., 65 A.L.R. 472 (1930), 127 A.L.R. 750 (1940), 152 A.L.R. 727 (1944). As indicated *infra,* the author favors giving consideration only to the basic family situation and the language and dispositive plan in the will, in applying the statute.

But it should be noted that their protection is no more than that of a child born during a testator's lifetime, and is subject to the same conditions.[31]

Although some states have expressly included adopted children in their statutes, the New York statute speaks only of a child *born* to the testator, thus raising a question of construction as to whether or not adopted children come within the statute's scope. In *Bourne v. Dorney*[32] the question was answered in the affirmative, the court holding that an after-adopted child had the same rights as an after-born child under the statute, by virtue of the adoption provisions of the Domestic Relations Law which declared that

> "[T]he foster parent or parents and the person adopted sustains toward each other the legal relations of parent and child, and have all the rights and are subject to all the duties of that relation, including the right of inheritance from each other."[33]

The court argued that since the statute established the relationship and obligations of parenthood, the right under Section 26 was within "the entirety of rights that go with the obligation." And this decision was, the court concluded in overruling an earlier case,[34] part of "the current of judicial thought" which was tending toward "the assimilation of the adopted child to a child of the blood."[35]

Another question of statutory construction which has arisen relates to the status of illegitimate children under Section 26. In *Bunce v. Bunce*,[36] a testatrix died leaving an after-born illegitimate child who asserted her rights under the statute. The court held that under the statute allowing an illegitimate child to inherit from its mother "as if such child were legitimate",[37] the illegitimate child came within the provisions of Section 26 and could take the share she would have received if her parent—the mother—"had died intestate". When, however, the claim of the after-born illegitimate child was made against the will

31. The statute was invoked successfully by posthumous children in *Stachelberg v. Stachelberg*, 124 App. Div. 232, 108 N. Y. Supp. 645 (1st Dep't 1908), *aff'd*, 192 N. Y. 576, 85 N. E. 1116 (1908))and *Matter of Yates*, 144 Misc. 409, 259 N. Y. Supp. 131 (Surr. Ct. 1932), *aff'd mem.*, 239 App. Div. 878, 265 N. Y. Supp. 976 (4th Dep't 1933). As to whether a posthumous child is considered mentioned in the testator's will by references to "surviving issue," see *infra*, note 58.

32. 184 App. Div. 476, 171 N. Y. Supp. 264 (2d Dep't 1918), *aff'd* 227 N. Y. 641, 126 N. E. 901 (1919).

33. Formerly §114 of the N. Y. DOMESTIC RELATIONS LAW; now §115, with some other minor changes in language.

34. *Matter of Gregory*, 15 Misc. 407, 37 N. Y. Supp. 925 (Surr. Ct. 1896).

35. In general the approach of the New York courts has been the same as that of other states with statutes which do not expressly include adopted children. See Annot., "Adopted child as within contemplation of statute regarding rights of children pretermitted by will," 105 A.L.R. 1176 (1936).

36. 27 Abb. N. Cas. 61, 14 N. Y. Supp. 659 (Sup. Ct. 1891).

37. L. 1855, c. 547, predecessor to §83 (13) of the N. Y. DECEDENT ESTATE LAW.

of the father, it was held that the child had no rights under Section 26 since it could not inherit from the father, were the father to die intestate.[38] Thus the courts followed a principal that the illegitimate child has rights under Section 26 against a parent it could inherit from in case of intestacy.[39]

The only New York case dealing with the question of whether the grandchildren of the testator come within the statute concerns the children of an after-born child who predeceased the testator. In *Matter of Horst*,[40] the testator had made his will before he had any children; thereafter he had three children one of whom predeceased him leaving children surviving. None of the testator's three children were mentioned or provided for by him, and although it was clear that his two surviving children could take under Section 26, a question was raised as to whether testator's grandchildren, the children of the predeceased child, could assert rights under the statute. In the surrogate's court the decision was against the grandchildren on two grounds: First, since the statute is intended to reinforce the parent's obligation to support his minor children, upon their death "the parent is necessarily relieved of the obligation of support, and the necessity for the protection afforded by the statute no longer exists". Second, the after-born child, to come within the language of the statute, must survive the testator.[41] The Court of Appeals, however, unanimously reversed, rejecting the idea that the statute was to be so geared to the parent's obligation of support. It said:

> "All the statutory conditions under which the statute must be applied exist in this case. Three children were born after the making of the will. None were provided for or in any way mentioned in the will, and the testator died leaving them unprovided for by any settlement. The statute does not in express terms provide that the after-born child must survive in order to share in the distribution of the estate by representation, and we find no reason why such a condition should be read into the statute by implication."[42]

38. *Matter of Tomacelli-Filomarino*, 189 Misc. 410, 73 N. Y. S. 2d 297 (Surr. Ct. 1947).

39. The only other case dealing with this question does so without specifically recognizing the problem, but nonetheless seems to apply the principle unconsciously. In *Matter of Cencevizky*, 137 N. Y. S. 2d 90 (Surr. Ct. 1954), the Surrogate, after holding a foreign divorce void, held that the testator's after-born child by his second, but invalid marriage, had no rights under §26 although unmentioned and unprovided for. When the divorce was held void, the child by the second marriage in effect became illegitimate and thus the case is one where an illegitimate child has no rights against its father's estate. In general, other states have taken the same approach to illegitimate children, holding that they can recover from the estate of a parent from whom, in an intestacy, they could inherit. See Annots., "Illegitimate child as within contemplation of statute regarding rights of child pretermitted by will," 142 A. L. R. 1447 (1943); and "Illegitimacy as affecting revocation of will by subsequent birth of child," 18 A. L. R. 91 (1922).

40. 264 N. Y. 236, 190 N. E. 475 (1934).

41. 148 Misc. 160, 161, 266 N. Y. Supp. 507, 508 (Surr. Ct. 1933), *aff'd mem.*, 240 App. Div. 982, 268 N. Y. Supp. 865 (2d Dep't 1933).

42. 264 N. Y. 236, 238, 190 N. E. 475, 476 (1934).

The court also considered that its decision was necessary to fully realize for grandchildren the right of representation "at least in the absence of clear expression to the contrary by the testator or by the Legislature."[43]

It seems clear that the decisions extending the scope of the term "a child born" in the statute, were based upon independent policies which, although they may not have gone into the making of the statute, reflect the social desire to protect children and encourage some equality of treatment for them. In the case of the adopted child, to put him in the position of a natural child; in the case of the illegitimate child, to give him the full protection the legislature declared to be forthcoming from the mother; and in the case of grandchildren, to reinforce the equality tendency behind the right of representation. In one instance, however, there was no independent policy on which the court could rely and it was there faced with a constructional problem purely within the terms of the statute; that is, whether a child already conceived at the time the will was made, but born afterwards, was intended to be protected by the statute. The argument was made that since the mother was pregnant at the time she or the father makes the will, it cannot be presumed that this later born child was not considered at the time the will was made. This argument was, however, rejected in *Udell v. Stearns*[44] and a child so born was held entitled to take under the statute despite the fact it was *en ventre sa mere* at the time the testator made his will. The court stated that the only methods of rebutting the presumption of inadvertent omission raised by the statute were those provided in the statute itself—mention or provision in the will or by settlement. And this principle was extended in *McCrum v. McCrum*[45] to the case of a pregnant woman who made her will within a few days of the delivery of the child, in the face of a trial court finding that the testatrix did in fact intend to cut off the approaching child.[46] Although this case may

43. *Matter of Horst, supra* at 239, 190 N. E. at 476. However, it should be noted, that the grandchildren take subject to their parent being barred under the statute by a mention or provision in the will. *Matter of Abell,* 154 Misc. 250, 276 N. Y. Supp. 776 (Surr. Ct. 1935)—grandchildren of deceased child barred by mention of children as a class; the decision does not, interestingly enough, refer to the *Horst* case. There does not seem to be any discernable pattern in the treatment of grandchildren under these statutes in other states. A few statutes expressly include "the issue of a deceased child" or "the descendants of a child" but the absence of such provision does not necessarily preclude the grandchildren. For a comprehensive discussion of the problems on these points, see Comment, *Statutory Rights of Pretermitted Grandchildren,* 44 YALE L. J. 841 (1935).

44. 125 App. Div. 196, 109 N. Y. Supp. 407 (2d Dep't 1908). The testator's wife was eight months pregnant at the time he made his will.

45. 141 App. Div. 83, 125 N. Y. Supp. 717 (2d Dep't 1910).

46. See also *Matter of Yates, supra,* note 31, where child already conceived at time of will was born after testator's death, held within the statute. In the following cases, the courts considered the after-born child, *en ventre sa mere* at the time of the will, as within the statute's protection, although the statute was held to be avoided by mention or provision for the child: *McLean v. McLean,* 207 N. Y. 365 101 N. E. 178 (1913); *Matter of Mitchell,* 144 Misc. 262, 258 N. Y. Supp. 440 (Surr. Ct. 1932); *Matter of Collister,* 147 Misc. 257, 263 N. Y. Supp. 536 (Surr. Ct. 1933); and *Matter of Von Finkenstein,* 179 Misc. 375, 39 N. Y. S. 2d 108 (Surr. Ct. 1943). In the last case, the testatrix made her will while in the hospital during confinement on the same day but just prior to delivery.

seem to reflect the court's desire to prevent the disinheritance of a child even in the face of a common sense inference that such a testatrix could not have "overlooked" such a child, it is more likely based upon the judicial reluctance to open the inquiry as to testamentary intent to extrinsic evidence. If, by a literal reading of the word "born", the court is broadening the protection of the statute to include a child who was likely contemplated by the testator, it is at the same time narrowing the statute's protection by foreclosing the question of whether a particular mention or provision in the will is, in the light of family circumstances, sufficient to indicate that testator considered the possibility of future children. As a practical matter—as appears in the next section—this has worked to avoid the statute's operation in most cases that have come up.

2. *Mention or provision in a will to avoid the statute's operation*

Even if a court were to view the statute as a technique for protecting children from being left destitute, or of enforcing a certain equality among children, it is clear that the statute does not provide a broad enough field of reference to allow it to accomplish such an end reasonably. For the court does not know, nor does the statute direct inquiry to, whether a child has other means of support, or what provision has been made for the other children of the testator who were living when he made his will. And even if the court views the statute—as it has—as preservative of testamentary intent, it is equally clear that no realistic inferences of intent can be made unless consideration is given to the whole family situation of the testator, at the time he made his will and at his death, and to his scheme of disposition. The statute does not open the inquiry this far, since the right of the after-born child is determined by a legislative presumption that is a substitute for any realistic inference of fact the court might make. For example: If a testator with three living children left his entire estate to his wife and failed to mention or provide for later born children, the common sense inference is that he intended his wife to take his whole estate despite the possible birth of a fourth child. And yet under the statute the fourth child (assuming no settlement has been made upon him) would take under the statute against his own mother, in preference to his siblings, and contrary to testator's probable intent. On the other hand, the statute might work in perfect consonance with the common sense inference as to the testator's intent. If the testator, in the above example, left one-third of his estate to his wife and divided the rest of his estate among his three children by name, we could likely conclude that he would have intended his after-born child to share equally with the other children and the statute carries out this intention. Between these two cases are any number of possible dispositive schemes which would raise differing inferences depending on the family situation. But since the statute does not direct inquiry to the family situation, the courts find that, not only can't they enforce the family duties directly, but they can't do so

indirectly either by carrying out the probable intent of the testator. In the face of this, we find the courts at times importing the social factor by secretly looking over the family situation and guiding itself accordingly in applying the statute.

The first case to deal with the meaning of "neither provided for, nor in any way mentioned in such will" was *Wormser v. Croce.*[47] There a testator with one living child left his entire estate to his wife, expressing "full confidence in [her] discretion and justice", after having recited in the exordium clause:

> ". . . . mindful of the uncertainty of life and being desirous of making a just distribution of my property among the members of my family . . ."

The testator had two after-born children, but the court held that they were "mentioned" in the exordium clause within the term "family" and thus barred from taking. It analyzed the statute as follows:

> "If, therefore, it can be seen or reasonably presumed from the terms of the will itself that the testator had in mind the probability that children might be born after the will was made, and provided with that contingency in mind, the statute will be satisfied and the will sustained. We think it apparent that [testator] made his will with a view to the possibility that there might be after-born children, and that in a legal sense he must be considered as having mentioned them in his will. It is as if he had said: 'Because I have full confidence in the discretion and justice of my wife, I leave all my estate to her to the end that there may be secured a just distribution of my property among the members of my family.' He knew, of course, that his will would become effective only upon his death, and it was a just distribution at that time which he wished to ensure. The word 'family,' which the testator uses to designate those to whom distribution is to be made, includes, by every definition, children. Hence the meaning and effect of his will was to give the property to his wife to ensure its just distribution at his death among those who should then constitute his family; that is, the children then surviving, whether born before or after the execution of the will."[48]

The court, it should be noted, limited its inquiry to "the terms of the will itself", and assumed that the mention or provision need not be dispositive nor adequate for the care of the after-born children. The language of the will was rather exceptional, however, since it spelled out so clearly the testator's mental processes.[49] But when the holding of this case is applied to the more usual cases, difficulty arises as to how illuminating the terms of the will alone can be.

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47. *Op. cit. supra,* note 27.
48. *Id.,* at 290.
49. There might, however, be a question of whether a mention in an exordium clause, which is most of the time *pro forma,* is alone a sound basis for inferring that a testator contemplated future issue; especially if the clause is a printed one.

The next case dealing with this language of the statute—*Stachelberg v. Stachelberg*[50] —represents such a difficulty. Testator who then had no children left his entire estate to his wife, but if she predecease him then "to lawful issue her surviving". The testator was survived by his wife who gave birth to a posthumous child who, it was claimed, was mentioned within the term "issue" as used in the will. Certainly if the court followed the approach of the *Wormser* case, it would conclude that since he had no children at the time he made his will, the reference to issue must indicate an awareness of the possibility of children born thereafter, especially where he named as primary beneficiary of the will his wife who could care for any after-born children according to their relative needs. The court, however, rejected this approach and said that it was not free to determine whether the mention was sufficient to raise the inference that the testator considered future children when he made his will, but was limited to determining only whether or not such after-born child as claimed under the statute was "mentioned". It rather casuistically illustrated this distinction as follows: If a testator without children "provided that at his death his property should go to his sons, it would clearly appear he contemplated the possibility he might have children; but it would be equally clear that any daughters he might have, born after the making of the will, would be in no way mentioned." Which is another way of saying that, despite the object of the statute to carry out a presumed testamentary intent, the statute allows only a limited number of ways the statutory presumption of inadvertence can be rebutted. The holding in the case was that the child *could* take under the statute; since the class "issue her surviving" was deemed to include only issue living at testator's death and not born posthumously,[51] the child was held not "mentioned" within the meaning of the statute. The court's approach here limits its inquiry in the strictest sense to the terms of the will—determine if the child is within a class that is mentioned, if so it is barred; if not, no matter what the dispositive scheme is, or the family situation, the child can take. On the court's reasoning it would have come to the same result if the testator had a number of children living when he made his will, with the anomolous result that the after-born child would take against his mother and in preference to the other children.

Although the Court of Appeals affirmed the *Stachelberg* case, it did so

50. *Op. cit. supra,* note 31.

51. The case seems wrong on this point, since by virtue of the intestacy law (N. Y. DECEDENT ESTATE LAW, §83(12)) posthumous children "shall take in the same manner as if they had been born in the lifetime of the deceased, and had survived him." Although not a case of intestacy, the construction of the class gift should have been governed by this principle. Certainly if it were a question of whether the child could have taken under a vested gift, the court would have considered him a member of the class of takers. To this extent the case has been quarantined, if not overruled, by the holding in *Holbrook v. Holbrook,* 193 App. Div. 286, 183 N. Y. Supp. 728 (2d Dep't 1920), *aff'd,* 230 N. Y. 600, 130 N. E. 909 (1921), where a testator left a contingent gift to such "lawful issue" as he should leave, and the court held a posthumous child to be mentioned within the term "issue" so as to be barred from taking under the statute.

without opinion. The first time it did speak on this issue, it was faced with a fact situation somewhere between the *Wormser* case and the *Stachelberg* case, and although the result of the case seems justified only in terms of the *Wormser* approach, the court claimed to be applying the rule in the *Stachelberg* case. In *Tavshanjian v. Abbott*,[52] the testator made a codicil leaving a large legacy to a new-born only child, and in the codicil there appeared a proviso for increasing certain gifts on the simultaneous death of testator and his "wife and child or children." Two children born thereafter claimed under the statute and the question was raised as to whether they were mentioned by reference to "children" in the proviso, even though no disposition to them was made or was even dependent on the conditions in the codicil. Since the testator had only one child at the time, it was argued that the use of the term "children" was indicative of his awareness of the possibility of future children. The court did not entirely reject this argument but concluded, after a review of the whole will, that

> "The mention of children is not such as to convey any idea of a purpose not to provide for those who might be born thereafter .... This testator was contemplating the possibility of some disaster terminating the lives of his family simultaneously and it is quite plain that it was not the birth thereafter of children, which was in his mind, nor a provision which was to exclude them from any share of his estate."[53]

This result may be supported only by a look at some of the facts which, under the *Stachelberg* case, could not be considered: (a) At the birth of his first child, the testator made the codicil leaving him a large legacy. (b) The widow was left a gift in lieu of dower and the residue to strangers—a charity. (c) The first child predeceased testator thus leaving only the after-born children surviving. From these facts we see that the court has made a reasonable inference as to what the testator would have wanted and that the result is equitable in social terms—there being no preference of after-born over living children, the estate staying in the family, the widow's share alone being insufficient for her to care for the children in the way testator would have deemed appropriate. These social factors moved the court to say that a contrary result would have left testator's only surviving children "destitute and without provision under a will of a man of large fortune." And yet when the court came to describe what approach it was using, it referred to its previous affirmance (without opinion) of the *Stachelberg* decision, and declared a standard which it had in fact not followed:

> "We have approved of a construction of the statute, that it is not sufficient that the will should show that the testator had in mind the possibility of children born after the making of the will. The child will

52. 200 N. Y. 374, 93 N. E. 978 (1911).
53. *Id.*, at 377-378, 93 N. E. at 978-979.

take, unless it is mentioned in some way, or included in some class that is mentioned."[54]

The result of the *Tavshanjian* case may be considered a happy one, reflecting an awareness of both inferred testamentary intent and social ends, but this standard does not—and did not—encourage other courts to take as broad an approach. For by directing inquiry away from what "the testator had in mind," the court is limited to the job of matching the after-born child to the class mentioned in the will to see if he fits. In fact, this is exactly what happened—no court, since the *Tavshanjian* case, has actually looked into whether the mention or provision in the will is sufficient to indicate an awareness of the possibility of children, but has assumed that any mention at all, in whatever context, indicates such awareness and satisfies the statute.

In *McLean v. McLean*,[55] the Court of Appeals gave final expression to this standard when it viewed the question as merely: Is the after-born child included in a class that is mentioned? In holding that an after-born child, who may have taken a contingent class gift if the conditions of the gift had been satisfied, was "mentioned" within the class so as to bar the child under the statute, the court developed its argument as follows:

> "It is, of course, apparent that the opportunity for individual and specific 'mention' of children to be born in the future is limited and it must be regarded as settled that mention of such children as a class and in terms broad enough to include a specific child is in this respect a sufficient compliance with the statute, and further that this mention may be made in the form of a provision for them. (*Wormser v. Croce,* 120 App. Div. 287; *Stachelberg v. Stachelberg,* 124 App. Div. 232; affirmed, 192 N. Y. 576; *Tavshanjian v. Abbott,* 200 N. Y. 374.)
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> " . . . . . .
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> "While it may not be necessary for the disposition of this case, we are naturally led to consider the other requirement of the statute in the alternative that 'provision' be made for children of subsequent birth, it being urged that a contingent remainder at least does not satisfy the statutory test.
>
> "I think that in the light of the principles underlying the adoption of the statute as they have been recognized in this state, what was said in the cases referred to in holding that the requirement for mention of after-born children is satisfied by a provision for them as a class, naturally if not necessarily leads to the further conclusion that the other and

54. *Id.*, at 377, 93 N. E. at 978-979, quoting from the *Stachelberg* opinion. This passage actually appears in the midst of the previous extract, thus straining considerably the logic of its argument.

55. 207 N. Y. 365, 101 N. E. 178 (1913).

alternative requirement of the statute for provision for such children is satisfied by a will, whereby the testator makes it apparent that he had in mind the possibility of such children, and makes a devise or bequest in their favor, even though such bequest or devise involves some element of uncertainty such as incident, for instance, to a contingent remainder, or of apparent inadequacy.

"In construing the statute we are to study it as a whole, and we are justified in interpreting one of its alternative requirements somewhat by reference to the meaning of the other. Inasmuch as the legislature has permitted a testator to meet the possibility of after-born children by mention or provision, and inasmuch as it has been held that 'mention' may be made through a very general provision, 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."[56]

The development may be observed as follows: In the *Wormser* case, a mere mention was considered sufficient *because* it indicated in its context that testator actually contemplated the possibility of future children and made provision for such event; in the *McLean* case, the court concluded that if a mere mention in a non-dispositive clause was sufficient, certainly a mention in a dispositive provision must be sufficient, without looking into the *because*. Thus the term "provided for" in the statute lost all reference to actual provision for the child's care, it being comprehended within the term "mentioned". Although the *McLean* case holding is reasonable in terms of the testatrix' probable intent, she having had no children at the time she made her will and having referred to "my issue", the application of its principles have been rather formalistic, with the courts disregarding the question of intent, and taking for granted that any mention of a class which might include the after-born child is sufficient, by force of the statute, to rebut the presumption of inadvertant pretermission.

Since the *McLean* case, the surrogate's courts have consistently followed it whenever faced with a contingent gift to a class of which the after-born child was a member, and have always found the child mentioned and therefore barred under the statute.[57] Similarly, they have followed the same principle in dealing with cases of mere mention, in line with the *Wormser* case, and with one exception found the child mentioned and therefore barred, without looking into the

56. *Id,* at 372-373, 101 N. E. at 179-180.

57. *Matter of Jones,* 134 Misc. 26, 234 N. Y. Supp. 316 (Surr. Ct. 1929), contingent class gift to "descendants"; *Matter of Land,* 160 Misc. 780, 290 N. Y. Supp. 637 (Surr. Ct. 1936), to "my children who shall survive me"; *Matter of Donaldson,* 165 Misc. 661, 1 N. Y. S. 2d 371 (Surr. Ct. 1938), to "my issue me surviving"; *Matter of Feuermann,* 47 N. Y. S. 2d 738 (Surr. Ct. 1944), to "descendants"; *Matter of Keech,* 73 N. Y. S. 2d 231 (Surr. Ct. 1947), to "my children"; and *Matter of Shea,* 94 N. Y. S. 2d 65 (Surr. Ct. 1949), to "my children". A dictum in an early case, *Minot v. Minot,* 17 App. Div. 521, 45 N. Y. Supp. 554 (1st Dep't 1897), to the effect that a contingent gift which did not vest in the after-born child would not be a sufficient provision in the will to bar the child, was rejected in the *McLean* opinion, and has not been referred to since.

question of intent.[58] It might be said that to whatever extent the courts have extended the coverage of the statute by a broad construction of the term "child", they have narrowed the protection by finding a mention that will avoid the statute in almost every case. However, this would be a misleading statement without a look at the facts of the cases coming before the surrogates: in every one of the cases following the *Wormser* decision, the testator left all, or substantially all, his estate to his spouse who, being the parent of the after-born child, would likely care for such child; in every case following the *McLean* decision, where the facts of the family situation appear, the spouse was the primary beneficiary of the estate. Thus the surrogates may not be said to have ignored the social purpose of the statute. The language of the will was generally clear in indicating a contemplation of future children. But more important, the dispositive schemes being quite "natural", the probable testamentary intent may be considered coterminous with the family duty. Thus, the surrogates were secure that the results

58. *Matter of Dick,* 117 Misc. 635, 191 N. Y. Supp. 762 (Surr. Ct. 1922), language used in the will being "In the event of my leaving *legitimate issue,* I annul this entire will . . . and devise to my wife my entire estate"—testator had no children living at time he made his will; *Matter of Brown,* 133 Misc. 457, 233 N. Y. Supp 145 (Surr. Ct. 1929), "confidence and faith that my wife will do everything for our son, or *any children that may be born to us*"—one child living at time of will; *Matter of Mitchell,* 144 Misc. 262, 258 N. Y. Supp. 440 (Surr. Ct. 1932), "If there be *any issues surviving me,* [my wife] will amply care and provide for them"—one child living at time of will; *Matter of Callister,* 147 Misc. 257, 263 N. Y. Supp. 536 (Surr. Ct. 1933), "I make no provision for *any issue that may survive me* as I feel confident that my beloved wife . . ."—no child living at time of will; *Matter of Dooling,* 158 Misc. 333, 285 N. Y. Supp. 603 (Surr. Ct. 1936), "having full confidence in my beloved wife to take the necessary care of and make provision for *our children,* I have omitted to make any specific bequests to them"—seven children living at time of will; *Matter of Dawson,* 192 Misc. 783, 82 N. Y. S. 2d 453 (Surr. Ct. 1948), "notwithstanding that I may have *children hereafter born to me*"—one child living at time of will; *Matter of Meng,* 201 Misc. 589, 110 N. Y. S. 2d 263 (Surr. Ct. 1952), "notwithstanding any *children which may be hereafter born to us*"—no child living at time of will; *Matter of Green,* 125 N. Y. S. 2d 278 (Surr. Ct. 1953), "knowing that [my wife] will properly and at all times care and maintain *our children*"—no facts as to living children; *Matter of Kreutz,* 49 N. Y. S. 2d 402 (Surr. Ct. 1944), "I hereby nominate my wife . . . as guardian of the person and of the estate of any of *my children* who may not have become of legal age at the date of my decease"—one child living at time of will. (The class in which the after-born child was deemed mentioned is italicized in each case.) The one exception to this line of cases following the *Wormser* decision is *Crocker v. Mulligan,* 154 App. Div. 711, 139 N. Y. Supp. 381 (2d Dep't 1913) where a testator with three living children left his estate to his wife, declaring he had "not mentioned any of our children or given to them any portion of my estate for the reason that I have the fullest confidence in my wife," and the court held that the term "our children" did not include the after-born child, who, therefore, not being mentioned, could take under the statute. The court held this way despite the fact that it acknowledged "it is beyond reason that the father would have denied a gift to any one of his three living daughters and given something to issue that might be born." *Id.,* at 713, 139 N. Y. Supp. at 383. The only possible explanation for the decision is that it was considered on a submitted statement of facts and may have been the result of some family compromise; the opinion is very short and there is no discussion of authority. The language of the *Dooling* case, *supra,* is indistinguishable from this case and is probably sounder law. The *Crocker* case has been distinguished on its language and impliedly rejected in the *Land* and *Callister* cases, as well as the *Dooling* case, *supra.*

reflected testamentary intent without going further than the language of the will. Where, however, the inferred testamentary intent did not so perfectly fit into the social notions of testator's family duties, then the surrogates have had to struggle between the literal reading of the statute, so firmly established by precedent, and an impulse to get socially sound results for the family.

Matter of Mulqueen[59] represents such a case. There a testator with three living children left the principal part of his estate to his wife, with an alternative gift if she predecease him "to my children equally," providing for a division of the gift into thirds and later in the will naming the three living children. The wife having survived the testator, the three living children took nothing. An after-born child was allowed to take under the statute on the ground that it was not mentioned within the term "children" since the will itself had, in effect, described the class as bein limited to the three living children. The court realized the inequity of the result, and that it was probably contrary to what the testator would have wanted, but felt that it had to apply the rule of the *McLean* case. It could not, it said, accept a "construction of expediency" for, it pointed out, if the wife had not survived, the after-born child would surely take under the statute.[60] It could not, it felt, gear the results to an inquiry into what testator would have desired, but had to content itself with determining whether he "mentioned" the child within the meaning of the statute.

A more difficult problem, and one which focuses the court's temptation to seek acceptable social results within the strict application of the statute, occurs when the testator has married twice and has two sets of children. In *Matter of Freisinger,*[61] a testator with one living child left his entire estate to his wife, but if she predecease him or die in a common disaster, then "to those children only who survive me." He later divorced his wife, remarried, had two after-born children by his second wife, and died. If we were to consider whether a reference to "children" by a man with one child indicates a contemplation of future children, we might answer in the affirmative and bar the after-born children as having been mentioned. And similarly we could hold that the after-born children came within the strict terms of the class "mentioned" and were thus barred. However, the court, perhaps out of a desire to reach some fair result in terms of the two families, construed the class of "children" in the will as being limited to children of the first wife, thus concluding that the after-born children of the second mar-

59. 213 App. Div. 637, 211 N. Y. Supp. 228 (1st Dep't 1925), *aff'd mem.*, 241 N. Y. 583, 150 N. E. 564 (1925).

60. *Id.*, at 642, 211 N. Y. Supp. at 233. Accord: *Matter of Leonard*, 73 N. Y. S. 2d 770 (Surr. Ct. 1947).

61. 263 App. Div. 970, 33 N. Y. S. 2d 196 (2d Dep't 1942), *aff'd mem.*, 289 N. Y. 697, 45 N. E. 2d 456 (1942).

riage were not "mentioned" and could therefore take under the statute.[62] The results are very neat, and cannot be questioned on social grounds: the second wife would take one-third of the estate by election, the two after-born children would take their intestate shares under the statute, or two-ninths each, and the remaining two-ninths would be left to the first wife which would benefit her child.

When we compare this case to a similar one, *Matter of Niles*,[63] we can see how far the courts' concern for results has moved them in cases where there is not a normal family situation. A testator had three children by a first marriage and made a will after his divorce and while as yet not remarried, leaving part of his estate in trust for his first wife for life, remainder "to such issue of mine who may be then living." Thereafter, he remarried, his second marriage was annulled, and after the decree of annulment the second wife gave birth to a child which was found to be the child of the testator. It would seem more reasonable here, than in the *Freisinger* case, to hold that the class of "issue" mentioned in the will referred only to issue of the first wife, since the class was to take after a life estate in the first wife, and the testator had more than one child living at the time he made his will. But such a holding would allow the after-born child by the second wife to take against the will, which would prefer him to children of the first marriage. The court held that the child of the second marriage *was* included in the class of issue mentioned in the will and therefore barred from taking under the statute.[64] But under this holding, the child shared in the gift made in the will, the result being that all children were treated equally.[65] Probably, if the limitation in the will was a contingent gift which failed, the court would have held the after-born child outside the class and so eligible to take, not under the will, but under the statute. So long, it seems, as the courts cannot look directly at the family situation or testator's scheme of disposition they will be

62. Although this does not appear in the Memorandum opinions in either the Appellate Division or the Court of Appeals, apparently heavy weight was placed upon the fact that in another clause of the will the testator states why he is not leaving anything to his then living only child, declaring that he reposes confidence in his wife to care for "our children." By taking the construction of "our children" from this clause, which clearly relates to the children of that marriage, and applying it to the dispositive clause, the Court concluded the dispositive clause included only children of that first marriage. (See *Record on Appeal*, p. 40, 5722 CASES & POINTS). In the argument, however, it is suggested that the Appellate Division had accepted the position that the children of the second marriage could have shared in the alternative gift, if the first wife had predeceased the testator. But this seems doubtful under the holding.

63. 199 Misc. 335, 99 N. Y. S. 2d 238 (Surr. Ct. 1950).

64. The cases may be reconciled if we avoid the question of "mention" and go back to the original notion behind the statute. We can say that the *Freisinger* testator was not contemplating the possibility of future children by any other wife but his present one, and that the *Niles* testator, being at the time of his will unmarried, was contemplating the possibility of future children by another future wife. In the arguments before the Court of Appeals, this position was taken in the *Freisinger* case. *Op. cit. supra*, note 62.

65. This result was not, however, an easy one to reach. The children of the

(Footnote continued on following page.)

forced to do so indirectly if they are to come to such socially desirable results as we presume a testator would have intended.[66]

3. *Provision by way of settlement as avoiding the statute's operation*

The meaning of the language of the statute as to mention or provision in the will was construed and settled, as above discussed, before the courts determined the nature of the "settlement" the statute contemplated. If the meaning of the term "settlement" had been placed before the courts without these precedents, the courts might have taken the view that a settlement effective under the statute was one that would actually support the after-born child. But as it was, once it was determined that a testator's provision for the child in the will need not be vested, certain or adequate, it seemed unnecessary if not unreasonable to require that the settlement be vested, certain or adequate either.[67] Where cases arose under the "settlement" language, the surrogates applied the principles of the *McLean* and *Wormser* cases directly to any transaction outside a will whereby property was or might be transferred to an after-born child. What the nature of the settlement had to be, was not articulated, but from the cases it was clear that the court looked upon the transaction pretty much the way they did the will. If the after-born child was "mentioned" in any way, usually within a class of

(Footnote continued from preceding page.)
first marriage took the position that testator, who had secured an uncontested Nevada divorce, had never been legally divorced from the first wife, and that therefore the after-born child was illegitimate and could neither take under the statute nor share in the gift made in the will or in intestate property. Once barring him under the statute, the court, to find the child legitimate, had to hold as follows: although the children of the first marriage could collaterally attack the foreign divorce decree, they had not sustained the burden of proving a jurisdictional defect; although the after-born child was born 291 days after the annulment, and the average normal period of gestation was 280 days, the court would recognize some reasonable leeway in upholding the legitimacy of the issue of the marriage. This latter argument was also colored by the fact that there was evidence that the testator had cohabited with the second wife after the interlocutory decree and even after the final decree. Despite the obviousness of the court's struggle to protect the after-born child, this is not an example of a defect in the judicial process; rather of a certain strength. For, in dealing with what is a patently abnormal situation, the normal judicial activity must be accommodating if it is not to be unjust.

66. The results the testator would have intended had he the knowledge the court has before it is, of course, different from the results that would flow from construing the language of the will as, it is decided, he intended at the time he executed the will. The problem, as has been commented upon rather often, is that the testator probably had no intent at all relating to the matter in issue, and perhaps none as relates to the application of particular words to circumstances he had not contemplated. See generally, Part II (note 96, *infra*).

67. However, it was established that the settlement had to be made by the parent-testator to be effective, and the court could not consider outside sources of income for the after-born child which may have been established by other members of the family. (*Matter of Bostwick*, 78 Misc. 695, 140 N. Y. Supp. 588 (Surr. Ct. 1912) where remainder in a trust created by father of testator, after a life estate in the testator, held to be no settlement). To this extent, the courts recognized the settlement as a reflection of the testator's intent to cure his oversight.

possible beneficiaries, the transaction was deemed a sufficient settlement although he did not in fact enjoy any benefit. The settlement might take the form of insurance,[68] Totten trusts,[69] or an inter vivos trust.[70] It might be made before the will was executed,[71] or afterwards;[72] before the after-born child was born,[73] or afterwards;[74] and whether it was in fact enjoyed or not.[75] As in the cases involving mention in the will, it should be noted that in *every* case where the facts appear,[76] the testator left all his estate to his spouse, whether or not there were living children; and, in the relative treatment of living children and after-born children, generally provided by settlement for the living children in the same manner as he did for the after-born. Thus it can be seen, the results in barring the after-born child from taking under the statute, are sound from both the point of view of probable testamentary intent and social ends.

This long line of surrogate's decisions was deviated from in only one case,

68. In *Matter of Brant,* 121 Misc. 102, 201 N. Y. Supp. 60 (Surr. Ct. 1923); *Matter of Froeb,* 143 Misc. 660, 257 N. Y. Supp. 851 (Surr. Ct. 1931); *Matter of Hagendorn,* 41 N. Y. S. 2d 491 (Surr. Ct. 1943); *Matter of Kraston,* 58 N. Y. S. 2d 364 (Surr. Ct. 1945); and *Matter of Stone,* 200 Misc. 639, 107 N. Y. S. 2d 775 (Surr. Ct. 1951) each of the testators, after the birth of the after-born child, took out insurance which was payable to such child absolutely. In *Matter of Kreutz,* 49 N. Y. S. 2d 402 (Surr. Ct. 1944), the testator, after the birth of the after-born child, named all his children contingent beneficiaries under an insurance settlement agreement. In *Matter of Backer,* 148 Misc. 318, 266 N. Y. Supp. 47 (Surr. Ct. 1933); *Matter of Kirk,* 80 N. Y. S. 2d 378 (Surr. Ct. 1948); and *Matter of Schwabacher,* 202 Misc. 15, 114 N. Y. S. 2d 157 (Surr. Ct. 1952), each of the testators, before he had made his will, had named "children" as beneficiaries of insurance. In the *Schwabacher* case, the children had a contingent interest which apparently failed, and so they took nothing under the settlement.

69. In *Matter of Curry,* 21 N. Y. S. 2d 544 (Surr. Ct. 1940), and *Matter of Hartman,* 55 N. Y. S. 2d 791 (Surr. Ct. 1945), the testator, after the birth or adoption of the child, made Totten trust deposits naming the child as the beneficiary.

70. In *Matter of Von Finkenstein,* 179 Misc. 375, 39 N. Y. S. 2d 108 (Surr. Ct. 1943), the testatrix, after the birth of the after-born child, entered into a supplemental agreement amending a trust which had been previously established by her mother, whereby a vested remainder in the trust was created for the after-born child. Because of the holding in the *Bostwick* case, *supra,* note 67, that the settlement to be effective under the statute had to come from the parent, the court dealt with this case as if the testarix (the parent) was the effective source of the property because, without the supplemntal agreeement, no property could have vested in the child. Although they did not characterize it as such, the use of the supplemental agreement appeared to be the exercise of an implied power of appointment.

71. *Backer, Kirk,* and *Schwabacher* cases, *supra,* note 68.

72. *Brant, Froeb, Hagendorn, Kraston, Stone* and *Kreutz* cases, *supra,* note 68.

73. Cases cited *supra,* note 71.

74. Cases cited *supra,* note 72.

75. No benefit was enjoyed in the *Schwabacher* case, *supra,* note 68. Also, in the *Kreutz* case, *supra,* note 68, the children's interest in the insurance settlement was subject to being divested by the spouse who survived and who had the right to invade the principal proceeds. In all the other cases cited, the after-born child took a vested interest under the settlement.

76. Only in the *Kirk* and *Schwabacher* cases, *supra,* note 68, are the facts as to the disposition in the will missing from the opinion. In the *Froeb* case, *supra,* note 68, testator left a nominal gift of $100 to an only living child.

Matter of Stern,[77] which, on the basis of a special reading of the history of the statute, held that the "settlement" contemplated by the legislature was one which was made prior to or contemporaneously with the will, and in a formal document such as an ante-nuptial agreement which expressly made provision for the future children.[78] Such an approach, it was maintained, was the only way to prevent what was in effect a partial revocation of a will by extrinsic non-testamentary evidence. This position was rejected by most of the surrogates,[79] it being pointed out that the proof of the settlement was of such independent legal significance as to be consonant with the general principles of the statute of wills;[80] and, as to the requirement that the settlement be made prior to or contemporaneous with the will, it was noted that "it was unlikely that a person who fails to contemplate the possibility of future issue in his formal testament will have remembered them in a settlement made before the will and before they exist."[81]

Whatever doubt was cast by the *Stern* decision on the practice of the surrogates of applying the *McLean* and *Wormser* principles, was put to rest by the

77. 189 Misc. 639, 56 N. Y. S. 2d 631 (Surr. Ct. 1945). The testator had made a will while his wife was pregnant leaving all his estate to his wife; after the birth of a daughter he purchased for her $1200 in government bonds, and died four months later. The gross estate was $37,000. The Surrogate held that the bonds were not a settlement but only "the natural expression of parental joy on the part of the deceased over the birth of his daughter." *Id.*, at 650, 56 N. Y. S. 2d at 640.

78. The case relies heavily on the view that the word "settlement" as used in §26 is intended to mean the same thing as a "settlement" under §35, N. Y. DECEDENT ESTATE LAW, which provides for a revocation of the will if there is a subsequent marriage and birth of issue, "unless provision shall have been made for them by some settlement." (See note 25, *supra.*) This language, deriving from the original statute, was amended (L. 1932, c. 459) by changing the word "settlement" to read "ante-nuptial agreement." Contrary to the view taken in this case, this might indicate that the word "settlement" as used in the original §35, and as continued to be used in §26, was something distinct from an ante-nuptial type agreement; especially since the word "settlement" in the original §35 was used to qualify "issue" and was not intended to protect the wife who then had her dower rights. (REV. STAT. of 1830, Part II, c. VI, Title I, §43).

79. Surrogate Delehanty had previously accepted the majority view, at least in dictum, in the *Backer* case, *supra,* note 68. Although Judge Fuld in the majority opinion in the *Faber* case, *infra,* note 82, cites the *Backer* case as a previous inconsistent position held by Surrogate Delehanty, the decision in that case is not on the facts inconsistent with the *Stern* decision. (See court's footnote 2, 305 N. Y. 200, 205, 111 N. E. 2d 883, 886 (1953)). Surrogate Collins was the only surrogate to follow the *Stern* decision; *Matter of Robinson,* 188 Misc. 720, 66 N. Y. S. 2d 705 (Surr. Ct. 1946) and *Matter of Kirk,* 191 Misc. 473, 80 N. Y. S. 2d 387 (Surr. Ct. 1948), although the latter case was decided on another point; see *supra,* note 68. Interestingly enough, in the *Kirk* case, the Surrogate held that a contingent provision made prior to the will was a good settlement, but, on the basis of the *Stern* decision, that vested settlements made after the will were not good.

80. *Matter of Stone,* 200 Misc. 639, 641, 107 N. Y. S. 2d 775, 777 (Surr. Ct. 1951). See also, *Matter of Kraston, supra,* note 68.

81. *Matter of Stone, supra,* note 80.

Court of Appeals in *Matter of Faber*,[82] which expressly rejected the reasoning of the *Stern* case, approved the practice of the surrogates as a proper one, and articulated this practice into a standard for the future guidance of the surrogates. The court in considering what the legislature meant by the term "settlement", adverted to the purpose of the statute, thus:

> "Its sole objective was to assure that, if *through oversight,* they were neglected in the will, other provision would be made for them. The Legislature did not choose, and has not chosen to specify the character or content of the essential 'settlement' or to prescribe any definite yardstick for determining whether one has been effected. Accordingly, it is the fact situation in each case that must be considered and appraised, with a view to determining whether the parent intended a given out-of-will provision to serve the purpose of a 'settlement' under section 26. The touchstone is intent, and no court can decree in advance the essential factors upon which a particular testator's intention may be predicated. Such factors as the character and size of the provision for the after-born child, the circumstances under which it was made, the value of the entire estate and, as here, the nature of the provision made for another child, may undoubtedly serve as signposts to the testator's intention."[83]

The court concluded, citing with approval earlier decisions by the surrogate's courts: (1) "The 'settlement' may be effected at any time; it need not be made before or contemporaneously with the execution of the will." (2) "It need not assume any particular form . . ." (3) "It need not be an irrevocable interest, forever placed beyond the control or dominion of the testator . . . and it may, indeed be contingent, payable upon the child's surviving someone other than the testator."[84]

82. 305 N. Y. 200, 111 N. E. 2d 883 (1953). A five to two decision, the majority opinion being written by Fuld, J. The dissenters in the Court of Appeals based their arguments to some extent on the approach of the *Stern* case, taking the position that (1) the settlement should be by some formally executed document, (2) should give the child an absolute rather than contingent interest, and (3) that there be "weighty evidence inside or outside the writing" that the testator intended it as a settlement to provide for the child after his death. *Id.*, at 208-9. They did not go so far as the *Stern* case to require the settlement be made prior to or contemporaneous with the will. On this point, it was apparently recognized that a "settlement" made before the will would be as extrinsic to the will as one made thereafter; what the dissenters wanted of this extrinsic "settlement" were some formal assurances which would substitute for a will or codicil. But, of course, the recent policies inducing judicial or legislative recognition of Totten trusts, survivorship bonds, pension rights, and other conventional modes of transferring property on death, as valid outside the statute of wills, apply as well in this situation, and the majority seemed to assume this. See note 9, *supra.*

83. 305 N. Y. at 203-4, 111 N. E. 2d at 885.

84. *Id.*, at 204-5, 111 N. E. 2d at 885-6. The Court also argued, in rejecting the *Stern* case's reading of the legislative history, that when the legislature revised the Decedent Estate Laws in 1930-32 it retained the term "any settlement" in §26, while changing the language of §35 from "some settlement" to "an ante-nuptial agreement," thus not only giving tacit legislative approval to the judicial interpretation of the statute up to that time, but indicating that it meant something different from ante-nuptial agreement when it used the term "settlement." See *supra,* note 78.

This decision, however, raises a logical problem. How, it might be asked, can some act taking place *after* testator made his will reflect on his state of mind at the time he made the will? How can the subsequent act be a guide in determining whether the testator was aware of the possibility of future children when he made his will? Although this question was not expressed, it seems to have been implied by the *Stern* opinion. One answer might be that the later settlement indicates that, at the time of making the will, the testator had in mind a plan to provide for after-born children by way of such settlement. The reply to this would be: if the testator was at all aware, at the time of making his will, of the possibility of future children he probably would have mentioned them in the will.[85] The solution would appear to be in the view taken by the *Faber* case, and the preponderance of authority in the surrogate's courts, that the statute itself is intended not only to cure an oversight itself by giving an inadvertently omitted child his intestate share,but also to allow the testator himself to cure his oversight by acting after the will was made, in such a manner that his intention need no longer be presumed, since it is expressed. It has been pointed out that the holding in the *Stern* case "renders the statute practically meaningless."[86] Under it, once a will had omitted to mention after-born issue, nothing but a new will or a codicil to the will could avoid the statute, and the phrase as to "settlement" could therefore be practically dropped from the statute. More important: how can a testator before he has children reasonably provide for them? In what manner? What amounts? It would seem that the standard laid down by the *Faber* case is a sound one, and especially so in that it returns to "intent" as the critical element. It is a standard which goes much beyond what had been the practise of the surrogates in following the *McLean* and *Wormser* cases, for it opens up the inquiry into family factors which could not be considered when the issue was mention or provision in the will.

However, the application of this standard in the *Faber* case itself raised serious problems, which may lead us to doubt that it is as flexible as it seems. At the time he made his will, the testator in the *Faber* case had one living daughter, Adell, and he left his entire estate in trust for his wife for life, remainder to Adell. Thereafter, another daughter, Sandra, was born, and the following transactions took place: The testator purchased a life insurance policy payable to Sandra, and later changed the beneficiaries of several life insurance policies, including the one payable to Sandra, making both daughters equal beneficiaries. Did these acts constitute a "settlement" that would bar the after-born child from

85. See text *supra* at note 81.

86. Wheeler, J. in dissent in *Faber* case, when in the Appellate Division. 280 App. Div. 394, 398, 114 N. Y. S. 2d 119, 123 (4th Dep't 1952). The whole court in the Appellate Division rejected the *Stern* case and accepted the standard which was then current and was later articulated in the Court of Appeals. Two of five appellate justices, however, in applying the standard, felt that the testator had not intended to make a settlement on the after-born child. See discussion in text, *infra*.

taking under the statute? On the basis of the standard set down, the Court of Appeals[87] and three justices of the Appellate Division answered: yes, since—as they viewed it—the testator's acts reflected an intent to cure the testamentary oversight. But two justices in the Appellate Division dissented,[88] and by applying the same standard concluded that the testator's acts did not indicate an intent to make provision for the after-born daughter by settlement, nor cure the testamentary oversight. The argument of the dissenters runs as follows: The value of the estate was $110,000 and the insurance $34,000; by providing equally for his two daughters to take the insurance, the testator could not—when the contents of his will are considered—be thought to have intended such "an unnatural . . . discrimination" between his daughters as that the after-born should take $17,000 in insurance and nothing from the estate while the other child took $17,000 in insurance plus a remainder interest in the $110,000 estate. The argument of the majority, that the statute was not intended to assure equality of distribution among children, was answered by the dissenters that they were not "unaware of such a principle," but they were considering the value of the respective shares not to assure equality but only "as one of the pertinent circumstances" to be considered in determining the testator's intent.[89] And as a caution, it would seem, against the automatic applications of a rule, as in the cases following the *McLean* decision, the dissenters said: "To arbitrarily assert that every gift of proceeds of an insurance policy is, in every instance, a settlement which precludes the after-born child from participation in the estate of its deceased parent strips the statute of all sense and justice."[90]

However, even if we were to accept the interpretation of the dissenters, we would have a result which is perhaps as out of line with what can be inferred of testator's intent as the one they object to; that is, the after-born child would take an intestate share of the testator's estate absolutely while the other child would take only a remainder after the life estate in the wife. The nearest we can come to what the testator would have intended, had he been aware of the possibility of future children when he made his will, is that he would have wanted both children to share the remainder after the life estate in the wife. But of course that might bring us into the whole fruitless area of argument as to whether the testator by not changing his will meant to prefer the named child over the after-born, or whether this failure to change the will was also a result of inadvertance, or whether the testator may be presumed to know what result would come about if he did not change his will, etc. The issue is insoluble in these terms mainly because the statute, in giving the after-born child his intestate share

87. The two dissenters in the Court of Appeals did not accept the standard laid down by the majority. See note 82, *supra*.

88. The two dissenters in the Appellate Division did accept the standard laid down by the majority. See note 86, *supra*. Referred to hereinafter as "the dissenters".

89. *Id.*, at 399-400, 114 N. Y. S. 2d at 124-125.

90. *Id.*, at 399, 114 N. Y. S. 2d at 124.

or nothing, cannot be accomodated to any realistic inferences of testamentary intent—inferences based upon the will and the family situation, putting aside any other extrinsic evidence of intent, which might reasonably be kept out on the same grounds we keep it out in construing wills generally. Even taking the will and family situation alone, the statute might in its operation fit the testamentary intent or not, depending on rather arbitrary facts.[91] This is true mainly because the basis for the statute is only half sound. It may be reasonable to presume that a testator who left an after-born child unprovided for would, if aware of this contingency, have provided for him, but it is not reasonable to presume that he would have left the child his intestate share.[92]

It may be said that despite the liberal standard set down in the *Faber* case,[93] the court cannot really make sensible inferences when they have available to it such an inflexible remedy: the after-born child takes his intestate share or nothing. The court becomes a kind of Procrustes who is allowed to make a free and real inquiry into whether the claimant fits the statute, but once it decides must use the ax or the rack. Another element which, no doubt, must plague a court making such an inquiry, is what the remedy does to the testamentary scheme. By giving the after-born child his intestate share absolutely we must seriously impair any scheme of trusts the testator may have set up. If the dissenters had prevailed in the *Faber* case, the after-born child would have taken her intestate share out of the trust set up for her mother, although it is clear that testator intended his wife to enjoy the benefit of the whole estate during her life,[94] and his children to enjoy only a remainder. Implicit in the testator's scheme, as in many of the cases we have

91. If a testator left everything to his wife, but if she predecease him then to an only named child, the statute would carry out the intent of the testator, or run contrary to it, depending on whether the wife survives him. If the wife predeceases him, then an after-born child under the statute, by taking his intestate share, would divide the estate with the child named in the will—and the presumed intent of the testator would be carried out. If, on the other hand, the wife survives the testator, the child named in the will takes nothing, and the after-born child takes an intestate share—a result that is impossible to justify in terms of intent. By giving the after-born child an intestate share in all events where the statute operates, it often works contrary to testator's probable intent and usually results in an unnatural preference being given after-born children over children living when the will was made. This is discussed in detail in Part II of the article. See note 96, *infra.*

92. Since we have no reasonable basis for presuming that testator would have provided for the after-born child with an intestate share, or its equal, the statute cannot be completely rationalized in terms of carrying out testamentary intent. Perhaps, to this extent, the statute's social end must be rationalized in positivistic terms: If a testator does not indicate in some prescribed manner that he considered his future children, the law deals with it as if he had not properly expressed his intent in the first place—such as if he had failed to execute his will according to the statute of wills— and his property is distributed as if there were an intestacy. This viewpoint is expressed in the quote from the *McLean* case, *supra,* at note 28.

93. One point the *Faber* case has not resolved, although it has illuminated, is whether an outright gift to an after-born child may be considered a settlement. The *Faber* case seems to assume the "character" of the settlement as,

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seen, is that a testator is making provision for his spouse to some extent out of the faith he reposes in the spouse to care for their children. And of course the testator's approach is a sound one, for he realizes that his surviving spouse will be better able to appraise and satisfy the needs of their respective children in the light of later circumstances which he could not possibly foresee. To the extent that the surviving spouse is obligated by statute to support and care for their minor children, the testator may be thought to be legally as well as morally justified in reposing this confidence in her.

A system of testamentary freedom presupposes that by letting each testator express his individaul intent with respect to his property we provide a fair mode for carrying out family obligations with some flexibility. But in the light of the incongruities between the testator's probable intent and the operation of a statute such as we have been dealing with, we are forced to ask whether such a statute can operate successfully at all. Although the *Faber* case very sensibly sets a broad area into which the court can inquire, thus showing a greater awareness of the social factors subsumed within the statute,[95] the results will not realistically reflect the testator's intent or an equitable adjustment of family interests so long as the remedy of the statute has no relation to that intent. This

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in some way, relating to the death of the testator. A case prior to the *Faber* case, *Matter of Griffin*, 159 Misc. 12, 287 N. Y. Supp. 514 (Surr. Ct. 1936), considered the question of whether $7.13 placed in a piggy bank for an after-adopted child by the testator, and later put into a Totten trust for the child by the testator's wife, was a settlement. Although the common sense answer seems obvious, the court felt rather strained in the face of the precedents that inadequacy of the settlement did not matter. It held it was not a settlement on the ground that the context of the transaction indicated that testator's acts were intended to teach the child thrift, rather than provide for the child. Presumably under the *Faber* decision, a court would not be constrained to find some other motive for the testator's acts in order to hold that such a gift was no settlement. Some questions relating to gifts, however, may still be open: Is an outright gift of a large amount presumed to be a "settlement", as it is an advancement in the case of an intestacy? Is a gift of such a nature that we can call it a "settlement" at all?—it doesn't, by its own terms, look toward the testator's death as do insurance, Totten trusts, or survivorship interests. If a gift is not considered a settlement to bar the child under the statute, will it be considered an advancement which he must bring into hotchpot for the purpose of computing his share as "if [his] parent had died intestate"? On a similar point, as to whether a child taking under the statute can bring in advancements made to other children for the purpose of computing his intestate share, there is a conflict of authority. A New York court, in an early case, held that he can, *Sanford v. Sanford*, 61 Barb. 293 (Sup. Ct. 1872); the majority and better view is that he cannot, *Gibson v. Johnson*, 331 Mo. 1198, 56 S. W. 2d 783, 88 A. L. R. 369 (1932) and 3 WOERNER, AMERICAN LAW OF ADMINISTRATION 1935 (3d ed. 1923).

94. The life estate happened also to be defeasible on her remarriage. In face of this, might it not be argued that so long as she remained a widow, and presumably caring for their children, the testator intended her to enjoy the life interest undiminished by any share going to an after-born child?

95. In general, since the *Faber* case, the opinions of the surrogates have articulated and given greater weight to those "signposts" suggested in the *Faber* opinion. *Matter of Harmetz*, 204 Misc. 942, 126 N. Y. S. 2d 268 (Surr. Ct. 1953)

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will be increasingly true as the courts must face more and more cases of "abnormal" family situations. Thus the question—Can the statute be made to work in consonance with a testator's probable intent?—must be answered by asking another, perhaps more fundamental, question: Shall we look to what the testator intended when he did or did not use certain language in his will, or to what the testator would have intended now, had he been aware of his family situation at his death? The second part of this article will be directed to these problems, and to whether we can solve them within a system of testamentary freedom or must, on the other hand, face directly the alternative of giving up this system in large measures and adopting some Civil Law approach or some method of testator's dependents' relief.[96]

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Totten trusts and jointly owned savings bonds for named after-born children; *Matter of Sorenson,* 205 Misc. 26, 128 N. Y. S. 2d 837 (Surr. Ct. 1954) Totten trusts for named after-born child; *Matter of Anderson,* 205 Misc. 151, 131 N. Y. S. 2d 163 (Surr. Ct. 1954) savings bonds payable on death to after-born child; *Matter of Smith,* 1 Misc. 2d 451, 147 N. Y. S. 2d 706 (Surr. Ct. 1955) insurance contingently payable to children as a class; and *Matter of Swenson,* 151 N. Y. S. 2d 206 (Surr. Ct. 1956) insurance contingently payable to one after-born child, absolutely payable to another. In all the foregoing cases, the acts were held to be "settlements"; as in the other cases, the spouse was generally the primary beneficiary and the after-born child was treated pretty much the way the children living at the time of the will were. In the *Sorenson* case, four living children who each took $2,500 legacies were, to that extent, preferred over the after-born child who took nothing under the will and received a settlement similar to that received by the living children; but, of course, this result did less harm to the testamentary scheme than if the after-born child were allowed to take under the statute.

96. Part II of this article will appear in the first issue of 7 BUFFALO L. REV.