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Decedent Estates—Settlement for After-born Children

Robert Manuele

with foreign countries, and as such it must fall as unconstitutional.[22] But it has been held that each state possesses the power to control the manner in which property within its own jurisdiction passes by last will and testament.[23] Along with this power the state may direct how both the procedure for the probate of the will and the process of administration is effectuated.[24] Actually the executive freezing order could be terminated without altering the conditions for which § 269 was enacted; for there would still be no guarantee that the distributee would receive the bequest and this uncertainty would frustrate New York's attempt to safe guard the testatrix's desires to protect the legatee's property.[25] Furthermore, the court overlooked the possibility of Executive Order No. 8389 which provides that such funds may be in the alternative deposited "in a blocked account or *with a public officer, agency, or instrumentality designated by a court having jurisdiction of the estate.*"[26] This could have well been interpreted as giving the state courts the express power to direct where the money should be deposited. Thus the question of constitutionality might have been avoided.

Settlement For After-born Children

The Court of Appeals has finally in a 5 to 2 opinion settled the question of what constitutes a settlement for an after-born child not provided for in the last will and testament of his parent. The holding of In re *Faber's Estate*[27] was that a settlement is dependent upon the intent of the testator and the facts of the individual case. In the instant case the testator left a net estate of $54,000 in trust for his wife and father with a weekly amount to be paid to both of them, and in the case that the wife's weekly amount was not sufficient, then additional amounts of any size were to be made from the principal. The principal was to go to the older child upon the death of the testator's father's and wife's deaths. The only other child, after-born, was the co-beneficiary, with her sister, of insurance policies which amounted to $14,500 for each child. The executors brought an action to determine if the amount of insurance policies constituted a settlement for the after-born child. The court found that they did constitute a settlement.

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22. U. S. CONST. Art. I, § 8.
23. *Mager v. Grima*, 8 How. 490 (U. S. 1850); see also *Rocca v. Thompson*, 223 U. S. 317 (1912).
24. *Lyeth v. Hoey*, 305 U. S. 188 (1938).
25. *Matter of Weidberg*, 172 Misc. 524, 15 N. Y. S. 2d 252 (Surr. Ct. 1939).
26. See note 18 *supra* [italics added].
27. 305 N. Y. 200, 111 N. E. 2d 883 (1953).

In New York it has been held that parenthood in itself constituted a revocation of any existing will in so far as the after-born child is concerned,[28] following the English rule that even the intent of the testator that his will should not be revoked is insufficient to override the presumed revocation.[29] However, other New York courts have decided cases in accordance with and in opposition to the English rule.[30] By the instant case the law of New York is held to be contra to the English doctrine.

Although the gift given in settlement must be absolute, it can be made contingent on the testator's life.[31] It is also required that the settlement be in written form.[32] Thus an insurance policy on the life of the testator can be a proper settlement.

The court reasons in the present case that if they were to award the after-born child her intestate share, then there would be a disappropriate division of the estate. The after-born child would receive a total of $32,000 while her sister would only receive $14,500 with only an expectancy of receiving the corpus of the trust which the court said would practically be naught, in the light of the unlimited power given to the trustee to give to the testator's wife any amount that she might need above her weekly payments. The money payable out of the insurance policies was then held to constitute a settlement and would provide for the child's education and maintenance in the future in the same manner as a child who would have been born at the time of the making of the will.

While the majority opinion appears to be equitable in its results, it does not set up a clear standard for future litigation. Judge Desmond in his dissent attempts to set up a standard that could be excellent if applied in moderation. The three principles that he sets up are: first, that a gift or transfer to constitute a settlement should be made in writing; second, that it should be absolute and not contingent; and third, that there be weighty evi-

28. *Matter of Del Genovese's Will,* 169 App. Div. 140, 154 N. Y. Supp. 806 (2d Dep't 1915).

29. *Marston v. Roe* and *Roe v. Marston,* 112 Eng. Rep. 742 (1838), "And we all concur in the opinion that the revocation of a will takes place in consequence of a rule or principle of law, independently altogether of any question of intention of the party (testator) himself, and consequently that no such evidence (as to his intent) is admissible".

30. In re *Kennedy's Will,* 167 N. Y. 163, 60 N. E. 442 (1901); In re *Stern's Estate,* 189 Misc. 639, 56 N. Y. S. 2d 631 (Surr. Ct. 1945). *Contra: Matter of Stone's Will,* 200 Misc. 639, 107 N. Y. S. 2d 775 (Surr. Ct. 1951); *Matter of Froeb's Estate,* 143 Misc. 660, 257 N. Y. Supp. 851 (Surr. Ct. 1931).

31. *Matter of Backer's Will,* 148 Misc. 318, 266 N. Y. Supp. 47 (Surr. Ct. 1933); *Matter of Froeb's Estate, supra* note 34; *Matter of Kirk's Estate,* 191 Misc. 473, 80 N. Y. S. 2d 378 (Surr. Ct. 1948).

32. *Matter of Snopek's Estate,* 249 App. Div. 369, 292 N. Y. Supp. 359, *aff'd,* 275 N. Y. 606, 11 N. E. 2d 778 (1937).

dence, inside or outside the writing, that it is intended to be a settlement by which his child would be provided for after his death. The first two requirements are concurred in by the majority. It was only with his third requirement that they differed. Judge Desmond's application was too strict and in cases such as the instant one the results would prove inequitable. His term "weighty evidence" should include the surrounding circumstances so that testator's intent may be shown by the relationship of the amount of his estate and the amount given to each legatee under the will. Only in this manner will it be possible to avoid the injustice of providing the after-born child with a sum out of proportion to that received by the other children living at the time of the execution of the will. This inequitable result surely would not be the intent of a testator.

Substitution of Executor for Testator

In *Humbeutel v. Humbeutel*,[33] the testator, who had been the plaintiff in the action, had recovered a judgment from her son directing him to pay over to her certain amounts of cash and securities in his possession. After the testator's death, her executor moved to amend the final judgment requiring the son to deliver the cash and securities to the executor. The *nunc pro tunc* amendment made to substitute the executor for the testator was held valid by the Court of Appeals.

There should be no reason, in the light that the executor is the continuing personality of the testator[34] and that a judgment may be amended to conform to the actual state of facts,[35] that a court should not be justified in allowing the amendment *nunc pro tunc* so that the executor can settle the estate of the deceased in the most expedient manner possible. There would be little reason in holding that the executor must establish his right to possession of the property when the right of the deceased has been already established and he is that person in the eyes of the law.

33. 305 N. Y. 159, 111 N. E. 2d 429 (1953).

34. C. P. A. § 84, "In the case of the death of a sole plaintiff or a sole defendant, if the cause of action survives or continues, the court, upon a motion, must allow or compel the action to be continued by or against his representative or successor in interest"; see also § 557 (3), "Where the adverse party has died since the making of the order or the rendering of the judgment appealed from or where the judgment appealed from was rendered after his death, in a case prescribed by law, an appeal may be taken as if he were living, but it cannot be heard until the heir, devisee, executor or administrator, as the case requires, has been substituted."

35. *Herpe v. Herpe*, 225 N. Y. 323, 122 N. E. 204 (1919); followed in *Core v. Hoffman*, 256 N. Y. 254, 176 N. E. 383 (1931); see also, C. P. A. § 105.