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Necessary Testamentary Provision for After-Born Children

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IV. RELATION TO THE PATIENT.

Assuming that the holding that the relation of the physician and nurse is that of master and servant,[25] it does not follow that because the doctor or master is personally liable for the negligence of the nurse or servant that the nurse it not also personally liable. The contrary is the law, and it is a general rule that a servant is personally liable for injuries resulting from his negligence.[26]

The degree of care and skill required of physicians and surgeons is not the highest possible, but only that which is reasonable and ordinary, and in determining the standard of care and skill which the law requires, the state of scientific knowledge at the time must be considered.[27] Nurses should be liable to no higher degree of care than physicians or surgeons. The same standard of care would seem to be applicable relative to the duties of a nurse toward the patient, as those of a physician toward the patient.

NICHOLAS UNKOVIC.

NECESSARY TESTAMENTARY PROVISION FOR AFTER-BORN CHILDREN

Section 21 of the Wills Act as amended,[1] provides as follows "When any person, male or female, shall make a last will and testament, and afterward shall marry, or shall have a child or children, either by birth or by adoption, not provided for in such will, and shall die leaving a surviving spouse and such child or children, or either a surviving spouse or such child or children, although such child or children be born after the death of their father, every such

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[25]Supra, note 21.

[26]7 Labatt's Master & Servant sec. 2580 et. seq.

[27]Wohlert v. Seibert, 23 Pa. Super. Ct. 213 (1903); Howard v. Grover, 28 Me. 97, 48 Am. Dec. 478 (1848); 29 Yale L. J. 684, 5; Barnard v. Schell, 85 Pa. Super. Ct. 329 (1924); 48 C. J. 1113.

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[1]1921, P. L. 937, Sec. 1.

person so far as shall regard the surviving spouse, or children born or adopted after the making of the will, shall be deemed and construed to die intestate; and such surviving spouse, child or children shall be entitled to such purparts, shares and dividends of the estate, real and personal, of the deceased, as if such testator had actually died without any will."

There is no doubt under this section that where a testator makes a will, and afterwards has a child or children not contemplated, nor provided for by him, in such will, that as to such child or children, the testator will be deemed to have died intestate. Nor is it doubted that when an actual provision is made for after-born children by the testator, that such after-born children will take according to the will and not according to the intestate law. The pertinent question to be discussed herein is, where a testator makes a will, and, in anticipation of after-born children, provides that such children are to be disinherited, will the courts in such a case carry out the intention of the testator and disinherit the children or will the courts disregard such intention and permit such children to inherit as if the testator had died intestate.

The case of *McIlvain's Estate,*[2] discusses this specific question. In that case one Biddle gave all his estate to his wife absolutely, providing further, that the devise to the wife would take effect notwithstanding the birth of any children born later. He said that it was his intention to disinherit all after-born children. Four children survived, two of whom were born after the execution of the will. The court held that the will failed as far as these two children were concerned. As to them he died intestate.

It is true that a will, which, as here, expresses an intention to disinherit after-born children certainly is not making a provision for them. It does exactly the opposite. It is also true that the statute makes no requirement that the child shall be fully or equally provided for therein. All that it does require is that the testator shall have the child

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[2] 2 D. & C. 501 (1922).

in mind and shall make clear his intention that there is some actual provision made for it. But such a construction of the act is clearly contrary to the theory upon which such statutes were founded. This theory is that the unborn child was not in the contemplation of the testator when he made his will and that, if it had been, he would have changed its provisions. As is shown by the historical retrospect of the development of the testamentary power in England, the basis of the rule as to revocation of wills by the subsequent marriage and birth of children to the testator is the latter's implied intention as to his disposition of his property under such a change of circumstances.[3] In other words, if the circumstances of the testator's family are materially changed after the execution of his will, his will ceases to represent his testamentary intention, and is, therefore, to be considered as revoked pro tanto. The evil designed to be remedied is the unintentional disherism by the testator of a child who has a natural moral claim to recognition.

Irrespective however, of the intention of the testator and the theory upon which this section was passed, the courts have invariably decided that the words of the statute must be strictly construed. By doing so they have avoided many evils which might otherwise have arisen.

The subject can be more clearly discussed by an historical survey of this section of the Wills Act. Under the common law which we inherited from England, the subsequent birth of a child did not revoke a will previously made, nor, indeed, did the subsequent marriage of the testator, but the marriage *and* the birth of the child conjointly had that effect. These circumstances produced such a total change in the testator's situation as to lead to a presumption that he could not intend his previous testamentary disposition to remain unchanged.

This English common law rule was altered, however,

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[3]Newlin's Estate, 209 Pa. 456, (1904); Coates v. Hughes, 3 Binn. 498, (1878).

in Pennsylvania, by the Act of Feb. 4, 1748-9,[4] which provided that when a testator should afterward marry or have a child or children "not named in any such will", the testator should, so far as regards such child or children, be deemed to die intestate, etc. By the Act of March 23, 1764,[5] there were substituted for the words "not named in any such will", the words, "not provided for in any such will", and this Act was substantially re-enacted by the Acts of April 10, 1794,[6] and April 8, 1833,[7] and June 7, 1917,[8] which continue this language. The earlier Act of 1748-9, therefore, revoked the will where an after-born child was not "named in the will", which means, so far as a non-existent child can be named, there must be something to show that the testator had in mind the possibility of its birth. This was changed by the later acts, as has been seen, and our courts have judiciously held that the amount of such provision must be left to the discretion of the testator, otherwise the contests that would arise, if the discretion of the court were substituted for that of the testator, would be interminable.

Thus we have seen that the inconveniences resulting from the state of the common law, produced this section of the Wills Act and that under the common law, marriage alone and birth of children alone were not sufficient to operate as a revocation of a will previously made and that however strongly the courts favored such children, they could not set aside a solemn will because no provision was made for these children. The legislature by the Act of 1748 pursued a more equitable system and one better calculated to carry into execution what might be supposed reasonably to be the dictates of an honest mind. "So far as shall regard the widow, or child or children after-born, the testator shall be deemed and construed to die intestate." So forcibly were the lawmakers struck with the

[4] 5 St. at. L. 64, Section 5.
[5] 3 Sm. Laws 160, Sect. 4.
[6] 3 Sm. Laws 152, Sect. 23.
[7] Sect. 15, P. L. 251.
[8] Sect. 21, P. L. 403.

propriety of this provision that they gave it retrospective operation as to all wills made from and after the fourth day of February, 1748.[9]

Our present Act is a positive statutory enactment which can neither be refuted by parol testimony, outside of the will, nor by any language in the will raising a presumption that he did not intend to provide for such after-born child. It is proper to give this effect to the well weighed words of our Act concerning a provision for a child, whose interests may be sacrificed to a mere stranger, by giving a forced meaning to this plain and clear language.[10]

In *McIlvain's Estate,*[11] the intention of the testator was indeed plain enough, and the after-born children, being named in the will, would have been excluded under the old law prior to the act of 1764, but under the present statute, requiring a provision to be made for an after-born child, the law was held to be otherwise. If the testator expressly disinherits after-born children, how can he be said to have provided for them? He says in so many words that he makes no provision for them.[12]

Many other cases in this jurisdiction show that the intention of the testator is not enough to satisfy the statute. All hold that there must be some provision made for the children, however slight, its amount and nature being determined by the testator.

A will by a testator, made in anticipation of after-born children, whereby he gave his entire estate to his wife "having utmost confidence in her integrity and belief that should a child be born to us, she will do the utmost to rear it in the honor and glory of its parents", was revoked pro tanto because there was no actual provision made for the child.[13] An estate in remainder or a reversionary interest, whether vested or contingent, was held not to be a

[9]Coates v. Hughes, 3 Binn. 498, (1878).
[10]Walker v. Hall, 34 Pa. 483, (1860).
[11]2 D. & C. 501 (1922).
[12]Smith's Estate, 14 D. & C. 271 (1930).
[13]Walker v. Hall, 34 Pa. 483 (1860).

provision for an after-born child within the spirit of the statute.[14] A will by a testator whereby he gave his entire estate to his wife with a provision, that if he leave any children, he appointed his wife guardian, committing their maintenance, education and future provision to her, adding, "which guardianship I intend and consider to be a suitable and proper provision for such child or children", was held to be clearly no provision for his children such as is contemplated by the Wills Act and the whole policy of the law.[15]

In *Newlin's Estate,*[16] one Newlin gave his trustees one-third of his estate, to pay the income to his wife during the minority of his children, if during the period the wife should remain unmarried, with the remainder to his daughter. A child was expected when the will was made. The court held that the Act of 1833 made no requirement that the child shall be fully provided for. True it is that Mr. Chief Justice Mitchell says that "all that it (the act) does require is that the testator shall have the child in mind and shall make clear his intention that the will shall apply to it." The context shows that the meaning of the expression, "the will shall apply to it" means making some provision for the child. In that case the real question was as to the sufficiency of the provision and it was held that the fact of provision and not the sufficiency thereof was the test. The statute makes no requirement as to adequacy and gives courts no authority over that subject.

In *Randall v. Dunlap,*[17] this interpretation was reiterated. In that case, the children, if any, took only upon condition that the husband failed to survive the wife, and the will stated in terms that the provision, which in fact and effect, turned out to be none at all, as the husband did

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[14]Edward's Appeal, 47 Pa. 114, (1864); Willard's Est. 68 Pa. 327, (1872).

[15]Hollingsworth's Appeal, 51 Pa. 518, (1867); also see Iron's Estate, 13 Pa. Dist. 338, (1904).

[16]Newlin's Estate, 209 Pa. 456 (1904).

[17]218 Pa. 210, (1907).

survive, was intended to cover the case of after-born children.[18]

There appears to be only one case in this jurisdiction which has attempted to carry out the intention of the testator in disinheriting after-born children and thus disregarding the absolute provisions of the Statute.[19] In that case, the testator, anticipating the birth of a child, stated, in a codicil to his will that his wife was the sole heir and that the birth of a child should in no wise disturb the disposition of his estate as directed in his will. The Court was of the opinion that under *Walker v. Hall,*[20] and *Hollingsworth's Estate,*[21] and the other cases referred to, the will must be held to be revoked, but expressed the opinion that *Newlin's Estate,*[22] marked a new road, and held that the will was not revoked.

It is true that the Court in *Newlin's Estate* said that all the statute requires is that the "testator shall have the child in mind and make clear his intention that the will shall apply to it;" but the court went on to say, what is not quoted in *Zug's Estate,* that "any provision which does that is sufficient, and the inquiry whether it be small or large, equal or unequal, vested or contingent, is irrelevant and outside the jurisdiction of the courts, except so far as it tends to throw light upon the question of intention."[23] But where the will not only makes no provision at all for an after-born child but even expressly says that the testator disinherits the child, how can such a will be said to provide for the child in the language of the act of assembly, in which there are significantly used the words, "not provided for", instead of "not named"? *Newlin's Estate* does not go as far as that and could not without overruling the prior cases of *Walker v. Hall* and especially *Hollingsworth's Appeal,* in both of which the intention of the testator clearly

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[18]Conn's Estate, 25 Pa. Dist. 29, (1916).
[19]Zug's Estate, 57 Pitts L. J. 176.
[20]34 Pa. 483, (1860).
[21]51 Pa. 518, (1867).
[22]209 Pa. 456, (1904).
[23]Randall v. Dunlap, 218 Pa. 210, (1922).

appeared to give his entire estate to his wife, even if a child or children should afterward be born, whose possible birth was referred to. As previously said, these cases show that the intention of the testator is not enough to satisfy the statute; there must be some provision made for the children, however slight, its amount and nature being determined by the testator.[24]

CONCLUSION

Although one of the personal rights of an individual, still safeguarded, is the right to dispose of his property by last will as his judgment dictates, it is subject to a few statutes limiting the absolute control of one's estate. For illustration, giving to a widow the right to take against her husband's will and vice versa, and the statute wherein marriage or birth of a child is sufficient to effect a pro tanto revocation of the will previously made. The statute being in derogation of the testator's testamentary right, must be construed according to its terms.[25]

As a result of Section 21 of the present Wills Act two things follow: The after-born child must be provided for, *i. e.,* the mention of the fact that testator has such child in mind is not sufficient; and if any provision is made, its character and amount are of no moment.[26]

Thus an attempt by a testator to absolutely disinherit after-born children will be entirely disregarded but if he makes the slightest provision for such after-born children, this will be deemed sufficient to satisfy the statute.

It is clear therefore, that all our rules in such cases are statutory ones, established by the legislature by which the common law rule has either been repealed or altered or enforced by positive legislative sanction, and therefore is not open to the doctrine of implied presumption.

ALEXANDER DENBO.

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[24]McIlvain's Estate, 2 D. & C. 501, (1922).
[25]Alburger's Estate, No. 1, 274 Pa. 10, (1922).
[26]Conn's Estate, 25 Pa. Dist. 29, (1916).