St. John's Law Review

Volume 28
Number 1 *Volume 28, December 1953, Number 1*

Article 18

Wills--Revocation by After-Born Child--Insurance Policy "Settlement" Within Meaning of Statute (Matter of Faber, 305 N.Y. 200 (1953))

St. John's Law Review

which a reasonable man would infer possible danger. This interpretation of last clear chance is but one step from the majority view—that if an ordinary prudent man would have discovered the danger, regardless of the facts actually known, there is sufficient knowledge to satisfy the requirements of the doctrine. It would seem that the ultimate result of the present trend will be the application, in those cases otherwise within the scope of the doctrine, of a purely objective test of knowledge.

Some will argue that further extensions of the doctrine of last clear chance will culminate in completely obviating the defense of contributory negligence.[22] However, if the doctrine is viewed as a facet of the theory of proximate causation, it automatically limits itself to situations in which the negligence of the plaintiff can be said to be remote.[23] It is submitted that the more liberal application of the last clear chance doctrine in New York reflects a more humane attitude on the part of the courts which is wholly consistent with the present trend toward "plaintiff-mindedness." The courts are obviously attempting to ameliorate the harshness of the defense of contributory negligence by extending the application of the doctrine of last clear chance. This would be rendered to a great degree unnecessary if the doctrine of comparative negligence, which is in itself an ameliorating doctrine,[24] were adopted in this jurisdiction.[25]

WILLS—REVOCATION BY AFTER-BORN CHILD—INSURANCE POLICY "SETTLEMENT" WITHIN MEANING OF STATUTE.—Pursuant to Section 26 of the Decedent Estate Law, plaintiff sought, as an after-born child, to recover her intestate share from her father's estate. Prior to her birth, plaintiff's father executed a will, establishing a trust for her mother and sister but making no mention of, or provision for, plaintiff. Subsequently, he made plaintiff co-beneficiary of several insurance policies. On appeal, the Court *held* that the testator's designation of plaintiff as co-beneficiary of the insurance policies was a settlement under Section 26, precluding her from taking her intestate share as against her father's will. *Matter of Faber,* 305 N. Y. 200, 111 N. E. 2d 883 (1953).

At English common law, a will was presumably revoked by a subsequent marriage and birth of issue.[1] However, mere birth of issue alone, where a marriage existed at the time of the execution of

[22] *See* Panarese v. Union Ry., 261 N. Y. 233, 238, 185 N. E. 84, 86 (1933).
[23] Rider v. Syracuse Rapid Transit Ry., 171 N. Y. 139, 63 N. E. 836 (1902); Nehring v. Connecticut Co., 86 Conn. 109, 84 Atl. 301 (1912).
[24] *See* Steam Dredge No. 1, 134 Fed. 161, 168 (1st Cir. 1904).
[25] See Note, 27 ST. JOHN'S L. REV. 303 (1953).

[1] For a discussion of the common law, see Brush v. Wilkins, 4 Johns. Ch. 506, 510-16 (N. Y. 1820).

the will, never gave rise to the presumption.[2] This rule was adopted by the New York courts [3] and later enacted into law.[4] The civil law, on the other hand, followed a different rule, resting upon the presumed oversight of the parent, whereby the failure to mention or provide for a child worked a nullification of the will.[5] It was this principle of the civil law which the legislature engrafted upon our law in modified form [6] so as to provide for partial revocation to the extent of the after-born child's intestate share.[7] Since the main purpose of the statute was to prevent an oversight and not to regulate distribution,[8] certain acts indicating that the after-born children were not overlooked place the will beyond the operation of the statute.[9] These acts may consist either of mention or provision for the children in the will or provision for them by any settlement *dehors* the will.[10] What constitutes "any settlement" as stated in the statute was the problem before the court in the instant case.

The courts' interpretation of the alternative requirements of "mention or provision in the will" are of great assistance in construing what is required by "any settlement." [11] If the will indicates that the parent had executed it with the possibility of after-born children in mind, the statute is satisfied.[12] Mention may be specific, general [13] or in the form of a general provision.[14] Moreover, the provision need not be vested,[15] certain,[16] or adequate.[17] The courts do not look to the adequacy or to the certainty of the provision but to the testator's intent—was the disinheritance deliberate or inadvertent.[18]

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[2] *Ibid.*

[3] Brush v. Wilkins, *supra* note 1.

[4] 2 N. Y. REV. STAT. pt. 2, c. 6, tit. 1, art. 3, § 43 (1829).

[5] See note 1 *supra;* Wormser v. Croce, 120 App. Div. 287, 289, 104 N. Y. Supp. 1090, 1091 (1st Dep't 1907); Matter of Kraston, 58 N. Y. S. 2d 364, 366 (Surr. Ct. 1945); 1 DAVIDS, NEW YORK LAW OF WILLS § 547 (1923).

[6] *See* McLean v. McLean, 207 N. Y. 365, 371, 101 N. E. 178, 179 (1913); Wormser v. Croce, *supra* note 5.

[7] N. Y. DEC. EST. LAW § 26.

[8] *See* McLean v. McLean, *supra* note 6 at 371-372, 101 N. E. at 179; Matter of Griffin, 159 Misc. 12, 15, 287 N. Y. Supp. 514, 517 (Surr. Ct. 1936).

[9] *Ibid.*

[10] See note 7 *supra.*

[11] *See* McLean v. McLean, 207 N. Y. 365, 373, 101 N. E. 178, 180 (1913); Matter of Froeb, 143 Misc. 660, 663, 257 N. Y. Supp. 851, 855 (Surr. Ct. 1931).

[12] Matter of Dawson, 192 Misc. 783, 82 N. Y. S. 2d 453 (Surr. Ct. 1948); Matter of Callister, 147 Misc. 257, 263 N. Y. Supp. 536 (Surr. Ct. 1933); Matter of Dick, 117 Misc. 635, 191 N. Y. Supp. 762 (Surr. Ct. 1922).

[13] Holbrook v. Holbrook, 193 App. Div. 286, 183 N. Y. Supp. 728 (2d Dep't 1920), *aff'd mem.*, 230 N. Y. 600, 130 N. E. 909 (1921); Wormser v. Croce, 120 App. Div. 287, 104 N. Y. Supp. 1090 (1st Dep't 1907).

[14] *See* McLean v. McLean, *supra* note 11 at 371, 101 N. E. at 179.

[15] Matter of Shea, 94 N. Y. S. 2d 65 (Surr. Ct. 1949); Matter of Keech, 73 N. Y. S. 2d 231 (Surr. Ct. 1947).

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

[17] *Id.* at 373, 101 N. E. at 180.

[18] Tavshanjian v. Abbott, 200 N. Y. 374, 93 N. E. 978 (1911).

The same test was applied in interpreting the meaning of the term "any settlement." [19] Since the statute did not specify any particular form, character or content for the settlement,[20] the court turned to the purpose of the statute for an explanation of the term. The parent is presumed to intend to take care of those to whom he owes an obligation, and the statute gives effect to this presumption by making provision for the after-born child unintentionally forgotten by his parent.[21] If his actions indicate the omission was not unintentional, the presumption is rebutted.[22] Thus the courts reasoned that settlement as used in this statute meant any act by which the testator intends to provide for the child outside of the will.[23]

Intent of the testator is, therefore, the decisive criterion in determining if a particular act is a settlement.[24] Consequently, the courts have refused to limit the settlement to any particular character or form: [25] insurance policies [26] and Totten trusts [27] have been held to meet the requirements of the statute. The settlement need not be such as would be determined by the courts to be adequate,[28] but the adequacy of the settlement is evidentiary in determining the specific intent of the testator.[29] The settlement may be vested or contingent,[30]

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[19] Matter of Froeb, 143 Misc. 660, 257 N. Y. Supp. 851 (Surr. Ct. 1931); Matter of Brant, 121 Misc. 102, 201 N. Y. Supp. 60 (Surr. Ct. 1923).

[20] *See* Matter of Kraston, 58 N. Y. S. 2d 364, 365 (Surr. Ct. 1945); Matter of Kreutz, 49 N. Y. S. 2d 402, 404 (Surr. Ct. 1944); Matter of Froeb, *supra* note 19 at 663, 257 N. Y. Supp. at 855; Matter of Brant, *supra* note 19 at 104, 201 N. Y. Supp. at 61.

[21] *See* Matter of Griffin, 159 Misc. 12, 15, 287 N. Y. Supp. 514, 517-518 (Surr. Ct. 1936).

[22] *Ibid.*

[23] Matter of Curry, 21 N. Y. S. 2d 544 (Surr. Ct. 1940); Matter of Griffin, *supra* note 21; Matter of Froeb, *supra* note 19; Matter of Brant, *supra* note 19.

[24] See note 3 *supra.*

[25] Matter of Kreutz, 49 N. Y. S. 2d 402 (Surr. Ct. 1944) (alternative holding); Matter of Griffin, *supra* note 21; Matter of Froeb, 143 Misc. 660, 257 N. Y. Supp. 851 (Surr. Ct. 1931). *Contra:* Matter of Stern, 189 Misc. 639, 52 N. Y. S. 2d 631 (Surr. Ct. 1945) (settlement must be a written document).

[26] Matter of Schwabacher, 202 Misc. 15, 114 N. Y. S. 2d 157 (Surr. Ct. 1952); Matter of Stone, 200 Misc. 639, 107 N. Y. S. 2d 775 (Surr. Ct. 1951); Matter of Kraston, 58 N. Y. S. 2d 364 (Surr. Ct. 1945); Matter of Kelly, 182 Misc. 481, 44 N. Y. S. 2d 438 (Surr. Ct. 1943) (alternative holding); Matter of Hagendorn, 41 N. Y. S. 2d 491 (Surr. Ct. 1943).

[27] Matter of Hartman, 55 N. Y. S. 2d 791 (Surr. Ct. 1945); Matter of Curry, *supra* note 23.

[28] Matter of Kraston, *supra* note 26; Matter of Kreutz, *supra* note 25; Matter of Griffin, 159 Misc. 12, 287 N. Y. Supp. 514 (Surr. Ct. 1936); Matter of Brant, 121 Misc. 102, 201 N. Y. Supp. 60 (Surr. Ct. 1923).

[29] In construing intent, the court will take into consideration such factors as the nature and size of the provision, the value of the entire estate and its relation to the settlement, the nature and amount of the provisions for other children, and other acts and words of the testator. Matter of Griffin, *supra* note 28 at 15, 287 N. Y. Supp. at 518.

[30] Matter of Schwabacher, *supra* note 26; Matter of Kirk, 191 Misc. 473,

and it may be made before or after the execution of the will.[31] It must, however, be made by the testator.[32]

The court's stress on intent rather than form is the most reasonable construction in view of the phraseology and purpose of the statute. It accomplishes the desired result—repairing the effects of an oversight, avoiding regulation of testamentary provisions, and giving effect to parental intentions. A set form for the settlement would not only tend to control a parent's testamentary distribution of his property but also have a greater likelihood of frustrating the execution of his real intentions.

WORKMEN'S COMPENSATION—EXCLUSIVE STATUTORY REMEDY —RECOVERY FOR PARTIAL SILICOTIC DISABILITY DENIED.—Plaintiffs, partially disabled by silicosis, sued defendant in negligence, charging violation of the New York Labor Law.[1] The Court of Appeals affirmed dismissal of the complaints and *held* that the plaintiffs were barred from maintaining the actions by the provisions of the Workmen's Compensation Law covering total silicotic disability,[2] and that such exclusive remedy[3] was not unconstitutional. *Cifolo v. General Electric Co.*, 305 N. Y. 209, 112 N. E. 2d 197 (1953).

The usual workmen's compensation act has as its objective the protection of the employee against accidents[4] and illnesses arising

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80 N. Y. S. 2d 378 (Surr. Ct. 1948).

[31] See Matter of Stone, 200 Misc. 639, 107 N. Y. S. 2d 775 (Surr. Ct. 1951); Matter of Kraston, 58 N. Y. S. 2d 364 (Surr. Ct. 1945).

[32] Matter of Bostwick, 78 Misc. 695, 140 N. Y. Supp. 588 (Surr. Ct. 1912).

[1] N. Y. LABOR LAW § 200 ("General duty to protect health and safety of employees"); § 299 (ventilation and removal of dust in factories where dust producing machines are in use).

[2] N. Y. WORKMEN'S COMP. LAW § 3(2). "Occupational diseases. Compensation shall be payable for disabilities sustained or death incurred by an employee resulting from the following occupational diseases:

". . .

"28. Silicosis or other dust diseases resulting in total disability or death."

[3] *Id.* § 11. "The liability of an employer . . . shall be exclusive and in place of any other liability whatsoever, to such employee, his personal representatives, husband, parents, dependents or next of kin, or anyone otherwise entitled to recover damages, at common law or otherwise on account of such injury or death. . . ."

[4] *See* Goldberg v. 954 Marcy Corp., 276 N. Y. 313, 317, 12 N. E. 2d 311, 312 (1938); Choctaw County v. Bateman, 252 P. 2d 465, 467 (Okla. 1952). "To constitute an accident within the Workmen's Compensation Act there must be an untoward, unforeseen or unexpected event or series of events causing injury." Matter of Carrie, 254 P. 2d 410, 411 (Idaho 1952).