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Wills--Bequest to Unborn Grandchildren (Matter of Gebhardt, 139 Misc. 775 (Kings Co. 1931))

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A bequest to the lawyer who draws the will is most often viewed with suspicion, and the courts require the lawyer to explain the circumstances and to show that the gift was freely and willingly made.[6] Slight circumstances indicating a testator's susceptibility to attorney-beneficiary's influence would support a finding of undue influence over the testatrix.[7] The burden of coming forward with evidence in these cases is always on the attorney to show that the will expressed the free, untrammeled wishes of the testatrix.[8] In the absence of any explanation a jury may be justified in drawing the inference of undue influence.[9]

R. C. W.

WILLS—BEQUEST TO UNBORN GRANDCHILDREN.—The decedent, after bequeathing two thousand dollars to two specifically named grandchildren, further bequeathed a like sum to each of her "grandchildren who may be born after the making of this will and who may still be living at my death." About seven and one-half months after the death of the testatrix, a granddaughter was born. This action was brought to enforce the infant's right to one of these legacies. *Held,* the granddaughter was "born" and "living" within the meaning of the will and so was entitled to receive one of the legacies. *Matter of Gebhardt,* 139 Misc. 775, 249 N. Y. Supp. 286 (Kings Co. 1931).

Cases in point over a considerable period of time have not limited the word "born" to the strict construction of "delivered" but have held that for the purpose of taking under a devise a child *en ventre sa mere* is deemed born and alive.[1] The child is regarded as a legal entity in many respects. It may sue to recover for the wrongful death of its parent due to the culpable negligence of another.[2] Blackstone says that at no matter how early a stage it may have a guardian appointed, it may take under a marriage settlement; it may have an

[6] Matter of Smith, 95 N. Y. 516 (1884).

[7] Tarr v. Tucker, — Mass. —, 172 N. E. 257 (1930).

[8] *Supra* note 4, at 371, "Such wills, when made to the exclusion of the natural objects of the testator's bounty, are viewed with great suspicion by the law, and some proof should be required beside the *factum* of the will before the will can be sustained."

[9] Matter of Kindberg's Will, 207 N. Y. 220, 228, 100 N. E. 789, 791 (1912).

[1] Heurtt v. Grum, 77 N. J. Eq. 345, 77 Atl. 25 (1910); Quinlen v. Welch, 69 Hun 584, 23 N. Y. Supp. 963 (5th Dept. 1893); Cooper v. Heatherstone, 65 App. Div. 561, 73 N. Y. Supp. 14 (2d Dept. 1901); Matter of Farmers Loan and Trust Co., 82 Misc. 330, 143 N. Y. Supp. 700 (1913); Matter of Voight, 178 App. Div. 751, 764 N. Y. Supp. 1117 (2d Dept. 1918); Matter of McEwan, 202 App. Div. 50, 195 N. Y. Supp. 460 (3d Dept. 1922); Matter of Wells, 129 Misc. 447, 221 N. Y. Supp. 714 (1927); (1908) 21 HARV. L. REV. 360; (1927) 12 ST. LOUIS L. REV. 85.

[2] Quinlen v. Welch, *supra* note 1.

estate limited to its use and take afterwards by such limitation.[3] The criminal law of New York considers an unborn child as *in esse* for the purpose of holding one criminally liable for its death.[4] On the contrary, for injuries arising *ex delicto* it has no right of action.[5]

In the execution of a will the intention of the testator prevails. To this end each of its terms is closely scrutinized. In the above will the deceased wished to place all on an equal standing by providing like legacies for grandchildren who might possibly be born subsequent to the making thereof and living at her death. A child *en ventre sa mere* was within the intention of such a gift because plainly within the reason and motive of the gift.

H. B. S.

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[3] 1 BL. COMM. 130.

[4] N. Y. PENAL LAW §1050.

[5] Dietrich v. Northampton, 138 Mass. 14, 52 Am. Rep. 242 (1884); Drobner v. Peters, 232 N. Y. 220, 133 N. E. 567 (1921); Nugent v. Brooklyn Hts. R. R. Co., 154 App. Div. 667, 139 N. Y. Supp. 367 (2d Dept. 1913).