

10-1-1957

Testamentary Freedom and Social Control—After-Born Children: Part II: Some Basic Problems and Some New Approaches

Saul Touster

University at Buffalo School of Law

Follow this and additional works at: <https://digitalcommons.law.buffalo.edu/buffalolawreview>



Part of the [Estates and Trusts Commons](#)

Recommended Citation

Saul Touster, *Testamentary Freedom and Social Control—After-Born Children: Part II: Some Basic Problems and Some New Approaches*, 7 *Buff. L. Rev.* 47 (1957).

Available at: <https://digitalcommons.law.buffalo.edu/buffalolawreview/vol7/iss1/6>

This Leading Article is brought to you for free and open access by the Law Journals at Digital Commons @ University at Buffalo School of Law. It has been accepted for inclusion in Buffalo Law Review by an authorized editor of Digital Commons @ University at Buffalo School of Law. For more information, please contact lawscholar@buffalo.edu.

TESTAMENTARY FREEDOM AND SOCIAL CONTROL—

AFTER-BORN CHILDREN

By SAUL TOUSTER*

PART II: SOME BASIC PROBLEMS AND SOME NEW APPROACHES

In the first part of this article,⁹⁷ the author reviewed the background of after-born children statutes which provide that a child born to a testator after he makes his will, and who is left unprovided for in the will or by settlement outside the will, can recover its intestate share from testator's estate. It was indicated that, although the significant and articulated reason behind these statutes was to carry out and sustain testamentary intent by curing a mistake upon which the intent was based, the courts have in some measure been moved by the social purpose of protecting children against disinheritance. In a close examination of the judicial experience under the New York statute, the view was expressed that no realistic inferences could be drawn concerning the testator's intent without an inquiry—which most of these statutes prevent—into the family situation at the time the will was made, the dispositive scheme expressed in the will, and the family situation at the time of the testator's death. In determining whether an after-born child has been mentioned or provided for in a testator's will, the New York courts have avoided looking to any such relevant material, deciding the issue only by reference to the language of the will: if the after-born child comes within a class "mentioned" in the will, it is under all circumstances barred from the remedy provided by the statute. Although the Court of Appeals in the *Faber*⁹⁸ case broadened the inquiry to include certain family factors, when determining whether a particular transaction constituted a "settlement" that would bar the after-born child under the statute, the statutory remedy, it was pointed out, made it impossible to achieve results consistent with what might be inferred to be testator's intent or with what might be considered the social or moral claims of the family unit. The after-born child, under these statutes, takes either his intestate share or nothing, depending on whether he is barred by mention or provision in the will or settlement outside the will. It is this either-or operation of the statute which creates some of the basic problems requiring solution.

SOME BASIC PROBLEMS

Two of the anomalies of the statute, in terms of ascertaining testamentary in-

*Associate Professor of Law, University of Buffalo, School of Law. The author was a consultant to the New York Law Revision Commission on a topic embracing material dealt with in this article and as such wrote a study for the Commission which will be published in New York Legislative Document (1957) No. 65 (D) and in the 1957 Report, Recommendations and Studies of the Law Revision Commission. This article is written independently of that study and should not be taken to reflect or represent in any way the views of the Law Revision Commission.

97. 6 BUFFALO L. REV. 251-282 (1957).

tent, have already been discussed in Part I. For present purposes, they can be illustrated by the following case:

A testator with two living children leaves his entire estate to his wife, but if she does not survive him then to these two children by name.⁹⁹ In addition to the two named children, an after-born child survives testator.

The results in this case will be consistent with or defeat probable testamentary intent depending upon the fortuitous fact of whether or not the wife survives the testator. If she survives the testator, the after-born child will take an intestate share under the statute against its mother, to the exclusion of the other two named children, and contrary to any inference that may be drawn concerning testator's probable intent. If, on the other hand, the wife fails to survive the testator, the after-born child will take a statutory share which, under the facts, would result in equal provision for the children—this being in line with what the testator probably intended. If, in this example, the testator by some means outside his will, say by insurance, conferred equal benefits on each of his three children, the issue would turn on whether this bounty provided for and thus barred the after-born child: if the child were barred, the two living children named in the will would secure a preference over the after-born child, if the wife did not survive the testator. For then they would receive not only their extra-testamentary benefits but the entire estate under the will, and the after-born child would be excluded, although the testator by making equal non-testamentary gifts to all three children may be said to have intended a similar equal distribution of his estate.

The technical operation of the statute causes the most inequitable and unnecessarily harmful results by (1) the contrasting treatment of after-born children and children living at the time of the will, and (2) its disruptive impact upon testamentary plans, especially those involving trusts or other limited interests. With respect to the former, consider the following example:

The testator with a living child, A, leaves one-half his estate to his wife, a \$9,000 bequest to a charity, and the remainder to child A. He dies survived by his wife, child A and child X, an after-born child. The net estate is \$90,000.

Under this example, child X, taking his intestate share of the estate as an after-born child under the statute, would receive one-third, or \$30,000. The shares of the wife, the charity and child A would accordingly be reduced to contribute to X's statutory share, so that the wife would receive \$30,000 (\$45,000 reduced

98. 305 N.Y. 200, 111 N.E.2d 883 (1953). See Part I, *supra*, at note 82 *et seq.*

99. Throughout the examples used, the qualification "by name" is added to dispel the notion of a class gift which might be construed as "mentioning" and thereby barring the after-born child under the statute.

TESTAMENTARY FREEDOM AND SOCIAL CONTROL: PART II

by \$15,000), the charity would receive \$6,000 (\$9,000 reduced by \$3,000), and child A would receive \$24,000 (\$36,000 reduced by \$12,000). Without considering the comparative claims of a spouse or strangers, it is clear that the after-born child X by taking an unreduced intestate share is preferred over the living child A whose share under the will must be proportionately reduced by its contribution to X's share.

This example may be generalized into the following startling rules: As a class, after-born children will always be preferred over living children as a class, whenever the testator has made any testamentary provision for persons other than distributees.¹⁰⁰ Living children (child A in our example), will never be on a par with an after-born child, unless the testator leaves his entire estate to those who would take by intestacy—that is, children and spouse. We may state these harsh rules in different terms: Whenever the testator, in his will, leaves his living children as a class less than what would be their intestate shares, or while leaving them the equivalent of their intestate shares makes a testamentary gift to strangers, in either event—probably the vast majority of cases—the after-born children are preferred over those living at the time of the will.

Let us now turn to another contingency which demonstrates the interplay of our statute with the statutory share of the spouse: Suppose a testator provides a statutory minimum for his spouse to prevent her electing against the will, and an after-born child, taking its statutory share, thereby reduces the testamentary provision for the spouse to less than the minimum. It is hardly surprising that the New York courts have held that the spouse may, in these circumstances, elect against the will, to assure herself of her statutory minimum.¹⁰¹ This would not offend the testator's scheme if he had provided for an outright gift since the spouse would be taking the same amount either under the will or by election. Where, however, in the more common case, the testator establishes a marital

100. For more detailed description of this result of the statutes in operation, see Mathews, *Pretermitted Heirs: An Analysis of Statutes*, 29 COLUM. L. REV. 748, 757-760 (1929). The qualification is made here that the after-born children are preferred as a class only; for there may be cases where a living child is preferred although living children as a class are not. For example: A testator with three living children leaves all his estate to one child and dies survived by these three children and an after-born child. The after-born child's intestate share will be one-quarter of the estate, the child named in the will receiving three-quarters of the estate.

101. *Matter of Wurmbrand*, 194 Misc. 203, 86 N.Y.S.2d 705 (Surr. Ct. 1949) *aff'd*, 275 App. Div. 915, 90 N.Y.S.2d 686 (1st Dep't 1949); and *Matter of Vice-domini*, 285 App. Div. 62, 136 N.Y.S.2d 259 (2d Dep't 1954), *modifying* 195 Misc. 1057, 91 N.Y.S.2d 472 (Surr. Ct. 1949). In both cases a childless testator left half of his estate to his spouse and half to collaterals; an after-born child took his intestate share under the statute, or two-thirds of the estate; this reduced the spouse's interest under the will to below one-third and therefore she was held entitled to elect a one-third share against the will. Thus nothing was left to the collaterals who were beneficiaries under the will.

trust, it can be seen how the statute's operation violates the testator's intent as expressed in his will. The following examples¹⁰² will illustrate this:

A testator with living children wants to give his wife the minimum required by law. He therefore leaves by will one-third of his estate in trust for her for life, the remainder of the trust and the balance of the estate to named children and collaterals. He is survived by his wife and children, including an after-born child taking under the statute.

In this case, the after-born child by taking his intestate share, whatever its amount, will reduce the trust for the wife to less than the statutory minimum and thus allow her to take by election one-third the estate absolutely. This will be true, as can be seen, whether or not there are living children. For, so long as the wife's trust must contribute anything to the statutory share of an after-born child, it will fall below the minimum required to prevent an election. In the following example, the disruptive impact of the statute will be even more drastic:

Testator with one living child, to secure the maximum advantages under the Federal estate tax laws, provides in his will for a marital trust for his wife of one-half his estate, leaving the other half in trust for the named living child. He is survived by his wife, the named living child and an after-born child taking under the statute.

Here, by the invasion of the after-born child, the marital trust will be reduced to one-third the estate limiting thereby its tax advantage. And if the marital trust were less than one-half, the resulting invasion would leave the wife with less than one-third, and thus give her a right to elect. When we consider how many testamentary plans are dependent upon trust provisions to fulfill various of the testator's objectives, we can readily visualize how destructively the statute may operate in a particular case.

As has been pointed out previously, the main reason for the statute's failure is that it is only partially sound in terms of presumed intention—although we may presume that a testator would have intended to provide for a pretermitted child, there is no basis to presume he would have given the child its intestate share.¹⁰³ Moreover, it should be apparent that in allowing an after-born child to take against its own parent, i.e., the testator's spouse, the statute runs counter to what is a common practice of testators to leave all or most of their estate to a spouse in the expectation that under this arrangement the children, whether living at the time or after-born, will be cared for. In large measure the basic problems of the statute stem from the "either-or" remedy; but this, in turn, stems from the

102. In the discussion following these examples (as in the previous material), the New York law with respect to a spouse's right of election is assumed. See N.Y. DEC. EST. LAW §§18, 83.

103. See Part I, *supra*, at note 92.

failure of the statute to take into consideration (1) the testator's dispositive scheme as a guide to his intention; or (2) the justifiable confidence reposed in a spouse to care for and provide for their children. How solve these problems of the statute within a system of testamentary freedom? A number of new statutory approaches have been taken which attempt solutions.

THE TEXAS STATUTE

One of the first and most promising approaches was made in Texas by a proviso added in 1931 to its statute. The original Texas statute had two separate provisions, one applicable where the testator at the time he made his will had children living, and the other where no child was living when the will was made.¹⁰⁴ In the former case, the after-born child was entitled to his intestate share; in the latter, where all the children were after-born, the will was deemed revoked unless the after-born child or children died before reaching the age of twenty-one without having married. This conditional limitation was apparently inserted to cover the case of the sole after-born child dying in infancy, a contingency which plainly does not require the complete voiding of the testator's dispositive plan. In general, both statutes operated pretty much the way other statutes did which do not distinguish between a testator who at the time of making his will has living children and one who does not.¹⁰⁵ Recent amendments, however, have added to both statutes the following proviso:

"provided, however, that where a surviving husband or wife is the father or mother of all of testator's children, exclusive of adopted children, and said surviving husband or wife is the principal beneficiary in said testator's last will and testament, to the entire exclusion by silence or otherwise, of all of said testator's children, then and in that event the foregoing provision of this Section shall not apply nor be considered in the construction of said last will and testament."¹⁰⁶

What this proviso does is to acknowledge the social basis of the statute by making a certain kind of inference as to the testator's intent. By denying the statute's remedy where a testator leaves the principal part of his estate to his spouse, the legislature is concluding that this would have been testator's disposition had he considered the possibility of future children; and to the extent that this

104. TEXAS CODE, Arts. 8291, 8292, 8293.

105. For a detailed review of the operation of the statutes in states distinguishing these two family situations, see Mathews, *op. cit. supra*, note 100, pp. 753 *et seq.* Although the statutes distinguish these two situations, no significant difference flows from the fact the testator had, or had not, living children when he made his will. In general, the same types of facts regarding provision for the after-born child can bar the operation of the statute in either event.

106. Added in 1931 to statute covering situation where child living at time of will (TEXAS CODE, Arts. 8291, 8292); added in 1949 where no child living at time of will (*Ibid.*, Art. 8293). Since reenacted, and amended in minor details, in TEXAS PROBATE CODE, §§66 and 67 (1955).

legislative "finding" of the testator's intent may be wrong, the legislature can still rely on the fact that the surviving spouse, being the parent of the after-born children, will care for them appropriately. Of course this inference regarding the testator's intent is a sound one only where he has left the principal part of his estate to a spouse at a time when he had other children; it is less convincing where he had no children. In the latter case, we do not know how he would have treated his children; even so, it must be conceded that the policy of relying upon the usual motivations of a spouse provides an adequate basis for barring the operation of a statute which would seriously upset a testamentary plan. To this extent, the proviso appears to accept somewhat more openly the social objectives of these statutes which, up to now, the legislatures and courts have left unstated.

Although the approach of the Texas proviso is sound, looking as it does to the testator's dispositive scheme as a guide for its application, its operation leaves much to be desired. Where there are both after-born children and children who were living at the time of the will, there seems to be no reason to require that the surviving spouse be the parent of "all of testator's children." It would seem sufficient protection for the after-born child if the surviving spouse receiving the principal part of the estate is the parent merely of such after-born child. But there are more serious objections. Why require for the operation of the proviso, the "entire exclusion . . . of all of said testator's children?" Does a nominal bequest or a keepsake left to a living child make the proviso inoperative?¹⁰⁷ Apparently. But assuming this problem were corrected, there remains an objection to the very core of this approach.

The proviso will operate or not depending upon whether the surviving spouse is found to be "the principal beneficiary" of the testator's estate. If, in a doubtful case, a court holds the spouse to be the *principal* beneficiary, the after-born child takes nothing; if it holds to the contrary, the statute operates and the child takes its intestate share (or the will is conditionally revoked). And yet, to the extent that the testator has left property to a spouse at all, it should normally be considered partly out of consideration for the children of the marriage. Thus, in the usual situation, the "either-or" result, under the proviso, does not conform to testator's intent. There is a second consideration: in view of the grave consequences of its application, the statute puts a high premium on litigating the question of whether the spouse was "the principal beneficiary." The Model Probate Code, which is modelled on the Texas statute, does little to cure this since its proviso depends on whether a testator who had living children left "substan-

107. See Miller, *Changes in the Law of Wills*, in Proceedings, Texas Probate Code Institute, Texas Law School, pp. 24-29 (1955) for a description of the development of the proviso and some critical comments.

tially all his estate to his surviving spouse."¹⁰⁸ The same fateful "either-or" result will follow the eventual judicial determination of whether a spouse was left "substantially all" of testator's estate.

THE PENNSYLVANIA STATUTE

Instead of using the provision for the spouse to qualify the right itself, it would be more in keeping with our inferences as to testamentary intent to use the spouse's provision to qualify the *quantum* of the right. If we assume that the testator intended the spouse's share to be for general family protection, then it would be reasonable to keep that share completely immune from any claim by an after-born child; accordingly if, under certain circumstances, the statute gives the child a right to some of the estate, let him recover this part from legatees other than the surviving spouse who is his parent. Under the Texas and Model statutes, if the surviving spouse takes a large share under the will, but it is something less than the "principal" share, or "substantially all," the after-born child takes under the statute, usually to the real disadvantage of the spouse and in violation of the testamentary scheme. The Pennsylvania Wills Act of 1947 has, to a rather limited extent, recognized this. To protect the surviving spouse's share, it provides that an after-born child taking under its statute

"shall receive out of the testator's property not passing to a surviving spouse, such share as he would have received if the testator had died unmarried and intestate owning only that portion of his estate not passing to a surviving spouse."¹⁰⁹

Under this statute any part of the estate going to the surviving spouse—which, of course, may be less than "substantially all"—will be saved to the spouse. In addition, the provision for the spouse, by not qualifying the right of the after-born child, still leaves him free to recover his statutory share proportionately from legatees other than the spouse. We may note, however, the failure of the statute to require that the surviving spouse be the parent of the after-born child; only in such event, is it safe to assume that the testator is providing indirectly for the child. Subject to this reservation, the Pennsylvania statute seems preferable to

108. Section 41 (a) of the MODEL PROBATE CODE reads as follows:

"When a testator fails to provide in his will for any of his children born or adopted after the making of his last will, such child, whether born before or after the testator's death, shall receive a share in the estate of the testator equal in value to that which he would have received if the testator had died intestate, unless it appears from the will that such omission was intentional, or unless when the will was executed the testator had one or more children known to him to be living and devised substantially all his estate to his surviving spouse."

Printed in Simes and Basye, *Problems in Probate Law*, Michigan Legal Studies, (1946).

109. PA. STAT. ANN. (Purdon) tit. 20, §180.7 (4) (1950).

the Texas or Model statutes, being as it is more consistent with probable testamentary intent.

None of these statutes, however, attempts to cure the inequitable treatment of children living when the will was made—their interests under the will must always contribute to make up the after-born child's intestate share. We may illustrate the resulting inequities by an example arising under the Pennsylvania statute. Suppose a testator left one-half of his estate to his wife, and divided the remaining one-half between an only child and a charity. An after-born child would, under the statute, be entitled to his intestate share (one-half) of the part not passing to the surviving spouse; and this share would be made up from the shares going to the living child and the charity. Again, to the extent that a non-distributee has an interest under the will, the statute discriminates against the living child in favor of the after-born child.

THE SOUTH CAROLINA STATUTE

The statute of South Carolina not only attempts to assure equality in the treatment of living and after-born children, it also uses the testamentary provisions for living children as a guide to determine how the testator would have treated after-born children. Under the provisions of the South Carolina statute the unprovided-for after-born child

"shall be entitled to an equal share of all real and personal estates given to any other child or children, who shall contribute to make up such share or shares according to their respective interests passing to them under such will."¹¹⁰

To a limited degree, this statute represents a step forward in its use of a realistic guide to the testator's probable treatment of his after-born child. However, by making the statute operative only where there are living children who receive gifts, it refuses intervention in the situation which presents the most urgent demand for social protection, i.e., where *all* the children are after-born, the testator having made his will when no children were living. But if we put this objection aside and observe only how the statute works when there are living children, we must conclude that the statute operates equitably depending upon rather arbitrary features of the will. If the living children are left interests determined by percentages of the estate, then the after-born child's equal sharing in these benefits will probably be consonant with the testator's intent. Thus, where a testator leaves half of his estate to two named children, it may be thought that he assigned this half of his estate to his children's collective interest and that, had he contemplated the future child, he would have included that child

110. S. C. CODE §§19-235,-236 (1952).

within such a gift. Where, however, the provisions made for the living children are stated in monetary amounts, the spreading of these gifts among the legatee-children and the after-born child are likely to violate the testator's probable intent. For example: a testator leaves \$15,000 to an only living child and there are two after-born children; under the statute each child will receive \$5,000, which is not very close to testator's intention. Moreover, whenever strangers take as legatees, there is no reason to allow their shares under the will to remain immune while the living children alone bear the burden of contributing to the after-born child's share. To this extent, the South Carolina statute seems to deal less equitably with the family unit than the conventional statute.

THE PROBLEM OF COMPLEX WILLS

One of the problems implicit in the South Carolina statute is that the after-born child's "equal share" in gifts left to the living children becomes surprisingly *unequal* under the normal complexities of will dispositions. How, under this statute, do we deal with a testator, with three living children, who disinherits child A, leaves a small bequest to child B, and a large bequest to child C? The after-born child X will come in to share the bequests—but in what proportions? Since there are four children, he probably will take one-quarter from the bequests to B and C. It is not likely that he would be permitted to take half of each—for then he would not be sharing equally, but would in fact be preferred. And yet, how close can this result be said to be to testator's probable intent? Suppose further that the gift to child B was a life estate defeasible upon marriage, or a trust in which the principal vests upon reaching certain ages or upon marriage. How does child X share in this gift? Under what conditions? It would probably be said that the testator would have intended a similarly conditioned gift for the after-born child. But can this be a reasonable inference when testator has disinherited child A and given a large outright gift to child C? We are obviously faced with problems of motivation which, under our system of inheritance, cannot be explored. And under the South Carolina type of statute, further questions remain unanswered: Does the after-born child share in a gift left to a child for a specific purpose peculiar to that child, e.g., a gift for the child's college education? Can special conditions in a gift carry over from the child named in the will to the after-born child who has come in to share the gift, e.g., a gift made defeasible upon marriage outside a specified church? Does the after-born child share in a gift made to a child in appreciation of special qualities or exertions, e.g., for A's kindness or services in the family household?

The problems of the complex will not only affect the relative treatment of children under the South Carolina statute, but even the testamentary scheme under the Pennsylvania statute whose very object was both to give "ample protection to the child and [to] avoid frequent occasions for disruption of well

laid plans."¹¹¹ As already noted, under the latter statute the interests "passing to a surviving spouse" are immune from any claim by an after-born child. Consider the application of this clause to a complex will which creates a trust for a spouse, trusts for living children, with cross-remainders to the children or the spouse. What interest is deemed "passing" to the spouse? Where she has a life interest terminable upon re-marriage, how does the child share in the corpus of the fund? Does the child take a presently valued interest in the remainder, computed on the basis of life expectancy and re-marriage tables? If so, will this not reduce the spouse's life interest by reducing corpus? The alternative would be for the child to wait out the happening of the event, the spouse's death or re-marriage, and then take a proportionate share of the remainder as it vests in enjoyment. This apparently has been the approach in Pennsylvania.¹¹² But does not this suspension of the statutory interest run counter to one of the underlying policies in the statute, namely, to provide care or support for children who, being after-born, are likely to be the youngest in the family? A more difficult problem is presented where the spouse is a remainderman after a life interest in a stranger. How does the after-born child recover from this interest? Does he take from corpus a presently valued equivalent of the stranger's life interest, or does he merely share in income during the existence of the life estate? The latter is probably the better solution since many interests terminable on various contingencies are incapable of actuarial conversion into present values. Even more difficult problems are presented where the spouse is given (a) a power to consume; or (b) a power to appoint; or (c) an interest which will vest only in the spouse's estate and not be itself enjoyed by the spouse. In these cases, how are we to treat the property involved? Shall it be deemed "passing to" the spouse or not, for the purposes of the statute? As soon as we attempt to answer these questions, we realize how far we have gone in doing something which, under our present system, courts are so aghast at doing—that is, what they describe when they say: "We are not here to make a new will for the testator." There is no doubt that a statute such as Pennsylvania's does just that, and it does so in order to approximate equitably what testator would have intended had he foreseen the possibility of future children. And yet, if we are to go so far in remaking the testator's will, in the light of inferences drawn from the limited information available within the four corners of the will, should we not more properly ask what the testator would have intended; not if he had foreseen future children, but if he had been aware of the very nature of his misapprehension, if *he* had known what the court

111. Advisory Commission's comment, Anno., *supra*, note 109. The Commission considered the new statute "a distinct improvement" over the previous statute, which resembled New York's.

112. See *In re Fownes Estate*, 82 Pa. D. & C. 518 (1953). One hopes that the Pennsylvania courts will not be faced with the multiplicity and complexity of dispositions which the Internal Revenue Code and Regulations has had to deal under the estate tax marital deduction, which is expressed in terms of "any interest in property which *passes*" to a surviving spouse. INT. REV. CODE OF 1954, §2056.

TESTAMENTARY FREEDOM AND SOCIAL CONTROL: PART II

now knows with his family situation before it?¹¹³ As has been pointed out before, under most circumstances no realistic inference as to how a testator would have treated an after-born child can be drawn from the facts existing at the time the will is made—certainly not as to the amount of the provision he would have made.¹¹⁴ And yet this is what is attempted by the legislative presumption implicit in the statute, that testator (under the usual statute) would provide an intestate share, or (under the Pennsylvania statute) an intestate share of the estate not passing to the spouse.¹¹⁵

The problems cannot be minimized in the belief that the more complex a will the more likely the drafting attorney will remind the testator to mention or make provision for future children and thus avoid the statute. Unfortunately, this has not been the case; and the already large volume of litigation under these statutes will likely increase with the modern tendency toward multiple marriages and their consequence—new sets of children born to testators, often late in life. In the circumstances, new solutions, more flexible than those in the foregoing statutes, will have to be sought.

113. To some extent the testator who is not aware of the possibility of future children when he makes his will resembles the testator who destroys his will upon a mistaken assumption. In the latter case we have what is called dependent relative revocation, and we often save the testator from his mistaken act. As Professor Warren stated the standard: "The inquiry should always be: What would the testator have desired had he been informed of the true situation? And there is no objection to going fully into parol evidence to ascertain his attitude, for one is not varying a writing but an act." Warren, *Dependent Relative Revocation*, 33 HARV. L. REV. 337, 345 (1920). Putting aside the latter point about varying a writing, might we not call the situation of the unforeseen after-born child a case of "dependent relative execution" and inquire into what testator would have desired had he been informed of the true situation—which must be the situation at his death? The question, it would seem, must remain rhetorical.

114. Consider the case of a posthumous child for whom testator had no chance to provide. If such child were born blind, can we say the testator would have provided for it in the same manner as for a healthy child?

115. Another way in which the after-born child statutes generally disrupt testamentary dispositions is in their effect upon the administration of the estate. Since each of the legatees and devisees must contribute proportionately to make up the share of the after-born child, each gift must abate, and nominal or memento gifts must bear a burden which testator could not reasonably have intended. In some states, an even more destructive form of abatement obtains; contribution to the after-born child's share being required first from residuary gifts which are most likely for the benefit of those closest to the testator. For a complete breakdown of the types of provisions applicable to both abatement and contribution to the after-born child, see notes to section 184, MODEL PROBATE CODE, *op. cit. supra*, note 108, pp. 360-365. The Alabama statute tries to do what the basic Pennsylvania statute does by requiring all legacies to be used up in contributing to the pretermitted child before he can reach residuary legacies to either the spouse or other children. ALA. CODE tit. 61 §11 (1940). The effectiveness of this scheme is limited in the important instances that the spouse and other children are the principal beneficiaries under the will. Nor is it reasonable to think that the spouse's share should be protected only when it is a residuary gift.

THE FAMILY MAINTENANCE APPROACH

The foregoing discussion has shown that whenever we are called on to draw realistic inferences concerning the testator's intent in a particular situation, we are inclined to consider many facts which, under these statutes, must be classified as extra-legal: the testator's motivations in his treatment of his then living children; the moral claim that an after-born child presents, especially in relation to those who would otherwise receive the estate; the family's situation at the time of testator's death. Considering the difficulties arising even under the more modern approaches of the Texas or Pennsylvania or South Carolina statutes—or under a statute combining their best features—we are led to the conclusion that there is no solution sufficiently flexible to cover all types of family situations under our present system of inheritance, a system which basically provides for only two alternatives: dispositions by will, or fixed shares by intestacy or election. The system of flexible restraints on testation, which goes under the name of dependent relatives' relief legislation or decedent's family maintenance legislation, may provide a real alternative to the approach now taken in the United States.

Under a system of family maintenance, a court is given the power to order payment out of an estate for the purpose of providing for and maintaining surviving members of the decedent's family who have not been adequately provided for by will.¹¹⁶ Such a system of discretionary maintenance has been functioning in Maine since 1821 with respect to intestate or insolvent estates, and since 1835 with respect to testate estates.¹¹⁷ The operation of the statute is confined to widows. A more recent and independent scheme, utilizing this approach, originated in New Zealand whose 1900 basic statute has been gradually

116. For an excellent review of this system see Laufer, *Flexible Restraints on Testamentary Freedom—A Report on Decedents' Family Maintenance Legislation*, 69 HARV. L. REV. 277 (1955). Most of the factual material hereinafter presented comes from this article.

117. For a history of the Maine statute, see *Brown v. Hodgdon*, 31 Me. 65 (1849). The present statute, in substantially the same form, reads as follows: Allowance to widows from personal estate. In the settlement of any intestate estate, or of any testate estate which is insolvent or in which no provision is made for the widow in the will of her husband, or when she duly waives the provision made, the judge may allow the widow so much of the personal estate, besides her ornaments and wearing apparel, as he deems necessary, according to the degree and estate of her husband and the state of the family under her care; he may also allow her any 1 pew in a meeting house, of which the deceased died seized; and such allowance, when recorded, vests title in her; and when an estate which, at the time of said allowance, was considered insolvent, ultimately appears to be solvent, the judge by a subsequent decree may make the widow a further reasonable allowance. When, after an allowance has been made from any estate, additional personal property belonging to said estate comes to the knowledge of the judge, he may make a further allowance to her therefrom. ME. REV. STAT. c. 156, §156.

TESTAMENTARY FREEDOM AND SOCIAL CONTROL: PART II

extended to apply to *all* dependent members of the decedent's immediate family, whether he died testate or intestate. New Zealand's lead has since been followed in varying degrees by all Australian states, by England, and by a number of the Canadian provinces. In some instances, a ceiling on the maintenance award is determined by what would be the applicant's intestate share. Professor Laufer summarizes the provisions of the typical statute, insofar as it affects a testate estate, in the following terms:

"In substance, it assures to a decedent's surviving family, above all his spouse and children, adequate maintenance whenever his will does not provide it. Maintenance may only be granted out of the net estate, i.e., after all claims have been discharged. A dependent who claims that the will failed to make proper provision for him may apply to the court within twelve months of probate. Eligible dependents are not only the testator's spouse, child, or grandchild, but also his parents and his adopted and illegitimate children. Upon application the court will determine whether the testator has adequately provided for the dependent. If it finds that he has not, it may in its discretion order that suitable provisions be made out of the estate, or it may refuse an order if it finds that the dependent's character or conduct "disentitled" him. It may order that provision shall be made in the form of periodic payments or in a lump sum. It may attach any conditions it deems fit to its order. It may provide that the incidence of the order shall fall ratably on the entire estate or it may exonerate certain portions, either completely or partially. Save where the dependent has been granted a lump sum, the court may later set aside, vary, or suspend its order where it finds that the dependent's situation has improved. The court's power extends over the entire estate even if the will disposes of only a part of the estate."¹¹⁸

Two major objections which have been made to these statutes appear unjustified in the light of over fifty years' experience in applying them. With respect to the objection that this type of statute will breed litigation, Professor Laufer points out that this fear has proved unfounded. The volume of litigation under the Maine or Commonwealth type statute seems appreciably smaller than under conventional statutes of American jurisdictions.¹¹⁹ One has only to look to the heavy case-load in New York involving the spouse's right to election, or the rights of after-born children, to realize that litigation is more likely the result of statutes which fail to meet the current needs of the family unit, than those which allow the exercise of judicial discretion.¹²⁰ The other objection, that the wide area for the play of judicial discretion would result in an undisciplined exercise of judicial power, has likewise proved unfounded. The cases, in these jurisdictions, have in fact developed along characteristic common law lines, establishing criteria and principles, "a climate of decision," which

118. *Op. cit. supra*, note 116, at 282-283.

119. *Ibid.*, 314.

120. See Part I, *supra*, 6 BUFFALO L. REV. 251-255.

"enables a practitioner to predict, within reasonable limits, the likely reaction of a court to a particular set of circumstances. He is thus enabled on the one hand to restrain testators from making unreasonable provisions and on the other to advise dependents and beneficiaries against engaging in fruitless litigation."¹²¹

It may be argued that adoption of this approach—requiring as it does a complete re-orientation to problems of inheritance and family responsibility—involves an extensive commitment when all we seek is a solution for what is after all a narrow problem: the ills afflicting after-born child statutes. The disproportion may be admitted, especially when we see how small and interstitial is the after-born child problem in the total fabric of family rights. And further, it can be argued, such an approach is equally valid for children left unprovided for who are not pretermitted within the meaning of a statute, and for surviving spouses, or other dependents, as well. This is true, but until such time as we are ready to essay this approach in the whole area of family rights, could it not be applied to the problem of the pretermitted child statutes, especially in view of their fundamental and far-reaching defects?

At the outset, however, a distinction in objectives should be noted: The main objective of an after-born child statute is to provide for *distribution* to a child omitted through oversight; the main objective of the family maintenance system is to provide for *support* of a dependent in need. One looks to presumed testamentary intent, the other social duties. But despite this difference in point of view, the system of family maintenance has not been carried out by the courts in disregard of testamentary intent; it has rather replaced an artificial and often invalid presumption with an intelligent inquiry into the real intention of a decedent. The cases involving after-born children arising in these jurisdictions illustrate this, for they not only concern themselves with the income needs of the petitioning child but also with his right to share in the corpus of the estate in the light of the dispositions made and the family situation.¹²² In fact, Professor Laufer reports that the courts often "protect rather than limit the testator's freedom," by seeking to correct dispositions based upon mistakes or made inequitable by changed circumstances.¹²³ As has been pointed out, the after-born child statute, although rationalized in terms of testamentary intent, has served to carry out the social policy of protecting children whose needs are most urgent.¹²⁴ In similar fashion, the family maintenance statutes, although originally intended to serve the social needs of support and maintenance, have in fact tended to carry out testamentary intent. For they not only assume that satisfying the needs of

121. Laufer, *op. cit.*, *supra*, note 116, at 313-314.

122. See *e.g.*, Will of Spense, 1929 St. R. Queensland, W. N. 15.

123. *Op. cit. supra*, note 116, at 295. For example, a testator was protected from the results of his own misunderstanding of what was in his will and from the error of a draftsman. *Ibid.*

124. See Part I, *supra*, 6 BUFFALO L. REV. 251 *et seq.*

decendent's family is consistent with the decendent's probable intent, but by making a broad inquiry into decendent's family situation and dispositive plans, they go far toward realizing the "true" intention.

The dilemma of the "true" intention probably derives from the nature of the legal institution of the will itself. A will is made on the basis of known facts and a more or less rough estimate of probable future events which might change these facts. Although the will is ambulatory we know it too often never catches up with the changes. This implicit limitation on the institution of the will and its consequences should, it is submitted, be mitigated in the special case of pretermitted children—by allowing them some claim on the testator's estate which does not violate either testator's intention or the social demands of the family. Despite the excellent experience in the Commonwealth jurisdictions, there may remain doubts—perhaps raised by significant differences in the make-up and traditions of the respective bars—that a system of discretionary awards could not work in the United States where *distribution* rather than *support* is the critical element. But by limiting this discretionary approach to the area of pretermitted children, where admittedly there is no sound solution, could we not work out principles and standards which would not only solve this problem, but would serve as guides in dealing with the more complex problems of the rights of surviving spouses and other dependent relatives?¹²⁵

125. Under such a proposal, an application could be made for an unprovided-for after-born child, for the court to make a provision for him out of the testator's estate in the light of the then family situation, with the child's intestate share setting a ceiling upon the award. In exercising its discretion, the court would consider not only the relative need of the child but also the intention of the testator, using as "signposts"—in the language of the Court of Appeals in *Matter of Faber*—not only the terms of the will, but the family circumstances at the time it was made, the provisions made for his family outside the will, and the family circumstances at his death.