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PROVISIONS BY WILL FOR POSTHUMOUS OR AFTER-BORN CHILDREN.—The recent case of *Newlin's Estate,* 209 Pa. 456, 1904, apparently marks a radical departure in Pennsylvania from a settled rule of construction of the Statute of Wills (Act of 1833) where the rights of posthumous children are involved. As the effect of the decision is to overrule the earlier cases on the subject, it is necessary to understand definitely the previous attitude of the court towards such provisions in order to determine whether or not the decision mentioned is consonant with established legal principles and sound reason. It was with that thought in mind that the following examination of the authorities was written.

A child, born after the making of a will by its parent, who has died without adapting that instrument to his changed circumstances, has long been an object of solicitude to our laws. The principle of protecting children thus left unprovided for did not originate with us nor with the common law, but owes its

existence to the civil law. It was thought or assumed that the parent had forgotten the child, or had by accident overlooked the fact that he had had offspring since the making of the will, or that issue might be born after his death. The civil law therefore disregarded such a will in order to enable the posthumous child to participate in the property left by its father. That principle was adopted by the common law, and at an early date by our own law.

Under the civil law great latitude was allowed children in contesting the provisions of the parent's will. A son might attack his father's will on the ground that he was not sufficiently provided for, and wills were frequently set aside on that ground. Naturally, the law was especially vigilant to protect the rights of posthumous children or of children born after the making of a will. If a man made a will and died, and a son was born after his death, it was necessary for him to disinherit the child expressly to keep it out of the inheritance. Otherwise the birth of the child revoked the will and *invalidated it entirely.*

Gaius counsels the testator to disinherit the child by means of this formula, "Let whatever son may be born to me be disinherited." (Gaius ii, 130-132.)

The common law, with its customary suspicion of the civil law, was long in adopting this doctrine, and then adopted it only in part. For the common law said that in the case of a will of personalty, subsequent marriage and birth of issue conjointly revoked the will. The birth of a posthumous child alone would not. It was not until 1771 that it was settled at the common law in England that a will disposing of realty was revoked by subsequent marriage and birth of issue.

The law of Pennsylvania progressed more rapidly. In 1748 (February 4, Miller's Laws, 22) the legislature enacted that if a person made a will and afterwards married or had a child or children, and then died leaving a child "not named in any such will, even though a posthumous child, the will should be revoked as to such child. And this act applied to lands as well as to personalty. This act, however, was repealed in 1764, and a new act passed which contained a similar provision, but substituted the words "not provided for in such will" for the words "not named in any such will." It is obvious that until the passage of the Act of 1764, March 23 (Hall and Sellers, 309), if a testator made a will and died, and had issue born after the making of the will or after his death, it was a sufficient compliance with the law if the child was named or mentioned in the will. The intention of the legislature in making this change in phraseology has been the cause of much discussion in the cases since decided. These statutes,

however, were undoubtedly intended for remedial statutes. In 1794 (April 19, 3 Sm. L. 152, Sec. 23) the legislature re-enacted these provisions of the Act of 1764. The first case that arose under the Act of 1794, and apparently the first case in which the construction of provisions for posthumous children was involved, was the case of *Coates* v. *Hughes*, 3 Binn. 509, 1811. Yeates, J., says in that case, "It cannot be denied that the inconveniences resulting from the state of the common law produced this section of the Act of April, 1794. Marriage alone and birth of children alone were not sufficient to operate the revocation of a previous will, and however strongly the inclination of the courts was with the children, they held that they could not set aside a solemn will because some of the children were left unprovided for." 5 T. R. 54, note; 4 Burr, 2171, 2182. And Chief Justice Tilghman in the same case says, "In the year 1764 the legislature of Pennsylvania, being struck, in consequence of an event which took place in the city of Philadelphia, with the imperfection of the common law as then understood, made a provision for all cases which could occur under a subsequent marriage." What this event was will be shown later.

The facts before the court in *Coates* v. *Hughes* were these: The testator had made a will giving his personal property to his wife, and dividing his real property among three persons, his brother, sister, and a friend. His wife died without issue and he remarried. By his second wife he had a son, born after his death. The marriage and birth of issue was held to work a revocation of the will *pro tanto*, the court allowing provisions for the payment of debts and appointment of executors to stand. In this case there was no difficulty. The contingency provided for by the act had happened and the course to be pursued was plain. The case, however, is interesting as affording some light upon the question of legislative intent.

The latest legislative provision upon the subject is that of the Act of 1833, April 8, P. L. 249, Sec. 15, which reads:

"When any person shall make his last will and testament, and afterwards shall marry or shall have a child or children *not provided for* in such will, and die, leaving a widow or child or children, although such child or children be born after the death of their father, every such person, so far as shall regard the widow, or child or children after-born, shall be deemed and construed to die intestate; and such widow, child or children, shall be entitled to such purparts, shares and dividends of the estate, real and personal, of the deceased, as if he had actually died without any will."

The precise meaning of the words "not provided for in such will" was directly involved in the cases of *Coates's Appeal*, 2

Pa. 129, 1845; and *Jackson* v. *Jackson*, 2 Pa. 212, 1845. In *Coates's Appeal* the testator gave all his personalty to his wife, saying, "Having full confidence in my wife that she will leave the surplus to be divided, at her decease, justly among my children." The court held that these were precatory words and created a trust, which the court would enforce for the benefit of the children born after the making of the will. Consequently, as the wife held the property, subject to the trust for the benefit of the children, they were provided for within the meaning of the Act of 1833, Sec. 15, above quoted. In *Jackson* v. *Jackson* the testator gave his property to his wife and directed that she should have the guardianship and tuition of any children afterborn. Upon the authority of *Coates's Appeal* it was decided that the will created a trust enforceable at law; that if the legatee accepted the benefits conferred by the will, she must take subject to the trust imposed; and, finally, that the after-born children were "provided for."

These cases are valueless as authorities for this reason. The Supreme Court, in the case of *Pennock's Estate*, 20 Pa. 268, 1853, repudiated the doctrine that mere precatory words or words expressing confidence were sufficient to raise a trust, and overruled *Coates's Appeal* and *Jackson* v. *Jackson* to that extent. (See also *Boyle* v. *Boyle*, 152 Pa. 128, 1893.) Now, the case of *Jackson* v. *Jackson* was ruled upon the assumption that there was a substantial provision for the after-born children in the will (the court saying, "The court, if necessary, will fix the amount which may be required for the maintenance and education of the children") in the trust supposedly raised by the precatory words. As no trust was in fact created, there was no provision whatever for after-born children, and the proposition that "a guardian appointed is a providing for" cannot be maintained. When the same question, substantially, arose again the court felt free to repudiate such a doctrine. The will in *Walker* v. *Hall*, 34 Pa. 483, 1859, provided, "Having the utmost confidence in the integrity of my wife, and believing that should a child be born to us, she will do the utmost to rear it to the honor and glory of its parents." The testator then devised all his real and personal property to his wife. A child was born after the will was made. The court said, "This is clearly no provision for his child, such as we have seen is contemplated by the Wills Act and the whole policy of our law.

This case may be considered as settling the meaning which the court was subsequently to attach to the words "not provided for in such will." They were held to mean "substantial provision," for the will clearly shows that the testator had the after-born child in mind and that he thought he was providing for it. He gives his property to his wife and expresses confi-

dence that she will rear it properly. If the act meant literally "provided for," this was literally providing for it. But the court, noting the change in phraseology in the earlier acts from "not named" to "not provided for," considered that a significant fact, and decided that there must be a *substantial* provision for the after-born child. The doctrine of this case was adopted in *Hollingsworth's Appeal*, 51 Pa. 518, 1866. The facts there were very similar to those in *Walker* v. *Hall*, but, in fact, presented a much stronger case. The maker of the will gave all his real and personal property to his wife in fee, and provided that in case he should leave any children he constituted his wife their guardian, committing to her entirely their "maintenance, education, and future provision," and "*which guardianship I intend and consider as a suitable and proper provision for such child or children.*" Two children were born after the making of the will, both of whom survived him, as did his wife. The testator here left no doubt of his intention. The will was obviously made with the fifteenth section of the Wills Act in mind. The court said the case was ruled by *Walker* v. *Hall*, and adopted the language of that case; this was "no provision for his children such as is contemplated by our Wills Act and the whole policy of the law."

In *Edwards's Appeal*, 47 Pa. 144, 1864, both the contingencies contemplated by the Act of 1833 occurred. An unmarried man by will directed the sale of his real and personal estate, the investment of the proceeds, and the payment of the interest to a lady whom he afterwards married; at her death the principal was to go to the heirs of her body. It will be seen that an estate tail was thus created which the Act of 1833 rendered inoperative. The devise was to A for life, remainder to the heirs of her body. A child was born after the death of the testator. The court held that the subsequent marriage revoked the will as to his wife; that as the life estate thereby became void, the remainder founded upon it must fall. It was said in the opinion, however, that "if the devise as to the wife were not revoked by marriage the question would arise whether a contingent remainder was such a provision as the fifteenth section of the statute contemplated and we should probably conclude that it was not, for we believe the legislature meant a present vested interest, not a contingent one."

The case did not involve this point and did not decide it, but it indicates the mind of the court as to the meaning of "not provided for." In *Willard's Estate*, 68 Pa. 327, 1871, however, one of the questions raised was whether or not a reversionary interest was a provision for an after-born child within the statute, and it was held that a reversionary interest was not a providing for such as the spirit of the act required.

The facts of that case were as follows: The testator gave the income of $3000 to his mother for life, the bequest at her death to revert to his children and heirs. One-half of the residue of his estate was secured to the benefit of his wife, together with the house and lot in which they resided, for life, valuing the same at $7000. On the decease of his wife the bequest of $7000 was to revert to his heirs-at-law, share and share alike "to those heirs who shall be living or entitled to be represented in said estate." He died leaving his wife *enceinte*. The posthumous child was thus entitled to a reversionary interest. The language of Mr. Justice Sharswood in this connection is significant. He said: "The statute does not say fully or equally provided for. It may be true that if it clearly appears by the terms of the will that an after-born child was within the special intention of the testator, if there was any provision, no matter how inadequate, the words of the statute would be satisfied. Where, however, an immediate provision is made for children by name who are living at the date of the will, and the interest which the after-born child takes is a reversion and by general words and not by special description as an after-born child, it would be a very strained construction to hold such a child to be provided for. The Act of February 4, 1748-9, 2 Miller's Laws, 22, used the words 'not named in any such will.' The present words, 'not provided for in any such will,' were first introduced by the Act of March 23, 1764, Hall and Sellers, 309, and have been continued in all subsequent acts. It is probable that the intention of the alteration was two-fold; first, that merely naming without providing for after-born children would not be sufficient, as was the case in *Walker* v. *Hall*, 10 Casey, 483; *and, secondly, if the after-born child would take with the other children under general words, without being specially named or described, such devise or bequest would be a provision.*

"Here, however, there was in effect no present provision whatever. For all the purpose of education and support, and that for an indefinite period, this son is left entirely dependent upon his mother unless, indeed, by a sale of his reversionary interest. In *Edwards's Appeal*, 11 Wright, 153, where there was a subsequent marriage and birth of a child, and there was devised to the lady who was afterwards married to the testator a life estate with a contingent remainder to her children, it was held that as the devise to the wife was revoked by the marriage, the remainder would fall with it; but Chief-Justice Woodward remarked that, if this were so, "then the question would arise whether a contingent remainder was such a provision as the fifteenth section of the Wills Act contemplates, and we should probably conclude that it was not, for we believe

the legislature meant a present vested interest and not a future and contingent one.

"But how could even a vested reversionary interest be a provision, unless by a present sale of such reversionary interest? A contingent interest could also be sold. An interest may be vested as in this case, although the period when it shall fall into possession is uncertain. Such an interest could not be sold for the maintenance and education of the minor except at an enormous sacrifice. Yet what could an Orphans' Court do under such circumstances? Refuse to sell and throw the child for maintenance and education on the public; or make a scanty provision for a short period for an immediate sacrifice of all his future estate. *We hold then that a reversionary interest, whether vested or contingent, is not a provision for an after-born child within the words or spirit of the statute.*"

There have been several cases falling directly within the terms of the act—*i. e.*, where the testator has made his will and had issue born subsequently entirely unprovided for; there is no difficulty in such cases, for by the act the will is revoked. And it has been held that the act applies as well to the will of a woman as to that of a man. *McKnight* v. *Reed*, 1 Wh. 213, 1835; *Grosvenor* v. *Fogg*, 81 Pa. 400, 1876; *Robeno* v. *Morlatt*, 136 Pa. 35, 1890; *Wilson* v. *Ott*, 160 Pa. 433, 1894 *Owens* v. *Haines*, 199 Pa. 137, 1901.

From the review of the authorities construing Section 15 of the Act of 1833 it will be seen that the words "not provided for" had, until the decision of *Newlin's Estate*, 209 Pa. 45[illegible], 1904, come to have a fairly definite meaning, and that the construction of the act was in a certain sense fixed. The conclusions reached may be summarized thus:

1. The Act of 1833, Sec. 15, is a remedial act; this applies to the Acts of 1794 and of 1764. Argument of Ingersoll and Tilghman, C. J., *Coates* v. *Hughes*, 3 Binn. 500; *Willard's Appeal, supra;* Argument of John G. Johnson, *Fidelity Trust Co.'s Appeal*, 121 Pa. 13, 1888. Votes of the Assembly, Vol. 5, page 309.

2. Being a remedial act, intended to benefit the posthumous or after-born child, it is to be construed in his favor. *Fidelity Trust Company's Appeal*, 121 Pa. 13, 1888.

3. The change in phraseology from "not named in such will" to "not provided for in such will" was intended to broaden the remedy. *Coates* v. *Hughes*, 3 Binn. 500; Votes of Assembly, Vol. 5, page 309.

4. The words "not provided for" mean

a. A substantial provision. *Willard's Estate, Walker* v *Hall.*

b. A present provision. *Willard's Estate, Hollingsworth's Appeal.*

c. A vested interest. *Willard's Estate, Walker* v. *Hall.*

5. The words "not provided for" are not satisfied by

a. A contingent interest. *Edwards's Appeal.*

b. Even a vested interest by way of reversion. *Willard's Estate.*

6. Merely naming without providing for after-born children is not sufficient. *Walker* v. *Hall, Hollingsworth's Appeal.*

7. If the after-born child would take with the other children under general words, without being specially named or described, such devise or bequest would be a provision. *Willard's Appeal.*

8. The appointment of a guardian or a request to a legatee to rear and educate the child, even if the latter be named or described, is not a providing for within the meaning of the act. *Hollingsworth's Appeal.*

These conclusions seem to be the result of the authorities until the decision of *Newlin's Estate,* 209 Pa. 456, 1904. It remains to examine whether the facts of that case raised a question, rules for the decision of which had not already been formulated.

The will in that case devised property to trustees to pay the income to the testator's wife "during the minority of my child or children, and during the period in which my wife shall remain unmarried after my death, and in further trust, to convey, assign, transfer, set over, and pay to the trustees herein named the share of each of my daughters upon reaching the age of twenty-one or upon my wife remarrying, in trust, to keep the shares of my daughters invested," etc. This was held a sufficient provision for a daughter born after the date of the will.

It is conceived that the court could have reached no other conclusion in the case under the statement numbered (7) above and laid down in *Willard's Appeal.* The rule is, "If the after-born child would take under general words, without being specially named or described, such devise or bequest would be a provision." There would seem to be no difficulty in classifying *Newlin's Appeal* under this statement of the law. An active trust was created under which the after-born child is substantially provided for. The point actually raised and decided is that "the creation of an active trust for the benefit of children by general words which would include after-born children is a provision for an after-born child within the meaning of the act."

The difficulty is not so much in the decision itself, which

would seem to be in accord with established principles, as in the reasoning incidental to the decision. For the court goes further than the facts necessitated and uses this language.

"This act makes no requirement that the child shall be fully or adequately provided for. That is left to the discretion of the parent, as in the case of living children. All that it does require is that he shall have the child in mind and shall make clear his intention that the will shall apply to it. Any provision which does that is sufficient and the inquiry, whether large or small, equal or unequal, vested or contingent, present or future, is irrelevant and outside the jurisdiction of the courts except so far as it tends to throw light on the question."

It is conceived that this language, instead of settling the law, will render it more confused. These statements do not accord with the authorities. They are, moreover, in the nature of dicta, and merely incidental to the decision itself. It is entirely possible that should a case arise in which a posthumous child was provided for in one of the ways hitherto regarded as insufficient,—*e. g.*, by way of contingent remainder or reversion, —that the statements above quoted would not be considered authority and that the principles of the decided cases would be held to govern.

Certainly the other cases seem to express the legislative intent and to be more in accord with reason and justice. It has been seen that the act was intended to benefit the posthumous or after-born child and that it should be construed accordingly.

It is true that the act does not require an adequate or full provision. That might be beyond the power or means of the parent. But if the act requires simply that the will shall show that he has the child in mind and that he intends the will shall apply to it, it does not differ in any respect from the Act of 1748-9, and gifts or provisions such as those made in *Walker* v. *Hall* and *Hollingsworth's Appeal* should have been held good.

To return for an instant to the older statutes, the common law held that marriage and the birth of issue conjointly revoked a will, but this doctrine was held not to operate to let in a pre-existing child not provided for. 1 Jarman on Wills, ch. 8, sec. 1.

This doctrine was borrowed from the civil law and was applied by the ecclesiastical courts to wills of personalty only. It was not until 1771 that it was definitely settled at common law that a will of realty was revoked by subsequent marriage and birth of issue. *Christopher* v. *Christopher*, 4 Burr. 2182.

Our earliest statute on the subject is that of 1748-9, which required that when a man made a will and married, or had issue

born subsequently, though posthumous, not named in any such will, the will was revoked *pro tanto.* This statute was in force until 1764, when it was repealed and a new act passed containing the words "not provided for in such will." The later Acts of 1794 and 1833 contain a similar provision. It is obvious, therefore, that since 1748 our courts have been constrained to follow, not the common law rule, but that of our statutes.

The tendency of the English law is shown by the Act of 1 Vict. ch. 26, sec. 18, which provides that "every will made by a man or woman shall be revoked by his or her marriage (except a will made in the exercise of a power of appointment), when the real or personal estate thereby appointed would not, in default of such appointment, pass to his or her heir, executor, or administrator, or the person entitled as his or her next of kin under the statute distributions; and (Sec. 19) that "*no will shall be revoked by any presumption of an intention on the ground of an alteration in circumstances.*"

The present English rule is stated by Jarman thus (vol. 1, ch. 7, sec. 1):

1st, That, unless in the expressly excepted cases, marriage alone will produce absolute and complete revocation as to both real and personal estate; and that no declaration, however explicit and earnest, of the testator's wish that the will should continue in force after marriage, still less any inference of intention drawn from the contents of the will, and, least of all, evidence collected *aliunde,* will prevent a revocation.

2d, That merely the birth of a child, whether provided for by the will or not, will not revoke it, the legislature, while it invested with a revoking efficacy one of the several circumstances formerly requisite to produce a revocation, having wholly discarded the other.

It appears, then, that the present English rule is that subsequent marriage will revoke a will, but subsequent birth of issue will not. These statements show clearly that the English law has developed in a different manner from our own and for that reason is of no assistance as an analogy.

But the reason for the change of phraseology from "not named" to "not provided for" in the earlier statutes might afford some light. In *Newlin's Estate,* 209 Pa. 456, the court says, page 462, "On the difference of phrase between the Act of 1748 and the later acts, the change (from "not named" to "not provided for") is better accounted for by the suggestion of Sharswood, J., in *Willard's Estate,* 68 Pa. 327, that the child might be provided for by general words including other children without being individually named."

But the objection to this theory is that it apparently cannot

be reconciled with the facts connected with the passage of the Act of 1764.

It will be recalled that in the quotation from the opinion of Tilghman, C. J., in *Coates* v. *Binney* he said (*supra*), "In the year 1764, the legislature of Pennsylvania being struck, in consequence of an event which took place in the city of Philadelphia, with the imperfection of the common law as then understood, made a provision for all cases which could occur under a subsequent marriage." Now, the event thus alluded to that led to the passage of the Act of 1764 was this: In January, 1764,—

"A petition from Messrs. Thomas and Charles Willing, of the City of Philadelphia, merchants, was presented to the House (of Assembly) and read, setting forth that the petitioners are sons and devisees of Charles Willing, late of this city, Esq., deceased, who, at the time of his death, was seized of divers houses, lots and lands in the City of Philadelphia, the greatest part of which he, by his last will, devised to the petitioners; that the petitioners' said father has left two children, born after making his said will, who are minors, and entitled, under a late Act of Assembly of this Province, to Two Elevenths Parts of the said houses and lands devised to the petitioners in the same manner as if there had been no will made; that the petitioners are deprived of the benefit both of improving and making sale of any of the said real estate so devised to them, by means of the said Minor Children's Claims; and no Partition thereof can be made without manifest injury to the whole;—that the petitioners are advised that the Act of Assembly aforesaid (Act of 1748), entitled, 'An Act for amending the Laws relating to the Partition and Distribution of Intestates' Estates,' does not in the Petitioners' case with sufficient certainty empower the Orphans' Court to order appraisement and valuation of such lands, whereof Partition cannot be made without prejudice to the whole, as that Court is empowered to do in the case of persons dying wholly intestate; wherefore the Petitioners humbly pray the House to afford them the aid of the Legislature in the premises, by expressly authorizing the Orphans' Court to order a valuation and appraisement to be made of the houses, lots and lands, so devised to the petitioners, and that on payment of the Proportionable Parts of the Real Estate thereof or securing the same to be paid to the children, they may be barred of all right and title to the same houses and lands or in any other manner that to the house shall seem most proper." (Votes of the Assembly, vol. 5, page 309.)

On February 1 a committee was appointed to prepare and bring in a bill for the purpose expressed in the said petition,

and also "for amending the laws in force relating to the Partition and Distribution of Intestates' Estates."

After an act had been prepared to carry out the purpose expressed in the said petition, it was re-committed to the committee with orders to revise the entire law, that is, not only as to partition, but as to the provisions for revocation of wills by marriage or subsequent birth of issue, and "to make such additions thereto as may be necessary in order that the said supplement may be repealed."

The act finally passed was entitled "A supplement to the act entitled 'An Act for the better settling Intestates' Estates, and for repealing one other act of General Assembly of this Province, entitled, "An Act for amending the laws relating to the partition and distribution of Intestates' Estates."'"

The petition above set forth shows that the subsequent birth of issue was in 1764 regarded as working not a total revocation but only a revocation *pro tanto* of the will. The action of the legislature in providing, thereupon, for all the cases which could occur under a subsequent marriage shows that the legislature thought the existing provisions inadequate and meant the act to remedy that inadequacy. There is other evidence, such as the reports of the secretaries in Great Britain on the Acts of 1764-5, that shows that this act was intended to broaden the remedy and certainly not to restrict it. (See notes to the Act of 1764 in the Statutes at Large.) The principle adopted from the civil law and seen in all the statutes and decided cases is that of a change of intent implied from the change of conditions or of circumstances. That this was the principle can be seen in the words of the statute of 1 Vict., *supra*. The meaning that the court now wishes to give to the change in phraseology in the Act of 1764 is that the legislature was seeking to relieve the testator of the hardship of having to name, actually, the posthumous or after-born child, and to permit the will to stand, if by any possibility the court could read into it an imaginary intention of the testator to provide for the child by general words. The most casual glance at the history of the legislature shows that that is precisely what the legislature was trying not to do. They were trying to pass a law for the benefit of the wife and of the after-born child, and that is the construction that should be given to it.

The facts in connection with the passage of the Act of 1764 are interesting for two reasons.

First, because they show that the decision in *Coates* v. *Hughes*, that subsequent marriage or birth of issue worked only a revocation *pro tanto*, was undoubtedly in accord with legislative intent.

Second, because they show that the statute was intended to broaden the remedy provided in the Act of 1748-9.

The legitimate result of this examination of the authorities seems to be:

1. That the Act of 1833, sec. 15, and the acts to which it is supplementary, were intended to secure a substantial provision for after-born or posthumous children.

2. That it is a remedial statute and should be construed in favor of posthumous or after-born children.

3. That it is not sufficient that the testator shows that he had the child in mind and intended his will to apply to it, but that he must make a real and substantial provision for it.

4. That the statute does create an inequality between children living at the time of the making of the will and those after-born, in that the testator can, if he wish, neglect the former entirely, but cannot do so with the latter.

To which should be added the eight propositions above stated that have been laid down from time to time by the authorities.

If the statute mean any less than this, it differs little in effect from the Act of 1748-9, which merely required naming the after-born child, but not providing for it. Furthermore, if the statute embarrass the courts, in requiring a provision for such children, the remedy would seem to be with the legislature and not with the courts.

G. F. D.