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For many people, passing their worldly possessions and wealth down to their children is of great importance. While some choose to give their wealth away as gifts during their lifetimes, others choose to wait and have their wealth transferred at death. Changes in a testator's known family structure subsequent to the creation of her will can result in a will that no longer comports with the testator's final intentions. One event that potentially affects the distribution of assets under a will is the unforeseen birth of a child after the will is executed—so-called after-born children. Recognizing the complication posed by after-born children, the New York Legislature attempted to provide for such children in New York's Estates, Powers and Trusts Law (EPTL) section 5-3.2. This statute, known as the after-born statute, allows the courts to provide for an after-born child (or children) of the deceased and avoid seemingly inadvertent disinheritances.[1]

At first glance, the meaning of after-born children appears quite simple: the children born after the execution of a will. However, this concept quickly becomes more complicated[2] considering that the term after-born children encompasses multiple categories, including: children born following the execution of the parent's will but during the parent's lifetime (the most basic type of after-born child),[3] children born following the execution of the parent's will but after the parent's death (sometimes called posthumous children),[4] and non-biological children who were

1. *See In re* Estate of Wilkins, 691 N.Y.S.2d 878, 881 (Sur. Ct. N.Y. Cnty. 1999) (observing that EPTL 5-3.2 effectively nullifies the will "to the extent required to give the child his intestate share"); *see also In re* Gilmore, 925 N.Y.S.2d 567, 568 (2d Dep't 2011) ("[T]o address situations where a child is inadvertently left out of a parent's will because such child was born after the will's execution, the Legislature enacted EPTL 5-3.2.").

2. "A legitimate natural child is a 'child' for inheritance purposes. Beyond that, it gets complicated." Sol Lovas, *When Is a Family Not a Family? Inheritance and the Taxation of Inheritance Within the Non-Traditional Family*, 24 Idaho L. Rev. 353, 367 (1987–1988).

3. N.Y. Est. Powers & Trusts Law § 5-3.2(a) (McKinney 2011) ("Whenever a testator has a child born after the execution of a last will . . . every such child shall succeed to a portion of the testator's estate . . . .").

4. *Id.* § 5-3.2(b) ("The term 'after-born child' shall mean a child of the testator . . . in gestation at the time of the testator's death and born thereafter."). With respect to children born following the execution of the parent's will and after the parent's death, the distinction between posthumous children and posthumously conceived children is important because posthumous children qualify for a portion of their parent's estate under EPTL 5-3.2, while posthumously conceived children do not qualify. The determining factor is the state of the biological parents at the time of conception. If both parents are alive when the child is conceived, but one or more is deceased at the time of birth, the child is said to be a posthumous child. If one or both of the biological parents are deceased at the time of conception, the child is called posthumously conceived. Posthumously conceived children are possible only through scientific advances that allow a person's frozen gametes (eggs or sperm) to remain viable after the person is deceased. Thus, if a person (man or woman) has their deceased partner's gametes frozen, that person could still produce children with the deceased partner as if the partner were still alive.

   New York's EPTL 5-3.2(b) specifically includes posthumous children (both parents alive at conception) in the definition of after-born child, giving posthumous children relief under the statute. *See id.* However, posthumously conceived children are specifically barred from receiving a portion of their parent's estate through EPTL 5-3.2 by the same section of the statute because they were not "in gestation at the time of the testator's death." *Id.* Posthumously conceived children (one parent deceased at conception) will be considered in more detail below at text accompanying notes 78 to 82, but will not be the focus of this comment. For a recent scholarly article that considers the complicated legal rights of

adopted following the execution of the will, whether born before or after that execution (commonly known as the adoption exception).[5] More simply stated, so long as the after-born child is conceived during the testator's lifetime, the child need only be born or adopted after the will is executed to qualify as an after-born child. Interestingly, New York common law considers adopted children as born on the date of adoption.[6] As such, the adopted child need only be adopted after the testator executes her will, regardless the child's date of birth, in order to qualify under EPTL 5-3.2.

In *In re Gilmore,* the New York State Appellate Division, Second Department, considered a very complex after-born child issue: whether a testator's biological children, who were born before the execution of a will, whose existence was unknown to the testator at the time of the will's execution, and who became known to the testator prior to his death, can qualify as after-born children within the meaning of EPTL 5-3.2.[7] Allowing these children to qualify would require courts to recognize a new common law exception to EPTL 5-3.2 for after-known[8] children—that is, biological children whose existence the testator realized *only after* the execution of her will. Arguably, after-known children are comparable to the existing common law adoption exception, which permits children adopted by the testator after the execution of her will to qualify as after-born children even if the child was born before the execution of the will.[9] However, despite the similarities between adopted children and after-known children, the Second Department in *Gilmore* refused to recognize after-known children within the meaning of EPTL 5-3.2.[10]

This case comment argues that the Second Department incorrectly grounded its ruling in a plain meaning interpretation of EPTL 5-3.2 when it should have premised its holding on an analysis of Gilmore's intent. The Second Department's plain meaning interpretation of EPTL 5-3.2 deprives the lower courts of the flexibility to equitably distribute a parent's assets to her children in a manner that is most in harmony with the overall intent of the testator. While the early statutory and

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posthumously conceived children, see Morgan Kirkland Wood, *It Takes a Village: Considering the Other Interests at Stake When Extending Inheritance Rights to Posthumously Conceived Children*, 44 Ga. L. Rev. 873 (2010).

5. *See, e.g.*, Bourne v. Dorney, 171 N.Y.S. 264, 269 (2d Dep't 1918), *aff'd*, 227 N.Y. 641 (1919).

6. *See In re* Gilmore, 925 N.Y.S.2d at 571 (2d Dep't 2011) (citing Est. Powers & Trusts § 5-3.2 cmt. (Adopted and Non-Marital Children)).

7. *Id.*

8. The term after-known children appears to have been coined in the *In re Gilmore* case by Andrea Hofler's attorney, Oshrie Zak, in his efforts to equate Andrea and Malverick Hofler with after-born children under EPTL 5-3.2. For an early example of Mr. Zak's use of the term after-known see Brief for Appellant at 2, *In re* Gilmore 925 N.Y.S.2d 567 (2d Dep't 2011) (No. 346747) (on file with author courtesy of Oshrie Zak, Attorney for Appellant).

9. The court in *Bourne v. Dorney* created the adoption exception for adopted children, finding that, by virtue of being adopted after the execution of the will, these children were thus essentially "born" after the execution of the will. *See Bourne*, 171 N.Y.S. at 269.

10. *In re Gilmore*, 925 N.Y.S.2d at 571.

common law origins of EPTL 5-3.2 demonstrate that it is designed to avoid inadvertent or accidental disinheritances of children,[11] another important purpose of the statute is to achieve an equitable distribution of a parent's estate that is consistent with the parent's presumed intent.[12] Thus, rather than imposing a strict rule excluding all after-known children from the protection of EPTL 5-3.2, the solution should be to give the courts a framework with enough flexibility to carry out the intent of the testator. By permitting the courts to either include or exclude after-known children from inheriting a portion of the parent's estate based on the particular circumstances of each case, such a framework would more effectively allow the testator's intent to remain the focus of asset distribution under the will.[13]

This case comment will first introduce the factual and procedural history that led to the Second Department's decision in *In re Gilmore*. It will then proceed by examining the legislative history and judicial precedent behind EPTL 5-3.2, demonstrating how nineteenth-century interpretations of the after-born statute have focused primarily on preserving the intent of the testator. The third section of this comment will demonstrate how early twentieth-century cases, while straying from the conclusions reached in nineteenth-century cases, nevertheless consistently retained the testator's intent as the primary focus of the analysis. The fourth section will explore how a series of amendments to the statute, beginning in 1966, aimed at ensuring that a will comports with the final wishes of the testator. Finally, this comment will show how the Second Department's recent decision in *In re Gilmore* departed dramatically from the historical purpose of the statute by imposing a strict rule that disregards testator intent.

On June 24, 1996, Roy L. Gilmore, Sr. executed his last will and testament.[14] At five pages in length, the will was neither very long nor overly complicated. In the will, Gilmore gave his entire estate, including his interest in the Roy L. Gilmore Funeral Home and substantial real property in New York, South Carolina, and the Virgin Islands, to his daughter Angela Manning.[15] In the event that Manning predeceased

11. *See In re* Estate of Faber, 305 N.Y. 200, 203 (1953) (explaining that the after-born statute's purpose was "to guard against inadvertent or unintentional disinheritance" (citing Wormser v. Croce, 104 N.Y.S. 1090, 1091 (1907))).

12. 1966 N.Y. Laws 2907 (stating that revisions to the after-born statute were made in an attempt to align the statute with "the reasonably presumable intention of the normal parent").

13. In a response to the increasingly complicated nature of American families, Susan Gary, in her article *Adapting Intestacy Laws to Changing Families*, advocates for a similar overhaul of the entire intestacy statute, but notes that the probate court should not be given complete discretion over intestate shares, because such discretion "will almost certainly yield uneven results." Susan N. Gary, *Adapting Intestacy Laws to Changing Families*, 18 Law & Ineq. 1, 71–72 (2000).

14. Affidavit of Comparison at 1, *In re* Gilmore, No. 3467217 (Sur. Ct. Nassau Cnty. Apr. 16, 2007) (on file with author).

15. *Id.* at 2–3. At the time of his death, Roy Gilmore's cumulative estate was valued at approximately $5 million, and Gilmore had a total of eleven children: three were with his first wife, four were with his second wife, and four were alleged non-marital children, two of which were Andrea and Malverick Hofler. *See In re* Gilmore, No. 346747, 2009 N.Y. Misc. LEXIS 6618, at *1 (Sur. Ct. Nassau Cnty. Dec. 23, 2009).

him, Gilmore's will provided that another daughter, Alicia Gilmore, would inherit his estate.[16] Otherwise, the rest of Gilmore's surviving children were left unmentioned, although not specifically written out of the will.[17] Ten years later, in early 2006, Gilmore learned that he had two more biological children—Andrea Hofler and Malverick Hofler—whom Gilmore later confirmed were his biological children through DNA testing.[18] Gilmore appears not to have challenged the DNA results, and he even began to introduce the Hoflers to other family members as his children.[19]

Gilmore died on January 13, 2007, approximately one year after first meeting Andrea and Malverick Hofler and acknowledging them as his biological children.[20] This timeline suggests that Gilmore would have had time to amend his will to include the Hoflers, should he have wanted to do so. In the will offered for probate, however, the Hoflers, along with eight of Gilmore's other nine children, did not receive any portion of Gilmore's estate.[21] Instead, Gilmore left his millions to Angela Manning, the named executrix of his estate and a daughter from his first marriage.[22]

Over a year after the will was offered for probate, Andrea and Malverick Hofler both moved for summary judgment requesting that the court treat them as Gilmore's after-born children pursuant to New York's after-born statute, EPTL 5-3.2. The argument advanced by the Hoflers was that "non-marital children, only known or acknowledged by their father after execution of his will, should be accorded the same presumption of inadvertent disinheritance as an after-born child and extended the same rights."[23]

The Surrogate's Court denied the Hoflers' motion in a December 23, 2009 opinion, stating that because the Hoflers are not, strictly speaking, "child[ren] *born* after the execution of a last will . . . . [Andrea and Malverick Hofler] are not entitled to any rights under the after-born statute (EPTL 5-3.2)."[24] The court further noted that it "is not at liberty to conjecture about, add to or subtract from words having a definite and plain meaning."[25] Over a year after their motion was denied, the Hoflers were granted a motion to reargue by the Surrogate's Court; however, the reargument

16. Affidavit of Comparison, *supra* note 14, at 3–4.

17. *See id.* at 3 (noting only that Gilmore's wife, Carol V. Gilmore, was expressly excluded from any inheritance).

18. *In re* Gilmore, 925 N.Y.S.2d 567, 568 (2d Dep't 2011). Malverick Hofler was born November 1, 1963 and Andrea Hofler was born on September 19, 1965. Brief for Appellant, *supra* note 8, at 2.

19. *In re Gilmore*, 925 N.Y.S.2d at 569.

20. *Id.* at 568.

21. *In re* Gilmore, No. 346747, 2009 N.Y. Misc. LEXIS 6618, at *1 (Sur. Ct. Nassau Cnty. Dec. 23, 2009).

22. *Id.*

23. *Id.* at *2.

24. *Id.* at *3.

25. *Id.*

merited the same disposition.[26] After losing the reargument, the Hoflers filed an appeal with the Second Department.

In a unanimous decision, the Second Department affirmed the ruling of the Surrogate's Court and denied the Hoflers' request to be treated as after-born children.[27] The decision of the Second Department followed the reasoning in the Surrogate Court's decision, but considered the issues in more detail, specifically analyzing the facts of this case under the adoption exception.[28] The adoption exception is a common law doctrine that allows children born before the execution of a will to be recognized as after-born children.[29] The doctrine does this by interpreting "birth" in the case of an adopted child to be the date of the child's adoption.[30] Realizing the implications of the doctrine, the Second Department acknowledged the "somewhat sympathetic" position in which the adoption exception placed the Hoflers. That is, had the Hoflers been adopted by instead of reunited with their father, they would have likely won their case.[31]

The problem *Gilmore* poses is that it sets precedent favoring the plain meaning of EPTL 5-3.2 that excludes all after-known biological children from being able to contest a parent's will regardless of the individual circumstances. This approach ignores the development of the statute and its common law history, both of which give deference to the intent of the testator. Because lower courts are obliged to follow the precedent set by *Gilmore*, they may be unable to achieve the overall purpose of EPTL 5-3.2 and avoid accidental disinheritances in the event that a testator is unaware of one or more of his children at the time he executes his will.[32] Rather, the court should have adopted a more nuanced approach through an analysis of Gilmore's intent by taking into consideration such factors as his knowledge of the existence of his children and the desire to gift money to existing children. This more nuanced approach would be more in line with the purpose of the after-born statute because it would be more likely to give appropriate deference to the intent of the testator.

Although the court in *Gilmore* considered the legislative intent behind EPTL 5-3.2, this case comment finds that the history accompanying the statute does not

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26. The decision of the Second Department on June 14, 2011 makes no mention of the reargument granted January 21, 2011, *see In re* Gilmore, No. 346747 (Sur. Ct. Nassau Cnty. Jan. 21, 2011) (order granting motion to reargue), but rather notes that the current appeal was the result of an appeal from the probate proceeding dated December 23, 2009. *See In re* Gilmore, 925 N.Y.S.2d 567, 568 (2d Dep't 2011).

27. *See id.* According to Andrea Hofler's attorney, Oshrie Zak, Mr. Zak tried the Gilmore case pro bono. E-mail from Oshrie Zak, Attorney for Andrea Hofler, to author (Sept. 30, 2011, 16:47 EST) (on file with author).

28. *In re Gilmore*, 925 N.Y.S.2d at 570–71 (citing Bourne v. Dorney, 171 N.Y.S. 264, 264 (2d Dep't 1918), *aff'd*, 227 N.Y. 641 (1919)).

29. *Id.* at 571 (citing N.Y. Est. Powers & Trusts Law § 5-3.2 cmt. (McKinney 2011) (Adopted and Non-Marital Children)).

30. *Id.*

31. *See id.* at 574.

32. See *infra* note 96 for a discussion on the increasing likelihood of cases in which a testator may be unaware of the existence of all of his children.

support the court's holding. More specifically, the statutory history focuses on the intent of the testator, which was rejected by the court in *Gilmore* in favor of a plain meaning interpretation. As such, this case comment will first review the history of the statute, including amendments and key interpretive cases that have shaped the statute into its present form.

The oldest statutory version of EPTL 5-3.2 dates back to New York's Revised Statutes published in 1829.[33] This version of the statute provided the basic framework. An after-born child was "a child born after the making of [the testator's] will, in his life-time or after his death."[34] To qualify for protection under the statute, the child had to also be "unprovided for by any settlement . . . [and not] in any way mentioned in his will."[35] In the event that the child did qualify under the statute, the after-born child would receive the same portion of the father's estate as "if the father had died intestate."[36]

Initially, the courts adopted a very narrow interpretation of the statute's definition of "child." In two notable cases, the term "child" was first limited to a biological

33. The court in *Gilmore* relies on the opinion *In re Estate of Faber*, 305 N.Y. 200 (1953), for the legislative history of EPTL 5-3.2. *In re Gilmore*, 925 N.Y.S.2d at 572–73. The *Faber* opinion contends that the earliest version of EPTL 5-3.2 was enacted in 1830. *In re Estate of Faber*, 305 N.Y. at 203 (referring to the then-present location of New York's after-born statute, Decedent Estate Law § 26). However, the earliest form of the after-born statute in New York was likely enacted some time before the 1827 and 1828 legislative session, and was subsequently published in 1829. *See* N.Y. Rev. Stat. ch. VI, art. 3, § 49 (1829).

Because the 1829 after-born statute appears codified as a statute and not as part of an act or bill in this publication, the statute may actually pre-date the 1827 and 1828 legislative sessions. However, the exact year in which the original after-born statute was enacted remains unknown. One clue is that the Laws of the State of New York, 1802 contain a complete statute concerning wills that does not include an after-born statute. This seems to imply that the New York state legislature enacted the after-born statute sometime after 1802 but before 1827–1828. *See* An Act to Reduce the Laws concerning Wills into one Statute, 1 N.Y. Laws 178 (1802).

Allowing an exception for after-born children was likely not first conceptualized by New York State's legislators. Instead, the court in *In re Will of Ashby* notes that New York's after-born statute is "derived from the civil law under which a will was revoked by the birth of offspring." 524 N.Y.S.2d 652, 653 (Sur. Ct. Nassau Cnty. 1988) (citing Delafield v. Parish, 25 N.Y. 9 (1862)); 1 Thomas Jarman, A Treatise on Wills ch. VII, § 1 (Joseph F. Randolph & William Talcott eds., Frederick D. Linn & Co. 5th Am. Ed. 1880). *Delafield* does not appear to support the court's assertions. The only reference in *Delafield* to the civil law has no application to after-born children; rather, the opinion notes that the civil law rendered void a will "if a party writes or prepares a will under which he takes a benefit." Delafield v. Parish, 25 N.Y. 9, 36 (1862).

Jarman on Wills supports the court's assertion in *In re Will of Ashby* regarding the origin of the after-born statute and points to the likely source of New York's after-born statute, an old English case, *Overbury v. Overbury*, 2 Show. 242 (1682). *Overbury*, decided before the English court, held that children born after the execution of a will may revoke the will. *See* John Chipman Gray, Select Cases and Other Authorities on the Law of Property 389 (Charles W. Sever & Co. 1890). Later, the after-born rule was adopted by the common law courts in *Christopher v. Christopher*, 4 Burr. 2171 (1771). *See* Arthur W. Blakemore, Law of Wills Executors and Administrators (1923), at 736 n.7. Thus, it is likely that the after-born rule was imported into New York's courts as a result of common law roots with England.

34. N.Y. Rev. Stat. ch. VI, art. 3, § 49 (1829).

35. *Id.*

36. *Id.*

child of the testator[37] and then further limited to a legitimate, biological child of the testator.[38] Under an interpretation of the word child that only includes legitimate, biological children, the extramarital Hofler children in *Gilmore* would not qualify as after-born even if they were in fact born after their father executed his will. But this is by no means inconsistent with the argument that the statute has historically been interpreted to give deference to the intent of the testator. Rather, these early interpretations of the statute reflect a time when non-marital and adopted children were not legally or socially considered the equals of marital children.[39] As such, these early courts excluded non-biological and non-marital children precisely because the courts meant to give deference to the intent of the testator, since it would have been most common for the testator at this time to intentionally omit such children.[40]

This narrow definition of "children" under the after-born statute prevailed through the end of the nineteenth century. While the statute itself was not substantially revised until 1966,[41] two notable cases from the early twentieth century signal a changing trend in society's view of "children." The first case, *McLean v. McLean*, provides insight into the court's still-current understanding of the statute.[42] The

37. *See* Barnes v. Greenzebach, 1 Edw. Ch. 41, 43–44 (1831) ("[A]s a general rule, persons standing in that relative position, and who have only acquired the title of son or daughter, child or grand-child, by or in consequence or marriage, are excluded from the class of persons who are to take by the general description of children or grand-children.").

38. *See* Cromer v. Pinckney, 3 Barb. Ch. 466, 466 (1848) (explaining that the ordinary meaning of the word "children" was limited to "immediate legitimate descendants"). The precedent set in *Cromer* would not be overturned until *In re* Estate of Wilkins, 691 N.Y.S.2d 878 (Sur. Ct. New York Cnty. 1999).

39. Regarding non-marital children, Jesse Dukeminier wrote that "[a]lthough innocent of any sin or crime, children of unmarried parents were given harsh, pitiless treatment by the common law. A child born out-of-wedlock was *filius nullius*, the child of no one." Jesse Dukeminier et al., Wills, Trusts, and Estates 100 (Erwin Chemerinsky et al. eds., 7th ed. 2005) (citation omitted). Both the *Barnes* and *Cromer* courts seem to have held the intent of the testator in high regard.

40. *See Barnes*, 1 Edw. Ch. at 44. ("[A] clear or manifest intention to the contrary expressed in the will . . . will govern and control the legal operation of words."); *see Cromer*, 3 Barb. Ch. at 466 (reasoning that the term "children" "will not include illegitimate offspring, stepchildren, children by marriage only, grand-children, or more remote descendants" unless there is something "to show that the testator intended to use it in a different sense").

41. The 1859 version of the after-born statute is word-for-word the same as the 1829 version, except that most of the commas were removed. *See* 1 N.Y. Laws 40 (1869). Interestingly, the 1869 amendment to the statute only changed the after-born statute to be gender neutral, possibly reflecting changes in the law that first afforded married women their property rights and the right to dispose of that property in a will. *See* Norma Basch, In the Eyes of the Law: Women, Marriage, and Property in Nineteenth-Century New York 162–99 (1982), for an interesting discussion of the Earnings Act of 1860, which granted women "sole and separate property" rights from their husbands. *Id.* at 234. The first substantial revision to the statute would come in 1966. *See infra* pp. 647–48.

42. McLean v. McLean, 207 N.Y. 365 (1913). *McLean* is given credit as "authority" in the most updated edition of New York Jurisprudence for the "fundamental object" or the "legislative intent" of the statute. *See* 38 N.Y. Jur. 2d *Decedents' Estates* § 124 (2012).

second case, *Bourne v. Dorney*,[43] expanded the scope of "children" under the statute to include adopted children.

McLean was the first New York Court of Appeals case of the twentieth century to conduct an in-depth consideration of the legislative intent behind the after-born statute.[44] The *McLean* court recognized that the after-born statute created an internal tension within intestacy law;[45] namely, on one hand, the law does not compel parents to bequeath anything to their children at death,[46] while on the other, a sense of justice—and, the court is quick to mention, a statute—enables the law to provide for after-born children outside of the will.[47] To resolve this apparent tension, the court turned to the legislative intent behind the after-born statute.[48]

According to the *McLean* court, the legislature created the statute to guard against a testator's "thoughtlessness and lack of vision," which could "prevent a testator from contemplating the possibility of after-born children."[49] The court concluded that if the testator "overlook[s] and fail[s] to consider the possibility and claims of those who, if born, will be the natural objects of his bounty, the law will provide for them."[50] Thus, the court understood the after-born statute to be a legislated safeguard against testators who inadvertently fail to include their after-born children in their will due to lack of foresight. This view of the statute resolves the internal tension in the law by emphasizing the intent of the testator. That is, the court in *McLean* is making it clear that the law is not necessarily compelling these testators to provide for their children, so much as the law is allowing intent to include

43. Bourne v. Dorney, 171 N.Y.S. 264, 264 (2d Dep't 1918), *aff'd*, 227 N.Y. 641 (1919). Because the New York Court of Appeals affirmed the Second Department's decision without writing its own opinion, the discussion of *Bourne* is based on the decision of the Second Department.

44. A WestlawNext™ search of New York Court of Appeals cases discussing the after-born statute between the years of 1899 and 1914 yielded only five results, including *McLean*. Of the four results not including *McLean*—*In re* U.S. Trust Co. of New York, 175 N.Y. 304 (1903); Pimel v. Betjemann, 183 N.Y. 194 (1905); *In re* Lansing's Estate, 182 N.Y. 238 (1905); Cammann v. Bailey, 210 N.Y. 19 (1913)—none undertook a discussion of the legislative intent behind the after-born statute.

45. *See McLean*, 207 N.Y. at 371–72.

46. *Id*. at 371 ("[I]t has never been held or assumed, in this state at least, that it was the intention of the Legislature by this statute to compel, regulate, or control testamentary provision even by a parent for children.").

47. *Id.* ("For reasons which at once commend themselves to our sense of justice it has been determined, and by statute provided, that if a testator does thus overlook and fail to consider the possibility and claims of those who, if born, will be the natural objects of his bounty, the law will provide for them in the distribution of his estate outside of the terms of his will").

48. *See id*. The *McLean* court does not use the phrase "legislative intent," but appears to use the term "fundamental object" as a synonym for the phrase.

49. *Id.*

50. *Id.* In *McLean*, the court would most likely not have considered the possibility that the testator may already have children of which he was not aware because illegitimate children had been specifically barred from recovery under the after-born statute since the *Cromer* case in 1848 and presumably the testator is aware of his legitimate children at the time he executes his will. *Cf.* Cromer v. Pinckney, 3 Barb. Ch. 466, 466 (1848) (defining children as "immediate legitimate descendants").

after-born children in a will to be implied where neither the will, nor any extraneous settlements, suggests that this assumption is contrary to the testator's wishes. This reasoning should also lead courts to the conclusion that, in some instances, the plight of an after-known child is substantially the same as an after-born child, especially because both involve a certain "thoughtlessness and lack of vision" of the "natural objects" of one's bounty.

Only five years after *McLean, Bourne v. Dorney* greatly expanded the scope of children protected by the after-born statute when, for the first time, the courts in New York recognized that a child adopted after the execution of the will is "a child born after the making of a last will."[51] As such, an "after-adopted" child is entitled to the same protection under the after-born statute as a biological child.[52] This expansion in the statute was not unanimously approved. In a dissenting opinion, Judge Putnam argued for a plain reading of the statute, noting that allowing adopted children to qualify as after-born children construed the after-born statute to read "shall have a child born [*or adopted*] after the making of his will."[53] The dissent reasoned that this could not possibly have been the purpose of the legislature since legal adoption did not exist in New York when the then-current after-born statute was enacted.[54] Judge Thomas, writing for the majority, rebuffed the dissent's concern, finding that "it is not necessary to interpolate words into the statute, but rather to decide that [the recently amended sections 100 and 114 of the N.Y. Domestic Relations Law] caused the adopted child to be regarded as the equivalent in right of the natural child."[55] With this reasoning, the Second Department in *Bourne* reversed the decision of the lower court and held that after-adopted children qualified as children under the after-born statute.[56] On appeal, the Court of Appeals unanimously affirmed the decision of the Second Department.[57]

Including adopted children within the after-born statute was a significant step in expanding the scope of the after-born statute. Even further, *Bourne* reflects an important divergence from the prevailing trend of adherence to the plain meaning of the statute when faced with changed societal circumstances. Instead, *Bourne*

51. Bourne v. Dorney, 171 N.Y.S. 264, 264 (2d Dep't 1918), *aff'd*, 227 N.Y. 641 (1919) (quoting EPTL 5-3.2's forerunner, N.Y. Decedent Est. Law § 26).

52. The court in *Bourne* did not use the term "after-adopted."

53. *Id.* at 272.

54. *Id.*

55. *Id.* at 270. Section 114 of the Domestic Relations Law (DRL) governs the rights granted to a legally adopted child. Section 114 of the DRL was amended in 1887 to include the right of inheritance for adopted children, while it had earlier specifically excluded the right. *Id.* at 266. In 1896, section 100 of the DRL (at the time of *Bourne*, section 110 of the DRL) established June 25, 1873 as the cut-off date, before which an adoption had no effect on an adoptive parent's will, devise, or trust. *Id.*

56. *Id.* at 271.

57. Bourne v. Dorney, 227 N.Y. 641 (1919).

emphasized the focus on the testator's intent by adopting a legal fiction,[58] the adoption exception,[59] that would unite the intent of the legislature with the intent of the testator.[60] This legal fiction allowed the adopted child in *Bourne* to inherit from her adoptive father exactly as if she had been born to him as a biological child.

Thus, even though the court in *Gilmore* noted that the reason it rejected an after-known child exception was because it would be "contrary to the plain meaning" of EPTL 5-3.2, this reason blatantly contradicts the rationale for including adopted children in *Bourne*, which has never been overruled. In *Gilmore*, the court states that:

> [i]f the movants' arguments were to be accepted, the result would be that children born of a testator *prior to the execution of a will*, but unknown to such testator, could be entitled to be treated as an after-born child. This would lead to a result that would be contrary to the plain meaning of EPTL 5-3.2.[61]

However, by enforcing the adoption exception, *Bourne* found that the plain meaning of EPTL 5-3.2 is subordinate to the intent of the testator. As such, an exception for after-known children, while contrary to the plain meaning of EPTL 5-3.2, would not be unique and would not necessarily be contrary to the overall purpose of the statute, which is to avoid the inadvertent or accidental disinheritance of children.[62]

Following *Bourne*, the next major change in New York's after-born statute occurred in 1966, when the statute was moved from section 26 of the Decedent Estate Law (DEL) to its current location in EPTL 5-3.2.[63] For the after-born statute, the relocation was not only a simple reorganization, but also a revision. The Revisers' Notes comment that the revision was intended to "eliminate a serious defect in the policy underpinning of [the after-born] statue [sic]," while leaving the principle

58. Nancy J. Knauer defined a legal fiction as "a device used to facilitate the application of the law to novel legal questions and circumstances." Nancy J. Knauer, *Legal Fictions and Juristic Truths*, 23 St. Thomas L. Rev. 1, 9 (2010) (citing Lon L. Fuller, Legal Fictions 1, 21–22 (1967)). Knauer notes that while some legal fictions are "bald untruths," others "operate more in the realm of metaphor." *Id.* The adoption exception would seem to fit into the latter category of metaphor since the exception treats the adopted child *as if* she were born after the execution of a will even though she was in fact born before.

59. *See In re* Gilmore, 925 N.Y.S.2d 567, 571 (2d Dep't 2011) ("As a result of the decision in *Bourne*, children adopted in [New York] are considered born to a testator at the time of the adoption for the purposes of EPTL 5-3.2" (citing N.Y. Est. Powers & Trusts Law § 5-3.2 cmt. (McKinney 2011) (Adopted and Non-Marital Children))).

60. *See* Bourne v. Dorney, 171 N.Y.S. 264, 267 (2d Dep't 1918), *aff'd*, 227 N.Y. 641 (1919) ("But if the statutes, read together, be construed to mean that the adopted child shall have the entire status of the born child, and that his exclusion from a will was not intentional, because his existence and relation to the testator were unseen and unknowable, then not only is the foster parent's power to disinherit preserved, but also the duties and rights that the statute imposes and confers are fulfilled.").

61. *In re Gilmore*, 925 N.Y.S.2d at 572 (emphasis added).

62. *See In re* Estate of Faber, 305 N.Y. 200, 203 (1953) ("[The after-born statute's] purpose was . . . to guard against inadvertent or unintentional disinheritance." (citing Wormser v. Croce, 120 App. Div. 287, 289 (1st Dep't 1907) (internal quotation marks omitted))).

63. *See* 1966 N.Y. Laws 2907–08. The relocation of DEL § 26 to EPTL 5-3.2 was part of a much larger effort to reorganize New York's laws in 1966. *See id.*

underlying the after-born statute unaffected.[64] Under the old statute, if a parent excluded her children from inheritance in her will, but made no reference to how after-born children should be treated, then after-born children would still be allowed to take an intestate share of their parent's estate.[65] The revision changes this outcome, interpreting the parent's decision to exclude some children from the will as the intent to limit the inheritance of all future children. By adjusting the statute to account for this unique circumstance, the revision and accompanying comments reflect the purpose and general trend in the statute to give deference to the intent of the testator. Similarly, this case comment's proposed solution to *Gilmore* promotes deference to the intent of the testator through flexibility that allows after-known children to be included in the after-born statute, with the requirement that some threshold amount of evidence be provided by the party claiming protection that would show that their inclusion would not be contrary to the intent of the testator.

Going back to the 1966 amendment, the legislature certainly acted wisely to bring the after-born statute more in line with the intent of the average parent. Unfortunately, the legislature's solution was to replace the previous rigid rule that all after-born children would be entitled to inheritance with a new rigid rule that granted after-born children in such a situation no more than a share of the gift provided to their other siblings. In hindsight, this "one size fits all" approach to a testator's intent seems equally as inflexible as the previous rule and just as likely to lead to results inconsistent with the testator's intent. Consider, for instance, a situation where one or more children seriously impair their relationship with their parents. Should one or both of the parents memorialize the situation by reducing or eliminating the children's inheritance, the 1966 amendment would interpret that act of the parent as subsequent intent to reduce or eliminate the inheritance of all after-born children.

The flaws in the 1966 amendment first became apparent twenty-two years later in *Matter of Ashby*.[66] In *Ashby*, the testator, Neal T. Ashby, had two children at the time he executed his will.[67] According to his will, both adult children were "for their own reasons, of little comfort, companionship or assistance to [him] in their adulthood."[68] Accordingly, Mr. Ashby gave the two children only a pittance in his will: $1000 each.[69] After writing this will, Mr. Ashby divorced his first wife,

64. *Id.* The underlying principle was the "reasonably presumable intention of the normal parent." *Id.* at 2907.

65. *See. id.* The court in a later case, *In re Will of Ashby*, noted that the Temporary Commission on Estates [1966] observed that under the "prior [version of the] law where a testator intended to benefit his wife to the exclusion of his children, the after-born was, nevertheless, entitled to a full intestate share." *In re* Will of Ashby, 524 N.Y.S.2d 652, 654 (Sur. Ct. Nassau Cnty. 1988) (citing Temp. State Comm'n on the Modernization, Revision, and Simplification of the Law of Estates, Fifth Report 778 (1966)). The solution to this problem was to limit the after-born child share to that of the other children inheriting under the will.

66. *See In re Will of Ashby*, 524 N.Y.S.2d at 654.

67. *Id.* at 653.

68. *Id.*

69. *Id.*

remarried, and had a daughter, Caroline.[70] At her father's death, Caroline was in no way provided for in her father's will or any extraneous settlement,[71] making her an after-born child under the statute before and after the 1966 amendment. However, under the amended statute, Caroline was limited to one-third of the $2000 collectively awarded to her other siblings, and not a full intestate share.[72] While the judge certainly felt sympathy for Caroline,[73] this sympathy was nevertheless outweighed by the very rigid nature of the new statute.[74] Despite not siding with Caroline, the judge was so sympathetic to her case that he forwarded his decision to the Law Revision Commission to encourage remedial legislation.[75]

Accordingly, four years later in 1992, the New York legislature passed an amendment to EPTL 5-3.2 that specifically overruled the reluctant decision of *Matter of Ashby*. This amendment gave the courts discretion to give an after-born child a significantly larger portion of the parent's estate "[i]f it appears from the will that the intention of the testator was to make a limited provision" to the testator's then-living children.[76] Such an amendment again reflects the ongoing purpose of the statute—to give effect to the "reasonably presumable intention of the normal parent"—but provides flexibility for subtle differences in factual scenarios when determining whether the after-born child takes an entire intestate portion of the parent's estate, or whether the child has to share a portion of the estate already left to their siblings.[77] Similarly, a common law or statutory exception for after-known children would benefit the current statute by providing the court increased flexibility to interpret the intent of the testator regarding after-known children.

Not long after the 1992 amendment, the New York Legislature passed two more amendments to EPTL 5-3.2, one in 2006 and another in 2007. The 2006 amendment clarified what should happen under the statute in the instance that the testator's sperm or eggs are used to create children after a testator's death.[78] Seeing inheritance by these

70. *Id.*

71. *Id.*

72. *Id.* at 654. In 1988, EPTL 5-3.2(a) stated that "[i]f the testator has one or more children living when he executes his last will" and "[p]rovision is made therein for one or more of such children," then "the portion of the testator's estate in which the after-born child may share is limited to the disposition made to children under the will." N.Y. Est. Powers & Trusts Law § 5-3.2(a)(1) (McKinney 2011).

73. *In re Will of Ashby*, 524 N.Y.S.2d at 654 ("[I]t may be argued that where the will itself states that a bequest to children is limited because of ill feelings towards them, the after-born should receive an intestate share.").

74. *See id.* (noting that "[t]he courts must give effect to legislation as it is written not as they or others believe it should be written").

75. *See id.*

76. 1992 N.Y. Sess. Laws ch. 611 (A. 10425-A) (McKinney) (codified at Est. Powers & Trusts § 5-3.2).

77. 1966 N.Y. Laws 2907.

78. 2006 N.Y Sess. Laws, New York Bill Jacket, ch. 249, A.B. 10721 (2006), Chief Administrative Judge Jonathan Lippman, Memorandum in Support of A. 10721 (McKinney) ("Recent developments in reproductive technology now make it possible for children to be conceived and born many years after the death of the biological father and/or mother." (citing Ronald Chester, *Posthumously Conceived Heirs*

posthumous children as unfair to the children conceived during the testator's lifetime,[79] the 2006 amendment restricted the term after-born children to mean only the testator's children "born during the testator's lifetime or in gestation at the time of the testator's death and born thereafter."[80] While the amendment narrows the scope of the statute, its purpose is to elaborate on the same, unchanged legislative intent behind the statute.[81] By excluding posthumously conceived children, the statute seeks to remain in harmony with the "reasonably presumable intent of the normal parent."[82]

Finally, the next and most recent amendment to the after-born statute occurred in 2007; it formally recognizes that an illegitimate child is a child of the testator within the meaning of the statute.[83] This amendment was motivated by the case *In re Estate of Wilkins*.[84] In *Wilkins*, the testator, Delwyn Wilkins, executed his last will and testament on January 29, 1965.[85] Thereafter, Wilkins and Mamie Minor conceived a

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Under a Revised Uniform Probate Code, 38 Real Prop. Prob. & Tr. J. 728, 728–30 (2004))); Kristine S. Knaplund, *Postmortem Conception and a Father's Last Will*, 46 Ariz. L. Rev. 91, 92–99 (2004); Kayla VanCannon, Note, *Fathering a Child from the Grave: What Are the Inheritance Rights of Children Born Through New Technology After the Death of a Parent?*, 52 Drake L. Rev. 331, 338–41 (2004).

79. *See* 2006 N.Y Sess. Laws, New York Bill Jacket, ch. 249, A.B. 10721 (2006), Sen. John A DeFrancisco, Letter to Hon. Richard Platkin, Counsel to the Governor (July 25, 2006) (McKinney) ("This legislation would eliminate the possibility that a child born many years after the death of the testator, without the testator's desire and knowledge, will claim a share of the estate, thereby unfairly depriving the testator's children born during his lifetime of their full expected inheritance.").

80. 2006 N.Y. Sess. Laws, ch. 249 (A. 10721) (McKinney).

81. *See* 2006 N.Y Sess. Laws, New York Bill Jacket, ch. 249, A.B. 10721, Letter to Hon. Richard Platkin, Counsel to the Governor. ("The sperm, ova or preembryos may have been donated to a fertility clinic, without any intent on the part of the donor that a resulting child would share in his or her estate.")

82. 1966 N.Y. Laws 2907. For an article arguing that posthumous children should be included under the statute, see generally Robert Matthew Harper, *Dead Hand Problem: Why New York's Estates, Powers and Trusts Law Should Be Amended to Treat Posthumously Conceived Children as Decedents' Issue and Descendants*, 21 Quinnipiac Prob. L.J. 267 (2008).

83. 2007 N.Y. Sess. Laws ch. 249 (amending EPTL 5-3.2(b) to read "[f]or purposes of this section, a non-marital child, born after the execution of a last will shall be considered an after-born child of his or her father where paternity is established pursuant to section 4-1.2 of this chapter."). Furthermore, there was overwhelming support for the amendment in the New York Legislature. The bill passed the Assembly 150 to 0 and the Senate 60 to 1. 2007 N.Y. Sess. Laws, New York Bill Jacket, 2007 S.B. 789, Ch. 423 (McKinney).

Illegitimate children have only incrementally received rights putting themselves on par with their legitimate counterparts under New York's EPTL. See John M. Czygier, Jr. & Barbara Howe, *Estate Planning and the Non-Marital Child*, 83 N.Y. St. B.J. 34, 35 (2011), for more detail on the EPTL sections that were gradually amended to provide illegitimate children with the same intestacy rights as legitimate children under the law.

84. *In re* Estate of Wilkins, 691 N.Y.S.2d 878 (Sur. Ct. N.Y. Cnty. 1999). The Introducer's Memorandum in Support of senate bill 789 (2007) notes two cases, *In re Estate of Wilkins*, and *In re* Estate of Walsh, N.Y.L.J., May 13, 1998, at 31-32 (Sur. Ct. Nassau Cnty.), as cases that demonstrate the inconsistency in not expressly accepting illegitimate children in EPTL 5-3.2. However, the memorandum also notes that the *Walsh* case would have been barred despite express acceptance of illegitimate children under the statute. In *Walsh*, the petitioner was already barred because she had conceded that her father knew of her existence before he wrote his will, clearly disqualifying her from availing herself of the after-born statute. *Id.*

85. *In re Estate of Wilkins*, 691 N.Y.S.2d at 879.

child while Mamie was still married to Raymond Minor.[86] For fear of losing her job at the State Department for having a child out-of-wedlock, Mamie Minor wrote on the child's birth certificate that her husband, Raymond Minor, was the father.[87] Although Mamie and Raymond Minor were married at the time of the child's birth, Mamie had left Raymond three years earlier after discovering that Raymond may have still been married to his first wife at the time of his marriage to Mamie.[88]

For the Surrogate's Court, the question was whether the child born to Wilkins and Minor out-of-wedlock could void Wilkins's will, thereby allowing the out-of-wedlock child to inherit as an after-born child.[89] Despite two cases on point decided to the contrary,[90] the court distinguished the *Wilkins* case because of recent changes to EPTL 4-1.2 (Inheritance by non-marital children), which allowed inheritance by non-marital children even when the child's mother and father do not eventually marry.[91] Even though EPTL 5-3.2 had not been likewise amended, the court reasoned that interpreting EPTL 5-3.2 as including illegitimate children was sufficiently consistent with the trend in social attitudes demanding abolition of the "unchosen birthgiven shackles of illegitimacy and to confer filial equality wherever possible."[92] Thus, the court's decision furthers the purpose of EPTL 5-3.2 by adjusting to the intent of the modern testator and recognizing that such testators now likely desire that their children born out-of-wedlock should be treated the same as children born within a marriage. The question now seems to be whether society also wishes to recognize out-of-wedlock children that the testator was unaware of at the time they drafted their will as after-born children. Certainly the father would have a responsibility toward the child during his lifetime,[93] so it would only seem just that the father's estate should also carry this responsibility.

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86. *Id.* at 879–80. Michael Minor was born on June 28, 1969. *Id.* at 880.

87. *Id.* The decision does not note when Mamie and Raymond got a divorce, but presumably it was after Michael was conceived. *Id.* at 879.

88. *Id.*

89. *Id.* The situation in *In re Estate of Wilkins* is different from the situation the revision of 1966 intended to prevent. The 1966 revision intended to prevent an after-born child from inheriting in cases where all of the testator's other children had been excluded under the will. *See* N.Y. Est. Powers & Trusts Law § 5-3.2(a)(1) (McKinney 2011) ("If the testator has one or more children living when he executes his last will, and: (A) No provision is made therein for any such child, an after-born child is not entitled to share in the testator's estate."). In the *Wilkins* case, Delwyn Wilkins had no other children, meaning that Michael Minor was not barred from inheriting under the 1966 amendment to the after-born statute embodied in EPTL 5-3.2(a)(1)(A). *In re Estate of Wilkin*s, 691 N.Y.S.2d at 882.

90. *Id.* at 881 (citing *In re* Crawford, 315 N.Y.S.2d 890 (1970); *In re* Tomacelli-Filomarino, 73 N.Y.S.2d 297 (1947)).

91. *Id.*

92. *Id.* at 882 (citing Prudential Ins. Co. v. Hernandez, 314 N.Y.S.2d 188, 190 (1970)).

93. N.Y. Fam. Ct. Act § 413 (McKinney 2011). According to Merril Sobie's Practice Commentaries, section 413 was amended in 1960 to stipulate that "the natural parents of a child born out-of-wedlock shall be severally liable for the support of such child." *Id.* § 413 cmt. The child support obligation in New York continues until the child is twenty-one years old. *Id.* § 414(1)(a).

Overall, the legal history of EPTL 5-3.2 reflects a pattern of legislative and judicial thought that has the purpose of avoiding inadvertent or accidental disinheritance of children.[94] Such a purpose has, at its heart, the intent of the testator. Prior to the early twentieth century, recognizing children whom the testator had inadvertently or accidentally disinherited seems to have been relatively straightforward: only legitimate children could qualify as children. As society began to recognize adopted and then non-marital children as also being children that could be accidentally disinherited, inheritance became more complicated.[95] This trend continues today, and with other factors such as increased divorce rates and increased birthrates of non-marital children, cases such as *Gilmore*—involving multiple marriages, marital and non-marital children, and after-known children—are only increasingly likely to appear before the courts.[96] These cases and their increasing complexity do not make EPTL 5-3.2 less useful; they make it more useful, but only if the statute and its common law interpretation can continue to adapt to society's needs. To this end, the adoption exception and amendments like those which occurred in 1992 are helpful because they give the court more flexibility to tailor the outcome of the statute to the specific situations that arise.

While the court in *Gilmore* came to the logical conclusion that Roy Gilmore very likely did not intend for the adult Hofler children to inherit any of his wealth, the reasoning used by the court, which excluded after-known children, demonstrates a problem with EPTL 5-3.2. The statute is not equipped to handle cases in which the testator has biological children that he is unaware of at the time he executes his will. The problem, however, likely did not receive the attention that it deserved because Roy Gilmore clearly did not intend to pass on any inheritance to any of his children except Angela Manning. Consider how differently the case could have proceeded if the Hoflers had been orphaned minors or if Roy Gilmore had given all of his children substantial inheritances. Should such a case come before a court in New York, the Second Department has set a clear precedent that will deprive the lower courts of the flexibly to distribute the testator's assets to after-known children.

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94. *See In re* Estate of Faber, 305 N.Y. 200, 203 (1953) ("[The after-born statute's] purpose was . . . to guard against inadvertent or unintentional disinheritance." (citing Wormser v. Croce, 120 App. Div. 287, 289 (1st Dep't 1907) (internal quotation marks omitted))).

95. *See generally supra* note 4.

96. While instances of men having children they are unaware of may be historically rare, the number of these cases seems likely to increase as the United States has seen a dramatic increase in unintended non-marital births between 1970 and 2009. *See* Gladys Martinez et al., Nat'l Ctr. for Health Statistics, Fertility of Men and Women Aged 15–44 Years in the United States: National Survey of Family Growth, 2006–2010, at 2 (2012), http://www.cdc.gov/nchs/data/nhsr/nhsr051.pdf. "In 1970, 11% of all live births were to unmarried women compared with 41% of all live births in 2009." *Id.* (citing Brady E. Hamilton et al., Nat'l Ctr. for Health Statistics, Births: Preliminary Data for 2010 (2011), http://www.cdc.gov/nchs/data/nvsr/nvsr60/nvsr60_02.pdf.) "Among births between 1999 and 2002, 77% of those to married women were intended at conception, while only 35% of those to never-married women were intended at conception." *Id.* (citing Chandra A. Martinez et al., Nat'l Ctr. for Health Statistics, Fertility, Family Planning, and Reproductive Health of U.S. Women: Data from the 2002 National Survey of Family Growth (2005), http://www.cdc.gov/nchs/data/series/sr_23/sr23_025.pdf).