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Testamentary Freedom and the Implied Right to Inherit

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Adam J. Hirsch, *Airbrushed Heirs: The Problem of Children Omitted from Wills*, 50 **Real Property, Trust and Estate L.J.** 175 (2015), available at [SSRN](#).



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One of the most frustrating aspects of the practice of estate planning and probate law is dealing with outdated plans. Specifically, when a testator has a change in circumstances and does not update his will or trust, we are left to speculate what the testator would have wanted.

Many jurisdictions provide statutory protections for children who were born or adopted by the testator after the will was created based on the presumption that these children were unintentionally disinherited. Professor Hirsch challenges this presumption by exploring the policy and the shortcomings of the various pretermitted (“unintentional omission”) rules. He focuses on two policy perspectives: the concern that testators pretermitted children because of forgetfulness, and the concern that testators failed to update their wills to account for changed circumstances. He raises questions about whether a testator’s unambiguous plan should be disrupted and how long a will should remain obsolescent (i.e., may no longer reflect the desires of the testator), after a change in circumstance.

While Professor Hirsch concedes that an existing child left out of a will is likely excluded intentionally, he challenges the presumption of inclusion by suggesting that pretermitted children may also be intentionally omitted if a testator does not update his plans after a certain period of time. Hirsch supports his premise by outlining why a testator might fail to update a will. The reasons include incapacitation, waiting for the right time, and just not getting around to it for a while (“lag time”). He then surmises that the longer the delay, the more likely it is that the testator did not want to update his plan. If that is the case, Professor Hirsch questions whether the implied pretermitted rules should take effect.

Specifically, Professor Hirsch proposes that legislators balance the risk of unintentional/intentional disinheritance by setting a time for the presumption to expire. Additionally, he proposes a preferential share concept, based on the size of the estate, similar to intestacy statutes. In other words, if the estate is small, then the surviving spouse would receive all, or the bulk of the estate, but if the estate is sufficiently larger, then the pretermitted children would receive a direct share.

Professor Hirsch also identifies several shortcomings in the pretermitted statutes, but I will address only three of them. The pretermitted provisions under the Uniform Probate Code (UPC) apply only to children, and only seven jurisdictions expressly include their descendants. In addition, the UPC pretermitted provisions do not cover embryonic children, and only eleven states expressly cover embryonic children. Furthermore, under the

UPC the inheritance rights of posthumously conceived children will be evaluated on a case-by-case basis. According to the UPC, posthumously conceived children born to a surviving spouse are presumed to have intestacy rights, while children born to anyone else are not presumed to have intestacy rights. He questions why the intestacy rights of these children should differ from intestacy rights of any other children.

Another issue Professor Hirsch addresses is the rights of unknown children of the testator. A father of a child may be unaware that his past relationship resulted in the birth of a child, especially if he does not maintain contact with the mother of the child. In the case where a testator is unaware of a child at the time he created his will, Professor Hirsch proposes that a will should be considered obsolescent only after the testator becomes aware of the child, rather than basing it on the birthdate of the child. Currently only two jurisdictions make such a provision. Contrary to the view that pretermission statutes should not apply to these children because the testator did not have an opportunity to clarify his intent, Hirsch finds – based on a poll that he commissioned for the paper – that by large margins both men and women would prefer to have unknown children inherit equally with the known ones.

Next, Professor Hirsch addresses the fact that pretermission statutes under the UPC, and in most states, apply only to wills. Nonprobate assets and will substitutes that might comprise a majority of the value of an estate are not subject to the pretermission statutes. While the *Restatement of Property* indicates pretermission provisions should apply to comprehensive will substitutes such as revocable trusts, it excludes pay-on-death designations for bank accounts. Professor Hirsch asserts there should be no distinction because a pay-on-death account is the functional equivalent of a specific bequest.

Professor Hirsch also describes the advantages and disadvantages to permitting extrinsic evidence to determine testamentary intent and overcome the pretermission presumptions. An obvious disadvantage is the cost of adjudicating on a case-by-case basis. Other disadvantages include unreliable testimony, ambiguous testimony regarding the relationship with the omitted child, and misconstruing statements made by the testator. On the other hand, allowing extrinsic evidence would permit the drafting attorney to report any missing information and clarify issues to effectuate the testator's intent about the omitted child. Another advantage to permitting extrinsic evidence is that it would make up for shortcomings in the statutes. Professor Hirsch suggests extrinsic evidence should be permitted to determine testamentary intent just as the UPC permits extrinsic evidence to override other default rules dealing with changed circumstances.

In short, Professor Hirsch concludes that existing rules regarding omitted children are inadequate. He suggests the rules should be more flexible; to wit, the presumption should be temporary and expire after a passage of time and should be decided on a case-by-case basis. Professor Hirsch's article provides great topics of discussion for Trusts and Estates courses. His article also provides something to think about for drafters of future UPC and state statute revisions regarding omitted children.

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