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substitute" which would prevent its becoming part of the parent's intestate estate will be excluded from the operation of the pretermitted heir statute.[283]

Even if the will omits a child who can claim under the pretermitted heir statute, that fact does not invalidate the will. Its only effect is to render the will ineffectual as to the omitted child. The child's remedy is not to have the will itself set aside, but to petition the court for a share of the estate as a part of the estate's administration.[284] Of course, if the omitted child is the only heir of the testator (that is, the only one entitled to take under the intestate succession statute), that child, although perhaps actually intended not to inherit at all, takes the entire estate to the exclusion of any other beneficiaries named in the will.[285] However, if the child's intestate share does not consume the entire estate, as to any other beneficiaries the will remains valid and effectual,[286] except to the extent that they must "refund their proportional part" to make up the child's share.[287] Thus the invocation of the pretermitted heir statute does not constitute a challenge to the "validity" of the will or a will contest for purposes of RCW 11.24.010, and the fact of pretermission can be brought to the court's attention at any time prior to the final decree of distribution.[288] Following that final decree (with proper notice) and the period for appeal, however, the question of pretermission cannot be raised in a collateral attack.[289]

As something of a corollary to the above, if the child whom the testator desires to disinherit is named and expressly disinherited in the will, but the testator fails to dispose of his entire estate in that document or by some nontestamentary means (such as joint tenancy or a revocable trust), the child (and any other legal heirs) will take a share of whatever property remains, by intestacy, despite the expressed intent to disinherit.[290] Thus it is necessary both to mention the disinherited child in the will and to dispose of the testator's

283. *See* McKnight v. McDonald, 34 Wash. 98, 103, 74 P. 1060 (1904) (community property agreement). Regarding will substitutes generally, see chapter 8.

284. Van Brocklin, *supra* note 195; Barker's Estate, *supra* note 204.

285. *See, e.g.*, Bauer's Estate, *supra* note 214.

286. Webster, *supra* note 244.

287. RCW 11.12.090. This again might leave the omitted child with a larger share than those named.

288. In re Gherra's Estate, 44 Wn.2d 277, 267 P.2d 91 (1954).

289. In re Ostlund's Estate, 57 Wash. 359, 106 P. 1116 (1910) (adult child); *but c.f.* Morrison v. Morrison, 25 Wash. 466, 473, 65 P. 779 (1901) (children not bound during minority).

290. *See* Atkinson, *supra* note 181, § 36 at 145.

entire estate to others in order to achieve an intended result of leaving nothing to that child.

Finally, there is an exception to the policy expressed in the pretermitted heir statute that a testator's lifetime obligation to his child can be terminated by express disinheritance in his will. If either a decree of divorce or a property settlement agreement contains an express or implied promise to continue support of a child beyond the death of the testator/obligor, that obligation will be enforced against the testator's estate regardless of the content of the will.[291]

B. CONDITIONS IMPOSED BY THE TESTATOR

In addition to restrictions on a testator's freedom of testation imposed by law (which can supersede a will even if the testator expressed an intention of making some other disposition), there are many conditions and restrictions that the testator himself might impose on the property passing under his will. Of these, only a few types are at all controversial or subject to substantial judicial scrutiny. Thus a testator may impose a condition on receipt of a legacy such as, "provided X is still in my employ at the time of my death," and the only questions that might arise would be those of construction (Did the testator mean to impose a condition? What is meant by "employ"?) and possibly the effect of a failure or inability to perform the condition. Other conditions or restrictions, however, such as those in restraint of marriage or alienation of real property, may be of questionable validity because they are contrary to public policy.

This section will cover the major types of conditions and restrictions that have raised substantial questions of validity and enforceability in Washington. It will also examine the effects of a failure of such a condition or restriction due to its invalidity or to noncompliance.

B.1. The Existence of a Condition

B.1.a. "Conditions Precedent" and "Conditions Subsequent"

Many cases speak in terms of "conditions precedent" and "conditions subsequent," and the validity of a testamentary gift may

291. *See, e.g.*, Scudder v. Scudder, *supra* note 47; Stone v. Bayley, 75 Wash. 184, 134 P. 820 (1913); O'Neal, *supra* note 47.