

THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
NH CIRCUIT COURT

10th Circuit - Probate Division - Brentwood
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Case Name: **Estate of Marie G. Dow**
Case Number: **318-2019-ET-00173**

ORDER ON MOTION TO DETERMINE PRETERMITTED HEIR

Before the court is a motion filed by the son of the deceased, Christopher Dow, asking the court to find that he is a pretermitted heir. Objecting to the motion is Leslie Dow, the executrix of the estate. The history of this estate is set forth in my order of August 27, 2019 granting the petition for estate administration.

The will of Marie Dow, dated June 30, 2014, fails to specifically name her son, Christopher, in any way. Article Eighth of the will, however, provides as follows:

I have intentionally omitted to mention, or to devise or bequeath or give anything of which I may die seized and possessed, or to which I may be in any way entitled at the time of my decease, to any person or persons other than those mentioned in this my last Will and Testament.

The will also contains an Article that requires that Massachusetts law be applied to the will. Therefore, the issues before the court are whether Massachusetts or New Hampshire law applies, and upon the application of the appropriate law, whether Christopher Dow is a pretermitted heir.

Mr. Dow argues that New Hampshire law applies and that the language in Article Eighth is not sufficient to meet the requirements of RSA 551:10 which establishes the pretermitted heir law of New Hampshire. The executrix, Leslie Dow, argues that since the deceased specifically provided in her will for the application of Massachusetts law, I must instead look to M.G.L.A.190B:2-302 to determine if Christopher Dow is a pretermitted heir. Under that statute, she argues that he is not a pretermitted heir.

Regarding the issue of which state's law governs, New Hampshire follows the Restatement (Second) Conflict of Laws regarding conflict of laws issues. See 7 New

Hampshire Practice Wills, Trusts and Gifts, at § 7.01 (4th Ed.). The Restatement provides that I must recognize the choice of law made by a testatrix in her will. Restatement (Second) Conflict of Laws, §§ 263(1), 239(1) (1971); see also *Royce v. Estate of Denby*, 117 N.H. 893 (1977)(finding that New York law was to be applied to determine pretermitted heir status where the testator indicated that she wanted New York law to apply regarding who would receive distributions under her will if her specific gifts under the will failed).

Given this, and the specific provisions of Marie Dow's will, Massachusetts law applies. Therefore, I must look to M.G.L.A. 190B:2-302 to determine if Christopher Dow is a pretermitted heir.

Pursuant to that statute, pretermitted heirs are limited to children born or adopted after the will has been executed by the deceased, or where the deceased believed that a child was deceased but the child was living at the time of the execution of the will. See M.G.L.A. 190B:2-302(a)(1) and (2). There are some exceptions contained in the statute, and Christopher Dow argues that the exception under 190B:2-302(b)(1) applies in this case. However, he has misread the statute.

The exception in §2-302(b)(1) provides that if the omission of the child is intentional, then the provisions of subsections (a)(1) and (a)(2) do not apply. Christopher Dow argues that this language should be read in an overly broad fashion - ignoring the rest of the statute - such that unless an omission is intentional, then any child would be a pretermitted heir.

This reading of the statute ignores the fact that the statutory language deals only with children born or adopted after the date of the deceased's death. It does not contain any language that broadens the statute to include any other children. The only exception is contained in subsection (c) which deals with children of the testator whom the testator believed to be dead but were in fact living at the time of the execution of the will. That is not the case here.

Therefore, I find that Massachusetts law applies to the determination of whether Christopher Dow is a pretermitted heir under the provisions of the will. Moreover, when Massachusetts law, specifically M.G.L.A. 190B:2-302, is applied, I must find that Christopher Dow is not a pretermitted heir. As a result, the motion is denied.

October 21, 2019

Date



Judge Mark F. Weaver