THE STATE OF NEW HAMPSHIRE
SUPREME COURT

Docket No. 2017-0532

In Re Teresa E. Craig Living Trust

Rule 9 Interlocutory Appeal From Final Order of the
6th Circuit – Probate Division – Concord Trust Docket

BRIEF OF RESPONDENT DANIEL TOLAND, TRUSTEE OF THE TERESA E. CRAIG LIVING TRUST

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Oral Argument is requested. Attorney Ralph F. Holmes will argue.

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QUESTIONS PRESENTED FOR REVIEW

Should the Court upheave the law of trusts, with wide ranging consequences for all types of trusts settled since the enactment of the New Hampshire Uniform Trust Code ("NHTC"), by holding that RSA 564-B:1-112 of the NHTC incorporates by reference the pretermitted heir statute, RSA 551:10, even though: neither RSA 564-B:1-112 nor its legislative history references RSA 551:10 or pretermitted heirs; no other provision of the NHTC provides any support for this interpretation; no commentator or lower court ruling has been cited to demonstrate that anyone before claimants even thought of such a construction; and the legislature today has before it Senate Bill 311 to clarify that it did not intend this result?

STATEMENT OF THE CASE

This case arises out of the Petitioners' allegations that they are pretermitted heirs of the Teresa E. Craig Living Trust ("Trust") and the Trustee's disagreement with that contention. On February 14, 2017, the Petitioners filed an Equity Petition in the 6th Circuit Court, Probate Division, requesting a copy of the Trust and seeking a determination of their status as pretermitted heirs. The Trustee filed a motion to dismiss the Petitioners' claims on March 27, 2017 and a second motion to dismiss on May 1, 2017. On May 9, 2017, the court transferred the matters to the 6th Circuit Court, Probate Division, Trust Docket.

On May 31, 2017, the Court held a hearing on the motions to dismiss. On July 21, 2017, the Court issued an order requiring the Trustee to file a copy of the Trust and any amendments for the Court's *in camera* review. The Trustee voluntarily provided the Petitioners with the Trust instrument and filed a Notice of Compliance with Petitioners' Request for Relief, to which the Petitioners objected.

On August 25, 2017, in an effort to provide further guidance to the Court, the New Hampshire Trust Council, filed a Motion for Leave to File an *Amicus* Memorandum of Law in support of the Trustee's position. This Motion was granted.

Pursuant to Rule 9, the Probate Court transferred to this Court, on an interlocutory basis without ruling, the question of whether the enactment of RSA 564-B:1-112, without specifically mentioning RSA 551:10 or permitted heirs, incorporates the pretermitted heir statute, RSA 551:10, as a rule of construction applicable to trusts. Ruling on the Equity Petition is stayed pending a ruling by this Court.

STATEMENT OF FACTS

Teresa E. Craig ("Teresa") died in Bow, New Hampshire on July 10, 2016. Add. 29[1]. In 2012, Teresa executed a will ("2012 Will"). Add. 29. She had previously created the "Teresa E. Craig Living Trust" on September 3, 1999, which was amended and restated on August 27, 2012 ("2012 Trust"). Add. 29. This is the trust at issue in this case. The 2012 Trust is the sole legatee of the 2012 Will. Add. 29. The Respondent, Daniel Toland, is the Trustee. Add. 29.

Teresa had two sons, Michael Grasso ("Michael") and Sebastian Grasso ("Sebastian"). Add. 29. Sebastian is the executor of the 2012 Will. Add. 29. Michael died on December 17, 2007. Add. 29. He had two children Andrew and Mikayla Grasso, the Petitioners in this action. Add. 29. The Petitioners and their father were not named in the 2012 Will or 2012 Trust. Add. 41-48. However, Teresa included the following provision in the 2012 Will, which clearly and unambiguously highlights her intent when drafting the documents:

> Except as otherwise expressly provided by this Will, I *intentionally, and not as the result of any accident, mistake or inadvertence*, make no provision for the benefit of any child of mine, nor the issue of any child of mine, whether now alive, now deceased, or hereafter born or deceased.

[1] "Add." refers to the addendum of this brief.

Add. 46. (emphasis added). The 2012 Trust names Sebastian and his descendants as the beneficiaries of the Trust upon Teresa's death. Add. 29. The Petitioners argue that they have inheritance rights under the pretermitted heir statute because they were not mentioned in the 2012 Will or 2012 Trust. This argument is made regardless of Teresa's clearly stated intent in the 2012 Will.

SUMMARY OF ARGUMENT

The legislature did not provide a "clear indication" that it intended the pretermitted heir statute to apply to trusts, so that statute does not apply to the Trust in this case. The mere enactment of RSA 564-B:1-112, without more—such as mentioning RSA 551:10 or permitted heirs—does not demonstrate that the legislature clearly intended for RSA 551:10 to apply to trusts. The result proposed by the Petitioners would in effect overturn the holding in *Robbins*, which should be left undisturbed.

The issue presented in this case—whether the implementation of the New Hampshire Trust Code ("NHTC"), specifically section RSA 564-B:1-112, effectively overruled *Robbins*, by applying RSA 551:10 to trusts—is one of first impression. This Court's decision will have a substantial effect on settlor intent and the administration of trusts in New Hampshire. For the following reasons the Petitioners' position that RSA 551:10 applies to trusts is flawed in numerous ways and, and if accepted, would upheave settled law and the administration of trusts throughout the state.

In deciding whether the pretermitted heir statute applies to the Trust, this Court should not add words that the legislature did not include, such as deciding that the pretermitted heir statute is a rule of construction, where RSA 564-B lacks evidence the legislature intended to confer rights on pretermitted heirs. Additionally, the Court must look to the plain meaning of RSA 551:10 and this Court's law, which limit its application *only* to wills.

Moreover, RSA 564-B:1-112 neither expressly mentions incorporating the pretermitted heir statute nor indicates that it intended RSA 551:10 to apply to trusts. There is no provision in the NHTC that supports the petitioners' claim. Furthermore, all of the substantive amendments to the NHTC since its adoption demonstrate incontrovertible efforts by the legislature to clarify the plain language understanding of the statute. Accordingly, where the legislature failed to amend the text of the code, the legislature did not intend for the text to have any additional meaning or application. The Court need not look beyond the text in the statute for further indication of legislative intent. The legislature further clarified its intent with the introduction of Senate Bill 311 ("S.B. 311"). S.B. 311, if enacted, will unequivocally express the legislature's intent with respect to the issue on appeal here: "For the purposes of this section, RSA 551:10, is not a rule of construction. RSA 551:10 shall not apply to any trust." S.B. 311.

Furthermore, given the complexity of the issues, the development of pretermitted heir rights in the trust context is a task for the legislature and would necessarily involve: defining the specific types and characteristics of trusts subject to these claims; the duties of trustees to pretermitted claimants; and the process to be followed to determine those rights. Additionally, if the Court accepted the Petitioners' argument it would need to provide guidance as to how RSA 551:10 might apply to the numerous types of trusts permitted under New Hampshire law, which is a task reserved for the legislature.

In conclusion, the Court should find that the legislature did not clearly indicate that the pretermitted heir statute applies to trusts because RSA 564-B:1-112 does not incorporate RSA 551:10, RSA 551:10 is not a rule of construction, and RSA 564-B nowhere references or incorporates any portion of the pretermitted heir statute. It is critical that the NHTC's provisions

are interpreted and applied by the courts accurately and consistent with the legislature's intent and well-established precedent. Thus, the Petitioners' claim is without merit under settled law.

ARGUMENT

I. The Plain Meaning of RSA 551:10 and Case Law Limit Its Application to Wills.

RSA 551:10 provides:

> Every child born after the decease of the testator, and every child or issue of a child of the deceased not named or referred to in his **will**, and who is not a devisee or legatee shall be entitled to the same portion of the estate, real and personal, as he would be if the deceased were intestate.

(Emphasis added.) "The pretermitted heir statute, on its face, applies to 'wills' not to trusts." *Robbins v. Johnson,* 147 N.H. 44, 45-46 (2001). In *Robbins,* the Court declined to extend the pretermitted heir statute to trusts "[a]bsent a clear indication from the legislature that this is its intention." *Id.* (emphasis added). Petitioners contend that RSA 564-B:1-112, which does not even reference RSA 551:10 or pretermitted heirs, should be construed as the "clear indication from the legislature" *Robbins* requires. As discussed below, they are mistaken.

II. The New Hampshire Trust Code Does Not Incorporate the Pretermitted Heir Statute, RSA 551:10.

A. The Plain Meaning and Structure of the New Hampshire Trust Code Requires Rejection of Petitioners' Claims.

Three years after this Court stated in *Robbins* that it needed a "clear indication from the legislature [of an] intention" that trusts are encumbered by pretermitted heir claims before such an intention would be found, the legislature enacted RSA chapter 564-B, the New Hampshire Trust Code ("NHTC"). The NHTC is a comprehensive scheme governing all aspects of trust administration that the legislature has serially updated in 2005, 2006, 2008, 2010, 2011, 2014,

2015, and 2017.[2] If the legislature had intended to encumber trusts with pretermitted heir claims, it would have: 1) defined the persons who could claim pretermitted status; 2) identify the types of trusts subject to the claim; 3) state the extent to which trustees must affirmatively identify such potential claimants and the action to be taken when one is identified; 4) the extent to which trustees have duties to potential claimants; 5) whether otherwise non-mandatory provisions of the NHTC under RSA 564-B:1-105, such as a trustee's duty to report under RSA 564-B:8-813 become mandatory if a potential claimant is identified;[3] 6) the extent to which extrinsic evidence may be considered to determine whether or not a settlor intentionally or unintentionally omitted an heir; 7) the extent to which a trust subject to a pretermitted heir claim may be reformed under RSA 564-B:4-415 to expressly reference and exclude a claimant; and 7) the extent to which other dispositions made by the settlor for the benefit of the claimant and other family members may be considered in determining whether the claimant has pretermitted status and the value of the claim. The silence of the NHTC on these critical issues is deafening. The legislature never expressed an intent to encumber trusts with pretermitted heir claims.

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[2] In 2005, the legislature substantively amended RSA 564-B:1-105, RSA 564-B:5-504, RSA 564-B:5-506, RSA 564-B:8-815, and RSA 564-B:10-1013, among other sections. In 2006, the legislature substantively amended RSA 564-B:1-103, RSA 564-B:1-105, RSA 564-B:1-110, RSA 564-B:7-703, and RSA 564-B:8-813, among other sections. In 2008, the legislature substantially amended RSA 564-B:1-103, RSA 564-B:5-505, and RSA 564-B:8-814, among other sections. In 2011, the legislature substantively amended RSA 564-B:1-109 and RSA 564-B:1-112, among other sections. In 2014, the legislature substantively amended RSA 564-B:1-102, RSA 564-B:1-105, RSA 564-B:1-108, RSA 564-B:8-816, RSA 564-B:8-817, RSA 564-B:10-1005, RSA 564-B:10-1014, and RSA 564-B:12-1206, among other sections. In 2015, the legislature substantively amended RSA 564-B:1-103, RSA 564-B:1-112, RSA 564-B:2-201, RSA 564-B:4-410, RSA 564-B:10-1005, and RSA 564-B:10-1005A, among other sections. In 2017, the legislature substantively amended RSA 564-B:1-103, RSA 564-B:4-406, RSA 564-B:4-418, RSA 564-B:7-711, RSA 564-B:8-802, and RSA 564-B:12-1206, among other sections.

[3] If the legislature intended to encumber trusts with pretermitted heir claims, it presumably would have required trustees to notify claimants by modifying the duty to report under RSA 564-B:813 and making this revised aspect mandatory under RSA 564-B:1-105. It did neither.

B. RSA 564-B:1-112 Does Not Incorporate RSA 551:10 Because RSA 551:10 Is a Rule of Law, Not a Rule of Construction.

RSA 564-B:1-112 provides:

> **Rules of Construction**. The rules of construction that apply in this state to the interpretation of and disposition of property by will also apply *as appropriate* to the interpretation of the terms of a trust and the disposition of the trust property. In interpreting or construing the terms of a trust, the settlor's intent shall be sovereign to the extent that the settlor's intent is lawful, not contrary to public policy, and possible to achieve. For purposes of determining the benefit of the beneficiaries, the settlor's intent as expressed in the terms of the trust shall be paramount.

RSA 564-B:1-112 (emphasis added). "[T]his court is the final arbiter of the intent of the legislature." *State v. Arris*, 139 N.H. 469, 471 (1995). "We look to the words of the statute because they are the touchstone of the legislature's intent, and we construe those words according to their fair import and in a manner that promotes justice." *State v. Daoud*, 141 N.H. 142, 145 (1996)(*citing Chambers v. Geiger,* 133 N.H. 149, 152 (1990)). "When we interpret a statute, we look first to the language of the statute itself, and, if possible, construe that language according to its plain and ordinary meaning." *Sate v. Boisvert,* 168 N.H. 182, 186 (2015). "Our goal is to apply statutes in light of the legislature's intent in enacting them, and in light of the policy sought to be advanced by the entire statutory scheme." *Id.* "We interpret legislative intent from the statute as written and will not consider what the legislature might have said or add language that it did not see fit to include."[4] *Id.* "We construe all parts of a statute together to effectuate its

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[4] If the New Hampshire legislature intended the pretermitted heir statue to apply to trusts it would have explicitly stated so in the statute. This Court should not add words that were not included in the statute when making its interpretation. *See In re Watterworth*, 149 N.H. 442, 445 (2003) (finding that "when a statute's language is plain and unambiguous, [the Court] need not look beyond it for further indication of legislative intent, and [the Court will] refuse to consider what the legislature might have said or add language that the legislature did not see fit to incorporate in the statute."); *Appeal of Town of Nottingham,* 153 N.H. 539, 546-47 (2006) (emphasis added) (finding that even though the "starting point in any statutory interpretation case

overall purpose and avoid an absurd or unjust result." *Franklin v. Town of Newport*, 151 N.H. 508, 509 (2004). Each of these rules of statutory construction require that Claimants' position be rejected.

A "rule of construction" is the same as a "canon of construction" which is "[a] rule used in construing legal instruments… a principle that guides the interpreter of a text…. [M]ost jurisdictions treat the canons as customs not having the force of law." *Black's Law Dictionary* (10th ed. 2014). This is likewise the meaning of the phrase "rule of construction" as used in New Hampshire cases regarding the interpretation of Wills. *See, e.g., Edgerly v. Barker,* 66 N.H. 434, 470-71 (1891); *Sanborn v. Sanborn,* 62 N.H. 631, 644 (1883); *Kennard v. Kennard,* 63 N.H. 303, 305 (1885). Such "rules" include: the testator's intent is paramount and trumps any technical construction of the will, *In re Frolich's Estate,* 112 N.H. 320 (1971); the testator's intent is to be derived from the language of the will and the "surrounding circumstances," *Stratton v. Stratton,* 68 N.H. 582, 586 (1896); "the interpretation which is consistent with other provisions of the will should be adopted," *In re Mooney's Estate,* 97 N.H. 187, 189 (1951); the testator is presumed to have intended not to bequeath worthless property, *In re Estate of Sayewich,* 120 N.H. 237 (1980); constructions "against intestacy" are preferred, *Concord National Bank v. Hill,* 113 N.H. 490, 494-95 (1973); words are presumed to be used in accordance with their popular meaning, *Souhegan National Bank v. Kenison,* 92 N.H. 117 (1942); a word occurring multiple times is presumed to have the same meaning throughout, *Fowler v. Whelan,* 83 N.H. 453 (1928); and absurd and unjust constructions are to be avoided, *Marvin v. Peirce,* 84 N.H. 455 (1930).

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is the language of the statute," the Court will not "consider what the legislature might have said *or add words that the legislature did not include*."); *see also In re Plaisted & Plaisted,* 149 N.H. 522, 526 (2003) (aptly reminding that it "is not the function of the courts to create legislation.").

In contrast, the pretermitted heir statute, RSA 551:10, is not a "rule," let alone a "rule of construction." RSA 551:10 is a statute and it is not a statute of construction. *See In re Estate of MacKay*, 121 N.H. 682, 684 (1981) (the pretermitted heir statute does not create merely a presumption that pretermission is accidental, but a rule of law). It does not give guidance relative to the interpretation of a will; rather, it sets forth a conclusive result that must arise in the event of certain circumstances. *In re Estate of Robbins*, 145 N.H. 145, 147 (2000). No case has been found or been cited by Petitioners referring to RSA 551:10 as a "rule of construction."

C. RSA 564-B:1-112 Does Not Incorporate RSA 551:10 Because It Would Not Be "Appropriate" To Do So As Required By RSA 564-B:1-112.

Even if the pretermitted heir statute is deemed a "rule of construction," RSA 564-B:1-112 would permit its application to a trust only if "*appropriate* to the interpretation of the terms of [the] trust and the disposition of the trust property." In fact, it would be extraordinarily inappropriate to apply the statute to trusts. The Petitioners' arguments proceed from their repeated characterizations of trusts as "*will substitutes*," Petitioners' Brief ("PB"), at 5, 7-8, 15, 17,[5] without articulation of the meaning of this glib phrase or analysis of the differences between the roles of and the law governing wills and trusts and thereby ignore the profound disruption to the law their argument invites. Below are some of the fundamental differences between wills and trusts:

[5] "PB" refers to the Petitioners' Brief, Andrew Grasso and Mikayla Grasso, *In re: Teresa E. Craig Living Trust*, Case No. 2017-0531.

Attribute	Wills	Trusts
Execution	Strict execution and witness requirements, RSA 551:2.	Can be written or oral, RSA 564-B:4-401, 564-B:4-407.
Property Covered	Assets subject to probate, that is, assets titled in the name of the testator at death, RSA 551:1, 551:7, 552:3.	Whatever property is titled in the trust, RSA 564-B:1-103(11), (15), 564-B:4-401.
Number of valid instruments permitted	One, RSA 552:1, 552:6.	Unlimited, RSA 564-B:1-103(20).
Reformation	Will may not be reformed contrary to plain meaning, *White v. Weed,* 87 N.H. 153, 156 (1934).	Trust may be reformed contrary to plain meaning, RSA 564-B:4-415.

Considering these attributes in turn, it becomes clear that a trust is not a "will substitute" and applying the pretermitted heir statute, RSA 551:10, to trusts would be highly inappropriate.

First, the requirement that a will must be written is integral to RSA 551:10, which creates a pretermitted heir right for "every child of the deceased *not named or referred to* in [the] will, and who is not a devisee or legatee." RSA 551:10. This Court has repeatedly held that the law requires analysis of the plain language of the will in question without consideration of oral statements or other extrinsic evidence of testator intent. *See In re Estate of Treloar*, 151 N.H. 460, 463 (2004) ("The court's task 'is not to investigate the circumstances to divine the intent of the testator; rather, it is to review the language contained within the four corners of the will…'"); *see also In re Estate of Came*, 129 N.H. 544, 550 (1987); *In re MacKay's Estate,* 121 N.H. at 684; *In re Segal Estate,* 107 N.H. 120, 121(1966). Petitioners do not even attempt to reconcile this authority with the allowance under RSA 564-B:4-407 of oral trusts.

Second, except to the extent a trust is a beneficiary of a will, a trust and will encompass different property with the trust governing the property assigned to it by the settlor during her

lifetime and the will governing the distribution at death of assets in the name of the testator not subject to a death beneficiary designation. *See* RSA 551:1; 551:7; 552:3; 564-B:1-103(11), (15); 564-B:4-401. The pretermitted heir statute by its terms and its invocation of the descent and distribution statute, RSA 561:1, is intended to apply solely to probate estates. A trust is not a "will substitute" in this respect.

Third, the distinction that there can be only a single valid will and unlimited valid trusts is perhaps the most critical difference and best demonstrates the extraordinary upheaval to trust law and practice that would result from the application of the pretermitted heir statute to trusts. In the probate context, application of the pretermitted heir statute makes sense: a testator who is limited to a single valid will is expected to have in contemplation all of her heirs and, if one of them is omitted without reference, the omission is deemed to be inadvertent and pretermitted heir relief is merited. *Matter of Jackson*, 117 N.H. 898, 902-03 (1977). Unlike wills, there can be unlimited valid trusts, all with on-death distribution provisions, including special needs trusts, charitable trusts, spendthrift trusts, asset protection trusts, business trusts, real estate trusts, life insurance trusts, and myriad others.[6] In this context, application of the pretermitted heir statute would be extraordinarily complicated and unjust. To illustrate, consider the following scenario:

[6] Many such trusts are created in part to take advantage of income or estate tax law. For instance, such trusts include, but are not limited to: Generation Skipping Trust ("GST") IRC §§2601 – 2664; Grantor Retained Annuity Trust ("GRAT") IRC §§2702, 7520; Qualified Personal Residence Trust (QPRT) IRC §§2702, 7520, 1034; Charitable Trust; Charitable Remainder Unitrust (CRUT) IRC §664 (qualification), §170 (income tax), §2522 (gift tax), §2055 (estate tax), §7520 (rate), §662 (min. and max. pay out); Charitable Remainder Annuity Trust (CRAT) *Id.*; Charitable Lead Annuity Trust (CLAT) Code §§642 (income tax charitable deduction), §170 (charitable organizations & income tax deduction), §2055 (estate tax charitable deduction), §2522 (gift tax charitable deduction), §7520 (rate), §§673-677 (grantor trust rules in which CLT must be a grantor trust to qualify for income tax deduction); Charitable Lead Unitrust (CLUT), *Id.*; Qualified Domestic Trusts ("QDOT"); IRC §2056(d), 2056A; Medicaid Trusts 42 U.S.C. §1396p(d)(4), 42 U.S.C. §1382b(e)(5), 42 U.S.C. §1396p(d)(2)(A) & 42 U.S.C.; §1396p(c)(2)(B)(iii); Life Insurance Trust IRC §2042; *Inter Vivos* Marital Qualified Terminable Interest Trust ("QTIP"), IRC §2523; Qualified Subchapter S Trust ("QSST") IRC§1361(d)(3); and Electing Small Business Trust ("ESBT") IRC §§641, 1361.

1. Settlor has three heirs: a son, a daughter, and a grandson who is the son of a deceased child;
2. Settlor creates a separate trust for each:
    a. A spendthrift trust for her son, who has a gambling problem;
    b. A special needs trust for her daughter, who has a disability; and
    c. An education trust for her grandson; and
3. None of these trusts references the other trusts or the beneficiaries of those other trusts.

Application of RSA 551:10 to the above trusts would raise vexing issues. If the Court applied the statute to each trust individually without consideration of extrinsic evidence, as required in the context of wills, *In re Estate of Treloar*, 151 N.H. at 463, then all three trusts would be substantially undone, the settlor's intent would be thwarted, and pretermitted heir payments would be made to the gambling son free of the spendthrift restrictions, the disabled daughter free of the special needs restrictions, potentially disqualifying her from public benefits, and the grandson free of the education restriction. The scenario becomes even more unpredictable if the settlor has a will that references the heirs and appoints assets from the probate estate to each of these trusts. In that scenario, the prospect exists that assets that would be free from a pretermitted heir claim at the probate estate level could become encumbered by the claims once held by the trustees. No doubt many other trapdoors await if the law is so radically changed.

Finally, the distinction that trusts, but not wills may be reformed against their plain meaning raises the prospect of waves of trust reformation litigation under RSA 564-B:4-415 if this Court extends the pretermitted heir statute to trusts. Such a ruling would mean that every trust signed since the enactment of the NHTC in 2004, including trusts that have already been

administered and closed, are subject to pretermitted heir claims if all heirs are not expressly referenced. Having in mind that the NHTC does not mention pretermitted heir rights and no court or commentator is known to have previously suggested this interpretation of the NHTC as even a possibility, there are presumably thousands of such trusts. A ruling in favor of Petitioners will upheave the law of trusts.

Individually and collectively, these distinctions between wills and trusts demonstrate the inappropriateness of application of the pretermitted heir statute to trusts. In light of these differences, this Court has repeatedly insisted on express guidance from the legislature before altering the law of trusts based on an interpretation of a probate statute. This is the approach taken in *Robbins*, 147 N.H. at 45-46, when it was last asked to extend the pretermitted heir statute to trusts, *see supra* Section I, as well as *Hanke v. Hanke,* 123 N.H. 175 (1983). In *Hanke*, the surviving spouse asked this Court to hold under the spousal elective share statute, RSA 560:10, that a trust established by the deceased spouse and funded with "virtually all of [the surviving spouse's] statutory share of the deceased spouse's estate" should be subject to challenge under the "'illusory transfer doctrine' enunciated in *Newman v. Dore,* 275 N.Y. 371, 9 N.E.2d 966 (1937)," rather than the fraud test set forth in *Hamm v. Piper,* 105 N.H. 418, 420 (1964). *Hanke v. Hanke,* 123 N.H. at 176-78. This Court declined to make such a change without clear indication from the legislature: "If the legislature considers the test specified in *Hamm* to be an improper balancing of these policies, it can adopt the *Newman* test or any other provision which it believes correctly balances these policies." *Id.* at 178-79. As it did in *Robbins* and *Hanke,* the Court should defer to the legislature to make such a sweeping change to the law of trusts.

III. By Serially Updating the New Hampshire Trust Code Without Referencing Pretermitted Heir Rights, The Legislature Has Confirmed That It Did Not Intend Pretermitted Heirs to Have Rights Under the Statute.

The legislature has made numerous substantive changes to the NHTC since its enactment. *See supra* Note 1. Despite making substantive textual additions that clarify or expand the meaning of the Code, the legislature has not seen fit to clarify whether the pretermitted heir statute applies to trusts. By way of illustration, in 2005, the legislature added an additional subsection, subsection (j), to RSA 564-B:10-1013. Subsection (j) clarifies that in cases of real property conveyances, the trust certificate described in RSA 564-A:7 is the appropriate instrument to use as opposed to the certificate described in this section. Subsection (j) further clarifies that the section is not intended to modify RSA 564-A:7. In 2006, the legislature added an additional subsection, subsection (d), to RSA 564-B:1-110. This section outlines that the Director of Charitable Trust has the rights of a qualified beneficiary of particular charitable trusts in certain circumstances, and sets forth the applicable circumstances. Subsection (d) clarifies that the section is not intended to limit the authority of the Director of Charitable Trusts to otherwise supervise and control charitable organizations. In 2014, the legislature expanded the scope of the Code and added three additional subsections, (b), (c), and (d), to RSA 564-B:1-102. Subsection (b) expands the applicability of the chapter to trusts that are governed by New Hampshire law. Subsection (c) clarifies that, unless the trust instrument states otherwise, New Hampshire law applies to the administration of trusts that have a principal place of administration in New Hampshire. Then, subsection (d) clarifies that the chapter is not intended to limit the authority of the Director of Charitable Trusts or the Department of Health and Human Services.

Demonstrably concerned with refining and modernizing the NHTC over the past fourteen years, the legislature must be deemed to have been aware that no published commentator

interpreted RSA 564-B:1-112 to incorporate the pretermitted heir statute and no report of a trust pretermitted heir claim has been made. If the legislature had intended to incorporate the pretermitted heir statute, it had repeated opportunities to so clarify the law. It did not do so because it never intended RSA 564-B:1-112 to be so construed.[7]

IV. The Legislature's Introduction of Senate Bill 311 Is A Clear Indication that the Legislature Does Not View the Pretermitted Heir Statute as Applicable to Trusts and, if Enacted, Would Moot Petitioners' Claims.

If enacted, Senate Bill 311 ("S.B. 311") would be dispositive of all issues in this proceeding no matter how the Court rules on them since S.B. 311 is remedial in nature and would apply retrospectively to Respondent's trust. S.B. 311 was introduced on December 8, 2017. Add. 51-53. *Clarifying Rules of Construction Under the New Hampshire Trust Code*, N.H. S.B. 311 (In Committee), 115th Cong. (2018).[8]

S.B. 311 provides:

> 1 Purpose. The purpose of this act is to clarify that, when the general court enacted RSA 564-B:1-112, it did not cause RSA 551:10 to apply to trusts.
> 2 New Hampshire Trust Code; Rules of Construction. Amend RSA 564-B:1-112 to read as follows:
> 564-B:1-112 Rules of Construction.
> (a) The rules of construction that apply in this state to the interpretation of and disposition of property by will also apply as appropriate to the interpretation of the terms of a trust and the disposition of the trust property. *For the purposes of this section, RSA 551:10 is not a rule of construction. RSA 551:10 shall not apply to any trust.*

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[7] No provision of RSA chapter 564-B suggests in any way that the legislature intended to confer rights on pretermitted heirs. If the legislature intended for pretermitted heirs to have rights, it had an opportunity to address that issue in the subsequent provisions of the statute, including but not limited to: the definition of "beneficiary," RSA 564-B:1-103; the rights and status of "others treated as beneficiaries," RSA 564-B:1-110; the designation of mandatory versus default provisions of the statute, RSA 564-B:1-105; rights of representation, RSA 564-B:3-301-305; the duties of Trustees, RSA 564-B:8-801-817; and other provisions of the NHTC.

[8] S.B. 311 was sponsored by Sen. D'Allesandro who is the current Chair of the Capital Budget, Ways & Means, and Finance Committees; Sen. Bradley who is the Chair of Health and Human Services and Vice-Chair of Energy and Capital Budget Committees; and Rep. Hunt who is the current chair of the Commerce and Consumer Affairs Committees.

(b) In interpreting or construing the terms of a trust, the settlor's intent shall be sovereign to the extent that the settlor's intent is lawful, not contrary to public policy, and possible to achieve.
(c) For the purposes of determining the benefit of the beneficiaries, the settlors intent as expressed in the terms of the trust shall be paramount.
Effective Date. This act shall take effect upon its passage.

S.B. 311 (emphasis added). As is clear from the text of the bill, if enacted, S.B. 311 will unequivocally express the legislature's intent with respect to the issue on appeal here: "For the purposes of this section, RSA 551:10, is not a rule of construction. RSA 551:10 shall not apply to *any* trust." S.B. 311 (emphasis added). This language also furthers the legislature's intent to follow the plain meaning of the law.

Even though there is a presumption that statues are applied prospectively, that presumption is reversed where, as here, "*the statute is remedial in nature or affects only procedural rights.*" *Eldridge v. Eldridge*, 136 N.H. 611, 613 (1993) (citing *State v. Johnson,* 134 N.H. 570, 572, (1991) (emphasis added)). Furthermore, the question of retrospective application "rests on a determination of fundamental fairness, because the underlying purpose of all legislation is to promote justice." *Id.* This Court has concluded that "[a] remedial statute is one designed to cure a mischief or remedy a defect in existing laws." *Town of Bartlett v. Furlong*, 168 N.H. 171, 179 (2015). In this case, S.B. 311 is remedial in nature because its intention is to correct an ambiguity in the current law.

V. The Decisions of Other Courts Support Respondent's Position.

Similar to this Court's holding in *Robbins*, the Supreme Court of Arkansas in *Kidwell v. Rhew*, held that Arkansas' pretermitted heir statute does not apply to a revocable *inter vivos* trust because Arkansas' pretermitted heir statute "speaks only in terms of wills, and not of trusts" and "if the language of the statute is plain and unambiguous, the analysis need not go further." 371 Ark. 490, 494 (2007) (citing *City of Fort Smith v. Carter*, 364 Ark. 100, 106 (2005)); *see also In*

re Estate of Jackson, 194 P.3d 1269, 1274 (2008) (declining to extend the reach of Oklahoma's pretermitted heir statute to revocable *inter vivos* trusts because the statute "unambiguously pertains only to wills" and "[i]t does not encompass a situation where a child is omitted from a trust.").

In *Kidwell*, the settlor created a trust naming her and her daughter as the trustee and successor trustee, respectively. *Kidwell*, 371 Ark. at 491. The plaintiff contended that the pretermitted heir statute should apply to "dispositions made by testamentary will substitutes, such as an *inter vivos* trust." *Id.* at 493. The Arkansas Supreme Court rejected this argument, concluding that "a will and a trust are two different things entirely" and the terms are "not interchangeable." *Id.* In that regard, the Court explained that a "will is a disposition of property to take effect upon the death of the maker of the instrument" and a "trust, on the other hand, is a fiduciary relationship in which one person is the holder of the title to property subject to an equitable obligation to keep or use the property for the benefit of another." *Id.* The Court further concluded that "[a]s the terms are not interchangeable, it follows that the pretermitted-heir statute, which speaks only in terms of the 'execution of a will,'" does not apply to trusts. *Id.* As the Arkansas Supreme Court did in *Kidwell*, this Court should decline to apply New Hampshire's pretermitted heir statute to trusts because "a will and a trust are two different things entirely." *Kidwell*, 371 Ark. at 493.

In Pennsylvania, the state's Supreme Court reversed the lower court's decision in *In re Trust Under Deed of Kulig*, 131 A.3d 494,495 (Pa. Super. Ct. 2016), concluding that Pennsylvania's pretermitted spouse statute was not a rule of construction applicable to trusts. *In re Trust Under Deed of David P. Kulig Dated Jan. 12, 2001*, 2017 WL 6459001 at 13 (Pa. Dec. 19, 2017). The Pennsylvania Supreme Court held that a revocable *inter vivos* trust executed by

the husband should not be included in his estate for purposes of discerning pretermitted wife's statutory entitlement to share of the estate. *Id.* The Petitioners relied on the reversed Pennsylvania Superior Court's decision to support their positions here, but as Pennsylvania Supreme Court made clear that is no longer good law. PB at 15-16.

Specifically, the Pennsylvania Supreme Court noted that until the adoption of the Pennsylvania Uniform Trust Code's rules of construction statute, the State's pretermitted spousal statute only applied to testamentary trusts and applying the statute to *inter vivos* trusts was a departure from statutory structure in place for almost 70 years. *Id.* at 7. The Pennsylvania Supreme Court recognized that nothing in the text of the statute or the commentary expressed any intent to change the 70 year framework. *Id.* Rather, the language employed by the rules of construction statute shows an intent to memorialize and maintain consistency with the statutory framework, not modify it. *Id.* Further, in light of the voluminous case law and exhaustive statutory enactments related to surviving spouses, the court found that had the legislature intended to make such a modification it would have done so explicitly and comprehensively. *Id.*

The court also concluded that the legislature did not intend an "absurd or unreasonable result… [rather] that the legislature intends that all provisions have effect." *Id.* at 10. The court analyzed several unreasonable and absurd results of applying the pretermitted spousal statute to *inter vivos* trusts including that the application would also include irrevocable trusts and charitable trusts "subjecting the corpora of such trusts to the pretermitted spousal share." *Id.* at 12. The court concluded, absent clear indications to the contrary, it could not reasonably infer the legislature intended to substantially modify the statutory framework and the court is disinclined to find such an intent for extensive modification without unmistakable expression. *Id.*

New Hampshire similarly has a long standing statutory framework limiting the pretermitted heir statute to wills. As early as 1789, New Hampshire statute provided relief for the heir pretermitted from a will. *See Smith v. Sheehan*, 67 N.H. 344, 344 (1893). From that time, New Hampshire has had some version of a pretermitted heir statute that was understood to only apply to wills. *See Smith v. Smith*, 72 N.H. 168, 168 (1903); *Boucher v. Lizotte*, 85 N.H. 514, 514 (1932); *Matter of Jackson*, 117 N.H. at 900; *In re Estate of Came*, 129 N.H. at 550. The Court recognized this in *Robbins*, where it found that the pretermitted heir statute, by its plain and ordinary meaning, did not apply to trusts. *Robbins*, 147 N.H. at 45. The Court also noted other will substitutes that would be subjected to the pretermitted heir statute if it was construed to apply to wills. *Id.* at 46. The Court reasoned that without a "clear indication from the legislature," it could not extend the pretermitted heir statue to trusts. *Id.* Accordingly, in light of a more than 200 year statutory and case law framework where the pretermitted heir statute only applied to wills, it is not reasonable to infer that RSA 564-B:1-112 constitutes a clear indication from the legislature that it intended to substantially modify this framework.

CONCLUSION

It is critical that the NHTC's provisions are interpreted and applied by the courts accurately and consistent with the legislature's intent and well-established precedent. In this case, the legislature did not clearly indicate that the pretermitted heir statute applies to trusts; and the Petitioners have failed to demonstrate otherwise. The mere enactment of RSA 564-B:1-112, without more, such as mentioning RSA 551:10 or permitted heirs, does not demonstrate that the legislature clearly intended for RSA 551:10 to apply to trusts. The Court should leave its earlier holding in *Robbins* undisturbed and defer to the legislature regarding its intent. *See In re Blanchflower*, 150 N.H. 226, 229 (2003) (finding that the Court "will not undertake the

extraordinary step of creating legislation where none exists."); *In re Plaisted*, 149 N.H. at 526 (reserving matters of public policy for the legislature). Further, the legislature's introduction of Senate Bill 311 is a clear indication that the Legislature does not view the pretermitted heir statute as applicable to trusts, and, if enacted, would moot petitioners' claims

For all the foregoing reasons, a ruling in favor of Petitioners would upheave that law and create great confusion regarding the administration, interpretation, and enforceability of trusts. Any such change as stated in *Robbins* must be made by the legislature, not the Courts.

REQUEST FOR ORAL ARGUMENT

Trustee respectfully requests oral argument not to exceed 15 minutes. Ralph F. Holmes will argue for Trustee.

DECISION ATTACHED

The Rule 9 Interlocutory Transfer Statement from the 6th Circuit – Probate Division – Trust Docket, submitted without ruling, is appended to this brief.

Respectfully submitted,

DANIEL TOLAND, TRUSTEE

By Its Attorneys,

McLANE MIDDLETON
PROFESSIONAL ASSOCIATION

Dated: January 16, 2018

By: _____

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STATEMENT OF COMPLIANCE

I hereby certify that on January 16, 2018, I served the foregoing Respondent's Brief and appendix by mailing two copies thereof by first class mail, postage prepaid, to the following counsel of record:

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_____
Jacqueline A. Botchman

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THE STATE OF NEW HAMPSHIRE
SUPREME COURT
CASE NO. - - - -

IN RE: THE TERESA E. CRAIG LIVING TRUST

No. 317-2017-EQ-00133

INTERLOCUTORY TRANSFER STATEMENT

(Pursuant to Supreme Court Rule 9)

Transfer From the 6th Circuit – Probate Division – Concord
Trust Docket

THE STATE OF NEW HAMPSHIRE
SUPREME COURT
CASE NO. - - - -

IN RE: THE TERESA E. CRAIG LIVING TRUST
No. 317-2017-EQ-00133

6th Circuit – Probate Division – Concord
Trust Docket

INTERLOCUTORY TRANSFER STATEMENT
(Pursuant to Supreme Court Rule 9)

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(Sup. Ct. R. 9(1)(a))

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STATEMENT OF FACTS AND NECESSITY OF TRANSCRIPT
(Sup. Ct. R. 9(1)(b))

The question posed for consideration is one of law, see infra, and thus the undersigned recites the following undisputed facts and procedural history for background purposes only. Teresa Craig died in Bow, New Hampshire in July 2016. She had executed a Will in August 2012 (the "2012 Will"). See App. at 20.[2] The 2012 Will named her son Sebastian Grasso, as executor. Id. at 22 (Preface & Art. I). She also executed the Teresa E. Craig Living Trust dated September 3, 1999, and that trust was amended and restated in August 2012 (the "2012 Teresa Trust"). See App. at 28 (Recitals). Daniel Toland is the trustee of the 2012 Teresa Trust. See App. at 59 (*Certification of Trust*). The 2012 Teresa Trust is the sole legatee of the 2012 Will. App. at 22. (Art. II).

Teresa's grandson and granddaughter, Andrew and Mikayla Grasso, filed a *Petition/Motion for Determination of Pretermitted Heirs and Request for Copy of Trust* (the "*Petition*"). App. at 60. They are the children of Teresa's son, Michael Grasso, who died in December 2007. Id. at 61-62 (¶¶ 3, 4, 13). The *Petition* seeks: (1) recognition of Andrew and Mikayla as pretermitted heirs under Teresa's 2012 Will pursuant to RSA 551:10, id. at 64 (¶23); and (2) an order compelling the Trustee to provide a copy of the 2012 Teresa Trust so they could determine whether they were, at any point in time, "beneficiaries of the Trust, [or] whether the Trust and any amendments thereto were properly executed or whether they are *pretermitted beneficiaries of the Trust*." Id. (¶¶24-29) (emphasis added). They assert that they may have rights as pretermitted heirs to the 2012 Teresa Trust because RSA 551:10 applies to trusts through RSA 564-

[2] The Court will denote documents in the attached *Appendix* as "App" followed by the page number on which the document is located. See Sup. Ct. R. 9(2).

B:1-112, the section of the New Hampshire Trust Code ("NHUTC") pertaining to rules of construction of trusts. Id. at 65 (¶¶ 30-31).

Daniel Toland, Trustee of the 2012 Teresa Trust, filed two *Motions to Dismiss*, see App. at 79; 96, seeking to dismiss the Petitioners' claim that they should be provided with a copy of the 1999 Teresa Trust and its 2012 amendment. The undersigned deferred ruling on the *Motion(s) to Dismiss*, see Order on Trustee's Motion to Dismiss and Trustee's Second Motion to Dismiss (Trust Docket, July 21, 2017) ("Order on Motion(s) to Dismiss"), App. at 7, and ordered the trust instruments to be produced for in camera review that would allow for a threshold determination of the Petitioners' standing. Id. at 18-19. In response, the Trustee filed a *Notice of Compliance With Petitioners' Request for Relief*, see App. at 184, notifying the undersigned that he had furnished a copy of the Teresa Trust instruments to the Petitioners and asking that the *Petition* be dismissed. The Petitioners responded with a lengthy *Response and Objection to Trustee's Notice of Compliance with Petitioners' Request for Relief and Request for Ruling that Petitioners Are Pretermitted Beneficiaries of the Teresa E. Craig Living Trust*. See App. at 188. In this pleading, the Petitioners attached a copy of the 2012 Teresa Trust,[3] as amended and restated in 2012, and sought: (1) a ruling denying the *Motion(s) to Dismiss;* (2) a ruling that they are pretermitted beneficiaries of the 2012 Teresa Trust; (3) deferral of consideration of pretermission under the 2012 Will; (4) a stay of their undue influence claims[4] pending determination of pretermission; (5) an order that the Trustee may not submit any

[3] The 2012 Teresa Trust does not specifically name or refer to Michael, Mikayla, or Andrew Grasso.
[4] The Court observes that such claims have not been pleaded and pursuit of them would require a *Motion to Amend*. Counsel for the Petitioners has indicated that, pending further discovery, such claims may be added.

extrinsic evidence unless a court rules that he may reform the 2012 Teresa Trust (presumably to specifically name the Petitioners and thus moot the pretermitted heir issue) after Teresa has died; and (6) attorney's fees. Id. at 193-194. The Trustee filed a *Response*, see App. at 236, seeking a hearing and structuring conference and orders: (1) requiring that the Petitioners amend their claim and allow for answer and counterclaims; (2) scheduling the matter for resolution, including dispositive motions; (3) permitting *amicus curiae* briefs; and (4) determining pretermission under both the 2012 Teresa Trust and 2012 Will considered together. Id. at 238-239. The New Hampshire Trust Council (the "Trust Council") filed a *Motion for Leave to File an Amicus Memorandum of Law* seeking to submit a brief addressing only whether "by enactment of RSA 564-B:1-112 in 2004, the pretermitted heir statute (RSA 551:10) applies to trusts." See App. at 242 (¶3). The Petitioners objected, see App. at 244, challenging both the undersigned's authority to consider submissions by *amicus curiae*, and whether the Trust Council may appropriately file an *amicus curiae* memorandum. Id. at 245-246.

A hearing was held at the initiation of the undersigned on August 31, 2017, after it determined that before this matter may proceed, the threshold issue concerning the application of the pretermitted heir statute, RSA 551:10, to trusts through RSA 564-B:1-112 must be decided. Specifically, it must be determined whether adoption of the NHUTC in 2004, see 2004 Laws Ch. 130, modifies or abrogates the ruling of the New Hampshire Supreme Court three years prior in Robbins v. Johnson, 147 N.H. 44, 45 (2001), that RSA 551:10 is not applicable to trusts (or other will substitutes). The Court

observes that neither party objected to submission of the question set forth infra for review and consideration by the New Hampshire Supreme Court.

Finally, as background facts set forth supra are undisputed by the parties, submission of a transcript from any of the proceedings before the Trust Docket is not necessary for review of the transferred question.

STATEMENT OF QUESTION
(Sup. Ct. R. 9(1)(c))

In Robbins v. Johnson, 147 N.H. 44, 45 (2001), the New Hampshire Supreme Court held that RSA 551:10 on its face does not apply to trusts (or other will substitutes), and, "[a]bsent clear indication from the legislature that this is its intention, we decline to apply the statute to the trust." Id. at 46. By enactment of the Uniform Trust Code in 2004, see 2004 Laws Ch. 130; RSA 564-B:1-112, did the New Hampshire Legislature clearly indicate that the pretermitted heir statute (RSA 551:10) applies to trusts?

STATEMENT OF REASONS WHY A SUBSTANTIAL BASIS EXISTS FOR A DIFFERENCE OF OPINION; OR WHY AN INTERLOCUTORY TRANSFER MAY MATERIALLY ADVANCE THE TERMINATION OR CLARIFY FURTHER PROCEEDINGS OF THE LITIGATION, PROTECT A PARTY FROM SUBSTANTIAL AND IRREPARABLE INJURY, OR PRESENT THE OPPORTUNITY TO DECIDE, MODIFY OR CLARIFY AN ISSUE OF GENERAL IMPORTANCE.

(Sup. Ct. R. 9(1)(d))

As set forth infra, not only does the question presented in this Rule 9 Interlocutory Transfer pose an unsettled question of law, only the New Hampshire Supreme Court may definitively answer it.[5] In addition, the transferred question must be determined before the remaining issues raised by the Petitioners, (and potential counterclaims offered by the Respondent) can be decided, and as such, it is likely that any decision by the undersigned would be appealed to the Supreme Court. Consequently, it is most efficient and assistive to the proper resolution of this case for the question transferred be decided on an interlocutory basis. See, e.g., See In re Frolich's Estate, 112 N.H. 320, 321 (1972)(certification of questions of law concerning proper distribution of trust estate is proper); In re Allaire Estate, 103 N.H. 318, 320 (1961)(questions of law relating to distribution of estate which turn on construction of a will or trust instrument may be certified for interlocutory determination); see generally, RSA 547:30 (Transfer of Questions of Law to the Supreme Court); Sup. Ct. R. 9 (Interlocutory Transfer without Ruling); Cir. Ct. – Prob. Div. R. 79 (Interlocutory Transfers and Appeals to the Supreme Court).

[5] Specifically, the Robbins decision indicated that only if the New Hampshire Supreme Court was given a "clear indication" by the Legislature would it hold that RSA 551:10 applies to trusts. As such, it is best positioned to determine whether enactment of RSA 564-B:1-112 constitutes a "clear indication."

In addition, swift and conclusive determination of the applicability of RSA 551:10 to trusts after adoption of the NHUTC is of critical importance to members of the New Hampshire Bar who draft estate planning documents and the citizens they serve. Not only is certainty required for estate plans currently under consideration, but a decision on the law in effect since 2004 impacts existing trusts. See generally, RSA 564-B:11-1104(a)(4) ("any rule of construction or presumption provided in this chapter applies to trust instruments executed before the effective date of this chapter unless there is a clear indication of a contrary intent in the terms of the trust").

Finally, a third-party has requested leave to file a memorandum as *amicus curiae*. See App. at 241. Although the Trust Docket may have authority to allow and consider such pleadings, see generally State ex rel. Com'r of Transp. v. Med. Bird Black Bear White Eagle, 63 S.W.3d 734, 757-58 (Tenn. Ct. App. 2001)(recognizing that courts have inherent authority to accept *amicus* pleadings even in absence of specific rule)(collecting cases), *amicus* briefs are more appropriately submitted to, and considered by, the New Hampshire Supreme Court. See generally, Sup. Ct. R. 30.

In requesting that the New Hampshire Supreme Court accept for consideration the question transferred, the undersigned reiterates observations made in its Order on the Motion(s) to Dismiss, App. at 7, that resolution of the question now posed requires consideration of: (1) the meaning and purpose of RSA 551:10 and RSA 564-B:1-112; (2) legislative intent in adopting the NHUTC and by extension the notes to the uniform law, see generally, Rabbia v. Rocha, 162 N.H. 734, 737-38 (2011)(courts look to the comments of the model act for guidance as to its meaning); and (3) proper public policy.

RSA 551:10 provides: "[e]very child born after the decease of the testator, and

every child or issue of a child of the deceased not named or referred to in [the] will, and who is not a devisee or legatee, shall be entitled to the same portion of the estate, real and personal, as ... if the deceased were intestate." The Supreme Court thus noted that RSA 551:10 "does not create merely a presumption that pretermission is accidental, but a rule of law," In re Estate of Treloar, 151 N.H. 460, 462 (2004); see In re Estate of Robbins, 145 N.H. 145, 147 (2000)(statute "is conclusive" unless terms of will demonstrate omission was intentional), intended to "provide that a child should take his intestate share when he has been forgotten by the testator or omitted through accident." In re Osgood's Estate, 122 N.H. 961, 964 (1982). RSA 564-B:1-112 provides: "[t]he rules of construction that apply in this state to the interpretation of and disposition of property by will also apply as appropriate to the interpretation of the terms of a trust and the disposition of the trust property."

Although the New Hampshire Supreme Court specifically ruled that: "[t]he pretermitted heir statute, on its face, applies to wills, not to trusts," Robbins, 147 N.H. at 45 (quotations omitted), it specifically declined to address whether the statute should apply to "will substitutes," noting "that the legislature should decide whether, as a matter of policy, it wishes to extend the pretermitted heir statute to will substitutes, such as the trust at issue." Id. at 46. Robbins, however, was decided before adoption of the NHUTC. See 2004 Laws Ch. 130. Although the legislative history as presented does not specifically mention RSA 551:10, drafters of the NHUTC indicated publically that they carefully considered the uniform act and made specific decisions about which provisions to include in the New Hampshire version of the uniform law. See App. at 153; 160-161; 163-165. Importantly, the drafters of section B:1-112 of the uniform law

indicated that adoption of it is "optional." See Uniform Laws Commission, *Trust Code – Final Act* §112, Comments at 39 (2010).

Case law from other jurisdictions is not informative[6] as to whether the pretermitted heir statutes apply to trusts after adoption of the uniform law. See generally, Adam J. Hirsch, Airbrushed Heirs: The Problem of Children Omitted From Wills, 50 Real Prop. Tr. & Est. L.J. 175, 238 (Fall 2015)("courts have rejected suits to construe pretermitted child statutes beyond the boundaries of their text; any extension to will substitutes requires legislative sanction"). The Restatements are inconsistent. One section states unhelpfully: "[a] will substitute is subject to rules of construction only to the extent appropriate." Restatement (Third) of Property Wills and Donative Transfers § 7.2 *Application of Will Doctrines to Will Substitutes*, cmt a (2003). Another urges that pretermitted heir statutes should apply as

> [s]ound policy suggests that a property owner's choice of form in using a revocable trust rather than a will as the central instrument of an estate plan should not deprive that property owner and the objects of his or her bounty of appropriate aids and safeguards intended to achieve likely intentions.

Restatement (Third) of Trusts §25, *Validity and Effect of Revocable Inter Vivos Trust*, cmt 2(e)(1) (2003). Finally, another observes that "[n]o cases have been found in which the protections by statute or case law afforded to a child omitted from a will have been extended to apply to a child omitted from a will substitute used as a comprehensive dispositive plan. Courts that have addressed the issue have decided against expanding

[6] In a recently decided state superior court case, the court determined that a statute similar to RSA 564-B:1-112 indicated that the legislature intended for a pretermitted spouse statute to apply to *inter vivos* trusts. See In re Trust Under Deed of Kulig, 131 A.3d 494, 499 (Pa. Super. Ct. 2015). That case, however, is on appeal to the Pennsylvania Supreme Court, see In re Trust Under Deed of Kulig, 158 A.3d 1234 (Pa. 2016), and to date remains undecided.

the policy." Restatement (Third) of Property Wills and Donative Transfers §9.6 *Protection of Child of Descendant Against Unintentional Disinheritance*, rptr. n. 17 (2003).

A threshold issue to be considered by the New Hampshire Supreme Court concerns the nature of RSA 551:10.[7] The notes to the Uniform Trust Code indicate that determination of whether the pretermitted heir statute can be applied to trusts through RSA 564-B:1-112 depends upon whether the RSA 551:10 is a rule of "construction" or a "constructional preference[]." The comments to the Uniform Law direct that

> A constructional preference is general in nature, providing general guidance for resolving a wide variety of ambiguities. An example is a preference for a construction that results in a complete disposition and avoids illegality. Rules of construction, on the other hand, are specific in nature, providing guidance for resolving specific situations or construing specific terms. Unlike a constructional preference, a rule of construction, when applicable, can lead to only one result.
>
> Rules of construction attribute intention to individual donors based on assumptions of common intention. Rules of construction are found both in enacted statutes and in judicial decisions. Rules of construction can involve the meaning to be given to particular language in the document, such as the meaning to be given to "heirs" or "issue." Rules of construction also address situations the donor failed to anticipate.

Uniform Laws Commission, *Trust Code – Final Act* §112, Comments at 38-39 (2010)(citation omitted). Any decision on the transferred question would require determination of whether the pretermitted heir statute is a rule of construction or a constructional preference. Given that prior case law deemed it "a conclusive rule of

[7] At the hearing on August 30th and in a later issued order, the undersigned clarified that although it observed in its Order on the Motion(s) to Dismiss that "it appears that RSA 551:10 states a rule of construction," it did not conclusively so rule.

law" see Robbins, 147 N.H. at 45, and "not merely a presumption" In re Estate of Treloar, 151 N.H. at 462, it *appears* that RSA 551:10 states a rule of construction, see generally, Danielle J. Halachoff, No Child Left Behind: Extending Ohio's Pretermitted Heir Statute to Revocable Trusts, Akron L. Rev. 605, 627-31 (Vol. 50 2017), however, New Hampshire law is not definitive. Compare In re Estate of Came, 129 N.H. 544, 547-48 (1987)(RSA 551:10 creates a statutory presumption). The Restatements observe that pretermitted heir statutes "are generally based on legislative judgments concerning probabilities of intention . . . ." Restatement (Third) of Trusts §25 *Validity and Effect of Revocable Inter Vivos Trust*, cmt e(1) (2003).

As such, an argument can be made that by enacting the NHUTC, the Legislature intended that RSA 551:10 would apply to trusts through Section 1-112. However, the Supreme Court in Robbins directed that "[a]bsent *clear indication* from the legislature that this is its intention, we decline to apply the statute to the trust." Id. at 46 (emphasis added). Accordingly, the narrow issue presented by this Rule 9 Interlocutory Transfer is whether, given the unequivocal ruling in Robbins, adoption of Section 1-112 and the incorporation of notes to the Uniform Act constitutes a "clear indication" that the Legislature, as a matter of policy, intended for RSA 551:10 to apply to trusts.

The Trustee, however, has advanced a compelling policy argument in his *Motion to Dismiss*, that in in reliance on Robbins, "settlors and their counsel have established an untold number of trusts with the expectation that the pretermitted heir statute . . . applies only to Wills, not trusts." See App. at 83 (¶2(B)(6)). That said, it can also be maintained that adoption of the NHUTC in 2004 constituted a significant change in trust law, and as such counsel, in particular trust and estates practitioners, were on notice

that the new law and its implications should be carefully considered when drafting trust documents. See generally Michelle M. Arruda, The Uniform Trust Code: A New Resource for Old (and New!) Trust Law, N.H. Bar J. – Winter 2006 (discussing at length adoption of the NHUTC and the significance of certain provisions of it).

In sum, interlocutory transfer of the question of whether the pretermitted heir statute, RSA 551:10, applies to trusts after enactment of RSA 564-B:1-112, is appropriate because: (1) it involves an unsettled question of law concerning distribution of trust assets; (2) an answer will aid in the efficient resolution of the remainder of the present case at the Trust Docket; (3) it involves a determination of whether the New Hampshire Supreme Court was given a "clear indication" of a legislative policy preference; (4) it involves a matter of importance to New Hampshire law affecting numerous estate plans; and (5) there will likely be motion(s) for leave to file briefs as *amicus curiae*.

SIGNATURE OF THE TRIAL COURT TRANSFERRING THE QUESTION
(Sup. Ct. R. 9(1)(e))

9/11/2017
Date

David D. King
Presiding Judge of the Trust Docket

LAST WILL AND TESTAMENT

OF

TERESA E. CRAIG

Prepared By

McDonald & Kanyuk, PLLC
Attorneys at Law
Concord, New Hampshire
(603) 228-9900

8/27/12 - JFM

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I, **TERESA E. CRAIG**, of Cambridge, in the County of Middlesex and the Commonwealth of Massachusetts, declare this to be my last Will, hereby revoking any and all Wills and Codicils I previously have made.

Prior to the execution of this Will I executed a revocable trust agreement entitled the **"TERESA E. CRAIG LIVING TRUST"** dated September 3, 1999, as amended and restated (my "revocable trust"). I am unmarried on the date of this Will. The name of my only child living on the date of this Will is SEBASTIAN J. GRASSO ("Sebastian"). I am executing this Will in the State of New Hampshire, in a manner that satisfies all of the requirements of the applicable statutes of Wills of both the State of New Hampshire and Commonwealth of Massachusetts. This is the original and only executed copy of this Will.

ARTICLE I.: NOMINATION OF EXECUTOR

I nominate Sebastian as Executor of my Will. If he is unable or unwilling to serve as Executor, I nominate my daughter-in-law, KELLY E. GRASSO ("Kelly"), as alternate or successor Executor. References in this Will to "Executor" shall include any person or persons administering my estate under this Will. I request that any person (whether a natural person or a corporation) nominated herein and appointed to serve as Executor be exempt from giving any bond, or, if required to give bond, be exempt from furnishing any surety. Any and all decisions, determinations or actions made or taken in good faith by my Executor pursuant to the powers and discretion given in this Will shall be conclusive on all persons who are or may become interested in my estate or under this Will.

ARTICLE II.: DISPOSITION OF PROPERTY

I give all of my property of whatever kind and wherever situated that I may own or possess at the time of my death, or to which I may be in any manner entitled, or over which I may have any power of appointment, disposition or control, to the then acting Trustee of my revocable trust to be held upon the terms of my revocable trust agreement, including any amendments to it in effect at the time of my death; provided, however, that if any such property would be distributed immediately under the terms of such agreement, the distribution may be made by my Executor directly to the person or persons entitled to such property. If my revocable trust is not in existence at the time of my death, then such property shall be held, managed and invested and reinvested as a trust fund in exactly the same manner described in my revocable trust agreement (giving effect to all the then existing amendments to it if it is legal to do so and in any event giving effect to the provisions of my revocable trust agreement as it existed at the time of the execution of this Will) and by the same Trustee or Trustees; and for that purpose and not otherwise, the terms of my revocable trust agreement are incorporated by reference into the terms of this Will.

ARTICLE III.: EXECUTOR'S POWERS

Without in any way limiting by implication or otherwise the powers conferred in this Will or those conferred by law, my Executor is hereby granted the following powers, discretions and immunities to be exercised in my Executor's sole discretion, for purposes not only of administration but also of distribution:

A. To determine what property is covered by general descriptions contained in this Will.

B. To pay or deliver any legacy without waiting the time prescribed by law and to make any distribution under this Will in cash or in kind.

C. To deduct in my Executor's sole discretion all or any part of my medical expenses or the administration expenses of my estate for Federal income tax purposes, and to make any other election under any tax law (unless specifically provided otherwise in this Will) regardless of whether such action increases the Federal estate tax on my estate or changes the proportions in which various persons share in my estate; to make or refrain from making, in my Executor's sole discretion, adjustments between principal and income or between shares of my estate by reason of any deduction taken for income tax instead of estate tax purposes or any election as to the date of the valuation of my estate for estate tax purposes; and to allocate, in my Executor's sole discretion, expenses of administering my estate between the income and principal of my estate, including, but not limited to, all to income or all to principal.

D. To apply property to the use of any person, whether principal or income, vesting in or payable to such person, and in the case of a minor (i) to do so without regard to either the duty of any person to furnish support to such minor or the availability of other funds for such purposes, or (ii) to pay or deliver such property to such minor, or to a guardian or custodian under a gifts to minors act, including a custodian selected by the Executor, or to a parent of such minor, or to a person with whom such minor resides.

E. To allocate any of my GST exemption (as defined in Section 2631 of the Internal Revenue Code of 1986, as amended (the "Code")) or any corresponding state exemption in such manner as my Executor deems appropriate.

F. To defer the payment of any Federal estate taxes attributable to the inclusion of any closely-held business interest in my gross estate for Federal estate tax purposes under Code §6166, upon such terms and conditions as my Executor determines in my Executor's sole discretion.

G. To receive and hold for as long a time as my Executor deems wise any shares of stock, bonds or other securities or investments, including any closely-held stock or partnership interests, which I own at the time of my death, although of such a nature or forming so large a

part of my estate that they would not otherwise be proper investments to hold, and whether or not they are or become wholly or partly unproductive of income, and to continue the operation and management of all closely-held businesses without liability for business decisions made in good faith and without the necessity of any approval of the probate court.

H. To sell, exchange, mortgage, lease for any duration of time, pledge, partition or improve any real or personal property forming part of my estate without obtaining the decree or license of any court, at such time or times, in such manner, for such consideration, and upon such terms as my Executor deems wise, with power to sign, seal, execute, acknowledge and deliver any and all deeds and other instruments necessary or desirable for any of the above purposes, and no purchaser from or lender to my Executor shall be required to see to the application of any purchase money paid or money loaned.

I. To invest and reinvest from time to time any cash in my estate or in the hands of my Executor or the proceeds of any sale of property in my estate in any shares of stock, bonds or other securities or investments that my Executor may determine, whether or not such investments would normally be deemed a proper investment for a fiduciary under the laws governing the administration of my estate, including full power to change investments of real estate to personal property and vice versa.

J. If I am married at the time of my death, to join with my husband or, if my husband is not then living, the personal representative of his estate in the execution and filing of joint income or gift tax returns and to pay so much of the taxes assessed as they may deem attributable to my estate or as my estate may be liable to pay.

K. To compromise, adjust, settle and pay in my Executor's sole discretion, any claims asserted against or arising in favor of my Executor or against any legatee, devisee or beneficiary, or upon any interest hereunder.

ARTICLE IV.: PAYMENT OF TAXES AND ADJUSTMENTS TO BASIS

I direct that all transfer, inheritance, legacy, succession, estate and death taxes and duties, by whatever name called, together with any interest and penalties that may be assessed in connection with such taxes and duties, but not including any additional tax imposed by Section 2032A of the Code or a corresponding provision of state law, or any tax imposed as a result of any generation-skipping transfer under Chapter 13 of the Code or a corresponding provision of state law, payable to any domestic or foreign taxing authority by reason of my death, with respect to any and all property, whether passing under this Will or otherwise, which is required to be included in my gross taxable estate for the purpose of determining any such tax or duty, shall be paid out of the residue of my estate as an expense of administration without apportionment and with no right of recovery from any recipient of any such property; provided, however, that nothing in this Will shall be deemed to limit any obligation or discretion of the Trustee of my revocable trust to contribute to the payment of such taxes and duties; and provided, further, that no such taxes or duties shall be paid out of any property if

doing so would subject such property to any such tax or duty not otherwise payable.

I authorize my Executor, in the exercise of sole and absolute discretion, to make any adjustment to basis authorized by law, including, but not limited to, increasing the basis of any property included in my gross estate, whether or not passing under my will, by allocating any amount by which the basis of assets may be increased. My Executor has no duty to and is not required to allocate any basis increase exclusively, primarily or at all to assets passing under this Will, as opposed to other property included in my gross estate. I waive any such duty that otherwise would exist. Any such allocation shall not cause my Executor to by liable to any person, or to be subject to removal, surcharge or forfeiture of commissions or other compensation.

ARTICLE V.: MISCELLANEOUS

A. Except as otherwise expressly provided by this Will, I intentionally, and not as the result of any accident, mistake or inadvertence, make no provision for the benefit of any child of mine, nor the issue of any child of mine, whether now alive, now deceased, or hereafter born or deceased.

B. Whenever the context permits, any word in one gender shall be construed to include the other gender and any word in either number shall be construed to include both singular and plural.

C. Whenever used in this Will the words "child," "children," "issue" or "descendants" are intended to include not only persons who are descendants by blood, but also persons, and issue of persons, who have been adopted according to law prior to their attaining the age of eighteen (18) years, whether born or adopted before or after the date of this Will.

D. In any proceeding for the allowance of any account of my Executor, I request that representation of the interests of persons unborn or unascertained or of a minor or other persons under disability and not represented by a duly appointed guardian or conservator, be dispensed with to the extent permitted by law.

E. Any property intended to pass by the terms of this Will that is disclaimed shall be distributed as if the disclaiming beneficiary had predeceased me.

F. If I and any beneficiary under this Will die under circumstances that render it doubtful as to who died first, it shall be presumed that I survived such beneficiary.

[SIGNATURE PAGE FOLLOWS]

IN WITNESS WHEREOF, I, **TERESA E. CRAIG**, hereunto set my hand and, in the presence of two (2) witnesses, declare this to be my Will on August 27, 2012.

Teresa E. Craig

Signed and declared by TERESA E. CRAIG as and for her Will, in the presence of us, who, at her request, in her presence, and in the presence of each other, hereunto subscribe our names as witnesses.

Witness — Address: Concord, N.H.

Witness — Address: Bow N.H

STATE OF NEW HAMPSHIRE
COUNTY OF MERRIMACK

The foregoing instrument was acknowledged before me on August 27, 2012, by TERESA E. CRAIG, the Testatrix; Kathleen M. Carter and Laurie McDonald the witnesses, who under oath do swear as follows:

1. The Testatrix signed the instrument as her Will or expressly directed another to sign for her.

2. This was the Testatrix's free and voluntary act for the purposes expressed in the Will.

3. Each witness signed at the request of the Testatrix, in her presence, and in the presence of the other witness.

4. To the best of my knowledge, at the time of the signing the Testatrix was at least 18 years of age, or if under 18 years was a married person, and was of sane mind and under no constraint or undue influence.

Notary Public/Justice of the Peace

SUSAN E. ANDRUS, Notary Public
My Commission Expires October 3, 2014

Massachusetts Form For Signature, Attestation Clause and Self-Proving Affidavit:

IN WITNESS WHEREOF, I, TERESA E. CRAIG, do hereby declare that I sign (or direct another to sign for me) and execute this instrument as my last Will, that I sign it willingly (or willingly direct another to sign for me) in the presence of each of said witnesses, and that I execute it as my free and voluntary act for the purposes herein expressed.

Teresa E. Craig

We, the undersigned witnesses, each do hereby declare in the presence of the aforesaid Testatrix that the Testatrix signed (or directed another to sign for her and said person signed for her) and executed this instrument as her last Will in the presence of each of us, that she signed it willingly (or willingly directed another to sign it for her), that each of us hereby signs this Will as witness in the presence of the Testatrix, and that to the best of our knowledge the Testatrix is eighteen (18) years of age or over, of sound mind, and under no constraint or undue influence.

(Witness) (Address)

(Witness) (Address)

STATE OF NEW HAMPSHIRE
COUNTY OF MERRIMACK

Subscribed, sworn to and acknowledged before me on this 27th day of August, 2012, by TERESA E. CRAIG, the Testatrix; Kathleen M. Carter and LAURIE McDONALD, the witnesses.

Notary Public/Justice of the Peace

SUSAN E. ANDRIKS, Notary Public
My Commission Expires October 7, 2014

Revised Statutes Annotated of the State of New Hampshire
Title LVI. Probate Courts and Decedents' Estates (Ch. 547 to 567-a)
Chapter 551. Wills (Refs & Annos)

N.H. Rev. Stat. § 551:10

551:10 Child Not Named, Etc.

Currentness

Every child born after the decease of the testator, and every child or issue of a child of the deceased not named or referred to in his will, and who is not a devisee or legatee, shall be entitled to the same portion of the estate, real and personal, as he would be if the deceased were intestate.

Notes of Decisions (47)

N.H. Rev. Stat. § 551:10, NH ST § 551:10
Updated with laws current through Chapter 258 (End) of the 2017 Reg. Sess., not including changes and corrections made by the State of New Hampshire, Office of Legislative Services

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KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

Revised Statutes Annotated of the State of New Hampshire
Title LVI. Probate Courts and Decedents' Estates (Ch. 547 to 567-a)
Chapter 564-B. New Hampshire Trust Code (Refs & Annos)
Article 1. General Provisions and Definitions

N.H. Rev. Stat. § 564-B:1-112

564-B:1-112 Rules of Construction.

Effective: October 1, 2015
Currentness

The rules of construction that apply in this state to the interpretation of and disposition of property by will also apply as appropriate to the interpretation of the terms of a trust and the disposition of the trust property. In interpreting or construing the terms of a trust, the settlor's intent shall be sovereign to the extent that the settlor's intent is lawful, not contrary to public policy, and possible to achieve. For the purposes of determining the benefit of the beneficiaries, the settlor's intent as expressed in the terms of the trust shall be paramount.

N.H. Rev. Stat. § 564-B:1-112, NH ST § 564-B:1-112
Updated with laws current through Chapter 258 (End) of the 2017 Reg. Sess., not including changes and corrections made by the State of New Hampshire, Office of Legislative Services

End of Document

SB 311 - AS INTRODUCED

2018 SESSION

18-2732
08/01

SENATE BILL ***311***

AN ACT clarifying rules of construction under the New Hampshire Trust Code.

SPONSORS: Sen. D'Allesandro, Dist 20; Sen. Bradley, Dist 3; Rep. Hunt, Ches. 11

COMMITTEE: Commerce

ANALYSIS

This bill clarifies the rules of construction under the New Hampshire Trust Code.

Explanation: Matter added to current law appears in ***bold italics.***
Matter removed from current law appears ~~[in brackets and struckthrough.]~~
Matter which is either (a) all new or (b) repealed and reenacted appears in regular type.
18-2732
08/01

STATE OF NEW HAMPSHIRE

In the Year of Our Lord Two Thousand Eighteen

AN ACT clarifying rules of construction under the New Hampshire Trust Code.

Be it Enacted by the Senate and House of Representatives in General Court convened:

1 Purpose. The purpose of this act is to clarify that, when the general court enacted RSA 564-B:1-112, it did not cause RSA 551:10 to apply to trusts.
2 New Hampshire Trust Code; Rules of Construction. Amend RSA 564-B:1-112 to read as follows:
564-B:1-112 Rules of Construction.
(a) The rules of construction that apply in this state to the interpretation of and disposition of property by will also apply as appropriate to the interpretation of the terms of a trust and the disposition of the trust property. ***For the purposes of this section, RSA 551:10 is not a rule of construction. RSA 551:10 shall not apply to any trust.***
(b) In interpreting or construing the terms of a trust, the settlor's intent shall be sovereign to the extent that the settlor's intent is lawful, not contrary to public policy, and possible to achieve.
(c) For the purposes of determining the benefit of the beneficiaries, the settlor's intent as expressed in the terms of the trust shall be paramount.
3 Effective Date. This act shall take effect upon its passage.

New Hampshire General Court - Bill Status System

SB311

Bill Title: *clarifying rules of construction under the New Hampshire Trust Code.*

General Status:

LSR#: **2732** *Body:* **S** *Local Govt:* **N** *Chapter#:* **None** *Gen Status:* **SENATE**

Senate Status

Status	IN COMMITTEE
Status Date	12/13/2017
Current Committee	Commerce
Committee of Referral	Commerce
Date Introduced	1/3/2018
Due out of Committee	
Floor Date	

House Status

Status	
Status Date	
Current Committee	
Committee of Referral	
Date Introduced	
Due out of Committee	
Floor Date	

Sponsors

Lou D'Allesandro (D) Jeb Bradley (R) John Hunt (r)

Next/Last Hearing: SENATE Commerce

Date:	*Time:*	*Place:*	*Majority Report:*	*Minority Report:*
01/09/2018	01:00 PM	SH Room 100		None

New Hampshire General Court - Bill Status System

Docket of SB311

Docket Abbreviations

Bill Title: clarifying rules of construction under the New Hampshire Trust Code.

Official Docket of **SB311**:

Date	Body	Description
12/8/2017	S	To Be **Introduced** 01/03/2018 and Referred to Commerce; **SJ 1**
12/13/2017	S	Hearing: 01/09/2018, Room 100, SH, 01:00 pm; **SC 48**

NH House	NH Senate