THE STATE OF NEW HAMPSHIRE
SUPREME COURT

Case No. 2017-0532

In re: Teresa E. Craig Living Trust

RULE 9 INTERLOCUTORY APPEAL FROM THE
6TH CIRCUIT - PROBATE DIVISION – CONCORD
TRUST DOCKET

REPLY BRIEF FOR PETITIONERS
Andrew Grasso and Mikayla Grasso

Barradale, O'Connell, Newkirk & Dwyer, P.A.
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Argument to be presented by Pamela J. Newkirk, Esq.

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STATEMENT OF THE CASE

In the Respondent's brief at page 2, he erroneously asserted that the lower court granted the New Hampshire Trust Council's Motion for Leave to File an *Amicus* Memorandum of Law. In fact, the lower court deferred ruling on that Motion. See Addendum (Reply) Page 4.

ARGUMENT

I. THE PLAIN MEANING OF A STATUTE SHOULD NOT BE UNDERMINED BY SUPPOSITION AND SPECULATION

The Respondent's enumeration of the changes to the New Hampshire Trust Code **subsequent to** the enactment of RSA 564-B:1-112 that did not expressly address the incorporation of the pretermitted heir statute by RSA 564-B:1-112 do not change the fact that when RSA 564-B:1-112 was enacted, the pretermitted heir statute was incorporated with respect to *inter vivos* trusts that serve as testamentary substitutes. It is not the job of the judiciary to tell the legislature how to express its intention. The Respondent advances various caveats that he claims should have been included along with the incorporation of the pretermitted heir statute as a rule of construction applicable to such trusts. However, none of those caveats exist with respect to the application of the pretermitted heir statute to wills. Most importantly, the entire premise for the pretermitted heir protection is that a child or the issue of a deceased child was forgotten or mistakenly omitted. The caveats suggested by the Respondent would require consideration of the omitted interest and/or speculation as to the settlor's intentions regarding that forgotten or omitted interest.

Preventing the situation where the child or the issue of a deceased child is forgotten or accidentally omitted from a will is simple – name the testator's children and the issue of any children deceased at the time the will is made. Since it is a rule of construction, there are no inquiries as to the settlor's intention, or the possibilities of modification, such as the Respondent suggests should exist. The rule is clear. Addressing the rule's application is simple.

The pretermitted heir rule provides for a simple calculation of the pretermitted heir's share of the estate, which he or she receives upon distribution of the residuary without conditions, even if some of the residuary would be held in a testamentary trust. Likewise, a pretermitted beneficiary of an *inter vivos* trust that serves as a testamentary substitute would have his or her share calculated under the laws of intestacy and would receive his or share upon the allocation of trust property between the beneficiaries after death of the settlor, regardless of whether some of the residuary would be held in trust for named beneficiaries for some additional period of time.

II. THE RESPONDENT'S ATTEMPTED DEFINITION OF THE PHRASE "RULES OF CONSTRUCTION" WITHIN RSA 564-B:1-112 WITH A DEFINITION FROM BLACK'S LAW DICTIONARY IS IN ERROR

The New Hampshire legislature included the phrase "rules of construction" within RSA 564-B:1-112. The official commentary to the Uniform Trust Code expressly acknowledged that the rules of construction may be statutory.[1] Despite this clear acknowledgment that the rules of construction may be established by statute, the Respondent relies on *Black's Law Dictionary,* which does not define the phrase "rule of construction" except by reference to the phrase "canon of construction." A canon of construction is a guideline, or a constructional preference, which

[1] "Rules of construction are found both in enacted statutes and in judicial decisions." *See* Uniform Trust Code Comments, Appendix to Interlocutory Transfer Statement at Page A-142.

the official commentary to the Uniform Trust Code clearly distinguishes from a rule of construction:

> Unlike a constructional preference, a rule of construction, if applicable, can lead to only one result.

See Uniform Trust Code Comments, Appendix to Interlocutory Transfer Statement at Page A-142. The Pennsylvania Supreme Court recently held that Pennsylvania's pretermitted spouse statute is a "rule of construction." *In re: Trust Under Deed of David P. Kulig Dated January 12, 2001,* 2017 WL 6459001 (December 19, 2017).

III. THE RESPONDENT'S EFFORT TO DISTINGUISH THE FORMALITIES GOVERNING THE ESTABLISMENT OF WILLS AND TRUSTS AS A FOUNDATION FOR NOT INCORPORATING THE PRETERMITTED HEIR RULE AS A RULE OF CONSTRUCTION APPLICABLE TO *INTER VIVOS* TRUSTS THAT SERVE AS TESTAMENTARY SUBSTITUTES WOULD RENDER RSA 564-B:1-112 INEFFECTIVE

There is no dispute that the formalities for establishing, funding and amending wills and trusts are different. Further, all wills serve the purpose of the testamentary disposition of property, whereas, only some trusts serve that purpose.[2] If pretermitted heir rule were not applicable to the construction of a trust because the formalities of execution are different, or the fact that trusts may be irrevocable or serve purposes other than as a testamentary substitute for a will, none of the rules of construction applicable to wills would also be applicable to trusts, thereby rendering RSA 564-B:1-112 impotent.

The Respondent contends that the pretermitted heir statute is not applicable to the Teresa Craig Trust by claiming it would be ridiculous to apply that statute to an oral trust, or situations

[2] Many trusts do not serve the purpose of testamentary disposition, but are established for the purpose of making charitable gifts, serving the beneficial interests of an individual with special needs, business succession, or the ownership of a life insurance policy that will assist in the payment of death and inheritance taxes.

with a settlor who has established multiple trusts, including trusts that serve purposes other than as a substitute for the testamentary disposition of a settlor's property. However, this contention directly supports the Petitioners' position that the phrase "as appropriate" within RSA 564-B:1-112 limits the application of the pretermitted heir statute to trusts that serve as will substitutes, such as the Teresa Craig Trust. The absurdity of the Respondent's position is further delineated in his hypothetical set forth at page 12 of his brief, which does not concern a pour-over trust that will dispose of the settlor's estate upon his or her death. The hypothetical has no relevance to the issue before this Court.

IV. REFORMATION IS IRRELEVANT AND WOULD NOT NEGATE THE INTERESTS ESTABLISHED BY APPLICATION OF THE PRETERMITTED HEIR RULE.

The Respondent suggests trust reformation proceedings will be required pursuant to RSA 564-B:4-415 for "every trust signed since the enactment of the NHTC in 2004" if this Court rules in favor of the Petitioners. This is yet another embellished claim. Reformation would not be possible to eliminate a statutorily established property interest. Further, when considering the number of trusts that will be affected by the Court's ruling in this case, several factors establish that the number is nothing close to all trusts established since 2004. First, the instances in which a trust settlor establishes a revocable trust that serves as a testamentary substitute would have to carved out of the set of all trusts signed since 2004 (the "First Subset"). Second, the instances in which a child or the issue of a deceased child are entirely disinherited, and are not named or expressly referred to[3] within the trust would have to be carved out of the First Subset (the

[3] Although the Respondent presents his arguments to the Court as though no members of the bar have drafted *inter vivos* testamentary substitute trusts with an eye towards the risk of a pretermitted beneficiary claim, on information and belief, many practitioners have indeed as a matter of practice named the disinherited children and issue of a deceased child, in anticipation that a pretermitted beneficiary claim could be made pursuant to the NH Trust Code, and more

"Second Subset"). Third, because the trusts implicated here are revocable when established, the situations where the trusts have become irrevocable as a result of the incapacity or death of the settlor[4] would have to be carved out of the Second Subset (the "Third Subset"). Finally, the trusts where any statute of limitations has passed to establish the rights of the pretermitted beneficiaries would have to be carved out of the Third Subset (the "Final Subset"). There is no way for any of the parties before the Court to know the size of the Final Subset, but the Petitioners suspect that the number of trusts affected would be very small, and unworthy of an overreaction that would undermine the clear meaning of RSA 564-B:1-112.

V. THE INTRODUCTION OF SB311, AN APPARENT EFFORT TO SUBVERT THE LAW, IS IRRELEVANT.

SB 311 proposes an amendment to RSA 564-B:1-112.[5] It is not the law. The status of this bill as of January 31, 2018 is that it is before the Senate Commerce Committee with no action on the docket. *See* Addendum (Reply) Page 5. The amendment is not law and is of no application to this matter. Further, as set forth in detail in the Petitioners' Objection to Motion to Stay previously filed with this Court, that they will not rehash here, RSA 564-B:1-112 may not be amended retroactively as a matter of law.

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importantly to ensure that the Settlor's intentions, including the intention to disinherit, are absolutely clear.

[4] A revocable trust could be amended by the settlor to address a pretermitted beneficiary issue.

[5] Although it is not personally known to the Petitioners how SB 311 came before the New Hampshire legislature, counsel for the Petitioners was present at a hearing on the bill before the Senate Commerce Committee on January 9, 2018. At the hearing, testimony was provided in favor of the legislation by three parties, Attorney Perlow, who represents the *Amicus* party and Attorneys Kanyuk and Neal, who work at the law firm where the Teresa Craig Trust was drafted.

VI. DESPITE THE PENNSYLVANIA SUPREME COURT'S REVERSAL OF THE INTERMEDIATE APPELLATE COURT'S ULTIMATE DECISION IN *IN RE: TRUST UNDER DEED OF KULIG,* THE ANALYSIS APPLIED BY THE PENNSYLVANIA SUPREME COURT SUPPORTS THE PETITIONERS' CONSTRUCTION OF RSA 564-B:1-112

Contrary to the *Kidwell* decision relied upon by the Respondent, which did not concern the construction of Uniform Trust Code Section 1-112, the matter of *In re: Trust Under Deed of David P. Kulig Dated January 12, 2001,* 2017 WL 6459001 (December 19, 2017), concerned the construction of Pennsylvania's version of Uniform Trust Code Section 1-112, which modified the language from that in the uniform act. *See* Addendum (Reply) Page 8. Pennsylvania's adoption of Section 1-112 is found at 20 Pa.C.S.A. §7710.2, which states as follows:

> The rules of construction that apply in this Commonwealth to the provisions of testamentary trusts also apply as appropriate to the provisions of inter vivos trusts.

See Addendum (Reply) Page 6. The Pennsylvania legislature also provided its own commentary to the statute, stating that it imported "20 Pa.C.S. §§ 2507, 2514 and 2517 and other statutory and judicial rules of interpretation that apply to trusts under wills." *See* Addendum (Reply) Page 7.

Unlike the Pennsylvania legislature, whose commentary contains express references to certain statutory rules of construction imported by its version of Uniform Trust Code Section 112, the New Hampshire legislature has no commentary to RSA 564-B:1-112. Thus, the official commentary to the Uniform Trust Code serves as the legislative intention. *See Hodges v. Johnson,* 2017 WL 6347941 (NH December 12, 2017). The Pennsylvania Supreme Court construed 20 Pa.C.S.A. §7710.2 considering the Pennsylvania legislature's commentary and the state's overall statutory scheme. *See In re: Trust Under Deed of David P. Kulig Dated January 12, 2001,* 2017 WL 6459001 (December 19, 2017). Addendum (Reply) Page 8. This Court must construe RSA 564-B:1-112 considering the official commentary and New Hampshire's legislative scheme, which is dramatically different from that in Pennsylvania.

Ultimately, the fact that Pennsylvania had, prior to its adoption of the Uniform Trust Code, statutorily established the right of a surviving spouse, not just pretermitted spouses, to receive one-third of the deceased spouse's probate and non-probate property, including the assets held in an *inter vivos* trust, led to its reversal of the lower appellate court's decision.

The Pennsylvania statutes contain two provisions that protect a surviving spouse. One of those statutes allows the surviving spouse to elect to take one-third of the deceased spouse's probate estate and all non-probate property over which the deceased spouse retained control during his or her lifetime. Pa. 20 C.S.A. §2507(3), Addendum (Reply) Page 22. The non-probate property against which the surviving spouse could take one-third includes the assets of a revocable trust. *In re: Trust Under Deed of David P. Kulig Dated January 12, 2001,* 2017 WL 6459001 (December 19, 2017). The other statute essentially allows a spouse who receives no property under a will to receive an intestate share, one-half, of the deceased spouse's probate estate. Pa. 20 C.S.A. §2203. Addendum (Reply) Page 25. This statutory scheme was in place prior to Pennsylvania's adoption of the Uniform Trust Code, and the Pennsylvania Supreme Court declined to hold that the Pennsylvania legislature intended to disrupt the statutory scheme that provided for a spouse to receive one-third of an *inter vivos* revocable trust by incorporating the statute that allows the pretermitted surviving spouse of a will made pre-marriage to receive one-half of the probate estate. *In re: Trust Under Deed of David P. Kulig Dated January 12, 2001,* 2017 WL 6459001 (December 19, 2017). Addendum (Reply) Page 8. The Court noted the absurdity of the result that would arise if a pretermitted spouse such as Mrs. Kulig, who was married only a month before Mr. Kulig died, could elect to receive one-half of the deceased spouse's estate and *inter vivos* trust, whereas a surviving spouse of a marriage of many years

would be limited to one-third of the deceased spouse's probate and non-probate property, including an *inter vivos* trust.[5] *Id.*

In New Hampshire, a forgotten or accidentally omitted beneficiary had no established rights prior to the enactment of RSA 564-B:1-112. The enactment of that statute established those rights and there is no disruption or conflict with other provisions within the New Hampshire statutes such as was the case in Pennsylvania.

VII. THE LAW CONCERNING THE PROTECTION OF THE INTENTION OF A TRUST SETTLOR IS THE SAME AS THE LAW CONCERNING THE PROTECTION OF THE INTENTION OF A TESTATOR

The *Amicus* party contends that applying the pretermitted heir rule to trusts would be inconsistent with New Hampshire law governing the protection of the intention of a trust settlor. However, New Hampshire law is well established that the fundamental principle in the construction of wills is the preservation of the intention of the testator. *In re: Estate of Donovan,* 162 N.H. 1, 4, 20 A.3d 989, 992 (2011). Indeed, the *Amicus* party cites to a case concerning a **will**, *Burtman v. Butman,* 97 N.H. 254, 85 A.2d 892 (1952) in support of its proposition regarding the sanctity of intention. The foundation of this Court's application of this principle to trusts is its application to wills. *See Bartlett v. Dumaine,* 128 N.H. 497, 524, 523 A.2d 1, 6 (1986) (*citing In re: Frolich Estate,* 112 N.H. 320, 327, 295 A.2d 448, 453 (1972)).

[5] Mrs. Kulig's stepchildren submitted that Mrs. Kulig would receive $1.5M more of Mr. Kulig's property if the pretermitted spouse statute was incorporated by 20 Pa. C.S.A. §7710.2 than she would receive if she the pretermitted spouse statute was not applicable to *inter vivos* trusts under 20 Pa. C.S.A. §7710.2.

However, the pretermitted heir statute is a statutory exception to this principle with respect to the construction of wills. Applying that rule of construction to *inter vivos* trusts that serve as will substitutes preserves the consistency of the construction of both types of testamentary documents.

The *Amicus* party goes on to suggest that reformation of a trust may occur when a beneficiary is forgotten or accidentally omitted. The Respondents disagree and suggest that opening the door to allow trust reformation proceedings to include omitted beneficiaries, which would not be limited to the children and issue of deceased children of a settlor, would be the opening of a pandora's box. It would be short-sighted to allow such proceedings that would just establish a precedent for litigation over the intention of a settlor.

Respectfully submitted,

ANDREW GRASSO AND MIKAYLA GRASSO

By their attorneys,

BARRADALE, O'CONNELL, NEWKIRK & DWYER, P.A.

Dated: 2/5/18

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Statement of Compliance

I hereby certify that copies of the foregoing brief and appendix hereto were sent via first-class mail this 5th day of January, 2018 to Attorney Ralph F. Holmes, McLane Middleton, PA, PO Box 326, Manchester, NH 03105-0326, Attorney Glenn A. Perlow, New Hampshire Trust Council, One Liberty Lane East, Hampton, NH 03824, Attorney Todd D. Mayo, New Hampshire Trust Council, One Liberty Lane East, Hampton, NH 03824 and Attorney Jacqueline A. Botchman, McLane Middleton, PA, PO Box 326, Manchester, NH 03105-0326.

Laura Votrault for Pamela J. Newkirk
Pamela J. Newkirk

Addendum (Reply)

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THE STATE OF NEW HAMPSHIRE
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September 05, 2017

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Case Name: **In Re: The Teresa E. Craig Living Trust**
Case Number: **317-2017-EQ-00133** ***317-2016-ET-00654***

Enclosed please find the Court's Order regarding the above case.

Sharon A. Richardson
Clerk of Court

C: Ralph F. Holmes, ESQ; Laura Therese Tetrault, ESQ

THE STATE OF NEW HAMPSHIRE

MERRIMACK COUNTY

TRUST DOCKET
6TH CIRCUIT COURT
PROBATE DIVISION

ESTATE OF TERESA E. CRAIG

317-2016-ET-00654

IN RE: TERESA E. CRAIG LIVING TRUST

317-2017-EQ-0133

ORDER ON AUGUST 30, 2017 CONFERENCE

A hearing was held at the initiation of the Court on August 31, 2017 to discuss its decision to submit for interlocutory transfer without ruling, see RSA 547:30; Sup. Ct. R. 9; Cir. Ct – Prob. Div. R. 79, in the In re: Theresa E. Craig Living Trust, No. 317-2017-EQ-00133 case (the "Equity Matter"), an issue concerning the application of the pretermitted heir statute, RSA 551:10, to trusts through RSA 564-B:1-112. See Order on Trustee's Motion to Dismiss and Trustee's Second Motion to Dismiss at 7-11 & 12 n. 7 (July 21, 2017)(Index #18).[1] The hearing was attended by: Ralph F. Holmes, Esq., on behalf of Daniel Toland, Trustee of the Teresa E. Craig Living Trust (the "Teresa Trust"), and Megan Neal, on behalf of Sebastian Grasso, executor of the Estate of Teresa A.

[1] For simplicity and convenience, in citing index numbers for pleadings, orders or other documentation in the case files, the Court will reference the numbers pertaining to the Equity Matter, No. 317-2017-EQ-0133. Where applicable, the Court will indicate that it is referencing an index number in case number No. 317-2016-ET-00654 (the "Estate Case").

Craig; and Pamela J. Newkirk, Esq., on behalf of the Petitioners, Andrew S. Grasso and Nancy White, as parent and next friend of Mikayla Grasso.[2]

Although the Court had decided that the most prudent course was to submit an interlocutory transfer without a ruling pursuant to RSA 547:30 and Supreme Court Rule 9, it scheduled the hearing to allow the parties to comment and for the Court consider any concerns they may bring to its attention. The parties did not object to submission of a Rule 9 interlocutory transfer, subject to certain clarifications and orders set forth infra. The Court informed the parties that it would submit the following question for review and consideration by the Supreme Court, and provided counsel the opportunity to comment:

> **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. 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?**

In addition, after consideration of comments by the parties during the conference, the Court **ENTERS** the following **ORDERS**:

- The Court **CLARIFIES** for the record that although in its Order on Trustee's Motion to Dismiss and Trustee's Second Motion to Dismiss, see Index #18, the Court observed that "it *appears* that RSA 551:10 states a rule of construction," id. at 10 (emphasis added), it did not affirmatively so rule as a matter of law. Compare Robbins, 147 N.H. at 45 (statute creates "a conclusive rule of law") and In re Estate of Treloar, 151 N.H. 460, 462 (2004) (statute "not merely a

[2] Ms. Grasso and Ms. White also attended the hearing.

presumption"), with In re Estate of Came, 129 N.H. 544, 547-48 (1987)(RSA 551:10 creates a statutory presumption).

- All proceedings in the "Equity Matter" are **STAYED** pending a ruling by the Supreme Court whether to accept or decline the Rule 9 Interlocutory Transfer Without Ruling. The Court will schedule a telephonic status conference **within thirty (30) days** after receipt of a decision from the Supreme Court whether it will consider the question posed for its consideration.[3]
- The Court **DEFERS** ruling on the following outstanding motions pending a ruling by the Supreme Court on the Rule 9 Interlocutory Transfer Without Ruling: the *Petition*, see Index #1; the *Trustee's Motion to Dismiss*, see Index #9; the *Trustee's Second Motion to Dismiss*, see Index #12; the Trustee's *Notice of Compliance With Petitioners' Request for Relief*, see Index #19; the Petitioners' *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 Theresa E. Craig Living Trust*, see Index #20; and a *Motion for Leave to File an Amicus Memorandum of Law* filed by The New Hampshire Trust Council. See Index #22.

SO ORDERED

Dated: 9/5/2017

David D. King, Judge

[3] Should the Supreme Court not render a decision by December 31, 2017, the Court will schedule a status conference in this matter **on or before January 15, 2018**.

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

▶▶▶ This Bill Has Streaming Audio!! ◀◀◀

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

Purdon's Pennsylvania Statutes and Consolidated Statutes
Title 20 Pa.C.S.A. Decedents, Estates and Fiduciaries (Refs & Annos)
Chapter 77. Trusts (Refs & Annos)
Subchapter A. General Provisions (Refs & Annos)

20 Pa.C.S.A. § 7710.2

§ 7710.2. Rules of construction - UTC 112

Effective: November 6, 2006
Currentness

The rules of construction that apply in this Commonwealth to the provisions of testamentary trusts also apply as appropriate to the provisions of inter vivos trusts.

Credits

2006, July 7, P.L. 625, No. 98, § 9, effective in 120 days [Nov. 6, 2006].

Editors' Notes

UNIFORM LAW COMMENT

This section is patterned after Restatement (Third) of Trusts Section 25(2) and comment e (Tentative Draft No. 1, approved 1996), although this section, unlike the Restatement, also applies to irrevocable trusts. The revocable trust is used primarily as a will substitute, with its key provision being the determination of the persons to receive the trust property upon the settlor's death. Given this functional equivalence between the revocable trust and a will, the rules for interpreting the disposition of property at death should be the same whether the individual has chosen a will or revocable trust as the individual's primary estate planning instrument. Over the years, the legislatures of the States and the courts have developed a series of rules of construction reflecting the legislative or judicial understanding of how the average testator would wish to dispose of property in cases where the will is silent or insufficiently clear. Few legislatures have yet to extend these rules of construction to revocable trusts, and even fewer to irrevocable trusts, although a number of courts have done so as a matter of judicial construction. *See* Restatement (Third) of Trusts Section 25, Reporter's Notes to cmt. d and e (Tentative Draft No. 1, approved 1996).

Because of the wide variation among the States on the rules of construction applicable to wills, this Code does not attempt to prescribe the exact rules to be applied to trusts but instead adopts the philosophy of the Restatement that the rules applicable to trusts ought to be the same, whatever those rules might be.

Rules of construction are not the same as constructional preferences. 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 avoid 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. *See* Restatement (Third) of Property: Donative Transfers Section 11.3 and cmt. b (Tentative Draft No. 1, approved 1995).

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. These include the failure to anticipate the predecease of a beneficiary or to specify the source from which expenses are to be paid. Rules of construction can also concern assumptions as to how a donor would have revised donative documents in light of certain events occurring after execution. These include rules dealing with the effect of a divorce and whether a specific devisee will receive a substitute gift if the subject matter of the devise is disposed of during the testator's lifetime.

Instead of enacting this section, a jurisdiction enacting this Code may wish to enact detailed rules on the construction of trusts, either in addition to its rules on the construction of wills or as part of one comprehensive statute applicable to both wills and trusts. For this reason and to encourage this alternative, the section has been made optional. For possible models, see Uniform Probate Code, Article 2, Parts 7 and 8, which was added to the UPC in 1990, and California Probate Code Sections 21101-21630, enacted in 1994.

JT. ST. GOVT. COMM. COMMENT--2005

This section imports 20 Pa.C.S. §§ 2507, 2514 and 2517 and other statutory and judicial rules of interpretation that apply to trusts under wills.

Notes of Decisions (2)

20 Pa.C.S.A. § 7710.2, PA ST 20 Pa.C.S.A. § 7710.2
Current through 2017 Regular Session Act 82 (End)

End of Document

2017 WL 6459001
Only the Westlaw citation is currently available.
Supreme Court of Pennsylvania.

IN RE: TRUST UNDER DEED OF DAVID P. KULIG DATED JANUARY 12, 2001
Appeal of: Carrie C. Budke and James H. Kulig

No. 97 MAP 2016
|
Argued: May 10, 2017
|
Decided: December 19, 2017

Synopsis

Background: Children of deceased husband filed petition for declaratory judgment for determination of whether widow was entitled to any share in husband's revocable deed of trust. The Court of Common Pleas, Bucks County, Orphans' Court Division, No. 2013-0179, C. Thomas Fritsch, Jr., J., awarded wife a one-half share of assets in trust. Children appealed. The Superior Court, No. 2891 EDA 2014, 131 A.3d 494, affirmed. Petition for allowance of appeal was granted.

[Holding:] The Supreme Court, No. 97 MAP 2016, Wecht, J., held that as a matter of first impression, revocable inter vivos trust executed by husband naming himself as trustee was not to be included in husband's estate for purposes of discerning pretermitted wife's statutory entitlement to share of estate to which she would have been entitled had husband died intestate.

Reversed and remanded.

Saylor, C.J., filed dissenting opinion in which Baer, J., joined.

West Headnotes (8)

[1] **Wills**
⇐ Inter vivos trusts

Revocable inter vivos trust executed by husband naming himself as trustee was not to be included in testator husband's estate for purposes of discerning pretermitted wife's statutory entitlement to share of estate to which she would have been entitled had husband died intestate. 20 Pa. Cons. Stat. Ann. §§ 2203, 2507(3), 7710.2.

Cases that cite this headnote

[2] **Appeal and Error**
⇐ Cases Triable in Appellate Court

Review of a question of statutory interpretation is de novo, and the scope of review is plenary.

Cases that cite this headnote

[3] **Statutes**
⇐ Plain Language;Plain, Ordinary, or Common Meaning

A court may not rely upon the various tools of statutory construction when the text of the statute, itself, is plain.

Cases that cite this headnote

[4] **Statutes**
⇐ Comments, notes, and summaries

When a court identifies a statute as unambiguous, any reference it makes to the commentary is gratuitous.

Cases that cite this headnote

[5] **Statutes**
⇐ Common or civil law

Statutes
⇐ Change in law

Statutes are never presumed to make any innovation in the rules and principles of the common law or prior existing law beyond what is expressly declared in their provisions.

Cases that cite this headnote

[6] **Statutes**

⇐ What constitutes ambiguity;how determined

Statutes

⇐ In general;factors considered

A statute is ambiguous and thus subject to the rules of statutory interpretation when there are at least two reasonable interpretations of the text.

Cases that cite this headnote

[7] **Statutes**

⇐ Context

In construing and giving effect to the text of a statute, a court should not interpret statutory words in isolation, but must read them with reference to the context in which they appear.

Cases that cite this headnote

[8] **Trusts**

⇐ Constitutional and Statutory Provisions

Wills

⇐ Constitutional and statutory provisions

The General Assembly has the power to enact all manner of legislation with respect to wills and trusts subject to the rights and limitations ordained in the Constitution of the United States and the Constitution of Pennsylvania.

Cases that cite this headnote

Appeal from the Order of the Superior Court at No. 2891 EDA 2014, dated December 24, 2015, Reconsideration Denied February 23, 2016, Affirming the Decree of the Court of Common Pleas of Bucks County, Orphans' Court Division, at No. 2013-0170 dated September 12, 2014, C. Theodore Fritsch, Jr., Judge.

Attorneys and Law Firms

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SAYLOR, C.J., BAER, TODD, DONOHUE, DOUGHERTY, WECHT, MUNDY, JJ.

OPINION

JUSTICE WECHT

*1 This Commonwealth has a "long existing public policy ... to protect the rights of [a surviving spouse]" against total disinheritance by his or her deceased spouse. *In re Pengelly's Estate*, 374 Pa. 358,97 A.2d 844, 849 (1953).[1] For centuries, the common law prevented such disinheritances under the doctrine of dower and curtesy, which established for surviving spouses threshold entitlements to their deceased spouse's property.[2] Pennsylvania's Probate, Estates and Fiduciaries Code ("PEF Code" or "the Code")[3] includes two provisions designed to protect against negligent omission of a spouse from a will or disinheritance by other means. First, if the parties marry after the operative will has been executed, Subsection 2507(3) of the Code entitles the excluded spouse (referred to as a "pretermitted spouse"[4]) to take the share of the estate to which she[5] would have been entitled had the decedent died intestate, *i.e.*, without a will. *See* 20 Pa.C.S. § 2507(3). Second, Section 2203 confers upon any surviving spouse, including but not limited to a pretermitted spouse, a "right of election," which entitles her to take a one-third share of specified categories of property, including the probate estate as well as assets nominally transferred during the decedent's lifetime (*inter vivos*) as to which he retained control to dispose of as he pleased at the time of his death. *See* 20 Pa.C.S. § 2203. The total amount of the elective share is reduced by other property and assets she obtained from the decedent by other means. *See* 20 Pa.C.S. § 2204.

*2 [1] In today's case, we consider for the first time the effect of 20 Pa.C.S. § 7710.2, enacted in 2006, upon the scope of the assets used to calculate the pretermitted spousal share. Section 7710.2 provides that the rules of construction that apply to the provisions of testamentary

trusts also apply to the provisions of *inter vivos* trusts.[6] For the reasons that follow, we reverse the Superior Court's determination that the revocable *inter vivos* trust at issue should have been included in David Kulig's estate for purposes of discerning the pretermitted spouse's statutory entitlement under Section 2507.

On January 12, 2001, while married to Joanne Kulig ("Joanne"), David Kulig ("Decedent") executed a revocable trust (the "Trust") naming himself as trustee. The named beneficiaries of the Trust upon Decedent's death were his then-wife Joanne, and the children born to Decedent and Joanne. Pursuant to the terms of the Trust, Decedent had the prerogative to receive any portion of the trust income during his lifetime, to draw any amount of the trust principal for his own welfare, comfort, and support, and to terminate the Trust.

Joanne died on August 15, 2010. On December 13, 2010, Decedent prepared a Last Will and Testament. Approximately one year later, on December 30, 2011, Decedent married Mary Jo Kulig ("Wife"), Appellee herein. Since the will had been executed before his second marriage, it made no provision for Wife. Nor did the will include any indication that Decedent had contemplated remarriage when he executed it.

On February 3, 2012, barely one month after marrying Wife, Decedent died, survived by Wife and by his children, Carrie C. Budke and James H. Kulig (collectively "Children"), Appellants herein. By the terms of the Trust, if Joanne predeceased Decedent, the balance of the Trust corpus was to be divided and distributed to Children according to the Trust's terms. Upon Decedent's death, the Trust had a value of $3,257,184.74. As of June 14, 2012, Decedent's probate estate (excluding the Trust) was valued at $2,106,417.26. As well, Wife undisputedly was entitled upon Decedent's death to an ERISA benefit plan worth at least $1,500,000.

The parties stipulated that Wife, a pretermitted spouse under Pennsylvania law, is entitled to receive the same share of Decedent's estate to which she would have been entitled had he died intestate, *see* 20 Pa.C.S. § 2507(3),[7] *i.e.*, one half of the intestate estate,[8] as defined by Chapter 21 of the PEF Code. In providing that "the surviving spouse shall receive the share of the estate to which [s]he would have been entitled had the testator died intestate," Subsection 2507(3) incorporates by reference Subsection 2101(a). Subsection 2101(a) defines the intestate estate as "[a]ll or any part of the estate of a decedent *not effectively disposed of by will or otherwise.*" 20 Pa.C.S. § 2101(a) (emphasis added).

*3 The parties disputed whether the Trust may be considered part of the intestate estate for purposes of calculating the pretermitted spousal share or is instead available to Wife only in the event that she chooses to claim her elective share pursuant to Section 2203 of the Code, which expressly includes in the elective share "[p]roperty conveyed by the decedent during his lifetime to the extent that the decedent at the time of his death had a power to revoke the conveyance or to consume, invade or dispose of the principal for his own benefit." 20 Pa.C.S. § 2203(a)(3). In the former case, Wife would receive one half of the intestate estate and one half of the Trust corpus, with no deductions. In the latter case, Wife would have access to the Trust only by spousal election, pursuant to which she would receive one third of the probate estate and one third of the Trust corpus, subject to certain charges against the gross elective share. *See* 20 Pa.C.S. § 2204(c). According to the parties, if Wife prevails, she would take approximately $1.5 million more than she would if Children's view is correct.[9]

Children filed a petition for declaratory judgment[10] before the Orphans' Division of the Bucks County Court of Common Pleas (hereinafter the "Orphans' Court"), seeking a declaration that the Trust was excluded from Wife's pretermitted spousal share. It is the "effectively disposed of ... otherwise" in Subsection 2101(a)'s definition of the intestate estate that Children argue excludes revocable trusts from the intestate estate:

> Assets that pass outside a decedent's probate estate, such as by the terms of a funded *inter vivos* trust (whether revocable or irrevocable), by operation of law (*e.g.*, jointly owned assets, "payable on death" accounts, "in trust for" accounts) or by beneficiary designation (*e.g.*, life insurance, IRAs), are not subject to the intestacy statutes because such assets are "effectively disposed of ... otherwise."

Brief for Children at 16–17 (emphasis in original) (citing *Estate of Sauers*, 613 Pa. 186, 32 A.3d 1241, 1249 (2011) (excluding life insurance benefits as estate assets); *Estate of Rood*, 121 A.3d 1104, 1115 (Pa. Super. 2015) (excluding "payable on death" accounts as probate assets)).[11] Because revocable trusts typically, as in this case, provide for the disposition of the trust upon death of the settlor, they are by their nature materially the same as a joint bank account that passes by operation of law to the surviving holder or an account in the decedent's name with a payable-on-death designation. Children contend that no Pennsylvania case law has treated any such account, or a revocable trust, as part of the intestate estate for purposes of intestacy or pretermission. This, they contend, is the essence of assets "disposed of ... otherwise" as intended by Subsection 2101(a). Wife opposed the petition, arguing primarily that, in calling for the application of the same interpretive principles to trusts that apply to wills, Section 7710.2 of the Code established that *inter vivos* trusts, like other assets, must be considered part of the intestate estate for purposes of calculating the pretermitted share.

*4 On September 12, 2014, the Orphans' Court issued a Decree entering judgment in Wife's favor and a Memorandum Opinion in support thereof. The court began by asserting that Subsection 2507(3) effectively provides for a "modification" of a will that excludes a spouse who marries a decedent after execution of the will when the will contains no indication that it was prepared in anticipation of the marriage. Orphans' Court Opinion ("O.C.O.") at 7. Pursuant to Subsection 2507(3), the court found, Wife was entitled to the share of the probate estate that would have passed through intestacy in the absence of a will.

The Orphans' Court then turned to Section 7710.2, which provides that "[t]he rules of construction that apply in this Commonwealth to the provisions of testamentary trusts also apply as appropriate to the provisions of *inter vivos* trusts." 20 Pa.C.S. § 7710.2. The court observed that the 2005 Joint State Government Committee Comment to Section 7710.2 asserts that it "imports 20 Pa.C.S. §§ 2507, 2514, and 2517 and other statutory and judicial rules of interpretation that apply to trusts under wills," *i.e.*, testamentary trusts. Therefore, Section 7710.2 mandated application to the Trust of the same presumption applicable to the will under Subsection 2507(3). Accordingly, the estate comprising the pretermitted spousal share necessarily included the Trust corpus.

In so ruling, the Orphans' Court relied upon various aspects of the commentary appended to Section 7710.2. For example, the commentary to Section 7710.2 notes the "functional equivalence between the revocable trust and a will," such that "the rules for interpreting the disposition of property at death should be the same whether the individual has chosen a will or revocable trust." 20 Pa.C.S. § 7710.2, Uniform Law Cmt. ("ULC"). The comment continues: "Few legislatures have yet to extend these rules of construction to revocable trusts...." *Id.* Thus, rather than "attempt[ing] to prescribe the exact rules to be applied to trusts," the Code "adopts the philosophy of the [Restatement (Third) of Trusts Section 25] that the rules applicable to trusts ought to be the same [as those applied to wills], whatever those rules might be." *Id.* The Orphans' Court inferred "that our General Assembly intended to place revocable *inter vivos* trusts on an equal footing with testamentary instruments and afford pretermitted spouses with an opportunity to claim an intestate share of said trusts." O.C.O. at 10. The court concluded that, by enacting Section 7710.2 with the ULC, the General Assembly, "became one of the 'few legislatures' to extend the rules of construction to revocable *inter vivos* trusts, by importing [Subs]ection 2507(3)'s spousal protections for pretermitted spouses." *Id.* at 11.

The Orphans' Court further found that the General Assembly "implicit[ly] accept[ed] ... the concept that statutory policy as to pretermitted heirs[12] ... should be 'applied by analogy to the omitted [spouse] in the substitute for a will, or in the transfer revocable by the donor at the time of the donor's death.' " *Id.* at 12 (quoting RESTATEMENT (THIRD) OF TRUSTS § 25, Reporters Notes to cmt. d and e (Tentative Draft No. 1, approved 1996)). The Orphans' Court evidently inferred the legislature's adoption of Section 25 of the Restatement from the ULC's several references to it, which included the observation that Section 7710.2 "is patterned after" Section 25(2) of the Restatement.[13] 20 Pa.C.S. § 7710.2, ULC. Notably, the Orphans' Court cited no support for an explicit adoption of these or any other provisions of the Third Restatement in any other source of Pennsylvania law, or in the operative statutory text of any provision in the PEF Code.

*5 Notwithstanding the superficial technicality of this analysis, the thrust of it is straightforward. Subsection 2507(3) reflects a legislative presumption as to the intent of a testator who failed to account for certain events that post-dated execution of his will—in this case, a post-execution marriage. The Orphans' Court interpreted Section 7710.2 as directing courts to assume the same intent not only with regard to the intestate estate incorporated by reference in Subsection 2507(3), but also as to revocable *inter vivos* trusts. Thus, to the extent that Subsection 2507(3) requires the implicit modification of a testamentary instrument in favor of, *e.g.*, a spouse married by the testator after executing the will, one also must infer such an intent with regard to the substance of a revocable trust executed before the marriage, and modify the instrument accordingly.

Upon review, the Superior Court largely adopted the Orphans' Court's reasoning. It, too, recognized Subsection 2507(3) as a "rule of construction" subject to Section 7710.2's direction that "the rules of construction that apply ... to the provisions of testamentary trusts also apply as appropriate to the provisions of *inter vivos* trusts." *See In re Trust Under Deed of Kulig*, 131 A.3d 494 (Pa. Super. 2015) (hereinafter "*Kulig Trust*"). Although the Superior Court at least suggested that its ruling was compelled by the plain language of Sections 2507 and 7710.2, the court also explicitly relied upon the 2005 Joint State Government Commission Comment to Section 7710.2. Indeed, in addition to basing its conclusion "on [the ULC] and the plain unambiguous text of Section 7710.2," *Kulig Trust*, 131 A.3d at 499, the court also stated unequivocally that "the orphans' court was correct to refer to the comments to Section 7710.2 to discern our Legislature's intent." *Id.*; *see* 1 Pa.C.S. § 1939.

The court found the following Section 7710.2 commentary particularly convincing:

> The revocable trust is used primarily as a will substitute, with its key provision being the determination of the persons to receive the trust property upon the settlor's death. *Given this functional equivalence between the revocable trust and a will, the rules for interpreting the disposition of property at death should be the same whether the individual has chosen a will or revocable trust as the individual's primary estate planning instrument.* Over the years, the legislatures of the States and the courts have developed a series of rules of construction reflecting the legislative or judicial understanding of how the average testator would wish to dispose of property in cases where the will is silent or insufficiently clear....
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> Rules of construction attribute intention to individual donors based on assumptions of common intention.... *Rules of construction can also concern assumptions as to how a donor would have revised donative documents in light of certain events occurring after execution.*

20 Pa.C.S. § 7710.2, ULC (emphasis added).

The court concluded that, in enacting Section 7710.2, the General Assembly "intended the rule of construction employed to ascertain a decedent's intent in connection to a pretermitted spouse be applied to *inter vivos* trusts." *Kulig Trust*, 131 A.3d at 499. The court rejected Children's argument that 20 Pa.C.S. § 2203, which allows for a spousal election that includes a one-third share of "[p]roperty conveyed by the decedent during his lifetime to the extent that the decedent at the time of his death had a power to revoke the conveyance or to consume, invade or dispose of the principal for his own benefit," 20 Pa.C.S. § 2203(a)(3), provides the only means by which a pretermitted spouse may take against a revocable trust. The court reasoned that Section 2203 is not a rule of construction, but rather an independently prescribed spousal right that exists regardless of the decedent's presumed intention, and is available to any surviving spouse, not just a pretermitted spouse. That is to say, even a spouse named in the will might choose an elective share if it is of greater value than the decedent's specific bequest, whereas no spouse contemplated or provided for by a will, no matter how meagerly, may recover under Section 2507, which applies only when there is no sign that the Decedent considered the surviving spouse. *See* 20 Pa.C.S. § 2507(3) (precluding application of that subsection if "it appears from the will that the will was made in contemplation of marriage to the surviving spouse"). Thus, the Superior Court affirmed the Orphans' Court's determination that the Trust should be incorporated into the estate for purposes of Wife's share as a pretermitted spouse.

*6 Children filed a Petition for Allowance of Appeal. We granted review in order to consider whether the Superior Court erred in construing Section 7710.2 by reference to the commentary while deeming that provision unambiguous—and by extension whether the Superior

Court erred in ruling that Section 7710.2 compelled inclusion of the Trust in the Estate subject to the pretermitted spousal share. *In re: Trust Under Deed of Kulig*, 158 A.3d 1234 (Pa. 2016) (*per curiam*). Children assert that the Superior Court's interpretation contradicts prior precedent concerning reliance upon statutory commentary and leads to absurd results.

[2] We review this question of statutory interpretation *de novo,* and the scope of our review is plenary. *Trust Under Agreement of Taylor*, 164 A.3d 1147, 1153 (Pa. 2017) (hereinafter "*Taylor Trust*").

> The purpose of statutory interpretation is to ascertain the General Assembly's intent and to give it effect. 1 Pa.C.S. § 1921(a). In discerning that intent, courts first look to the language of the statute itself. If the language of the statute clearly and unambiguously sets forth the legislative intent, it is the duty of the court to apply that intent and not look beyond the statutory language to ascertain its meaning. *See* 1 Pa.C.S. § 1921(b).... Courts may apply the rules of statutory construction only when the statutory language is not explicit or is ambiguous. 1 Pa.C.S. § 1921(c).
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> We must read all sections of a statute "together and in conjunction with each other," construing them "with reference to the entire statute." 1 Pa.C.S. § 1922(2). When construing one section of a statute, courts must read that section not by itself, but with reference to, and in light of, the other sections.
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> Parts of a statute that are *in pari materia, i.e.*, statutory sections that relate to the same persons or things or the same class of persons and things, are to be construed together, if possible, as one statute. 1 Pa.C.S. § 1932. If they can be made to stand together[,] effect should be given to both as far as possible. In ascertaining legislative intent, statutory language is to be interpreted in context, with every statutory section read together and in conjunction with the remaining statutory language, and construed with reference to the entire statute as a whole. We must presume that in drafting the statute, the General Assembly intended the entire statute, including all of its provisions, to be effective. 1 Pa.C.S. § 1922. Importantly, this presumption requires that statutory sections are not to be construed in such a way that one section operates to nullify, exclude or cancel another, unless the statute expressly says so.

Id. at 1155-57 (citations and internal quotation marks omitted).

Central to the arguments of the parties is the well-settled principle that, when official comments to statutes were before the legislature at the time of enactment and are appended to the statutory text, we may treat them as evidence of legislative intent. 1 Pa.C.S. § 1939; *see Bricklayers of W. Pa. Combined Funds, Inc. v. Scott's Dev. Co.*, 625 Pa. 26, 90 A.3d 682, 693 n.11 (2014); *see also In re Martin Estate*, 365 Pa. 280, 74 A.2d 120, 122 (1950). However, when the commentary conflicts with the text of the statute, the text must prevail. 1 Pa.C.S. § 1939; *see Taylor Trust*, 164 A.3d at 1159–60.

We first must address whether, when a statute is clear and unambiguous, it is inappropriate to consider the commentary to the rule, as the Superior Court did in this case. The parties provide limited focused argument on this point, but the underlying principles are straightforward.

*7 Section 1939 provides in full:

> The comments or report of the commission, committee, association or other entity which drafted a statute may be consulted in the construction or application of the original provisions of the statute if such comments or report were published or otherwise generally available prior to the consideration of the statute by the General Assembly, *but the text of the statute shall control in the event of conflict between its text and such comments or report.*

1 Pa.C.S. § 1939 (emphasis added). Thus, on its face, Section 1939 contains no explicit caveat regarding the principle's application when the statutory language is unambiguous. However, as a matter of logic and by necessary implication, the answer must be that Section 1939 is relevant only when the statute is unclear.

[3] [4] As set forth in *Taylor Trust* and *Martin Estate*, we may not rely upon our various tools of statutory construction when the text of the statute, itself, is plain. In *Taylor Trust*, we acknowledged that Section 1939 contains no express limitation on its application to instances of ambiguity. We emphasized nonetheless that, "if the relevant statutory language is free of ambiguity, resort to [S]ection 1939 would be unnecessary." 164 A.3d at 1160 n.6. When a statute is unambiguous, the commentary can serve only to confirm the statute's import, rendering resort to the commentary redundant, or to contradict the statute's plain meaning, which is impermissible. Thus, when a court identifies a statute as unambiguous, any reference it makes to the commentary is gratuitous.

Turning to the effect of Section 7710.2 upon the law protecting pretermitted spouses, we have the benefit of thorough, erudite briefs from both parties. They examine the common law, the long evolution of the PEF Code, the introduction of uniform codes into Pennsylvania's statutory law, and the ramifications of the General Assembly's 2006 addition of Section 7710.2 to the Uniform Trust Code. While these analyses are illuminating, they prove too much, because the parties concur on a point that significantly simplifies the case. Specifically, the parties agree—correctly in our view—that, at least until 2006, Sections 2203 and 2507 operated independently, such that Section 2507's pretermitted share applied only to the intestate estate commonly understood as excluding any property "not effectively disposed of by will *or otherwise.*" *See* 20 Pa.C.S. § 2101(a).

Hence, *inter vivos* trusts, which are among assets "disposed of ... otherwise," lay outside the reach of the intestate estate at least until the enactment of Section 7710.2. Before 2006, the only way a surviving spouse, pretermitted or otherwise, could reach *inter vivos* trusts or other property "disposed of ... otherwise" was by choosing to take the statutory elective share instead of the pretermitted spousal share. *See* Brief for Wife at 28–29 ("The option to choose between taking an elective share or an intestate share is precisely what the legislature intended when it first codified Section 2507(3) in 1956 (though at that time the option to take an intestate share *did not extend to an* inter vivos *trust*). In 2006, the legislature *simply extended that option to an after-married spouse from a testamentary trust under will to an* inter vivos *trust as well.*") (emphasis added); Superior Court Brief for Wife at 17–18 (same); Brief for Children at 10 ("The Orphans' Court, the Superior Court and [Wife] agree that the rulings in this case applying Section 2507(3) to an *inter vivos* trust constitute a change in the statutory structure for decedents' spouses that has been in place for nearly 70 years."); *see also* O.C.O. at 10 ("In light of Section 7710.2 and the comments to this section, we perceive that our General Assembly intended to place revocable *inter vivos* trusts on an equal footing with testamentary instruments and afford pretermitted spouses with an opportunity to claim an intestate share of said trusts."); 20 Pa.C.S. § 2507, Jt. State Gov't Comm. Cmt.—1956 (noting that the 1917 Act's pretermitted spouse and children provision is divided into separate parts in furtherance of clarity, and contrasting "[t]he Model Probate Code[, which] makes no provision for the after-married spouse because it is considered that his right to take [an elective share] against the will is a full protection. Pennsylvania places the after-married spouse in the more gracious position of receiving a full intestate share ... without requiring that there be an election to take against the will."); *cf. id.* Jt. State Gov't Comm. Cmt.—1992 ("The spouse's right of election against the will is not affected [by amendments to Subsections 2507(2) and (3)] and would be the same regardless of whether the will was executed before or after the marriage."). [14]

*8 [5] The sole point of disagreement, then, concerns whether the General Assembly's enactment of Section 7710.2 was intended to change what long had been the *status quo* by extending the scope of a Subsection 2507(3) estate, defined by reference to an intestate estate, to encompass *inter vivos* trusts—this, despite the fact that such a trust is addressed textually only in Subsection 2203(a)(3). In addressing whether a given enactment changes pre-existing law, we proceed cautiously. "Statutes are never presumed to make any innovation in the rules and principles of the common law or prior existing law beyond what is expressly declared in their provisions." *Rahn v. Hess*, 378 Pa. 264, 106 A.2d 461, 464 (1954); *accord Everhart v. PMA Ins. Grp.*, 595 Pa. 172, 938 A.2d 301, 307 (2007); *Carrozza v. Greenbaum*, 591 Pa. 196, 916 A.2d 553, 565–66 (2007); *Commonwealth v. Miller*, 469 Pa. 24, 364 A.2d 886, 887 (1976).

[6] [7] As a threshold matter, we disagree with the Superior Court to the extent that it found that the statutory provisions here at issue are unambiguous when read in their full context. Whether a statute is ambiguous cannot be determined in a vacuum.

> A statute is ambiguous when there are at least two reasonable interpretations of the text. In construing and giving effect to the text, "we should not interpret statutory words in isolation, but must read them with reference to the context in which they appear." *Roethlein v. Portnoff Law Assoc.*, 623 Pa. 1, 81 A.3d 816, 822 (Pa. 2013) (citing *Mishoe v. Erie Ins. Co.*, 573 Pa. 267, 824 A.2d 1153, 1155 (Pa. 2003)); *accord Commonwealth v. Office of Open Records,* 628 Pa. 163, 103 A.3d 1276, 1285 (Pa. 2014) (party's argument that statutory language is ambiguous "depends upon improperly viewing it in isolation;" when language is properly read together and in conjunction with rest of statute, legislative intent is plain). The United States Supreme Court also takes a contextual approach in assessing statutes and in determining predicate ambiguity. *See generally King v. Burwell,* —— U.S. ——, 135 S.Ct. 2480, 2489, 192 L.Ed.2d 483 (U.S. 2015) ("If the statutory language is plain, we must enforce it according to its terms. But oftentimes the meaning—or ambiguity—of certain words or phrases may only become evident when placed in context. So when deciding whether the language is plain, we must read the words in their context and with a view to their place in the overall statutory scheme." (internal quotation marks and citations omitted)); *Yates v. United States,* —— U.S. ——, 135 S.Ct. 1074, 1081–82, 191 L.Ed.2d 64 (U.S. 2015) ("Whether a statutory term is unambiguous, however, does not turn solely on dictionary definitions of its component words. Rather, '[t]he plainness or ambiguity of statutory language is determined [not only] by reference to the language itself, [but as well by] the specific context in which that language is used, and the broader context of the statute as a whole.' Ordinarily, a word's usage accords with its dictionary definition. In law as in life, however, the same words, placed in different contexts, sometimes mean different things." (internal citations omitted)).

A.S. v. Pa. State Police, 636 Pa. 403, 143 A.3d 896, 905–906 (2016) (some citations omitted, others modified).

It is materially undisputed that Subsection 2507(3) is a rule of construction that imputes a will modification based upon the presumed intent of the testator, absent evidence to the contrary, not to disinherit a spouse or child whose arrival post-dated the will's execution. One might reasonably read Section 7710.2 as introducing the rebuttable presumption established in Section 2507 into the context of *inter vivos* trusts. However, viewed in its full context, including Section 2203, which long has been recognized as providing protections for omitted spouses that are distinct from those provided for pretermitted spouses and which reach certain *inter vivos* transfers, it also is reasonable to conclude that the legislature omitted to mention *inter vivos* trusts in Subsection 2507(3) and the provisions incorporated therein for a reason, given that it specifically addresses them in Section 2203. Thus, there are competing, reasonable readings of the content and intended effect of Section 7710.2. Accordingly, we must rely upon the array of tools that we use to construe an ambiguous statute, including the commentary to Section 7710.2 pursuant to 1 Pa.C.S. § 1939.

***9** Recognizing that the PEF Code is an elaborate machine with many moving parts, we begin by addressing whether Sections 2203 and 2507 must be read *in pari materia*. Children argue that each of those provisions reflects the legislature's intent to protect surviving spouses from disinheritance and hence must be harmonized. The Superior Court disagreed:

> In contrast to [Subs]ection 2507(3), the Section 2203 spousal election provision is not a rule of construction. The former is a construction applied in the absence of contrary intent to provide for a surviving spouse based on the presumption that a decedent did not intend to omit the surviving spouse from his or her testamentary decisions. The latter is a right of a surviving spouse available notwithstanding any contrary intent of the decedent to protect against disinheritance. In recognition of the "functional equivalence" between *inter vivos* trusts and testamentary dispositions, the [l]egislature in adopting Section 7710.2 merely sought to impose consistency on the construction of such instruments. Accordingly, there is little reason to treat a decedent's presumed intent differently when considering his will or his *inter vivos* trust. The fact that surviving spouses retain other rights independent of that

> intent is irrelevant. Therefore, it is unnecessary to read Section 7710.2 *in pari materia* with Section 2203, because they relate to different concerns.

Kulig Trust, 131 A.3d at 500. In effect, the court read Sections 2507 and 7710.2 in the abstract, finding them concerned only with matters of will interpretation independent of the import or practical effect of their provisions, while Section 2203 serves an entirely separate function simply because its remedial spousal protections are predicated on fundamentally equitable concerns without regard to the decedent's intent. We find that the Superior Court's approach to distinguishing the intent and effect of Sections 2203 and 2507 is cramped, lacking both formal and practical support.

Both sections reflect modern embodiments of centuries-old protections designed to ensure that surviving spouses are not left destitute by their departed spouses by design or neglect. *See Schwartz' Estate*, 295 A.2d at 602 ("The obvious philosophy of [the spousal election provision in the Estates Act of 1947] ... is to prevent a husband from indirectly disinheriting his wife through an *inter vivos* transfer while retaining control over the use and enjoyment of the property during his lifetime."); *In re Huested's Estate*, 403 Pa. 185, 169 A.2d 57, 61 (1961) ("The mischief to be remedied and the reason for the [1947 revision] are clear. Wives were being very unfairly deprived of a share in their husband's personal property by a transparent trust device which permitted a husband to retain control of his property, and at the same time legally deprive his wife of her just marital rights therein."); *Pengelly's Estate*, 97 A.2d at 849 (same); *Appeal of Fid. Ins., Tr. & Safe–Deposit Co.*, 121 Pa. 1, 15 A. 484, 486 (1888) (identifying predecessor provision to modern pretermitted spousal share as intended to "provide against the improvidence of husbands who should neglect to alter their wills in accordance with the changed circumstances caused by subsequent marriage"); *In re Estate of Long*, 410 Pa.Super. 607, 600 A.2d 619, 621 (1992) ("The most obvious purpose behind [Subs]ection 2507(3) is to protect a surviving spouse from the negligence of the decedent in failing to update his will after marriage. The statute makes a presumption that had the decedent thought about it, or had a chance, he would have provided for his current spouse."). Albeit by different means, Sections 2203 and 2507 serve to protect surviving spouses from disinheritance and destitution when the decedent has made no provision or insufficient accommodation under the terms of his will or by the arrangement of his financial affairs. Given this substantive complementarity of these provisions, they must be interpreted *in pari materia*, both with respect to each other and against Section 7710.2, given the lower courts' and Wife's broad reading of the latter provision in effect to modify the previously-understood import of one or both of the former provisions.

***10** In interpreting these statutes, we also must consider "the object to be attained" by the statute; "the former law, if any, including other statutes upon the same or similar subjects"; and "the consequences of a particular interpretation." 1 Pa.C.S. § 1921. In doing so, we presume that the General Assembly does not intend an absurd or unreasonable result and that the legislature intends that all provisions have effect. 1 Pa.C.S. § 1922.

We begin with what is undisputed: Nothing in the text of Section 7710.2 or the commentary thereto expresses any specific legislative intent to change the pre–2006 framework for providing for pretermitted spouses and spouses otherwise deprived of the legislatively-determined minimum share of the deceased spouse's assets reflected in Section 2203's formula. Notably, the commentary to another Uniform Trust Code section clearly indicates the legislature's intention to disturb prior law on other topics. *See* 20 Pa.C.S. § 7752 (providing in the 2005 Joint State Government Committee Comment that "subsection (a) reverses prior Pennsylvania law and presumes that a trust created after the effective date of this chapter is revocable unless the trust instrument provides that it shall not be," in direct contradiction of prior law recognized in *Biggins v. Shore*, 523 Pa. 148, 565 A.2d 737, 747–48 (1989)). Nor is this uncommon; the legislature knows well how to signal its intention to change prior law. *See Lower Makefield Twp. v. Lands of Chester Dalgewicz*, 620 Pa. 312, 67 A.3d 772, 776 (2013) (finding intent in Joint State Government Commission Comments to an Eminent Domain Code provision to "change existing law" in a way that abrogated prior precedent, and concluding that further reliance upon that precedent would be misplaced). Yet, no such indication appears on the face of, or in the commentary to, Section 7710.2.

It also is noteworthy that the language employed by Section 7710.2 is consistent with prior precedent, suggesting a codification, rather than a modification,

of long-standing interpretive law. In *Matter of Tracy*, 464 Pa. 300, 346 A.2d 750 (1975), this Court held that "[t]he principles applicable to the construction of trust instruments are essentially the same as those used in the construction of wills." *Id.* at 752; *cf.* 20 Pa.C.S. § 7710.2 ("The rules of construction that apply in this Commonwealth to the provisions of testamentary trusts also apply as appropriate to the provisions of inter vivos trusts."). Wife somewhat confusingly contends that *Tracy* supports her own argument in establishing that wills and trusts should be interpreted utilizing the same principles such that Section 7710.2, indeed, codified that principle, which contradicts her acknowledgment that, before the enactment of Section 7710.2, she would have had no claim to a pretermitted spousal share of the Trust. The text of Section 7710.2 specifically speaks in terms of interpreting the "provisions" of wills and trusts, suggesting that, as in *Tracy*, it intends only that interpretive principles that apply to aid courts in inferring testamentary intent from testamentary language that is less than clear should also be employed in aiding courts in discerning a settlor's intent in establishing a trust.

That being said, the commentary to Section 7710.2 complicates this reference to "provisions" in drawing a distinction between "constructional preferences" and "rules of construction." The former, the commentary suggests, are "general in nature," tools for resolving ambiguities of intention, while the latter "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." 20 Pa.C.S. § 7710.2, ULC (citing RESTATEMENT (THIRD) OF PROPERTY: DONATIVE TRANSFERS § 11.3 & cmt. b (Tentative Draft No. 1, approved 1996) (proposing a distinction between constructional preferences and rules of construction)).

***11** Nonetheless, in all of this, the closest thing Children can identify to an affirmative indication of legislative intent substantially to change the undisputed pre–2006 *status quo* is the commentary's general acknowledgment that revocable trusts commonly are used as an alternative to probate. Courts and legislatures long have recognized that trusts may be used in this fashion. Indeed, we addressed the phenomenon as long ago as 1887. *See Dickerson's Appeal*, 115 Pa. 198, 8 A. 64 (1887) (denying widow access by election to revocable *inter vivos* trusts as to which decedent exercised a power of revocation); *see also Beirne v. Continental–Equitable Tr. Co.*, 307 Pa. 570, 161 A. 721 (1932) (same under circumstances where decedent utilized a revocable *inter vivos* trust to disinherit wife). In 1947, moreover, the General Assembly amended Section 11 of the Estates Act, thereafter entitling a spouse to elect against assets conveyed *inter vivos* by the decedent when he "retain[ed] a power of appointment by will, or a power of revocation or consumption over the principal thereof." In commentary to the amendment, the legislature noted that, before this amendment, "Pennsylvania ha[d] given little opportunity to the surviving spouse to share when legal title ha[d] passed from the decedent prior to death," and added that "it was stated correctly that 'It is only the stupid husband who, against his wishes, would be forced to allow his wife to share in his personalty.' " Act of April 24, 1947, P.L. 100, § 11, Cmt., codified at 20 P.S. § 301.11 (repealed) (quoting *Comment*, 5 U. PITT. L. REV. 78, 87 (1939)). Finally, for evidence that the General Assembly long has been aware of such maneuvers, one need look no farther than Section 2203 itself. With its lengthy enumeration of categories of non-probate assets subject to the spousal election,[15] Section 2203 long has been understood as a hedge against attempts to park assets outside the probate context in an effort to disinherit or shortchange a spouse. *See Schwartz' Estate*; *Pengelly's Estate*, *supra*. Any argument that depends upon the premise that the General Assembly failed until 2006 to consider how best to care for surviving spouses subject to attempts by their decedent spouses to disinherit them with financial chicanery pales before this legacy of judicial decisions and legislative enactments endeavoring to deal equitably with precisely such situations. In short, we hardly could ask for *more* evidence that the General Assembly long has understood the import and effect of Sections 2203 and 2507, and has remained unperturbed by it. In light of this ineluctable inference, the fact that the legislature declined expressly to identify the effect that Wife imputes to Section 7710.2 provides powerful evidence that the General Assembly did not intend it.

The broader consequences and questions implicated by Wife's approach, consequences the lower courts neglected to consider, further chip away at the lower courts' rulings. Because the lower courts' and Wife's interpretation of Section 7710.2 relies solely upon the importation of Section 2507's rule of construction into a court's reading of an *inter vivos* trust the share due a pretermitted spouse,

it necessarily excludes pretermitted spousal share access to the other categories of assets delineated by Section 2203. Thus, while a pretermitted spouse would be entitled to include an *inter vivos* trust in the pretermitted spousal share, she could not do so with property conveyed by the decedent to others with a right of survivorship, such as payable-on-death or transferable-on-death accounts, annuities, and so on. Thus, Wife's account requires us to infer the addition of one financial device a decedent might have employed to isolate assets from his spouse while excluding numerous other devices that might be employed to the same end.[16] In short, if a Decedent aimed to force a spouse into selecting a one-third elective share instead of a one-half pretermitted spousal share, he need only place his assets in any of several non-trust assets that remain available to an omitted spouse only through the one-third elective share. This is an unreasonable, if not absurd, result to the extent that Wife's argument depends upon us finding in Section 7710.2 evidence of legislative intent to increase a pretermitted spouse's access to decedent's will substitutes generally.

*12 Nor does this exhaust the problematic implications of the Superior Court's and Wife's account. Notably, the ULC states that Section 7710.2 "is patterned after Restatement (Third) of Trusts Section 25(2) and comment e (Tentative Draft No. 1, approved 1996), although this section, unlike the Restatement, *also applies to irrevocable trusts.*" 20 Pa.C.S. § 7710.2, ULC (emphasis added). Thus, taking the commentary at face value, as the lower courts did in every other regard, their reasoning would appear also to apply to irrevocable trusts, including charitable ones, subjecting the corpora of such trusts to the pretermitted spousal share. The consequences of such a ruling upon, *e.g.*, charitable trusts and trusts designated for the care of disabled dependents need not be detailed here as they are self-evident. In effect, Wife's argument simultaneously is underinclusive, in leaving readily-available avenues for a testator to inflict the harm Wife would have us find that Section 7710.2 sought *sub silentio* to prevent, and overinclusive in threatening heretofore sacrosanct irrevocable *inter vivos* trusts.[17]

If we understand correctly, Wife would take considerably more through pretermission than she would through election if her view were to prevail. *See supra* n.9. Implicit in Wife's view is that to deny her these assets is fundamentally unfair and contrary to the General Assembly's intent in enacting Section 7710.2. But Wife does not dispute that she would have had no such pretermitted spousal claim to the *inter vivos* trust under the pre–2006 law, which prevailed in materially the same form for sixty years and was implicitly reaffirmed each time the Legislature revisited the PEF Code without modifying this aspect of the Code's operation. Nor does she account for the methods that a decedent might apply to effectuate the same end that are unaffected by her proposed reading of Section 7710.2.

[8] The law is clear that the General Assembly "has the power to enact all manner of legislation with respect to wills and trusts subject, of course, to the rights and limitations ordained in the Constitution of the United States and the Constitution of Pennsylvania," neither of which are implicated in this case. *In re Scott*, 418 Pa. 332, 211 A.2d 429, 431 (1965). We read the interplay of Sections 2203 and 2507 as reflecting a two-tiered system to protect any spouse from being entirely or substantially excluded from receiving the benefit of her deceased spouse's assets. In the innocuous circumstance, pretermission, in which there is no sign that the decedent intended to exclude the spouse whom he married after executing the operative will, our long-standing common law and codifying statutory law direct that we impute to the decedent an unmemorialized intent to include that spouse. Our legislature has determined that the contours of that presumed intent should be those embodied in the law governing intestacy.

Conversely, where a decedent has, during his lifetime, shifted substantial assets outside the reach of probate, such that one half of the would-be intestate estate that remains has less value than one third of the assets comprising the alternative elective share (including the probate estate, itself, it bears noting[18]), nothing about the governing statute suggests a parallel assumption. Indeed, Section 2203 effectively starts from the premise that the decedent *intended to disinherit* his spouse, or at least deliberately secreted assets outside probate indifferently to his spouse's interests. Thus, Section 2203 exclusively embodies a policy determination that a surviving spouse should enjoy no less than one third of the enumerated assets, defined in a way that captures all or most of the decedent's assets more effectively than does the pretermitted spousal share. That this reflects a legislatively-defined minimum share for the spouse is evident in the fact that, unlike the pretermitted spousal share, the elective share is subject to offsets for assets

already received by the spouse, which serve to ensure that the electing spouse receives precisely that legislatively-defined minimum share and nothing more.

*13 Regardless of the advisability of this approach, reading the PEF Code as a whole in this fashion provides a plausible explanation for the fact that the shares differ in some particulars—an explanation that recognizes the preservation of the same remedial ends. Against this backdrop, we cannot reasonably infer from the General Assembly's enactment of Section 7710.2 that the provision was intended to substantially revise this long-standing distributive scheme absent clear indications to that effect. It is a necessary corollary of judicial reluctance to intrude upon legislative prerogatives that we will find legislative intent to effectuate a substantial change to time-honored legal principles only when it is expressed clearly and unmistakably or, at least, follows by necessary implication from the statutory text. Neither Wife nor the lower courts have satisfied that stringent standard.

Accordingly, we reverse the Superior Court's order affirming the Orphans' Court's decree declaring that the Trust should be considered to be part of the pretermitted spousal share under the circumstances presented, and we remand for proceedings consistent with this Opinion.

Justices Todd and Dougherty join the opinion.

Chief Justice Saylor files a dissenting opinion in which Justice Baer joins.

Justices Donohue and Mundy did not participate in the consideration or decision of this case.

CHIEF JUSTICE SAYLOR, DISSENTING

I agree, in substantive part, with the analyses and conclusions of the orphan's court and the Superior Court, namely that, with respect to Section 7710.2 of the Probate, Estates and Fiduciaries Code, *see* 20 Pa.C.S. § 7710.2, the enactment of this model law provision plainly reflects the Legislature's intention for *inter vivos* trusts to be construed the same as testamentary trusts, including the protections for pretermitted spouses pursuant to Section 2507(3), *see id.* § 2507(3).

To the degree that Section 7710.2 may be viewed as ambiguous, as the majority concludes, *see* Majority Opinion, at ——, resort to the commentary is appropriate to determine the intention of the General Assembly. *See* 1 Pa.C.S. § 1939 ("Use of comments and reports"); *accord* 20 Pa.C.S., Ch. 77, Refs & Annos, Jt. St. Govt. Comm. Comment—2005 ("These comments may be used in determining the intent of the General Assembly. *See* 1 Pa.C.S. § 1939 and *In re Martin's Estate*, 365 Pa. 280, 74 A.2d 120 (1950)."). In this respect, the comments to Section 7710.2 are clear regarding the application of the pretermitted spousal provision in the *inter vivos* trust context: "This section imports 20 Pa.C.S. [§]2507 ...." 20 Pa.C.S. § 7710.2, Jt. St. Govt. Comm. Comment—2005. The Uniform Law Comment provides additional context, explaining the rationale supporting the adoption of this provision, *i.e.*, that the "revocable trust is used primarily as a will substitute, *with its key provision being the determination of the persons to receive the trust property upon the settlor's death.*" *Id.*, Uniform Law Comment (emphasis added); *see also* Danielle J. Halachoff, Comment, *No Child Left Behind: Extending Ohio's Pretermitted Heir Statute to Revocable Trusts*, 50 AKRON L. REV. 605, 623 (2016) ("Because revocable trusts are functionally equivalent to wills ..., the basis for inconsistent treatment of wills and revocable trusts is lacking." (footnotes omitted)).

Given this commentary-incorporated reasoning and the express cross-reference to the pretermitted spousal section, I remain unpersuaded that the Legislature was required to enact a point-by-point codification of all the rules of construction it sought to apply to *inter vivos* trusts, rather than proceed via the broad provision of Section 7710.2. *Compare* Majority Opinion, at ——("[T]he fact that the legislature declined expressly to identify the effect that Wife imputes to Section 7710.2 provides powerful evidence that the General Assembly did not intend it."), *with* 20 Pa.C.S. § 7710.2, Uniform Law Comment ("*Instead* of enacting this section, a jurisdiction ... may wish to enact detailed rules on the construction of trusts ...." (emphasis added)). Accordingly, I respectfully dissent.

Justice Baer joins this dissenting opinion.

All Citations

--- A.3d ----, 2017 WL 6459001

Footnotes

1 *See, e.g., In re Schwartz' Estate*, 449 Pa. 112, 295 A.2d 600, 602 (1972) (observing that Pennsylvania common law and statutory law have sought "to prevent a husband from indirectly disinheriting his wife through an *inter vivos* transfer while retaining control over the use and enjoyment of the property during his lifetime"); *see also* Alan Newman, *Incorporating the Partnership Theory of Marriage into Elective Share Law: The Approximation System of the Uniform Probate Code and the Deferred–Community–Property Alternative*, 49 EMORY L.J. 487, 493 n.29 (2000) (noting that, "[t]raditionally, the policies underlying the prohibition of one spouse's disinheriting the other were to ensure a means of support for a surviving spouse who might otherwise become a ward of the state," but opining that the modern Uniform Probate Code has adopted a model aimed more at ensuring that a spouse, as marital partner, obtains "a fair share of property they helped to accumulate during the marriage").

2 An in-depth review of this history would exceed the scope of this Opinion. However, there is an extensive body of literature on that history. *See, e.g.*, Terry L. Turnipseed, *Community Property v. The Elective Share*, 72 LA. L. REV. 161, 163–69 (2011). Professor Turnipseed suggests that principles resembling dower and curtesy can be traced back over 4,000 years to the Code of Hammurabi. *See* Terry L. Turnipseed, *Why Shouldn't I Be Allowed to Leave My Property to Whomever I Choose at my Death (or How I Learned to Stop Worrying and Start Loving the French)*, 44 BRANDEIS L.J. 737, 742 n.33 (2006) (discussing provisions pertaining to the inheritance of land as between son and wife based upon the ability to maintain it in service of feudal obligations while the husband is away serving the King in war); *cf.* Janet Loengard, *Interpretation and Re-interpretation of a Clause: Magna Carta and the Widow's Quarantine*, 25 WM. & MARY BILL OF RTS. J. 403 (2016) (examining the relationship between the common-law doctrine of quarantine, which protected a widow's right to remain in the marital residence for a period of time pending assignment of her dower).

3 Act of June 30, 1972, P.L. 508, No. 164 (codified as amended 20 Pa.C.S. §§ 101 *et seq.*).

4 "A child or spouse who has been omitted from a will, as when a testator makes a will naming his or her two children and then, sometime later, has two more children who are not mentioned in the will." *Heir, pretermitted heir*, BLACK'S LAW DICTIONARY 841 (10th ed. 2014).

5 Code provisions, of course, apply equally without regard to sex or gender of any spouse whom they affect. Throughout this Opinion, we use the female pronoun as a convenience, reflecting the sex of the surviving spouse in this case.

6 *See* 20 Pa.C.S. § 7710.2 ("The rules of construction that apply in this Commonwealth to the provisions of testamentary trusts also apply as appropriate to the provisions of inter vivos trusts.").

7 "If the testator marries after making a will, the surviving spouse shall receive the share of the estate to which [s]he would have been entitled had the testator died intestate, unless the will shall give [her] a greater share or unless it appears from the will that the will was made in contemplation of marriage to the surviving spouse." 20 Pa.C.S. § 2507(3).

8 In relevant part, Subsection 2102(4) defines the intestate share for purposes of Subsection 2507(3) as follows: "If there are surviving issue of the decedent one or more of whom are not the issue of the surviving spouse, one-half of the intestate estate." 20 Pa.C.S. § 2102(4).

9 Children note that, if their view prevails, which undisputedly is consistent with the law at least until 2006, Wife may opt to take $2,287,867.33 (the elective share, offset by the $1.5 million ERISA plan to which she is entitled in any scenario) or $2,553,208.63 (the pretermitted spouse share). Under Wife's view, which was adopted by the lower courts, the elective share would remain the same, but the pretermitted share would increase to $4,181,801.00, reflecting the addition of a one-half share of the revocable *inter vivos* trust at issue to the estate used to calculate the pretermitted share, which by virtue of being included in the pretermitted spousal share would not be subject to the offset for the ERISA plan that applies in the context of a spousal election. *See* Brief for Children at 49.

10 *See* the Declaratory Judgments Act, Act of July 9, 1976, P.L. 586, No. 142, § 2 (codified as amended, 42 Pa.C.S. §§ 7531 *et seq.*).

11 *See generally* Nathaniel W. Schwickerath, *Note, Public Policy & the Probate Pariah: Confusion in the Law of Will Substitutes*, 48 DRAKE L. REV. 769, at 785–96 & n.104 (2000) (discussing payable-on-death accounts, transfer-on-death registries for stocks and bonds, and life insurance, *inter alia*, as will substitutes, and citing *In re Estate of Stevenson*, 436 Pa.Super. 576, 648 A.2d 559, 562 (1994)); *see also* Kara Peischl Marcus, *Comment, Totten Trusts: Pragmatic Pre–Death Planning or Post–Mortem Plunder?*, 69 TEMP. L. REV. 861 (1996) (identifying four main types of "will substitutes": life insurance policies, pensions, revocable living trusts, and multiple-party or joint accounts).

12 Section 2507 also includes provisions governing other post-execution events warranting presumptions of subsequent intent, including the treatment of spouses named in a will who were divorced from decedents before death, provision for

children by birth or adoption, and excluding a slaying spouse from taking under a spousal victim's will. *See* 20 Pa.C.S. § 2507.

13 "A trust that is not testamentary is not subject to the formal requirements of § 17 ['Creation of Testamentary Trusts'] or to procedures for the administration of a decedent's estate; nevertheless, a trust is ordinarily subject to substantive restrictions on testation and to rules of construction and other rules applicable to testamentary dispositions, and in other respects the property of such a trust is ordinarily treated as though it were owned by the settlor." RESTATEMENT (THIRD) OF TRUSTS § 25(2).

14 *See also* Roberta Rosenthal Kwall, Anthony J. Aiello, *The Superwill Debate: Opening the Pandora's Box?*, 62 TEMP. L. REV. 277, 297 (1989) (noting that historically "courts treating the claims of pretermitted heirs have not been particularly willing to void *inter vivos* transfers of assets in order to increase the pretermitted heir's intestate share"); *id.* at 300 (noting that pretermitted heirs, *i.e.*, non-spouses, do not have the same protection against disinheritance by *inter vivos* transfers that spouses do through the spousal election).

15 Section 2203 entitles a spouse to claim against "[p]roperty passing from the decedent by will or intestacy" as well as the following assets:

> (2) Income or use for the remaining life of the spouse of property conveyed by the decedent during the marriage to the extent that the decedent at the time of his death had the use of the property or an interest in or power to withdraw the income thereof.
>
> (3) Property conveyed by the decedent during his lifetime to the extent that the decedent at the time of his death had a power to revoke the conveyance or to consume, invade or dispose of the principal for his own benefit.
>
> (4) Property conveyed by the decedent during the marriage to himself and another or others with right of survivorship to the extent of any interest in the property that the decedent had the power at the time of his death unilaterally to convey absolutely or in fee.
>
> (5) Survivorship rights conveyed to a beneficiary of an annuity contract to the extent it was purchased by the decedent during the marriage and the decedent was receiving annuity payments therefrom at the time of his death.
>
> (6) Property conveyed by the decedent during the marriage and within one year of his death to the extent that the aggregate amount so conveyed to each done exceeds $3,000, valued at the time of conveyance.
>
> In construing this subsection, a power in the decedent to withdraw income or principal, or a power in any person whose interest is not adverse to the decedent to distribute to or use for the benefit of the decedent any income or principal, shall be deemed to be a power in the decedent to withdraw so much of the income or principal as is subject to such power, even though such income or principal may be distributed only for support or other particular purpose or only in limited periodic amounts.

20 Pa.C.S. § 2203(a).

16 *See* Marcus, *supra* n.11, at 864–65 (identifying four main types of "will substitutes": life insurance policies, pensions, revocable living trusts, and multiple-party or joint accounts, all of which are substantially recognized as subject to the elective share under Section 2203, and only one of which would be imported into the pretermitted spousal share under the lower courts' account of Section 7710.2).

17 Children argue that this potential consequence of the lower court's decisions would confound the General Assembly's prior intent to preclude precisely this result. In *In re Estate of Behan*, 399 Pa. 314, 160 A.2d 209 (1960), this Court held that the spouse may elect against an irrevocable charitable trust based solely upon the decedent settlor's retention of a testamentary power of appointment of the trust to a charitable trust or foundation. In 1978, in enacting Chapter 22 of the PEF Code as presently worded, the General Assembly effectively abrogated *Behan's Estate* by allowing election only against *inter vivos* trusts as to which the decedent had retained the lifetime power to revoke or to consume or dispose of the principal *for his own benefit*. Children further note that this would be in derogation of our canon of construction directing in case of ambiguity that we presume "[t]hat the General Assembly intends to favor the public interest as against any private interest." *See* Brief for Children at 47–48.

18 Given the range of assets subject to election that are excluded from the pretermitted spousal share, there will be circumstances not involving *inter vivos* trusts whereunder the elective share is more lucrative than the pretermitted spousal share, and this would be true even if we affirmed the Superior Court's decision, given the many other non-probate assets subject to election.

End of Document

Purdon's Pennsylvania Statutes and Consolidated Statutes
Title 20 Pa.C.S.A. Decedents, Estates and Fiduciaries (Refs & Annos)
Chapter 25. Wills (Refs & Annos)

20 Pa.C.S.A. § 2507

§ 2507. Modification by circumstances

Effective: December 27, 2010
Currentness

Wills shall be modified upon the occurrence of any of the following circumstances, among others:

(1) Repealed by 1976, July 9, P.L. 551, No. 135, § 8, imd. effective.

(2) Divorce or pending divorce.-- Any provision in a testator's will in favor of or relating to the testator's spouse shall become ineffective for all purposes unless it appears from the will that the provision was intended to survive a divorce, if the testator:

(i) is divorced from such spouse after making the will; or

(ii) dies domiciled in this Commonwealth during the course of divorce proceedings, no decree of divorce has been entered pursuant to 23 Pa.C.S. § 3323 (relating to decree of court) and grounds have been established as provided in 23 Pa.C.S. § 3323(g).

(3) Marriage.--If the testator marries after making a will, the surviving spouse shall receive the share of the estate to which he would have been entitled had the testator died intestate, unless the will shall give him a greater share or unless it appears from the will that the will was made in contemplation of marriage to the surviving spouse.

(4) Birth or adoption.--If the testator fails to provide in his will for his child born or adopted after making his will, unless it appears from the will that the failure was intentional, such child shall receive out of the testator's property not passing to a surviving spouse, such share as he would have received if the testator had died unmarried and intestate owning only that portion of his estate not passing to a surviving spouse.

(5) Slaying.--Any person who participates either as a principal or as an accessory before the fact in the willful and unlawful killing of any person shall not in any way acquire property or receive any benefits as the result of the willful and unlawful killing but such property or benefits shall be distributed as provided by Chapter 88 [1] (relating to slayers).

Credits

1972, June 30, P.L. 508, No. 164, § 2, eff. July 1, 1972. Amended 1992, Dec. 16, P.L. 1163, No. 152, § 3, imd. effective; 2010, Oct. 27, P.L. 837, No. 85, § 2, effective in 60 days [Dec. 27, 2010].

Editors' Notes

JT. ST. GOVT. COMM. COMMENT--1947

The grouping of what were several separate sections of the 1917 act in one section is believed to be logical and convenient. A will may be affected vitally by the happening of any one of the circumstances listed in the clauses. In addition it may be changed by the election of the surviving spouse. All of the circumstances mentioned in this section must occur at or before testator's death. The importance of the surviving spouse's election warrants separate consideration, and therefore was excluded from this section.

While marriage of the parents of children born illegitimate and death of legatees or devisees are changes in circumstances, they also concern rules of construction and are included thereunder in section 14 [20 Pa.C.S. § 2514] so that they can appear with other rules with which they are closely associated and which are properly included in that section alone.

Paragraph (2): This is taken from section 53 of the Model Probate Code. There is no similar provision in the 1917 act. A will in favor of a named spouse remained good in Pennsylvania without regard to a subsequent divorce: *Jones's Est.*, 211 Pa. 364. It is not a complete answer to say that the will can be changed or revoked. The testator may delay the change too long or may forget to make it or may be incompetent to make it. The real question is whether most persons so circumstanced (as in the case of later marriage or birth) would wish their wills changed or would wish them to remain the same, and there is no doubt that most would wish them changed.

JT. ST. GOVT. COMM. COMMENT--1956

Paragraph (2): This amendment eliminates any question concerning the rights of the divorced spouse if the will as probated includes provision for the surviving spouse, thus avoiding possible confusion as to what should be probated.

Paragraph (3): Clauses (3) and (4) as proposed takes the place of section 21 of the 1917 act, as amended, which reads:

> "Section 21. When any person, male or female, shall make a last will and testament, and afterward shall marry, or shall have a child or children, either by birth or by adoption, not provided for in such will, and shall die leaving a surviving spouse and such child or children, or either a surviving spouse or such child or children, although such child or children be born after the death of their father, every such person, so far as shall regard the surviving spouse or child or children born or adopted after the making of the will, shall be deemed and construed to die intestate; and such surviving spouse, child, or children shall be entitled to such purparts, shares, and dividends of the estate, real and personal, of the deceased, as if such person had actually died without any will."

The division of the substance of the 1917 act, section 21, into two clauses is a step toward clarity. This is especially necessary with the substantive changes made.

The Model Probate Code makes no provision for the after-married spouse because it is considered that his right to take against the will is a full protection. Pennsylvania places the after-married spouse in the more gracious position of receiving a full intestate share, including the spouse's allowance (*Shestack's Est.*, 267 Pa. 115), without requiring that there be an election to take against the will.

"unless the will shall give him a greater share" is declaratory of existing law. See *Lintner's Est.*, 297 Pa. 428 where a will written prior to marriage gave the surviving spouse the entire estate which he was permitted to retain. In most instances it will be obvious which is the greater share, and such a share of personal property will be awarded in the adjudication or in the decree of distribution.

Paragraph (4): This clause is believed to be a distinct improvement over section 21 of the 1917 act. It avoids the necessity for nominal gifts to after-born or after-adopted children or the re-execution of a will after the birth of a child. The revised form gives ample protection to the child and will avoid frequent occasions for the disruption of well laid plans.

JT. ST. GOVT. COMM. COMMENT--1972

Paragraph (5): With regard to clause (5), Slaying, see also Chapter 88, *infra*.

JT. ST. GOVT. COMM. COMMENT--1976

Paragraph (1) of Section 2507 relating to voiding of charitable bequests made within 30 days of death was held unconstitutional in Cavill Estate, 329 A.2d 503, 459 Pa. 411 (1974).

JT. ST. GOVT. COMM. COMMENT--1992

The amendments to paragraphs (2) and (3) give a testator who contemplates a particular marriage or divorce the same freedom to adjust his will to this event before it occurs as he has always had to do so afterwards. The spouse's right of election against the will is not affected and would be the same regardless of whether the will was executed before or after the marriage.

Notes of Decisions (318)

Footnotes

1 20 Pa.C.S.A. § 8801 et seq.

20 Pa.C.S.A. § 2507, PA ST 20 Pa.C.S.A. § 2507

Current through 2017 Regular Session Act 82 (End)

Purdon's Pennsylvania Statutes and Consolidated Statutes
Title 20 Pa.C.S.A. Decedents, Estates and Fiduciaries (Refs & Annos)
Chapter 22. Elective Share of Surviving Spouse (Refs & Annos)

20 Pa.C.S.A. § 2203

§ 2203. Right of election; resident decedent

Effective: January 28, 2005
Currentness

(a) Property subject to election.--Except as provided in subsection (c), when a married person domiciled in this Commonwealth dies, his surviving spouse has a right to an elective share of one-third of the following property:

(1) Property passing from the decedent by will or intestacy.

(2) Income or use for the remaining life of the spouse of property conveyed by the decedent during the marriage to the extent that the decedent at the time of his death had the use of the property or an interest in or power to withdraw the income thereof.

(3) Property conveyed by the decedent during his lifetime to the extent that the decedent at the time of his death had a power to revoke the conveyance or to consume, invade or dispose of the principal for his own benefit.

(4) Property conveyed by the decedent during the marriage to himself and another or others with right of survivorship to the extent of any interest in the property that the decedent had the power at the time of his death unilaterally to convey absolutely or in fee.

(5) Survivorship rights conveyed to a beneficiary of an annuity contract to the extent it was purchased by the decedent during the marriage and the decedent was receiving annuity payments therefrom at the time of his death.

(6) Property conveyed by the decedent during the marriage and within one year of his death to the extent that the aggregate amount so conveyed to each donee exceeds $3,000, valued at the time of conveyance.

In construing this subsection, a power in the decedent to withdraw income or principal, or a power in any person whose interest is not adverse to the decedent to distribute to or use for the benefit of the decedent any income or principal, shall be deemed to be a power in the decedent to withdraw so much of the income or principal as is subject to such power, even though such income or principal may be distributed only for support or other particular purpose or only in limited periodic amounts.

(b) Property not subject to election.--The provisions of subsection (a) shall not be construed to include any of the following except to the extent that they pass as part of the decedent's estate to his personal representative, heirs, legatees or devisees:

(1) Any conveyance made with the express consent or joinder of the surviving spouse.

(2) The proceeds of insurance, including accidental death benefits, on the life of the decedent.

(3) Interests under any broad-based nondiscriminatory pension, profit sharing, stock bonus, deferred compensation, disability, death benefit or other such plan established by an employer for the benefit of its employees and their beneficiaries.

(4) Property passing by the decedent's exercise or nonexercise of any power of appointment given by someone other than the decedent.

(c) Nonapplicability.--Pursuant to 23 Pa.C.S. § 3323(d.1) (relating to decree of court), this section shall not apply in the event a married person domiciled in this Commonwealth dies during the course of divorce proceedings, no decree of divorce has been entered pursuant to 23 Pa.C.S. § 3323 and grounds have been established as provided in 23 Pa.C.S. § 3323(g).

Credits

1978, April 18, P.L. 42, No. 23, § 3, effective in 60 days. Amended 1980, July 11, P.L. 565, No. 118, § 2, effective in 60 days; 2004, Nov. 29, P.L. 1357, No. 175, § 1, effective Jan. 28, 2005.

Editors' Notes

JT. ST. GOVT. COMM. COMMENT--1978

Subsection (a) changes present law by following the Uniform Probate Code in making the electing spouse's share one-third in all cases, rather than providing one-third or one-half, depending on whether issue survive. The balance of the subsection redefines the property subject to election and is based to a large extent on the provisions of the Uniform Probate Code.

In one respect, the class of property subject to election is narrower than in present Pennsylvania law. It is intended that the spouse should have a right of election only with respect to assets which the decedent retained the right or power to enjoy during his lifetime. This should not include property which the decedent has given away absolutely and cannot recapture for his own benefit, even though he has retained a power of appointment which cannot be exercised in his favor during his life. For application of the present law in this regard, see *Behan Estate*, 399 Pa. 314 (1960) (as noted in Fid. Rev., May 1960), where Section 11 of the Estates Act of 1947, P.L. 100, No. 39 (now 20 Pa.C.S. § 6111) was applied to permit a spouse to elect against an irrevocable trust to A for life with remainder to "such charitable trust or foundation" as the settlor might establish by will.

In other respects the property subject to the spouse's election is broadened by the proposed provisions, as follows:

(1) Probate property. By including both testamentary and intestate property and requiring their disclaimer, this clause conforms with the decision in *Martin Estate*, 365 Pa. 280 (1950), where the court denied the spouse the $10,000 allowance against intestate property in a case of partial intestacy.

(2) Reservation of income. This is one of the main expansions from the class of property presently subject to election. It is based on the Uniform Probate Code but confines the spouse to the income interest rather than the principal of the fund of which decedent has retained the income. Thus, assuming no other powers or interests were reserved, the spouse will take one-third of what the decedent retained--a life income interest.

(3) Revocable transfers. This conforms with present Pennsylvania law.

(4) Joint property. This conforms with present Pennsylvania case law which allows the spouse to take against property held jointly by decedent and another on the theory that the decedent had the power to revoke the conveyance as to his one-half or other fractional share by unilaterally changing it to a tenancy in common.

(5) Annuities. There are no known Pennsylvania cases on this subject. The clause goes beyond the Uniform Probate Code which treats "joint annuities" in the same way as life insurance which is exempt from election. But policy considerations are quite different. An annuity is enjoyed by the decedent and is analogous to retained income, while life insurance is for the most part a burden to the insured rather than a benefit.

(6) Contemplation of death. This is based on the Uniform Probate Code and changes present law by extending the spouse's rights to transfers that are likely to be in contemplation of death.

The final provision in the subsection, equating beneficial powers to beneficial interests, is found neither in the Uniform Code nor present Pennsylvania law. It will make certain transfer subject to the spouse's election which under present law might offer an easy escape from the rights of the surviving spouse, e.g., discretionary trusts where a disinterested trustee has the power to make payments to the decedent or where the decedent had the right to withdraw a certain percentage of the principal each year.

Subsection (b) of Section 2203 conforms to present Pennsylvania law.

JT. ST. GOVT. COMM. COMMENT--1980

Section 2203(a)(6) is amended to clarify provisions added in 1978 relating to the exclusion of certain annual gifts from the assets against which a surviving spouse may elect.

This clarifying amendment assures that to the extent the aggregate amount of all property conveyed to each donee during the one-year period exceeds $3,000, that excess amount will be subject to the election. The amendment also clarifies that the date of valuation is the time of conveyance.

Notes of Decisions (654)

20 Pa.C.S.A. § 2203, PA ST 20 Pa.C.S.A. § 2203
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