THE STATE OF NEW HAMPSHIRE
SUPREME COURT

Docket No. 2017-0532

In Re Teresa E. Craig Living Trust

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

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

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

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QUESTIONS PRESENTED FOR REVIEW

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

STATEMENT OF THE CASE

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

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

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

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

STATEMENT OF FACTS

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

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

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

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

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

SUMMARY OF ARGUMENT

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

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

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

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

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

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

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

ARGUMENT

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

RSA 551:10 provides:

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

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

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

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

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

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

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

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

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

RSA 564-B:1-112 provides:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

S.B. 311 provides:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

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

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

REQUEST FOR ORAL ARGUMENT

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

DECISION ATTACHED

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

Respectfully submitted,

DANIEL TOLAND, TRUSTEE

By Its Attorneys,

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Dated: January 16, 2018

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STATEMENT OF COMPLIANCE

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

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