

# Senate Commerce Committee

*Angela Leach 271-3077*

**SB 311**, clarifying rules of construction under the New Hampshire Trust Code.

**Hearing Date:** January 9, 2018

**Members of the Committee Present:** Senators French, Soucy and Lasky

**Members of the Committee Absent:** Senators Innis and Sanborn

**Bill Analysis:** This bill clarifies the rules of construction under the New Hampshire Trust Code.

**Sponsors:**

Sen. D'Allesandro

Sen. Bradley

Rep. Hunt

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**Who supports the bill:** Senator D'Allesandro, Glenn Perlow, Megan Neal, Amy Kanyuk, Todd Mayo

**Who opposes the bill:** John Ransmeier, Pam Newkirk, Michelle Aruda, Virginia Sheehan, Ann Flood

**Summary of testimony presented:**

**Senator D'Allesandro**, the prime sponsor, introduced the bill. We want to have the best trust language in the country because it is an economic boom for NH. This bill would amend RSA 564-B:1-112 to clarify that RSA 551:10, which is the "wills" chapter was never intended to apply to trusts. RSA 551:10 provides that children and their descendants who were inadvertently omitted from a will would receive the same share of the estate as if there had never been a will. Wills that are intended to disinherit children are carefully drafted with specific language to avoid any question of inadvertent omission. In Robbins v. Johnson, the NH Supreme Court was asked to extend the application of RSA 551:10 to trusts, but refused to do so because the statute only applies to wills and it did not find clear indication from the legislature that this was its intention. In a current case, Estate of Craig, is being asked to apply RSA 551:10 again. The plaintiffs have argued that in 2004, the Legislature clearly indicated its intention that RSA 551:10 would also apply to trusts when it adopted the Uniform Trust Code. The Trustee for Craig has pointed out that if the Court were to uphold that RSA 551:10 has applied to trusts since 2004, the results would be disruptive. Trusts practitioners have never believed that to be the case. Many trusts have been drafted since then and the children not provided for in these trusts might claim a statutory right to a share of the trust. This could lead to legal challenges. The Trustee in Craig has asked the Court to wait pending final action on this bill. The court has not ruled on that request. The bill will uphold the status quo.

**John Ransmeier- Attorney- Opposed-** I am concerned that this is a fix we don't need. The pretermitted heir statute ought not to apply to trusts, which is clearly framed in terms of language. If the legislature thinks it needs to provide clarity, the problem is if we don't fix other areas that exist, we invite contention. It will create a precedent.

**Glenn Perlow- Perspective Trusts-In Favor-** This is a unique situation and it is not often

that a piece of legislation is interacting with a court. This was in the Probate Court and went all the way up to the Supreme Court. In the Robbins case, the Supreme Court made reference that they are not going to change policy. In the Craig case, the adoption of the entire UTC, created that clear indication. It is not a retroactive statute. It has been simply understood that 551:10 doesn't apply to trusts.

**Pam Newkirk- Probate Trust Attorney- Opposed-** I have an interest on the appeal that is pending before the Supreme Court, I do represent one of the parties. I am concerned about this fix, and the impact it has in other rules of construction. The implication would be argued that all of the other rules of construction are incorporated. In order to make NH Trust law more certain, all the trust laws should be considered. The pretermitted heir statute does apply to wills but there are people that believe that it should not apply to wills or trust. If the same rule applied to both there would be more certainty and less litigation over whether someone intended to disinherit someone. If you don't want to have your child inherit from your estate, you put their name in the will. I am concerned that this change is made retroactively. If people can come to the legislature to generate an outcome when there is an appeal pending, that could be argued it makes the law more uncertain.

**Senator French-** If I have a trust, is it a possibility I would inadvertently leave out one of my children?

**Pam Newkirk-** It could happen, that is why the statute is there. In a will, the Attorney will say give me the names of all your children.

**Senator French-** A trust does not say that?

**Pam Newkirk-** Some practitioners put specifics in the trust.

**Megan Neal- Trust and Estate Attorney- In Favor-** The pretermitted heir statute is not rule of construction and doesn't apply to trusts. I represent the trustee of the trust that is currently involved in the litigation. The pretermitted heir statute provides that every child or issue not named or referred to in a will and who is not a devisee or legatee shall be entitled to the same portion of the estate if the deceased were intestate. This statute specifically states wills and does not reference trusts. RSA 564:B1-112 provides, the rules of construction to the interpretation and disposition of property by will also as appropriate to interpretation to the terms of the trust and disposition of the trust property. This is a codification of long standing interpretive law not a modification of it. Nothing in the trust code or legislative history indicates that the legislature intended that the pretermitted heir statute apply to trusts. This bill does not seek to retroactively change the law but clarify already existing law. It is my understanding that all state planning attorneys believe that the pretermitted heir statute does not apply to trusts. According to Black's Law Dictionary, the phrase a rule of construction means a rule construed in legal documents, a principal that guides an interpreter of a text, the pretermitted heir statute is not a statute of construction, it does not give guidance to interpretation of a will. The Supreme Court of at least one other state found similar language under its trust codes which is based on the uniform trust code and did not modify existing law to extend the pretermitted heir statute to trusts. NH Estate Attorneys have drafted trusts in the last 14 years under the assumption that pretermitted heir statute does not apply to trusts. Because of this many revocable and irrevocable trusts do not contain the necessary provisions needed to protect those trusts. Irrevocable trusts that are created for a specific purpose such as a special needs trust for a disabled dependent, charitable trusts and life insurance trusts are not drafted to include children and could be vulnerable to claims.

**Amy Kanyuk- Trust Attorney- In Favor-** For disclosure, I am partner with the previous testifier who represents a client in the case. Nothing in the legislative history of the NH Trust Code indicates that the legislature considered whether or not the pretermitted heir statute applies to trusts. Not passing this legislation will raise the question of whether the pretermitted heir statute would apply to other will substitutes such as payable upon death accounts, transfer on death accounts, life insurance proceeds, pension funds, IRA's and 401K's.

Would trusts that are already closed be subject to reopening to redistribute assets to pretermitted heirs?

**Senator French**-The clarification by the legislature would prevent litigation in the future?

**Amy Kanyuk**- I do.

**Virginia Sheehan- Estate Attorney- Opposed** - Pretermitted heir statute should not apply to trusts and I never thought it did. I am concerned by specifically stating that 551:10 should not apply to trusts, there are other statutes that we have assumed that don't apply to trusts and only apply to wills. I am concerned that this could cause more litigation because you only excluded one specific statute in regards to trusts. I agree with the concept. You could possibly amend the pretermitted heir statute to state it does not apply to trusts.

**Future Action:** Pending

AJL

Date Hearing Report completed: January 11, 2018