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SB 311

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To the members of the House Commerce Committee:

Among the bills on the Committee's hearing calendar for Wednesday is SB311, which would amend a section of the trust code that applies the rules of construction for interpreting wills, "as appropriate," to trusts.

As the prime sponsor, Sen. D'Allesandro, openly acknowledged to the Senate Commerce Committee in January, the bill is specifically intended to affect the outcome in a pending lawsuit. The Craig Trust case was argued to the state supreme court less than two weeks ago. I have asked the co-sponsors to say who actually wrote the bill, but have heard no response.

The bill would add a few words to section 564-B:1-112 of the trust code to "clarify" that the pretermitted heir statute, section 551:10 of the wills chapter, "is not a rule of construction" for interpreting trusts.

The word "clarify" would seem to suggest that the existing statute is ambiguous on this point. In any event, casting this as a "clarification" rather than as an amendment is apparently intended to give the bill retroactive effect.

What the pretermitted heir statute says is that if a testator neglects in his will to provide for a child or the descendant of a predeceased child, the omitted heir nonetheless receives what would have been his or her share if the decedent had died without a will. The courts have interpreted this to mean that the omission is understood to be unintentional, unless there is evidence somewhere in the will itself to indicate it was intentional. Other, "extrinsic" evidence is not admissible to determine the question.

Where the testator does in fact intend to omit a descendant covered by the statute, a competent drafting lawyer will include a statement in the will acknowledging the omission and stating that it is intentional. Clearly the statute is "a rule of construction," in that it interprets the testator's silence on a matter on which he would have been expected to express himself.

At the January hearing, at least two lawyers who are involved in the pending litigation testified that "most" lawyers have simply assumed that section 564-B:1-112 does not import the pretermitted heir statute to the interpretation of a trust -- not even a revocable trust that is functioning as a "will substitute" -- and based on that assumption, for fourteen years they have not been including language in trust documents to override a presumption that the omission to provide for an heir was unintentional.

In the context of the pending litigation, of course, this testimony is self-serving. But more to the point, these witnesses offered no data to support their assertion, nor any explanation why it would be reasonable for a drafting lawyer to assume section 564-B:1-112 does not mean what it appears to mean and not take steps to draft around it if a trust settlor does intend to exclude a child or the descendant of a deceased child.

Section 564-B:1-112 was enacted in 2004 as part of a nearly wholesale adoption of the Uniform Trust Code. The uniform laws commissioners had identified section 112 as "optional," suggesting that state legislatures might instead want to enact "detailed rules on the construction of trusts." This the New Hampshire legislature chose not to do. They went with the broad brush.

The commissioners' commentary to section 112 expressly states that it is "patterned after" section 25(2) of the Restatement (Third) of Trusts, and in particular comment "e" to that section. Comment e(1) specifically mentions the pretermitted heir statute as an example of a will construction rule that "ought to" apply to revocable trusts.

The "notes on decisions" following the commentary characterize as "unfortunate" the then-recent decision in Robbins v. Johnson, 147 N.H. 44 (2001), in which the New Hampshire Supreme Court had declined to extend the pretermitted heir statute to a revocable trust absent legislation effecting this result.

The New Hampshire court has repeatedly said that "the intention of the drafters" of a uniform statute, as expressed in the official commentary, "becomes the legislative intent upon enactment." In other words, when the legislature enacted section 112 of the uniform code in 2004, it adopted comment e(1).

If on Wednesday the Committee hears from witnesses who again argue that "most" lawyers who draw these documents have somehow thought the pretermitted heir statute does not apply to a revocable trust functioning as a will substitute, despite the broad language of section 112 and the clear commentary expressly referencing pretermitted heir statutes, it might be useful to ask those witnesses some questions along these lines:

1. What is the basis of your estimate that "most" lawyers are acting on this belief? Has the organized bar, or anyone, taken a survey? What was the methodology of that survey?

2. If the pretermitted heir statute, section 551:10, provides a rule that a testator who completely omits to mention a descendant, even if only to exclude him or her from inheriting, must have done this inadvertently, how is this not "a rule of construction"? It

interprets the testator's silence on a subject on which he would be expected to express himself.

[The argument that the rule sometimes has the effect of frustrating the intent of a testator who in fact did mean to exclude the heir does not answer the question. The rule does attribute meaning to -- that is, it construes -- the document. One might ask as a follow-up question to this line of argument, give me an example of a rule of construction that could not have the effect of frustrating the testator's unstated intent.]

3. If the pretermitted heir statute is an appropriate rule for interpreting a will, why is it not an appropriate rule for interpreting a revocable trust functioning as a will substitute?

[In other words, setting aside what "most" lawyers may have assumed, and whether their assumptions were justified, what "ought to" be the legislative policy on the inadvertent omission of an heir from a revocable trust document? If the legislature is understood to have adopted the commentary of the uniform law commissioners in enacting the uniform code, it already answered this question in 2004.]

4. Isn't this simply a matter of adding one sentence to the will or trust document saying, "I intentionally make no provision for [x]"?

5. [Responding to the argument that there are many kinds of trusts, apart from a revocable trust functioning as a will substitute, for which it should not be necessary to add even that one sentence], but isn't that the function of the phrase "as appropriate" in section 112 -- if the revocable trust being used as a will substitute, would it not be "appropriate" to protect against the inadvertent pretermission of heirs, even if it might not be "appropriate" as to some other kind of trust?

You might also hear someone say that the Pennsylvania state supreme court recently ruled that the enactment of section 112 of the uniform code in that state did not cause the wills statute protecting against the inadvertent omission of a spouse to become applicable to a revocable trust.

The case in question is In re Kulig Trust, No. 97 MAP 2016 (Pa. 2017). Without getting too deep into the weeds, the ruling in that case was that while the pretermitted spouse statute is in fact "a rule of construction," it would not be "appropriate" to apply it to a revocable trust, specifically because the legislature had created a separate mechanism -- the elective share -- that would be undercut by allowing a parallel, inconsistent remedy.

Similar considerations do not apply to the pretermitted heir statute, as there is not an alternative mechanism by which an omitted descendant can claim an "elective share."

In submitting these comments, I am acting on behalf of no one but myself, as a freelance legal journalist and as a longtime student of this area of law. I have no connection to any of the parties to the pending litigation. I do think the Committee needs to hear informed perspectives on these questions from disinterested sources.

This is a sufficiently difficult area of law that it would probably be a good idea to get a report from your staff researcher before moving forward. I have included Ms. Smarling among the copy parties to this e-mail. I have also copied in John D. MacIntosh, who represents the state bar, which so far I know was not involved in drafting this bill.

And I think if someone is proposing legislation that is specifically intended to secure a particular outcome in a pending lawsuit between private parties, there should be full disclosure of who is behind it and why.

Among the witnesses who testified at the Senate committee hearing in January, only one was a registered lobbyist, for a trust company. It is unclear why a trust company should take any position at all on this question, but in any event his testimony merely echoed the flat assertion that for some reason lawyers have simply "assumed" section 112 did not import the pretermitted heir statute into the trust code.

A trade organization of trust companies and law firms, of which that individual is president, did file an amicus brief in the Craig Trust matter. The lawyers who drafted the trust at issue in the case are directors and equity owners of a trust company which is a member of that organization. But the witness himself is registered as a lobbyist only on behalf of the trust company, not the trade organization or any of its members.