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SB 311 consent calendar report

russ willis <rawillis3@plannedgiftdesign.com> Sat, Feb 10, 2018 at 11:51 AM
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Sen. French,

Alongside my practice as a tax planning consultant, I am a freelance writer on legal developments, both tax and non-tax, concerning the transfer of private wealth. At the moment, I am working on an article about the Craig Trust litigation now pending before the New Hampshire Supreme Court.

Some portion of this article will discuss SB 311, which recently cleared your committee and is on the consent calendar for Thursday, February 15. Athough I am in conversation with the New Hampshire Bar News to place a version of the article in their March issue, my present plan is to include another version in my own fortnightly newsletter as early as this coming Tuesday -- i.e., prior to the consent calendar vote.

I am writing to you to express concerns that the explanatory report given in the February 8 calendar entry (a) misstates the substance of the bill, and (b) includes a statement that may cause confusion among members who are not familiar with this area of law.

I do not know whether these concerns might put the report out of compliance with Senate rule 6-21(c), but probably the time to raise that question is before the consent calendar vote.

The report says the bill "would amend the wills chapter," presumably a reference to the pretermitted heirs statute, RSA section 551:10, to clarify "it was never intended to apply to trusts." In fact, of course, the bill would amend RSA section 564-B:1-112, which applies the "rules of construction" for wills to the interpretation of trusts, "as appropriate."

In other words, contrary to the report, SB 311 is an amendment to the trust code, not the wills statute.

Literally, the bill says the pretermitted heirs statute is not a "rule of construction," so the question whether it would be "appropriate" to apply it to a revocable trust functioning as a will substitute would not arise. As its sponsors openly acknowledge, the bill is specifically intended to dictate a particular result in the Craig Trust case, though this fact is not mentioned in the calendar report.

The report then says "wills that are intended to disinherit children are carefully drafted with specific language to avoid any question of inadvertent omission." This statement appears to imply that a lawyer

drafting a revocable trust to function as a will substitute might not (or even would typically not) take care to include such language.

But section 551:10 is in the wills statute precisely because these omissions do occur, and to provide a rule to cover situations (a) where a child is born after the will is executed or (b) where a child or more remote descendant is simply not mentioned in the will, and there is no evidence the omission was intentional.

In other words, a lawyer drafting a will that is intended to exclude a child or a descendant of a deceased child is "careful" to make plain that the omission is intentional, partly in order to overcome the statutory presumption that it is not.

At the January 9 hearing, several witnesses testified anecdotally that, in their perception at least, lawyers typically do not include this kind of language in revocable trust documents, but no one indicated why this might be the case. And apart from speculation as to what lawyers typically do, no one indicated why it would be "inappropriate" to apply a rule that accounts for heirs inadvertently omitted from a will to heirs inadvertently omitted from a revocable trust functioning as a will substitute.

On its face, the reference in section 564-B:1-112 to "rules of construction" applicable to wills could be read as including the pretermitted heirs statute, and one might imagine a "careful" lawyer would take this into account.

One of the witnesses at the January 9 hearing acknowledged that her office had drafted the trust document which is at issue in the Craig Trust case. One might ask whether her testimony that lawyers typically omit the language that was in fact omitted from that document was self-serving.

At least one witness testified it would be better to approach this problem by amending section 551:10 itself, which is what the explanatory report mistakenly says this bill would do.

All of which is neither here nor there, but if the purpose of rule 6-21(c) is to require a report that informs members what is the substance of the bill, sufficiently to assure them it is non-controversial, I think the argument can be made that the report in its current form does not accomplish this purpose.

Clearly there is a controversy, now pending before the state Supreme Court. The legislature is being invited to participate in that controversy, and members who were not in the hearing room on January 9 might need to be informed this is what they are doing.

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