THE STATE OF NEW HAMPSHIRE
SUPREME COURT
CASE NO. - - - -

IN RE: THE TERESA E. CRAIG LIVING TRUST
No. 317-2017-EQ-00133

INTERLOCUTORY TRANSFER STATEMENT

(Pursuant to Supreme Court Rule 9)

Transfer From the 6th Circuit – Probate Division – Concord
Trust Docket

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PARTIES AND COUNSEL OF RECORD

(Sup. Ct. R. 9(1)(a))

Petitioners in the Probate Division-Trust Docket:

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Respondents in Probate Division-Trust Docket:

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Executor of the Estate of Teresa E. Craig
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[1]Megan C. Neal, N.H. Bar Association #17138, McDonald & Kanyuk, 89 N. State Street, Concord, N.H. 03301, represents the Executor in the related estate matter before the Trust Docket, Estate of Teresa Craig, No. 317-2016-ET-00654.

STATEMENT OF FACTS AND NECESSITY OF TRANSCRIPT

(Sup. Ct. R. 9(1)(b))

The question posed for consideration is one of law, see infra, and thus the undersigned recites the following undisputed facts and procedural history for background purposes only. Teresa Craig died in Bow, New Hampshire in July 2016. She had executed a Will in August 2012 (the "2012 Will"). See App. at 20.[2] The 2012 Will named her son Sebastian Grasso, as executor. Id. at 22 (Preface & Art. I). She also executed the Teresa E. Craig Living Trust dated September 3, 1999, and that trust was amended and restated in August 2012 (the "2012 Teresa Trust"). See App. at 28 (Recitals). Daniel Toland is the trustee of the 2012 Teresa Trust. See App. at 59 (*Certification of Trust*). The 2012 Teresa Trust is the sole legatee of the 2012 Will. App. at 22. (Art. II).

Teresa's grandson and granddaughter, Andrew and Mikayla Grasso, filed a *Petition/Motion for Determination of Pretermitted Heirs and Request for Copy of Trust* (the "*Petition*"). App. at 60. They are the children of Teresa's son, Michael Grasso, who died in December 2007. Id. at 61-62 (¶¶ 3, 4, 13). The *Petition* seeks: (1) recognition of Andrew and Mikayla as pretermitted heirs under Teresa's 2012 Will pursuant to RSA 551:10, id. at 64 (¶23); and (2) an order compelling the Trustee to provide a copy of the 2012 Teresa Trust so they could determine whether they were, at any point in time, "beneficiaries of the Trust, [or] whether the Trust and any amendments thereto were properly executed or whether they are *pretermitted beneficiaries of the Trust.*" Id. (¶¶24-29) (emphasis added). They assert that they may have rights as pretermitted heirs to the 2012 Teresa Trust because RSA 551:10 applies to trusts through RSA 564-

[2] The Court will denote documents in the attached *Appendix* as "App" followed by the page number on which the document is located. See Sup. Ct. R. 9(2).

B:1-112, the section of the New Hampshire Trust Code ("NHUTC") pertaining to rules of construction of trusts. Id. at 65 (¶¶ 30-31).

Daniel Toland, Trustee of the 2012 Teresa Trust, filed two *Motions to Dismiss*, see App. at 79; 96, seeking to dismiss the Petitioners' claim that they should be provided with a copy of the 1999 Teresa Trust and its 2012 amendment. The undersigned deferred ruling on the *Motion(s) to Dismiss*, see Order on Trustee's Motion to Dismiss and Trustee's Second Motion to Dismiss (Trust Docket, July 21, 2017) ("Order on Motion(s) to Dismiss"), App. at 7, and ordered the trust instruments to be produced for in camera review that would allow for a threshold determination of the Petitioners' standing. Id. at 18-19. In response, the Trustee filed a *Notice of Compliance With Petitioners' Request for Relief*, see App. at 184, notifying the undersigned that he had furnished a copy of the Teresa Trust instruments to the Petitioners and asking that the *Petition* be dismissed. The Petitioners responded with a lengthy *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 Teresa E. Craig Living Trust*. See App. at 188. In this pleading, the Petitioners attached a copy of the 2012 Teresa Trust,[3] as amended and restated in 2012, and sought: (1) a ruling denying the *Motion(s) to Dismiss;* (2) a ruling that they are pretermitted beneficiaries of the 2012 Teresa Trust; (3) deferral of consideration of pretermission under the 2012 Will; (4) a stay of their undue influence claims[4] pending determination of pretermission; (5) an order that the Trustee may not submit any

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[3] The 2012 Teresa Trust does not specifically name or refer to Michael, Mikayla, or Andrew Grasso.
[4] The Court observes that such claims have not been pleaded and pursuit of them would require a *Motion to Amend.* Counsel for the Petitioners has indicated that, pending further discovery, such claims may be added.

extrinsic evidence unless a court rules that he may reform the 2012 Teresa Trust (presumably to specifically name the Petitioners and thus moot the pretermitted heir issue) after Teresa has died; and (6) attorney's fees. Id. at 193-194. The Trustee filed a *Response*, see App. at 236, seeking a hearing and structuring conference and orders: (1) requiring that the Petitioners amend their claim and allow for answer and counterclaims; (2) scheduling the matter for resolution, including dispositive motions; (3) permitting *amicus curiae* briefs; and (4) determining pretermission under both the 2012 Teresa Trust and 2012 Will considered together. Id. at 238-239. The New Hampshire Trust Council (the "Trust Council") filed a *Motion for Leave to File an Amicus Memorandum of Law* seeking to submit a brief addressing only whether "by enactment of RSA 564-B:1-112 in 2004, the pretermitted heir statute (RSA 551:10) applies to trusts." See App. at 242 (¶3). The Petitioners objected, see App. at 244, challenging both the undersigned's authority to consider submissions by *amicus curiae*, and whether the Trust Council may appropriately file an *amicus curiae* memorandum. Id. at 245-246.

A hearing was held at the initiation of the undersigned on August 31, 2017, after it determined that before this matter may proceed, the threshold issue concerning the application of the pretermitted heir statute, RSA 551:10, to trusts through RSA 564-B:1-112 must be decided. Specifically, it must be determined whether adoption of the NHUTC in 2004, see 2004 Laws Ch. 130, modifies or abrogates the ruling of the New Hampshire Supreme Court three years prior in Robbins v. Johnson, 147 N.H. 44, 45 (2001), that RSA 551:10 is not applicable to trusts (or other will substitutes). The Court

observes that neither party objected to submission of the question set forth infra for review and consideration by the New Hampshire Supreme Court.

Finally, as background facts set forth supra are undisputed by the parties, submission of a transcript from any of the proceedings before the Trust Docket is not necessary for review of the transferred question.

STATEMENT OF QUESTION
(Sup. Ct. R. 9(1)(c))

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. at 46. 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?

STATEMENT OF REASONS WHY A SUBSTANTIAL BASIS EXISTS FOR A DIFFERENCE OF OPINION; OR WHY AN INTERLOCUTORY TRANSFER MAY MATERIALLY ADVANCE THE TERMINATION OR CLARIFY FURTHER PROCEEDINGS OF THE LITIGATION, PROTECT A PARTY FROM SUBSTANTIAL AND IRREPARABLE INJURY, OR PRESENT THE OPPORTUNITY TO DECIDE, MODIFY OR CLARIFY AN ISSUE OF GENERAL IMPORTANCE.

(Sup. Ct. R. 9(1)(d))

As set forth infra, not only does the question presented in this Rule 9 Interlocutory Transfer pose an unsettled question of law, only the New Hampshire Supreme Court may definitively answer it.[5] In addition, the transferred question must be determined before the remaining issues raised by the Petitioners, (and potential counterclaims offered by the Respondent) can be decided, and as such, it is likely that any decision by the undersigned would be appealed to the Supreme Court. Consequently, it is most efficient and assistive to the proper resolution of this case for the question transferred be decided on an interlocutory basis. See, e.g., See In re Frolich's Estate, 112 N.H. 320, 321 (1972)(certification of questions of law concerning proper distribution of trust estate is proper); In re Allaire Estate, 103 N.H. 318, 320 (1961)(questions of law relating to distribution of estate which turn on construction of a will or trust instrument may be certified for interlocutory determination); see generally, RSA 547:30 (Transfer of Questions of Law to the Supreme Court); Sup. Ct. R. 9 (Interlocutory Transfer without Ruling); Cir. Ct. – Prob. Div. R. 79 (Interlocutory Transfers and Appeals to the Supreme Court).

[5] Specifically, the Robbins decision indicated that only if the New Hampshire Supreme Court was given a "clear indication" by the Legislature would it hold that RSA 551:10 applies to trusts. As such, it is best positioned to determine whether enactment of RSA 564-B:1-112 constitutes a "clear indication."

In addition, swift and conclusive determination of the applicability of RSA 551:10 to trusts after adoption of the NHUTC is of critical importance to members of the New Hampshire Bar who draft estate planning documents and the citizens they serve. Not only is certainty required for estate plans currently under consideration, but a decision on the law in effect since 2004 impacts existing trusts. See generally, RSA 564-B:11-1104(a)(4) ("any rule of construction or presumption provided in this chapter applies to trust instruments executed before the effective date of this chapter unless there is a clear indication of a contrary intent in the terms of the trust").

Finally, a third-party has requested leave to file a memorandum as *amicus curiae*. See App. at 241. Although the Trust Docket may have authority to allow and consider such pleadings, see generally State ex rel. Com'r of Transp. v. Med. Bird Black Bear White Eagle, 63 S.W.3d 734, 757-58 (Tenn. Ct. App. 2001)(recognizing that courts have inherent authority to accept *amicus* pleadings even in absence of specific rule)(collecting cases), *amicus* briefs are more appropriately submitted to, and considered by, the New Hampshire Supreme Court. See generally, Sup. Ct. R. 30.

In requesting that the New Hampshire Supreme Court accept for consideration the question transferred, the undersigned reiterates observations made in its Order on the Motion(s) to Dismiss, App. at 7, that resolution of the question now posed requires consideration of: (1) the meaning and purpose of RSA 551:10 and RSA 564-B:1-112; (2) legislative intent in adopting the NHUTC and by extension the notes to the uniform law, see generally, Rabbia v. Rocha, 162 N.H. 734, 737-38 (2011)(courts look to the comments of the model act for guidance as to its meaning); and (3) proper public policy.

RSA 551:10 provides: "[e]very 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 [the] will, and who is not a devisee or legatee, shall be entitled to the same portion of the estate, real and personal, as ... if the deceased were intestate." The Supreme Court thus noted that RSA 551:10 "does not create merely a presumption that pretermission is accidental, but a rule of law," In re Estate of Treloar, 151 N.H. 460, 462 (2004); see In re Estate of Robbins, 145 N.H. 145, 147 (2000)(statute "is conclusive" unless terms of will demonstrate omission was intentional), intended to "provide that a child should take his intestate share when he has been forgotten by the testator or omitted through accident." In re Osgood's Estate, 122 N.H. 961, 964 (1982). RSA 564-B:1-112 provides: "[t]he 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."

Although the New Hampshire Supreme Court specifically ruled that: "[t]he pretermitted heir statute, on its face, applies to wills, not to trusts," Robbins, 147 N.H. at 45 (quotations omitted), it specifically declined to address whether the statute should apply to "will substitutes," noting "that the legislature should decide whether, as a matter of policy, it wishes to extend the pretermitted heir statute to will substitutes, such as the trust at issue." Id. at 46. Robbins, however, was decided before adoption of the NHUTC. See 2004 Laws Ch. 130. Although the legislative history as presented does not specifically mention RSA 551:10, drafters of the NHUTC indicated publically that they carefully considered the uniform act and made specific decisions about which provisions to include in the New Hampshire version of the uniform law. See App. at 153; 160-161; 163-165. Importantly, the drafters of section B:1-112 of the uniform law

indicated that adoption of it is "optional." See Uniform Laws Commission, *Trust Code – Final Act* §112, Comments at 39 (2010).

Case law from other jurisdictions is not informative[6] as to whether the pretermitted heir statutes apply to trusts after adoption of the uniform law. See generally, Adam J. Hirsch, Airbrushed Heirs: The Problem of Children Omitted From Wills, 50 Real Prop. Tr. & Est. L.J. 175, 238 (Fall 2015)("courts have rejected suits to construe pretermitted child statutes beyond the boundaries of their text; any extension to will substitutes requires legislative sanction"). The Restatements are inconsistent. One section states unhelpfully: "[a] will substitute is subject to rules of construction only to the extent appropriate." Restatement (Third) of Property Wills and Donative Transfers § 7.2 *Application of Will Doctrines to Will Substitutes*, cmt a (2003). Another urges that pretermitted heir statutes should apply as

> [s]ound policy suggests that a property owner's choice of form in using a revocable trust rather than a will as the central instrument of an estate plan should not deprive that property owner and the objects of his or her bounty of appropriate aids and safeguards intended to achieve likely intentions.

Restatement (Third) of Trusts §25, *Validity and Effect of Revocable Inter Vivos Trust*, cmt 2(e)(1) (2003). Finally, another observes that "[n]o cases have been found in which the protections by statute or case law afforded to a child omitted from a will have been extended to apply to a child omitted from a will substitute used as a comprehensive dispositive plan. Courts that have addressed the issue have decided against expanding

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[6] In a recently decided state superior court case, the court determined that a statute similar to RSA 564-B:1-112 indicated that the legislature intended for a pretermitted spouse statute to apply to *inter vivos* trusts. See In re Trust Under Deed of Kulig, 131 A.3d 494, 499 (Pa. Super. Ct. 2015). That case, however, is on appeal to the Pennsylvania Supreme Court, see In re Trust Under Deed of Kulig, 158 A.3d 1234 (Pa. 2016), and to date remains undecided.

the policy." Restatement (Third) of Property Wills and Donative Transfers §9.6 *Protection of Child of Descendant Against Unintentional Disinheritance*, rptr. n. 17 (2003).

A threshold issue to be considered by the New Hampshire Supreme Court concerns the nature of RSA 551:10.[7] The notes to the Uniform Trust Code indicate that determination of whether the pretermitted heir statute can be applied to trusts through RSA 564-B:1-112 depends upon whether the RSA 551:10 is a rule of "construction" or a "constructional preference[]." The comments to the Uniform Law direct that

> 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 avoids 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.
>
> 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.

Uniform Laws Commission, *Trust Code – Final Act* §112, Comments at 38-39 (2010)(citation omitted). Any decision on the transferred question would require determination of whether the pretermitted heir statute is a rule of construction or a constructional preference. Given that prior case law deemed it "a conclusive rule of

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[7] At the hearing on August 30th and in a later issued order, the undersigned clarified that although it observed in its Order on the Motion(s) to Dismiss that "it appears that RSA 551:10 states a rule of construction," it did not conclusively so rule.

law" see Robbins, 147 N.H. at 45, and "not merely a presumption" In re Estate of Treloar, 151 N.H. at 462, it *appears* that RSA 551:10 states a rule of construction, see generally, Danielle J. Halachoff, No Child Left Behind: Extending Ohio's Pretermitted Heir Statute to Revocable Trusts, Akron L. Rev. 605, 627-31 (Vol. 50 2017), however, New Hampshire law is not definitive. Compare In re Estate of Came, 129 N.H. 544, 547-48 (1987)(RSA 551:10 creates a statutory presumption). The Restatements observe that pretermitted heir statutes "are generally based on legislative judgments concerning probabilities of intention . . . ." Restatement (Third) of Trusts §25 *Validity and Effect of Revocable Inter Vivos Trust*, cmt e(1) (2003).

As such, an argument can be made that by enacting the NHUTC, the Legislature intended that RSA 551:10 would apply to trusts through Section 1-112. However, the Supreme Court in Robbins directed that "[a]bsent *clear indication* from the legislature that this is its intention, we decline to apply the statute to the trust." Id. at 46 (emphasis added). Accordingly, the narrow issue presented by this Rule 9 Interlocutory Transfer is whether, given the unequivocal ruling in Robbins, adoption of Section 1-112 and the incorporation of notes to the Uniform Act constitutes a "clear indication" that the Legislature, as a matter of policy, intended for RSA 551:10 to apply to trusts.

The Trustee, however, has advanced a compelling policy argument in his *Motion to Dismiss,* that in in reliance on Robbins, "settlors and their counsel have established an untold number of trusts with the expectation that the pretermitted heir statute . . . applies only to Wills, not trusts." See App. at 83 (¶2(B)(6)). That said, it can also be maintained that adoption of the NHUTC in 2004 constituted a significant change in trust law, and as such counsel, in particular trust and estates practitioners, were on notice

that the new law and its implications should be carefully considered when drafting trust documents. See generally Michelle M. Arruda, The Uniform Trust Code: A New Resource for Old (and New!) Trust Law, N.H. Bar J. – Winter 2006 (discussing at length adoption of the NHUTC and the significance of certain provisions of it).

In sum, interlocutory transfer of the question of whether the pretermitted heir statute, RSA 551:10, applies to trusts after enactment of RSA 564-B:1-112, is appropriate because: (1) it involves an unsettled question of law concerning distribution of trust assets; (2) an answer will aid in the efficient resolution of the remainder of the present case at the Trust Docket; (3) it involves a determination of whether the New Hampshire Supreme Court was given a "clear indication" of a legislative policy preference; (4) it involves a matter of importance to New Hampshire law affecting numerous estate plans; and (5) there will likely be motion(s) for leave to file briefs as *amicus curiae*.

SIGNATURE OF THE TRIAL COURT TRANSFERRING THE QUESTION

(Sup. Ct. R. 9(1)(e))

9/11/2017
Date

David D. King
Presiding Judge of the Trust Docket