

THE STATE OF NEW HAMPSHIRE
SUPREME COURT

Case No. 2017-0532

In re: Teresa E. Craig Living Trust

RULE 9 INTERLOCUTORY APPEAL FROM THE
6TH CIRCUIT - PROBATE DIVISION – CONCORD
TRUST DOCKET

BRIEF FOR PETITIONERS
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QUESTIONS PRESENTED FOR REVIEW

- IV. Whether RSA 564-B:1-112 incorporates the pretermitted heir statute, RSA 551:10, as a rule of construction applicable to *inter vivos* trusts that serve as will substitutes.
- V. Whether the clear and unambiguous language of RSA 564-B:1-112 includes statutory rules of construction applicable to wills.
- VI. Whether it is appropriate to incorporate the statutory rules of construction applicable to wills, including the pretermitted heir statute, to *inter vivos* trusts that serve as will substitutes.

STATEMENT OF THE CASE

This matter came before the 6th Circuit Court, Probate Division upon the Petitioners' filing of an Equity Petition seeking a determination that the Petitioners are pretermitted heirs of the Estate of Teresa Craig (the "Estate") and requesting a copy of the Teresa E. Craig Living Trust (the "Trust") so that the Petitioners could also determine whether they are pretermitted beneficiaries of the Trust. The Trustee of the Trust filed two motions to dismiss the Petitioners' claims with respect to the Trust. By Order dated May 9, 2017, the Estate and Trust matters were transferred to the 6th Circuit Court, Probate Division, Trust Docket (the "Probate Court").

After a May 31, 2017 hearing on the motions to dismiss, the Probate Court issued an Order dated July 21, 2017 that required the Trustee to file, for the Court's *in camera* review, a copy of the Trust and any amendments thereto by July 31, 2017. The July 21, 2017 Order also included the following analysis that succinctly gets to the crux of the issue before the Court:

As such, a strong argument can be made that by enacting the NHTC [New Hampshire Trust Code}, the Legislature intended that RSA 551:10 would apply to trusts through Section 1-112. However, the Supreme Court in Robbins v. Johnson 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 45 (emphasis added). Accordingly, the Court queries whether, given the Supreme Court’s unequivocal ruling in Robbins v. Johnson, 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. As such, it is not unsympathetic to the Trustee’s argument that in reliance on Robbins v. Johnson, “settlers and their counsel have established an untold number of trusts with the expectation that the pretermitted heir statute . . . applies only to Wills, not trusts.” *Motion to Dismiss* at ¶2(B)(6) (Index #9). That said, adoption of the NHTC in 2004 constituted a significant change in trust law, and as such counsel was on notice that the new law and its implications should be carefully considered when drafting trust documents.

See Appendix to Interlocutory Statement at A-16 through A-17.

The Trustee did not file the Trust and amendments with the Probate Court but instead the Trustee provided copies of the Trust and amendments to the Petitioners. The Trustee then filed a Notice of Compliance with Petitioners’ Request for Relief with the Probate Court, asserting that the action was concluded because the Trustee had provided the Petitioners with a copy of the Trust and amendments. The Petitioners objected to the Notice of Compliance, stating that the Petition requested a copy of the Trust so that they could determine whether they are pretermitted beneficiaries, and that upon disclosure of the Trust to the Petitioners, they learned that they are pretermitted under the Trust. The Petitioners’ Equity Petition requested a determination that they are pretermitted beneficiaries if upon disclosure of the Trust that status was revealed.

The legal question of first impression of whether RSA 564-B:1-112 incorporates the pretermitted heir statute, RSA 551:10, as a rule of construction applicable to trusts must be answered in order for the Probate Court to rule on the matters before it, to wit the Trustee’s Motions to Dismiss and the Petitioners’ request for a ruling that they are pretermitted beneficiaries of the Trust. Thus, the Probate Court transferred this legal question to this Court on an interlocutory basis without ruling.

STATEMENT OF THE FACTS

Teresa E. Craig (hereinafter referred to as "Teresa" or the "Settlor") died on July 10, 2016. Teresa was survived by her son, Sebastian Grasso (hereinafter referred to as "Sebastian"), and two grandchildren, Andrew Grasso and Mikayla Grasso, who are the issue of Teresa's deceased son, Michael, who died on December 17, 2007.

Teresa established The Teresa E. Craig Living Trust by instrument dated September 3, 1999, while she was a resident of Cambridge, Massachusetts. The Teresa E. Craig Living Trust provided that upon the death of the Settlor, if her husband did not survive her, the trust property would be divided into equal shares for Sebastian and Michael, or their respective issue should either of them pre-decease the Settlor.

Thereafter, by instrument dated August 27, 2012, while Teresa was still a resident of Cambridge, Massachusetts, she signed an Amendment and Restatement of the Teresa E. Craig Living Trust (the original trust, and the amendment and restatement shall hereinafter be referred to as the "Trust"). The Amendment and Restatement of the Teresa E. Craig Living Trust names Sebastian as the sole beneficiary of the Trust upon Teresa's death and does not name or expressly refer to Michael Grasso, Andrew Grasso or Mikayla Grasso. On August 27, 2012, Teresa also signed a last Will that names the Trust as the sole beneficiary of Teresa's estate.¹

The Trust, as originally executed and thereafter amended, is a testamentary substitute. Since the Trust was first established, all of Teresa's property owned in her own name and all property held in the Trust at the time of her death will be disposed of pursuant to the Trust. As

¹ The Will names Sebastian, but likewise does not name or expressly refer to Michael Grasso, Andrew Grasso or Mikayla Grasso. The Petitioners have a companion proceeding in the Estate of Teresa E. Grasso seeking declaratory judgment that Andrew and Mikayla are pretermitted heirs of Teresa's Estate. That issue is not before this Court in this interlocutory appeal.

with a will, so long as Teresa had capacity, she retained the right to change the terms of this testamentary disposition by amending or revoking the Trust.

SUMMARY OF ARGUMENT

RSA 564-B:1-112, by its clear and unambiguous language, incorporates the rules of construction concerning wills to trusts, as those rules of construction are applicable to a particular trust. All of the rules of construction applicable to wills are applicable to *inter vivos* trusts that serve as testamentary substitutes. These rules of construction applicable to wills are found at common law and in New Hampshire's statutes. RSA 564-B:1-112 was enacted three years after this Court held that one of the rules of construction concerning wills, the pretermitted heir statute set forth at RSA 551:12, did not apply to *inter vivos* trusts that serve as testamentary substitutes because the language of RSA 551:12 did not apply to trusts. The subsequent enactment of RSA 564-B:1-112 in 2004 clearly and unequivocally rendered RSA 551:12 applicable to trusts.

A holding that RSA 564-B:1-112 did not incorporate the pretermitted heir rule set out in RSA 551:12 as applicable to *inter vivos* trusts that serve as testamentary substitutes would require judicial legislation to add language and meaning that does not exist within the statute itself. Further, the comments to the uniform act on which RSA 564-B:1-112 is based, which are incorporated in the absence of contrary commentary or any modification to the uniform language, acknowledges that statutory rules of construction such as the pretermitted heir rule may be incorporated. The commentary further provides that it would be up to each jurisdiction adopting the uniform act to determine how it wishes to modify the uniform language to include or exclude particular rules of construction. The New Hampshire legislature issued no separate commentary and did not modify the uniform language.

The language of RSA 564-B:1-112 and the intention of the legislature is clear that RSA 551:10 is applicable to *inter vivos* trusts that serve as testamentary substitutes.

ARGUMENT

The issue before the Court is whether RSA 564-B:1-112 incorporates the pretermitted heir statute applicable to testate estates as a rule of construction applicable to trusts. This issue requires a determination of what the law is, through an analysis of the applicable statutes and the intention of the legislature in enacting them. The issue before the Court precludes consideration of what the law should be, or what the Respondent or the *amicus* party would like it to be.

RSA 564-B:1-112 recognizes that **not all** rules of construction applicable to wills are appropriately applicable to every trust. However, all of the rules of construction of wills are applicable to *inter vivos* trusts that serve as will substitutes, and applying those rules would achieve consistency with respect to testamentary dispositions by written instrument, whether those dispositions are made pursuant to a will or a trust. For the purposes of this brief, the Petitioners' arguments specifically refer to *inter vivos* trusts that serve as will substitutes, which serve the purpose of disposing of a settlor's property upon his or her death. The Petitioners will not address which rules of construction concerning wills would apply to other types of trusts, such as an *inter vivos* irrevocable life insurance trusts, which has the discrete purpose of funding the tax liabilities of a settlor's estate upon his or her death, or special needs trusts. The Trust that is the subject of this appeal is an *inter vivos* trust that serves to dispose of Teresa Craig's property upon her death. All property in her own name and all property held in the Trust at the time of her death will pass pursuant to the terms of the Trust.

I. AN UNDERSTANDING OF THE LAW PRIOR TO THE ENACTMENT OF RSA 564-B:1-112 IS NECESSARY TO THE CONSTRUCTION OF RSA 564-B:1-112

When a statute changes the law existing at the time it becomes effective, consideration of the law prior to the change is appropriate. *See generally, Petition of Willeke*, 169 N.H. 802, 160 A3d 688 (2017). RSA 564-B:1-112 is part of the Uniform Trust Code² enacted in 2004. The enactment of the New Hampshire Trust Code represented a landmark shift in New Hampshire trust law. Prior to October 1, 2004, the effective date of the New Hampshire Trust Code, New Hampshire had only a modicum of statutes applicable to trusts. RSA 564:1, *et seq.* governed the administration of testamentary trusts created under a will, and RSA 564-A:1 through 11 essentially codified some of the duties of a trustee.

With respect to the rules of trust construction, New Hampshire common law applied. The theme of the common law rules of trust construction were to effectuate the intention of the trust settlor. *Bartlett v. Dumaine*, 128 N.H. 497, 504, 523 A.2d 1, 6 (1986). Prior to October 1, 2004, there was no **statute** that rendered the statutory and/or common law rules of construction applicable to wills also applicable to trusts. The adoption of the New Hampshire Trust Code was a wholesale change to and substitution for the then existing common law governing trusts, except as expressly recognized by the Code. *See* RSA 564-B:1-106 (“The common law of trusts and principles of equity supplement this chapter, except to the extent modified by this chapter or another statute of this state.”).

² These statutes were originally statutorily defined as the “Uniform Trust Code,” but a statutory amendment in 2015 changed the name to the “New Hampshire Trust Code.” RSA 564-B:1-101. For the purposes of this brief, the Petitioners will refer to RSA 564-B:1-101, *et seq.* as it is currently defined, the New Hampshire Trust Code.

A. As a Matter of Common Law, Prior to October 1, 2004, the Pretermitted Heir Statute Did Not Apply to *Inter Vivos* Trusts That Serve as Will Substitutes.

Prior to the enactment of the New Hampshire Trust Code, there was some confluence of the common law rules of construction of wills and trusts.³ However, the statutory rules of construction applicable to wills by their terms did not apply to *inter vivos* trusts. By its express language, RSA 551:12 providing that the heirs of a legatee who predeceases the testator shall take the share of the deceased legatee was not applicable to *inter vivos* trusts.⁴ RSA 551:10, the statute providing that forgotten heirs shall receive their intestate share of a testate estate (the “Pretermitted Heir Statute”) was not applicable to trusts. *See Robbins v. Johnson*, 147 N.H. 44, 780 A.2D 1282 (2001). The Pretermitted Heir Statute states as follows:

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.

RSA 551:10.

Three years before the New Hampshire Trust Code was enacted, this Court ruled that the Pretermitted Heir Statute did not apply to an *inter vivos* trust when two children of a deceased settlor, who were pretermitted heirs of the deceased settlor’s probate estate,⁵ claimed that they were also pretermitted as to the decedent’s *inter vivos* revocable trust. *Robbins v. Johnson*, 147 N.H. 44, 780 A.2D 1282 (2001). This Court declined the children’s claim, and affirmed the

³ New Hampshire cases determining the intention of the settlor often cited to the principles set forth in will construction cases. *See, Bartlett v. Dumaine*, 128 N.H. 497, 504, 523 A.2d 1, 6, (1986) citing to *In re: Frolich’s Estate*, 112 N.H. 320, 327, 295 A.2d 448, 453 (1972) for the principle that the settlor’s intention is effected unless the intention is contrary to statute or public policy, and to *Edgerly v. Barker*, 66 N.H. 434, 31 A. 900 (1891) for the principle that determining intention is a question of fact.

⁴ However, the antilapse statute was held by this Court to apply to a testamentary trust established by a will. *See In re: Frolich’s Estate*, 112 N.H. 320, 326, 295 A.2d 448, 452 (1972).

⁵ *See In re: Estate of Robbins*, 145 N.H. 145, 567 A.2d 602 (2000).

Probate Court’s ruling that the Pretermitted Heir Statute did not apply to will substitutes, including *inter vivos* trusts that dispose of property upon the death of the trust settlor. *Id.*

In *Robbins*, this Court held that when construing a statute, the language of the statute is given its plain and ordinary meaning. *Id.* Since the Pretermitted Heir Statute, “on its face” only applied to wills, it was held not to apply to trusts.⁶ Despite the clear and unambiguous language of RSA 551:10, the settlor’s children asked this Court to “extend the statute to the trust at issue as a matter of policy.” *Id.* In declining that request, this Court stated 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.*

B. The Enactment of the New Hampshire Trust Code Represented a Comprehensive Change to New Hampshire’s Trust Laws.

The ink was barely dry on the *Robbins* opinion when the New Hampshire legislature decided to extend the pretermitted heir statute to trusts just three years later, enacting the New Hampshire Trust Code effective October 1, 2004, a comprehensive body of law governing trusts. The New Hampshire Trust Code includes a specific statute that extended the pretermitted heir statute to *inter vivos* trusts that serve as will substitutes, reflecting a clear intention to change the common law.

⁶ The Court also stated that it had “not previously ruled that the pretermitted heir statute applies either to testamentary or intervivos trusts.” *Id.* However, it would be redundant to apply the pretermitted heir statute to a testamentary trust, as the terms of the testamentary trust are established in a will. If the will does not name or expressly refer to the issue of a testator, the forgotten issue would receive his or her intestate share of the estate and there would never be a cause to establish a pretermitted share of the testamentary trust.

II. THE PLAIN AND ORDINARY MEANING OF RSA 564-B:1-112 INCORPORATES THE PRETERMITTED HEIR STATUTE TO *INTER VIVOS* TRUSTS THAT SERVE AS TESTAMENTARY SUBSTITUTES

The New Hampshire legislature clearly and unambiguously incorporated all of the rules of construction applicable to wills, statutory and at common law, to trusts when it enacted the New Hampshire Trust Code. These rules of construction include the Pretermitted Heir Statute, as it is appropriately applicable to *inter vivos* trusts that serve as testamentary substitutes.

The enactment of the New Hampshire Trust Code was a significant undertaking, resulting in a comprehensive body of law governing all aspects of trust law, including without limitation the establishment, modification, termination and administration of trusts, the duties of trust fiduciaries, and the rights of trust beneficiaries. Since the effective date of the New Hampshire Trust Code on October 1, 2004, the New Hampshire legislature has made some changes to the New Hampshire trust laws nearly every year.⁷ However, the relevant language of RSA 564-B:1-112 regarding the construction of trusts has not been amended since it was enacted:

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.

See RSA 564-B:1-112 (2004), Addendum Page 3. There were two amendments to RSA 564-B:1-112 that do not modify the original language. In 2011, the legislature added the following sentence after the original language:

For the purposes of determining the benefit of the beneficiaries, the settlor's intent as expressed in the terms of the trust shall be paramount.⁸

⁷ See Perspecta Trust Brief Timeline of New Hampshire Trust Legislation, Addendum at Pages 5-6.

⁸ This language was likely incorporated due to the tenet adopted by some legal scholars that the term "benefit of the beneficiaries" in Sections 1-105(b)(3) (establishing a mandatory rule that a trust must be for the benefit of one or more beneficiaries) and 4-404 of the Uniform Trust Code is determined by what is best of the beneficiaries rather than what the settlor intended. *See*,

See RSA 564-B:1-112 (2011), Addendum Page 4. The second amendment, in 2015, added the following sentence in between the original language and the sentence added in 2011:

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.

See RSA 564-B:1-112 (2015), Addendum Page 2.

Statutes are interpreted by giving the words of the statute their “plain and ordinary meanings.” *Stihl v. State of New Hampshire*, 168 N.H. 332, 334, 126 A.3d 1192, 1195 (2015). When ascribing the plain and ordinary meaning of statutory language, the overall statutory scheme is considered. *Ocasio v. Federal Exp. Corp.* 162 N.H. 436, 450, 33 A.2d 3d 1139, 1150-1151 (2011). The plain and ordinary meaning of the first sentence of RSA 564-B:1-112 is that the statutory and common law rules of construction that apply to the interpretation of and disposition of property by will also apply to trusts if the rule of construction is appropriate to the type of trust.

In considering this issue, it is necessary to contemplate that although the issue presented in this case concerns the Pretermitted Heir Statute, there are a host of other statutory rules of construction concerning wills that are also appropriate to apply to *inter vivos* trusts that serve as testamentary substitutes. The refusal to construe RSA 564-B:1-112 to include the Pretermitted Heir Statute as a rule of construction in this instance would also establish that the other statutory rules of construction concerning wills are not applicable to *inter vivos* trusts that serve as

Jeffrey A. Cooper, *Empty Promises: Settlor's Intent, the Uniform Trust Code, and the Future of Trust Investment Law*, 88 Boston University Law Review 1165, 1168-1169 (2008) (“Under Professor Langbein’s formulation of the benefit-the-beneficiaries rule, the ‘benefit’ of a trust provision is determined by reference to objective notions of prudence and efficiency rather than the settlor’s subjective intent.”). New Hampshire has been and remains dedicated to implementing a settlor’s intention.

testamentary substitutes. Those other rules of construction include, without limitation, the anti-lapse statute, providing that a devise to a person who pre-deceases the testator passes to the issue of the deceased devisee, RSA 551:12, and the rule of disseizin, providing that a devise or bequest shall not be defeated by the wrongful possession of the property devised or bequeathed, RSA 551:9.⁹

A. The Plain and Ordinary Meaning of RSA 564-B:112 Incorporates Statutory and Common Law Rules of Construction

There is no limiting language that only the common law rules of construction of wills were incorporated by RSA 564-B:1-112. Any construction of RSA 564-B:1-112 to limit its scope to include only common law rules of construction would require judicial legislation to add language to the clear and unambiguous statutory language to achieve that result. This Court has clearly refused to engage in such judicial legislation. Such a limitation would require the very thing that this Court refused to do in *Robbins, supra*, to change the meaning of a statute in order to effect a public policy. In *Carter v. City of Nashua*, 113 N.H. 407, 418, 308 A.2d 847, 854 (1973), when asked to insert limiting language in a zoning statute, this Court held:

No such limitation upon the [zoning] board's power to allow variances is expressed in the statute, and **for us to read such a limitation into the law would constitute a flagrant case of judicial legislation.**

(emphasis added).

⁹ The rule of construction that revokes a devise or bequest in a will to a former spouse in the event of a divorce or annulment is not so incorporated, because the statute was amended in 2003, prior to the enactment of the New Hampshire Trust Code, to include an identical paragraph applicable to trusts. See RSA 551:13, II and III. As it is not necessary, it is not appropriate to include this statutory rule of construction under RSA 564-B:1-112. However, RSA 551:13 is further evidence of the legislature's merging of the law governing the testamentary disposition of property by will or trust.

Thus, both common law and statutory rules of construction applicable to wills were incorporated by RSA 564-B:1-112. New Hampshire has several statutory rules of construction governing wills, including the Pretermitted Heir Statute. Although the identification of these statutory rules of construction governing wills has not previously come before this Court, courts outside of New Hampshire have treated statutes governing the construction and interpretation of wills as statutory rules of construction. *See Matter of Estate of Allen*, 150 Mich. App. 413, 418, 388 N.W.2d 706, 707 (1986) (Statute providing that after-acquired property is disposed of by will is a statutory rule of construction¹⁰); *In re: Trust Under Deed of Kulig*, 131 A.3d 494, 497 (2015) (on appeal) (Statute providing for the modification of a will to provide that the surviving spouse of marriage entered into after will is made shall receive his or her intestate share of the estate is a rule of construction).

B. If the Court Were to Determine That There is an Ambiguity in the Phrase “Rules of Construction” the Legislative History Clearly Reflects the Intention to Include the Pretermitted Heir Statute as a Rule of Construction Applicable to Trusts.

The only way for the Court to consider an argument that the statutory rules of construction were **not** incorporated by RSA 564-B:1-112 is for the Court to first find that there is an ambiguity in the statute. *See Stihl v. State of New Hampshire*, 168 N.H. at 334-335, 126 A.3d at 1195 (“When statutory language is ambiguous, however, we will consider legislative history and examine the statute’s overall objective and presume that the legislature would not pass an act that would lead to an absurd or illogical result.”). Although the Petitioners’ aver that there is no such ambiguity, if the Court were to find an ambiguity in the phrase “rules of construction,” the legislative history clearly demonstrates that the legislature was aware that the

¹⁰ New Hampshire has a corresponding statute at RSA 551:7.

uniform act they were adopting contemplated that the pretermitted heir statute would be incorporated as a rule of construction.

The New Hampshire Legislature had the opportunity to limit which rules of construction applicable to wills were incorporated by RSA 564-B:1-112. Yet they declined to do so even though the drafters of the Uniform Trust Code expressly recognized that such modifications could be made in their comments to the uniform law:

Instead of enacting this section, a jurisdiction enacting this [Uniform Trust] Code may wish to enact detailed rules on the construction of trusts, either in addition to its rules on the construction of wills or as part of one comprehensive statute applicable to both wills and trusts. For this reason and to encourage this alternative, *the section has been made optional.*

See Uniform Trust Code Comments, Appendix to Interlocutory Transfer Statement beginning at Page A-127, at Page A-143 (emphasis added). Despite making modifications to other portions of New Hampshire Trust Code, thereby deviating from the model language of the Uniform Trust Code, the New Hampshire legislature declined to modify the language in RSA 564-B:1-112 to further define, expand or restrict the rules of construction applicable to trusts. The enactment of RSA 564-B:1-112 with the exact language of Uniform Trust Code Section 112, is an adoption of the construction of Uniform Trust Code Section 112. See Uniform Trust Code Section 112 at Appendix to Interlocutory Transfer Statement Page A-142. The legislative history confirms that the legislature intended to incorporate the pretermitted heir statute as a rule of construction applicable to *inter vivos* trusts that serve as testamentary substitutes.

C. RSA 564-B:1-112 Incorporates the Pretermitted Heir Rule Because it is Appropriate to Apply the Rule to *Inter Vivos* Trusts That Serve as Testamentary Substitutes

The incorporation of the rules of construction applicable to wills to trust is qualified by the phrase “as appropriate.” Determination of the plain and ordinary meaning of statutory

language looks first to find a definition within the statute. *K.L.N. Construction Company, Inc. v. Town of Pelham*, 167 N.H. 180, 185, 107 A.3d 658, 662 (2014). There is no definition of the word “appropriate” or the phrase “as appropriate” within the New Hampshire Trust Code. Absent a statutory definition, the Court looks to a word’s “common usage, using the dictionary for guidance.” *Id.* *Merriam-Webster’s Dictionary* defines “appropriate” as “especially suitable or compatible.” The overall purposes of a will and an *inter vivos* trust are the disposition of a settlor’s “estate” upon his or her death. In light of this common purpose, all of the rules of construction governing wills are especially suitable and compatible to such trusts.

The determination of the plain and ordinary meaning may be assisted by reference to the comments to the corresponding provision of the Uniform Trust Code. *See Rabbia v. Rocha*, 162 N.H. 734, 738, 34 A.3d 1220, 1223 (2011). The legislative history for RSA 564-B does not provide any specific commentary that contradicts the commentary to the identical Uniform Trust Code provision provides guidance to the construction of Uniform Trust Code Section 112. Specifically, the comments to Uniform Trust Code Section 112 state that the section is patterned after the Restatement (Third) of Trusts §25(2), comment e, and further states that "given the functional equivalence between the revocable trust and a will, the rules for interpreting the disposition of property at death should be the same whether the individual has chosen a will or revocable trust as the individual's primary estate planning instrument." *See Appendix to Interlocutory Transfer Statement at Page A-142.*

The Restatement (Third) of Trusts § 25(2), comment e(1), provides additional insight behind the construction of Uniform Trust Code Section 112. Comment e(1) provides that:

In addition to the limitations on testamentary dispositions represented by statutes ... an array of statutes are found throughout the various American jurisdictions that are designed as protections or aids against oversight or inadequacies in the planning and drafting of wills. These statutes often fail specifically to address

revocable *inter vivos* trusts or other will-substitute dispositions . . . illustrative are pretermitted heir statutes.

See Restatement (Third) of Trusts § 25, Appendix to Interlocutory Transfer Statement beginning at Page A-171, §25(2), comment e(1) at Pages A-181 through A-182. The comments to Uniform Trust Code Section 112 also explain that "rules of construction attribute intention to individual donors based on assumptions of common intention."¹¹ See Comments to Uniform Trust Code Section 112, Appendix to Interlocutory Transfer Statement at Page A-142. The Pretermitted Heir Statute proscribes a rule based on the "common intention" that a testator who fails to provide for his natural heir in his will does so by mistake, unless the testator states his intention to disinherit that heir within the document itself.¹²

Where an *inter vivos* trust is the controlling document for the distribution of an estate upon death, it is appropriate to apply the pretermitted heir statute as the will plays a small role in the ultimate distribution of the estate. Contrastingly, the pretermitted heir statute would not be appropriate to apply to trusts that do not act as a will substitute, such as irrevocable life insurance trusts, realty trusts, and special needs trusts.

An appellate court in Pennsylvania recently ruled that its pretermitted spouse statute is a rule of construction applicable to trusts.¹³ In that case, the settlor created an *inter vivos* trust in

¹¹ "Unlike a constructional preference, a rule of construction, if applicable, can lead to only one result." Comments to Uniform Trust Code Section 112 (citing Restatement (Third) Donative Transfers § 11/3 amd cmt. B (tentative draft No. 1, approved 1995). See Appendix to Interlocutory Transfer Statement at Page A-142.

¹² See Restatement (Third) of Trusts, § 25, Comment e(1) ("statutes of these various types are generally based on legislative judgements concerning probabilities of intention...") Appendix to Interlocutory Transfer Statement at Pages A-181 through A-182.

¹³ The Petitioners distinguish a pretermitted spouse statute from a statute conferring a spousal right of election, such as New Hampshire has adopted. The spousal right of election is not a rule of construction, but is a right conferred upon a surviving spouse should such surviving spouse elect to do so. On the contrary, New Hampshire's pretermitted heir statute establishes property

2001 for the benefit of himself and his then spouse, whom he subsequently divorced. *In re Trust under Deed of Kulig*, 131 A.3d 494, 495, 2015 PA Super 271 (Pa. Super Ct. 2016) (appeal pending). He later remarried, but failed to modify his *inter vivos* trust to include his then spouse as a beneficiary. *Id.* Upon the settlor's death, the surviving spouse claimed her intestate share of the revocable trust under the pretermitted spouse statute.¹⁴ *Id.* At issue in *Kulig* was whether under Pennsylvania's version of Uniform Trust Code Section 112,¹⁵ the rules of construction applicable to the dispositive terms of testamentary trusts, or other testamentary instruments, are applicable to the provisions of an *inter vivos* trust. *Id.* at 495-496. The appellate court ruled that the Commonwealth's pretermitted spouse statute applied to *inter vivos* trusts as a rule of construction under 20 Pa.C.S.A § 2507(3), citing the comments to Uniform Trust Code Section 112. *Id.* at 499. The Pennsylvania court further reasoned that the plain language of the statute, consistent with the legislative comments, reveals the intention to make "rules of construction consistent whether interpreting testamentary dispositions or *inter vivos* trusts." *Id.* at 501.

As the court held in *Kulig*, this court should similarly rule that RSA 554-B:1-112 incorporates the statutory rules of construction to *inter vivos* trusts that serve as testamentary substitutes. The statutory rules of construction so incorporated include the Pretermitted Heir Statute.

rights in the name of the pretermitted heir with no action or election by the pretermitted heir. In order to decline those property interests, the pretermitted heir would have to disclaim them.

¹⁴ Although Pennsylvania also has a separate spousal election statute, 20 Pa.C.S.A. §2203, the case did not address whether that statute is a rule of construction incorporated by the Pennsylvania Trust Code. Nor do the Petitioners contend that New Hampshire's spousal election statute is a statutory rule of construction applicable to wills.

¹⁵ Pennsylvania adopted the Uniform Trust Code, and as part of it enacted 20 Pa.C.S.A. § 2507(3), which provides:

The rules of construction that apply in this Commonwealth to the provisions of testamentary trusts also apply as appropriate to the provisions of *inter vivos* trusts.

III. IF THE COURT DETERMINES THERE IS AN AMBIGUITY IN RSA 564-B:1-112, INCORPORATION OF THE PRETERMITTED HEIR STATUTE AS APPLICABLE TO *INTER VIVOS* TRUSTS THAT SERVE AS TESTAMENTARY SUBSTITUTES WILL AVOID AN ABSURD OR ILLOGICAL RESULT.

When construing a statute, the Court presumes that the legislature would not pass a law that would lead to an absurd or illogical result. *Stihl v. State of New Hampshire*, 168 N.H. at 334-335, 126 A.3d at 1195. The selective incorporation of some rules of construction concerning wills, but not others, to *inter vivos* trusts that serve as a will substitute would lead to an absurd and inconsistent result. Such a selective process would necessarily require the establishment of a subjective criteria that would arbitrarily determine which statutory rules of construction concerning wills apply to an *inter vivos* trust that serve as a testamentary substitute, and which do not. **There is no rational reason why the antilapse statute should be applicable to such trusts but that the Pretermitted Heir statute should not.** This would be an absurd or illogical result.

Individuals and married couples commonly create estate plans including a revocable *inter vivos* trust and a pour-over will. Under such a plan, the revocable trust is the controlling document governing the disposition of property as it sets forth the terms by which the “estate” shall be distributed. The pour-over will only acts to capture any assets remaining in the testator's name at death and directs that any such assets be distributed to the trust, which will ultimately be distributed or administered pursuant to the terms of the trust. The primary objective for such estate plans is to avoid the expense and delay that results from probate. Given that *inter vivos* trusts used in this context are the controlling instrument for the estate, the law governing testamentary dispositions by will or trust will be consistent only if the Pretermitted Heir Statute is applicable to trusts that serve as will substitutes.

The purpose of the Pretermitted Heir Statute is the protection of forgotten heirs. The overall legislative scheme resulting from the adoption of and subsequent amendments to the New Hampshire Trust Code has resulted in continuity between the laws governing wills and trusts that serve as testamentary substitutes beyond the rules of construction.¹⁶

Consistency will be achieved only if this Court rules that the statutory rules of construction applicable to wills, including the Pretermitted Heir Statute, also applies to *inter vivos* trusts that serve as testamentary substitutes. Otherwise, if the Pretermitted Heir Statute only applies to wills, it is likely that the statute will provide very little protection as more individuals utilize *inter vivos* trusts as a will substitute. To utilize *inter vivos* trusts as intended, settlors must transfer property to the trust during their lifetimes so that the property will not require probate upon their death. If the Pretermitted Heir Statute only applied to wills, property titled in the name of the trust upon death would not be subject to the terms of the will and therefore, would not be subject to RSA 551:10. As more estate plans now incorporate the *inter vivos* trust and pour-over will, it is conceivable that a many estates will largely avoid probate. The forgotten heirs, who a settlor does not intend to disinherit, would be protected if property passes by will, but would not be protected if the property passes by trust.

The consequence of the law on those who have prepared and/or signed trusts in ignorance of the law since October 1, 2004 is of no consideration in this analysis. Refusing to honor the clear intention of the legislature in order to protect those who may have erred should not be

¹⁶ For example, the New Hampshire Trust Code codifies that a revocable trust that becomes irrevocable upon the death of the settlor is liable for the debts of the settlor and further establishes a short statute of limitations period effectively the same as the short statute of limitations for creditor claims brought against an estate pursuant to RSA 556:5. *See* RSA 564-B:5-505 and 5-508.

considered. As the Probate Court recognized, practitioners have been on notice since 2004 that this is the law.

Finally, determination of the rights afforded to a pretermitted beneficiary is easily determined by reference to the intestacy statute, as directed by RSA 551:10. Again, this result is consistent with the result of protecting a forgotten or inadvertently omitted heir of an estate.

CONCLUSION

The New Hampshire legislature clearly and unequivocally incorporated the statutory and common law rules of construction applicable to wills to *inter vivos* trusts that serve as testamentary substitutes when it enacted RSA 564-B:1-112 in 2004. The official commentary to the Uniform Trust Code acknowledged that pretermitted heir statutes could be incorporated by this provision unless a legislature adopting the Code made modifications to the uniform language. The New Hampshire legislature declined to make any modification to the uniform language and declined to issue any separate commentary to reflect a contrary intention. The Pretermitted Heir Statute set forth at RSA 551:10 is applicable to *inter vivos* trusts that serve as testamentary substitutes.

REQUEST FOR ORAL ARGUMENT

The Appellant requests a 15 minute oral argument. The argument will be made by Attorney Pamela J. Newkirk.

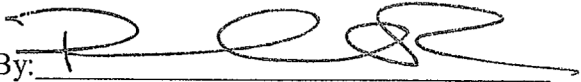
Respectfully submitted,

ANDREW GRASSO AND MIKAYLA
GRASSO

By their attorneys,

BARRADALE, O'CONNELL, NEWKIRK
& DWYER, P.A.

Dated: 12/4/17

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Statement of Compliance

I hereby certify that copies of the foregoing brief and appendix hereto were sent via first-class mail this 4th day of December, 2017 to Attorney Ralph F. Holmes, McLane Middleton, PA, PO Box 326, Manchester, NH 03105-0326, Attorney Glenn A. Perlow, New Hampshire Trust Council, One Liberty Lane East, Hampton, NH 03824, and Attorney Todd D. Mayo, New Hampshire Trust Council, One Liberty Lane East, Hampton, NH 03824.



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