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

REPLY BRIEF FOR PETITIONERS
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STATEMENT OF THE CASE

In the Respondent's brief at page 2, he erroneously asserted that the lower court granted the New Hampshire Trust Council's Motion for Leave to File an *Amicus* Memorandum of Law. In fact, the lower court deferred ruling on that Motion. See Addendum (Reply) Page 4.

ARGUMENT

I. THE PLAIN MEANING OF A STATUTE SHOULD NOT BE UNDERMINED BY SUPPOSITION AND SPECULATION

The Respondent's enumeration of the changes to the New Hampshire Trust Code **subsequent to** the enactment of RSA 564-B:1-112 that did not expressly address the incorporation of the pretermitted heir statute by RSA 564-B:1-112 do not change the fact that when RSA 564-B:1-112 was enacted, the pretermitted heir statute was incorporated with respect to *inter vivos* trusts that serve as testamentary substitutes. It is not the job of the judiciary to tell the legislature how to express its intention. The Respondent advances various caveats that he claims should have been included along with the incorporation of the pretermitted heir statute as a rule of construction applicable to such trusts. However, none of those caveats exist with respect to the application of the pretermitted heir statute to wills. Most importantly, the entire premise for the pretermitted heir protection is that a child or the issue of a deceased child was forgotten or mistakenly omitted. The caveats suggested by the Respondent would require consideration of the omitted interest and/or speculation as to the settlor's intentions regarding that forgotten or omitted interest.

Preventing the situation where the child or the issue of a deceased child is forgotten or accidentally omitted from a will is simple – name the testator's children and the issue of any children deceased at the time the will is made. Since it is a rule of construction, there are no inquiries as to the settlor's intention, or the possibilities of modification, such as the Respondent suggests should exist. The rule is clear. Addressing the rule's application is simple.

The pretermitted heir rule provides for a simple calculation of the pretermitted heir's share of the estate, which he or she receives upon distribution of the residuary without conditions, even if some of the residuary would be held in a testamentary trust. Likewise, a pretermitted beneficiary of an *inter vivos* trust that serves as a testamentary substitute would have his or her share calculated under the laws of intestacy and would receive his or share upon the allocation of trust property between the beneficiaries after death of the settlor, regardless of whether some of the residuary would be held in trust for named beneficiaries for some additional period of time.

II. THE RESPONDENT'S ATTEMPTED DEFINITION OF THE PHRASE "RULES OF CONSTRUCTION" WITHIN RSA 564-B:1-112 WITH A DEFINITION FROM BLACK'S LAW DICTIONARY IS IN ERROR

The New Hampshire legislature included the phrase "rules of construction" within RSA 564-B:1-112. The official commentary to the Uniform Trust Code expressly acknowledged that the rules of construction may be statutory.[1] Despite this clear acknowledgment that the rules of construction may be established by statute, the Respondent relies on *Black's Law Dictionary,* which does not define the phrase "rule of construction" except by reference to the phrase "canon of construction." A canon of construction is a guideline, or a constructional preference, which

[1] "Rules of construction are found both in enacted statutes and in judicial decisions." *See* Uniform Trust Code Comments, Appendix to Interlocutory Transfer Statement at Page A-142.

the official commentary to the Uniform Trust Code clearly distinguishes from a rule of construction:

> Unlike a constructional preference, a rule of construction, if applicable, can lead to only one result.

See Uniform Trust Code Comments, Appendix to Interlocutory Transfer Statement at Page A-142. The Pennsylvania Supreme Court recently held that Pennsylvania's pretermitted spouse statute is a "rule of construction." *In re: Trust Under Deed of David P. Kulig Dated January 12, 2001,* 2017 WL 6459001 (December 19, 2017).

III. THE RESPONDENT'S EFFORT TO DISTINGUISH THE FORMALITIES GOVERNING THE ESTABLISMENT OF WILLS AND TRUSTS AS A FOUNDATION FOR NOT INCORPORATING THE PRETERMITTED HEIR RULE AS A RULE OF CONSTRUCTION APPLICABLE TO *INTER VIVOS* TRUSTS THAT SERVE AS TESTAMENTARY SUBSTITUTES WOULD RENDER RSA 564-B:1-112 INEFFECTIVE

There is no dispute that the formalities for establishing, funding and amending wills and trusts are different. Further, all wills serve the purpose of the testamentary disposition of property, whereas, only some trusts serve that purpose.[2] If pretermitted heir rule were not applicable to the construction of a trust because the formalities of execution are different, or the fact that trusts may be irrevocable or serve purposes other than as a testamentary substitute for a will, none of the rules of construction applicable to wills would also be applicable to trusts, thereby rendering RSA 564-B:1-112 impotent.

The Respondent contends that the pretermitted heir statute is not applicable to the Teresa Craig Trust by claiming it would be ridiculous to apply that statute to an oral trust, or situations

[2] Many trusts do not serve the purpose of testamentary disposition, but are established for the purpose of making charitable gifts, serving the beneficial interests of an individual with special needs, business succession, or the ownership of a life insurance policy that will assist in the payment of death and inheritance taxes.

with a settlor who has established multiple trusts, including trusts that serve purposes other than as a substitute for the testamentary disposition of a settlor's property. However, this contention directly supports the Petitioners' position that the phrase "as appropriate" within RSA 564-B:1-112 limits the application of the pretermitted heir statute to trusts that serve as will substitutes, such as the Teresa Craig Trust. The absurdity of the Respondent's position is further delineated in his hypothetical set forth at page 12 of his brief, which does not concern a pour-over trust that will dispose of the settlor's estate upon his or her death. The hypothetical has no relevance to the issue before this Court.

IV. REFORMATION IS IRRELEVANT AND WOULD NOT NEGATE THE INTERESTS ESTABLISHED BY APPLICATION OF THE PRETERMITTED HEIR RULE.

The Respondent suggests trust reformation proceedings will be required pursuant to RSA 564-B:4-415 for "every trust signed since the enactment of the NHTC in 2004" if this Court rules in favor of the Petitioners. This is yet another embellished claim. Reformation would not be possible to eliminate a statutorily established property interest. Further, when considering the number of trusts that will be affected by the Court's ruling in this case, several factors establish that the number is nothing close to all trusts established since 2004. First, the instances in which a trust settlor establishes a revocable trust that serves as a testamentary substitute would have to carved out of the set of all trusts signed since 2004 (the "First Subset"). Second, the instances in which a child or the issue of a deceased child are entirely disinherited, and are not named or expressly referred to[3] within the trust would have to be carved out of the First Subset (the

[3] Although the Respondent presents his arguments to the Court as though no members of the bar have drafted *inter vivos* testamentary substitute trusts with an eye towards the risk of a pretermitted beneficiary claim, on information and belief, many practitioners have indeed as a matter of practice named the disinherited children and issue of a deceased child, in anticipation that a pretermitted beneficiary claim could be made pursuant to the NH Trust Code, and more

"Second Subset"). Third, because the trusts implicated here are revocable when established, the situations where the trusts have become irrevocable as a result of the incapacity or death of the settlor[4] would have to be carved out of the Second Subset (the "Third Subset"). Finally, the trusts where any statute of limitations has passed to establish the rights of the pretermitted beneficiaries would have to be carved out of the Third Subset (the "Final Subset"). There is no way for any of the parties before the Court to know the size of the Final Subset, but the Petitioners suspect that the number of trusts affected would be very small, and unworthy of an overreaction that would undermine the clear meaning of RSA 564-B:1-112.

V. THE INTRODUCTION OF SB311, AN APPARENT EFFORT TO SUBVERT THE LAW, IS IRRELEVANT.

SB 311 proposes an amendment to RSA 564-B:1-112.[5] It is not the law. The status of this bill as of January 31, 2018 is that it is before the Senate Commerce Committee with no action on the docket. *See* Addendum (Reply) Page 5. The amendment is not law and is of no application to this matter. Further, as set forth in detail in the Petitioners' Objection to Motion to Stay previously filed with this Court, that they will not rehash here, RSA 564-B:1-112 may not be amended retroactively as a matter of law.

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importantly to ensure that the Settlor's intentions, including the intention to disinherit, are absolutely clear.

[4] A revocable trust could be amended by the settlor to address a pretermitted beneficiary issue.

[5] Although it is not personally known to the Petitioners how SB 311 came before the New Hampshire legislature, counsel for the Petitioners was present at a hearing on the bill before the Senate Commerce Committee on January 9, 2018. At the hearing, testimony was provided in favor of the legislation by three parties, Attorney Perlow, who represents the *Amicus* party and Attorneys Kanyuk and Neal, who work at the law firm where the Teresa Craig Trust was drafted.

VI. DESPITE THE PENNSYLVANIA SUPREME COURT'S REVERSAL OF THE INTERMEDIATE APPELLATE COURT'S ULTIMATE DECISION IN *IN RE: TRUST UNDER DEED OF KULIG,* THE ANALYSIS APPLIED BY THE PENNSYLVANIA SUPREME COURT SUPPORTS THE PETITIONERS' CONSTRUCTION OF RSA 564-B:1-112

Contrary to the *Kidwell* decision relied upon by the Respondent, which did not concern the construction of Uniform Trust Code Section 1-112, the matter of *In re: Trust Under Deed of David P. Kulig Dated January 12, 2001,* 2017 WL 6459001 (December 19, 2017), concerned the construction of Pennsylvania's version of Uniform Trust Code Section 1-112, which modified the language from that in the uniform act. *See* Addendum (Reply) Page 8. Pennsylvania's adoption of Section 1-112 is found at 20 Pa.C.S.A. §7710.2, which states as follows:

> 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.

See Addendum (Reply) Page 6. The Pennsylvania legislature also provided its own commentary to the statute, stating that it imported "20 Pa.C.S. §§ 2507, 2514 and 2517 and other statutory and judicial rules of interpretation that apply to trusts under wills." *See* Addendum (Reply) Page 7.

Unlike the Pennsylvania legislature, whose commentary contains express references to certain statutory rules of construction imported by its version of Uniform Trust Code Section 112, the New Hampshire legislature has no commentary to RSA 564-B:1-112. Thus, the official commentary to the Uniform Trust Code serves as the legislative intention. *See Hodges v. Johnson,* 2017 WL 6347941 (NH December 12, 2017). The Pennsylvania Supreme Court construed 20 Pa.C.S.A. §7710.2 considering the Pennsylvania legislature's commentary and the state's overall statutory scheme. *See In re: Trust Under Deed of David P. Kulig Dated January 12, 2001,* 2017 WL 6459001 (December 19, 2017). Addendum (Reply) Page 8. This Court must construe RSA 564-B:1-112 considering the official commentary and New Hampshire's legislative scheme, which is dramatically different from that in Pennsylvania.

Ultimately, the fact that Pennsylvania had, prior to its adoption of the Uniform Trust Code, statutorily established the right of a surviving spouse, not just pretermitted spouses, to receive one-third of the deceased spouse's probate and non-probate property, including the assets held in an *inter vivos* trust, led to its reversal of the lower appellate court's decision.

The Pennsylvania statutes contain two provisions that protect a surviving spouse. One of those statutes allows the surviving spouse to elect to take one-third of the deceased spouse's probate estate and all non-probate property over which the deceased spouse retained control during his or her lifetime. Pa. 20 C.S.A. §2507(3), Addendum (Reply) Page 22. The non-probate property against which the surviving spouse could take one-third includes the assets of a revocable trust. *In re: Trust Under Deed of David P. Kulig Dated January 12, 2001,* 2017 WL 6459001 (December 19, 2017). The other statute essentially allows a spouse who receives no property under a will to receive an intestate share, one-half, of the deceased spouse's probate estate. Pa. 20 C.S.A. §2203. Addendum (Reply) Page 25. This statutory scheme was in place prior to Pennsylvania's adoption of the Uniform Trust Code, and the Pennsylvania Supreme Court declined to hold that the Pennsylvania legislature intended to disrupt the statutory scheme that provided for a spouse to receive one-third of an *inter vivos* revocable trust by incorporating the statute that allows the pretermitted surviving spouse of a will made pre-marriage to receive one-half of the probate estate. *In re: Trust Under Deed of David P. Kulig Dated January 12, 2001,* 2017 WL 6459001 (December 19, 2017). Addendum (Reply) Page 8. The Court noted the absurdity of the result that would arise if a pretermitted spouse such as Mrs. Kulig, who was married only a month before Mr. Kulig died, could elect to receive one-half of the deceased spouse's estate and *inter vivos* trust, whereas a surviving spouse of a marriage of many years

would be limited to one-third of the deceased spouse's probate and non-probate property, including an *inter vivos* trust.[5] *Id.*

In New Hampshire, a forgotten or accidentally omitted beneficiary had no established rights prior to the enactment of RSA 564-B:1-112. The enactment of that statute established those rights and there is no disruption or conflict with other provisions within the New Hampshire statutes such as was the case in Pennsylvania.

VII. THE LAW CONCERNING THE PROTECTION OF THE INTENTION OF A TRUST SETTLOR IS THE SAME AS THE LAW CONCERNING THE PROTECTION OF THE INTENTION OF A TESTATOR

The *Amicus* party contends that applying the pretermitted heir rule to trusts would be inconsistent with New Hampshire law governing the protection of the intention of a trust settlor. However, New Hampshire law is well established that the fundamental principle in the construction of wills is the preservation of the intention of the testator. *In re: Estate of Donovan,* 162 N.H. 1, 4, 20 A.3d 989, 992 (2011). Indeed, the *Amicus* party cites to a case concerning a **will**, *Burtman v. Butman,* 97 N.H. 254, 85 A.2d 892 (1952) in support of its proposition regarding the sanctity of intention. The foundation of this Court's application of this principle to trusts is its application to wills. *See Bartlett v. Dumaine,* 128 N.H. 497, 524, 523 A.2d 1, 6 (1986) (*citing In re: Frolich Estate,* 112 N.H. 320, 327, 295 A.2d 448, 453 (1972)).

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[5] Mrs. Kulig's stepchildren submitted that Mrs. Kulig would receive $1.5M more of Mr. Kulig's property if the pretermitted spouse statute was incorporated by 20 Pa. C.S.A. §7710.2 than she would receive if she the pretermitted spouse statute was not applicable to *inter vivos* trusts under 20 Pa. C.S.A. §7710.2.

However, the pretermitted heir statute is a statutory exception to this principle with respect to the construction of wills. Applying that rule of construction to *inter vivos* trusts that serve as will substitutes preserves the consistency of the construction of both types of testamentary documents.

The *Amicus* party goes on to suggest that reformation of a trust may occur when a beneficiary is forgotten or accidentally omitted. The Respondents disagree and suggest that opening the door to allow trust reformation proceedings to include omitted beneficiaries, which would not be limited to the children and issue of deceased children of a settlor, would be the opening of a pandora's box. It would be short-sighted to allow such proceedings that would just establish a precedent for litigation over the intention of a settlor.

Respectfully submitted,

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Statement of Compliance

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