Jack Straw Fortnightly*

the pedant's pedant

"Or occasional." This time not even two weeks. Maybe we could number this issue ten point five.

Not just yet

I was intending to write up the decision of the 5th Circuit federal appeals court in *PBBM-Rose Hill, Ltd. v. Commissioner*, affirming a transcript opinion of the Tax Court which had disallowed a claimed charitable contribution deduction for a conservation easement over a golf course.

Though this had not been made particularly clear in the text of the transcript opinion, the concern was that language in the easement deed would have allocated additional proceeds to the holder of the servient estate in the event of a condemnation, to account for improvements made subsequent to the grant of the easement.

The Tax Court ruled, and the appeals court affirmed, that this mechanism failed the "perpetuity" requirement of section 170(h)(5)(A), as elaborated in reg. section 1.170A-14(g)(6), which requires that proceeds of a condemnation be shared in proportion to the relative values of the easement and the servient estate on day one, without regard to later improvements.

Maybe we can cover this in more depth another time. Certainly there is room to argue that the regulation is wrong. IRS itself had ruled privately in PLR 200836014 that an "improvements" clause was permissible.

But not just yet.

Also I was thinking of writing up the notice of proposed rulemaking published August 27, which would formalize the position IRS asserted in Notice 2018-54, that state legislative proposals seeking to make an end run around the $10k cap on the deductibility of state and local taxes by offering tax credits in exchange for deductible contributions to specified organizations would fail under a substance over form analysis.

But again, maybe another time.

Instead, I want to talk about a decision that came out of the New Hampshire state supreme court last Friday. These other items will have to wait.

This is what you get

I had been awaiting a ruling from the New Hampshire supreme court in the *Craig Trust* case, which we talked about in Jack Straw number three. That ruling finally came last Friday. Not all that well reasoned, and arguably a "wrong" result.

The petitioners have until the 17th to file a motion for rehearing, but there may not be much percentage in that, for reasons we will get into in a moment.

Rather than go into the entire history of this case here, I will refer you to the discussion in Jack Straw number three, linked above. The question before the court was whether the state's pretermitted heir statute should apply to reinstate a decedent's grandchildren as remainder beneficiaries of her revocable trust.

Back in 2001, the court had ruled in *Robbins v. Johnson*, 147 N.H. 44 (2001), that the statute by its express terms referred only to a "testator," a "will," and an "intestate share," none of which should be understood to apply to a decedent's revocable trust absent a "clear indication" from the legislature to this effect.

But three years later, the New Hampshire legislature enacted the Uniform Trust Code nearly wholesale, including section 112, which does import the "rules of construction" for wills, "as appropriate," to the interpretation of trusts. And the authors of the uniform code had made it clear that a pretermitted heir statute is exactly the kind of thing they had in mind.

While the *Craig* case was already pending in the supreme court, a handful of interested parties persuaded the state legislature to enact a measure amending section 112 to "clarify" that the pretermitted heir statute "is not a rule of construction" and "does not apply to any trust."

Again, all of this is explored in much more detail in Jack Straw number three, with some followup in numbers five and six. Apparently I cannot leave this alone.

Right now I want to zero in on exactly what is "wrong" with the court's ruling last week in *Craig*.

What is it trying to say

Of course it would have been distasteful for the court to rule that SB 311 applies retroactively. It was bad enough lawyers involved with the drafting of the disputed documents had to show up at legislative committee hearings to testify that "everyone" always understood the statute did not mean what it appeared to mean. These are ACTEC fellows, for god's sake.

Anyway, for whatever reason the court chose not to go that route. Instead, the court endorsed the trustee's argument that the pretermitted heir statute is not a rule of construction at all, but rather "a rule of law."

A "rule of construction," said the court, here paraphrasing the trustee's argument,

> is intended merely to provide guidance relative to the

> interpretation of a will[,] which the decision-maker is free to accept or reject depending on the circumstances of the particular situation[,]

whereas a "rule of law," if it applies, dictates the result.

And there is a meaningful distinction being drawn here, but it has to do with whether a presumption can or cannot be rebutted by extrinsic evidence, not with whether the presumption is or is not a rule of construction. Unless the one implies the other.

The court cited *In re Lathrop Estate*, 100 N.H. 393 (1956), for the general proposition that

> [a]rbitrary canons of construction give way to a single broad rule of construction that always favors rather than opposes the testamentary disposition,

etc., but the actual decision in *Lathrop* was that a bequest of the decedent's "personal effects" was in the nature of "a private trust with indefinite beneficiaries," therefore the bequest failed and the property passed with the residue.

In other words, the court in *Lathrop* applied a rule of construction that could have resulted in a partial intestacy, if this had been a residuary bequest, despite the "broad rule."

So maybe not the best citation for the purpose.

The pretermitted heir statute attributes meaning to the testatrix' silence on a matter on which she might be expected to express herself. If she omitted to provide for grandchildren by a predeceased child, this is presumed to be a mistake. The presumption can be rebutted, but only by other indications from within the document itself.

A competent draftsperson understands that what the statute requires is that the testatrix put one sentence in her will, literally saying "I intentionally leave nothing to my grandchildren," and naming them. She need not say why.

And if section 112 arguably does import rules of will construction into the trust code, put a similar sentence in the trust document.

Not difficult, and the downside of not doing it is all this litigation and having to go hat in hand to the state legislature.[fn. 1]

Lorem ipsum dolor sit amet

The court went on to cite two of its own previous decisions, which said the pretermitted heir statute is not a "presumption," but a "rule of law." But each of those cases was actually decided -- as these cases typically are -- on the basis that other language elsewhere in the will did not "sufficiently" reference the omitted heirs to overcome the, um, "to preclude application of the statute," yeah, that's the ticket.

And then the court cited decisions from other states that have recited the commonplace that "pretermitted heir statutes have no application to trusts." Absent a statute like section 112. Therefore not relevant to our situation.[fn. 2]

Okay, so what about section 112. And this is where the petitioners might actually have a shot at a rehearing.

Just a few months ago, this very court ruled in *Hodges v. Johnson*, see Jack Straw number one, that "the intention of the drafters of a uniform act" as expressed in the official comments "becomes the legislative intent upon enactment," and the court will "rely upon" those comments to construe the statute if there is any ambiguity.

The fact that the legislature found it necessary to "clarify" section 112 fourteen years after the fact suggests there was an ambiguity. Is the pretermitted heir statute a "rule of construction" or not.

The official comments to section 112 of the uniform code expressly acknowledge that the legislative text 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 pretermitted heir statutes as an example of a will construction rule that "ought to" apply to revocable trusts.

Going one or two levels deeper, the "notes on decisions" following the commentary characterizes the 2001 decision in *Robbins* as "unfortunate."

According to *Hodges*, the legislature "knew" all this back in 2004 and enacted section 112 anyway, without the "clarification." Therefore they intended to enact comment e.

Obviously that is a fiction, but it is our fiction.

Post mortem

So, what should the court have done differently. And what might they do differently on a motion for rehearing if they still want to reach the same result.

Jack wants to go on record here as saying he has no particular brief for the Restatement (Third). As he has mentioned more than once in these pages, a revocable trust is, or at least used to be, a rather different animal from a will, and there is no reason they "should" be treated identically.

Except that apparently we are trying to simplify everything so that even an amateur can navigate this space. And why not.

In other words, the result here may not be "wrong" from a policy perspective. But the court should have the courage of its convictions. Obviously the pretermitted heir statute is a rule of construction, and obviously section 112 was intended by its drafters to import the rule into the trust code. They said as much.

And if we want to maintain the fiction recited in *Hodges* that the legislature intended what the drafters said in their commentary, then we have to accept that at least until May 30 of this year, when the governor signed off on SB 311, the pretermitted heir statute applied to revocable trusts. Period. Unless the "clarification" is effective retroactively.

That is the question the court should have confronted.

Tubes and wires

[fn. 1]

Incidentally, in this particular case, although there was a boilerplate clause in the decedent's will that purports to exclude heirs not named in the document, it is not entirely clear that the clause as drafted actually accomplishes the purpose of overcoming the statutory presumption that the decedent did not know what she was doing. But that is a separate case, for which we have not yet seen anything online.

[fn. 2]

The Arkansas decision cited here, *Kidwell v. Rhew*, 371 Ark. 490, 268 S.W.3d 309 (2007), might at first appear to be an anomaly. The Arkansas legislature did enact its version of the uniform trust code, including section 112, in 2005, prior to the decision in the case. However, the statute appears to apply prospectively only, contrary to the recommendation of the drafters. The decedent had died in 2004. Neither the parties nor the court mentioned the possible application of the statute to the situation at hand.

Subsequently, in *Tait v. Community First Trust Co.*, 2012 Ark. 455, 425 S.W.3d 684 (2012), the Arkansas court declined to apply section 112 in resolving the question whether a remainder interest in a decedent's revocable trust lapses if the named beneficiary predeceases. As the court correctly noted, there is no need to apply an anti-lapse statute in this situation, as the remainder interest was not contingent on surviving the settlor, but vested subject to defeasance.

**Jack says,
the failing light illuminates the mercenary's creed.**