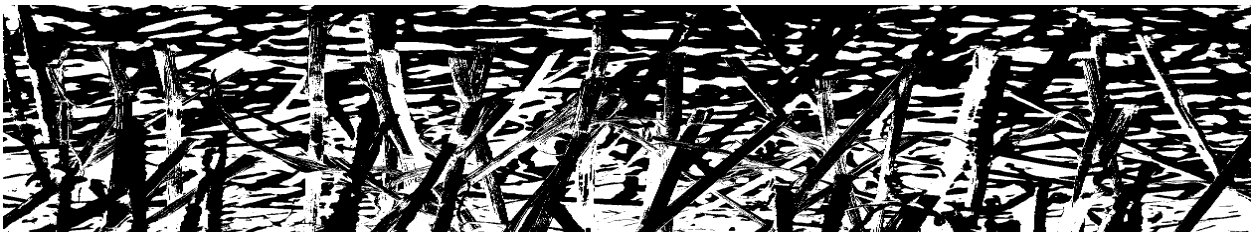

Jack Straw Fortnightly*

"as appropriate"

Oral argument to the New Hampshire supreme court is set for March 15, but by then the dispositive question may already have been decided by the state legislature.

Having cleared the commerce committee on a vote of five to zero, SB 311 was on the senate consent calendar this morning, and unless something intervenes to derail the measure, the house may be able to complete its work and deliver a final bill to the governor within weeks.

The proponents openly acknowledge they are seeking to secure a particular result in a live controversy, *In re Craig Trust*, now before the state supreme court. Two grandchildren of the deceased settlor of a revocable trust are claiming they should be entitled to a share of the trust as "pretermitted heirs."

Section 564-B:1-112 of the New Hampshire statutes, enacted in 2004 as part of a nearly wholesale adoption of the Uniform Trust Code, imports the rules of construction for wills into the trust code "as appropriate." But just three years earlier, in *Robbins v. Johnson*, 147 N.H. 44 (2001), the supreme court had declined to extend the pretermitted heir statute, section 551:10 of the probate code, to a decedent's revocable trust "absent clear indication from the legislature that this is its intention."

So the question before the court in *Craig* is whether by enacting section 112 of the uniform code the legislature did express an intention to extend the pretermitted heir statute to trusts in "appropriate" circumstances, and if so what those circumstances are.

In twenty-two words, the pending legislation would "clarify" that, "for purposes of this section," *i.e.*, section 112, the pertermitted heir statute is not a "rule of construction," so that the question whether it would be "appropriate" to apply it to a particular trust would not arise.[fn. 1]

A tangled path

When the settlor first created the trust in 1999, about a year after marrying her second husband, both her adult sons from her first marriage were still alive and each of them had children. Under the terms of the trust, if her husband did not survive her, the remainder after the settlor's death was to be divided into equal shares for the two sons.

If either son predeceased her, his share was to pass to his descendants, per stirpes.

The spouse and one son did predecease, and if the settlor had done nothing further, that son's share would have descended to the two grandchildren. But in 2012 the settlor amended the trust, leaving everything to the surviving son, and she executed another will, pouring the residue of her probate estate over to the trust as amended.

She said nothing in either document to make clear she understood she was disinheriting the two grandchildren.

There was boilerplate in the pourover will saying the omission of "any" child or more remote descendant was intentional, and not the result of "accident, mistake[,] or inadvertence." The will did not mention the deceased son or either of the grandchildren by name.

The grandchildren petitioned the probate court to determine that this language was not sufficient to disinherit them, and also to require the trustee to produce a copy of the trust document so they could build a case that they were "pretermitted" remainder beneficiaries under the trust as well, and/or lay the groundwork for a possible claim of undue influence.

The trustee objected, but after the trial court ordered him to produce copies of both the 1999 trust and the 2012 amendment for *in camera* review, he simply delivered copies to the lawyer for the grandchildren. In its order transferring the matter to the supreme court for a determination on the question of statutory construction, the trial court noted the trust document also did not mention the deceased son or either of the grandchildren.[fn. 2]

Friends like these

Once again, as in the *Hodges* case, which was the subject of our first issue back in January, a membership organization of lawyers and corporate fiduciaries sought to file an amicus brief. The grandchildren objected, and the trial court deferred the question to the supreme court, which ultimately granted leave.[fn. 3]

Both the amicus brief and the brief for the trustee take the position that a pretermitted heir statute is not a "rule of construction" at all, despite the fact that it does attribute meaning to the testatrix' silence on a matter on which she might be expected to express herself.

The crux of that argument is that there may be -- and indeed there have been, in several cases that have come before the court over the years -- circumstances in which the statute operates to defeat the testatrix' intent, as ascertained by reference to extrinsic evidence which the statute does not permit the court to consider.[fn. 4]

But this is an argument for legislative revision of the pretermitted heir statute itself, to admit extrinsic evidence under at least some circumstances. It does not address the question what the legislature intended when it enacted section 112 in 2004.

On that point, both the trustee's brief and the amicus brief argue that if the legislature had intended to overturn the then recent decision in *Robbins*, it would have said so. The amicus brief notes that the minutes of the two legislative committees that handled the 2004 enactment do not include any mention of *Robbins* or of the pretermitted heir statute.

Factoring one twelve

This argument is perhaps disingenuous. The bill as introduced ran nearly forty pages. At the hearing before the senate judiciary committee, the sponsor remarked, "we were not trying to kill trees with this bill. It just turned out to be a rather large subject matter."

The minutes from the house committee hearing in January 2004 are very brief, but they do mention that the chair of the thirty-odd member ad hoc drafting committee walked the panel through the bill "by section."

The minutes from the senate committee hearing in April, by contrast, are nearly verbatim, and while most of the discussion focused on a couple of other issues, one member of the drafting committee testified at some length on what they were trying to accomplish -- primarily, to bring certainty to an area of law that had until then been developed haphazardly through litigation on unsettled questions.

That witness testified on the one hand that the committee "felt pretty comfortable that we really aren't working substantial changes in what we think New Hampshire law is," but on the other hand that the uniform code "does substantially conform to the restatement."

The latter remark is telling.

The uniform laws commissioners identified section 112 as "optional." The commentary suggests that state legislatures might instead want to enact "detailed rules on the construction of trusts." The New Hampshire legislature did not take that approach.

More to the point, the commentary expressly acknowledges that it 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. The "notes on decisions" following the commentary characterizes the decision in *Robbins* as "unfortunate."

None of this was mentioned in the committee hearings in 2004, but the New Hampshire courts have said repeatedly, most recently in *Hodges*, that "the intention of the drafters of a uniform act becomes the legislative intent upon enactment."

Don't know much about history

Shortly after work on the uniform code was completed, the reporter, Prof. David M. English of the University Missouri School of Law, published several law journal articles in which he acknowledged that the phrase "as appropriate" in section 112 "masks some very difficult questions. Not all will construction rules should necessarily be applied to trusts," he said, and

"[e]ven those that should apply may require modification due to the legal distinctions between wills and trusts."

As an example, Prof. English cited anti-lapse statutes, which provide for alternative takers in the event a legatee or devisee predeceases the testatrix. In New Hampshire, section 551:12 indicates "the heirs in the descending line" of the predeceased taker. Because of the way the common law of trusts has developed, an anti-lapse statute is actually unnecessary to accomplish this result in the case of a revocable trust functioning as a will substitute. Bear with me here a moment.

A transfer under a will does not take effect until the testatrix' death, whereas a remainder after the death of the settlor of a revocable trust is actually vested at the moment the trust is created, subject to defeasance by the settlor amending or revoking the trust, or by consuming the corpus during her own life.[fn. 5]

This analysis was actually necessary to the courts' almost grudging recognition of revocable trusts starting a little over a century ago. If the transfer were not treated as a completed gift, it would instead be a failed testamentary transfer.

The restatement and the uniform code threaten to erase these distinctions, and while that may or may not prove to be a "good thing," it is probably unrealistic to say legislature clearly understood the nuances of what they were doing in enacting section 112 of the uniform code in 2004. After all, it is not entirely clear the lawyers on the ad hoc drafting committee understood those nuances. The lawyer whose testimony before the senate judiciary committee in 2004 is quoted above also appeared before the commerce committee a few weeks ago to testify briefly against SB 311 on the ground it is "a fix we don't need," because in his view it is already "clear" that section 112 does not apply the pretermitted heir statute to trusts.

The problem of *Kulig*

In her opening brief, the lawyer for the grandchildren noted that an intermediate appeals court in Pennsylvania had ruled, in *Kulig Trust*, 2015 PA Super 271 (Pa. Super. 2015), that state's enactment of section 112 of the uniform code extended the state's pretermitted spouse statute, section 2507(3), to a revocable trust.

The effect was to include the assets of the decedent's revocable trust in the pretermitted spouse's intestate share -- one-half, as the decedent was survived by children from a prior marriage --, which was considerably more advantageous to her than electing against the will and claiming only one-third.

At the time that brief was filed, the *Kulig* decision was still pending review by the state supreme court. Two weeks later, a majority of that court reversed,[fn. 6] finding it was not "appropriate," within the meaning of section 112, to extend the pretermitted spouse statute to a revocable trust, where the legislature had already provided an alternative remedy through the elective share statute.

In his response brief, the lawyer for the trustee in *Craig* mistakenly characterized *Kulig* as having determined that the pretermitted spouse statute was not a "rule of construction." To the contrary, the court said this point was "materially undisputed."

The amicus brief spent nearly a page arguing the court in *Kulig* had ruled section 2507(3) "did not apply to trusts," without mentioning the court's rationale, *i.e.*, the inconsistency with the existing remedial structure of the elective share statute.

In a parenthesis on the last page of its brief, the amicus did somewhat more accurately describe *Kulig* as having rejected the argument that it would be "appropriate" under section 112 to apply the pretermitted spouse statute to a revocable trust.

But the phrase "elective share," which was key to the court's analysis in *Kulig*, appears nowhere in either brief.

The key takeaways from *Kulig* are (a) that the pretermitted heir statute is indeed a "rule of construction" and (b) that the phrase "as appropriate" places the policy details in the hands of the courts.

Circular reasoning

The response brief for the trustee also makes the rather startling argument that the mere introduction of SB 311 in the current session somehow confirms what the legislature intended back in 2004. Even if the bill is enacted, as does appear likely, it is not entirely clear that it would apply retroactively.

At the January 9 senate committee 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.

Yet more stray notes

[fn. 1]

The consent calendar report submitted by the vice chair of the commerce committee mistakenly says SB 311 "would amend the wills chapter," *i.e.*, section 511:10, rather than the trust code. While one witness at the January 9 committee hearing did express the view this would have been a better approach, she also said the "clarification" was unnecessary.

The calendar explanation then says, somewhat gratuitously, that "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, despite the possibility that section 112 might actually mean what it seems to at least maybe mean.

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 (c) there is no evidence within the document itself that 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, in order to overcome the statutory presumption that it is not.

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 heir statute, and one might imagine a "careful" lawyer would take this into account.

The consent calendar report says nothing about the fact that the bill is intended to determine the outcome in the *Craig Trust* case.

[fn. 2]

Although the transfer order does not mention this, apparently the trust document did not include even boilerplate language to overcome any presumption section 112 might import from the probate code that the exclusion of unnamed heirs was unintentional.

At the committee hearing on SB 311 on January 9, the lawyer who at that time[*] represented the trustee in the probate proceeding testified it was her understanding that "all" estate planning lawyers "believe" the pretermitted heir statute "does not apply to trusts."

Another lawyer from the same firm speculated that if SB 311 is not enacted, this would "raise the question" whether other nonprobate transfers are also susceptible to claims of pretermitted heirs. It is unclear on what this speculation was based.

[*] That lawyer's bio has since been deleted from the firm's website, but her LinkedIn profile has not yet been updated.

[fn. 3]

The amicus brief opens with a disclaimer that although two lawyers in the small firm that drafted the 2012 trust amendment are directors and equity owners of a member trust company, neither of them participated in the decision to file the brief, nor in preparing the brief itself. The amicus brief in *Hodges* opened with a similar disclaimer. But in fairness, New Hampshire is a rather small state.

[fn. 4]

Notably, *In re Jackson*, 117 N.H. 898 (1977), in which the drafting lawyer testified over the objection of the guardian *ad litem* for three children of a former spouse

the testator had adopted during that marriage that he intended to omit them. The supreme court ruled this evidence was inadmissible.

[fn. 5]

Justice Duggan picked up on this point in his special concurrence in R*obbins v. Johnson*, when he mentioned almost in passing that "[d]uring [the settlor's] lifetime, the defendants had a vested remainder in the trust." What he omitted to say is that the remainder was vested "subject to defeasance."

[fn. 6]

The dissent in *Kulig* is linked here.

Jack says

Jack calls shenanigans.

At the hearing in January, proponents of SB 311 testified that estate planning lawyers have simply "believed" that section 112 does not apply the pretermitted heir statute to a revocable trust functioning as a will substitute.

What might be the basis for that belief they did not exactly say.

But they argued that enacting this "clarification" will preserve a supposed "status quo" in which folks have been drafting revocable trusts that exclude children and descendants of deceased children without mentioning them.

As if that were a desirable state of affairs.

And that if it is not enacted and the supreme court rules in favor of the grandchildren in *Craig*, all hell will break loose with respect to trusts that have become irrevocable since 2004.

Jack says show me the data. How many lawyers drafting how many trusts who for some reason or another "believed" section 112 does not import one or another particular rule of will construction.

How many revocable trusts functioning as will substitutes in which a line of descent has been excluded only implicitly, on which the limitations statute has not run, etc., etc.

Vanishingly small, probably, but show me the data.

It would have been as simple as adding one sentence to each of these documents saying, "I intentionally leave nothing to my grandchildren," and naming them.

What on earth is the downside? You are not required to explain why.

Putting aside section 112 and the *Craig* litigation for a moment, what "ought" the result to be, where a settlor is using a revocable trust as a will substitute?

If we do not care about pretermitted heirs, maybe we should repeal section 551:10.