State of New Hampshire
Supreme Court

NO. 2010-0069

2010 TERM

MAY SESSION

Estate of Gertrude A. Finnegan

RULE 7 APPEAL OF FINAL DECISION OF
HILLSBOROUGH COUNTY PROBATE COURT

BRIEF OF PETITIONERS/APPELLEES
SCOTT MACKIE, TERESA D'AMBROSIO and LEEANN DONOVAN

By: Joshua L. Gordon, Esq.
NH Bar ID No. 9046
Law Office of Joshua L. Gordon
26 S. Main St., #175
Concord, NH 03301
(603) 226-4225

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STATEMENT OF FACTS AND STATEMENT OF THE CASE

Gertrude Finnegan had three children, Paul, Beverly, and Deanna.[1] Deanna died in March 2001, leaving three children, Scott, Teresa, and LeeAnn, the petitioners here. Gertrude executed a will in October 2004, three-and-a-half years after Deanna died, when Gertrude was 79 years old. The will provided, in relevant part:

> ARTICLE III. I give [everything] in equal shares to my children, Paul … and Beverly …. If any one of my children shall predecease me her share thereof shall pass to her issue then living by right of representation.
>
> ARTICLE IV. For purposes of avoiding any further dispute and explanation, I herewith declare that the interest I possess [in real estate] shall go to my children, Paul … and Beverly….
>
> ARTICLE VI. Reference [in] this will to the masculine/singular shall be construed to include the feminine/plural where appropriate.

LAST WILL AND TESTAMENT OF GERTRUDE A. FINNEGAN, *Appx*. at 4, 5.

Gertrude died in 2007. Probating of the will occurred in the normal course. Scott, Teresa and LeeAnn petitioned for their intestate share as pretermitted heirs pursuant to RSA 551:10.[2] The Hillsborough County Probate Court (*Richard A. Hampe*, J.) granted the request, and the estate appealed.

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[1] For ease of understanding first names are used throughout this brief. No disrespect is intended.

[2] "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.

SUMMARY OF ARGUMENT

The petitioners, Scott Mackie, Teresa D'ambrosio and LeeAnn Donovan, are the grandchildren of testator Gertrude Finnegan. They are the children of Gertrude's dead daughter, Deanna.

Scott, Teresa, and LeeAnn first review the pretermitted heir statute, the purpose of which is to protect forgotten heirs by ensuring them their share of an ancestor's bounty. To avoid application of the statute, the testator must actually name or distinctly and personally refer to the disinherited heir in her will.

They point out that Gertrude's will does not personally name or refer to Deanna, and that she appears forgotten. They argue that vague implications are not sufficient references. They also note that regardless of the meaning given to the word "children," they inherit under the will.

ARGUMENT

I. Forgotten Heir Statute Protects Against Forgetfulness

The purpose of the forgotten heir statute, RSA 551:10, "is to prevent a mistake or unintended failure by the … testatrix to remember the natural object of … her bounty." *In re Estate of Came*, 129 N.H. 544, 547 (1987) (quotation omitted). "It prevents forgetfulness, not disinheritance," and "shield[s] against the inequitable result of enforcing a will containing an inadvertent omission." *Royce v. Denby's Estate*, 117 N.H. 893, 896 (1977). The statute "protects a testator's heirs against unintentional omission from the testator's will." *In re Estate of Laura*, 141 N.H. 628, 633 (1997). *See also*, *In re Estate of Treloar*, 151 N.H. 460, 462 (2004); *In re Estate of Robbins*, 145 N.H. 145, 147 (2000); *Boucher v. Lizotte*, 85 N.H. 514 (1932); *Gage v. Gage*, 29 N.H. 533 (1854).

"New Hampshire's strong policy in favor of protecting pretermitted heirs," *In re Estate of Rubert*, 139 N.H. 273 (1994), has been on the books in some form since 1716, and in essentially its current form since the 1830s. *Smith v. Sheehan*, 67 N.H. 344 (1893); *Eyre v. Storer*, 37 N.H. 114 (1858); *Gage v. Gage*, 29 N.H. at 533; DEGRANDPRE, 7 *New Hampshire Practice, Wills, Trusts and Gifts* § 14.01.

The policy is in recognition that old people tend to be forgetful, and that "it being reasonable to suppose that those about the sick and the aged would not be anxious to remind them of the absent unnecessarily." *Gage v. Gage*, 29 N.H. at 542. Those absent and forgotten may include a child of a former marriage, *In re Estate of MacKay*, 121 N.H. 682 (1981), or a child already dead. *In re Estate of Treloar*, 151 N.H. 460 (2004).

There is a substantial body of law in New Hampshire and elsewhere regarding

pretermitted children, presumably because disinheriting, whether by intention or lapse, can cause tragic consequences. WILLIAM SHAKESPEAR, *King Lear* (1623) (Cordelia disinherited by father King Lear for failure of flattery); SIR WALTER SCOTT, *Ivanhoe* (1819) (Ivanhoe disinherited by father Cedric for supporting King Richard and falling in love with Lady Rowena); F. SCOTT FITZGERALD, *The Beautiful And The Damned* (1922) (Anthony fears disinheritance by grandfather for hedonist lifestyle and marrying flapper Gloria).

II. Law Presumes Testatrix's Intent is to Leave Bounty to her Children

"The effect of the statute is to create a conclusive rule of law that pretermission of a child is accidental, unless the testator devises or bequeaths property to the child or names or refers to the child in the will." *In re Estate of Came*, 129 N.H. 544, 547 (1987); *In re Estate of Laura*, 141 N.H. 628, 634 (1997). "[I]f a child is not named or referred to in the will, and is not a devisee or legatee under the will, then the statute creates a conclusive rule of law that pretermission of the child was accidental." *In re Estate of Robbins*, 145 N.H. 145, 147(2000).

"The New Hampshire statute reverses the general presumption that a person is deemed to know and approve all dispositions and omissions in her will." *Royce v. Denby's Estate*, 117 N.H. 893, 896 (1977). "It is important to note that the statute … is not a limitation on the power to make testamentary dispositions but rather is an attempt to effectuate a testator's presumed intent." *Id.*

Thus "[t]he statutory presumption will be upheld even if the testator's intent is defeated as a result." *In re Estate of Came*, 129 N.H. 544, 547-548 (1987); *In the Matter of Jackson*, 117 N.H. 898, 903 (1977) ("The formal requirements of RSA 551:10 may in some cases operate to defeat a testator's intent."). "Accordingly, [the court's] task is not to investigate the circumstances to divine the intent of the testator; rather, it is to review the language contained within the four corners of the will for a determination of whether the testator named or referred to the plaintiff." *In re MacKay's Estate*, 121 N.H. 682, 684 (1981).

Extrinsic evidence is not relevant to the inquiry and is therefore not admissible. *In re Estate of Came*, 129 N.H. 544 (1987); *In re MacKay's Estate*, 121 N.H. 682 (1981); *In the Matter of Jackson*, 117 N.H. 898 (1977). Any factual findings of the probate court are accorded

great deference by statute. RSA 567-A:4 ("The findings of fact of the judge of probate are final unless they are so plainly erroneous that such findings could not be reasonably made."). Here the probate court found that the phrase "my children" in the will should be read consistently – either as including Deanna or as not including a reference to her – and that the petitioners were entitled to a share of the estate, either by right of representation or as pretermitted heirs.

III. To Disinherit Testator Must Make Distinct Personal Reference and Provide Clear Evidence of Intent to Disinherit

Intentionally disinheriting one's children is not complex or difficult. It can be done affirmatively. *Estate of Ruel*, 123 N.H. 768, 769 (1983) ("I intentionally make no provision for my adopted daughter… now living, or any children hereinafter born to or adopted by me or for any other issue of mine."). It can be done using the time-tested method of naming the heir but leaving a nominal $1 gift. *Boucher v. Lizotte* 85 N.H. 514 (1932). But disinheritance by implication is not allowed under New Hampshire law, though it may be elsewhere. *See*, *e.g.*, *Royce v. Estate of Denby*, 117 N.H. 893 (1977) (construing New York law).

In order to disinherit, New Hampshire law requires that the heir be actually named or distinctly referred to:

> The statute was designed to lay down a clear, distinct and perspicuous rule, that no testator should be understood to intend to disinherit one of his children or grandchildren upon any less clear evidence than his *actually naming or distinctly referring to them personally* so as to show that he had them in his mind.… The true rule of law is just what is laid down in the statute; if a child or grandchild is not named or referred to in the will, and is not a devisee or legatee, he will take his share, as if the estate was intestate.

Matter of Jackson, 117 N.H. 898, 903 (1977) (emphasis added) (quotations and citations omitted). The personal reference must provide "*clear evidence*" "so as to show that [the testator] had the heir in his mind." *In re Estate of Treloar*, 151 N.H. 460, 462 (2004) (emphasis added) (quotations and citations omitted).

The reference must be within the four corners of the will. *In re Estate of Robbins*, 145 N.H. 145, 147, (2000) (statutory "rule is conclusive unless there is *evidence in the will itself* that the omission was intentional.") (emphasis in original); *In re MacKay's Estate*, 121 N.H. 682

(1981); *Boucher v. Lizotte*, 85 N.H. 514 (1932); *Jones v. Bennett*, 78 N.H. 224 (1916); *c.f.* , *In re Osgood's Estate*, 122 N.H. 961 (1982) (original will, revoked by codicil, named heir; court held naming sufficient to prevent application of statute). The reference may be "indirect," meaning that naming a person includes those in their lineage. *In re Estate of Robbins*, 145 N.H. 145 (2000); *In re Estate of Laura*, 141 N.H. 628 (1997). A person is sufficiently referenced where they are a member of a named class. *Smith v. Sheehan*, 67 N.H. 344 (1892).

IV. Deanna Forgotten

To disinherit Deanna or Deanna's children, Gertrude is required by the statute to have either actually named them in her will, or distinctly and personally referred to them – to show she had them in her mind when she executed it. As the Estate concedes, the will does not name Deanna, and contains no reference to Deanna nor her children. ESTATE'S BRF. at 6. Looking within the four corners of the will, a reader would not be aware that Deanna and her children even exist.

The will provides in relevant part: "I give [everything] in equal shares to my children, Paul … and Beverly …. If any one of my children shall predecease me her share thereof shall pass to her issue then living by right of representation." WILL, *Appx*. at 4, 5.

It appears from the face of the will that Gertrude simply forgot Deanna. This is understandable, since Gertrude executed it when she was 79 years old, three-and-a-half years after Deanna died, and the named children, Paul and Beverly, "would not be anxious to remind" Gertrude of Deanna, *Gage v. Gage*, 29 N.H. at 542, especially because they apparently believed Deanna's children had taken advantage of her.

Thus, looking to the will itself for evidence, Deanna's children are pretermitted and, as the probate court held, should take their intestate shares.

V. Heirs Must Be Discernible to Avoid Being Pretermitted

Where an heir is discernable, the statute does not apply and the claimant is disinherited. In *Boucher v. Lizotte*, 85 N.H. 514 (1932), for example, the testator left a legacy to the "wife of my son Alphonse." Alphonse argued the reference to him was not sufficiently clear and claimed a share. This court found that Alphonse "was not out of the mind of the testator at the time of making his will" and thus held that "the testator's failure to provide for him was not the result of mistake or forgetfulness." *Boucher v. Lizotte*, 85 N.H. at 516. Similarly, in *Estate of Osgood*, 122 N.H. 961 (1982), the child had originally been named in a will, but a codicil revoked the provision, thus showing that the testator had thought about him.

Where, however, it is indisputable that an heir is neither named nor referred to, the heir is deemed forgotten and the statute applies. *Eyre v. Storer*, 37 N.H. 114 (1858), involved the classic situation of a child born after the testator's death and was thus not named. Where children or adoptive children of former marriages are not named in the will, the statute likewise applies. *Estate of MacKay*, 121 N.H. 682 (1981); *Estate of Came*, 129 N.H. 544 (1987); *Matter of Jackson*, 117 N.H. 898 (1977).

In *Gage v. Gage*, 29 N.H. 533 (1854), the testator's son was not named, but the son's children (the testator's grandchildren) were specifically provided for. The question was whether the son was sufficiently mentioned – through the grandchildren – to prevent his claim to an intestate share. This Court held that "the naming of a grandson and describing him as such, is no reference to his father or mother." *Gage v. Gage*, 29 N.H. at 543. Even though the testator was probably aware of his son – being the father of the named grandchildren – the son was neither actually named nor distinctly referred to personally. He was thus deemed forgotten in the will

and took his intestate share under New Hampshire's pretermitted heir statute.

Gage is similar to the Finnegan's situation. Gertrude's will names Deanna's siblings, but not Deanna. Naming them cannot be construed as naming her.

In *Estate of Treloar*, 151 N.H. 460 (2004), the testator executed the relevant will after his daughter had died. It provided for the testator's other two children, but did not name the dead daughter nor her children – the testator's grandchildren. Unlike *Estate of Laura*, 141 N.H. 628 (1997), the will also did not mention anyone in the dead daughter's line of descent. This Court thus held that the pretermitted heir statute applied to the two grandchildren, who were allowed to take their intestate share of the testator's estate.

Treloar is directly on point. Gertrude's will did not mention her daughter Deanna, who had already died when the Gertrude executed her will. Like *Treloar*, the claimant-grandchildren were not named. Here, as in *Treloar*, the children of the dead daughter must be treated as forgotten heirs.

VI. Estate's Argument That Vague References Indicate Remembrance of Deanna is Without Merit

The Estate concedes that neither Deanna nor her children are mentioned in Gertrude's will. ESTATE'S BRF. at 6. In order to avoid application of the statute, the Estate instead urges the Court to interpret vague references, which it claims are to Deanna, as being the equivalent of actually naming or referring to her. These vague references, however, are insufficient to defeat the statute.

A. "Children" Means Just Paul and Beverly

The first vague reference the Estate claims is that gifts "to my children, Paul … and Beverly," because it uses the word "children," also includes Deanna. The argument makes sense only if one accepts that at the time Gertrude made her will she was remembering Deanna, that Gertrude made a decision to disinherit Deanna, and that Gertrude chose the words "to my children, Paul … and Beverly" to effectuate that decision. If remembering and disinheriting were in her mind, however, the words "to my children, Paul … and Beverly" is hardly the way one would express it. The argument rests on a mere implication, which is precisely what the statute bars.

This court has ruled that this phraseology – "to my children, x and y" – does not avoid the statute. In *Dumas' Estate*, 117 N.H. 909, 912 (1977), the will gave to "my grandchildren, David Dumas and Darrell Dumas, in equal shares, to them, their heirs and assigns forever." This court said that construction "ordinarily imports a gift to individuals," unless "it appears upon the whole will that the testator considered them as constituting a class." *Id.* at 912. *Dumas* comports with the law of class gifts generally.

> Where legatees are named as individuals and also described as a class, and there is nothing more to show the testator's intention, the construction usually is that the gift by name constitutes a gift to individuals, to which the class description is added by way of identification. That is, if a clause in a will contains a gift to a number of persons described not only as a class but also named individually, then the gift is presumptively a distributive gift to individuals rather than a class gift. Accordingly, a gift to named individuals is not affected by joining with the enumeration a general expression such as "brothers and sisters," "grandchildren," "children of my deceased daughter," "my said nephews," or "lawful heirs."

80 AM. JUR. 2D *Wills* § 1214 (numerous citations omitted)

There is nothing in Gertrude's will suggesting that "my children, Paul … and Beverly" meant the entire class of her children, which would include Deanna. Thus, as in *Dumas*, the gift is to the individuals named – Paul and Beverly – and Deanna appears forgotten.

B. "Children" Still Means Just Paul and Beverly

The second vague reference the Estate claims is based on the conditional phrase: "If any one of my children shall predecease me her share thereof shall pass to her issue then living by right of representation." The Estate argues that the "if" clause does not refer to Deanna. ESTATE'S BRF. at 8.[3] It then offers a strained reading suggesting that this failure to reference Deanna shows an intent to disinherit her.

It is clear from the clause, however, that Gertrude had simply forgotten about Deanna. Deanna was already dead when Gertrude executed her will, and it would be illogical to refer to her as though her death could be in the future. Rather the clause must therefore refer only to Paul and Beverly, who were alive and whose death could logically be referred to by the conditional "if."

[3]One must note that the sentence ("If any one of my children shall predecease me *her* share thereof shall pass to *her* issue then living by right of representation.") twice uses the female pronoun. This could suggest Gertrude specifically had Deanna in mind, an point not addressed by the Estate. Article VI of the will ("Reference [in] this will to the masculine/singular shall be construed to include the feminine/plural where appropriate.") does not necessarily aid construction because it does not provide that the unusual use of the female pronoun should also mean the masculine. If the feminine pronoun does refer to Deanna, then the petitioners take by right of representation.

Neither of the vague references put forth by the Estate are sufficient to indicate that Gertrude was thinking of Deanna and intended to disinherit her. Neither of them show "clear evidence" that Deanna was actually named or distinctly and personally referred to. The Estate admits this by alleging the vague references provide merely "persuasive evidence." ESTATE'S BRF. at 7. In any event, the references – if that's what they are – are too vague to preclude the application of the statute. As such, Deanna was a forgotten heir, and her children should properly take their intestate share.

VII. Deanna's Children Inherit Regardless of the Meaning of the Word "Children"

"Where words occur more than once in a will, unless a contrary intention appear by the context, or unless the words be applied to a different subject, there is a strong inference that they are used in the same sense." *Fowler v. Whelan*, 83 N.H. 453 (1928); *Barnes v. First Baptist Church*, 82 N.H. 503(1927); *Hall v. Wiggin*, 67 N.H. 89 (1891); *Hall v. Hall*, 27 N.H. 275 (1853).

As the Estate points out, the word "children" appears twice in Article III – "to my *children*, Paul … and Beverly," and in the very next sentence, "[i]f any one of my *children* shall predecease me her share thereof shall pass to her issue then living by right of representation." WILL, *Appx*. at 4, 5 (emphasis added).

The Estate would like the word "children" to change meaning. In the first sentence, the Estate argues, the word means "Paul, Beverly, and Deanna," while in the next it means just "Paul and Beverly." The Estate can provide no basis, however, for such a "contrary intention" that is sufficient to overcome the "strong inference" that the word means the same thing in both places – especially where it appears in the same paragraph and in neighboring sentences.

Because it applies to the same subject and no contrary intention appears from the context, the word "children" must be read consistently. And – whether the word means just Paul and Beverly, or also Deanna – reading the term consistently means Deanna's children inherit under the will. Deanna's children are either surviving issue taking by right of representation, or they are pretermitted under the statute.

The probate court "finds that if the word 'children' used in Article III includes a reference to Deanna … so as not to make her and her issue pretermitted under RSA 551:10, then the

petitioners are legatees pursuant to the last sentence of Article III." The probate court went on: "If the word 'children' as used in Article III is construed so as not to include a reference to Deanna … because it is limited to those children named, then the court finds that the petitioners are pretermitted pursuant to RSA 551:10. ORDER, *Appx*. at 72. Both findings are accorded statutory deference. RSA 567-A:4

Thus Deanna's children inherit regardless of the meaning of the word, and this Court should dismiss this appeal as frivolous.

CONCLUSION

For the foregoing reasons, this Court should affirm the ruling of the Probate Court below.

Respectfully submitted,
Scott Mackie, Teresa D'ambrosio
and LeeAnn Donovan

By their Attorney,

Law Office of Joshua L. Gordon

Dated: May 18, 2010

Joshua L. Gordon, Esq.
NH Bar ID No. 9046
26 S. Main St., #175
Concord, NH 03301
(603) 226-4225

REQUEST FOR ORAL ARGUMENT AND CERTIFICATION

Counsel for Scott Mackie, Teresa D'Ambrosio and LeeAnn Donovan requests that Attorney Joshua L. Gordon be allowed 15 minutes for oral argument.

I hereby certify that on May 18, 2010, copies of the foregoing will be forwarded to Ronald I. Bell, Esq. (*pro hac vice*) and John B. Carroll (local counsel).

Dated: May 18, 2010

Joshua L. Gordon, Esq.