#2018-006

TO: Supreme Court Advisory Committee on Rules
FROM: Timothy A. Gudas, Supreme Court Deputy Clerk
DATE: December 5, 2018

RE: Proposal to Increase Word Limits in Supreme Court Rule 16(11)

On October 25, 2018, the New Hampshire Supreme Court Advisory Committee on Rules issued a Public Hearing Notice to solicit comments on proposed rules amendments, including amendments to Rule 12-D(6) and Rule 16(11) that would increase the word limits of principal briefs (the appellant's opening brief and the appellee's opposing brief) from 9,500 words to 11,250 words. I do not have an ultimate view on the appropriateness of those proposed amendments, but I have five interrelated comments that may be helpful to the Advisory Committee in deciding whether to recommend the amendments to the Supreme Court for adoption.

First, in connection with the development of new electronic filing (e-filing) rules in 2017, the Supreme Court also proposed at that time to amend its then-existing rules concerning the maximum length of briefs from a page limit (35 pages) to a word limit (9,500 words). By order dated September 21, 2017, the Supreme Court put those proposed amendments out for public comment and requested comments by October 23, 2017. No comments were received on the subject of word limits. As a result, the Supreme Court adopted those proposed amendments on March 29, 2018. The word-limit amendments took effect on August 6, 2018, when the Supreme Court implemented e-filing.

Second, in the nearly four-month period since those amendments took effect, the Supreme Court has received one or more briefs in approximately 160

different cases, but has received only a single motion to exceed the word limit. (The motion in that case – an appeal from a homicide conviction in which the defendant is challenging the sufficiency of the evidence – requested an increase to a limit of 10,000 words. The Supreme Court granted the motion.)

Third, as the chart below shows, the word limit for briefs in the New Hampshire Supreme Court is in line with those of our neighboring states of Vermont and Maine. The word limit in New Hampshire is also consistent with those of other states that lack an intermediate appellate court and that therefore rely on their high courts to perform appellate review for "routine" error correction as a substantial component of the caseload.

State Supreme Court	**Word Limit on Principal Brief**
North Dakota	8,000 words. See Rule 32 of North Dakota Supreme Court Rules.
Vermont	9,000 words (but does not include questions presented). See Rule 32 of Vermont Rules of Appellate Procedure.
New Hampshire	9,500 words. See Supreme Court Rule 16(11).
Maine	10,000 words. See Rule 7A of Maine Rules of Appellate Procedure.
South Dakota	10,000 words. See South Dakota Codified Laws, 15-26A-66 (Rules of Civil Appellate Procedure).
Montana	10,000 words. See Rule 11 of Montana Rules of Appellate Procedure.

Fourth, the change from a limit of 35 pages to a limit of 9,500 words works out to 271 words per page, on average. I readily concede that some briefs average more than 271 words per page, but others do not. The difference largely depends upon the particular brief writer's choice of font style, the extent to which the writer includes single-spaced block quotes, the degree to which

the writer eliminates white space, and the existence and number of single-spaced footnotes that are often in a smaller font size.

With respect to font style, the following chart and pages 6 through 14 of this document depict the widely divergent number of words on a page when an excerpt from a New Hampshire Supreme Court opinion is put into different 12-point fonts and double spaced, as Rule 16(11) previously required when the length of a brief was limited to 35 pages. The excerpt strikes me as a reasonably generous representation of a page of a brief – it contains no footnotes, but it includes a single-spaced quote and covers the entire page with text (i.e., no headings, no page breaks to start a new section, limited white space, etc.).

Style of 12-Point Font	**Number of Words on Page**
Courier New (p. 6)	234
Consolas (p. 7)	261
Verdana (p. 8)	266
Palatino Linotype (p. 9)	274
Lucida Fax (p. 10)	278
Century Schoolbook (p. 11)	284
Bookman Old Style (p. 12)	293
Arial (p. 13)	335
Times New Roman (p. 14)	354

A few points of explanation concerning the fonts in the chart: The federal courts of appeals used Courier New as the benchmark when they converted from a page limit (50 pages) to a word limit (13,000 words, which equals 260 words per page), but Courier New is a subpar font for computer reading. The United States Supreme Court requires use of a Century font, such as Century Schoolbook. The New Hampshire Supreme Court uses Bookman Old Style for

its opinions because the justices find it to be very readable. (This document is in Bookman Old Style.) The American Bar Association's Council of Appellate Lawyers notes that Times New Roman has received heavy criticism as a font because it not pleasant to view and it is not very readable on a computer screen. See The Leap from E-Filing to E-Briefing: Recommendations and Options for Appellate Courts to Improve the Functionality and Readability of E-Briefs at 22-23 (2017). As many courts and commentators have noted, a major reason for switching from a page limit to a word limit is to level the playing field so that nobody gains an advantage or suffers a disadvantage in briefing based upon font choice or other formatting decisions.

Fifth, I have reviewed the word-count analysis prepared by Attorney Joshua Gordon. I have no quibbles with its raw numbers, but I draw different conclusions for the following reasons:

- The briefs that do not approach the 35-page limit provide a reliable indicator of the average number of words per page (272) because the attorney in those cases was not concerned with bumping up against the page limit. Therefore, one can reasonably infer that the attorney prepared and formatted the brief in the style most natural to him/her as a writer and most conducive to a Supreme Court justice as a reader.

- The briefs that contain 34 or 35 pages are dense with text, most likely because the attorney needed to fit a brief of 38-39 pages (or more) into a 35-page limit. For example, the three briefs filed in case no. 2016-0390, Massachusetts Bay Insurance Company v. American Healthcare Services Association & a., contain no white spaces or breaks between sections of the briefs, and they average 125 lines of single-spaced text as a result of their liberal use of footnotes and block quotes. The brief in case no. 2016-0357, Condominiums at Lilac Lane Unit Owners' Association v. Monument Garden, LLC & a., likewise contains no white spaces or breaks between sections of the brief, and it has 109 lines of single-spaced text, including 71 lines of single-spaced footnotes.

- The briefs filed by the appellate defender, which contain between 249 and 260 words per page, offer the best single benchmark for calculating the number of words on a page because (a) the briefs are written in Bookman Old Style, the same font that the Supreme Court uses for its readability; (b) the briefs employ single-spaced footnotes and block quotes sparingly, rather than liberally; (c) the appellate defender's office files more appellant's briefs, by far, than any other office or firm; and (d) its briefs, therefore, are not merely one data point among several of equal weight, but instead represent an outsized contributor to the justices' reading load.

For all of these reasons, I do not believe that the Supreme Court's previously adopted change from a limit of 35 pages to a limit of 9,500 words constitutes a decrease in the length of briefs. Accordingly, I am not in favor of the currently proposed amendments to the extent that they are based upon the view that a limit of 11,250 words represents the "accurate" length of a 35-page brief. As noted above, however, I have no view on the ultimate issue as to whether the Advisory Committee should recommend to the Supreme Court that it adopt the proposed amendments increasing the length of briefs from 9,500 words to 11,250 words.

"The interpretation of a statute is a question of law, which we review de novo." STIHL, Inc. v. State of N.H., 168 N.H. 332, 334 (2015) (quotation omitted). "In matters of statutory interpretation, we are the final arbiters of the legislature's intent as expressed in the words of the statute considered as a whole." Id. (quotation omitted). "When construing [a statute's] meaning, we first examine the language found in the statute, and where possible, we ascribe the plain and ordinary meanings to the words used." Id. (quotation omitted). "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." Id. at 334-35 (quotation omitted). "We interpret statutory provisions in the context of the overall statutory scheme." Id. (quotation omitted).

The pretermitted heir statute, RSA 551:10, states:

> 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 (emphases added).

The plain text of the statute is consistent with the widely understood definition of a pretermitted heir as "[a] child **[234]**

"The interpretation of a statute is a question of law, which we review de novo." STIHL, Inc. v. State of N.H., 168 N.H. 332, 334 (2015) (quotation omitted). "In matters of statutory interpretation, we are the final arbiters of the legislature's intent as expressed in the words of the statute considered as a whole." Id. (quotation omitted). "When construing [a statute's] meaning, we first examine the language found in the statute, and where possible, we ascribe the plain and ordinary meanings to the words used." Id. (quotation omitted). "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." Id. at 334-35 (quotation omitted). "We interpret statutory provisions in the context of the overall statutory scheme." Id. (quotation omitted).

The pretermitted heir statute, RSA 551:10, states:

> 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 (emphases added).

The plain text of the statute is consistent with the widely understood definition of a pretermitted heir as "[a] child or spouse who has been omitted from a will, as when a testator makes a will naming his or her two children and then, then, sometime later, [261]

"The interpretation of a statute is a question of law, which we review de novo." STIHL, Inc. v. State of N.H., 168 N.H. 332, 334 (2015) (quotation omitted). "In matters of statutory interpretation, we are the final arbiters of the legislature's intent as expressed in the words of the statute considered as a whole." Id. (quotation omitted). "When construing [a statute's] meaning, we first examine the language found in the statute, and where possible, we ascribe the plain and ordinary meanings to the words used." Id. (quotation omitted). "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." Id. at 334-35 (quotation omitted). "We interpret statutory provisions in the context of the overall statutory scheme." Id. (quotation omitted).

The pretermitted heir statute, RSA 551:10, states:

> 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 (emphases added).

The plain text of the statute is consistent with the widely understood definition of a pretermitted heir as "[a] child or spouse who has been omitted from a will, as when a testator makes a will naming his or her two children and then, sometime later, has two more children who are **[266]**

"The interpretation of a statute is a question of law, which we review de novo." STIHL, Inc. v. State of N.H., 168 N.H. 332, 334 (2015) (quotation omitted). "In matters of statutory interpretation, we are the final arbiters of the legislature's intent as expressed in the words of the statute considered as a whole." Id. (quotation omitted). "When construing [a statute's] meaning, we first examine the language found in the statute, and where possible, we ascribe the plain and ordinary meanings to the words used." Id. (quotation omitted). "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." Id. at 334-35 (quotation omitted). "We interpret statutory provisions in the context of the overall statutory scheme." Id. (quotation omitted).

The pretermitted heir statute, RSA 551:10, states:

> 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 (emphases added).

The plain text of the statute is consistent with the widely understood definition of a pretermitted heir as "[a] child or spouse who has been omitted from a will, as when a testator makes a will naming his or her two children and then, sometime later, has two more children who are not mentioned in the will." Black's Law Dictionary [274]

"The interpretation of a statute is a question of law, which we review de novo." STIHL, Inc. v. State of N.H., 168 N.H. 332, 334 (2015) (quotation omitted). "In matters of statutory interpretation, we are the final arbiters of the legislature's intent as expressed in the words of the statute considered as a whole." Id. (quotation omitted). "When construing [a statute's] meaning, we first examine the language found in the statute, and where possible, we ascribe the plain and ordinary meanings to the words used." Id. (quotation omitted). "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." Id. at 334-35 (quotation omitted). "We interpret statutory provisions in the context of the overall statutory scheme." Id. (quotation omitted).

The pretermitted heir statute, RSA 551:10, states:

> 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 (emphases added).

The plain text of the statute is consistent with the widely understood definition of a pretermitted heir as "[a] child or spouse who has been omitted from a will, as when a testator makes a will naming his or her two children and then, sometime later, has two more children who are not mentioned in the will." Black's Law Dictionary 841 (10th ed. 2014) **[278]**

"The interpretation of a statute is a question of law, which we review de novo." STIHL, Inc. v. State of N.H., 168 N.H. 332, 334 (2015) (quotation omitted). "In matters of statutory interpretation, we are the final arbiters of the legislature's intent as expressed in the words of the statute considered as a whole." Id. (quotation omitted). "When construing [a statute's] meaning, we first examine the language found in the statute, and where possible, we ascribe the plain and ordinary meanings to the words used." Id. (quotation omitted). "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." Id. at 334-35 (quotation omitted). "We interpret statutory provisions in the context of the overall statutory scheme." Id. (quotation omitted).

The pretermitted heir statute, RSA 551:10, states:

> 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 (emphases added).

The plain text of the statute is consistent with the widely understood definition of a pretermitted heir as "[a] child or spouse who has been omitted from a will, as when a testator makes a will naming his or her two children and then, sometime later, has two more children who are not mentioned in the will." Black's Law Dictionary 841 (10th ed. 2014) (emphases added). The statute's use of **[284]**

"The interpretation of a statute is a question of law, which we review de novo." STIHL, Inc. v. State of N.H., 168 N.H. 332, 334 (2015) (quotation omitted). "In matters of statutory interpretation, we are the final arbiters of the legislature's intent as expressed in the words of the statute considered as a whole." Id. (quotation omitted). "When construing [a statute's] meaning, we first examine the language found in the statute, and where possible, we ascribe the plain and ordinary meanings to the words used." Id. (quotation omitted). "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." Id. at 334-35 (quotation omitted). "We interpret statutory provisions in the context of the overall statutory scheme." Id. (quotation omitted).

The pretermitted heir statute, RSA 551:10, states:

> 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 (emphases added).

The plain text of the statute is consistent with the widely understood definition of a pretermitted heir as "[a] child or spouse who has been omitted from a will, as when a testator makes a will naming his or her two children and then, sometime later, has two more children who are not mentioned in the will." Black's Law Dictionary 841 (10th ed. 2014) (emphases added). The statute's use of the terms "testator" and "will," and the absence of **[293]**

The interpretation of a statute is a question of law, which we review de novo." STIHL, Inc. v. State of N.H., 168 N.H. 332, 334 (2015) (quotation omitted). "In matters of statutory interpretation, we are the final arbiters of the legislature's intent as expressed in the words of the statute considered as a whole." Id. (quotation omitted). "When construing [a statute's] meaning, we first examine the language found in the statute, and where possible, we ascribe the plain and ordinary meanings to the words used." Id. (quotation omitted). "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." Id. at 334-35 (quotation omitted). "We interpret statutory provisions in the context of the overall statutory scheme." Id. (quotation omitted).

The pretermitted heir statute, RSA 551:10, states:

> 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 (emphases added).

The plain text of the statute is consistent with the widely understood definition of a pretermitted heir as "[a] child or spouse who has been omitted from a will, as when a testator makes a will naming his or her two children and then, sometime later, has two more children who are not mentioned in the will." Black's Law Dictionary 841 (10th ed. 2014) (emphases added). The statute's use of the terms "testator" and "will," and the absence of references to "settlor" and "trust," are strong indicia that it was not meant to apply to trust instruments. Indeed, in Robbins v. Johnson, 147 N.H. 44, 46 (2001), we specifically declined to apply RSA 551:10 to a trust. Id. ("Absent clear indication **[335]**

"The interpretation of a statute is a question of law, which we review de novo." STIHL, Inc. v. State of N.H., 168 N.H. 332, 334 (2015) (quotation omitted). "In matters of statutory interpretation, we are the final arbiters of the legislature's intent as expressed in the words of the statute considered as a whole." Id. (quotation omitted). "When construing [a statute's] meaning, we first examine the language found in the statute, and where possible, we ascribe the plain and ordinary meanings to the words used." Id. (quotation omitted). "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." Id. at 334-35 (quotation omitted). "We interpret statutory provisions in the context of the overall statutory scheme." Id. (quotation omitted).

The pretermitted heir statute, RSA 551:10, states:

> 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 (emphases added).

The plain text of the statute is consistent with the widely understood definition of a pretermitted heir as "[a] child or spouse who has been omitted from a will, as when a testator makes a will naming his or her two children and then, sometime later, has two more children who are not mentioned in the will." Black's Law Dictionary 841 (10th ed. 2014) (emphases added). The statute's use of the terms "testator" and "will," and the absence of references to "settlor" and "trust," are strong indicia that it was not meant to apply to trust instruments. Indeed, in Robbins v. Johnson, 147 N.H. 44, 46 (2001), we specifically declined to apply RSA 551:10 to a trust. Id. ("Absent clear indication from the legislature that this is its intention, we decline to apply the [pretermitted heir] statute to the trust."). **[354]**