# State of New Hampshire

# Supreme Court

NO. 2019-0752

2020 TERM MARCH SESSION

In RE: Estate of Marie G. Dow

---

RULE 7 APPEAL OF FINAL DECISION OF THE
10TH CIRCUIT – PROBATE DIVISION – BRENTWOOD

---

BRIEF OF CHRISTOPHER DOW

Nadine M. Catalfimo, Esq.
282 Main Street, Suite 211
Salem, NH 03079
Phone: (603) 952-4491
NH Bar No. 18149
MA BBO No. 674938

Lisa J. Bellanti, Esq.
Casassa Law Office
459 Lafayette Road
Hampton, NH 03842
NH Bar No. 13792

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### NEW HAMPSHIRE CASES



### OTHER STATES' CASES



### NEW HAMPSHIRE STATUTES

## QUESTIONS PRESENTED

1. Did the probate division err when it found that the Appellant is not a pretermitted heir?

   Preserved: MOTION TO DETERMINE PRETERMITTED HEIR, *Appx.* At 24.

2. Did the probate division err when it found that Massachusetts law applies to a will of a decedent who died a resident of New Hampshire?

   Preserved: MOTION FOR RECONSIDERATION, *Appx.* At 49.

3. Did the probate division err when it applied Restatement (Second) Conflict of Laws to provide that the court must recognize the choice of law made by a testator in her will?

   Preserved: MOTION FOR RECONSIDERATION, *Appx.* At 49.

4. Did the probate division err by not applying RSA 551:10 to determine the issue of a pretermitted heir under the decedent's will?

   Preserved: MOTION TO DETERMINE PRETERMITTED HEIR, *Appx.* At 24.

5. Did the probate division err by applying M.G.L.A. 190B:2-302 to determine whether the Appellant was a pretermitted heir?

   Preserved: MOTION FOR RECONSIDERATION, *Appx.* At 49.

6. Was the denial of the Motion for Reconsideration an unsustainable exercise of discretion by the probate division because the probate division had previously found that the decedent was a resident of the State of New Hampshire, the decedent did not own property in Massachusetts and therefore New Hampshire law should apply to the decedent's will?

   Preserved: MOTION FOR RECONSIDERATION, *Appx.* At 49.

## STATEMENT OF FACTS AND STATEMENT OF THE CASE

Marie Dow had two children, Christopher Dow and Harry R. Dow, IV.[1] Marie executed a will on June 30, 2014 (hereinafter "Will"). The Will provided, in relevant part:

> SECOND: All the rest, residue and remainder of my estate, real, personal and mixed, of which I may die, seized and possess, or to which I may be entitled at the time of my demise, wheresoever the same may be found (hereinafter called my "residuary estate"), I give, devise and bequeath to my daughter-in-law, **LESLIE DOW**, of Hampstead, New Hampshire.
>
> EIGHTH: I have intentionally omitted to mention, or to devise or bequeath or give anything of which I may die seized and possessed, or to which I may be in any way entitled at the time of my decease, to any person or persons other than those mentioned in this my last Will and Testament.
>
> NINTH: My estate is to be administered and enforced account to the laws of the Commonwealth of Massachusetts.

LAST WILL AND TESTAMENT OF MARIE G. DOW, *Appx.* At 16.

Marie died on November 20, 2018. NH 10TH CIRCUIT COURT-PROBATE DIVISION-BRENTWOOD ORDER DATED APRIL 24, 2019, *Appx.* At 20. On April 22, 2019, a hearing was held at the NH 10th Circuit Court – Probate Division – Brentwood to determine Marie's domicile, where the Court found it to be New Hampshire. NH 10TH CIRCUIT COURT-PROBATE DIVISION-BRENTWOOD ORDER DATED APRIL 24, 2019, *Appx.* At 20. In its order dated April 24, 2019, the NH 10th Circuit Court found "the deceased had lived in New Hampshire for approximately one year..." The Court further found "the evidence is that the deceased moved to New Hampshire approximately one year before her death. She sold her property in Massachusetts, and there was no evidence before the court of any intention to move back to Massachusetts except for the pleadings of Leslie Dow [filed in the Commonwealth of Massachusetts]." NH 10TH CIRCUIT COURT-PROBATE DIVISION-BRENTWOOD ORDER DATED APRIL 24, 2019, *Appx.* At 20.

---

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

Christopher filed a Motion to Determine Pretermitted Heir pursuant to RSA 551:10[2] with the NH 10th Circuit Court. MOTION TO DETERMINE PRETERMITTED HEIR, *Appx.* At 24. On October 21, 2019, the NH 10th Circuit Court found that Massachusetts law applies to the determination of whether Christopher Dow is a pretermitted heir under the will of Marie G. Dow. NH 10TH CIRCUIT COURT-PROBATE DIVISION-BRENTWOOD ORDER DATED OCTOBER 21, 2019, *Appx.* At 62. The NH 10th Circuit Court determined that Massachusetts law applied to the determination of Christopher's status as a pretermitted heir and denied the Motion to Determine Pretermitted Heirs. NH 10TH CIRCUIT COURT-PROBATE DIVISION-BRENTWOOD ORDER DATED OCTOBER 21, 2019, *Appx.* At 62. Christopher appealed the NH 10th Circuit Court's decision.

[2] "Every child born after the decease of the testator, and every child or issue 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

Christopher is the son of testator Marie G. Dow. Christopher first reviews the pretermitted heir statute, the purpose of which is to protect forgotten heirs by ensuring them their share of their parent's estate. To avoid application of the statute, the testator must actually name or distinctly and personally refer to the disinherited heir in her will.

He argues that Marie's Will does not personally name or refer to him, and that he appears forgotten pursuant to RSA 551:10 and New Hampshire common law.

Christopher also argues that Marie lived in New Hampshire for approximately one year before her death. She had an opportunity to update her Will before she died but failed to do so. New Hampshire law governs the estate administration of Marie G. Dow because she died a resident and domiciled in the State of New Hampshire.

## ARGUMENT

### I. Forgotten Heir Statute Protects Against Forgetfulness

RSA 551:10 provides as follows:

> 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.

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 NH 544, 547 (1987) (quotation omitted). "It prevents forgetfulness, not disinheritance," and "shied[s] against the inequitable result of enforcing a will containing an inadvertent omission." Royce v. Estate of Denby, 117 NH 893, 896 (1977). The statute "protects a testator's heirs against unintentional omission from the testator's will." In Re Estate of Laura, 141 NH 628, 633 (1997). *See also* In Re Estate of Treloar, 151 NH 460, 462 (2004); In Re Estate of Robbins, 145 NH 145, 147 (2000); Boucher v. Lizotte, 85 NH 514 (1932); Gage v. Gage, 29 NH 533 (1854).

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

"The effect of [RSA 551:10] 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 (1987) *citing* In re Estate of MacKay, 121 N.H. 682, 684 (1981); Royce v. Estate of Denby, 117 N.H. 893, 896 (1977); and In Re Estate of Laura, 141 NH 628, 634 (1997). "[I]f a child is not named or referred 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 NH 145, 147 (2000).

The NH Supreme court explained that RSA 551:10 "will be upheld even if the testator's intent is defeated as a result." In Re Estate of Came, 129 N.H. 544 (1987), *citing* In the Matter of Jackson, 117 N.H. 898, 903 (1977).

The NH Supreme Court has also held that RSA 551:10 does not create a presumption that the pretermission of a child or issue is accidental, but a "rule of law."

*See* In Re Estate of Mackay, 121 N.H. 682, 684 (1981) (citations excluded). The NH Supreme Court in MacKay explained that unless there is evidence within the "four corners" of the Will itself, this rule is conclusive. *Id.* at 684. "Our cases have continually emphasized that whenever possible maximum effect should be given to the testator's intent...The formal requirements of RSA 551:10 may in some cases operate to defeat a testator's intent. However, this does not permit us to formulate a rule different from that laid down in the statute. Accordingly, our 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 [omitted children]." *Id.* at 684.

## III. Extrinsic Evidence Regarding Testator's Intent to Exclude Heirs is not allowed under New Hampshire law

In order to disinherit, the NH Supreme Court in Jackson required that the heir must be actually named or referred and explained:

> 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 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.

In the Matter of Jackson, 117 N.H. 898, 903 (1977) (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 NH 460, 462 (2004) (quotations and citations omitted).

The reference must be within the four corners of the will. In Re Estate of Robbins, 145 NH 145, 147 (2000).

## IV. The Reference in the Last Will to "person" or "persons" is not sufficient to exclude the Grantor's son, Christopher Dow, as an heir of the Estate

It is well settled under New Hampshire common law what constitutes a sufficient reference to a beneficiary, or a reference to a class to preclude the application of RSA 551:10. In this case, there is no direct reference to Christopher Dow, nor is there a reference to him as "issue" of the decedent, or as a "child" or "children" of the decedent

within the four corners of the Last Will of the Decedent. Paragraph Eighth of the Last Will provides, in pertinent part, that the Decedent "intentionally omitted to mention, or to devise or bequeath or give anything of which I may die seized or possessed, or to which I may be in any way entitled at the time of my decease, to any person or persons other than those mentioned in this my Last Will." [Emphasis added]

The NH Supreme Court has addressed what constitutes a sufficient reference to a class to exclude a child of the Testator in several cases. The court explained In re Estate of Guy C. Came, 129 NH 544, 549 (1987), that a reference to a class described as "children" or "issue," whether or not a bequest is made to them, may be sufficient to prevent the application of the statute," citing In the Matter of Jackson, 117 NH 898, 900-901 (1977); and Smith v. Smith, 72 NH 168, 169 (1903). In the Came decision, the NH Supreme Court explained that a reference to "legal heirs" was held in one case to be a sufficient a reference to the children the testator's who were excluded under a will, *Id.* at 549, citing Smith v. Sheehan, 67 NH 344, 347-48 (1892). The NH Supreme Court also held in the case of In Re Estate of MacKay, 121 NH 682, 684-85 (1981), that a reference to "heirs at law" or "next of kin" was **not** a sufficient reference to exclude the daughter of the Testator from his first marriage, even though the excluded child was an heir at law under the default provisions of the Testator's Will.

## V. The Decedent's real and personal property descends according to the laws of New Hampshire when the Decedent was domiciled in New Hampshire at death, when there is a conflict of law between states and a foreign Will is submitted to probate in New Hampshire

Under New Hampshire law, "a decedent's personal property passes according to the law of the state of domicile." *See* In Re Estate of Rubert, 139 NH 273, 276 (1994), citing Eyre v. Storer, 37 NH 114, 120 (1858); and French v. Short, 207 Va. 548, 151 S.E. 2d 354, 356-57 (1966). Because the Decedent in this case did not own any real estate at the time of her death in either Massachusetts or New Hampshire, the application of RSA 551:10 to pretermitted heirs as it relates to real estate is inapplicable.

In Rubert, the excluded heir argued that the New Hampshire pretermission statute was inapplicable to property located in New Hampshire when a foreign Will was created in the State of Virginia and when the Testator was domiciled in Virginia "because the

decedent intended to disinherit the [pretermitted heir]." *Id.* at 277. Under Virginia law, the excluded heir would not be pretermitted. The court in Rubert explained that Mr. Rubert had an opportunity to change his Will after relocating and should have done so, so that his Will complied with the law of his new domicile. *Id.* at 277.

Mr. Rubert and his wife originally lived in Dunbarton next door to their daughter while their son lived in Virginia. *See* In re Estate of Rubert, 139 N.H. 273, 274 (1994). Mrs. Rubert was ill and her doctors were located in Virginia. *Id.* The Mr. and Mrs. Rubert moved to Virginia and leased an apartment together in a retirement facility. *Id.* Shortly after moving, Mrs. Rubert passed away and Mr. Rubert leased a different unit in a different retirement facility in Virginia where he resided after his wife's death. *Id.* Just before taking a trip to visit New Hampshire, Mr. Rubert 's attorney was unable to have his new Will ready, so Mr. Rubert prepared a holographic Will. *Id.* While he was visiting his daughter in New Hampshire, he passed away in New Hampshire, owning real estate in New Hampshire. His new Will excluded his daughter and left his entire estate to his son, with no mention of his daughter. *Id.*

The issue of domicile was litigated first in Virginia which determined that Mr. Rubert was in fact domiciled in the State of Virginia. *Id.* at 277. The foreign Will of Mr. Rubert was submitted to probate in New Hampshire. *Id.* In the New Hampshire estate administration proceeding, where the Will was filed for probate as a foreign Will, the daughter contested the Will and relitigated the issue of domicile. *Id.* The Merrimack County Probate Court held that Mr. Rubert was domiciled in New Hampshire at the time of his death and that his real and personal property descended pursuant to the pretermission statute, RSA 551:10. On appeal, the NH Supreme Court reversed in part the probate court's finding that the decedent was domiciled in New Hampshire and held Mr. Rubert was domiciled in Virginia and that only Mr. Rubert's real estate in the State of New Hampshire would be subject to the provisions of RSA 551:10, despite Mr. Rubert's intent to exclude his daughter under Virginia law where he was domiciled at the time of his death and where he executed his Last Will pursuant to Virginia law. The NH Supreme court explained that the full faith and credit clause prevented the parties from relitigating the issue of domicile in New Hampshire, which was a factual issue previously

determined by the Virginia courts, and merited full faith and credit to that court's determination of domicile. *Id.* at 276.

In Rubert, the NH Supreme Court again upheld its strong policy in favor of protecting pretermitted heirs, and explained that RSA 551:10 warranted application to the real property of Mr. Rubert which was located in the State of New Hampshire at the time of his death, even though the Will was executed in Virginia, and submitted to probate in New Hampshire, and when the daughter was a pretermitted heir only under New Hampshire law. *Id.* at 276. Since the NH Supreme Court determined that Mr. Rubert was domiciled in Virginia, the court held that his personal property rightfully descended pursuant to the laws of Virginia. *Id.*

In this case, it is undisputed that the Decedent's Last Will is a valid foreign will created under the laws of the Commonwealth of Massachusetts and submitted for probate in New Hampshire, similar to Rubert. However, this case differs from Rubert in that this court determined that the Decedent was domiciled in New Hampshire at the time of her death and similarly, the Essex Probate and Family Court dismissed the petitions for informal and formal probate of a will based on a motion to dismiss for lack of jurisdiction and proper venue. As such, it is clear that Christopher Dow is a pretermitted heir of the Decedent's probate estate and entitled to an intestate share of the Decedent's entire probate estate, even if he was not a pretermitted heir under the laws of the Commonwealth of Massachusetts at the time the Decedent's Last Will was executed in Massachusetts and pursuant to Massachusetts law.

Further, in the case of In Re Farnsworth, 109 NH 15 (1967), the NH Supreme Court explained that the Testratrix died a resident of the State of New Hampshire, and in her Last Will she created a testamentary trust naming Trustees located in New York, and over the trust of which the situs was real property and tangible property located in the State of New York. The application of the choice of law provision in Farnsworth is inopposite to the facts of this case. In this case, there is no trust. The rule of law, including statutes and case law, as they apply to estates and trusts, are different in the State of New Hampshire and apply differently to estates and trusts. As such, a choice of law provision in a trust will be applied in a trust pursuant to common law and the New Hampshire Uniform Trust Code ("UTC"). The UTC does not apply to estates. The

choice of law provision in Marie G. Dow's Will is inapplicable to the administration of the estate pursuant to New Hampshire law. Massachusetts law does not apply to this case because Massachusetts does not have jurisdiction over the Estate of Marie G. Dow, when Marie G. Dow died a New Hampshire resident and domiciled in the State of New Hampshire owning only personal property located in the State of New Hampshire.

Allowing a choice of law provision in this case to apply to allow Massachusetts law in interpreting RSA 551:10 would directly contract the "conclusive rule of law" set forth in RSA 551:10 and common law which excludes the admissibility of extrinsic evidence to interpret the Grantor's intent outside the four corners of the Last Will. *See* In Re Estate of Guy C. Came, 129 NH 554, 556 (1987); In Re Estate of McKay, 121 NH 682, 684 (1981); In the matter of Jackson, 117 NH 898, 903 (1977); In Re Rubert, 139 NH 273, 276 (1994).

The Probate Divisoin cites Royce v. Estate of Denby, 117 NH 893 (1977) finding that New York law was to be applied to determine heir status where the testator indicated that she wanted New York law to apply regarding who would receive distributions under her will if her specific gifts under the will failed. Royce v. Estate of Denby, 117 NH 893, 895 (1977) found that the testratrix gave up her New York apartment and shipped all of her possessions to Exeter, New Hampshire, where they arrived in the fall of 1963. The testatrix then went on a prolonged trip abroad, and returned to New York in March of 1964. *Id.* While in New York, she suffered a stroke which left her permanently incapacitated. *Id.* After the stroke, she moved to New York and a guardian was appointed over her in 1964. The testatrix then died on February 21, 1966. *Id.* at 895. In Royce, the testratrix became incapacitated and did not have the opportunity to update her Will. *Id.*

The facts in this estate are distinguishable from Royce v. Estate of Denby. There is no evidence that Marie G. Dow was incapacitated prior to her death. The testatrix lived in New Hampshire for approximately one year prior to her death. In Royce v. Estate of Denby, the decedent was moved to New Hampshire at a time when she lacked testamentary capacity, was appointed a guardian and continued to lack testamentary capacity until her death. *Id.* at 895.

NH Supreme Court has found that the Royce v. Estate of Denby holding is limited to the facts of that case and explained that "Royce involved a testatrix who moved to New Hampshire after becoming permanently and mentally incapacitated and deprived of all ability to communicate; she therefore had no opportunity to change her will to comply with New Hampshire law. We recognized that it would be inequitable to apply the New Hampshire rule that the law of the domicile controls the succession to personalty when the testatrix had no opportunity to respond to New Hampshire law." In Re Rubert, 139 NH 273, 277 (1994). In this case, Marie G. Dow had an opportunity to update her Will after becoming a New Hampshire resident but failed to do so. Marie G. Dow also executed a Quitclaim Deed on November 6, 2018 recorded in the Essex North Registry of Deeds at Book 15673, Page 202, only fourteen (14) days before her death, evidencing her capacity to execute a legal document.

## VI. Restatement (Second) Conflict of Laws §263 Supports a Finding that New Hampshire Law Applies

The Probate Division found that "New Hampshire follows the Restatement (Second) Conflict of Laws" (1971) pursuant to 7 New Hampshire Practice Wills, Trusts and Gifts, at §7.01 (4th Ed.)" explaining that the Restatement (Second) Conflict of Laws §§263(1), 239(1) (1971) requires this court to recognize the choice of law provision provided in the Testratrix's Last Will. However, Restatement (Second) Conflict of Laws §239 is inapplicable to the case at bar because the Testratrix in this case did not own any real estate at the time of her death. Restatement (Second) Conflict of Laws §239 provides: (1) Whether a will transfers an interest in **land** and the nature of the interest transferred are determined by the law that would be applied by the courts of the situs; and (2) These courts usually apply their own local law in determining such questions [emphasis added]. However, Restatement (Second) Conflict of Laws §263 (1971) titled "Validity and Effect of Will of Movables," is applicable to the case at bar and provides: (1) Whether a will transfers an interest in **movables** and the nature of the interest transferred are **determined by the law that would be applied by the courts of the state where the testator was domiciled at the time of his death**; and (2) These courts would usually apply their own local law in determining such questions [emphasis added]. Hence, Restatement (Second) Conflict of Laws §263 (1971) supports a finding that this

court should apply the law of the State of New Hampshire in determining the law that applies to the disposition of the personal property of the Testatrix to a pretermitted heir pursuant to RSA 551:10. Note, there is no mention in Restatement (Second) Conflict of Laws §263 and §239 (1971) that a choice of law provision in the Testatrix's Last Will must be applied so that this court applies Massachusetts law regarding the interpretation of the Testatrix's Last Will.

New Hampshire law as set forth in Eyre v. Storer, 37 N.H. 114, 119 (1858) remains common law precedence, which provides "the rule that the law of the domicil controls the disposition of the personal estate, is as well established as the rule that the "lex loci rei sitae....controls the disposition of real estate. But it is well settled law of this State, and this country, that the former rule will not be recognized in favor of a foreigner to the prejudice of our own citizens." The NH Supreme Court in Eyre explained the court could not "give to foreigners the same rights and remedies which they had in their own jurisdiction; but that there is no comity or rule of law which authorize foreigners to claim, or compel our courts to allow, greater rights then they had at home, to the prejudice of our own citizens; and that where there is a conflict arising between the rule as applicable to the status of the parties, and the rule applicable to the subject matter of litigation, our courts will follow the rule most advantageous to our own citizens." *Id.* at 119. The Supreme Court explained that "the general principle of the common law is, that the right and disposition of movables is to be governed by the law of the domicil of the owner..." *Id.* at 120.

Applying the choice of law provision in the Last Will of Marie G. Dow to apply Massachusetts law to exclude a pretermitted heir from taking pursuant to NH RSA 551:10 is against the public policy of the State of New Hampshire. RSA 551:10 is not a presumption but a statutory automatic "conclusive rule of law" regarding the language contained in the "four corners" of the Last Will regarding pretermission of an heir. *See* In Re Estate of McKay, 121 N.H. 682, 684 (1981).

In McKay, the Supreme court explained:

> Our cases have continually emphasized that whenever possible maximum effect should be given to the testator's intent...The formal requirements of RSA 551:10 may in some cases operate to defeat a testator's intent. However, this does not permit us to formulate a rule different from that laid down in the statute.

> Accordingly, our 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 [omitted children]. [Emphasis added] *Id.* at 684.

Aside from the exception in Royce v. Denby, 117 N.H. 893 (1977) (which carved out an exception for a Testatrix who lacked testamentary capacity before moving to New Hampshire from New York and who therefore had no opportunity to change her Will), there is no other New Hampshire case law that applied an exception to allow a choice of law provision to apply a foreign state's law to interpret a foreign Last Will offered for probate in New Hampshire for a person domiciled in New Hampshire. In Re Farnsworth, 109 N.H. 15 (1967), is distinguishable from the case at bar because it related to a testamentary trust which is governed by a different set of laws. The NH Supreme Court has held that New Hampshire law applies to a foreign Last Will when a Testator relocates to the State of New Hampshire when the Testator had an opportunity to change his Last Will to comply with the laws of this state. *See* In Re Estate of Rubert, 139 N.H. 273, 277 (1994).

The precedence that would be set by a court decision allowing the application of a choice of law provision of a foreign state to apply to the disposition of personal property of a New Hampshire resident to defeat the mandates of RSA 551:10 when a foreign Last Will is admitted to probate in New Hampshire (1) creates an issue of the jurisdiction of this court to interpret foreign state laws, (2) circumvents the laws of the State of New Hampshire for decedent's dying domiciled in the State of New Hampshire; and (3) creates conflict of law issues because New Hampshire courts would be required to interpret and implement the laws of foreign states in the probate of estates in New Hampshire. This conflicts with the concept that the law of the domicile of a decedent has subject matter and personal jurisdiction for the probate of a decedent's estate. *See* Eyre v. Storer, 37 N.H. 114 (1858); Restatement (Second) Conflict of Laws §263 (1971).

## CONCLUSION

For the foregoing reasons, this Court should reverse the ruling of the NH 10th Circuit Court-Probate Division.

Respectfully submitted,
for Christopher Dow,

By his attorneys:

Nadine M. Catalfimo, Esq.
282 Main Street, Suite 211
Salem, NH 03079
Phone: (603) 952-4491

Dated: March 26, 2020

Nadine M. Catalfimo, Esq.
NH Bar No. 18149
MA BBO No. 674938

Lisa J. Bellanti, Esq.
Casassa Law Office
459 Lafayette Road
Hampton, NH 03842

Dated: March 26, 2020

Lisa J. Bellanti, Esq.
NH Bar No. 13792

## REQUEST FOR ORAL ARGUMENT AND CERTIFICATION

Counsel for Christopher Dow requests that Attorney Lisa J. Bellanti be allowed 15 minutes for oral argument.

I hereby certify a copy of this memorandum of law have been sent electronically to Tyler Pentoliros, Esq., counsel for the appellant.

Dated: March 26, 2020

Lisa J. Bellanti, Esq.

**APPENDIX**


# *Last Will and Testament*

## *of*

## *Marie G. Dow*

I, **MARIE G. DOW**, of North Andover, Essex County, Commonwealth of Massachusetts, make this my last will and hereby revoke all earlier wills and codicils.

After the payment of my just debts, funeral expenses and expenses of administration, I give, devise and bequeath as follows:

FIRST: I may leave a memorandum stating my wishes with respect to the disposition of certain articles of personal property. Such memorandum, however, will be simply an expression of my wishes and shall not create any trust or obligation, nor shall it be offered for probate as a part of this will.

The decisions of my Personal Representative as to what is tangible personal property and other decisions made and actions taken by my Personal Representative in carrying out the provisions of this article shall be final and binding on all parties.

SECOND: All the rest, residue and remainder of my estate, real, personal and mixed, of which I may die, seized and possess, or to which I may be entitled at the time of my demise, wheresoever the same may be found (hereinafter called my "residuary estate"), I give, devise and bequeath to my daughter-in-law, **LESLIE DOW**, of Hampstead, New Hampshire.

If **LESLIE DOW** fails to survive me, then I hereby give, devise and bequeath my estate to my granddaughter, **COURTNEY LABONTE**, of Londonderry, New Hampshire.

THIRD: I nominate my daughter-in-law, **LESLIE DOW**, to be Personal Representative of this Will. I direct that my Personal Representative and Special Personal Representative, if any, be exempt from furnishing bond, or from giving surety on any bond required by law.

If **LESLIE DOW** is unable or unwilling to service, I hereby nominate my granddaughter,

Dennis M. Spurling, P.C.
The Wingate Building
21 Wingate Street
Haverhill, MA 01832
(978) 374-2230

**COURTNEY LABONTE** as Successor Personal Representative, and I hereby direct that she shall be exempt from furnishing bond, or from giving surety on any bond required by law.

Where appropriate in this Will, reference to Personal Representative shall include reference to Special Personal Representative; reference to the masculine shall include the feminine, and reference to the singular shall include the plural, and vice versa.

FOURTH: I hereby nominate and appoint my daughter-in-law, **LESLIE DOW**, as Special Personal Representative of this my Last Will and Testament. Said Special Personal Representative or her successor named herein shall be exempt from any surety on his bond. Said Special Personal Representative or her successor named herein shall have the same duties and responsibilities as the Permanent Personal Representative except therefrom those provisions of the law only acceptable to the Permanent Personal Representative. I hereby empower the Special Personal Representative or her successor to do whatever is legally necessary and proper before the final appointment of the Permanent Personal Representative.

FIFTH: My Personal Representative and Special Personal Representative, if any, shall have, in addition to, and not in limitation of all common law and statutory powers of the Commonwealth of Massachusetts including, but not limited to, G.L.c.190B, Sec. 3-715(2), or of any other jurisdiction whose laws apply to this Will, the following powers, without order or license of any Court:

A. To sell, lease, or give options to purchase any real property or personal property of my estate at public or private sale, as such prices and upon such terms as my Personal Representative shall determine are fair and reasonable in relation to the property condition, the current market values, and any other pertinent factors.

B. To employ or delegate as custodian, appraiser, broker, investment counsel, accountant, attorney of my estate and/or any other agent, such persons, firms or organizations, including my Personal Representative and/or any firm or organization of which my Personal Representative may be an employee or member, as my Personal Representative deems necessary or desirable; and to pay as an expense of my estate administration, the reasonable compensation of such persons, firms or organizations.

Dennis M. Spurling, P.C.
The Wingate Building
21 Wingate Street
Haverhill, MA 01832
(978) 374-2230

The decisions and actions of my Personal Representative shall be conclusive and binding. My Personal Representative shall be liable only for those acts or omissions made in bad faith, negligence or nonperformance of duty, willful misconduct or breach of fiduciary duty.

SIXTH: I request that my estate be subject to information administration with as little Court supervision as the law allows and that My Personal Representative not be required to render to any court annual or other periodic accounts, or any inventory, appraisal or other returns or reports. My Personal Representative shall take such action for the settlement or approval of accounts at such times and before such courts or without court proceedings as my Personal Representative shall determine. My Personal Representative shall pay the costs and expenses of any such action or proceeding, including (but not limited to) the compensation and expenses of attorneys and guardians ad litem, as an expense of administration.

SEVENTH: Any estate, inheritance or similar tax due as a result of my death with respect to property passing under my Will shall be paid from the residue of my estate as an expense of administration.

EIGHTH: I have intentionally omitted to mention, or to devise or bequeath or give anything of which I may die seized and possessed, or to which I may be in any way entitled at the time of my decease, to any person or persons other than those mentioned in this my last Will and Testament.

NINTH: My estate is to be administered and enforced according to the laws of the Commonwealth of Massachusetts.

IN WITNESS WHEREOF, I hereunto set my hand and seal this 30th day of June, 2014.

Marie G. Dow

**MARIE G. DOW**

Signed, sealed, published and declared by said **MARIE G. DOW** as and for her Will in the presence of us two who at her request, in his presence and in the presence of one another subscribe our names hereunto as witnesses.

Dennis M. Spurling, P.C.
The Wingate Building
21 Wingate Street
Haverhill, MA 01832
(978) 374-2230

Witness: Dennis M. Spurling

Witness: Tyler Pentoliros

COMMONWEALTH OF MASSACHUSETTS

ESSEX, ss. June 30, 2014

Before me, the undersigned authority, on this day personally appeared the Testatrix and the witnesses whose names are signed to the foregoing instrument, and, all of these persons being by me duly sworn, the Testatrix declared to me and to the witnesses in my presence that the instrument is her last Will and that she executed it as her free and voluntary act for the purposes therein expressed; and each of the witnesses stated to me, in the presence of the Testatrix, that he or she signed the Will as witness and that to the best of his or her knowledge, the Testatrix was eighteen years of age or over, of sound mind and under no constraint or undue influence.

MARIE G. DOW

Witness: Dennis M. Spurling

Witness: Tyler Pentoliros

Subscribed and sworn to before me by the said Testator and the said witnesses, this 30th day of June, 2014.

Notary Public: Mary Lou Keefe
My Commission Expires: 03/05/2015

MARY LOU KEEFE
Notary Public
COMMONWEALTH OF MASSACHUSETTS
My Commission Expires
March 05, 2015

Dennis M. Spurling, P.C.
The Wingate Building
21 Wingate Street
Haverhill, MA 01832
(978) 374-2230

# THE STATE OF NEW HAMPSHIRE
## JUDICIAL BRANCH
NH CIRCUIT COURT

10th Circuit - Probate Division - Brentwood
PO Box 789
Kingston NH 03848-0789

Telephone: 1-855-212-1234
TTY/TDD Relay: (800) 735-2964
http://www.courts.state.nh.us

Case Name: **Estate of Marie G. Dow**
Case Number: **318-2019-ET-00173**

**ORDER AFTER HEARING ON MOTION TO ORDER THE FILING OF THE ORIGINAL WILL IN NEW HAMPSHIRE AND MOTION TO DETERMINE DOMICILE**

I held a hearing on April 22, 2019 regarding the petitioner's motion to require the filing of an original will in New Hampshire as well as a motion to determine that the deceased was domiciled in New Hampshire at the time of her death. Appearing at the hearing were the heir and petitioner, Christopher Dow, and his counsel Attorney Catalfimo and Attorney Bellanti.

Although she filed an objection to the motion to file the will, neither Leslie Dow nor her counsel, Attorney Pentoliros, appeared for the hearing. Upon a review of the file, I note that Attorney Pentoliros received notice of the hearing by mail, and was served by mail with a copy of the motion to determine the decedent's domicile in New Hampshire and no objection was filed to that motion. Therefore, I find that the hearing was properly held and orders may issue on both matters.[1]

The issues before the court arise from the fact that the petitioner, Christopher Dow, is the son of the deceased. The deceased died testate and the original will was believed to be in the possession of either the attorney of the deceased in Massachusetts (Attorney Dennis Spurling) or the named executrix under the will, Leslie Dow. Christopher Dow was omitted from the will, and he claims status as a pretermitted heir under New Hampshire law.

[1] It does not appear Attorney Pentoliros registered to receive notice of any electronic filings, even though he filed his appearance. He should note that he must register into the e-filing system to receive notices of electronic filings. In this case, he received notice of the hearing and the motion regarding domicile by mail.

20

Counsel for Christopher Dow attempted to obtain the will from Attorney Spurling but was unable to do so. Attorney Spurling filed the will in Massachusetts without seeking to open a probate of the estate. Attorney Catalfimo reports that when she contacted the Clerk of the Essex Probate and Family Court, she was told that the will would be rejected because the death certificate indicated that the deceased died as a resident of New Hampshire. However, the will was to be released only to Attorney Spurling since he was the one who filed it with the court.

After unsuccessfully attempting to obtain the original copy of the will from Attorney Spurling, Attorney Catalfimo filed a petition for estate administration in New Hampshire on behalf of Christopher Dow on January 29, 2019. This court ordered that the petition would not be acted upon without the original will. Thereafter, the petitioner filed a motion to require Leslie Dow or Attorney Spurling to file the original will with this court.

Ms. Dow filed an objection to the motion. She noted in her objection that she had filed the original will for probate in Massachusetts on February 7, 2019. She further claimed that the deceased was domiciled in Massachusetts at the time of death, even though she was living in an assisted living facility in New Hampshire, and had been for approximately a year.

Ms. Dow argued that the deceased had sold her home in Massachusetts on November 6, 2018, and was in the process of purchasing a unit at an assisted living facility in Massachusetts when she passed. She died on November 20, 2018 while still living in New Hampshire. There is no evidence of a purchase agreement for a unit in Massachusetts, or anything else before the court showing that she was in the process of moving other than Leslie Dow's statements in her objection. At the time of her death, the deceased is believed to have had limited personal property, with nearly all of it in New Hampshire.

The petitioner also informed the court that he had filed a motion to dismiss the probate administration in Massachusetts. The petitioner cited Massachusetts General Laws 190B:3-202 in his memo to this court, relying on the provision that the courts of Massachusetts will defer to the ruling of the courts of another state regarding domicile when the petition for administration was first filed in the other state.

Here, the evidence shows that the petition for estate administration was first filed in New Hampshire. Moreover, the deceased had lived in New Hampshire for approximately one year, and had sold her home in Massachusetts. Although Ms. Leslie Dow argues that the deceased intended to return to Massachusetts, there is no evidence of that fact. Instead, the deceased and nearly all of her property were in New Hampshire.

This court has jurisdiction to probate the estate of a deceased who was an inhabitant of the State of New Hampshire at the time of death. RSA 547:8. Pursuant to RSA 21:6, an inhabitant of New Hampshire includes a person who is "domiciled or has a place of abode or both in this state...and who has, through all of his actions, demonstrated a current intent to designate that place of abode as his principal place of physical presence for the indefinite future to the exclusion of all others."[2]

In this case, the evidence is that the deceased moved to New Hampshire approximately one year before her death. She sold her property in Massachusetts, and there was no evidence before the court of any intention to move back to Massachusetts except for the pleadings of Leslie Dow. The death certificate listed the decedent as residing in Salem, New Hampshire at the time of death. The decedent's personal property, then, was located in New Hampshire at that time as well.

Given all of these factors, I find that the decedent was an "inhabitant" of the state of New Hampshire at the time of death as she resided in New Hampshire, and was domiciled here at that time. I note that even if the deceased was considering moving back to Massachusetts, there is no evidence of when that was likely to occur. Therefore, the decedent was in New Hampshire for the indefinite future as she had no finite plans as to when or how she might return to Massachusetts, if indeed she wished to do so.

[2] This statute was amended effective July 1, 2019. Since the deceased passed in 2018 and the estate was filed prior to the effective dates of the amendments, I am applying the statute as it exists at this time to this case.

Therefore, the petitioner's motion to find that the deceased was domiciled in New Hampshire at the time of death is granted. Moreover, the court's prior order to Leslie Dow and Attorney Spurling to file the original will in New Hampshire remains in effect. They shall have 30 days from the date of the clerk's notice of this order to file the original will in this court.

**Ordered by the Court:**

April 24, 2019
Date

Judge Mark F. Weaver

THE STATE OF NEW HAMPSHIRE

ROCKINGHAM, SS. 10TH CIRCUIT COURT- PROBATE DIVISION – BRENTWOOD

ESTATE OF MARIE G. DOW

CASE NO. 318-2019-ET-00173

**MOTION TO DETERMINE CHRISTOPHER DOW IS A PRETERMITTED HEIR OF MARIE G. DOW**

NOW COMES, Christopher Dow, Petitioner, by and through his attorneys, Nadine M. Catalfimo and Lisa J. Bellanti, and files this motion and states as follows:

1. On January 29, 2019 Christopher Dow, as Petitioner, filed a Petition for Administration with this court for the above referenced estate.

2. On April 22, 2019 a hearing was held before this court and orders were issued holding that Marie G. Dow (hereinafter the "Decedent") was domiciled in the State of New Hampshire at the time of her death and that the Decedent's property was located in the State of New Hampshire. See Order After Hearing on Motion to Order the Filing of the Original Will in New Hampshire and Motion to Determine Domicile dated April 24, 2019.

3. The original Last Will and Testament of Marie G. Dow dated June 30, 2013 (hereinafter "Last Will") was executed in the Commonwealth of Massachusetts and as such said Last Will is a foreign will filed for probate in New Hampshire.

4. The Decedent was a widow and was survived by two living adult children, namely Christopher Dow and Harry R. Dow, IV, at the time of her death. The Decedent was also survived by her ex daughter-in-law, Leslie Dow.

5. The Last Will does not make any reference whatsoever to Christopher Dow.

6. The Last Will does not make sufficient reference to a class which would include her children, such as "children," "issue" or "legal heirs." *See* In re Estate of Guy C. Came, 129 N.H. 544, 549 (1987), citing In the matter of Jackson, 117 N.H. 898, 900 (1977); and Smith v. Smith, 72 N.H. 168, 169 (1903); and In re Estate of MacKay, 121 N.H. 682, 684 (1981).

7. Paragraph Second of the Last Will omits any mention to the decedent's children entirely and leaves the Decedent's entire probate estate to Leslie Dow.

8. Paragraph Eighth of said Last Will provides as follows:

> I have intentionally omitted to mention, or to devise or bequeath or give anything of which I may die seized and possessed, or to which I may be in any way entitled at the time of my decease, to any person or persons other than those mentioned in this my last Will and Testament.

9. Paragraph Ninth of said Last Will provides as follows:

> My estate is to be administered and enforced according to the laws of the Commonwealth of Massachusetts.

10. RSA 551:10 provides ". . . 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."

11. If the Decedent died intestate then her entire estate would pass to the decedent's children, Christopher Dow and Harry R. Dow, IV, in equal shares, pursuant to the provisions of RSA 561:1, II. (a).

**WHEREFORE**, Christopher Dow, by and through his attorneys, requests this Honorable Court:

A. Determine that Christopher Dow is a pretermitted heir under the Last Will and Testament of Marie G. Dow dated June 30, 2014 pursuant to RSA 551:10;

B. Order that Christopher Dow receives one-half of the Decedent's probate estate as if the Decedent died intestate pursuant to RSA 561:1 and RSA 561:17; and

C. Grant such other and further relief as this Honorable Court deems fair and just.

Respectfully submitted,
for Christopher Dow,
By his attorneys:

Nadine M. Catalfimo, Esq.
282 Main Street, Suite 211
Salem, NH 03079
Phone: (603) 952-4491

Nadine M. Catalfimo, Esq.
NH Bar No. 18149

Lisa J. Bellanti, Esq.
Cassassa Law Office
459 Lafayette Road
Hampton, NH 03842

Lisa J. Bellantini, Esq.
NH Bar No. 13792

CERTIFICATE OF SERVICE

I, Nadine M. Catalfimo, Attorney for Christopher Dow, hereby certify that I sent a copy of the foregoing by U.S. mail, first class, on August 13, 2019, to all of the following interested parties:

Courtney LaBonte
25 High Range Road
Londonderry, NH 03053

Harry R. Dow, IV
21 Oak Street
Clinton, MA 01510

Christopher Dow
25 Equestrian Road
Salem, NH 03079

Tyler Pentoliros, Esq.
21 Wingate Street
Haverhill, MA 01832

Nadine M. Catalfimo, Esq.
NH Bar Id. No. 18149

THE STATE OF NEW HAMPSHIRE

ROCKINGHAM, SS. 10th CIRCUIT COURT- PROBATE DIVISION – BRENTWOOD

ESTATE OF MARIE G. DOW

CASE NO. 318-2019-ET-00173

**MEMORANDUM OF LAW IN SUPPORT OF THE MOTION TO DETERMINE CHRISTOPHER DOW IS A PRETERMITTED HEIR OF MARIE G. DOW**

NOW COMES, Christopher Dow, by and through his attorneys, Nadine M. Catalfimo and Lisa J. Bellanti, and submits this memorandum of law in support of the Motion to Determine Christopher Dow as a Pretermitted Heir of Marie G. Dow pursuant to RSA 551:10 and RSA 561:17, and submits the following to this court:

**I. Factual Background:**

Marie G. Dow (hereinafter the "Decedent") died on November 20, 2018, a resident of Salem, County of Rockingham, State of New Hampshire. The Decedent was a widow at the time of her death and was survived by her two adult sons, namely Christopher Dow and Harry R. Dow, IV. It is undisputed that the Decedent rented and lived in Apartment No. 118, at The Residence of Salem Woods, 6 Sally Sweets Way, Salem, New Hampshire, for approximately one year prior to her death and was a resident of the State of New Hampshire.

The Decedent died from breast cancer.

The Decedent was a former resident of the Commonwealth of Massachusetts. The Decedent did not own any personal or real estate in the Commonwealth of Massachusetts at the time of her death and she did not

maintain a residence in the Commonwealth of Massachusetts at the time of her death.

The Decedent previously resided at 200 Bridle Path, North Andover, County of Essex, Massachusetts, which was sold prior to her death.

Leslie Dow is the nominated Executrix/Personal Representative of the Estate of the Decedent and the sole beneficiary of the Estate of the Decedent under the terms of Paragraph Second of the Last Will and Testament of Marie G. Dow dated June 30, 2014 (hereinafter referred to as the "Last Will"). Said Last Will was witnessed by Dennis Spurling, Esq. and Tyler Pentoliros, Esq. on June 30, 2014, and was executed in the Commonwealth of Massachusetts where the Decedent resided at the time of its execution, pursuant to the laws of the Commonwealth of Massachusetts. A review of the Last Will indicates that Dennis Spurling, Esq. was the attorney that drafted the Last Will. It is undisputed that the Last Will was executed in conformity with Massachusetts law.

Said Last Will makes no reference to the Decedent's children, Harry R. Dow, IV. and Christopher Dow, and makes no reference to any class that would include the Decedent's children as beneficiaries.

Paragraph Eighth of the Last Will provides as follows:

> I have intentionally omitted to mention, or to devise or bequeath or give anything of which I may die seized and possessed, or to which I may be in any way entitled at the time of my decease, to any person or persons other than those mentioned in this my last Will and Testament.

Paragraph Ninth of the Last Will provides as follows:

> My estate is to be administered and enforced according to the laws of the Commonwealth of Massachusetts.

Christopher Dow filed a Petition for Administration with this court on January 29, 2019.

On February 1, 2019 and February 7, 2019, Leslie Dow, as Petitioner, filed a Petition for an Informal Probate of the Will and for the Appointment of Personal Representative and a Petition for Formal Probate of the Will and for the Appointment of Personal Representative, respectively, with the Essex Probate and Family Court, Commonwealth of Massachusetts, Docket No. ES-19P021EA. Christopher Dow challenged the jurisdiction and venue of the Essex Probate and Family Court regarding both petitions filed by Leslie Dow based on the Decedent's domicile being the State of New Hampshire at the time of her death, and filed a Motion to Dismiss both the informal and formal petitions for the probate and appointment of Personal Representative. After a hearing on May 28, 2019, at the Essex Probate and Family Court, said court granted the Motion to Dismiss both the informal and formal petitions, and issued Judgment of Dismissals, without prejudice, dated June 28, 2019, for said informal and formal petitions for probate.

After a hearing held on April 22, 2019, on the determination of the domicile of the Decedent, this court entered an Order After Hearing on Motion to Order the Filing of the Original Will in New Hampshire and Motion to Determine Domicile dated April 24, 2019, holding that Marie G. Dow was an "inhabitant" of

New Hampshire, was domiciled in New Hampshire, and that her personal property at the time of her death was thus located in the New Hampshire.

**ARGUMENT:**

**II. RSA 551:10 - Pretermission of Heirs under New Hampshire law**

RSA 551:10 provides as follows:

> 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.

The NH Supreme Court explained in the case of In Re Estate of Guy C. Came, 129 N.H. 554, 546 (1987) "that the statute [RSA 551:10] sets forth three requirements that are applicable...the fulfillment of which will result in a finding of pretermission: the child is (1) not named in the will, (2) not referred to in the will; and (3) not a devisee or a legatee under the will," citing C. DeGrandpre, 7 New Hampshire Practice, Wills, Trusts and Gifts §372 (1986). In this case, it is undisputed that the son of the Decedent, Christopher Dow, is not specifically named in the Decedent's Last Will, is not referred to in the Last Will and is not a devisee or legatee under the Last Will. The NH Supreme Court explained in Came that "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," [emphasis added], citing In re Estate of MacKay, 121 N.H. 682, 684 (1981); Royce v. Estate of Denby, 117 N.H. 893, 896 (1977). The court went on to explain that the statute

**"will be upheld even if the testator's intent is defeated as a result"** [emphasis added], citing In the Matter of Jackson, 117 N.H. 898, 903 (1977).

The NH Supreme Court has also held that RSA 551:10 does not create a presumption that the pretermission of a child or issue is accidental, but a **"rule of law."** [Emphasis added], *See* In Re Estate of Mackay, 121 N.H. 682, 684 (1981) (citations excluded). The court in MacKay explained that unless there is evidence within the "four corners" of the Will itself, this rule is conclusive. *Id.* at 684. The court's explanation of the pretermission rule of law in MacKay was stated as follows:

"Our cases have continually emphasized that whenever possible maximum effect should be given to the testator's intent...The formal requirements of RSA 551:10 may in some cases operate to defeat a testator's intent. However, this does not permit us to formulate a rule different from that laid down in the statute. Accordingly, our 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 [omitted children]." [Emphasis added] *Id.* at 684.

A review and reading of the Last Will in this case reveals an absence of any mention of, or reference to, the Decedent's son, Christopher Dow.

## III. Extrinsic Evidence Regarding Testator's Intent to Exclude Heirs is not allowed under New Hampshire law

In Jackson, the NH Supreme court reviewed the issue of whether extrinsic evidence should be allowed to determine a Testator's intent to exclude heirs under a Testator's Will. In Jackson, there were three adopted children from a first marriage who were excluded from their father's Will and they were not referred to or mentioned under his Last Will and Testament. On appeal from a Grafton Probate and Family Court decision, the guardian ad litem for the three adopted children of the Mr. Jackson claimed the adopted children were entitled to take the estate as pretermitted heirs under RSA 551:10. The attorney who prepared the Last Will of Thomas Jackson testified to the probate court, over objection, regarding his discussions with Mr. Jackson to intentionally exclude his adopted children from his Last Will and his intent to leave everything to his brother and sister, equally. The brother and sister of Mr. Jacskson argued to the NH Supreme Court that when extrinsic evidence indicates that the omission to provide for the adopted children was intentional, the court should not allow the statute to defeat the Testator's intent. Jackson at 902. The NH Supreme Court disagreed.

The NH Supreme Court in Jackson explained that allowing extrinsic evidence to defeat the statute would require the NH legislature to redraft the statute in order to adopt the position of allowing extrinsic evidence. The court went on to explain the "rule of law," as explained in the Came decision, explaining "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" *Id.* at 903 [citations omitted]. The court went on to explain that the terms of the RSA 551:10 do **not** allow the admissibility of extrinsic evidence to defeat the language of the statute, even when the extrinsic evidence shows the Testator's intent is to exclude a beneficiary. *Id.* at 903.

In the case at bar, Leslie Dow is barred by New Hampshire law from admitting any extrinsic evidence, including the testimony of the Decedent's attorney and/or the witnesses to the Last Will of Marie G. Dow, regarding the intent of Marie G. Dow to exclude any heirs from inheriting from her estate upon her death. The NH Supreme Court has clearly held that any such extrinsic evidence beyond the "four corners" of the Last Will of a Testator is not admissible to defeat the statutory language of RSA 551:10.

**IV. The Reference in the Last Will to "person" or "persons" is not sufficient to exclude the Grantor's son, Christopher Dow, as an heir of the Estate**

It is well settled under New Hampshire common law what constitutes a sufficient reference to a beneficiary, or a reference to a class to preclude the application of RSA 551:10. In this case, there is no direct reference to Christopher Dow, nor is there a reference to him as "issue" of the decedent, or as a "child" or "children" of the decedent within the four corners of the Last Will of the Decedent. Paragraph Eighth of the Last Will provides, in pertinent part, that

the Decedent "intentionally omitted to mention, or to devise or bequeath or give anything of which I may die seized or possessed, or to which I may be in any way entitled at the time of my decease, to any person or persons other than those mentioned in this my Last Will." [Emphasis added]

The NH Supreme Court has addressed what constitutes a sufficient reference to a class to exclude a child of the Testator in several cases. The court explained In re Estate of Guy C. Came, 129 NH 544, 549 (1987), that a reference to a class described as "children" or "issue," whether or not a bequest is made to them, may be sufficient to prevent the application of the statute," citing In the Matter of Jackson, 117 NH 898, 900-901 (1977); and Smith v. Smith, 72 NH 168, 169 (1903). In the Came decision, the NH Supreme Court explained that a reference to "legal heirs" was held in one case to be a sufficient a reference to the children the testator's who were excluded under a will, *Id.* at 549, citing Smith v. Sheehan, 67 NH 344, 347-48 (1892). The NH Supreme Court also held in the case of In Re Estate of MacKay, 121 NH 682, 684-85 (1981), that a reference to "heirs at law" or "next of kin" was **not** a sufficient reference to exclude the daughter of the Testator from his first marriage, even though the excluded child was an heir at law under the default provisions of the Testator's Will.

In this case, it cannot be gleaned from a reading of the four corners of the Last Will that the Decedent intended to include her son, Christopher Dow, as a "person" or "persons" and further, to exclude him under her Last Will when there is no direct mention of him. The class reference of "person" or "persons" is too broad and vague to conclude that she had him in mind when she executed her

Last Will. A ruling that the provisions of Paragraph Eighth sufficiently exclude Christopher Dow would defeat a long line of common law cases in New Hampshire interpreting the rule of law in RSA 551:10, which requires a more specific reference to a class or a direct reference to the excluded heir under the terms of a will.

**V. Massachusetts law regarding pretermission of an heir**

The Massachusetts Uniform Probate Code Chapter §190B:2-302 (b) controls the omission of children in a testator's Will under Massachusetts law and provides that it must "appear from the will that the omission was intentional."

Massachusetts common law requires "the proponent of the will to prove the omission was intentional and not occasioned by accident or mistake." *See* Draper v. Draper, 267 Mass 528, 531 (1929). Unlike New Hampshire law, there is no automatic rule of law or presumption in Massachusetts. The testator's intent "may appear from any language in the will which states or implies it; or if there is no such language in the will, it may be proved by any appropriate evidence." *See* Jones v. Jones, 297 Mass 198, 208 (1937). Whether the omission of a child was intentional is a question of fact and extrinsic evidence is admissible in the courts in Massachusetts to determine whether the omission was the product of a mistake or accident." Draper v. Draper, supra at 532. The court in the Commonwealth will make its determination either from the direct wording in the will or from extrinsic evidence outside of the will. *See* Branscombe v. Jenks, 7 Mass.App.Ct. 897, 897 (1979).

Allowing extrinsic evidence in this case would be a direct contradiction of the precedent set forth by many NH Supreme Court cases holding that no extrinsic evidence is allowed in determining the intent of the Testator to determine whether a child was omitted intentionally when there is no direct mention of the child in the will or the mention of a "class" that the child would belong to, such as "children." As mentioned above in Paragraph III., allowing extrinsic evidence would frustrate the New Hampshire legislature's intent for a presumption and the automatic "rule of law" that requires only a reading of the four corners of the Will.

**VI. The Decedent's real and personal property descends according to the laws of New Hampshire when the Decedent was domiciled in New Hampshire at death, when there is a conflict of law between states and a foreign Will is submitted to probate in New Hampshire**

Under New Hampshire law, "a decedent's personal property passes according to the law of the state of domicile." *See* In Re Estate of Rubert, 139 NH 273, 276 (1994), citing Eyre v. Storer, 37 NH 114, 120 (1858); and French v. Short, 207 Va. 548, 151 S.E. 2d 354, 356-57 (1966). Because the Decedent in this case did not own any real estate at the time of her death in either Massachusetts or New Hampshire, the application of RSA 551:10 to pretermitted heirs as it relates to real estate is inapplicable.

In Rubert, the excluded heir argued that the New Hampshire pretermission statute was inapplicable to property located in New Hampshire when a foreign Will was created in the State of Virginia and when the Testator was domiciled in

Virginia "because the decedent intended to disinherit the [pretermitted heir]." *Id.* at 277. Under Virginia law, the excluded heir would not be pretermitted. The court in Rubert explained that Mr. Rubert had an opportunity to change his Will after relocating and should have done so, so that his Will complied with the law of his new domicile. *Id.* at 277.

Mr. Rubert and his wife originally lived in Dunbarton next door to their daughter while their son lived in Virginia. *See* In re Estate of Rubert, 139 N.H. 273, 274 (1994). Mrs. Rubert was ill and her doctors were located in Virginia. *Id.* Mr. and Mrs. Rubert moved to Virginia and leased an apartment together in a retirement facility. *Id.* Shortly after moving, Mrs. Rubert passed away and Mr. Rubert leased a different unit in a different retirement facility in Virginia where he resided after his wife's death. *Id.* Just before taking a trip to visit New Hampshire, Mr. Rubert 's attorney was unable to have his new Will ready, so Mr. Rubert prepared a holographic Will. *Id.* While he was visiting his daughter in New Hampshire, he passed away in New Hampshire, owning real estate in New Hampshire. His new Will excluded his daughter and left his entire estate to his son, with no mention of his daughter. *Id.*

The issue of domicile was litigated first in Virginia which determined that Mr. Rubert was in fact domiciled in the State of Virginia. *Id.* at 277. The foreign Will of Mr. Rubert was submitted to probate in New Hampshire. *Id.* In the New Hampshire estate administration proceeding, where the Will was filed for probate as a foreign Will, the daughter contested the Will and relitigated the issue of domicile. *Id.* The Merrimack County Probate Court held that Mr. Rubert was

domiciled in New Hampshire at the time of his death and that his real and personal property descended pursuant to the pretermission statute, RSA 551:10. On appeal, the NH Supreme Court reversed in part the probate court's finding that the decedent was domiciled in New Hampshire and held Mr. Rubert was domiciled in Virginia and that only Mr. Rubert's real estate in the State of New Hampshire would be subject to the provisions of RSA 551:10, despite Mr. Rubert's intent to exclude his daughter under Virginia law where he was domiciled at the time of his death and where he executed his Last Will pursuant to Virginia law. The NH Supreme court explained that the full faith and credit clause prevented the parties from relitigating the issue of domicile in New Hampshire, which was a factual issue previously determined by the Virginia courts, and merited full faith and credit to that court's determination of domicile. *Id.* at 276.

In Rubert, the NH Supreme Court again upheld its strong policy in favor of protecting pretermitted heirs, and explained that RSA 551:10 warranted application to the real property of Mr. Rubert which was located in the State of New Hampshire at the time of his death, even though the Will was executed in Virginia, and submitted to probate in New Hampshire, and when the daughter was a pretermitted heir only under New Hampshire law. *Id.* at 276. Since the NH Supreme Court determined that Mr. Rubert was domiciled in Virginia, the court held that his personal property rightfully descended pursuant to the laws of Virginia. *Id.*

In this case, it is undisputed that the Decedent's Last Will is a valid foreign will created under the laws of the Commonwealth of Massachusetts and submitted for probate in New Hampshire, similar to Rubert. However, this case differs from Rubert in that this court determined that the Decedent was domiciled in New Hampshire at the time of her death and similarly, the Essex Probate and Family Court dismissed the petitions for informal and formal probate of a will based on a motion to dismiss for lack of jurisdiction and proper venue. As such, it is clear that Christopher Dow is a pretermitted heir of the Decedent's probate estate and entitled to an intestate share of the Decedent's entire probate estate, even if he was not a pretermitted heir under the laws of the Commonwealth of Massachusetts at the time the Decedent's Last Will was executed in Massachusetts and pursuant to Massachusetts law.

In this case, the court order regarding the determination of domicile was not appealed to the New Hampshire Supreme Court by Leslie Dow.

**VIII. The application of RSA 561:1, Distribution Upon Intestacy, and RSA 561:17 provides Christopher Dow is entitled to one-half of the Decedent's probate estate**

In this case, it is undisputed that the Decedent was not married at the time of her death, and she was survived by her two adult children, Christopher Dow and Harry R. Dow, IV. This court by order dated April 24, 2019, determined the Decedent was domiciled in the State of New Hampshire at the time of her death.

If the Decedent died intestate, her probate estate descends to her two

living children, in equal shares, pursuant to the provisions of RSA 561:1, II (a), which provides, in pertinent part, as follows:

> The real and personal property of every person deceased, not devised or bequeathed... and personally remaining in the hands of the administrator on settlement of his or her account, shall descend or be distributed by decree of the probate court:
>
> . . .
>
> II. The part of the estate not passing to the surviving spouse . . . or the entire intestate estate if there is no surviving spouse, passes as follows:
>
> (a) To the issue of the decedent equally if they are all of the same degree of kinship to the decedent...

Further, RSA 561:17, Priority of Legacies, Etc., provides as follows:

> The estate, real and personal, not specifically devised or bequeathed, shall first be liable to the payment of the legal charges against the estate and legacies given by the will, and to be applied to make up the share of any child born after the decease of the testator, or of any child or issue of any child omitted or not provided for in the will.

Since the Decedent had two children living who survived her at the time of her death, under RSA 561:1 and RSA 561:17, Christopher Dow takes one-half of the intestate estate of the decedent as a pretermitted heir.

Respectfully submitted,
for Christopher Dow,

By his attorneys:
Nadine M. Catalfimo, Esq.
282 Main Street, Suite 211
Salem, NH 03079
Phone: (603) 952-4491

Nadine M. Catalfimo, Esq.
NH Bar No. 18149

Lisa J. Bellanti, Esq.
Cassassa Law Office
459 Lafayette Road
Hampton, NH 03842

Lisa J. Bellantini, Esq.
NH Bar No. 13792

CERTIFICATE OF SERVICE

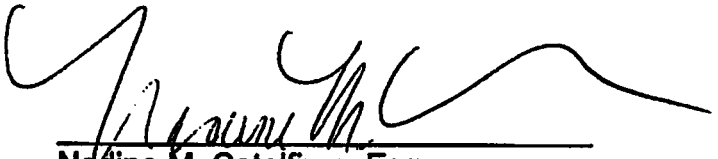
I, Nadine M. Catalfimo, Attorney for Christopher Dow, hereby certify that on August 13, 2019, I sent a copy of the foregoing by U.S. mail, first class, to all of the following interested parties:

Courtney LaBonte
25 High Range Road
Londonderry, NH 03053

Harry R. Dow, IV
21 Oak Street
Clinton, MA 01510

Christopher Dow
25 Equestrian Road
Salem, NH 03079

Tyler Pentoliros, Esq.
21 Wingate Street
Haverhill, MA 01832



Nadine M. Catalfimo, Esq.
NH Bar Id. No. 18149

THE STATE OF NEW HAMPSHIRE

ROCKINGHAM, SS. 10TH CIRCUIT COURT- PROBATE DIVISION – BRENTWOOD

ESTATE OF MARIE G. DOW

CASE NO. 318-2019-ET-00173

**RESPONSE TO OBJECTION TO MOTION TO DETERMINE CHRISTOPHER DOW IS A PRETERMITTED HEIR**

NOW COMES, Christopher Dow, Petitioner, by and through his attorneys, Nadine M. Catalfimo and Lisa J. Bellanti, and files this Response to Objection to Motion to Determine Christopher Dow is a Pretermitted Heir, and states as follows:

1. RSA 551:10 provides that "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."
2. Counsel for Leslie Dow argues that Marie G. Dow "gave gifts to her "daughter in law" and "grandchild" and that those references were a sufficient reference to preclude the application of RSA 551:10, citing Boucher v. Lizotte, 85 NH 514 (1932). In Boucher, the testatrix specifically mentioned the name of her son, Alphonse, in her Last Will when referring to her daughter in law and grandchild, and thus the court in Boucher held that the mention of the son's name was sufficient to preclude the application of RSA 551:10 when the mention of "wife of my son Alphonse Lizotte" showed that Alphonse was not "out of mind" of the

testatrix because she expressly named and referred to him in defining her gift to a member of his family. Boucher at 516. In this case, there was no mention of the children of Marie G. Dow, or a reference to a class of persons that would include the children of Marie G. Dow in the Last Will and Testatement of Marie G. Dow dated June 30, 2014 (hereinafter "Last Will").

3. The Massachusetts Uniform Probate Code Chapter §190B:2-302(b) (1) expressly provides in pertinent part that it "must appear from the will that the omission was intentional" to omit a child of the testator under a Last Will. Under Massachusetts and New Hampshire law, and after a review of the provisions of the Last Will, it is not clear from the four corners of the Last Will that Marie G. Dow intended to exclude her children, Christopher Dow and Harry R. Dow, IV.
4. Counsel for Leslie Dow argues that choice of law provisions are given effect in New Hampshire, citing 7 NH Practice, Wills, Trusts and Gifts (4th Edition) chapter 7.03, citing In Re Farnsworth Estate, 109 N.H. 15 (1967) and states that the provision in the Last Will should be given effect as to the law governing the estate administration in New Hampshire. However, New Hampshire law governs the estate administration of Marie G. Dow because she died a resident and domiciled in the State of New Hampshire. Further, in the case of In Re Farnsworth, 109 NH 15 (1967), the NH Supreme Court explained that the Testratrix died a resident of the State of New Hampshire, and in her Last Will she created a testamentary

TRUST naming Trustees located in New York, and over the trust of which the situs was real property and tangible property located in the State of New York. *Id.* at 16. The application of the choice of law provision in Farnswoth is inopposite to the facts of this case. In this case, there is no trust. Counsel is requesting this court to apply Massachusetts law to a foreign Last Will submitted to probate for a decedent domiciled in the State of New Hampshire. The rule of law, including statutes and case law, as they apply to estates and trusts, are different in the State of New Hampshire and apply differently to estates and trusts. As such, a choice of law provision in a trust will be applied in a trust pursuant to common law and the New Hampshire Uniform Trust Code ("UTC"). The UTC does not apply to estates. A choice of law provision in the Last Will is inapplicable to the administration of the estate pursuant to New Hampshire law. Massachusetts law does not apply to this case because Massachusetts does not have jurisdiction over the Estate of Marie G. Dow, when Marie G. Dow died a New Hampshire resident and domiciled in the State of New Hampshire owning personal property located in only the State of New Hampshire.

5. Allowing a choice of law provision in this case to apply to allow Massachusetts law in interpreting RSA 551:10 would directly contradict the "conclusive rule of law" set forth in RSA 551:10 and common law which excludes the admissibility of extrinsic evidence to interpret the Grantor's intent outside the four corners of the Last Will. *See* In Re Estate

of Guy C. Came, 129 NH 554, 556 (1987); In Re Estate of McKay, 121 NH 682, 684 (1981); In the matter of Jackson, 117 NH 898, 903 (1977); In Re Rubert, 139 NH 273, 276 (1994).

6. Marie G. Dow died domicile in the State of New Hampshire, and lived in the State of New Hampshire for approximately one year prior to her death. As such, Marie G. Dow had an opportunity to change her Last Will during her lifetime. *See* In Re Rubert, 139 NH 273, 277 (1994).

Respectfully submitted,
for Christopher Dow,

By his attorneys:

Nadine M. Catalfimo, Esq.
282 Main Street, Suite 211
Salem, NH 03079
Phone: (603) 952-4491

Nadine M. Catalfimo, Esq.
NH Bar No. 18149

Lisa J. Bellanti, Esq.
Cassassa Law Office
459 Lafayette Road
Hampton, NH 03842

Lisa J. Bellantini, Esq.
NH Bar No. 13792

## CERTIFICATE OF SERVICE

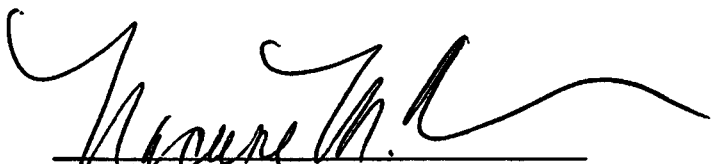
I, Nadine M. Catalfimo, Attorney for Christopher Dow, hereby certifies that I sent a copy of the foregoing by U.S. mail, first class, on August 23, 2019, to all of the following interested parties:

Courtney LaBonte
25 High Range Road
Londonderry, NH 03053

Harry R. Dow, IV
21 Oak Street
Clinton, MA 01510

Christopher Dow
25 Equestrian Road
Salem, NH 03079

Tyler Pentoliros, Esq.
21 Wingate Street
Haverhill, MA 01832



Nadine M. Catalfimo, Esq.
NH Bar Id. No. 18149

THE STATE OF NEW HAMPSHIRE

ROCKINGHAM, SS. 10TH CIRCUIT COURT- PROBATE DIVISION – BRENTWOOD

ESTATE OF MARIE G. DOW

CASE NO. 318-2019-ET-00173

**MOTION TO RECONSIDER THIS COURT'S ORDER ON THE MOTION TO DETERMINE PRETERMITTED HEIR DATED OCTOBER 21, 2019**

NOW COMES, Christopher Dow, son of Marie G. Dow, by and through his attorneys, Nadine M. Catalfimo and Lisa J. Bellanti, and submits this Motion to Reconsider this Court's Order on the Motion to Determine Pretermitted Heir dated October 21, 2019 and states as follows:

1. On October 21, 2019, this Court found that Massachusetts law applies to the determination of whether Christopher Dow is a pretermitted heir under the will of Marie G. Dow.
2. This Court has previously found that Marie G. Dow died a resident of Salem, New Hampshire. In its order of April 24, 2019, this Court found "the deceased had lived in New Hampshire for approximately one year..." The Court further found "the evidence is that the deceased moved to New Hampshire approximately one year before her death. She sold her property in Massachusetts, and there was no evidence before the court of any intention to move back to Massachusetts except for the pleadings of Leslie Dow."
3. In this case, both Leslie Dow and Christopher Dow reside in the State of New Hampshire.

4. In this case, there was no mention of the children of Marie G. Dow, or a reference to a class of persons that would include the children of Marie G. Dow in the Last Will and Testament of Marie G. Dow dated June 30, 2014.

5. The Court finds that because New Hampshire follows the Restatement (Second) Conflict of Laws, it must recognize the choice of law made by the Testatrix in her will.

6. New Hampshire law governs the estate administration of Marie G. Dow because she died a resident and domiciled in the State of New Hampshire. Further, in the case of In Re Farnsworth, 109 NH 15 (1967), the NH Supreme Court explained that the Testratrix died a resident of the State of New Hampshire, and in her Last Will she created a testamentary TRUST naming Trustees located in New York, and over the trust of which the situs was real property and tangible property located in the State of New York. The application of the choice of law provision in Farnswoth is inopposite to the facts of this case. In this case, there is no trust. The rule of law, including statutes and case law, as they apply to estates and trusts, are different in the State of New Hampshire and apply differently to estates and trusts. As such, a choice of law provision in a trust will be applied in a trust pursuant to common law and the New Hampshire Uniform Trust Code ("UTC"). The UTC does not apply to estates. A choice of law provision in the Last Will is inapplicable to the administration of the estate pursuant to New Hampshire law. Massachusetts law does not apply to this case because Massachusetts does not have jurisdiction

over the Estate of Marie G. Dow, when Marie G. Dow died a New Hampshire resident and domiciled in the State of New Hampshire owning personal property located in only the State of New Hampshire.

7. Allowing a choice of law provision in this case to apply to allow Massachusetts law in interpreting RSA 551:10 would directly contract the "conclusive rule of law" set forth in RSA 551:10 and common law which excludes the admissibility of extrinsic evidence to interpret the Grantor's intent outside the four corners of the Last Will. *See* In Re Estate of Guy C. Came, 129 NH 554, 556 (1987); In Re Estate of McKay, 121 NH 682, 684 (1981); In the matter of Jackson, 117 NH 898, 903 (1977); In Re Rubert, 139 NH 273, 276 (1994).

8. The Court cites Royce v. Estate of Denby, 117 NH 893 (1977) finding that New York law was to be applied to determine heir status where the testator indicated that she wanted New York law to apply regarding who would receive distributions under her will if her specific gifts under the will failed.

9. Royce v. Estate of Denby, 117 NH 893, 895 (1977) found that the testratrix gave up her New York apartment and shipped all of her possessions to Exeter, where they arrived in the fall of 1963. The testatrix then went on a prolonged trip abroad, and returned to New York in March of 1964. *Id.* While in New York, she suffered a stroke which left her permanently incapacitated. *Id.* After the stroke, she moved to New York

and a guardian was appointed over her in 1964. The testatrix then died on February 21, 1966. *Id.* at 895.

10. The facts in this estate are distinguishable from Royce v. Estate of Denby. There is no evidence that Marie G. Dow was incapacitated prior to her death. This Court has already found that the decedent lived in New Hampshire for approximately one year prior to her death. In Royce v. Estate of Denby, the decedent was moved to New Hampshire at a time when she lacked testamentary capacity, was appointed a guardian and continued to lack testamentary capacity until her death. *Id.* at 885. There was no evidence offered by Leslie Dow that Marie G. Dow was incapacitated, that she was under a guardianship or even that any power of attorney had ever been activated.

11. New Hampshire has found that the Royce v. Estate of Denby holding is limited to the facts of that case. "Royce involved a testatrix who moved to New Hampshire after becoming permanently and mentally incapacitated and deprived of all ability to communicate; she therefore had no opportunity to change her will to comply with New Hampshire law. We recognized that it would be inequitable to apply the New Hampshire rule that the law of the domicile controls the succession to personalty when the testatrix had no opportunity to respond to New Hampshire law." In Re Rubert, 139 NH 273, 277 (1994).

12. As this Court found that the decedent lived in New Hampshire for approximately one year and that there was no evidence of incapacity

offered by Leslie Dow, the Court has overlooked the points of law and facts before this Honorable Court.

13. This court found that "New Hampshire follows the Restatement (Second) Conflict of Laws"(1971) pursuant to 7 New Hampshire Practice Wills, Trusts and Gifts, at §7.01 (4th Ed.)" explaining that the Restatement (Second) Conflict of Laws §§263(1), 239(1) (1971) requires this court to recognize the choice of law provision provided in the Testratrix's Last Will. However, Restatement (Second) Conflict of Laws §239 is inapplicable to the case at bar because the Testratrix in this case did not own any real estate at the time of her death. Restatement (Second) Conflict of Laws §239 provides: (1) Whether a will transfers an interest in **land** and the nature of the interest transferred are determined by the law that would be applied by the courts of the situs; and (2) These courts usually apply their own local law in determining such questions [emphasis added]. However, Restatement (Second) Conflict of Laws §263 (1971) titled "Validity and Effect of Will of Movables," is applicable to the case at bar and provides: (1) Whether a will transfers an interest in **movables** and the nature of the interest transferred are **determined by the law that would be applied by the courts of the state where the testator was domiciled at the time of his death**; and (2) These courts would usually apply their own local law in determining such questions [emphasis added]. Hence, Restatement (Second) Conflict of Laws §263 (1971) supports a finding that this court should apply the law of the State of New Hampshire in determining the law

that applies to the disposition of the personal property of the Testatrix to a pretermitted heir pursuant to RSA 551:10. Note, there is no mention in Restatement (Second) Conflict of Laws §263 and §239 (1971) that a choice of law provision in the Testatrix's Last Will must be applied so that this court applies Massachusetts law regarding the interpretation of the Testatrix's Last Will.

14. New Hampshire law as set forth in Eyre v. Storer, 37 N.H. 114, 119 (1858) remains common law precedence, which provides "the rule that the law of the domicil controls the disposition of the personal estate, is as well established as the rule that the "lex loci rei sitae....controls the disposition of real estate. But it is well settled law of this State, and this country, that the former rule will not be recognized in favor of a foreigner to the prejudice of our own citizens." The NH Supreme Court in Eyre explained the court could not "give to foreigners the same rights and remedies which they had in their own jurisdiction; but that there is no comity or rule of law which authorize foreigners to claim, or compel our courts to allow, greater rights then they had at home, to the prejudice of our own citizens; and that where there is a conflict arising between the rule as applicable to the status of the parties, and the rule applicable to the subject matter of litigation, our courts will follow the rule most advantageous to our own citizens." *Id.* at 119. The Supreme Court explained that "the general principle of the common law is, that the right and disposition of movables is to be governed by the law of the domicil of the owner..." *Id.* at 120.

Christopher Dow, Leslie Dow and Marie G. Dow are all residents of the State of New Hampshire.

15. Applying the choice of law provision in the Last Will of Marie G. Dow to apply Massachusetts law to exclude a pretermitted heir from taking pursuant to NH RSA 551:10 is against the public policy of the State of New Hampshire. RSA 551:10 is not a presumption but a statutory automatic "conclusive rule of law" regarding the language contained in the "four corners" of the Last Will regarding pretermission of an heir. *See* In Re Estate of McKay, 121 N.H. 682, 684 (1981). In McKay, the Supreme court explained:

"Our cases have continually emphasized that whenever possible maximum effect should be given to the testator's intent...The formal requirements of RSA 551:10 may in some cases operate to defeat a testator's intent. However, this does not permit us to formulate a rule different from that laid down in the statute. Accordingly, our 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 [omitted children]." [Emphasis added] *Id.* at 684.

Aside from the exception in Royce v. Denby, 117 N.H. 893 (1977) (which carved out an exception for a Testatrix who lacked testamentary capacity before moving to New Hampshire from New York and who therefore had no opportunity to change her Will), there is no other New

Hampshire case law that applied an exception to allow a choice of law provision to apply a foreign state's law to interpret a foreign Last Will offered for probate in New Hampshire for a person domiciled in New Hampshire. In Re Farnsworth, 109 N.H. 15 (1967), is distinguishable from the case at bar because it related to a testamentary trust which is governed by a different set of laws. The NH Supreme court has held that New Hampshire law applies to a foreign Last Will when a Testator relocates to the State of New Hampshire when the Testator had an opportunity to change his Last Will to comply with the laws of this state. *See* In Re Estate of Rubert, 139 N.H. 273, 277 (1994).

16. To the extent this court applies Massachusetts law, the provisions of M.G.L §190B:2-302 are not applicable. The annotated comments to this statute explain that "this section provides for both the case where a child was born or adopted after the execution of the will and not foreseen at the time and thus not provided for in the will, and the rare case where a testator omits one of his or her children because of the mistaken belief that the child is dead."

17. In the Commonwealth of Massachusetts, common law determines whether and heir is pretermitted in a Last Will and Testament. M.G.L. 191 § 20, titled "Omitted Children" was repealed effective March 12, 2012 (see 2008, 521, Sec. 10).

18. Massachusetts common law requires "the proponent of the will to prove the omission was intentional and not occasioned by accident or mistake."

*See* Draper v. Draper, 267 Mass 528, 531 (1929). The testator's intent "may appear from any language in the will which states or implies it; or if there is no such language in the will, it may be proved by any appropriate evidence." *See* Jones v. Jones, 297 Mass 198, 208 (1937). Whether the omission of a child was intentional is a question of fact and extrinsic evidence is admissible in the courts in Massachusetts to determine whether the omission was the product of a mistake or accident." Draper v. Draper, supra at 532. The court in the Commonwealth will make its determination either from the direct wording in the will or from extrinsic evidence outside of the will. *See* Branscombe v. Jenks, 7 Mass.App.Ct. 897, 897 (1979). There was no evidentiary hearing before this court to determine the Testatrix's intent to exclude her son, Christopher Dow, as a beneficiary of her estate. This is consistent with New Hampshire law, in that allowing extrinsic evidence in this case would be a direct contradiction of the precedence set forth by many NH Supreme Court cases holding that no extrinsic evidence is allowed in determining the intent of the Testator to determine whether a child was omitted intentionally when there is no direct mention of the child in the will or the mention of a "class" that the child would belong to, such as "children." Allowing extrinsic evidence would frustrate the New Hampshire legislature's intent for a presumption and the automatic "rule of law" that requires only a reading of the four corners of the Will pursuant to RSA 551:10.

19. The precedence that would be set by a court decision allowing the application of a choice of law provision of a foreign state to apply to the disposition of personal property of a New Hampshire resident to defeat the mandates of RSA 551:10 when a foreign Last Will is admitted to probate in New Hampshire (1) creates an issue of the jurisdiction of this court to interpret foreign state laws, (2) circumvents the laws of the State of New Hampshire for decedent's dying domiciled in the State of New Hampshire; and (3) creates conflict of law issues because New Hampshire courts would be required to interpret and implement the laws of foreign state in the probate of estates in New Hampshire. This conflicts with the concept that the law of the domicile of a decedent has subject matter and personal jurisdiction for the probate of a decedent's estate. *See* Eyre v. Storer, 37 N.H. 114 (1858); Restatement (Second) Conflict of Laws §263 (1971).

NOW THEREFORE, Christopher Dow, by and through his attorneys, Nadine M. Catalfimo and Lisa J. Bellanti, respectfully requests that this court:

a. Reconsider its order dated October 21, 2019;

b. Apply NH RSA 551:10 to determine the issue of a pretermitted heir under the Last Will of Marie G. Dow;

c. Determine that Christopher Dow was a pretermitted heir under the Last Will of Marie G. Dow pursuant to RSA 551:10; and

d. For such other relief as this court deems just.

Respectfully submitted,
for Christopher Dow,

By his attorneys:

Nadine M. Catalfimo, Esq.
282 Main Street, Suite 211
Salem, NH 03079
Phone: (603) 952-4491

Nadine M. Catalfimo, Esq.
NH Bar No. 18149
MA BBO No. 674938

Lisa J. Bellanti, Esq.
Cassassa Law Office
459 Lafayette Road
Hampton, NH 03842

Lisa J. Bellantini, Esq.
NH Bar No. 13792

CERTIFICATE OF SERVICE

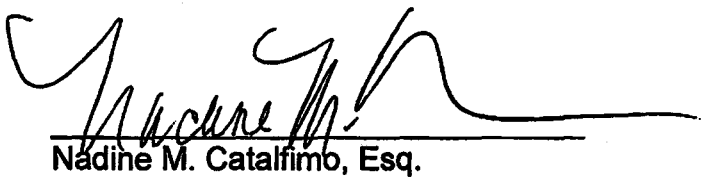
I, Nadine M. Catalfimo, Attorney for Christopher Dow, hereby certifies that I sent a copy of the foregoing by U.S. mail, first class, to all of the following interested parties:

Tyler Pentoliros, Esq.
21 Wingate Street
Haverhill, MA 01832

Courtney LaBonte
25 High Range Road
Londonderry, NH 03053

Harry R. Dow, IV
21 Oak Street
Clinton, MA 01510

Christopher Dow
25 Equestrian Road
Salem, NH 03079



Nadine M. Catalfimo, Esq.
NH Bar Id. No. 18149

# THE STATE OF NEW HAMPSHIRE
## JUDICIAL BRANCH
NH CIRCUIT COURT

10th Circuit - Probate Division - Brentwood
PO Box 789
Kingston NH 03848-0789

Telephone: 1-855-212-1234
TTY/TDD Relay: (800) 735-2964
http://www.courts.state.nh.us

## NOTICE OF DECISION

Case Name: **Estate of Marie G Dow**
Case Number: **318-2019-ET-00173**

**Notice to Parties:**

On October 21, 2019, Judge Mark F. Weaver issued orders relative to:

Order on Motion to Determine Pretermitted Heir – See copy of attached Court Order.

Please review all e-mails and mail which may contain orders, notices or important information about your case.

Any Motion for Reconsideration must be filed with this court by November 07, 2019. Any appeals to the Supreme Court must be filed by November 27, 2019.

October 28, 2019

LoriAnne Hensel
Clerk of Court

C: Christopher Dow; Nadine M. Catalfimo, ESQ; Harry R. Dow, IV; Leslie Dow; Tyler G. Pentoliros, ESQ; Lisa J. Bellanti, ESQ

# THE STATE OF NEW HAMPSHIRE
## JUDICIAL BRANCH
NH CIRCUIT COURT

10th Circuit - Probate Division - Brentwood
PO Box 789
Kingston NH 03848-0789

Telephone: 1-855-212-1234
TTY/TDD Relay: (800) 735-2964
http://www.courts.state.nh.us

Case Name: **Estate of Marie G. Dow**
Case Number: **318-2019-ET-00173**

**ORDER ON MOTION TO DETERMINE PRETERMITTED HEIR**

Before the court is a motion filed by the son of the deceased, Christopher Dow, asking the court to find that he is a pretermitted heir. Objecting to the motion is Leslie Dow, the executrix of the estate. The history of this estate is set forth in my order of August 27, 2019 granting the petition for estate administration.

The will of Marie Dow, dated June 30, 2014, fails to specifically name her son, Christopher, in any way. Article Eighth of the will, however, provides as follows:

> I have intentionally omitted to mention, or to devise or bequeath or give anything of which I may die seized and possessed, or to which I may be in any way entitled at the time of my decease, to any person or persons other than those mentioned in this my last Will and Testament.

The will also contains an Article that requires that Massachusetts law be applied to the will. Therefore, the issues before the court are whether Massachusetts or New Hampshire law applies, and upon the application of the appropriate law, whether Christopher Dow is a pretermitted heir.

Mr. Dow argues that New Hampshire law applies and that the language in Article Eighth is not sufficient to meet the requirements of RSA 551:10 which establishes the pretermitted heir law of New Hampshire. The executrix, Leslie Dow, argues that since the deceased specifically provided in her will for the application of Massachusetts law, I must instead look to M.G.L.A.190B:2-302 to determine if Christopher Dow is a pretermitted heir. Under that statute, she argues that he is not a pretermitted heir.

Regarding the issue of which state's law governs, New Hampshire follows the Restatement (Second) Conflict of Laws regarding conflict of laws issues. See 7 New

Hampshire Practice Wills, Trusts and Gifts, at § 7.01 (4th Ed.). The Restatement provides that I must recognize the choice of law made by a testatrix in her will. Restatement (Second) Conflict of Laws, §§ 263(1), 239(1) (1971); see also *Royce v. Estate of Denby*, 117 N.H. 893 (1977)(finding that New York law was to be applied to determine pretermitted heir status where the testator indicated that she wanted New York law to apply regarding who would receive distributions under her will if her specific gifts under the will failed).

Given this, and the specific provisions of Marie Dow's will, Massachusetts law applies. Therefore, I must look to M.G.L.A.190B:2-302 to determine if Christopher Dow is a pretermitted heir.

Pursuant to that statute, pretermitted heirs are limited to children born or adopted after the will has been executed by the deceased, or where the deceased believed that a child was deceased but the child was living at the time of the execution of the will. See M.G.L.A.190B:2-302(a)(1) and (2). There are some exceptions contained in the statute, and Christopher Dow argues that the exception under 190B:2-302(b)(1) applies in this case. However, he has misread the statute.

The exception in §2-302(b)(1) provides that if the omission of the child is intentional, then the provisions of subsections (a)(1) and (a)(2) do not apply. Christopher Dow argues that this language should be read in an overly broad fashion - ignoring the rest of the statute - such that unless an omission is intentional, then any child would be a pretermitted heir.

This reading of the statute ignores the fact that the statutory language deals only with children born or adopted after the date of the deceased's death. It does not contain any language that broadens the statute to include any other children. The only exception is contained in subsection (c) which deals with children of the testator whom the testator believed to be dead but were in fact living at the time of the execution of the will. That is not the case here.

Therefore, I find that Massachusetts law applies to the determination of whether Christopher Dow is a pretermitted heir under the provisions of the will. Moreover, when Massachusetts law, specifically M.G.L.A.190B:2-302, is applied, I must find that Christopher Dow is not a pretermitted heir. As a result, the motion is denied.

October 21, 2019
Date

Judge Mark F. Weaver

# THE STATE OF NEW HAMPSHIRE
## JUDICIAL BRANCH
NH CIRCUIT COURT

10th Circuit - Probate Division - Brentwood
PO Box 789
Kingston NH 03848-0789

Telephone: 1-855-212-1234
TTY/TDD Relay: (800) 735-2964
http://www.courts.state.nh.us

## NOTICE OF DECISION

Case Name: **Estate of Marie G Dow**
Case Number: **318-2019-ET-00173**

**Notice to Parties:**

On November 25, 2019, Judge Mark F. Weaver issued orders relative to:

Motion to Reconsider This Court's Order on the Motion to Determine Pretermitted Heir Dated October 21, 2019 – After careful consideration, the motion to reconsider is denied. The intention of the testatrix was clear in the language of the will that Massachusetts law applies. I cannot find that under the circumstances of this case that the specific language of the will should be ignored, and under Massachusetts law Mr. Dow is not a pretermitted heir.

Please review all e-mails and mail which may contain orders, notices or important information about your case.

Any Motion for Reconsideration must be filed with this court by December 07, 2019. Any appeals to the Supreme Court must be filed by December 27, 2019.

November 27, 2019

LoriAnne Hensel
Clerk of Court

C: Nadine M. Catalfimo, ESQ; Tyler G. Pentoliros, ESQ; Lisa J. Bellanti, ESQ