THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 2010-0069, In re Estate of Gertrude A. Finnegan, the court on August 11, 2010, issued the following order:

Having considered the parties' briefs and the appellate record, we conclude that oral argument is unnecessary for the disposition of this appeal. See Sup. Ct. R. 18(1). The respondent, Beverly A. Buckley, executrix of the Estate of Gertrude A. Finnegan, appeals a probate court order finding that the petitioners, Scott Mackie, Teresa D'Ambrosio, and LeeAnn Donovan, are entitled to a share of the estate either as pretermitted heirs or as legatees under the will. Finding no error, we affirm.

In light of our decision, the petitioners' motion to strike appellant's brief and appendix is moot.

To be a pretermitted heir, the child must not be named in the will, referred to in the will, or be a devisee or legatee under the will. In re Estate of Treloar, 151 N.H. 460, 462 (2004). We have interpreted the phrase "named or referred to" in RSA 551:10 to require clear evidence that the testatrix actually named or distinctly referred to the heir personally, so as to show that she had the heir in mind. Id. The respondent concedes that the will names neither Deanna nor the petitioners, but argues that the petitioners are not pretermitted heirs because the will contains sufficient reference to Deanna. The respondent relies upon a provision in Article III of the will, pursuant to which the testatrix bequeaths her remaining estate "in equal shares to my children, Paul F. Finnegan . . . and Beverly A. Buckley . . . ." The respondent argues that the testatrix had Deanna in mind when referring in this provision to "my children," and that she intended to disinherit Deanna by not naming her in the remainder of the sentence along with her siblings. We conclude that this language does not clearly evidence the testatrix's intent to disinherit Deanna. It is not sufficient to infer that the child was not forgotten because a sibling or other relative was remembered in the will. Id. at 464. Accordingly, we conclude that this language is insufficient to avoid the application of the pretermission statute.

The next sentence in Article III provides, "If any one of my children shall predecease me, her share thereof shall pass to her issue then living by right of representation . . . ." The respondent argues that the testatrix intended by this provision to refer only to her two children then living, and not Deanna. In light of our ruling on the previous issue, we need not address this issue because, as

the probate court correctly reasoned, if the term "children" in this sentence is not intended to refer to Deanna, then the petitioners are pretermitted pursuant to RSA 551:10; otherwise, if the term "children" is intended to include Deanna, then the petitioners are legatees under the will and take the same share.

Affirmed.

Broderick, C.J., and Dalianis, Duggan, Hicks and Conboy, JJ., concurred.

Eileen Fox,
Clerk

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