

CONSENT CALENDAR

February 3, 2022

HOUSE OF REPRESENTATIVES

REPORT OF COMMITTEE

**The Committee on Judiciary to which was referred HB
1448,**

AN ACT relative to the pretermitted heir statute.

**Having considered the same, report the same with the
following amendment, and the recommendation that
the bill OUGHT TO PASS WITH AMENDMENT.**

Rep. Edward Gordon

FOR THE COMMITTEE

COMMITTEE REPORT

Committee:	Judiciary
Bill Number:	HB 1448
Title:	relative to the pretermitted heir statute.
Date:	February 3, 2022
Consent Calendar:	CONSENT
Recommendation:	OUGHT TO PASS WITH AMENDMENT 2022-0394h

STATEMENT OF INTENT

A pretermitted heir is a child who is not mentioned in a will. Typically, that occurs when a person makes a will and then subsequently has a child. It can also happen when someone wishes to disinherit a child but makes no formal expression of that intent in their will. An unnamed child is entitled to a share of the deceased's estate. Recently, the New Hampshire Supreme Court rendered a harsh decision which appeared to be inconsistent with the traditional interpretation of New Hampshire's existing pretermitted heir statute. This bill is patterned after the model law and has been reviewed and approved by New Hampshire probate practitioners. It will make the law clear and consistent with New Hampshire practice.

Vote 21-0.

Rep. Edward Gordon
FOR THE COMMITTEE

Original: House Clerk
Cc: Committee Bill File

CONSENT CALENDAR

Judiciary

HB 1448, relative to the pretermitted heir statute. **OUGHT TO PASS WITH AMENDMENT.**

Rep. Edward Gordon for Judiciary. A pretermitted heir is a child who is not mentioned in a will. Typically, that occurs when a person makes a will and then subsequently has a child. It can also happen when someone wishes to disinherit a child but makes no formal expression of that intent in their will. An unnamed child is entitled to a share of the deceased's estate. Recently, the New Hampshire Supreme Court rendered a harsh decision which appeared to be inconsistent with the traditional interpretation of New Hampshire's existing pretermitted heir statute. This bill is patterned after the model law and has been reviewed and approved by New Hampshire probate practitioners. It will make the law clear and consistent with New Hampshire practice. **Vote 21-0.**

Original: House Clerk

Cc: Committee Bill File

Amendment to HB 1448

1 Amend the bill by replacing all after the enacting clause with the following:

2

3 1 Wills; Child Not Named. RSA 551:10 is repealed and reenacted to read as follows:

4 551:10 Child Not Named.

5 I. In this section:

6 (a) "Estate" means all property of the testator subject to probate administration and
7 disposition under the testator's will.

8 (b) "Devise" means any testamentary disposition of real or personal property made
9 under the testator's will.

10 II. Except as provided in paragraph III, if a testator fails to provide in the testator's will for
11 any of the testator's children born or adopted after the execution of the will, the omitted after-born or
12 after-adopted child shall receive a share in the estate as follows:

13 (a) If the testator had no child living when the testator executed the will, an omitted
14 after-born or after-adopted child receives a share in the estate equal in value to that which the child
15 would have received had the testator died intestate, unless the will devised all or substantially all of
16 the estate to the other parent of the omitted child and that other parent survives the testator and is
17 entitled to take under the will. The share to which the omitted child shall be entitled under this
18 subparagraph shall be satisfied first from the residue of the estate and if insufficient, from the other
19 assets of the estate pro rata.

20 (b) If the testator had one or more children living when the testator executed the will,
21 and the will devised property or an interest in property to one or more of the then-living children, an
22 omitted after-born or after-adopted child is entitled to share in the testator's estate as follows:

23 (1) The portion of the testator's estate in which the omitted after-born or after-
24 adopted child is entitled to share is limited to devises made to the testator's then-living children
25 under the will.

26 (2) The omitted after-born or after-adopted child is entitled to receive the share of
27 the testator's estate, as limited in subparagraph (b)(1), that the child would have received had the
28 testator included all omitted after-born and after-adopted children with the children to whom
29 devises were made under the will and had given an equal share of the estate to each child.

30 (3) To the extent feasible, the interest granted an omitted after-born or after-adopted
31 child under this section must be of the same character, whether equitable or legal, present or future,
32 as that devised to the testator's then-living children under the will.

Amendment to HB 1448

- Page 2 -

1 (4) In satisfying a share provided by this paragraph, devises to the testator's
2 children who were living when the will was executed abate ratably. In abating the devises of the
3 then-living children, the character of the testamentary plan adopted by the testator shall be
4 preserved to the maximum extent possible.

5 III. Neither subparagraph I(a) or (b) shall apply if it appears from the will that the omission
6 was intentional.

7 IV. If at the time of execution of the will the testator fails to provide in the testator's will for
8 a living child solely because the testator believes the child to be dead, the child is entitled to share in
9 the estate as if the child were an omitted after-born or after-adopted child.

10 2 Repeal. RSA 551:11, relative to the share of an unnamed child, is repealed.

11 3 Applicability. This act shall apply to all wills executed before or after the effective date of this
12 act, except that this act shall not apply to those wills executed by a testator who died prior to the
13 effective date of this act.

14 4 Effective Date. This act shall take effect January 1, 2023.



2021 SESSION

Judiciary

Bill #: 1448 Motion: OTPA AM #: 0394H Exec Session Date: 2-3-22

<u>Members</u>	<u>YEAS</u>	<u>Nays</u>	<u>NV</u>
Gordon, Edward M. Chairman	✓		
McLean, Mark Vice Chairman	✓		
Sylvia, Michael J.	✓		
Wuelper, Kurt F. Clerk	✓		
Alexander, Joe H.	✓		
Rice, Kimberly A. EDWARDS	✓		
Silber, Norman J. MERNER	✓		
Greene, Bob J.	✓		
Kelley, Diane E.	✓		
Tausch, Lindsay ANDRUS	✓		
Trottier, Douglas R.	✓		
Smith, Marjorie K.	✓		
Berch, Paul S. WOODS	✓		
Horrigan, Timothy O.	✓		
DiLorenzo, Charlotte I.	✓		
Chase, Wendy	✓		
Kenney, Cam E.	✓		
Langley, Diane M.	✓		
McBeath, Rebecca Susan	✓		
Paige, Mark	✓		
Simpson, Alexis	✓		

Kurt Wuelper

21 0

HOUSE COMMITTEE ON JUDICIARY

PUBLIC HEARING ON HB 1448

BILL TITLE: relative to the pretermitted heir statute

DATE: 1/13//2022

LOB ROOM: 206-208

Time Public Hearing Called to Order: 2:15 PM
Time Adjourned: 2:45 PM

Committee Members: Reps. Gordon, McLean, Wuelper, Sylvia, Alexander Jr., Notter, Merner, Greene, D. Kelley, Andrus, Trottier, M. Smith, Berch, Horrigan, DiLorenzo, Chase, Kenney, Langley, McBeath, Paige and Simpson

Bill Sponsors: Rep Lynn, Rock. 7; Rep. Umberger, Carr. 2

TESTIMONY

* Use asterisk if written testimony and/or amendments are submitted.

***Rep. Lynn Sponsor** The intent of this bill is to have the law reflect the desires of the deceased. RSA551:10 [Pretermitted heir] speaks to children born after making the will or born but not note named in the will. The theory is you just forgot to add a later-born child to your will. But, if you have two and you don't name one in the will, it seems like the presumptions should be you deliberately chose to not name that child. Under current law, that unnamed child gets a full share of the estate. This could lead to the unnamed child getting a larger share of the estate than named children.

Another example is you die and leave everything to your wife, your unnamed child would give the unnamed child the portion she would get if you died intestate. The procedure in the bill is close to the model penal code. This was circulated to the Probate bar last Fall and they asked for time to comment and meet within the next week or two.

On page 2, Applicability is careful to apply only wills drafted after the effective date.

Q Sylvia: Will this cause people to have to review their wills after it is enacted?

Ans: it certainly would be prudent to do that, but the intent is to follow the intent of the deceased more closely.

Q DiLorenzo: What about children born out-of-wedlock or in vitro children?

Ans: This should apply to any child, but there are provisions for the court to deal with unusual cases.

Q Langley: How would the court deal with a deliberately left out child?

Ans: the bill says it does not apply if it appears the omission was intentional or if there is good evidence the testator too another path to taking care of that unnamed child.

Q Gordon: This changes the law to deal only with children born after or presumed dead at its drafting?

Ans: Yes. Under this bill children born that you know about, it is presumed that you intentionally left them out.

Q If you do have an illegitimate child and didn't know about it-what?

Ans: Good question.

Q Simpson: Why is the law written as it is?

Ans: It goes back to the 19th century. I guess it goes back to when people made their own wills and there were few protections for children who might have been estranged or simply forgotten. has been a problem right along because of the time required to travel to meetings and we've long desired a way to mitigate that concern and increase the numbers of people willing to serve and access to the public for those who are interested Colleagues of mine have submitted testimony that way.



Rep Kurt Wuelper, Clerk

House Remote Testify

Judiciary Committee Testify List for Bill HB1448 on 2022-01-13

Support: 0 Oppose: 0 Neutral: 0 Total to Testify: 0

[Export to Excel](#)

Archived: Wednesday, March 16, 2022 11:00:09 AM
From: Jan Myskowski
Sent: Wednesday, January 12, 2022 1:05:39 PM
To: Marjorie Smith
Cc: Bob Lynn; karenumberger@gmail.com; ~House Judiciary Committee; vss@fstlaw.com; Wells, Bob; Pamela Newkirk; Benjamin Siracusa Hillman; Ned Gordon
Subject: RE: HB 1448
Importance: Normal

Thank you, Distinguished Representative Smith. You are, of course, correct that I mean to address him in that capacity. I used his title as Chief Justice as a matter of professional courtesy and out of custom, as the last time I addressed him it was indeed in that former capacity during oral argument. We will be sure to share our comments on the bill with your committee as quickly as possible, and thank you for the opportunity and invitation to do so. I similarly invite you to call or email me with any questions or concerns you have in the meantime.

Thank you again,
Jan

Jan P. Myskowski
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From: MARJORIE SMITH <msmithpen@aol.com>
Sent: Wednesday, January 12, 2022 12:49 PM
To: Jan Myskowski <jan@mmlawnh.com>
Cc: rjlynn4@gmail.com; karenumberger@gmail.com; HouseJudiciaryCommittee@leg.state.nh.us; vss@fstlaw.com; Wells, Bob <BOB.WELLS@mclane.com>; Pamela Newkirk <pnewkirk@bondpa.com>; Benjamin Siracusa Hillman <bsiracusahillman@shaheengordon.com>; Ned Gordon <Ned.Gordon@leg.state.nh.us>
Subject: Re: HB 1448

I believe that while you addressed this to Chief Justice Lynn, you are writing to him in his capacity as a member of the NH house. It is in this capacity that the distinguished member filed legislation. The bill has been assigned to the house judiciary committee, and is now in their custody. If you have any comments I know that the committee would like to hear from you in a timely way before they have to vote. Naturally you are free to communicate with representative Linn in any way that you choose, but please know that it

is the judiciary committee that will now be making a decision as to whether and in what form the bill will move through the legislature. We hope to hear from you. Best, Marjorie Smith

Sent from my iPhone
Marjorie Smith
100 Piscataqua Road
Durham, NH 03824
603 868 7500

On Jan 12, 2022, at 12:24 PM, Jan Myskowski <jan@mmlawnh.com> wrote:

Dear Chief Justice Lynn. I'm writing on behalf of an informal group of New Hampshire trust and estate lawyers who monitor and comment on legislation affecting that practice area. Last year you sent our group a copy of a predecessor to current HB 1448, which we discussed briefly at a meeting last fall. Some concerns were raised at that meeting, but unfortunately we were not able to muster the resources to give you an appropriate response at that time. We are all volunteers and sometimes don't get to all of the things that deserve our attention. We apologize for not having responded to your communication more timely.

Some of our members just became aware of HB 1448, and of the fact that it is currently scheduled for hearing before the House Judiciary Committee tomorrow (January 13th). We will not be able to attend the hearing and give meaningful comment on the bill by tomorrow. Our group has convened a meeting that will take place this coming Tuesday the 18th, at which time we will discuss HB 1448 and formulate our comments on the same.

We will share those comments with you as quickly as possible following that meeting. I will take the lead in communicating the comments to you, and the other addressees of this email. If you would like me to share the comments with anyone else, or if you would like to speak to me about the bill before tomorrow's hearing, I will make myself available to you. Just let me know if you would like to talk by phone.

Otherwise, I will follow up with you after our group's meeting on the 18th.

Again, our apologies for not giving this more attention sooner.

Thank you,
Jan

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Archived: Wednesday, March 16, 2022 11:00:10 AM
From: rjlynn4@gmail.com
Sent: Wednesday, January 12, 2022 12:54:25 PM
To: 'Jan Myskowski'; karenumberger@gmail.com
Cc: ~House Judiciary Committee; vss@fstlaw.com; 'Wells, Bob'; 'Pamela Newkirk'; 'Benjamin Siracusa Hillman'; Ned Gordon
Subject: RE: HB 1448
Importance: Normal

Dear Attorney Myskowski,

Thank you so much for your email and for your group's willingness to offer suggestions and assistance regarding HB1448. As you probably know, I am not a trust and estate lawyer and therefore lack the expertise of the members of your group. I introduced this bill at the suggestion of a legal colleague who was very concerned that the current pretermitted heir statute can operate harshly in some cases and can produce results at odds with the clear intent of the testator. My proposal, which generally follows the Model Probate Code, is intended to alleviate some of that harshness. But I am completely open to receiving input from your group regarding all aspects of this bill, ranging from whether it is needed at all, to ways in which it may be improved. Indeed, that is why I gave a draft of the bill to my estate attorney, Ben Siracusa Hillman, asked him to circulate it among your group.

When I testify before House Judiciary tomorrow, I will mention that your group will be meeting to discuss this bill next week and that I expect you will have important input to offer. I will ask the committee to hold off on executing the bill until you have had a chance to offer your input.

In the meantime, if you would like to discuss any issues relating to the bill, please do not hesitate to call me at 603-235-7952.

Best regards,

Bob Lynn

From: Jan Myskowski <jan@mmlawnh.com>
Sent: Wednesday, January 12, 2022 12:25 PM
To: rjlynn4@gmail.com; karenumberger@gmail.com
Cc: HouseJudiciaryCommittee@leg.state.nh.us; 'vss@fstlaw.com' <vss@fstlaw.com>; 'Wells, Bob' <BOB.WELLS@MCLANE.COM>; Pamela Newkirk <pnewkirk@bondpa.com>; Benjamin Siracusa Hillman <bsiracusahillman@Shaheengordon.com>; Ned Gordon <Ned.Gordon@leg.state.nh.us>
Subject: HB 1448

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HB 1448 - AS INTRODUCED

2022 SESSION

22-2023

04/05

HOUSE BILL **1448**

AN ACT relative to the pretermitted heir statute.

SPONSORS: Rep. Lynn, Rock. 7; Rep. Umberger, Carr. 2

COMMITTEE: Judiciary

ANALYSIS

This bill revises the statute governing pretermitted heirs.

Explanation: Matter added to current law appears in ***bold italics***.
Matter removed from current law appears ~~[in brackets and struckthrough.]~~
Matter which is either (a) all new or (b) repealed and reenacted appears in regular type.

STATE OF NEW HAMPSHIRE

In the Year of Our Lord Two Thousand Twenty Two

AN ACT relative to the pretermitted heir statute.

Be it Enacted by the Senate and House of Representatives in General Court convened:

1 1 Wills; Child Not Named. RSA 551:10 is repealed and reenacted to read as follows:

2 551:10 Child Not Named.

3 I. Except as provided in paragraph II, if a testator fails to provide in the testator's will for
4 any of the testator's children born or adopted after the execution of the will, the omitted after-born or
5 after-adopted child shall receive a share in the estate as follows:

6 (a) If the testator had no child living when the testator executed the will, an omitted
7 after-born or after-adopted child receives a share in the estate equal in value to that which the child
8 would have received had the testator died intestate, unless the will devised all or substantially all of
9 the estate to the other parent of the omitted child and that other parent survives the testator and is
10 entitled to take under the will.

11 (b) If the testator had one or more children living when the testator executed the will,
12 and the will devised property or an interest in property to one or more of the then-living children, an
13 omitted after-born or after-adopted child is entitled to share in the testator's estate as follows:

14 (1) The portion of the testator's estate in which the omitted after-born or after-
15 adopted child is entitled to share is limited to devises made to the testator's then-living children
16 under the will.

17 (2) The omitted after-born or after-adopted child is entitled to receive the share of
18 the testator's estate, as limited in subparagraph (b)(1), that the child would have received had the
19 testator included all omitted after-born and after-adopted children with the children to whom
20 devises were made under the will and had given an equal share of the estate to each child.

21 (3) To the extent feasible, the interest granted an omitted after-born or after-adopted
22 child under this section must be of the same character, whether equitable or legal, present or future,
23 as that devised to the testator's then-living children under the will.

24 (4) In satisfying a share provided by this paragraph, devises to the testator's
25 children who were living when the will was executed abate ratably. In abating the devises of the
26 then-living children, the court shall preserve to the maximum extent possible the character of the
27 testamentary plan adopted by the testator.

28 II. Neither subparagraph I(a) or (b) shall apply if:

29 (a) It appears from the will that the omission was intentional; or

HB 1448 - AS INTRODUCED

- Page 2 -

1 (b) The testator provided for the omitted after-born or after-adopted child by transfer
2 outside the will and the intent that the transfer be in lieu of a testamentary provision is shown by
3 the testator's statements or is reasonably inferred from the amount of the transfer or other evidence.

4 III. If at the time of execution of the will the testator fails to provide in the testator's will for
5 a living child solely because the testator believes the child to be dead, the child is entitled to share in
6 the estate as if the child were an omitted after-born or after-adopted child.

7 IV. In satisfying a share provided by subparagraph I(a), devises made by the will abate as
8 provided in RSA 551:11.

9 2 Applicability. This act shall apply to all wills executed before or after the effective date of this
10 act, except that this act shall not apply to those wills executed by a testator who died prior to the
11 effective date of this act.

12 3 Effective Date. This act shall take effect 60 days after its passage.