

[REDACTED]

victim's neck, the victim said, "You cut me"; and the defendant conceded that the officer could testify that the wound was a clean cut. In addition, the jury viewed photographs of the wound.

Finally, the defendant faults the trial court for permitting Officer Tanner to testify because, according to the defendant, Officer Tanner provided no basis for his opinion. "Objections to the basis of an expert's opinion go to the weight to be accorded the opinion evidence, and not to its admissibility. The appropriate method of testing the basis of an expert's opinion is by cross-examination of the expert." *Tullgren v. Phil Lamoy Realty Corp.*, 125 N.H. 604, 609-10, 484 A.2d 1144, 1148 (1984) (citation omitted). Here, the defendant had ample opportunity to cross-examine Officer Tanner on the basis of his opinion that a sharp instrumentality or knife caused the victim's injury. This cross-examination allowed the defendant to test the weight that the officer's opinion should be given by demonstrating Officer Tanner's familiarity or lack thereof with "clean cut" wounds. Thus, the trial court did not abuse its discretion in allowing Officer Tanner's testimony.

Affirmed.

BROCK, C.J., and HORTON and BRODERICK, JJ., did not sit; GRAY, J., retired superior court justice, and MCHUGH and GROFF, JJ., superior court justices, sat by special assignment pursuant to RSA 490:3; all who sat concurred.

[REDACTED]

Cheshire County Probate Court
No. 98-697

IN RE ESTATE OF ELIZABETH ROBBINS

July 5, 2000

[REDACTED]

[REDACTED]

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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 statute is to prevent a mistake or unintended failure by the testator or testatrix to remember the natural object of his or her bounty. Consequently, if a child is not named or referred to in the will, and is not a devisee or legatee under the will, then the statute creates a conclusive rule of law that pretermission of the child was accidental. See *In re Estate of Came*, 129 N.H. 544, 547, 529 A.2d 962, 964 (1987). "This rule is conclusive unless there is *evidence in the will itself* that the omission was intentional." *In re Estate of MacKay*, 121 N.H. 682, 684, 433 A.2d 1289, 1290 (1981) (quotation omitted).

"[N]o 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." *In the Matter of Jackson*, 117 N.H. 898, 903, 379 A.2d 832, 835 (1977) (quotation and ellipsis omitted).

The testator's reference to the child need not be direct. See *In re Estate of Laura*, 141 N.H. 628, 634, 690 A.2d 1011, 1015-16 (1997). In *Laura*, we held that by naming the father of the great-grandchildren, the testator sufficiently referred to the great-grandchildren to preclude them from invoking the statute. See *id.*

The petitioners were neither named nor devisees or legatees under the testator's will. The respondents argue, however, that the testator's statement in the will that "I intentionally make no provisions for the benefit of any other heir of mine" sufficiently refers to the petitioners so as to deprive them of the statute's protection.

Two cases control the outcome of this case. In *MacKay*, the testator's will did not directly refer to the daughter-claimant, but provided that the residue of the estate would go to the testator's "heirs at law" and "next of kin." See *MacKay*, 121 N.H. at 683, 433 A.2d at 1290. Similarly, in *Jackson*, the testator's will devised the residue of his estate to his brother and sister and "to their heirs and assigns forever," but did not directly name his three adopted children. See *Jackson*, 117 N.H. at 900, 379 A.2d at 833-34. We held in both cases that the testator's use of a generic term such as "heirs" was insufficient to preclude application of RSA 551:10. See *MacKay*, 121 N.H. at 684, 433 A.2d at 1290; *Jackson*, 117 N.H. at 901-02, 379 A.2d at 834-35.

In a similar context, when determining whether language in a will is sufficient to render a claimant a legatee for purposes of RSA 551:10, we have stated that although

a devise or legacy to a class circumscribed by the terms "children" or "issue" may be a sufficient recognition of a child of the testator to exclude the child from the ambit of RSA 551:10, a devise or legacy to a class which *may include* children, such as "heirs-at-law" or "next-of-kin" is not sufficient recognition.

MacKay, 121 N.H. at 684-85, 433 A.2d at 1291 (citation omitted).

■ In the instant case, the reference to "any other heirs of mine" is insufficient to establish that the testator had her children in mind when she omitted them from the will. *See Jackson*, 117 N.H. at 903, 379 A.2d at 835. We hold, therefore, that the probate court erred in concluding that the petitioners are not pretermitted heirs pursuant to RSA 551:10.

The respondents argue that *Smith v. Sheehan*, 67 N.H. 344, 39 A. 332 (1892), controls the outcome of this case. In *Smith*, the testator's son was not expressly mentioned in the testator's will, but the will contained a residual clause providing that the residue go "to my legal heirs." *Id.* at 348, 39 A. at 333. We held that the use of the term "heirs" was sufficient to deprive a child of the protection of the pretermitted heir statute. *See id.* at 347-48, 39 A. at 333 (decided under prior law).

Our holding in *Smith* rested not only on the fact that the term "heirs" was sufficient under the statute, but also on the fact that the testator's son was a legatee under the will. *See id.* at 347, 39 A. at 333. Thus, we did not have before us the question of whether the use of the term "heirs," alone, was sufficient under the predecessor to RSA 551:10. Moreover, our decisions in *MacKay* and *Jackson* have severely limited, if not overruled, the portion of the *Smith* decision upon which the respondents now rely. *See MacKay*, 121 N.H. at 683-84, 433 A.2d at 1290; *Jackson*, 117 N.H. at 901-02, 379 A.2d at 834.

■ Accordingly, we hold today that a testator's use of the term "heirs" is insufficient to preclude application of the pretermitted heir statute. The words "children" or "issue" must be used. To the

extent the holding in the *Smith* decision is inconsistent, it is overruled.

Reversed and remanded.

BROCK, C.J., and HORTON and BRODERICK, JJ., did not sit; GRAY, J., retired superior court justice, specially assigned under RSA 490:3, was recused and did not sit or participate in the decision; MCHUGH and GROFF, JJ., superior court justices, sat by special assignment pursuant to RSA 490:3; all who sat concurred.

Cheshire
Nos. 98-517
98-547

STATE OF NEW HAMPSHIRE

v.

RICHARD TIMMONS

STATE OF NEW HAMPSHIRE

v.

MELISSA NASON

July 5, 2000

Philip T. McLaughlin, attorney general (*Brian R. Graf*, senior assistant attorney general, on the brief and orally), for the State.

James E. Duggan, chief appellate defender, of Concord, and *Carl Olson*, assistant appellate defender, of Littleton (*Mr. Duggan* on the brief, and *Mr. Olson* orally) for the defendants.

GRAY, J. The defendants, Richard Timmons and Melissa Nason, appeal the Superior Court's (*Morrill, J.*) partial imposition of their deferred sentences, arguing that the trial court erred in finding that