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THE APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION
PROBATE PART
MONMOUTH COUNTY
DOCKET NO. MON-P-471-23

IN THE MATTER OF THE
ESTATE OF

ELEANOR MARKO,

Deceased.

OPINION

Decided October 14, 2025.

Heymann & Fletcher (Alix Claps, Esq., appearing), attorneys for plaintiffs Annette Marshall, Barbara Cetta, Bette Ann Van Etten, Gabrielle Solomon, and Janice Lee.

Antoinetta L. Milelli, attorney for plaintiff Robert Marshall.

Szaferman, Lakind, Blumstein & Blader, P.C. (Steven L. Fox, Esq., appearing), attorneys for defendants Fran Marko and Lindsay Sanecki.

Zager Fuchs, P.C. (Michael T. Warshaw, Esq., appearing), attorneys for defendant Shannon Marko Thorpe.

Nirenberg & Varano, LLP (Howard M. Nirenberg, Esq., appearing), attorneys for defendant Michael Weintraub.

FISHER, P.J.A.D. (t/a, retired on recall).

Theodore and Eleanor Marko were married and had two children, Robert and Renee. In 1992, Ted and Eleanor[1] made reciprocal wills and settled reciprocal revocable living trusts. Ted's trust was funded with various accounts; Eleanor's was funded with title to their Middletown home. Ted's trust provided Eleanor with certain benefits under its credit shelter provisions and further directed, on Eleanor's death, that Renee would receive in trust 60% of its value and Robert the remainder after certain specific bequests. Ted and Eleanor's reciprocal wills directed a pour over of their probate assets into their trusts. In 2004, because of changes in New Jersey's estate tax laws that impacted the credit shelter provisions, Ted and Eleanor executed new wills, but they apparently took no similar action with respect to the trusts. Ted died later that same year. During the ten years following Ted's death, Eleanor engaged in further estate planning, culminating, in 2015, with her execution of a new will and a new revocable living trust agreement. She died in 2016.

[1] The court utilizes the first names of the parties to avoid confusion.

Eleanor's 2015 trust – like her 1992 trust – directed that Renee, because of her disabilities, would receive in trust 60% of the trust's res after certain bequests; Robert received the rest. But the 1992 and 2015 trusts differ in one highly relevant way. The 1992 trust directs that the remainder of Renee's trust – after Renee's death, which occurred in 2023 – would pass to Fran Marko (Robert's spouse) and Robert and Fran's two children, defendants Shannon Marko Thorpe and Lindsay Sanecki; the 2015 trust, however, directs that what remained after Renee's death would pass to plaintiffs Bette Ann Van Etten, Annette Marshall, Gabrielle Salomon, Janice Lee, and Barbara Cetta.

Eleanor's 2015 trust did not expressly state that she revoked the 1992 trust, and the newer trust apparently went un-funded. And therein lies the pivotal dispute presented by this lawsuit. Did Eleanor intend to revoke the 1992 trust when she settled the 2015 trust, or did she intend to establish an estate plan that would ultimately benefit a different group than would benefit by way of her 2015 trust and will?

Plaintiffs filed their complaint in this action, seeking, among other things, a declaration that Eleanor probably intended to revoke the 1992 trust. Discovery is now complete, and defendants Fran, Lindsay, and Shannon have moved for summary judgment, presenting an array of information that largely suggests that after Eleanor's death no one thought or acted as if Eleanor's probable intent was

as now argued by plaintiffs. They contend that Eleanor did not have an intent to revoke the 1992 trust because she did not express that in the 2015 trust or in any other written instrument,[2] and because she did not fund the 2015 trust. See F/LBr. at 3, 8-9; SBr. at 5.[3] Plaintiffs argue from that what is stated in Eleanor's draft and executed wills following Ted's death, as well as Eleanor's undisputed creation of the 2015 trust – all of which reveal a desire to benefit plaintiffs over defendants – is compelling evidence that Eleanor probably intended to revoke the 1992 trust; in other words, they rhetorically ask, why would Eleanor create a trust in 2015 if, as defendants would have it, it would leave her estate plan essentially unaltered?

Defendants' motions require the court's application of the standard described in Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520 (1999), that

[2] Her 2015 will, that also favors plaintiffs, expressly revoked all prior wills including the 1992 will that favored defendants just as the 1992 trust favored defendants. Those undisputed events cut two ways. While plaintiffs may argue that the 2015 trust should be interpreted by what was stated in the 2015 will and that interpretation suggests Eleanor's desire to revoke the 1992 trust, like she revoked the 1992 will, defendants could just as well argue that the 2015 will deliberately revoked earlier wills while the 2015 trust did not revoke the 1992 trust, thus arguably evincing an intent to maintain two trusts, not just the newer one.

[3] These abbreviations refer to Fran and Lindsay's moving brief and Shannon's moving brief, respectively. Pb refers to the brief filed by plaintiffs Bette Ann, Annette, Gabrielle, Janice, and Barbara in opposition to Fran and Lindsay's moving brief.

need not be iterated here because we're all familiar with it. It suffices to observe that this standard requires the court's analysis of the factual contentions of the parties in search of a genuine factual dispute that might stand in the way of the movants' quest for a favorable judgment. And so, the court must turn first to the legal and equitable principles that govern the parties' disputes.

The construction of wills as well as the construction of trusts are governed by the doctrine of probable intent. In re Estate of Branigan, 129 N.J. 324, 331 (1992). To ascertain that intent, courts are expected to consider more than an instrument's isolated sentences or phrases. Engle v. Siegel, 74 N.J. 287, 291 (1977). "[P]rimary emphasis" must be given to the testator's "dominant plan and purpose as they appear from the entirety of [the instrument] when read and considered in light of the surrounding facts and circumstances," Fidelity Union Trust Co. v. Robert, 36 N.J. 561, 564-65 (1962), while ascribing to the testator "those impulses . . . common to human nature," id. at 565 (quoting Greene v. Schmurak, 39 N.J. Super. 392, 400 (App. Div. 1956)). So heavy is the public policy favoring enforcement of a testator's or trust settlor's wishes that a court may divine those intentions by "inserting omitted words, by altering the collocation of sentences, or even by reading [the instrument] directly contrary to its primary signification." Bottomley v. Bottomley, 134 N.J. Eq. 279, 291 (Ch. 1944) (quoted with approval in Branigan, 129 N.J. at 331-32); see also In

re Estate of Tateo, 338 N.J. Super. 121, 127 (App. Div. 2001) (observing that, since Robert, 36 N.J. 561, "a clearly ascertained probable intent can be effectuated . . . even if it means the deletion from, substitution of or insertion in the verbiage used in the will"). Thus, to the extent Fran, Lindsay and Shannon argue the court should render a decision based upon a plain reading of the instruments' words – or more precisely, what isn't found in the 2015 trust – that argument runs counter to this doctrine.

In short, as Judge Kilkenny explained, the so-called "plain meaning" doctrine so often applied by courts elsewhere "is not a controlling principle in New Jersey in the construction of wills." Darpino v. D'Arpino, 73 N.J. Super. 262, 270 (App. Div. 1962). Instead, courts must "effectuat[e] the testator's probable intent to accomplish what . . . would have [been] done had [the testator] envisioned the present inquiry"; courts may, in undertaking that task, look beyond "the words and phrases in the will" and consider extrinsic evidence about the surrounding circumstances, including "the testator's own expressions of . . . intent" outside the instrument to be interpreted so as to give life to the testator's probable intent rather than simply fall back on a "literal reading of the instrument." In re Estate of Payne, 186 N.J. 324, 335 (2006); see also In re Trust Created by Agreement Dated Dec. 20, 1961, 194 N.J. 276, 282 (2008); Darpino, 73 N.J. Super. at 270. Governing principles enacted by our Legislature are not

inconsistent. See N.J.S.A. 3B:3-33.1(a) (declaring that "[t]he intention of a testator as expressed in his [or her] will controls the legal effect of his [or her] dispositions, and the rules of construction expressed in [N.J.S.A. 3B:3-34 through N.J.S.A. 3B:3-48] shall apply unless the probable intention of the testator, as indicated by the will and relevant circumstances, is contrary").[4]

Considering this strong public policy in favor of the enforcement of a testator's or a settlor's probable intent when an ambiguity exists – or even when an ambiguity doesn't exist[5] – suggests that the summary-judgment procedure provides a too fragile foundation for disposition of a case like this. While defendants have forcefully argued the lack of evidence to support plaintiffs' theory, in this court's view plaintiffs' response sufficiently rebuts their contentions. The very existence of Eleanor's 2015 trust and will – notwithstanding the absence in the former of a statement revoking the 1992 trust – in and of themselves both provide evidence that Eleanor may have intended to revoke the 1992 trust. Viewing this evidence alone in plaintiffs' favor – as they

[4] While some of the cases and authorities cited above apply this doctrine to the interpretation of wills, the approach is no different when the questioned instrument is a trust.

[5] The finding of an ambiguity is not a requirement for enforcing a decedent's probable intentions. See, e.g., Roberts, 36 N.J. at 565 (recognizing that courts should "strain towards effectuating" the decedent's probable intentions "even though it mean[s] departing from the literal terms of the will"); see also Darpino, 73 N.J. Super. at 269-71.

are the opponent of the summary judgment motions – a factfinder could very well come to the conclusion that there must have been some reason for Eleanor to have engaged in estate planning in 2015; why would she have created a trust and a will in 2015 that favor plaintiffs, when, as defendants argue, the lion share, if not the entirety, of her property would pass on her death under the 1992 trust? Did she really intend to benefit defendants through the 1992 trust when she had indicated her desire to supplant them as the objects of her affection by way of the 2015 instruments? In applying the Brill standard, the court cannot conclude from this record that a trial is unnecessary and that the answers to those questions must be in the negative, as defendants argue. Although defendants make much of the facts about how the parties acted after Eleanor's death, it is not presently clear how the actions of others after her death reveal anything about what her probable intentions were before her death. Eleanor's statements, her actions, and her writings, during her lifetime provide the best evidence of her probable intentions. Even if her only statements, actions, and writings were the 2015 trust and will, that would be enough to defeat summary judgment. The court cannot resolve the pivotal question about Eleanor's probable intent absent a trial at which extrinsic evidence may be offered to light the way.

The court lastly observes that defendants further urge the propriety of summary judgment on their assertion that plaintiffs are required to prove their

theory about Eleanor's probable intentions by clear and convincing evidence.[6] The standard to be applied depends on how the facts and claims are viewed. In In re Trust of Nelson, 454 N.J. Super. 151, 160 (App. Div. 2018), the court held that when a party seeks reformation, the clear-and-convincing standard applies but when a particular interpretation or construction is sought, the preponderance standard applies. See also In re Estate of Reininger, 388 N.J. Super. 289, 298 (Ch. Div. 2006). The Legislature drew this same distinction in the Uniform Trust Code, N.J.S.A. 3B:31-1 to -84. In N.J.S.A. 3B:31-31, the Legislature directed that reformation of a trust requires "clear and convincing evidence," but, as stated in N.J.S.A. 3B:31-32, the Legislature also recognized that "nothing in [the Uniform Trust Code] shall prevent the court from construing the terms of a trust, even if unambiguous, to conform to the settlor's probable intent." In this case, where or whether there needs to be a bifurcation of plaintiff's theory between a request for reformation or a request for construction or interpretation of the 2015 trust is not entirely clear at this moment. Only once the claim is illuminated by the proofs will there be clarity about whether it is reformation or interpretation, or a little of both, that plaintiffs seek. And, only then, will the applicable standard of proof become apparent.

[6] To be sure, that higher standard would apply to plaintiffs' fraud claim, but not necessarily on the other claims.

In addition, it should be recognized that the fixing of the appropriate burden of persuasion doesn't alter the availability of summary judgment, as defendants seem to contend. The clear-and-convincing standard does not require that the proponent produce "more" or "other" evidence than would be required by the preponderance standard. Clear-and-convincing evidence is that which produces "in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established"; it is evidence that is "so clear, direct and weighty and convincing as to enable [the factfinder] to come to a clear conviction, without hesitancy, of the precise facts in issue." In re Seaman, 133 N.J. 67, 74 (1993) (quoting Aiello v. Knoll Golf Club, 64 N.J. Super. 156, 162 (App. Div. 1960)). This higher standard requires only that the evidence cause a greater impact in the factfinder's mind than necessary to succeed in a matter governed by the preponderance standard. So, even if plaintiffs are burdened by the higher standard here, the court is in no position to conclude – without taking in all the evidence and having it subjected to cross-examination at a trial – whether what plaintiffs have presented in support of their claim will lead the court, as factfinder, to "a clear conviction, without hesitancy, of the precise facts." In short, the clear-and-convincing standard concerns itself with the weight of the evidence not the amount, and the weight of evidence cannot be

calibrated on a cold record. Resolution of the burden of persuasion to be applied does not alter the disposition of these motions.

The motions also address whether plaintiffs' fraud and unjust enrichment claims may go forward; the motions additionally seek a fee award based on what they claim is the frivolity of plaintiffs' complaint. Since the court has determined that the circumstances pose genuine disputes about Eleanor's probable intentions that can only be resolved at a trial, the claim that the complaint is entirely without merit and warrants an award to defendants of attorneys' fees, under either Rule 4:46, Rule 1:4-8, or N.J.S.A. 2A:15-59.1, must be rejected. With the exception of the fraud claim, plaintiffs' other claims are dependent on the outcome of the probable-intent question and, thus, the motions, insofar as they seek summary judgment on those claims, must be denied. The fraud claim is largely based on an alleged forgery of a signature as the means for placing Shannon in the role of trustee that was an alleged product of Shannon "overstepping . . . authority." PBr at 10. The record on these motions is too lacking in clarity to allow for entry of summary judgment on that particular claim.

The motion lastly seeks summary judgment in favor of the movants insofar as the legal malpractice claim is directed at them. Plaintiffs, however, acknowledge the movants here are not targets of their malpractice claim. In prior

case management proceedings, the legal malpractice claim was separated from the balance of the action; the probate issues will be tried first, and in the very near future.

* * *

Defendants' motions for summary judgment will be denied. The court's order will further reflect that the movants are not targets of the legal malpractice claim, which has already been bifurcated.

So ordered.