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Estate Planning

Ambiguity Is Not Required

To invoke and apply the Doctrine of Probable Intent, an ambiguity in the will is not required

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What happens when a husband and wife die leaving identical wills, but literal construction of the wills leads to an apparently unintended result?

The recent appellate decision in *In the Matter of the Estate of Jennie Tateo*, 338 N.J. Super. 121 (App. Div. 2001), appeared to confirm that courts should employ the Doctrine of Probable Intent to resolve the inconsistency. Yet there is still confusion among practitioners and in the courts as to when and how the doctrine should be applied.

Generally, New Jersey courts have consistently taken the position that, in construing a will, a court should ascertain the intent of the testator. *Rutherford Trust Co. v. Staag*, 127 N.J. Eq. 541 (Ch. 1940); *The Trust Co. of New Jersey v. Greenwood Cementary*, 21 N.J. Misc. 169 (Ch. 1943); *Engle v. Siegel*, 74 N.J. 287, 290 (1977); *In the Matter of Estate of Dawson*, 136 N.J. 1, 9 (1994); *In the Matter of the Estate of Jennie Tateo*, 338

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N.J. Super. 121, 128 (App. Div. 2001).

But “[a] court may not, under the guise of construing a will, rewrite it; the intention must be found within its four corners, read in relation to the surrounding circumstances and canons in aid of interpretation.” *Kennedy v. Mockler*, 38 N.J. Super. 35, 49 (App. Div. 1955).

The use of any extrinsic evidence to determine a testator’s probable intent is supposedly limited and may only be used to explain *ambiguities* in a will. *In the Matter of Estate of Zahn*, 305 N.J. Super. 260 (1997); *Engle*, 74 N.J. at 298.

What happens if there are no ambiguities in the will, but it appears that an event has occurred under which a literal interpretation of the will would be inconsistent with the testator’s probable intent? New Jersey courts have long used the Doctrine of Probable Intent to look beyond the mere four corners of the will despite the fact that no ambiguities in the will exist.

Courts Consider Intent

The Appellate Division recently applied the Doctrine of Probable Intent in *In the Matter of the Estate of Jennie Tateo*, the testatrix left a will that left \$50,000 to her daughter, \$5,000 to each grandchild, and a house to her son. *In Estate of Jennie Tateo*, 338 N.J. Super. at 124. The testatrix’s son claimed that the bequests to his sister and the testatrix’s grandchildren had abated because there were no funds. Id. at 125. The testatrix’s daughter, of course, disagreed and initiat-

ed a lawsuit. Id.

The trial court found that the gift of real estate to the testatrix’s son was a specific devise and the gift of cash to the testatrix’s daughter was a general bequest. Id. Applying standard rules of construction, the trial court concluded that because the gift to the testatrix’s daughter was general, it alone was subject to abatement and its payment was not a charge upon the specific real estate devised. Id.

The appellate court, relying on the landmark case of *Fidelity Union Trust Co. v. Robert*, 36 N.J. 561 (1962), held that the trial court gave insufficient consideration to the Doctrine of Probable Intent. Charging the real property with the gifts to the testatrix’s daughter and her two grandchildren was the only result consistent with the probable intent of the testatrix. Id. at 130.

The appellate court noted that the disparity between the testatrix’s gifts to each of her children became less over the years as she changed her will to favor her daughter. Id. at 128. While the testatrix’s dominate plan continued to favor her son, she did not intend to favor him to the exclusion of her daughter. Id. The appellate court opined that providing payment to the testatrix’s daughter and grandchildren, while still allowing the testatrix’s son to have ownership of the house, was the fairest possible result and the result most consonant with the testatrix’s probable intent. Id. at 130.

The seminal decision defining the Doctrine of Probable Intent is *Fidelity Union Trust Co.* The decision expanded the rule that required the determination of the testator’s intent essentially from the four corners of the will. *Fidelity*

Union Trust Co., 36 N.J. at 565.

The court emphasized that the judicial inquiry must focus on the subjective intent of the testator as evidenced not merely by the text of the will but, primarily, by the testator's "dominant plan and purpose as they appear from the entirety of his will when read and considered into the light of the surrounding circumstances." *Id.* at 564-565. "So far as the situation permits, courts will ascribe to the testator, those impulses which are common to human nature, and will construe the will so as to effectuate those impulses." *Id.* at 565. Courts should "strain towards effectuating the probable intent of the testator." *Id.* at 566.

Because the goal is to determine the testator's probable intent under a particular will, precedents involving the construction of other wills and canons of construction have no controlling force. *Id.* at 568. Thus, the court concluded that the essential endeavor the court must undertake "is to put itself in a testator's position insofar as possible in the effort to accomplish what he would have done had he 'envisioned the present inquiry.'" *Id.* at 565-566 (quoting, *In re Klein*, 36 N.J. Super. 407, 419 (App. Div. 1955)).

If the testator's probable intent can be determined, "any language which may be read literally to the contrary must give way" thus allowing the deletion from, substitution of, or insertion in the verbiage used in the will. *Id.* at 568.

Another case which reinforced the Doctrine of Probable Intent is *Engle v. Siegel*, decided approximately fifteen years after the *Fidelity Union Trust Co.* case. In *Engle*, the court said relevant circumstances including the testator's own expressions of intent, must be considered. *Id.* A "court should strive to construe a testamentary instrument to achieve the result most consonant with the testator's 'probable intent.'" *Id.*

Doctrine Used in Earlier Cases

Although the seminal decision in *Fidelity Union Trust Co.* defining the Doctrine of Probable Intent was decided in 1962, it appears that courts were considering the Doctrine much earlier.

In *Rutherford Trust Co.*, two sisters, Minnie and Florence, left identical wills devising and bequeathing her entire

estate to her sister. Each will contained a contingency clause stating that in the event the sister and the testatrix both died, through accident, while they were together, then the sister's share of the estate would pass to various legatees. *Rutherford Trust Co.*, 127 N.J. Eq. at 541. The court stated that to construe the will, it must give effect to the intention of the testatrix so far as that intent could be determined from the will and was consistent with the language used. *Id.* The court held that the contingent clause in both wills was effective because both sisters died through an accident that occurred while they were together, although they did not die at the same instant. *Id.*

Each of the two wills made an identical bequest to a cemetery in the same amount. If both of these bequests were given effect, the court highlighted the fact that the cemetery would receive double requests. *Id.* The court stated, "[w]hether such was the intention of the two sisters may well be doubted." *Id.*

The court did not have to decide the issue, because the cemetery waived its right to one of the bequests. *Id.* However, the court's remark seemed to indicate that it would have considered each sister's dominant plan and purpose as it appeared from the entirety of her will and at least question whether each sister's subjective intent was to leave a bequest to the cemetery under each will.

Only three years later, in *The Trust Company of New Jersey*, a decision was made regarding the construction of identical wills that seemed to be based in part on factors considered under the Doctrine of Probable Intent. The executor and trustee under the wills of two sisters, Emma and Mercedes, sought construction of the wills and instruction as to their duties. *The Trust Company of New Jersey*, 21 N.J. Misc. 169. The wills of both sisters were executed on the same date and were identical in every respect. *Id.*

Emma died two days before Mercedes. *Id.* Each sister devised her entire estate to the surviving sister. *Id.* Each will also contained a provision that if the surviving sister did not survive the deceased sister long enough to receive the residuary estate into her custody and control, then certain monetary bequests

were to be paid to individual beneficiaries in identical amounts. *Id.* One of the individual beneficiaries claimed that she was entitled to a \$5,000 bequest under each will. *Id.*

The court held that it was not the intention of either testatrix "that those to whom they proposed their estate should ultimately go, should take identical bequests under each will." *Id.* The court stated that it was "impossible to believe that the testatrices' [sic] intended that their beneficiaries should, under any circumstances, take under both wills ..." when they must have known that the result would be that there would be no residuary estate for the residuary beneficiary. *Id.*

The court concluded that Emma's entire residuary estate passed to Mercedes to the exclusion of all beneficiaries named and that the bequests provided for in Mercedes' will would be paid out of the combined net assets of Emma and Mercedes. *Id.*

It seems an inescapable conclusion from the holding in *The Trust Company of New Jersey*, that the court focused on the subjective intent of each sister as evidenced not merely by the text of their wills, but by each sister's dominant plan and purpose as it appeared from the entirety of her will when read and considered in light of the surrounding circumstances. The court focused on the factors used in applying the Doctrine of Probable Intent as later defined in *Fidelity Union Trust Co.*

Ambiguity Not Required

Although the Doctrine of Probable Intent has echoed in New Jersey courts for a significant period of time, some attorneys continue to believe that an ambiguity must exist before the Doctrine can be applied. That is simply not the case.

In *Engle*, the majority opinion did not rely upon the finding of an ambiguity in the will to support its decision. This is clear from reading the dissenting opinion. In his dissent, Judge Clifford stated, "an ambiguity in the [will] is the condition which triggers the [Doctrine of Probable Intent's] application to change the result which would attend a literal application of the language of the will."

Engle, 74 N.J. at 298.

In the recently decided case of *In the Matter of the Estate of Jennie Tateo*, applying the Doctrine of Probable Intent, the court did not even mention the finding of an ambiguity, much less rely upon one in applying the Doctrine.

Based upon the cases of *Engle* and

In the Matter of the Estate of Jennie Tateo, a logical conclusion is that an ambiguity is not necessary to invoke and apply the Doctrine of Probable Intent. However, the dissenting opinion in *Engle* indicates there is still much confusion regarding this Doctrine.

While I hope that this confusion will

eventually erode in future decisions, the careful scrivener may want to spend a little more time thinking of various situations that would have an absurd result under a literal meaning of a will to avoid reliance on the Doctrine of Probable Intent. ■