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SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION
PROBATE PART
MONMOUTH COUNTY
DOCKET NO. MON-P-459-19

IN THE MATTER OF THE
ESTATE

OF

QUY DINH VUONG a/k/a
PETER QUY DINH VUONG,

Deceased.

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IN THE MATTER OF THE
ESTATE

OF

NGHIA THI LE,

Deceased.

DOCKET NO. MON-P-458-19

OPINION

Decided August 28, 2024.

Paul E. Minnefor, Esq. (Giordano, Halleran & Ciesla, attorneys for plaintiff Chinh Minh Vuong).

Joel N. Kreizman, Esq. (Scarinci Hollenbeck, attorneys for defendant Thu M. Ngo).

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

Quy Dinh Vuong (also known as Peter Dinh Vuong) and his wife, Nghia Thi Le, executed Wills on May 2, 1984.[1] Peter died on May 20, 2011, Nghia died eight months later. Peter's Will, like Nghia's, named as executrix their daughter, defendant Thu M. Ngo, and directed that, after the payment of all debts, "the rest, residue and remainder" should pass to their son, plaintiff Chinh Minh Vuong. In the provision's next sentence, however, Peter also expressed that he "kn[e]w" Chinh "will carry out my instructions for the care of [Chinh's] mother, brothers and sisters."[2] Chinh's and Thu's competing claims in these consolidated probate actions pivot on the meaning and significance of these two sentences.[3]

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[1] See Minnefor Certification (January 21, 2022), Exhibits A and B.

[2] See Minnefor Certification (January 21, 2022), Exhibit A, ¶ 3.

[3] Nghia's Will contains similar directions. See Minnefor Certification (January 21, 2022), Exhibit B, ¶ 4. This opinion focuses solely on Peter's Will because, with their similar language, the same result must attach to the construction of Nghia's Will.

In ruling on earlier motions, another judge concluded – and memorialized in a September 27, 2023 order – that the sentence about Chinh carrying out Peter's "instructions" neither imposed a legal obligation nor sufficiently revealed an intention to create a trust. The judge instead determined that the Will only directed Thu, as executrix, to distribute the estate assets to Chinh, although the judge also found Thu had some discretion about the timing of the distribution; so he denied Chinh's motion to remove Thu as executrix while compelling her to provide an accounting. The judge denied without prejudice Chinh's summary judgment motion on his fraud, conversion, breach of fiduciary duty, and unjust enrichment claims, but denied, apparently with prejudice, Thu's motion to amend her counterclaim, which claimed the Will called for the creation of a trust and alleged that Chinh committed conversion and had been unjustly enriched.

Both parties seek reconsideration of the September 27, 2023 order. Chinh argues the order didn't go far enough, that Thu's "actions constitute fraud, conversion, unjust enrichment, and breach of fiduciary duties" and the court should have then, and should now, remove Thu as executrix and assess damages against her. On the other hand, Thu argues that the prior judge erred by failing to recognize that the Will's language, alone and as illuminated by other communications and events, reveals Peter's probable intent to create a trust; she

argues as well that the judge erred by barring the filing of her amended counterclaim.

No one disputes or questions the court's authority to reconsider the September 27, 2023 interlocutory order, see Lawson v. Dewar, 468 N.J. Super. 128, 134-36 (App. Div. 2021), even though the present motions do not seem to present anything new or different, Ford v. Weisman, 188 N.J. Super. 614, 619 (App. Div. 1983), and even though the request is made of a judge who did not enter the challenged order, Gonzalez v. Ideal Tile Importing Co., Inc., 371 N.J. Super. 349, 355-56 (App. Div. 2004), aff'd o.b., 184 N.J. 415 (2005).[4] The court has broad power to reconsider an interlocutory order any time prior to entry of final judgment in the interest of justice. When adopting Rule 4:42-2(b), the Supreme Court intended to "expansively" and "broadly codif[y]," with "no restrictions," the common law power to revise interlocutory orders at any time prior to entry of final judgment in the interest of justice. Lombardi v. Masso, 207 N.J. 517, 534 (2011).

In reviewing and considering the submissions that led to the September 2023 order, as well as the current submissions, this court concludes that the prior holding that Peter's Will cannot be understood – either alone or as illuminated

[4] It is of course preferable that a challenged order be reconsidered by the judge who entered it rather than another, but that judge is retired and unavailable.

by other events and communications – as expressing or suggesting Peter's probable intent to create a trust is incorrect and requires modification.

To be sure, there are many peculiarities about this case. But those peculiarities counsel against a summary disposition about Peter's alleged intent to create a trust. Ambiguities abound and preclude summary judgment. For example, the debated provision itself is a walking contradiction. Its first sentence purports to distribute without limitation the residuary estate to Chinh ("I give, devise and bequeath all the rest, residue and remainder of my estate, both real and personal" to Chinh), which is clear enough, but in the next sentence the testator expressed his knowledge that Chinh will "carry out" his "instructions" for the care of Chinh's mother and his siblings. If the first sentence means what Chinh argues, and as the prior judge held, that Chinh is to unconditionally receive the entirety of the estate after the payment of debts, then why did Peter include the second sentence? Should the court assume the second sentence is just meaningless verbiage or might a trier of fact not conclude that it carries the significance urged by Thu?

The doctrine of probable intent governs the construction of Wills. In re Estate of Branigan, 129 N.J. 324, 331 (1992). To ascertain that intent, courts are required to consider more than a Will'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] Will 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)). A testator's probable intent may, in fact, be divined by "inserting omitted words, by altering the collocation of sentences, or even by reading [the] Will 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"). In short, courts must "effectuat[e] the testator's probable intent to accomplish what . . . would have [been] done had [the testator] envisioned the present inquiry," and may look beyond "the words and phrases in the [W]ill" and consider extrinsic evidence about the surrounding circumstances, including "the testator's own expressions of . . . intent" outside the Will, 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). 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"). It is thus clear, as recognized by then Judge (later Justice) Haneman in Tourigian v. Tourigian, 29 N.J. Super. 94, 99 (Ch. Div. 1953), that a Will may be construed to create a testamentary trust even if the word "trust" does not appear within its four corners so long as the evidence reveals that that was the testator's probable intent. See also Scarborough v. Scarborough, 134 N.J. Eq. 201, 206 (Ch. 1943) (recognizing that "a testamentary trust may be found by implication where the intention of the testator to set up a trust is manifest, or testator's obvious purpose cannot be executed except through such an instrumentality, or the executors are given duties to be discharged beyond their ordinary functions as executors").

Applying these bedrock precepts, as well as the Brill standard[5] that governed the September 2023 motions as well as the disposition of these motions, it is readily apparent that a determination about whether Peter intended to create testamentary trusts must await a hearing at which time all relevant

[5] Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520 (1995).

extrinsic evidence may be received and considered. After all, it is not just the ambiguous relationship between the two sentences in question – one which calls for the outright distribution of the residuary estate to Chinh and the other which expresses the testator's knowledge that Chinh will follow his instructions about caring for Chinh's mother and siblings – that precludes the summary relief previously granted in September 2023. The court may also divine Peter's probable intent from information outside the Will's four corners.

The extrinsic evidence referred to in the moving and opposing papers may assist in the resolution of the ambiguities and the ascertaining of probable intent. For example, in 2000 Peter typed out in Vietnamese a document that appears to direct the creation of a trust[6]; Peter invoked the words "Chi Thi," which Thu asserts should be understood in English as "Command to Implement."[7] In that document, Peter expressed an intent to create a "family trust fund" for the purpose of encouraging ancestor worship, good education, marriage, and progeny, as well as "building unity among family members at large."[8] Are these the instructions that Peter may have envisioned when he added the Will

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[6] See Kreizman Certification (May 8, 2024), Exhibits C and D (the latter is represented to be an English translation of the former).

[7] See Thu Certification (June 20, 2024), ¶ 6.

[8] See Kreizman Certification (May 8, 2024), Exhibit D.

provision questioned here? In 2011, Peter wrote to his Wells Fargo broker speaking again about the formation of a trust.[9] These writings may illuminate what Peter intended in 1984.

The court's September 2023 decision focuses almost exclusively on an August 11, 2011 letter written by an attorney to Thu about the meaning of the provision in question; the attorney wrote:

> Your father intended to impose a moral obligation on your brother to carry out those instructions, not an enforceable legal obligation, perhaps because your father wanted your brother to exercise his judgment about the use of the estate for your mother and the others instead of creating enforceable rights.
>
> [Minnefor Certification (January 21, 2022), Exhibit X (emphasis added).]

It is not clear whether this statement arises from information conveyed to the attorney by Peter or others,[10] or whether it merely expresses a legal opinion about the provision's meaning. If the former, it may constitute admissible extrinsic evidence that may aid in the court's understanding of the testator's probable intent; if the latter, it may also have weight. But it is interesting, though, that even if the attorney's opinion is accepted at face value, it does not

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[9] See Kreizman Certification (May 8, 2024), Exhibit E.

[10] The opining attorney had apparently been retained by Peter in 2011 to draft for him a new Will that would have created a family trust. See Kreizman Certification, Exhibit J. Peter died before that intention could be fulfilled.

necessarily support Chinh's argument that Peter intended to convey the residuary estate to Chinh with no strings attached since the attorney also stated that Peter "wanted [Chinh] to exercise his judgment about the use of the estate for your mother and the others instead of creating enforceable rights." If this opinion is correct, it suggests at best an intent to convey property to Chinh on conditions, and it may be that even if a court could ultimately agree that the creation of a trust wasn't affirmatively directed by the Will, a court might still impose limitations on Chinh's disposition of the property. In any event, the attorney's expression to Thu is not dispositive of the parties' competing factual and legal assertions about the Will; the Brill standard governed the prior decision and required the judge to view this evidence – if it is evidence and not just an opinion – in the light most favorable to Thu, not Chinh. See Brill, 142 N.J. at 540; see also Comprehensive Neurosurgical, P.C. v. Valley Hosp., 257 N.J. 33, 71 (2024); C.V. v. Waterford Twp. Bd. of Educ., 255 N.J. 289, 305 (2023); Conforti v. County of Ocean, 255 N.J. 142, 162 (2023).

It should also not be overlooked that the interpretation urged by Chinh seems to require an assumption that Peter effectively intended to disinherit his other children despite the lack of any evidence to support that. In other words, in turning again to notions that guide the construction of a Will, the court should include in the calculus whether a potential interpretation would favor or exclude

the natural objects of the testator's bounty. Thu's suggested interpretation – if adopted – results in a construction that conveys a benefit to all Peter's children, not just one and, thus, is arguably more probable about what Peter intended than Chinh's proposed interpretation, which thoroughly excludes Peter's other children.

It is also of interest that while Peter was educated as an attorney in Viet Nam before he came to this country in the mid-1970s, there is no evidence to suggest that he ever practiced law either in Viet Nam or here or, if he did, that he possessed any knowledge let alone developed expertise in New Jersey probate law, a subject that often proves elusive to many New Jersey attorneys who practice in other areas. Moreover, questions about Peter's intentions may be illuminated by information about Vietnamese culture[11] that may provide additional dimension to the simple but ambiguous Will provision now in question.

Lastly, some mention should be made of Chinh's argument that Thu's arguments about the Will's meaning and her counterclaim are time-barred. Asserting that there is a brightline time-bar that has been surpassed, Chinh relies on Rule 4:85-1. That rule, however, concerns only the timing of an action to

[11] Thu has referred in her most recent certification to the "utmost importance" of "Vietnamese culture honoring parents." Thu Certification (June 20, 2024), ¶ 6.

probate a Will, not actions seeking an interpretation of the Will's meaning or applications seeking instructions based on a Will's alleged uncertainty. See, e.g., In re Estate of Thomas, 431 N.J. Super. 22, 26 (App. Div. 2013). To be sure, Thu's claims may be barred by equitable doctrines, such as estoppel, waiver, or laches, but those doctrines often if not always turn on the particular facts and reasons for delay or silence, and so the determination of whether those doctrines ought to apply here must await the presentation of the parties' evidence at trial.

In short, there are many perplexing questions presented about Peter's probable intent that defy summary disposition. The prior order will be vacated insofar as it granted any summary relief and insofar as it dismissed or barred the filing of Thu's amended counterclaim.

An appropriate order has been entered.