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IN THE MATTER OF VIOLET NELSON, DECEASED.	SUPERIOR COURT OF NEW JERSEY CHANCERY DIVISION BERGEN COUNTY DOCKET No. BER-P-001-15 CIVIL ACTION OPINION

Argued: January 15, 2016
Decided: January 27, 2016

Honorable Robert P. Contillo, P.J.Ch.

Joseph H. Neiman, Esq. appearing on behalf of the plaintiffs, Jacob Nelson, et al.

Lorraine Teleky-Petrella, Esq. appearing on behalf of the defendant, Jared Lina.

OPINION

This matter is before the court upon the Plaintiffs' Motion for Summary Judgment and Defendant's Cross-Motion for Partial Summary Judgment. The motions were argued on January 15, 2016, and the court reserved decision. Trial is scheduled for February 8, 2016.

The core issue presented involves the doctrine of probable intent. The specific question is whether the court can alter the plain, unambiguous language of the Trust, based upon extrinsic evidence suggesting that the plain, unambiguous language of the Trust is not what the Settlor intended and that, while the Trust names as beneficiaries of the Settlor's Trust her "grandchildren", she actually intended to benefit some of her grandchildren and not others. For

the reasons that follow, the court concludes that extrinsic evidence can not, in this case, be used to alter the plain, unambiguous language of the Trust to exclude from a specific beneficiary class — "grandchildren" — two grandchildren of the Settlor who were in existence at the time of the creation of the Trust, and were known to the Settlor to be in existence at the time of the creation of the Trust. To rule otherwise would be to stretch the doctrine of probable intent beyond the breaking point, and create a substantive provision of the Trust written not by the Settlor, but by the court.

I. FACTUAL BACKGROUND

Violet Nelson ("Violet")[1] and Joseph Nelson ("Joseph") had three children: Jacob Nelson (known as "Jack"), Jacoba Nelson ("Jacoba") and Robert Nelson ("Robert"). Jack has three children: Ayelet, Ariel and Alexandra. Jacoba has two children: Jared Lina and Jason Lina; Robert has one child: Laura. All are over the age of twenty-one. The grandchildren's dates of birth are as follows: Jason Lina – October 3, 1975; Jared Lina – July 27, 1978; Laura Nelson – November 16, 1988; Ayelet Nelson – October 16, 1981; Ariel Nelson – March 22, 1983; and Alexandra Nelson Tal – May 13, 1986.

Violet and Joseph practiced Orthodox Judaism, which forbids members of the Jewish faith from marrying non-Jews.

On August 25, 1970, Jacoba married John Lina, a non-Jew. As aforesaid, they have two children, Jared Lina and Jason Lina. The marriage caused a rupture in the relationship between Jacoba and her parents, Violet and Joseph.[2]

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[1] First Names are used in this opinion for clarity and convenience, and not out of disrespect.

[2] The motion papers are afflicted with some inflammatory language about who caused the rupture in the relationships between Jacoba and her parents, and blame for its perpetuation. Those contentions play no part in the court's analysis. No testatrix or settlor is required to divide her estate or assets equally among her children; indeed, she may exclude from her estate one or more or all of her children. Benedict v. New York Trust Company, 48 N.J. Super. 286, 289 (Ch. Div. 1958), aff'd per curiam, 50 N.J. Super. (App. Div. 1958).

There is poignant evidence in the record of possible steps towards reconciliation, particularly around 1986. There is a visit in 1986 by Violet to Jacoba at the latter's home in North Carolina. There was a death bed visit by Jacoba with her mother in late October or early November of 2006, just a few days before Violet died. In between 1986 and Violet's death in 2006, there is no evidence of any contact between Jacoba and Violet, Jared and Violet, or Jason and Violet.

Violet's Last Will and Testament is dated March 19, 1988. In the Will, "Family Members" are identified by name: her husband Joseph, her daughter Jacoba, her son Jack, her son Robert, and the following grandchildren: Ayelet, Ariel, Alexandra. At the time of execution of the Will all six of Violet's grandchildren were in existence except Laura Nelson, who was born November 16, 1988.

Paragraph Seventh of the Will provides as follows: "For reasons known to my family, I specifically leave nothing, to my daughter, JACOBA NELSON or her surviving issue, heirs and/or assigns".

Violet executed a Codicil to her Will on August 5, 2001, in which she makes reference to "my four grandchildren". At that time, all six of her grandchildren were in existence.

Attorney Lawrence Diener, Esq. prepared a Trust Agreement for execution by Violet, as Settlor, and by Jack, as Trustee. The terms of the Trust were based upon instructions from Violet's husband, Joseph, and Violet's son, Jack. Diener did not speak to Violet prior to the execution of the Trust document. The uncontracticed evidence in the record is that Violet, as Settlor, and Jack, as Trustee, signed the Trust Agreement on September 27, 2005. Present for the signing were Diener and Violet, Jack and Joseph.

There is no evidence in the record that Violet was provided a copy of the Trust Agreement prior to being presented the execution copy for signature on September 27, 2005. There is no evidence that she read the document before signing it. There is no evidence that the document was read to her. There is no evidence that either Jack or Joseph, Violet's son and husband, who had provided the proposed Trust provisions to Diener, read the document prior to execution.

Diener has submitted a certification in support of the Trustee's motion for Summary Judgment in which he certifies that Jack and Robert advised him that Violet wished to leave a one-third interest that she owned in Ribey, LLC[3] to her four (4) grandchildren Ayelet, Ariel, Alexandra and Laura, and that Jacoba Lina's children were specifically excluded. (Diener cert. of November 13, 2015, paragraph 8). "In drafting the trust I utilized the word "grandchildren" to describe Jack and Robert's children. I had no intention to utilize that term or any other term to include anyone other than the 4 beneficiaries I was directed to include". Diener cert. of November 13, 2015, at paragraph 11. Diener also confirms that "When the trust was executed by Violet Nelson, in their apartment, I explained to her that the beneficiaries were the grandchildren of Jack and Robert. She understood that fact. She fully agreed. She executed the trust agreement with that specific knowledge and understanding". (Diener cert. of November 13, 2015, at paragraph 14).

Violet died on November 2, 2006. Joseph died on January 10, 2011. The Trust provides that upon Joseph's death, the then principal shall be distributed in equal shares per capita and not per stirpes to Settlor's "grandchildren" who survived Settlor. Paragraph Fifth. It reads as follows:

[3] The LLC owns an apartment building in Yonkers, New York.

> FIFTH: If Settlor's husband fails to survive Settlor or, upon his death, the then principal and all accrued or undistributed net income of the trust shall be distributed in equal shares per capita and not per stirpes **to Settlor's grandchildren** who survive Settlor provided that if any of Settlor's said grandchildren have not yet reached the age of twenty-one (21) years the Trustee shall hold the share of any such grandchildren in trust for the benefit of such grandchild, pay such amount of income or principal to or for the benefit of such grandchild as the Trustee determines to be necessary or advisable and at the time the grandchild reaches the age of twenty-one (21) years to deliver the then remaining principal and interest of such share to the grandchild free of trust. (Emphasis added).

Jack brought this action on January 2, 2015 as Trustee of Violet's Trust, seeking a declaration that Violet's grandchildren Jared and Jason are not beneficiaries under the Trust. Jack's three children join in the action. Jacoba's son Jared opposes. Jared's brother Jason has not joined the suit. Robert's child has not joined the suit.

Neither Jared nor, apparently, Jason had any knowledge of the Trust until late 2014.

II. SUMMARY JUDGMENT

Jack Nelson and the four grandchildren bring this motion for summary judgment, seeking judicial confirmation that Jared and Jason are not beneficiaries under the Trust.

Jared's cross-motion for partial summary judgment seeks confirmation that Jared and Jason are beneficiaries under the Trust. It is a motion for partial summary judgment because if the court agrees that they are proper beneficiaries, an accounting of the trust and attendant damages will be sought.

Per R. 4:46-2(c), summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law. An issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the

motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issue to the trier of fact.

It is clear that there is ample evidence in the record which, if accepted by a fact finder, could lead to a finding that Violet intended to exclude Jacoba's children from the Trust of September 27, 2005. She had excluded them from her Will dated March 19, 1988 – explicitly – and she had had no relationship with them or their mother after 1986. While there is no evidence Violet ever read the Trust Agreement, and its contents were provided to the scrivener, Diener, not by her but by her husband and her son, the scrivener certifies that he expressly told Violet at signing that the only beneficiaries of her trust would be the children of Jack and the children of Robert. He certifies that he drafted the Trust as he did knowing that Violet had six grandchildren but only wanted to include four of them. The word 'mistake' is not used in the attorney's certification, but the inference is clear. There is no way to understand this claim, if it is credited, as anything other than confession of error by the scrivener. Clearly then, this evidence, if credited by the fact finder at trial, could support a finding that Violet intended to benefit her four grandchildren by her sons Jack and Robert, and to exclude her two grandchildren by her daughter Jacoba.

That finding would typically be a sufficient basis to deny Jared's motion for partial summary judgment, seeking confirmation of his and his brother's inclusion in the Trust.

Conversely, there is evidence in the record which, viewed most favorably in Jared's favor, would support a finding that Violet intended her Trust to benefit **all** her grandchildren. What is that evidence? Violet said so, in plain English, in her Trust; in language susceptible to no alternate interpretation. Violet so provided, in clear, unambiguous language, at a time when she knew that she had six (6) not four (4) grandchildren.

That finding would typically be sufficient to deny the Trustee's motion for summary judgment, as a material fact would be in need of adjudication at trial.

III. DOCTRINE OF PROBABLE INTENT

N.J.S.A. 3B:3-33-16 provides that "[t]he intention of a settlor as expressed in a trust, or of an individual as expressed in a governing instrument, controls the legal effect of the disposition therein, 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 intent of such settlor or of such individual, as indicated by the trust or such governing instrument **and** relevant circumstances, is contrary". (Emphasis added).

Here the language of the trust is plain and unambiguous: the beneficiaries of the Trust are the "Settlor's grandchildren". This is the core provision of this simple trust. It is not susceptible to alternate readings. It is the sole reference in the Trust to the identity of the beneficiaries of the Trust.

It is undisputed that, at the time she created the Trust Agreement, Violet knew how many actual grandchildren she had, who their parents were and what their names were. There is no 'afterborn' issue here.

There is evidence that Violet did not consider Jacoba to be her daughter for 16 years before 1986, nor after 1986, and one may infer from that that she did not consider Jared and Jason to be her grandchildren. But that is revealed, and that inference is allowed, only if we examine extrinsic evidence of Violet's intentions and apply it to alter a substantive, unambiguous provision to, in effect, disinherit persons that are otherwise indisputably included under the plain language of the Trust. In my view, under existing case law, that would be an impermissible judicial intrusion.

The court has considered the extrinsic evidence in the extensive motion record. It is substantial and it is supportive of the Trustee's contention that Violet did not intend what her Trust unambiguously provides. The extrinsic evidence, however, does not create an ambiguity in the Trust language. It seeks to contradict that which is unambiguous in the text, not explain any ambiguity in the text, and it seeks to do it in order to completely exclude one-third of the known members of the unambiguously identified beneficiary class ("grandchildren"). This again is impermissible, in my view.

Under the statutory language quoted above, the Settlor's intention as expressed in the Trust controls the legal effect of the disposition therein, "…unless the probable intent of the settlor or indicated by the trust or such governing instruct **and** relevant circumstances, is contrary". (Emphasis added). N.J.S.A. 3B:3-33-1b. Absent ambiguity in the language of the Trust, the court can not resort to extraneous circumstances to explain away what is plainly said. "The doctrine of probable intent is not applicable where the documents are clear on their face and there is no failure of any bequest or provision." In re Estate of Gabrellian, 372 N.J.Super. 432, 443 (App. Div. 2004), cert. denied, 182 N.J. 430 (2005). Recognizing that the trust benefits the Settlor's grandchildren works no failure of any bequest or provision. Excluding two of the six grandchildren has the exact effect of working a failure of bequests. "Where the doctrine [of probable intent] has been used it has been done only with caution and to clarify ambiguities in a will …". Id., 372 N.J. Super. at 442.[4] There are no ambiguities in the Trust document and to interpret it as the Trustee wishes causes a failure of bequests to Jared and Jason.

In In re Estate of Flood, 417 N.J. Super. 378, 381 (App. Div. 2010), cert. denied, 206 N.J. 64 (2011) the Appellate Division denied an estate Administrator's efforts to establish post-

[4] The statutory provisions relating to invocation of the probable intent doctrine are the same for trusts and wills. N.J.S.A. 3B:3-33.1.

decedent's passing a supplemental needs trust for Medicaid eligibility purposes. It summarizes the law as follows:

> The doctrine permits the reformation of a will in light of a testator's probable intent by "searching out the probable meaning intended by the words and phrases in the will". Engle v. Siegel, 74 N.J. 287, 291, 377 A.2d 892 (1977). Moreover, extrinsic evidence may be offered not only to show an ambiguity in a will but also, if an ambiguity exists, "to shed light on the testator's actual intent". Wilson v. Flowers, 58 N.J. 250, 263, 277 A.2d 199 (1971). The outer reach of the doctrine's evolution is likely the court's decision in In re Estate of Branigan, 129 N.J. 324, 330-31, 335, 609 A.2d 431 (1992), where the doctrine was used to reform a will to take advantage of changes in federal estate tax laws that had occurred after execution of the will and after the death of the testator.

In re Estate of Flood, 417 N.J. Super. at 381.

In re Estate of Branigan, 129 N.J. 324 (1992), the doctrine of probable intent was employed by the New Jersey Supreme Court to reform a will to take advantage of federal estate tax laws that occurred after the Will was executed and after the testator died. The reformation of the will in Branigan was for the purpose of minimizing taxes and thus maximizing the size of the decedent's estate, but was allowed only to the extent that the reformation did not alter any substantive disposition under the Will. Id. At 336-337. The rising tide lifted all boats, so to speak: all beneficiaries benefitted by the enhanced Estate. By contrast, the Trustee in the instant matter is asking the court to alter the plain provisions of the Trust, which is to benefit Settlor's "grandchildren", to cut-out one-third of her grandchildren. That is a significant, substantive re-writing of the core dispositive provision of the trust, something this court is not authorized to do. That there is or might be substantial evidence the Settlor intended to exclude them is an impermissible argument in the face of the unambiguous mandate expressed in the Trust.

SUMMARY

Accordingly, the court denies the motion for summary judgment filed on behalf of the Trustee and four of the grandchildren of Violet Nelson, and grants the motion for partial summary judgment brought by her grandson Jared Lina. Orders accompany this decision.