NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3560-14T1

IN THE MATTER OF THE ESTATE OF
KEITH R. O'MALLEY, DECEASED.

Argued May 9, 2016 - Decided June 1, 2016

Before Judges Messano, Simonelli, and Carroll.

On appeal from the Superior Court of New Jersey, Chancery Division, Probate Part, Monmouth County, Docket No. P-0006-15.

Kenneth J. Lackey argued the cause for appellant Renee Brozowski, Guardian for E.L. (Neff Aguilar LLC, attorneys; Mr. Lackey, on the briefs).

Joseph A. Bottitta argued the cause for respondents Jeffrey Bond, Executor, Barbara O'Malley, Jessica Shuman, and Dennis O'Malley (Genova Burns LLC, attorneys; Mr. Bottitta, of counsel; Jenna M. Beatrice, on the brief).

PER CURIAM

In this probate matter, Renee Brozowski, as guardian for her minor son, E.L.,[1] appeals from a March 3, 2015 judgment dismissing her claims against the estate of decedent Keith R.

---

[1] We use initials to preserve the confidentiality of minors named as interested parties in this probate litigation.

O'Malley. For the reasons that follow, we affirm in part and reverse and remand in part.

I.

Brozowski and O'Malley were never married but had one child, E.L., who was born in August 2000. E.L. lived with Brozowski in the Albany, New York area. O'Malley was a New Jersey resident who lived in Spring Lake when he died unexpectedly in June 2014 at age thirty-six. By all accounts, O'Malley was financially prosperous, and prior to his death he had expressed an interest in sharing his acumen in trading stocks with E.L.

On February 8, 2008, Brozowski and O'Malley entered into a Child Support Agreement (CSA) "based upon [their] financial circumstances . . . as well as an application of the laws of the State of New York including, but not limited to, the Child Support Standard[s] Act." The CSA provided that O'Malley would pay Brozowski $3000 per month child support for E.L., and that "[t]he basic child support obligation created hereunder . . . shall be paid until such time as [E.L.] reaches his twenty-first birthday or becomes earlier emancipated." Additionally, O'Malley agreed to pay 100% of E.L.'s childcare and unreimbursed medical expenses. He also agreed to deposit $7500 per year into a college account for E.L., "commencing in the year 2008 and

each year thereafter through and including the year in which the child obtains a four[-]year degree or attains his twenty-third birthday, whichever shall occur first."

By consent, the CSA was incorporated into a Child Support Order entered by the Albany County Family Court on March 19, 2008. The order provided that it "shall be enforceable pursuant to Section 5241 or Section 5242 of the [New York] Civil Practice Law and Rules, or in any other manner provided by law."

O'Malley executed a Last Will and Testament (the will) on March 8, 2013. The FIRST Article of the will directed that "all my debts . . . that are just and not barred by time or for any other reason be paid by my Executors in accordance with the terms of the indebtedness from my residuary estate." The SECOND Article specifically disinherited E.L.:

> (A) I hereby specifically omit my son, [E.L.], and his issue, as beneficiaries under my Will and of my estate and specifically provide that they shall not be included in any class group such as, but not limited to, "children," "issue," or "descendants." For all purposes under or outside of this Will, including for purposes of determining my intestate heirs, my son, [E.L.], and his issue shall be deemed to have predeceased me.

In the THIRD Article of the Will, O'Malley gave all his personal property, excluding aircraft, to S.O., his young daughter from another relationship. Alternatively, the property

was to be sold and the proceeds added to his residuary estate. O'Malley also established a $50,000 trust for the lifetime care of his dog Bella.

In the FOURTH Article, O'Malley bequeathed $5,000,000 to S.O. plus, under the FIFTH Article, fifty percent of his residuary estate. The remaining fifty percent of the residuary was to be held in the "Keith R. O'Malley Family Trust" and disposed of pursuant to the NINTH Article of his will. In turn, the NINTH Article designated O'Malley's parents, his sister, and his sister's issue, as "allowable beneficiaries" entitled to share in the Family Trust.

Following his death, O'Malley's will was admitted to probate by the Monmouth County Surrogate on July 8, 2014. On January 6, 2015, Brozowski filed an order to show cause (OTSC) and verified complaint in the Chancery Division, Probate Part, seeking, among other things, to invalidate the will and enforce the CSA. The complaint asserted the following six causes of action: (1) Protective Arrangement pursuant to N.J.S.A. 3B:12-1; (2) Mistake; (3) Lack of Capacity; (4) Undue Influence; (5) Probable Intent; and (6) Breach of Contract. The Executor and O'Malley's parents and sister (collectively, defendants) opposed the application.

The Probate Part heard oral argument on the return date of the OTSC and issued an oral opinion denying the relief sought by Brozowski. The court found that N.J.S.A. 3B:12-1, by its express terms, did not apply. The court also found that Brozowski did not allege facts sufficient to establish viable claims of lack of capacity or undue influence. Additionally, because the court determined that "the [w]ill is clear and expressly disinherits [E.L.]," Brozowski's claims founded on mistake and the probable intent doctrine also failed. Ultimately, the court concluded:

> No matter how unfortunate these circumstances are, I find I cannot invalidate the [w]ill . . . . I find that there is nothing in the paper[s] that would allow me to do that, that would allow me to enter into a protective arrangement or enforce the child support agreement because that is a New York agreement. Perhaps there may be something in New York. But New York law states that they cannot be enforced after death.

The court entered judgment on March 3, 2015, dismissing Brozowski's complaint with prejudice. This appeal followed.

On appeal, Brozowski reasserts her probable intent and mistake claims.[2] She contends that factual issues exist that

[2] The claims relating to a protective arrangement, lack of capacity, and undue influence are not before us as Brozowski did not raise them in her appeal. Sklodowsky v. Lushis, 417 N.J. (continued)

preclude the dismissal of these claims. She also urges that we adopt a "common law, bright-line rule, as a corollary to the probable intent doctrine," which would create a rebuttable presumption that "a decedent's probable intent is for support payments to be a valid claim against his estate."

II.

We first consider our standard of review. We will not disturb the factual findings and legal conclusions of a trial judge unless we are convinced that those findings and conclusions "are so manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interests of justice." Tractenberg v. Twp. of West Orange, 416 N.J. Super. 354, 365 (App. Div. 2010) (quoting Rova Farms Resort, Inc. v. Inv're Ins. Co. of Am., 65 N.J. 474, 484 (1974)). "However, '[a] trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference.'" Ibid. (alteration in original) (quoting Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995)).

Rule 4:83-1 designates that "all actions in the Superior Court, Chancery Division, Probate Part, shall be brought in a

---

(continued)
Super. 648, 657 (App. Div. 2011) ("An issue not briefed on appeal is deemed waived.").

summary manner by the filing of a complaint and issuance of an order to show cause pursuant to [Rule] 4:67." Consequently, probate matters are specifically subject to Rules governing expedited summary actions when in the trial court. See Courier News v. Hunterdon Cty. Prosecutor's Office, 358 N.J. Super. 373, 378 (App. Div. 2003).

Actions brought in a "summary manner" are distinguishable from summary judgment actions because in a summary action, the court makes findings of fact and accords no favorable inferences to the action's opponent. O'Connell v. N.J. Mfrs. Ins. Co., 306 N.J. Super. 166, 172 (App. Div. 1997), appeal dismissed, 157 N.J. 537 (1998). If the court is "satisfied with the sufficiency of the application, [it] shall order defendant to show cause why final judgment should not be rendered for the relief sought." Courier News, supra, 358 N.J. Super. at 378 (alteration in original) (quoting R. 4:67-2(a)). Furthermore, summary actions are specifically designed to be expeditious and avoid plenary hearings. Under Rule 4:67-5,

> [t]he court shall try the action on the return day, or on such short day as it fixes . . . [i]f . . . the affidavits show palpably that there is no genuine issue as to any material fact[.] If any party objects to such a trial and there may be a genuine issue as to a material fact, the court shall hear the evidence as to those matters which may be genuinely in issue, and render final judgment. At the hearing or on

> motion at any stage of the action, the court for good cause shown may order the action to proceed as in a plenary action . . . .

Consequently, judges sitting in probate on summary proceedings have broad discretion in determining the genuine nature of the factual dispute and whether the issue may merit a plenary hearing. See Tractenberg, supra, 416 N.J. Super. at 365 (holding that a judge properly utilized a summary proceeding to determine whether facts supported the claim that the attorney-client privilege or attorney work product protected the release of certain documents under the Open Public Records Act).

Here, we find that the Probate Part reasonably exercised its discretion in determining that a plenary hearing was not warranted and dismissing Brozowski's probable intent and mistake claims. We reach a different result, however, with respect to the breach of contract claim. We address each of these issues in turn.

A.

Brozowski contends that application of the probable intent doctrine is appropriate here because, had O'Malley known he would die prematurely, he would have made adequate provision for E.L.'s support, care, education and welfare. She asserts that discovery of the will scrivener's file and the scrivener's deposition are necessary to determine whether O'Malley was aware

that his support obligations would cease upon his death, as defendants contend is the result under New York law. Defendants respond that, because O'Malley's will contains no ambiguity and is a clear expression of his intent to disinherit E.L., Brozowski cannot state a claim of probable intent. Also, because the will is clear and unambiguous, extrinsic evidence is not needed to determine O'Malley's actual intent. We agree with defendants.

The doctrine of probable intent is embodied in N.J.S.A. 3B:3-33.1(a): "The intention of a testator as expressed in his will controls the legal effect of his 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."

The doctrine is no more than "a rule of construction or interpretation and, therefore, presupposes an existing testamentary disposition" to interpret. In re Estate of Flood, 417 N.J. Super. 378, 382 (App. Div. 2010), certif. denied, 206 N.J. 64 (2011). The doctrine is "applied sparingly and only where necessary to give effect to the intent of the will or trust without varying the terms of the document." In re Estate of Gabrellian, 372 N.J. Super. 432, 441 (App. Div. 2004),

certif. denied, 182 N.J. 430 (2005). By way of example, a decedent's intent to minimize the tax consequences of testamentary dispositions might be used to read "technical provisions essential to achieve tax savings" into an existing gift, In re Estate of Branigan, 129 N.J. 324, 335 (1992), "but only to the extent that those revisions [do] not alter the dispository provisions of the will." Gabrellian, supra, 372 N.J. Super. at 442. "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." Id. at 443.

These principles are fatal to Brozowski's probable intent claim that the will should be construed to include E.L. as a beneficiary. She is unable to point to a single sentence, phrase or word in the will that could be interpreted to give any part of O'Malley's estate to E.L. The will could hardly be clearer: "I hereby specifically omit my son, [E.L.], and his issue, as beneficiaries under my [w]ill." Because the will is clear that none of O'Malley's estate should go to E.L., and because this directive can be carried out as written, the doctrine of probable intent has no role in this case. Therefore, the Probate Part properly dismissed the probable intent claim.

B.

In a similar vein, Brozowski argues that the court erred in dismissing her claim of mistake in the inducement without the opportunity for discovery. Specifically, she contends that she should be afforded the opportunity to ascertain whether O'Malley mistakenly believed that the child support obligations would survive his premature death prior to the fulfillment of those obligations. Defendants again respond that the will reveals a clear intent to disinherit E.L. upon O'Malley's death, and any suggestion that O'Malley held an inaccurate belief as to any essential fact is pure speculation.

Mistake in the inducement may exist when a testator is influenced to execute a will based on an inaccurate belief as to as essential fact, such as the death of a beneficiary who is in fact alive. See In re Araneo, 211 N.J. Super. 456, 461 (Law Div. 1985), aff'd, 213 N.J. Super. 116 (App. Div.), certif. denied, 107 N.J. 62 (1986) (applying N.J.S.A. 3B:5-16(c), which mandates that if a decedent fails to provide for a child solely because of a mistaken belief that the child is dead, the child may be entitled to a share of the estate).

Here, Brozowski provided no evidence for her bare allegation that O'Malley held a mistaken belief as to whether his support obligations would survive his death, and that this

mistaken belief served as his motivation for disinheriting E.L. We agree with defendants that the will is clear and that this claimed motivation based on a mistake is pure speculation on Brozowski's part. In any event, an improper motivation does not invalidate a will. "A court cannot pass upon either the wisdom or fairness of a will's provisions so long as it was validly executed and it is not illegal or offensive to public policy." Ibid. (citing In re Blake's Will, 21 N.J. 50, 57 (1956); In re Petkos, 54 N.J. Super. 118, 128 (App. Div.), certif. denied, 30 N.J. 150 (1959) ("Any repugnance the court may feel at the unnaturalness of the testament cannot be permitted to influence it to frustrate the testator's legal right to dispose of his property as he willed.")).

Accordingly, we cannot say on the basis of this record, that the Probate Part erroneously exercised its discretion. Thus, there is no basis to reverse the dismissal of Brozowski's mistake claim.

C.

Brozowski's breach of contract claim requires a somewhat different analysis. Here, our focus is primarily on the CSA rather than the will, and whether E.L., through Brozowski, is a creditor rather than a beneficiary of O'Malley's estate. In count six of her complaint, Brozowski alleged, at least in part,

that the CSA was a valid contract and that the executor breached that contract "by taking the position that the [CSA] terminated upon O'Malley's death." Although the court cited no controlling authority, it appears to have impliedly rejected this claim on the basis that "New York law does not provide for support upon the death of the father." In reaching that conclusion, however, the court does not appear to have fully considered applicable case law which, in appropriate circumstances, may lead to the conclusion that O'Malley's child support obligation survives his death and constitutes a debt of the estate.[3]

Defendants assert that there is no common law or statutory obligation in New York on the part of a parent to support a child after the parent's death, absent an agreement otherwise (citing CLS Family Ct Act §413; In re Estate of Phinney, 673 N.Y.S.2d 621 (App. Div. 1998); Keehn v. Keehn, 524 N.Y.S.2d 238 (App. Div. 1988); Flatto v. Flatto, 398 N.Y.S.2d 687 (App. Div. 1977); Chiaramonte v. Chiaramonte, 435 N.Y.S.2d 523 (Sup. Ct. 1981); Ehrler v. Ehrler, 328 N.Y.S.2d 728 (Sup. Ct. 1972)). See also Black v. Walker, 295 N.J. Super. 244, 258 (App Div. 1996). Defendants thus argue that, because the CSA fails to expressly provide that the child support payments continue in the event of

[3] On appeal, none of the parties dispute that O'Malley's support obligations under the CSA are governed by New York law.

O'Malley's death, governing New York law requires us to conclude that the support obligation ceased upon his death.

Brozowski contends that New York's highest court, faced with analogous circumstances in Cohen v. Cronin, 346 N.E.2d 524 (N.Y. 1976), reached a different result. In Cohen, the parties entered into a separation agreement that obligated the husband to pay the wife "$400 each month for the wife's separate maintenance and support until she shall remarry or expire." Id. at 525-26. The husband died less than two months after the separation agreement was signed, and the wife sought to charge his estate with the obligation to make the agreed-upon monthly payments. Id. at 526. The Court of Appeals framed the issue as "whether the provision in a separation agreement obligating the husband to make support payments to his wife survives his death and is binding on his estate." Id. at 525. In deciding the issue, the court reasoned:

> We start with the well—accepted proposition that a husband's obligation to support his wife terminates with the husband's death. However, the husband might, by agreement, impose upon his estate a duty to make alimony or support payments after his death. In order to bind the estate, a separation agreement must either specifically provide for the continuation of payments or evince, from the terms of the agreement read as a whole, a clear intention that support payments continue, notwithstanding the husband's death. While explicit agreement by the parties is

> obviously much to be preferred, where such explicit agreement is lacking, the court must read the document as a whole in its total context and examine each of its provisions in order to ascertain the overriding intention of the parties. Since the burden of proof is borne by the claimant, the wife must establish, to the satisfaction of the court, that the parties actually intended to extend the obligation to make support payments beyond the husband's lifetime.
>
> From our analysis of the agreement, we conclude that the provision in the agreement for the support payments to the wife to continue "until she shall remarry or expire", without any qualifying or limiting language, obligates the husband's estate to make payments for the lifetime of the wife. Nowhere in the agreement is it suggested that payments are to be made during the joint lives of the parties or that the agreement would terminate upon death of either party. On the contrary, the agreement expressly states that termination of the payments of support would only occur where the wife has either remarried or died.
>
> [Id. at 526-27 (citations omitted).]

The Court of Appeals further noted that "the agreement involved in this case does not make provision for any other payments to the wife, aside from the support payments. No effort was made to make other provision for the wife's support after the husband's death." Id. at 528. The Court concluded:

> Although this separation agreement does not specifically provide for the continuation of payments after the husband's death, we believe that the tenor of the separation agreement reflects an intent to

> obligate the estate, in the event of the husband's death, to make the support payments called for in the agreement. Not having been shown any evidence extrinsic to the agreement that would support a contrary interpretation, we hold that Special Term properly granted the [wife] summary judgment. Since the [wife] is a creditor of the estate, she was also entitled . . . to have a reserve fund established to ensure that adequate funds would be set aside to satisfy the estate's obligation to her.
>
> [Ibid. (citations omitted).]

The New York Court of Appeals again considered the issue in In re Riconda, 688 N.E.2d 248, 253 (N.Y. 1997). There, the parties' separation agreement simply provided for the husband to make maintenance payments to the wife until her death or remarriage, but was otherwise silent as to the consequence of his predeceasing her. The Court noted that, by statute and under relevant case law, "[g]enerally, the obligation to make maintenance payments terminates upon the death of either party," but "[p]arties may, however, modify or extend the duration of maintenance by contract." Id. at 251. The Court concluded that summary judgment under the facts presented was inappropriate, and remanded the case to the Surrogate's Court to determine "the legal intent and effect behind this singularly controverted portion of the agreement." Id. at 253.

We glean from these cases the need to examine the disputed agreement carefully and to ascertain from its tenor whether the

parties intended the support obligation to survive the payor's death. We see no reason to distinguish between or treat differently a decedent's spousal and child support obligations. No such searching inquiry of the CSA, as opposed to the will, was undertaken here. Consequently, although the CSA obligated O'Malley to pay basic child support until E.L.'s twenty-first birthday, and contribute to E.L.'s college expenses until he obtains a college degree or attains his twenty-third birthday, the court failed to examine the intent and legal effect of the time frames agreed to by the parties for the payment of these obligations.

Accordingly, we remand the breach of contract claim to the Probate Part. Rather than seeking to have E.L. declared a beneficiary under the will, Brozowski shall be afforded the opportunity to amend her complaint to assert a claim that O'Malley's support obligations under the CSA constitute a valid debt of his estate.[4] If successful, the court may then fashion an appropriate remedy to ensure the future payment of the support obligations. In remanding, we express no opinion as to the ultimate merits of such claim. We leave it to the Probate

[4] Notably, S.O.'s guardian has filed a letter to the court supporting such a result.

Part on remand to determine whether discovery or a plenary hearing are needed to resolve the disputed issue.

We affirm the Probate Part's judgment in part and reverse it in part, and we remand to the Probate Part for further proceedings in conformity with our decision. We do not retain jurisdiction.