

VERMONT SUPERIOR COURT
Addison Unit
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802-388-7741
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CIVIL DIVISION
Case No. 69-4-20 Ancv

Hayes et al vs. Estate of Harriet Hayes

ENTRY REGARDING MOTION

Title: Motion for Summary Judgment (Motion: 1)
Filer: James W. Swift
Filed Date: March 16, 2021

The motion is GRANTED.

DECISION ON MOTION FOR SUMMARY JUDGMENT

The Estate of Harriet Hayes is being administered in the Probate Division of the Addison Superior Court. A dispute over applicable law developed between the Co-Executors and their attorneys agreed to submit the issue to the Civil Division for a legal ruling. The Probate Judge agreed, and this court accepted the referral. It is therefore before the court on Dennis Page's Motion for Summary Judgment. The issue is whether Janice Hayes, decedent's daughter to whom real estate was devised, is entitled to have the mortgage on the property paid off from estate funds, or whether she was required to take the property subject to the mortgage loan even though she does not have direct liability to the lender on the note.

Harriet Hayes passed away on March 31, 2014, leaving two adult children, Janice Hayes and Dennis Page, who are the Co-Executors of her Estate. At the time of her death, Harriet¹ owned property in New Jersey, located at 14 Village Road, New Vernon, New Jersey ("14 Village Road"). She had written her Last Will and Testament in 2005. In it, she devised the 14 Village Road Property to her daughter, Janice Hayes. In the will she also devised a property located at 10 Village Road, New Vernon, New Jersey ("10 Village Road") to her son, Dennis Page, but she ultimately conveyed 10 Village Road to Dennis during her life. At the time of her death, Harriet still owned 14 Village Road.²

¹ To prevent confusion, and for consistency, all parties are referred to by their first names.

² According to Janice, 10 Village Road was unencumbered and debt-free when Harriet conveyed it to Dennis. Dennis Page Dep. at 18:14–19:09 (Ex. 3 to Janice Hayes' Response to Dennis Page's Statement of Undisputed Material Facts) (filed April 15, 2021); Janice Hayes Aff., ¶ 31 (Ex. 1 to Hayes Response to SUMF).

When Harriet died, 14 Village Road was encumbered with a mortgage. Harriet's will contains standard debt payment language: "I direct that all my debts ... shall be paid or satisfied by my Executors from my Estate." Hayes Last Will & Testament, Article First (a). Initially, Janice and Dennis as Co-Executors both understood the phrase "all my debts" to include the mortgage on 14 Village Road, so they used estate funds to pay that mortgage off.³

Dennis now moves for summary judgment and maintains that under New Jersey law, the estate was not authorized to pay the mortgage on 14 Village Road because Harriet's will did not explicitly direct it to do so. Janice argues that Harriet intended for her to inherit 14 Village Road free and clear, not subject to the mortgage, and that New Jersey law requires this court to read Harriet's probable intent into the will.

Summary judgment is appropriate when, "viewing the evidence most favorably to the nonmoving party, there are no genuine disputed issues of material fact and the prevailing party is entitled to judgment as a matter of law." *LeClair v. LeClair*, 2017 VT 34, ¶ 10, 204 Vt. 422. There are no genuine disputed issues of fact that are material to the issue. Many of the facts presented by both parties describe historical events that are simply not relevant to the legal issue that is in dispute. The facts that are material to the issue are not in dispute.

The Property Swap

Harriet's will contains two specific monetary bequests to Dennis, and they are in separate Articles. The first is in the amount of \$16,500.00 plus interest, and the stated purpose is to pay off a promissory note Harriet owed to Dennis from 2001. Hayes Will, Article First (b). The second is in the amount of \$22,000.00. It is accompanied by an explanation that the money was "to equalize the gifts to my daughter, JANICE HAYES and my son, DENNIS S. PAGE with respect to the Chester and Clinton, New Jersey properties." Hayes Will, Article Third (d). Both monetary bequests arose out of a property swap that occurred in the 1990s involving two properties in Chester, New Jersey and Clinton, New Jersey.

Harriet and Dennis purchased both properties together in the 1970s; Harriet used some of her own money and some money that had been earmarked for Janice, who was still only a teenager. Initially, Harriet had a 50% interest in the Chester, New Jersey property; Janice had a 50% interest in the Clinton, New Jersey property; and Dennis had a 50% interest in both properties.⁴

Prior to the swap, Dennis made four payments to Harriet, totaling \$16,500.00, with the intention of buying out Harriet's share of the Chester, New Jersey property. Harriet did not pay back this amount during her lifetime, but this is the basis for Harriet's bequest in Article First (b) of her will, directing Harriet's estate to pay Dennis \$16,500.00 plus interest. Hayes Will, Article First (b).

³ Dennis paid off part of the mortgage using personal funds in addition to estate funds. Dennis Page's Expert Disclosure, Ex. 1 (filed June 11, 2020).

⁴ The parties dispute whether Dennis knew that Janice had an interest in the Clinton property, or whether he believed his mother Harriet had a 50% interest in both properties. Those details are not relevant to this court's decision.

At some point, Harriet, Dennis, and Janice decided to swap their property interests in the two properties. Following the swap, Harriet and Janice each had a 50% interest in the Chester, New Jersey property, while Dennis had a 100% interest in the Clinton, New Jersey property. Ultimately, Harriet gave Janice her interest in the Chester property, such that Janice owned the Chester property 100%.

Around the time of the property swap, Harriet and Dennis had both properties appraised and determined that the Clinton property was worth \$22,000.00 less than the Chester property. Harriet directed her estate to pay Dennis \$22,000.00 “to equalize the gifts to my daughter, JANICE HAYES and my son, DENNIS S. PAGE with respect to the Chester and Clinton, New Jersey properties.” Hayes Will, Article Third (d).

Harriet executed her will in 2005, by which time the property swap had long since been completed. There are handwritten notes, attributed to Harriet, memorializing the property swap, including one in which she notes, “Think it ended up as fairly as possible. Don’t know how I can rectify it any better.” Handwritten Notes, Hayes Dep. (Ex. 2 to Hayes Response to SUMF).

Harriet’s Last Illness

In 2007, Harriet moved to Vermont to be closer to her daughter, Janice. Janice Hayes’ Separate Statement of Additional Material Facts (“SSAMF”), ¶ 1. At that time, Harriet purchased a new home, located at 5 Swanage Court, Middlebury, Vermont (5 Swanage Court). *Id.* ¶ 2. To pay for the new house, Harriet took out a mortgage on 14 Village Road. *Id.* ¶ 4.

Ultimately, Harriet moved out of 5 Swanage Court and into Janice’s home so that Janice could help care for her. Harriet paid for the first floor of Janice’s home to be remodeled for that purpose; she also assisted Janice financially in other ways.

According to Janice, Harriet initially intended to obtain a purchase mortgage for 5 Swanage Court, but a loan officer at the bank persuaded her that it would be easier to obtain an equity loan against 14 Village Road instead. SSAMF ¶¶ 2–4. Janice argues that Harriet would not have burdened 14 Village Road with a mortgage if she understood that doing so would make Janice responsible for the mortgage after her death. In her affidavit, Janice states, “On many occasions, my mother repeatedly expressed to me her intent to treat Dennis and me financially equally and to have us share in her estate equally.” Hayes Aff. ¶ 35. Janice also asserts that back in 2005, at the time Harriet executed her will, 14 Village Road was unencumbered and free of debt. *Id.* ¶ 31. Both parties agree that during her lifetime, Harriet strove to treat her children equally and was “very fair-minded.” Page Dep. at 17:25.

However, Janice does not claim that Harriet ever told her explicitly that she would inherit 14 Village Road free and clear of any debt.

New Jersey’s Doctrine of Probable Intent

Both parties agree that this court should apply New Jersey law to determine who must pay the mortgage, because the 14 Village Road property is located in New Jersey. See *In re Estate of Fitzsimmons*, 2013 VT 95, ¶ 5 n.3 (a will’s “effect and validity in respect to the disposition of

real property situated in another jurisdiction ... will depend on the *lex rei sitae*,” or the law where the property is situated).

Under New Jersey law, an heir who inherits property subject to a mortgage (in this case, Janice) is not entitled to have the mortgage loan paid off out of estate funds “unless the will of the testator shall direct that the mortgage or security interest be otherwise paid.” N.J.S.A. 3B:25-1. Moreover, “[a] general direction in the will to pay debts shall not be deemed a direction to pay the mortgage or security interest.” N.J.S.A. 3B:25-1. Thus, it appears that under New Jersey law, Janice takes 14 Village Road subject to the mortgage and its terms.

However, Janice asks the court to apply New Jersey’s doctrine of probable intent, which allows courts to look to extrinsic evidence “first to show if there is an ambiguity [in the will] and second, if one exists, to shed light on the testator’s actual intent.” *In re Estate of Gabrellian*, 859 A.2d 700, 705 (N.J. App. Div. 2004) (quoting *Wilson v. Flowers*, 277 A.2d 199, 207 (1971)). If the testator’s actual intent appears to be different from the literal text of the will, the court must “give primary emphasis to [the testator’s] dominant plan and purpose as they appear from the entirety of [the] will when read and considered in the light of the surrounding facts and circumstances.” *Matter of Estate of Branigan*, 609 A.2d 431, 436 (N.J. 1992).

“Courts endeavor to put themselves in the testator’s position to attempt to accomplish what [s]he would have done had [s]he envisioned the present inquiry.” *Gabrellian*, 859 A.2d at 705. A court may not create a missing provision “out of the whole cloth,” but “it may, on the basis of the entire will, competent extrinsic evidence and common human impulses strive reasonably to ascertain and carry out what the testator probably intended should be the disposition if the present situation developed.” *Engle v. Siegel*, 377 A.2d 892, 894 (1977) (quoting *In re Estate of Burke*, 222 A.2d 273, 280 (1966)).

Finally, the fulfilment of a testator’s probable intent may take “two forms: interpretation, and reformation.” *Matter of Trust of Nelson*, 184 A.3d 526, 531 (N.J. App. Div. 2018). Interpretation “involves finding the meaning of language already in the instrument,” while “reformation involves remaking or modifying an instrument, to correct mistakes, to fulfill an unexpressed intention, or to address circumstances that were unforeseen.” *Id.* To “interpret” language that already exists in the will, the court must apply a preponderance-of-the-evidence standard. *Id.* To “reform” a will, the court must apply a clear-and-convincing evidentiary standard. *Id.*

Dennis argues that the will is unambiguous on its face, and that a finding by this court that the estate is responsible for the mortgage would be a “reformation,” not an “interpretation,” and cannot meet the clear-and-convincing standard. Janice argues that the will is ambiguous because it demonstrates an intent to treat both children equally, and thus this court should “interpret” the debt payment language to include the mortgage.

The parties dispute the meaning and significance of two different parts of Harriet’s will: the debt payment language in Article First, and the language in Article Third (d) that explains Harriet’s wish to “to equalize the gifts ... with respect to the Chester and Clinton, New Jersey properties.”

The language in Article Third is simply not ambiguous, whether or not the court looks to extrinsic evidence. Harriet's stated intention was to "equalize the gifts" to her children *with respect to a specific past property transaction*—the Chester-Clinton property swap. The language in Article Third is highly specific and cannot be read as a general statement of intention for Harriet's children to be "equalized" with respect to any other gifts, whether at the time of her death or any other time.

The plain language in Article First of the will is also unambiguous on its face. Harriet's instruction to her estate to "pay all my debts," read in light of N.J.S.A. 3B:25-1, does not include an instruction to pay the mortgage on 14 Village Road. Harriet's will was drafted in New Jersey with the assistance of a New Jersey attorney, and no evidence has been presented that Harriet believed a generic instruction to "pay all my debts" would be sufficient to overcome N.J.S.A. 3B:25-1, such that her estate would be required to pay off a mortgage loan on either of the properties devised in her will. As Dennis points out, Harriet had ample opportunity, in the seven years after she took out the mortgage on 14 Village Road, to revise her will to fully reflect her intentions with respect to the mortgage. She did not do so.

Janice argues that Harriet believed that her instruction to "pay all my debts" included the mortgage. But the evidence Janice presents on this point is insufficient to meet either a preponderance-of-the-evidence or a clear-and-convincing standard of proof. Janice points to written statements by Harriet that show her intention to treat her children equally with respect to the Chester-Clinton swap; she also states that Harriet told her many times that she intended to treat Dennis and Janice "financially equally and to have us share in her estate equally." Finally, she notes that when the will was drafted in 2005, neither the 10 Village Road property nor the 14 Village Road property was encumbered by a mortgage.

While the will reflects Harriet's intent to treat her children equally with respect to the Chester-Clinton properties, it does not show the same intent with respect to the two Village Road properties. The devise to Janice is in Article Third, and the will represents that it was Harriet's residence at the time of the will, whereas the devise to Dennis is in Article Fourth, and specifically states that he had been occupying that property for many years. He already had full ownership at the time of Harriet's death. The two properties had different histories and unknown financial statuses, and the will reflects no intent that the devises confer equal value on the children or that the gift or devise of either property would or would not be subject to a mortgage. This is in contrast to the clearly expressed intent to equalize the gifts to the children with respect to the Chester and Clinton properties.

Crucially, Janice does not point to any specific statement Janice ever made as to whether Harriet wanted Janice to receive 14 Village Road free of all debt. The fact that there was no mortgage on 14 Village Road at the time of the will does not support an inference that Harriet intended to pass it to Janice without a mortgage, as an owner may mortgage her property at any time, as Harriet later did. Janice's facts show that at the time Harriet arranged for a loan to buy the Middlebury property in 2009, 14 Village Road was already encumbered with a line of credit. Janice's Separate Statement of Additional Material Facts, ¶3.

In *In re Estate of Zahn*, a New Jersey appellate court found that language directing the decedent's estate to pay "all my just debts" did not include the mortgage on his home, because the decedent's specific uncorroborated oral promise to his girlfriend that she would inherit the home "free and clear of any liens or encumbrances" was insufficient to show the decedent's probable intent. *In re Estate of Zahn* 702 A.2d 482, 483 (N.J. App. Div. 1997). In contrast, in *In re Estate of Payne*, the New Jersey Supreme Court found that language directing the decedent's estate to pay "all my just debts" *did* include the mortgage on his home, because a letter from decedent to his attorney explaining that he wanted his partner to receive the home debt-free was "clear and unambiguous" evidence of his probable intent. *In re Estate of Payne*, 895 A.2d 428, 435 (N.J. 2006).

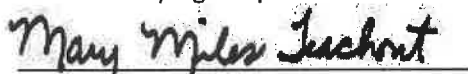
This case is much closer to *Zahn* than it is to *Payne*. Here, Janice points to oral statements by Harriet that she intended to treat her children financially equally, and to written notes that demonstrate only that Harriet wanted to make sure the Chester-Clinton property swap was fair to both children. Without more, and given the difficulty of quantifying the financial support Harriet provided to both her children at various times over the years, this evidence is not sufficient for this court to find that Harriet's probable intent was for her estate to pay off the mortgage loan on 14 Village Road. See *Gabrellian*, 859 A.2d at 705 ("Applying probable intent can be a slippery slope. Obviously, it is not for the court to determine what a judge would have written if originally drafting the instrument.")

In sum, the court finds that New Jersey law applies, that the will is not ambiguous, and thus that there is no need to invoke the doctrine of probable intent. Moreover, even if the doctrine were invoked, there is insufficient evidence to meet the preponderance of the evidence standard that Harriet intended Janice to take the 14 Village Road property free and clear of any debt.

The court concludes that the estate is not responsible for the mortgage loan on 14 Village Road. Thus, Dennis Page's motion for summary judgment is GRANTED.

The case is remanded back to the Probate Court for further administration of the Estate.

Electronically signed pursuant to V.R.E.F. 9(d) on June 30, 2021 at 1:33 PM.



Mary Miles Teachout
Superior Court Judge