

When are the Statements of the Decedent Admissible into Evidence in Estate Litigation?

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Fact Pattern

- ▶ Ted is not married and has no children.
- ▶ Ted owns a vacation home in Maine and a house in New Jersey. Both are encumbered by mortgages.
- ▶ Ted's partner Don lives with him in New Jersey.
- ▶ The Maine property is owned with another as JTWRROS.
- ▶ The New Jersey property is owned by Ted outright.
- ▶ Don claims that Ted tells him that he wants Don to have the house debt free when he dies.

Fact Pattern (cont.)

- ▶ Ted asks his attorney to prepare a Will to accomplish several key goals:
 - ▶ He wants the debt on the Maine property to be paid out of his estate;
 - ▶ He wants his NJ home and its contents to pass to Don;
 - ▶ He wants the balance of his estate to pass to various friends and relatives.

Fact Pattern (cont.)

- ▶ In a written letter to his attorney, Ted writes:
 - ▶ “I want the debt encumbering my real estate liquidated by whatever means so that it passes to the beneficiaries free and clear and I don’t want it to be necessary for the properties to be sold in order to satisfy the debt.”
 - ▶ Ted went on to say that he had a \$1M life insurance policy payable to his estate and another 3-400k in a brokerage account.
 - ▶ He also wrote that: “I have viewed this cash as available to be directed to pay off the mortgage balances which may exist at the time.”

Fact Pattern (cont.)

- ▶ As finally drafted, the Will specifically provides for the payoff of the debt encumbering the Maine property.
- ▶ The Will also provides for the “payment of all just debts”.
- ▶ Nothing was specifically provided with regards to the debt secured by the New Jersey property.
- ▶ The question presented is whether Ted intended for Don to inherit his home in NJ debt free.

Questions Presented

- ▶ Can the decedent's written statement to his attorney be admitted to interpret the language in the will?
- ▶ Is Don permitted to testify at trial as to what Ted told him?
- ▶ Under what circumstances are the decedent's statements admissible?

Hearsay

- ▶ **NJ R. Evid. 801.**

- ▶ “Statement” – oral or written assertion (can also be non-verbal gesture if intended as an assertion)
- ▶ “Declarant” – person who makes the statement
- ▶ “Hearsay” – a statement, other than one made by the declarant while testifying, offered into evidence to prove the truth of the matter asserted

- ▶ **NJ R. Evid. 802.**

- ▶ “Hearsay is not admissible except as provided by these rules or by other law”.

Not Hearsay

- ▶ It follows that “if evidence is not offered for the truth of the matter asserted, the evidence is not hearsay and no exception to the hearsay rule is necessary to introduce that evidence at trial.” State v. Long, 173 N.J. 138, 152 (2002).
- ▶ For example, when a statement is offered only to show that the statement was in fact made and that the listener took certain actions as result, or to show the probable state of mind induced in the listener, the statement is not hearsay. Carmona v. Resorts Intern. Hotel, 189 N.J. 354, 376-377 (2007).

Not Hearsay - Example

- ▶ In Russell v. Rutgers Community Health Plan, Inc., N.J. Super. 445 (App. Div. 1995), the court held that a witness could testify that her daughter told her that the decedent may have had pneumonia.
- ▶ The statement wasn't made by the decedent, but since the statement was offered to prove that the witness knew how to seek treatment for pneumonia (and not that the decedent had pneumonia) the statement was allowed.

Hearsay – Public Policy

- ▶ Hearsay is a rule about fairness.
- ▶ It would be unfair to admit a statement into evidence that cannot be cross-examined or otherwise tested for credibility.
- ▶ It would be unfair to allow self-serving statements that cannot be challenged at trial
- ▶ Should courts be granted latitude to determine the trustworthiness of the statement?
- ▶ There are many statutory exceptions that may apply

Hearsay Exceptions – State of Mind

- ▶ **NJ R. Evid. 803. Hearsay exceptions not dependent on declarant's unavailability**
 - ▶ 803(c)(3): “A statement made in good faith of the declarant's then existing state of mind, emotion, sensation or physical condition ... but not including a statement of memory or belief ... unless it relates to the execution, revocation, identification, or terms of the declarant's will.”
- ▶ **Key Foundation Issues:**
 - ▶ Is the statement being offered to prove the decedent's state of mind at the time the statement was made?
 - ▶ If yes, is the decedent's state of mind at issue?

Hearsay Exceptions – State of Mind

- ▶ In Woll v. Dugas, 104 N.J. Super. 586 (Ch. Div. 1969), aff'd 112 N.J. Super. 366 (App. Div. 1970), the decedent's attorney was permitted to testify as to statements made by the decedent.
- ▶ The attorney was permitted to testify that he had spoken with the decedent who had told him that the decedent and his wife had reached an agreement as to the disposition of their estates, and that the decedent intended to effectuate this plan in a certain manner.
- ▶ The testimony went to the decedent's state of mind at the time the statement was made, and it was admissible to show an intention on the decedent's part to create an estate plan at a future date.

Hearsay Exceptions – State of Mind

- ▶ In Gresham v. Mass. Mut. Life Ins. Co., 248 N.J. Super. 64, 67 (App. Div. 1991), plaintiff was allowed to testify that the decedent, plaintiff's late husband, told her after meeting with an agent that it was too late to convert his group life insurance policy to an individual policy.
- ▶ In re Will of Smith, 108 N.J. 257 (1987), the decedent's handwritten note to her attorney, which detailed her instructions for drafting her will, was admitted into evidence. The question was whether the decedent intended the note to be her last will and testament, and so it went to her state of mind. The Court held that the note could not be admitted to probate.

Hearsay Exceptions – State of Mind

- ▶ In Manna v. Pirozzi, 44 N.J. Super. 227 (App. Div. 1957), an action concerning the transfer of stock by the decedent's attorney-in-fact, the court admitted a letter written by the decedent as evidence of the decedent's state of mind (and not to prove or probate the contents).
- ▶ However, in State v. Boratto, 154 N.J. Super. 386 (App. Div. 1977), aff'd in part, rev'd in part 80 N.J. 506 (1979), the court held inadmissible the decedent's verbal statement about the decedent's concern for the witness's family. The court held the decedent's state of mind, as revealed by the conversation, was not an issue in the case.

Hearsay Exceptions – Reputation

- ▶ 803(c)(19): Reputation Concerning Personal or Family History. “Evidence of a person’s reputation, among members of the person’s family by blood, adoption, or marriage ... concerning a person’s birth, adoption, marriage, divorce, death ... or other similar fact of the person’s personal or family history.”
- ▶ If the statement by the decedent is used to prove his reputation within his family, a court may allow it.
- ▶ No reported decisions are available to support such a claim.

Hearsay Exceptions – Reputation

- ▶ 803(c)(21): Reputation as to Character. “Evidence reputation of a person’s character at a relevant time among the person’s associates or in the community.”
- ▶ Presumably a statement by the decedent would be admissible to prove a character trait.
 - ▶ honesty, trustworthiness, truthfulness, deceit, etc.
- ▶ The witness must have known the decedent’s reputation at the time, and have had a sufficient relationship with the decedent’s community. See Fitzgerald v. Stanley Roberts, Inc., 186 N.J. 286, 312 (2006); State v. Micci, 46 N.J. Super. 454 (App. Div. 1957).

Hearsay Exceptions – Trustworthiness

- ▶ 804(b)(6). Trustworthy statements by decedents. “In a civil proceeding, a statement made by a person unavailable as a witness because of death if the statement was made in good faith upon declarant’s personal knowledge in circumstances indicating that it is trustworthy.”
- ▶ This is the catch-all hearsay exception.
- ▶ Allows the court to weigh the trustworthiness of the statement and its evidentiary value against an adversary’s inability to cross-examine.

Hearsay Exceptions – Trustworthiness

- ▶ Bruning v. Eckman Funeral Home, 300 N.J. Super. 424 (App. Div. 1997).
- ▶ Dispute between the decedent's live-in girlfriend and his estranged wife over the disposition of his remains.
- ▶ The court held that the controlling statute at the time gave weight to the decedent's intentions regarding his remains.
- ▶ Although hearsay, the decedent's statements were admissible because "if N.J.S.A. 8A:5-18 did not authorize hearsay, we perceive no way to convey the decedent's expressed intention to the court." Also, the court made reference to trustworthy statements generally pursuant to 804(b)(6).

Hearsay Exceptions – Trustworthiness

▶ 804(b)(6) – Requirements:

1. That the declarant is deceased;
2. That the statement was made in good faith;
3. That the statement was made upon the declarant's own personal knowledge; and
4. That there is a probability from the circumstances that the statement is trustworthy.

Hearsay Exceptions – Trustworthiness

- ▶ The statement doesn't have to be corroborated and there only needs to be a probability that the statement is trustworthy. See Estate of Grieco v. Schmidt, 440 N.J. Super. 557, 565-567 (App. Div. 2015); Estate of Hanges v. Metropolitan Prop. & Cas. Ins. Co., 202 N.J. 369 (2010).
- ▶ The court is looking for a good faith showing of trustworthiness
- ▶ Entirely self-serving statements inherently lack trustworthiness

Hearsay Exceptions – Trustworthiness

- ▶ Lyon v. Glaser, 60 N.J. 259 (1972).
- ▶ Inheritance Tax Case
- ▶ Issue: Was the decedent a resident of New Jersey or Maryland at death? Impacts imposition of inheritance tax on intangible property.
- ▶ Facts: She moved after her husband died. Affidavits were admitted into evidence containing declarations by the decedent as to her domicile.
- ▶ Holding: “These declarations, although hearsay, are of course admissible and have substantial probative value on the issue of domicile.” at 267.

Hearsay Exceptions – Trustworthiness

- ▶ Estate of Zahn, 305 N.J. Super. 260, 272 (App. Div. 1997).
- ▶ Case about whether the decedent intended for his home mortgage to be paid out of his estate, or whether the property was to pass with the encumbrance attached.
- ▶ After learning of an illness, the decedent transferred title to himself and his girlfriend as JTWRROS. He then prepared a will leaving his residuary estate to his two children.
- ▶ His will included the standard language directing his executors to “pay all of my just debts and funeral expenses as soon as practicable after my death.”
- ▶ After being notified by the bank that she was delinquent on her mortgage payment, plaintiff brought suit to compel payment from the estate.

Hearsay Exceptions – Trustworthiness

- ▶ Estate of Zahn, cont.
- ▶ Plaintiff argued that the non-exoneration provisions of N.J.S.A. 3B:25-1 did not apply because she was not a devisee or heir within the meaning of the statute.
- ▶ Middlesex County Chancery Court held for plaintiff finding that the estate was responsible for the debt.
- ▶ Appellate Division reversed, holding that the mortgaged premises are the primary source of payment of mortgage indebtedness. See N.J.S.A. 2A:50-2. In essence, the debt would not be a “just debt” of the estate until the value in the property was exhausted.

Hearsay Exceptions – Trustworthiness

- ▶ Estate of Zahn, cont.
- ▶ What about the decedent’s probable intent?
- ▶ Plaintiff argued that the decedent verbally told her that she was “to become the sole owner of the house, free and clear of any liens or encumbrances”.
- ▶ Is that statement admissible to interpret the “just debt” provision of decedent’s will?

Doctrine of Probable Intent

- ▶ Under the doctrine of probable intent, NJ courts construe wills to “ascertain and give effect to the probable intention of the testator.” Fidelity Union Trust Co. v. Robert, 36 N.J. 561, 564 (1962).
- ▶ In determining the testator’s subjective intent, “courts will give primary emphasis to his dominant plan and purpose as they appear from the entirety of his will when read and considered in the light of the surrounding facts and circumstances.” Fidelity Union Trust at 564-565.
- ▶ A court can “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.

Doctrine of Probable Intent

- ▶ The trial court is not limited by the words and phrases in the document being construed, and extrinsic evidence may “furnish ... information regarding the circumstances surrounding the testator [and] should be admitted in ascertaining [the testator’s] probable intent under the will.” Wilson v. Flowers, 58 N.J. 250 (1971).
- ▶ Extrinsic evidence, including a testator’s direct statements has been admissible, not to vary the terms of the will, but to explain ambiguities. Danelczyk v. Tynek, 260 N.J. Super. 426, 430 (App. Div. 1992).

Doctrine of Probable Intent

- ▶ Wilson v. Flowers, 58 N.J. 250 (1971).
- ▶ Will Construction Case
- ▶ Issue: Did the testator's use of the word "philanthropic" have the legal equivalence and meaning of the word "charitable". (If not, the argument was that that the provision was void, which would benefit the intestate heirs).
- ▶ Holding: A court may admit extrinsic evidence to: (1) show that an ambiguity exists, and (2) to shed light on the testator's actual intent, **BUT** not to vary the terms of the Will.

Hearsay Exceptions – Trustworthiness

- ▶ Estate of Zahn, cont.
- ▶ In Zahn, the appellate division held that the provision in the will regarding payment of debts was not ambiguous.
- ▶ Also, the appellate division refused to allow the decedent's purported statement to be admitted under the state-of-mind exception to the hearsay rule, and the court found that the statement was entirely self-serving and lacked trustworthiness.
- ▶ Ultimately, the appellate division reversed and held that the estate was not liable for the mortgage debt.

Back to Our Fact Pattern

- ▶ Ted dies and Don inherits his NJ property. The question is whether Ted intended for Don to take the property free of all encumbrances, or whether those encumbrances remain attached to the property.
- ▶ These are also the facts of the case, In re Estate of Payne, 186 N.J. 324 (2006).
- ▶ In Payne, the New Jersey Supreme Court applied the probable intent doctrine to find that the testator intended for his house to pass debt-free.

Estate of Payne

- ▶ In Payne, the Court looked to the decedent's written statement to his attorney and found it to be credible and admissible to show the decedent's intent.
- ▶ Unlike Zahn, where the court found serious evidentiary problems in admitting the decedent's purported verbal statement to the plaintiff (i.e. that is was hearsay), in Payne, the decedent's statement was written and trustworthy.

Estate of Payne

- ▶ The real issue in Payne was not the trustworthiness of the decedent's statement, but rather its meaning.
- ▶ In a dissenting opinion, Justice Rivera-Soto took issue with the court's finding that the statement is clear and the will ambiguous.
- ▶ Justice Rivera-Soto read the same language and found the will to be clear and the statement to be ambiguous.

Summary

- ▶ Statements by the Decedent are admissible in estate litigation if:
 - A. They are not hearsay; or
 - B. They are hearsay, but fall within an exception such as:
 - 1. The decedent's state of mind;
 - 2. The decedent's reputation;
 - 3. General trustworthiness.
- ▶ These statements can be used to show ambiguities in the will, and the decedent's probable intent.

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