JUSTICE WORRALL F. MOUNTAIN: THE TESTATOR'S UNWRITTEN SUBJECTIVE INTENT AS CONTROLLING THE INTERPRETATION OF HIS WILL

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The opinions of Justice Worrall F. Mountain have added much distinction to the work of the New Jersey Supreme Court during his eight years on that bench.[1] Most of this article is devoted to one of his distinguished opinions, now a landmark, *Engle v. Siegel*.[2] That opinion calls for a probing of the fundamentals of the law governing the interpretation of wills. It was held in the circumstances presented by *Engle* that a gift to "Rose Siegel" is to be interpreted, to put it boldly, as a gift to "the family of Rose Siegel" where she had predeceased the testator.[3] The words of the will gave no indication whatsoever that her family was to take. Nothing appeared in the will except the words "Rose Siegel". The construction thus placed by the court on the words "Rose Siegel" was drawn by the court entirely from words dehors the will. Yet that construction without the slightest question effectuated the unwritten testatorial intention.

The Reporter sought to capsulize the decision in *Engle* in his first headnote, stating that the "[c]ourt is no longer limited simply to searching out probable meaning intended by words and phrases in will . . . ."[4]

This radical development in the law as to the interpretation of wills, for which Justice Mountain's opinion in *Engle* is now a precedent, stands in sharp contrast to the pre-existing rule of *In re Armour's Estate*[5] which was overruled by *Engle*. Justice Mountain quoted from *Armour* the rule which was formerly regarded as settled:

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[1] Justice Mountain served on the court between 1971 and 1979.

[2] 74 N.J. 287, 377 A.2d 892 (1977).

[3] *Id.* at 295–96, 377 A.2d at 896–97.

[4] *Id.* at 287, 377 A.2d 892.

[5] 11 N.J. 257, 94 A.2d 286 (1953). In *Armour*, the testator, through his will, granted his brother the right to purchase within one year of his death all of the testator's shares of American Aniline Products, Inc. stock. *Id.* at 263, 94 A.2d at 288. Prior to his death, the testator transferred most of his shares to Sterling Chemicals, Inc., whose entire issue of capital stock was owned by him. *Id.* at 264, 94 A.2d at 289. It was contended that the will, by its very terms, granted the brother the option to purchase only the small amount of stock still owned by the testator. *Id.* at 266, 94 A.2d at 290.

> It is elementary principle in the construction of wills that the controlling consideration is the effect of the words as actually written rather than the actual intention of the testator independently of the written words. The question is not what the testator actually intended, or what he was minded to say, but rather the meaning of the terms chosen to state the testamentary purposes. . . .[6]

Justice Mountain's opinion in *Engle* overruled this and much other law demanding that the court disregard words not expressed in the will. Moreover, the law required the court to put the construction on the words used which a reasonable man would put on them. Justice Oliver Wendell Holmes in his classic little essay on *The Theory of Legal Interpretation*, expressed the pre-existing rules of law in mandatory terms:

> It is true that the testator is a despot, within limits, over his property, but *he is required by statute to express his commands in writing* and that means that *his words must be* sufficient for the purpose when *taken in the sense which would be used by the normal speaker of English* under his circumstances . . . .[7]

Justice Holmes further commented that "the normal speaker of English is merely a special variety, a literary form, so to speak, of our old friend the prudent man."[8] One goes no further than this in the interpretation of a will, even though, as Holmes says, the "document is found to have a certain play in the joints when its words are translated into things . . . ."[9]

Justice Mountain, in *Engle*, held that the court must examine extrinsic evidence, common human impulses and the testator's subjective desires. In referring to *Fidelity Union Trust Co. v. Roberts*,[10] the court stated:

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[6] 74 N.J. at 290, 377 A.2d at 893–94 (quoting *In re* Armour's Estate, 11 N.J. 257, 271, 94 A.2d 286, 292 (1953)). The court determined in *Armour* that the transfer of stock to Sterling did not divest the testator's ownership and thus the brother continued to have the option to purchase all of the owned shares of Aniline. 11 N.J. at 271, 94 A.2d at 292. With regard to the purchase price of the stock, the will declared that the price would be equal to the book value of the shares, as determined without including valuation for patents, good will or "other intangible assets." *Id.* at 263, 94 A.2d at 288. It was with reference to the construction of "other intangible assets" that the court stated this position.

[7] Holmes, *The Theory of Legal Interpretation*, 12 HARV. L. REV. 417, 420 (1899) (emphasis added).

[8] *Id.* at 418.

[9] *Id.* at 417.

[10] 36 N.J. 561, 178 A.2d 185 (1962) (expounding doctrine of probable intent). For a discussion of the doctrine, see Clapp, *Justice Nathan L. Jacobs—The Doctrine of Probable Intent*, 28 RUTGERS L. REV. 251 (1975).

> In applying the new rule [of *Fidelty Union Trust*] a court not only examines "the entire will" but also studies "competent extrinsic evidence": it attributes to the testator "common human impulses" and seeks to find what he would *subjectively* have desired had he in fact actually addressed the contingency which has arisen.[11]

Other authorities, in addition to *Fidelty Union Trust*, have stated that the court should seek to effectuate the testator's subjective intent.[12] Thus, the *Restatement of Property* holds:

> Hence the judicial ascertainment of the intent of the conveyor is a process which combines an orderly, but somewhat restricted search for his subjective intent with supplementary inferences of an intent which the conveyor probably would have had, if he had addressed his mind to those problems which, in fact, have arisen out of his conveyance.[13]

Engle went much further than *Fidelity Union Trust*. Consideration must be given to the facts presented in *Engle*, for they sharpen the point of the case. There, a husband and wife provided in the words of their mutual wills that in the event they and their children died as a result of a common accident, the entire residuary estate of each testator was to pass to Rose Siegel and Ida Engle, share and share alike.[14] Rose was the mother of the husband; Ida, the mother of the wife. Rose predeceased the testators, and the issue was whether Ida took the entire residuary estates of both testators. New Jersey law provides that where a residuary gift is made to two persons, one of whom dies before the testator, the share of the one so dying, goes to the surviving residuary beneficiary.[15] The statute had

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[11] 74 N.J. at 291, 377 A.2d at 894 (emphasis in original).

[12] *E.g.*, 1 L. SIMES & A. SMITH, THE LAW OF FUTURE INTEREST §§ 462, 465 (2d ed. 1956).

[13] RESTATEMENT OF PROPERTY § 241, Comment c (1940). The *Restatement* holds that direct statements of intention are inadmissible because the Statute of Wills requires intentions to be included in the will. *Id.* § 242, Comment j. But New Jersey has rejected this view and holds such statements to be admissible. Wilson v. Flowers, 58 N.J. 250, 262, 277 A.2d 199, 206 (1971). However, *Engle* goes further and holds that the construction can rest entirely on unwritten statements of intention. 74 N.J. at 291, 377 A.2d at 894.

[14] 74 N.J. at 289, 377 A.2d at 893. While visiting Copenhagen, Denmark, Albert Siegel and his wife Judith, along with their two children, were killed as a result of a hotel fire. *Id.*

[15] N.J. STAT. ANN. § 3A:3-14 (West 1953) reads:

> When a residuary devise or bequest shall be made to 2 or more persons by the will of any testator dying after July 3, 1947, unless a contrary intention shall appear by the will, the share of any such residuary devisees or legatees dying before the testator and not saved from lapse by section 3A:3-13 of this title [provision against lapsed gifts], or not capable of taking effect because of any other circumstance or cause, shall go to and be vested in the remaining residuary devisee or legatee, if

been interpreted to require the above result unless the testator's probable intention was to the contrary.[16]

Engle held that the family of Rose took her share of the assets, rather than the entire residuary estate going to Ida.[17] The decision depended upon the oral instructions of the two testators to the attorney who drafted their wills. They told him that in the event of a common disaster, they wanted their estates to go one-half to each "family". The attorney properly advised them that the term "family" was inappropriate for the designation of a class of beneficiaries.[18] However, as Justice Mountain said in *Engle*, the problem so posed by the attorney was obviously a matter of form or draftsmanship—not a matter of intent.[19] As a result of the attorney's rejection of the word "family", the testators directed him to provide in their will that in the event of a common disaster, their residuary estates were to be divided equally between their respective mothers, Rose Siegel and Ida Engle.[20] Justice Mountain stated:

> Each mother was obviously thought of as an appropriate representative of a "family".
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> To give the assets of both estates entirely to Mrs. Engle would seem to fly directly in the face of all the evidence bearing upon probable intent.[21]

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any there be, and if more than 1, then to the remaining residuary devisees or legatees in proportion to their respective shares in said residue.

N.J. STAT. ANN. § 3A:3-14 (West 1953) has recently been repealed and has been replaced by N.J. STAT. ANN. § 3A:2A-25 (West Cum. Supp. 1978–1979) which is substantially identical to the previous statute.

[16] 44 N.J. 1, 206 A.2d 865 (1965).

[17] 74 N.J. at 296, 377 A.2d at 896.

[18] *Id.* at 295–96, 892 A.2d at 896. The word "family" has various meanings. *See, e.g.*, Fratellanza Italiana v. Nugues, 114 N.J. Eq. 185, 168 A. 589 (Ch. 1933), and cases cited therein.

[19] 74 N.J. at 295, 377 A.2d at 896.

[20] *Id.* at 296, 377 A.2d at 896.

[21] *Id.* It should be noted that Justice Sullivan in his concurring opinion in *Engle* agreed with the result reached by the majority, but stated that he would not rest the decision on the doctrine of probable intent. He noted that "Rose Siegel and Ida Engle are mentioned [in the wills] as class or family representatives rather than individually." *Id.* at 296, 377 A.2d at 897. (Sullivan, J., concurring). However, the only evidence establishing that they are such representatives is to be found in statements dehors the wills. The insertion into the will of a testator's unwritten words surely brings into play the doctrine of probable intent. Prior to *Engle*, that doctrine was invoked merely to spell out other words in the will. *See* notes 17–19 *supra* and accompanying text.

The question arises as to how far one may extend *Engle*. The problem thus raised may be illustrated by the situation presented in *In re* Swanson's Estate, 261 Ore. 405, 373 P.2d 422 (1962). There a husband and wife made a joint will with a gift of all their property to a nephew in the event of a common accident. 373 P.2d at 423. The accident never occurred; however, the husband survived the wife, leaving no heirs. An attempt was made to establish that the testators

When we are interpreting a unilateral writing, that is, a will or a deed, we are seeking the intent of only one person and of nobody else, that is, the donor's or the testator's intent; and we should under *Engle* be concerned with his subjective intent. The New Jersey law today disagrees with Oliver Wendell Holmes that the words of a will must be taken in their objective sense, namely, the sense used by the normal speaker of English under the circumstances.

In contrast to a will, however, we attach to the words of a bilateral contract the meaning that would be attached to them by a reasonably prudent person; such a contract may not, in the absence of mutual mistake, be varied by evidence as to unwritten intentions.[22] In the case of a contract, the test is not what the contracting parties intended the words of the contract to mean, but what a reasonable person in the position of the parties would have thought they meant. The courts fold their hands, saying it is not the function of the judiciary to rewrite the agreement.[23] The contractual instrument thus becomes a true memorial of the parties' intent.

The law has come a long way since the doctrine of probable intent was first announced in 1955.[24] It was then held that two conditions must exist before a gift by implication could be made. The first condition was that the court would not supply an intention which the testator did not then have. However, the courts will now supply such an intention under certain circumstances, for it is held that the court will "accomplish what he would have done had he 'envisioned the

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at the time the will was executed intended the nephew to take in the situation presented. *Id.* at 423–24. Professor Corbin commented on this case, stating:

> His [the testator's] oral statements of an intention that [the nephew] should get the property do not satisfy the requirements of the law of wills. The evidence was not offered to show that the special provision, leaving the property to [the nephew] in the event of their deaths by common accident, was intended by the testator to leave the property to him in the event of their deaths otherwise than by common accident.

3 A. CORBIN, CONTRACTS § 537, at 19 (West Supp. 1971). Professor Corbin further stated that such evidence was inadmissible because it was "not an interpretation of the words of the will." *Id.*

[22] For a discussion concerning the interpretation of the language of contracts, see generally 3 A. CORBIN, CONTRACTS § 537 (1960 & West Supp. 1971).

[23] Thus it was held in Atlantic Northern Airlines v. Schwimmer, 12 N.J. 293, 96 A.2d 652 (1953), that "an intention wholly unexpressed in the writing . . . is irrelevant." *Id.* at 302, 96 A.2d at 656. Of course, the word "family" is wholly unexpressed in the wills in *Engle*. An extended quotation from another portion of the Atlantic Northern Airlines case is to be found in 3 A. CORBIN, CONTRACTS § 539, at 83 (1960).

[24] It was first stated in New Jersey in the concurring opinion of the author in *In re* Estate of Klein, 36 N.J. Super. 407, 417, 116 A.2d 53, 59 (App. Div. 1955) (Clapp, J., concurring). *See* Clapp, *supra* note 30, at 257.

present inquiry.'"[25] The great Professor John Chipman Gray went further in a snide reference to judges, commenting that "the practice of modern judges . . . is to guess from the language used in the particular will what the testator would have meant had he had any meaning, which he had not."[26]

The second condition once posited was this, "[w]e must be convinced from the will not only that it contains but a fragment of the testator's actual intentions, but also that we can see, in the fragment given us, the contour of that which is not stated."[27] Justice Mountain's opinion in *Engle* relied on this condition. Can it be said that the words "Rose Siegel" constitute a fragment of intention in which the court can see the contour of that which is not stated?

> *As a result of Justice Mountain's opinion in* Engle, *the parol evidence rule, insofar as it applies to wills, became defunct in New Jersey.*

James Bradley Thayer, the great pioneer in the law of evidence, which he valiantly sought to rationalize in his classic treatise, stated:

> It is ordinarily said that in the case of . . . wills, deeds and other solemn documents, parol evidence is not admissible to vary or add to their legal effect, or to cut it down; and especially that such evidence of the writer's intention is not admissible. In this expression, "parol" means what is extrinsic to the writing, and "evidence" means testimony or facts conceived of as tending to show what varies, adds to, or cuts down the writing, or to show the intention. The phrase parol, or extrinsic evidence, stands contrasted with that intrinsic evidence which is found in the writing itself.[28]

Thayer, speaking of the Parol Evidence Rule, said "[f]ew things are darker than this, or fuller of subtle difficulties."[29]

Wigmore held that the making of a will constituted a "jural act" integrated in a "single memorial". He laid down what he calls a "perfectly well settled [principle] in our law," noting that "when a jural act is embodied in a single memorial all other utterances of the par-

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[25] *Fidelity Union Trust*, 36 N.J. at 565–66, 178 A.2d at 187.

[26] J. GRAY, NATURE AND SOURCES OF THE LAW 175 (2d ed. 1972). Gray is also the author of the leading texts, RULE AGAINST PERPETUITIES (4th Ed. 1942) and RESTRAINTS ON THE ALIENATION OF PROPERTY (2d ed. 1895).

[27] *In re* Estate of Klein, 36 N.J. Super. 407, 416, 113 A.2d 53, 59 (App. Div. 1955) (Clapp, J., concurring).

[28] J. THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 396 (1898).

[29] *Id.* at 390. Wigmore had the same view. 9 J. WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 2400, at 3 (3d ed. 1940).

ties on that topic are legally immaterial for the purpose of determining what are the terms of their act."[30] Edmund M. Morgan, the leading scholar of the law of evidence since Wigmore, is of the same view.[31]

In 1971, however, New Jersey opened the door to "other utterances," holding that "direct statements [by a testator] of intention should be admitted no matter what the form of the ambiguity" in order to throw light on the words of the will.[32] In *Engle* however, the words "Rose Siegel" presented no ambiguity, and it was held that direct statements of intention, not embodied in the integrated "memorial", can be added to its words under the particular circumstances presented in *Engle*.[33]

Under Justice Mountain's opinion in *Engle*, we look to the testator's subjective intent, and we do not limit ourselves to "the circumstances that might have surrounded some imaginary reasonable and prudent ghost,"[34] as Corbin described him, or as Holmes described him, "our old friend the prudent man."[35]

The long-established "plain meaning doctrine," demanding that the court give to the words of the will their ordinary meaning unless repugnant to other words contained in the will,[36] is also defunct in New Jersey.

The Testator's Unwritten Intent to Minimize Taxes.

On the same day that Justice Mountain's opinion in *Engle* was reported, his opinion in *In re Estate of Ericson*[37] was reported, both cases dealing with the interpretation of wills. *Ericson* decided that words inadvertently written into a will contrary to the directions of

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[30] J. WIGMORE, *supra* note 29, § 2425, at 3 (emphasis in original).

[31] 2 ALI BASIC PROBLEMS OF EVIDENCE 342 (E. Morgan ed. 1957).

[32] Wilson v. Flowers, 58 N.J. 250, 262, 277 A.2d 199, 206 (1971).

[33] *See* notes 12–22 *supra* and accompanying text.

[34] 3 A. CORBIN, *supra* note 21, § 536, at 36.

[35] Holmes, *supra* note 7, at 417; *see* text accompanying notes 7–9 *supra*.

[36] Clapp, *supra* note 10, at 254; A. CLAPP, 5 N.J. PRAC., WILLS AND ADMINISTRATION § 198 (3d ed. 1962); Warren, *Interpretation of Wills*, 49 HARV. L. REV. 689 (1936). The Plain Meaning Doctrine and The Parol Evidence Rule formerly laid a will on a procrustean bed stretching it till it just fitted the construction which would have been put on it by a reasonable man. Gray has commented:

> When the judges say they are interpreting the intention of a testator, what they are doing, ninety-nine times out of a hundred, is deciding what shall be done with his property on contingencies which he did not have in contemplation.

J. GRAY, *supra* note 26, at 175; *see* 2 A. SCOTT, THE LAW OF TRUSTS § 164.1 (3d ed. 1967).

[37] 74 N.J. 300, 377 A.2d 898 (1977).

the testator and the scrivener, would be disregarded by the court.[38] This rarely occurs. However, the case has been much cited in briefs for another proposition which comes up much more frequently, namely, that the court is to construe a will so as to effectuate the testator's implied intent to minimize taxes.[39]

Fidelty Union Trust held that there is a "readiness" on the part of the court today to "strain" toward effectuating the testator's probable intent[40] so as "to accomplish what he would have done had he 'envisioned the present inquiry.'"[41] Suppose one construction of an instrument would lead to a saving of taxes which would be imposed under another construction. The testator did not have in mind the tax impact of either construction. Should the court "strain" to accomplish, or at least lean in favor of, a construction that will minimize taxes? In ascertaining a testator's probable intent, the court attributes to him impulses common to human nature.[42]

On these bases, the court should adopt a construction of a will which would minimize death or other taxes. *Ericson* held, under the subheading, "Minimization of Taxes:"

> It is argued that Mr. Ericson was uninterested in minimizing taxes, because he never discussed the subject. This conclusion is not justified. Every testator is entitled to assume, absent evidence to the contrary, that his lawyer will undertake to accomplish his testamentary wishes with as little tax impact as possible. Furthermore, it is normally and quite rationally presumed that this is what the testator wishes. Any other belief, absent evidence to support it, is fatuous.[43]

Armed with Justice Mountain's distinguished opinions in *Engle* and *Ericson*, the judges of New Jersey may henceforth join boldly

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[38] *Id.* at 310–11, 377 A.2d at 903–04.

[39] *Id.* at 309, 377 A.2d at 903; *see* note 44 *infra* and accompanying text.

[40] 36 N.J. at 566, 178 A.2d at 187. Where the proofs as to his intent are conflicting, and there is a 40% chance that he wanted to accomplish "this" and a 51% chance that he wanted "that", does the court strain to accomplish "that"?

[41] *Id.* at 565–66, 178 A.2d at 187 (quoting Bank of New York v. Black, 26 N.J. 276, 287, 139 A.2d 393, 398 (1958)).

[42] *Fidelity Union Trust* and many other cases have so held. A. CLAPP, 5 N.J. PRAC., WILLS AND ADMINISTRATION §196 n.11 (3d ed. 1962 & West Supp. 1978).

[43] 74 N.J. at 309, 377 A.2d at 903. To the contrary, it was decided by the appellate division in *In re* Estate of Benner, 152 N.J. Super. 435, 378 A.2d 34 (App. Div. 1977), two months before *Ericson* was decided, that when the court has ascertained the testator's dominant plan it is not the function of the court to so construe the will as to relieve that plan of incidental burdens resulting from the impact of future taxes. *Id.* at 441, 378 A.2d at 371.

with Lord Atkin in the prospect he envisaged in the House of Lords in *Perrin v. Morgan*:[44]

> I anticipate with satisfaction that henceforth the group of ghosts of dissatisfied testators who, according to a late chancery judge, wait on the other bank of the Styx to receive the judicial personages who have misconstrued their wills, may be considerably diminished.[45]

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[44] [1943] A.C. 399.
[45] *Id.* at 415.