NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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4110 Chain Bridge Road
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April 16, 2019

Joseph W. Stuart
Joseph W. Stuart, PLC
10427 North Street, Suite 200
Fairfax, Virginia 22030

John F. Rodgers
Redmon, Peyton & Braswell LLP
510 King Street, Suite 301
Alexandria, Virginia 22314

RE: *In Re Estate of Kevin Joseph Connolly,* Case No. CL-2018-0002347

Dear Counsel:

This matter comes before the Court on Kevin B. Connolly's Petition to strike a provision in the Will of Kevin J. Connolly, his father. The hearing took place on January 10, 2019, after which the Court took the matter under advisement. For the reasons that follow, the Petition is granted.

BACKGROUND

This opinion addresses the validity of a stipulation in a will. Kevin J. Connolly (hereinafter "Mr. Connolly") had four children: Susan Ann Connolly ("Susan"), Brian M. Connolly ("Brian"), Sean B. Connolly ("Sean"), and Kevin B. Connolly ("Kevin"). The Petitioner, Kevin, married Francine Lynn Connolly on March 17, 1995. They have four children and have remained married to the present date. Mr. Connolly adamantly opposed their marriage and did not attend the wedding ceremony. Evidence was presented at trial, including the depositions of Kevin and one Catholic priest, Father Donahue, that showed that Mr. Connolly did not approve of the marriage.

Mr. Connolly, predeceased by Mrs. Connolly, executed his Last Will and Testament on September 29, 1998 ("the Will"). Mr. Connolly owned and resided in a house located in Alexandria and devised this house to his daughter Susan "for as long as she desires to live there" and further provided:

> Upon [Susan's] death or upon her cessation of living on the premises or any time she chooses to sell the house, the house shall be sold and the net proceeds of such sale shall be divided equally among my surviving children, except that the share which I bequeath to my son, Kevin Brian Connolly, shall not be distributed to him if he is married to the same person he is married to on the date of the execution of this will. Said share shall be divided equally among my surviving children.

Mr. Connolly died on April 5, 2013, survived by all four of his children. In 2014, this Court admitted the Will into probate. Susan currently resides in the home. The current assessed value of the home is $532,220.

Kevin filed his petition on February 14, 2018. He asked the Court to strike the clause in the Will that conditioned his share of the estate on no longer being married to Francine, on the grounds that it violated public policy, and to permit Susan, who was named Executrix of the Will, to file a Statement in Lieu of Account. Sean demurred to the Petition on the grounds that the suit was premature because Susan had not yet sold the house. The Honorable Penney S. Azcarate entered an Order on October 12, 2018 overruling the Demurrer. On October 26, Kevin filed a Motion for Summary Judgment on both counts of his Petition. The Honorable David Oblon entered an Order on November 9, 2018, granting Kevin's request to relieve Susan of the responsibility to file accountings, but denied summary judgment as to the validity of the Will provision. A hearing took place on this issue on January 10, 2019 in front of the Honorable Robert J. Smith.

ARGUMENTS

At oral argument, Kevin's Counsel, Mr. Stuart, relies on *Meek v. Fox*, 88 S.E. 161 (Va. 1916), which stands for the proposition that the Court must strike any provision in a will that imposes an absolute prohibition on marriage if that provision constitutes a condition subsequent on a devised estate. Mr. Stuart argues that *Meek v. Fox* should extend to provisions encouraging divorce, as in this case, in light of Virginia case law that abhors unreasonable restraints on marriage. Counsel then maintains that the contested clause is a condition on Kevin's estate (the proceeds from the sale of the house) because it will disqualify Kevin from receiving any distribution if he does not terminate his marriage. Mr. Stuart posits that because Mr. Connelly clearly exhibited an intent to encourage divorce and because this condition threatens to cut off Kevin's share of the estate, the Court should strike the provision under *Meek v. Fox*, *supra*.

Sean's Counsel, Mr. Rodgers, argues multiple points for denying the Petition:

1. He contends that while one could interpret the language of the Will as Mr. Connolly encouraging divorce, it could instead reflect Mr. Connelly's concern for Kevin's welfare if he and Francine separated. Mr. Rodgers encourages the Court to accept this interpretation.

2. The word "divorce" does not appear in the will. Citing case law, Mr. Rodgers argues that the Court must look only to the words used by the testator.

3. Mr. Rodgers maintains that Kevin is estopped from attacking the Will because he agreed to its admission to probate in 2014. Further, he asserts that once a will is admitted to probate, "it is final and conclusive on all parties and cannot be questioned."

4. Counsel argues that even if the language is deemed to induce a divorce, the clause merely marks the end of Kevin's devised estate: It is a "special limitation in that it limits Kevin's bequest if his marital status remains the same as when the will was signed." Mr. Rodgers represents that under *Meek v. Fox*, in which the Supreme Court advised that if a will merely provides that a devised estate will end upon the devisee's marriage it is not void, in contrast to a condition that threatens to defeat the estate, the Court must uphold the clause in Mr. Connelly's Will.

5. Counsel postulates that Kevin assumed the risk of disinheritance when he married Francine over his father's adamant opposition. Because some Virginia courts have deemed "[a] restriction on marriage is valid in some circumstances," Counsel avers that the provision is valid considering these circumstances.

6. Counsel also suggests that the "Court cannot infer that this language would have any impact at all in a decision by Kevin whether to stay married to his wife or to divorce her...." Counsel appears to be asking the Court to look beyond the testator's intent at the time of the execution of the Will and instead speculate on other reasons why the couple may get divorced, contrary to Virginia law.

7. Lastly, Counsel maintains the suit is premature because Susan's life estate has not yet ended. He argues that under *Potts v. Rader*, 179 Va. 722 (1942), Kevin could refile the suit in a few years and the Court will not be bound by this decision today if the facts have changed.

ANALYSIS

The question presented before the Court is whether the Will provision, "except that the share which I bequeath to my son, Kevin Brian Connolly, shall not be distributed to him if he is married to the same person he is married to on the date of the execution of this will," is void as against public policy.[1] To determine whether this Court must strike the provision, I must answer two questions: 1) What was the testator's intent at the time of the execution of the Will, and 2) if the testator's intent reflects an undue restraint on marriage, does the contested clause mandate a

[1] While Mr. Rodgers also argued that Kevin forfeited his right to sue when he failed to challenge the provision before the conclusion of the 2014 probate case, this argument is meritless. It has been common practice for a beneficiary to sue to construe a will after it has already been admitted to probate. *See, e.g.*, *Tiffany v. Thomas*, 168 Va. 31 (1937); *Wornom v. Hampton Normal & Agricultural Institute*, 144 Va. 533, 541 (1926). In fact, probate proceedings are confined *solely* to the issue of the determining the validity of the will. *Rickard v. Rickard*, 115 S.E. 369, 372 (Va. 1922).

divesting of the estate upon the failure to comply with the testator's demand? *Meek v. Fox*, 88 S.E. 161 (Va. 1916).

First, the Court must look primarily to the language of the will, and then to circumstantial evidence, to determine if the testator intended to unreasonably restrain or prohibit marriage. *Meek*, *supra*, at 161; *see Conrad v. Conrad's Executor et al.*, 97 S.E. 336, 338 (Va. 1918) ("The rule is elementary that the intention of the testator is the polar star which is to guide in the interpretation of all wills, and, when ascertained, effect will be given to it unless it violates some rule of law, or is contrary to public policy."). The Supreme Court has held that

> In the construction of wills, it is a well-settled rule that effect must be given to every word of the will, if any sensible meaning can be assigned to it not inconsistent with the general intention of the whole will taken together. Words are not to be changed or rejected unless they manifestly conflict with the plain intention of the testator, or unless they are absurd, unintelligible or unmeaning, for want of any subject to which they can be applied. *Tiffany v. Thomas*, 168 Va. 31, 35 (1937).

Further, "[T]he underlying principle always is that in the construction of wills the intention of the testator, if it is legal and can be determined, is controlling." *Wornom v. Hampton Normal & Agricultural Institute*, 144 Va. 533, 541 (1926).

The language of the Will conclusively shows Mr. Connolly's intent for Kevin to divorce Francine. First, Mr. Connolly clearly refers to Francine when he writes: "if [Kevin] is married to the same person he is married to on the date of the execution of this will" because Kevin was married to Francine at the time Mr. Connolly signed the Will and the evidence presented showed that Mr. Connolly was aware of their marriage at this time. Second, "no longer married" clearly expresses his intent for them to divorce.[2] Further, the depositions of Kevin and Father Donahue, the family's priest, show that Mr. Connolly adamantly opposed Kevin's marriage to Francine because he did not attend their wedding and repeatedly expressed his contempt for Francine after they married. Therefore, under the facts of this case, I find that Mr. Connolly, through his Will, explicitly encouraged Kevin to divorce his wife.[3]

While there is no Virginia common law addressing the validity of will provisions that encourage divorce, there exists strong precedent against wills containing absolute prohibitions of marriage. *See, e.g.*, *Meek v.* Fox, 88 S.E. 161, 163 (Va. 1916) ("It has, by numerous decisions of this court, been held that any contract or provision in general or total restraint of marriage is against the policy of the laws of this state, and this view, it appears, has been uniformly taken wherever the question has arisen."); *Maddox v. Maddox*, 52 Va. (11 Gratt.) 804, 807 (1854) ("[N]ot only should all positive prohibitions of marriage be rendered nugatory, but all unjust and

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[2] While the statement in the Will did not include the word "divorce," this does not preclude a finding that the testator intended to encourage a divorce. *See Shelton v. Stewart*, 193 Va. 162 (1951).

[3] While Mr. Rodgers argues that because "no longer married" does not exclude non-divorce options such as death or annulment the Court cannot hold that the provision encourages divorce, under *Meek*, the *intent* of the testator is dispositive in determining the legality of the provision.

improper restrictions upon it should be removed, and all undue influences in determining the choice of the parties should be carefully suppressed."). Further, Virginia courts have long held that provisions in contracts that encourage divorce are prohibited as against public policy. *See, e.g.*, *Capps v. Capps*, 216 Va. 378 (1975); *Shelton v. Stewart*, 193 Va. 162 (1951). Courts in other states have also deemed that absent a testator's intent to protect the beneficiary, a provision in a will encouraging divorce violates public policy. *See, e.g.*, *Hall v. Eaton*, 259 Ill. App. 3d 319 (4th Dist. 1994). Taking the next logical step, this Court finds that a stipulation in a will that encourages a devisee to divorce his or her spouse, absent an intent to financially protect the devisee, is as loathsome as an absolute prohibition on marriage and therefore violates public policy.

Second, the Court must determine if the contested clause "cut[s] down and destroy[s] this larger estate" (a "condition"), or merely signifies the end of the estate (a "limitation") and is therefore not prohibited. *Meek*, 88 S.E. at 162. In *Meek v. Fox*, *supra*, the disputed term concerned a devise to the testator's daughter, Julia Anne. The testator conveyed to her a share of his estate and declared that "she shall have it forever, except should she marry, then at her death I desire that it shall revert to her legal heirs." *Id.* at 161. The Supreme Court held that the clause violated public policy because the estate would divest upon her marriage.

At trial, the parties appeared to conflate a condition precedent with a condition subsequent. To clarify, *Meek* stands for the proposition that an unsavory term in a will must threaten to *cut short* a devised estate before the Court may strike it. The Supreme Court's holding in *Meek* therefore contemplated a condition *subsequent* rather than a condition *precedent* or a limitation. The Supreme Court distinguished the will stipulation thus:

> It is not a condition precedent, for the reason that the estate had *already vested* in the devisee, Julia Anne, at the time of her marriage, and the effect of the provision respecting her marriage, if valid at all, could only be to divest such estate, and not to prevent its vesting, which would be the result in the case of a condition precedent. *Meek*, 88 S.E. at 162 (emphasis added).

Under *Phillips v. Ferguson*, 8 S.E. 241 (Va. 1888), a clause in a will that prohibits marriage may nevertheless be upheld if the condition prevents the estate from vesting in the devisee.

> The common law, although it does not allow a condition in restraint of marriage generally, when annexed to a devise of lands or of a legacy charged on land, to divest an estate, yet, if the condition be precedent, it must be observed, no matter how restrictive of marriage it may be. If, however, it be subsequent, then its effect depends on whether it is reasonable or not.... A condition subsequent is one the effect of which is to enlarge or defeat an estate already created. 8 S.E. 241, 242 (Va. 1888) (citation omitted).

Mr. Connolly prescribed that the proceeds of the sale of the house would be distributed to his "surviving children." The phrase "surviving children" is a condition precedent because this remainder could not vest in Kevin unless Kevin survived Mr. Connolly. Because Kevin survived

Mr. Connolly, Kevin's remainder has now vested. *Meek*, 88 S.E. at 161 ("[A]ll devises and bequests are to be construed as vesting at the testator's death, unless the intention to postpone the vesting is clearly indicated in the will."). Therefore, the contested clause cannot be a *condition precedent* because the estate vested at the time of Mr. Connolly's death. The clause cannot be a *limitation* because it does not "mark the extent of time for which the estate [is] to last." *Meek*, *supra*, at 162. Rather, the term in the Will is a *condition subsequent* because it threatens to divest the estate from Kevin if he is still married to Francine when the house is sold.[4]

As of the date of the hearing, Susan remains in the house. Kevin will be disqualified from receiving any distribution if he is still married to Francine when the house is eventually sold. Or, Kevin may divorce Francine. Or Francine may pass away. While these are unfortunate circumstances, any one of these events will affect Kevin's right to a share of the proceeds of the estate if they occur before the house is sold. While we cannot know at this time *if*, under the current language of the Will, Kevin will receive a share of the estate, under *Meek v. Fox*, *supra*, the test to determine if a condition violates public policy requires the Court not to assess what may happen in the future, but to determine the nature of the condition and the intent of the testator at the time of the execution of the will. This issue is ripe for review.

CONCLUSION

This Court finds that the Will provision clearly exhibits the testator's intent to encourage the Petitioner to divorce his wife. Because this provision threatens to cut off Kevin's remainder if he does not obey the testator's demand, this Court strikes that condition on the grounds that it is void as against public policy. Therefore, the Petition is granted. The Petitioner is entitled to a share of the proceeds when the house is sold.

An order is attached.

Sincerely,

[redacted]

Robert J. Smith
Judge, Fairfax County Circuit Court

Enclosure

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[4] While Mr. Connolly did not explicitly state a date or time at which Kevin must no longer be married to Francine, interpreting the Will to conclude that Kevin must divorce Francine by the date of execution of the Will would make little sense, since that would nullify Mr. Connolly's devise to Kevin and would be counterintuitive in light of Mr. Connolly's attempt to encourage Kevin to divorce Francine. The most plausible interpretation of the Will is that the condition (Kevin no longer being married to Francine) will take effect at the time at which the house is sold. Mr. Connolly divided the remainder of his estate (the proceeds from the sale of the house) between his four surviving children and in that same sentence added "except that the share which I bequeath to [Kevin] shall not be distributed to him if he is married to [Francine]..." It is apparent that Mr. Connolly intended that if Kevin was still married to Francine *at the time the house was sold*, Kevin would be disqualified from receiving any share of the proceeds.

VIRGINIA :

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

IN RE: ESTATE OF KEVIN JOSEPH CONNOLLY | Case No. CL-2018-0002347

FINAL ORDER

THIS CAUSE came before the Court on January 10, 2019 for a bench hearing.

For the reasons stated in the attached letter opinion, Petitioner Kevin B. Connolly's Petition to Construe the Will is GRANTED, and

THIS CAUSE IS ENDED.

ENTERED this 16 day of April, 2019.

[redacted]
Circuit Court Judge

ENDORSEMENT OF THIS ORDER BY COUNSEL OF RECORD FOR THE PARTIES IS WAIVED IN THE DISCRETION OF THE COURT PURSUANT TO RULE 1:13 OF THE SUPREME COURT OF VIRGINIA.