NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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December 30, 2019

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Re: *Renee Sun v. Joseph Michael Riley*
Case No. CL–2019–13249

Dear Counsel and Joseph Riley:

The issues before the Court in this annulment action are whether: (1) lack of consummation, alone, is sufficient ground for annulment; and (2) a spouse met her burden to prove her spouse's gender transition amounted to fraud in the inducement. Specifically, this Court must decide whether Joseph Riley ("Riley") defrauded Renee Sun ("Sun")[1] by inducing her to marry him without telling her he had (1) "no intention of ever consummating the marriage"; and (2) "no intent of remaining a male."[2] This Court holds Sun failed to prove either alleged fraud by clear and convincing evidence and thus denies the Petition for Marriage Annulment.

[1] The Court uses each party's pronouns in the manner each party expressed to the Court each one preferred. The Court mentions this due to the materiality of the subject matter.
[2] Pet. ¶¶ 7-8.

OPINION LETTER

I. FACTS.

The parties married on November 19, 2017. (Pet. ¶ 2.[3]) However, they never engaged in coitus once married. Riley testified he approached his new wife twice for marital relations, but she rebuffed him. He did not wish to force her, so he abandoned both proceeding and any future attempts. He denied being impotent before marriage, or on either of his two post-marriage attempts at coitus.[4] Sun "could not recall" these advances, but she firmly testified that she never approached him for marital relations. She did not testify that she ever asked him for coitus or even asked why they remained celibate.

Prior to the marriage, Riley was "unsure of [his] gender." (Test. of Riley.) He engaged in hormone testing and took female hormones on May 16, 2017, roughly six months before marriage. He claimed he spoke to Sun about this "in passing." For example, he would say he was a girl and liked to "dress up." He claimed Sun was supportive.

Sun acknowledged Riley would joke about being a girl and dressing up, but she thought of it as just that—a joke. She admitted he told her he had taken female hormones prior to the marriage, but she testified he explained it was only to treat "in-grown hair." She asked if this would turn him into a female, to which he replied it would not happen because a doctor oversaw the treatment and the dosage was low.

Sun testified she did not know Riley was transitioning to becoming a female, they had no gender reassignment discussions, and she wanted children and a male-female marriage. She claimed the two talked about children and both wanted them; Riley, on the other hand, testified they discussed his not wanting children.

On March 29, 2019, Riley underwent a surgical procedure consistent with a male to female gender reassignment. Sun testified she learned of this, not from Riley, but from medical records she found in their bedroom. To the contrary, Riley testified he discussed it with Sun before the procedure. Sun testified he only told her he was obtaining a vasectomy, and not a bilateral orchiectomy.

Riley emphatically denied defrauding Sun at the time of the marriage. He testified he "doesn't want to be transgender" and that his feelings are unfolding. He "had no choice." He believes he was "not supposed to be male." He would take steps he hoped would satiate his changing feelings, but it did not work as he expected. Instead of being satiated, the desire to transition grew stronger.

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[3] The Petition for Marriage Annulment was filed September 26, 2019; an *ore tenus* hearing was held December 17, 2019.

[4] The Court mentions performance ability only because incurable impotence pre-marriage is a ground for annulment. VA. CODE ANN. § 20-89.1(B).

II. ANNULMENT VERSUS DIVORCE.

When a marriage is annulled, the law treats the marriage as a nullity. It never happened because it was either void *ab initio* (such as in the case of bigamy, VA. CODE ANN. § 20-38.1(a)(1)), or it is voidable (such as in the case of marriage to one lacking capacity to consent, VA. CODE ANN. § 20-45.1(B)). Some parties may prefer an annulment over a divorce for religious reasons or as a form of marital expungement, giving them a clean marital record of sorts. The biggest effect is that annulments are divorced from the benefits of Virginia's equitable distribution and spousal support laws. *Shoustari v. Shoustari*, 39 Va. App. 517, 520 (2002). As a result, parties seeking annulment must be held to their high evidentiary burdens.

Importantly, one seeking annulment has an alternate remedy if unsuccessful—through divorce. *See* VA. CODE ANN. § 20-91. In the present case, should Sun not meet her burden for an annulment, she may still be successful through an action for divorce.

III. FAILURE TO CONSUMMATE A MARRIAGE IS NOT, ALONE, A GROUND FOR ANNULMENT.

Standing alone, failure to consummate a marriage through coitus is not a ground for annulment. Virginia Code § 20-89.1 sets forth grounds for annulment—namely, bigamy, consanguinity, youth, mental incapacity or infirmity, incurable impotency existing at time of marriage, fraud, prior unknown felony convictions, prior unknown children, or prior unknown prostitution. VA. CODE ANN. § 20-89.1 (with cross-references to §§ 20-13, 20-38.1, and 20-45.1). Noticeably absent is "coitus," "sexual intercourse," or any synonymous term.

These statutory grounds for annulment are not exclusive. *See Pretlow v. Pretlow*, 177 Va. 524, 548-49 (1941) ("Divorce is the creature of statute; annulment rests within the inherent power of equity . . . and that power is not lost because other grounds are specifically mentioned in the statute."). However, coitus is nowhere included in the solemnization procedures of Virginia Code § 20-13 *et. seq.* Virginia Code § 20-31 does protect a marriage "solemnize[d]" and "consummated" in good faith from certain procedural defects, such as an imperfection of a marriage license. But, the term "consummated" is not defined. The term is used elsewhere in the Virginia Code to mean things other than coitus. For example, Virginia Code § 13.1-730 provides appraisal rights upon "consummation" of a corporate merger, clearly without meaning human intimacy. There are no statutory grounds for annulment based solely on nonconsummation and, as discussed further herein, the Court has found no other authority holding that consummation, alone, is a marital requirement.

Fraudulently inducing one to marry is a statutory ground for annulment. VA. CODE ANN. § 20-89.1(A). "The party charging fraud has the burden of proving '(1) a false representation, (2) of a material fact, (3) made intentionally and knowingly, (4) with intent to mislead, (5) reliance by the party misled, and (6) resulting damage to the party misled.' The fraud must be proved by clear and convincing evidence." *Batrouny v. Batrouny*, 13 Va. App. 441, 443 (1991) (citing *Winn v. Aleda Constr. Co.*, 227 Va. 304, 308 (1984)).

A knowingly false pre-marital promise to engage in coitus post marriage can be fraud and a ground for annulment. *See Pretlow*, 177 Va. 524 (1941). In *Pretlow*, a husband sought annulment of his marriage—and the return of money he paid to settle his wife's premarital debts—in a counterclaim to her divorce complaint on the basis that the couple never consummated their marriage. The Court "examined [the case] with care and [opined] that the marriage was never consummated and that for this Mrs. Pretlow is to blame. She never at any time intended that it should be consummated." *Id.* at 529. The Court held the marriage was one in name only and awarded an annulment to Mr. Pretlow's counterclaim. *Id.* at 555-56. The Court did not hold that consummation was itself a condition precedent to a valid marriage. Rather, it held that the fraud was misleading a person to marry with the intent to deny marital relations, not the lack of marital relations by itself.

So, to award an annulment for nonconsummation, a court must find by clear and convincing evidence that one party induced the marriage on a false promise of coitus and not just the fact that the marriage proceeded without coitus. In *Jacobs v. Jacobs*, 184 Va. 281 (1945), a 79-year-old man actively pursued and ultimately married his 42-year-old nurse. 184 Va. at 283, 285-86. The evidence showed he promised her a gift of real property to induce the marriage, which he delivered. He later sued for annulment and the return of his property on the basis that the two had not engaged in coitus. The Supreme Court considered the possibility that the marriage was never consummated. However, it did not grant an annulment on that basis. Rather, it wrote, "if there was a failure of consummation such failure was due as much, if not more, to the fault of the appellee as to that of the appellant." *Id.* at 296-297. Thus, the Court held that the husband failed to prove that his wife defrauded him into marrying him for his property with no intention of consummating the marriage. The Court concluded, "Courts do not exist to guarantee happy and successful marriages, or to annul and cancel the effect of mere errors of judgment in the making of contracts of marriage. In the absence of fraud, duress or other improper elements affecting such transactions no relief can be granted." *Id.* at 298.

Counterposed, the Court of Appeals affirmed an annulment order where the trial court found that a husband proved his wife defrauded him into marrying where (1) she told a friend she was not going to consummate the marriage because her husband was "too old"; (2) the couple slept in separate rooms and she travelled with a male chaperone; and (3) she married him only to come to the United States for the benefit of her daughter. *Mustafa v. Mustafa*, No. 2175-09-4, 2010 WL 1439410 (Va. App. Apr. 13, 2010) (unpublished). As with *Jacobs*, the failure to consummate the marriage was not by itself the basis for a ruling on annulment. Rather, defrauding one into marriage with the intent to not consummate it can be the basis.

In the present case, Riley testified he entered the marriage with the intent to consummate it. He claimed he tried twice with the ability to perform, was twice rebuffed, and that he never tried again. The Court believed his testimony. Sun did not deny Riley tried to have marital relations with her; instead, she testified that she never recalled his advances. Tellingly, she admitted she never approached him for marital relations despite her stated goal of having children. She did not even testify that she ever initiated a conversation about why they would not have sex. This is very different than the language she used in her Petition. There, she wrote, "the

parties have not engaged in any sexual relations or sexual contact due to [Riley] vehemently refusing to do so." (Pet. ¶ 12.) The Court finds as fact her *ore tenus* testimony to be more credible than her Petition and concludes that Riley did not "vehemently" refuse sexual relations; rather, he tried and was rebuffed, and it was Sun who did not want these relations. Since Sun is seeking the annulment, it is her burden of production and of proof, by clear and convincing evidence, to show Riley defrauded her into marrying him on the promise of consummating the marriage.

The Court finds as fact that Sun failed to carry her burdens and that she did not prove Riley defrauded her in this regard.

IV. FAILURE TO DISCLOSE SEXUAL IDENTITY IS NOT, ALONE, FRAUD *PER SE*.

Sun alleges Riley defrauded her into marriage by "never disclosing his true desires." (Pet. ¶ 21.) She wanted a heterosexual partner with whom she could engage in sexual relations. (Pet. ¶ 9.) She wanted children. (Test. of Sun.) She believed she was marrying a male who always intended to be and remain a male. (Pet. ¶ 10.) She did not know he was in the process of becoming a female. (Pet. ¶ 13.)

She argues Riley knew before the marriage he did not want to remain male and defrauded her by (1) not telling her he planned to transition from male to female; (2) lying to her that his pre-marital female hormones was to resolve ingrown hair when it was really to make him feel more like a female; and (3) not telling him he engaged in hormonal testing.

Sun points to events after the marriage showing a continued trajectory. Approximately a year and a half after an unconsummated marriage, she learned that Riley hid from her a surgical procedure consistent with a transition from male to female (Pet. ¶¶ 17-18) and lied to her about it by calling it a vasectomy to minimize the operation. She reasons that Riley knew prior to the marriage he wanted to become female and defrauded her by not telling her. (Pet. ¶ 21.) She averred that she never would have entered the marriage had she known what she now knows. (Pet. ¶ 20.)

Riley implicitly argues that it is not as simple as Sun argues. He testified he never wanted to be transgender, he wanted to have marital relations with Sun, and his feelings changed over time despite his wishes.

The parties presented no expert witness or other evidence to help explain the complexities of human sexuality and identity. The Court must rely on burdens of proof and weight of evidence under the lens of its own understanding and of common sense. So viewed, Sun has not proved by clear and convincing evidence that Riley defrauded her into marrying him. The Court concedes that upon viewing the evidence as a whole—especially the fact that Riley underwent surgery—it can understand Sun's feeling defrauded. One can almost hear her

pleading, "He *had to have known* his feelings before the wedding and he had a duty to tell me!" However, she did not prove it.

First, the Court must look at what each party knew at the time of the marriage ("*ex ante*") and not what each learned after the marriage ("*ex post*").[5] While the latter can inform inferences about the former, it can dangerously mislead as to true intent *ex ante*.

Second, the Court must consider that people are not static; they change over time—some in ways more dramatic than others. A grumpy old man may have once been charming when he was a young newlywed. An alcoholic woman may have been a casual, social drinker at the time of her marriage but is now a raging alcoholic.[6] In both cases, using an *ex post* analysis, one might be able to point to events leading the man to becoming grumpy or the woman to becoming an alcoholic. The temptation would then be to infer that the grumpy man and alcoholic woman *must have known* he was going to be grumpy and she would become an alcoholic because, in retrospect, the signs seem obvious. However, it is possible that despite signs that look clear *ex post*, it is entirely possible people going through their own life experiences *ex ante* could not internalize them as they unfold.

Must a person "unsure of his gender" before marriage, who now believes he was "not supposed to be male" have told this to a future spouse to avoid defrauding the spouse? The Court can conceive of circumstances where failure to so inform—or to affirmatively hide these feelings—could amount to fraud in the inducement. However, on the present record, the Court finds Sun failed to prove by clear and convincing evidence that, at the time of her marriage, Riley defrauded her by knowing he did not wish to engage in and perpetuate a marriage between a man and a woman with her.

The Court believed Riley that he entered the marriage believing he would be in a lifelong relationship with Sun. It believed him that he tried to have marital relations with her. It believed him that he was unsure of his own sexuality, but that he wanted to be married to Sun as a male.

There was no evidence Riley tried to trick Sun into marriage in order to gain any material advantage, as alleged in *Pretlow* (to defraud a spouse into paying off self-incurred debts), *Jacobs* (to defraud a spouse into gifting real property), or *Mustafa* (to defraud a spouse in order to gain entry into the United States). Counterfactually, the evidence showed that Sun knew—pre-marriage—that he joked about being a girl and dressing up. She knew he had taken female hormones. She rebuffed his sexual advances and did not make advances of her own or question him as to their celibate status. If one were to apply an *ex post* analysis to this case, one could make a case that Sun should have known Riley was on a trajectory toward becoming a female

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[5] Colloquially, one evokes this *ex ante/ex post* concept when quoting the aphorism "Hindsight is 20/20," meaning that things that have already happened appear obvious.

[6] The Court uses these hypotheticals merely as part of its *ex ante/ex post* analysis and not as analogies to sexual or gender identity.

someday. However, since Sun seeks the annulment, she has the burden of proof and has not met her burden. Her Petition for Marriage Annulment must be denied.

V. CONCLUSION.

For the reasons stated herein, the Court holds Sun failed to prove, by clear and convincing evidence, Riley defrauded her to induce their marriage by not telling her he had (1) "no intention of ever consummating the marriage"; and (2) "no intent of remaining a male." Accordingly, the Petition for Marriage Annulment is denied.

An appropriate Order is attached.

Kind regards,

[redacted]

David A. Oblon
Judge, Circuit Court of Fairfax County
19th Judicial Circuit of Virginia

Enclosure

OPINION LETTER

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

RENEE SUN	)	
	)	
Plaintiff,	)	
v.	)	CL–2019–13249
	)	
JOSEPH MICHAEL RILEY	)	
	)	
Defendant.	)	

FINAL ORDER

Based on Plaintiff's "Petition for Marriage Annulment" (September 26, 2019); *ore tenus* hearing (December 17, 2019); and the Court's Opinion Letter (December 30, 2019), which is incorporated herein, it is hereby ADJUDGED, ORDERED, and DECREED as follows:

The Petition for Marriage Annulment is DENIED.

And this CAUSE IS FINAL.

DEC 3 0 2019

Dated [redacted]

[redacted]
Judge David A. Oblon

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.