NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

Fairfax County Courthouse
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December 7, 2021

Michael D. Toobin, Esquire
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7006 Little River Turnpike
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RE: *In re George William Estate of Asmuth*, Case No. CL-2021-12578

Dear Counsel:

This letter states the findings and the decision of this Court in the above-referenced matter.

FACTS

George William Asmuth (decedent) died testate on Feb. 24, 2021. He signed his last will and testament on Oct. 17, 2018, which was admitted for probate on June 28, 2021. Decedent wrote a document on Oct. 18, 2018 that purported to be a codicil to the will. The decedent did not sign the codicil but rather typed his name at the end of the letter. The codicil includes witness and notary certification pages. The certification pages were signed on Oct. 19, 2018.

The complainant, Phung T. Nguyen, is the decedent's wife and executor of his estate. She asks that the Court give its aid and guidance as to whether the discovered document is a valid codicil. David E. Asmuth, Jennifer Asmuth Day (presumably his children from his first marriage), and Lynne Y. (Deffner) Asmuth (his ex-wife) are interested parties to this matter. They were all served by publication. No interested party has brought forth arguments on whether the document is a valid codicil.

OPINION LETTER

STANDARD OF REVIEW

Under Virginia Code § 64.2-445, any person interested in the probate of a will may appeal any order entered pursuant to § 64.2-444 within six months after the entering of such an order. Only five months passed between the probate of the will and the filing of this petition.

"A codicil is a supplement or addition to a will, not necessarily disposing of the entire estate but modifying, explaining, or otherwise qualifying the will in some way. When admitted to probate, the codicil becomes a part of the will." *Codicil, Black's Law Dictionary* (11th ed. 2019). The requirements of Code § 64.2–403, "which apply to the probate of a will, extend with like force and effect to the probate of a codicil." *Irving v. Divito*, 294 Va. 465, 471 (2017) (quoting *Delly v. Seaboard Citizens Nat'l Bank*, 202 Va. 764, 767, 120 S.E.2d 457, 459 (1961)).

Virginia Code § 64.2-403 requires that for a will or codicil to be valid, it must be in writing and signed by a testator. *See* Va. Code § 64.2-403(A). It also requires that if the document is not written in the person's handwriting, then it is "not valid unless the signature of the testator is made, or the will is acknowledged by the testator, in the presence of at least two competent witnesses who are present at the same time and who subscribe the will in the presence of the testator." *Id.* § 64.2-403(C).

However, a codicil not executed in compliance with § 64.2-403 may still "be treated as if it had been executed in compliance with § 64.2-403 if the proponent of the document or writing establishes by clear and convincing evidence that the decedent intended the document or writing to constitute … an addition to or an alteration of the will." Va. Code § 64.2-404.

ANALYSIS

I. This Is Not a Valid Codicil Under Va. Code § 64.2-403 Because the Codicil Does Not Meet the Signature Requirement.

Virginia Code § 64.2-403 requires that for a will or codicil to be valid, it must be in writing and signed by a testator. *See* Va. Code § 64.2-403(A). Additionally, it requires that if the document is not written in the person's handwriting, then it must be signed or acknowledged by the testator "in the presence of at least two competent witnesses who are present at the same time and who subscribe the will in the presence of the testator." *Id.* § 64.2-403(C). These requirements are designed to prevent mistakes, imposition, fraud, and deception. *See Berry v. Trible*, 271 Va. 289, 297-98 (2006).

"Virginia law does not define what shall constitute a 'signature.'" *Irving v. Divito*, 294 Va. 465, 471 (2017). Initials or a mark *can* be sufficient. *Id.* Whether a signature—be it a full signature, initials, or a mark—satisfies the signature requirement. Whether a signature is present "largely depend[s] upon the circumstances of each particular case, though in all cases ... intent is a vital factor." *Id.* The codicil must be "signed by the testator ... in such a manner as to make it manifest that the name is intended as a signature." *Id.* at 472.

To determine intent, first Virginia courts look to the face of the document to see if it gives some evidence that the name appearing on it was intended as a signature to authenticate the document as testamentary. *Irving*, 294 Va. at 473. Second, they look to extrinsic evidence to confirm or disprove that the testator designed by the use of his name to authenticate the document at issue. *Id.* There may be sufficient evidence of such intent if the writing is placed at the foot or end of the document, or in the testator's handwriting, or there is some internal proof that it was affirmatively intended to be the testator's signature. *See id.*; *see also Slate v. Titmus*, 238 Va. 557, 560-61 (1989) (recognizing a holographic will that includes the testator's name and the statement "Given under my hand" as properly signed).

In *Irving v. Divito*, the Virginia Supreme Court analyzed a "signature," under Va. code § 64.2-403.[1] The codicil at issue was a handwritten note "written diagonally and in cursive" on one of the dividers in the binder holding the will. 294 Va. at 468. At the bottom of the writing, the testator initialed his name. *See id.* The Virginia Supreme Court recognized initials appearing at the end of a writing as evidence that it was designed to authenticate the document as a codicil. *Id.* at 473. This determination allowed the Circuit Court to consider extrinsic evidence to determine if it was in fact a signature. *See id.* However, when the Virginia Supreme Court considered external evidence, specifically, the original will, the Court decided that the initials may not have been intended as a signature. *See id.* at 473. In the original will, the testator used his full name as a signature, while in the codicil he only used his initials. *Id.* This inconsistency raised doubts, and therefore, the Supreme Court affirmed the Circuit Court's conclusion that Plaintiff did not prove by clear and convincing evidence that the signature was intended as a codicil or executed with testamentary intent. *Id.* at 474.

In the proposed codicil presently before the Court, the testator's name is typed at the end of the document, following the word "sincerely." This could arguably be considered a signature because, like in *Irving*, it was put at the end of the writing which could be evidence that it was designed to authenticate the document as a codicil. *See Irving*, 294 Va. at 473. Additionally, the proposed codicil is titled "additional changes to last will and testament" and Mr. Asmuth explicitly states that he "would like to make the following changes to my Last Will and Testament dated 17 October 2018." Therefore, based on the face of the document, there is some evidence that the typed name appearing at the end of the document was intended as a signature to authenticate the document as testamentary, and therefore the court may consider extrinsic evidence to confirm or disprove this intent. *See id.* at 472-73.

In this case, however, the original will was prepared by Chris S. Brownwell at Fort Myer and was hand-signed by testator as well as witnessed by two witnesses. Like in *Irving*, the fact that Mr. Asmuth hand wrote his full name at the end of the original will in order to sign it raises doubts as to whether he intended his typed name to authenticate the document as a codicil. This doubt prevents the conclusion that it is manifest that the typed name was intended as Mr. Asmuth's signature. Therefore, the document is not a codicil under Va. Code § 64.2-403.

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[1] *Irving v. Divito* also analyzed Va. Code § 64.2-404, discussed *supra*.

II. There Is Clear and Convincing Evidence That the Testator Intended this Writing to be a Codicil, and Therefore It Is a Valid Codicil Under Va. Code § 64.2- 404.

Under Va. Code § 64.2-404, a codicil not executed in compliance with § 64.2-403 may still "be treated as if it had been executed in compliance with § 64.2-403 if the proponent of the document or writing establishes by clear and convincing evidence that the decedent intended the document or writing to constitute … an addition to or an alteration of the will."

The only published Virginia Supreme Court case interpreting Va. Code § 64.2-404 since the statute was enacted in 2012 is *Irving v. Divito*. In *Irving*, the Virginia Supreme Court spelled out how to determine whether the decedent intended the document or writing to constitute an addition to or an alteration of the will. *See generally Irving*, 294 Va. at 474. According to the Virginia Supreme Court, "testamentary intent ... means that the writing offered for probate must have been executed by the testator with the intent that such writing take effect as his last will." *Irving*, 294 Va. at 472 (quoting *Thompkins v. Randall*, 153 Va. 530, 538–39 (1929)). Initially, "testamentary intent is determined by looking at the document itself, not from extrinsic evidence." *Irving*, 294 Va. at 472 (quoting *Wolfe v. Wolfe*, 248 Va. 359, 360 (1994)). "Whether the face of an instrument contains evidence of testamentary intent is a matter of law to be decided by the trial court." *Irving*, 294 Va. at 472 (quoting *Bailey v. Kerns*, 246 Va. 158, 162 (1993)). If a court determines there is no evidence of testamentary intent within the four corners of the instrument, that instrument is not a valid will. *Irving*, 294 Va. at 472. However, after a court determines that "an instrument contains some evidence of testamentary intent, extrinsic evidence may be admitted to determine whether the instrument is testamentary in nature." *Id.*

In this case, the proposed codicil is titled "additional changes to last will and testament" and Mr. Asmuth explicitly states that he "would like to make the following changes to my Last Will and Testament dated 17 October 2018." Additionally, it is witnessed by two witnesses. Therefore, there is evidence within the four corners of the document itself that Mr. Asmuth intended that it to be considered a part of his will. As a result, this Court shall look to extrinsic evidence that was given to it—the original will.

The proposed codicil appears consistent with the contents of the October 17th, 2018 will. For example, in the will, the testator asks that his body be cremated. In the codicil, he again asks that his remains are cremated. Furthermore, in his will, the testator says that he will give David E. Asmuth and Jennifer A. Asmuth (presumed to be his children from his first marriage) "the smallest portion of my estate, if any, required to be given.... under applicable law.... It is my desire and intent that David A. Asmuth and Jennifer A. Asmuth be disinherited by me to the fullest extent permitted by law." In the codicil, decedent says that he wishes that the document not be challenged or modified by anyone "specifically … Jennifer Asmuth Day and/or David Asmuth. I have intentionally not mentioned them in any of my affairs due to the way they have been treating my spouse. I wish both of you Godspeed and best wishes." Finally, in his will, he appoints his wife Phung Nguyen as his executor, or if she cannot do it, Monique, his stepdaughter as the executor. In the codicil, he names Monique as his "daughter," not stepdaughter, and again has her be the replacement administrator if his wife cannot do it.

There is clear and convincing evidence that the testator intended the document to constitute an addition to or an alteration of his October 17th, 2018 will.

CONCLUSION

The Court rules that the writing in this case not signed in the manner required by Code § 64.2–403(A) but there is clear and convincing evidence that the testator intended the writing to constitute a codicil. Therefore, it is a valid codicil pursuant to Va. Code § 64.2-404 and Ms. Nguyen must consider its contents when administering her late husband's estate.

Please direct any questions you may have to my law clerk, Ms. Noga Baruch at 703-246-5471.

Sincerely,

[redacted]

Robert J. Smith
Judge
Fairfax County Circuit Court

OPINION LETTER