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## OPINION OF THE CONNECTICUT PROBATE COURT

### IN RE: ZIRKENBACH

PROBATE COURT, WINDHAM-COLCHESTER DISTRICT

JULY 31, 2017

#### EDITOR'S SUMMARY & HEADNOTES

Two of Decedent's children claimed that their father failed to comply with the binding terms of a 1972 Dissolution of Marriage Judgment. As part of the Judgment, Decedent agreed to various provisions relating to his ownership of businesses and also agreed to provide in his Will that upon his death one quarter of his estate would be left outright and absolutely to each of the children. A final financial report and intended distribution of the estate had not been filed; therefore, the Court was only addressing the validity of the claims filed by the children regarding their rights under the Dissolution of Marriage Judgment approved by the Superior Court in 1972. The Court found that the Dissolution Agreement constituted a contract between the Decedent and his first wife. The Court found that elements of the Decedent's Will did not comply with the binding terms of the Dissolution Agreement. Therefore, the Court held that the children's claims against their father's estate were valid and that these claims must be resolved prior to distribution of the estate's assets.

#### 1. Claims Against Estate: Claims Defined

Pursuant to Conn. Gen. Stat. § 45a-353(d) (2016), a claim is defined as all claims against a decedent (1) existing at the time of the decedent's death or (2) arising after the decedent's death including, but not limited to, claims which are mature, unmatured, liquidated, unliquidated, contingent, founded in tort, or in nature of exoneration, specific performance or replevin.

## **2. Claims Against Estate: Creditor Defined**

Pursuant to Conn. Gen. Stat. § 45a-353(e) (2016), a creditor is defined as any person having a claim.

## **3. Probate Court: Jurisdiction**

The probate court's jurisdiction of the settlement of decedents' estates is exclusive.

## **4. Probate Courts: Jurisdiction**

The jurisdiction of the probate court or of commissioners appointed by it with respect to equitable claims against the estate is concurrent with the jurisdiction of courts of general equity jurisdiction.

## **5. Probate Court: Powers**

Pursuant to Conn. Gen. Stat. § 45a-98(a) (2016), probate courts have the power to make any lawful orders or decrees to carry into effect the power and jurisdiction conferred upon them by Connecticut law.

## **6. Contracts: Generally**

A contract must be construed to effectuate the intent of the parties, which is determined from the language used interpreted in the light of the situation of the parties and the circumstances connected with the transaction.

### **Opinion**

The Court finds, after hearing and a review of the Legal Memoranda filed by counsel, the following facts in this matter and the application of law related thereto. Carl W. Zirkenbach ("Decedent") was a resident of Colchester, located in the Windham-Colchester probate district. He died on November 29, 2015. He was ninety-one-years old at the time of his death. He had executed a Last Will and Testament dated December 2, 2004, which was admitted to probate in this Court by J. Schad, cited in to hear the admission of will issue on June 21, 2016. An amended Inventory has been filed with the Court reporting the estate inventory to be \$1,198,149.31. Included in this estate inventory is 51% of an LLC which owns commercial real estate in Marlborough, Connecticut.

Decedent was survived by his spouse, Clara K. Zirkenbach ("Spouse") and by two adult children of a previous marriage, Deborah Leonard ("Leonard") and Carl D. Zirkenbach ("Zirkenbach"). During his lifetime, Decedent had developed and continued to own an interest in commercial properties located in Marlborough, CT. Previously, Decedent had owned a business known as the Marlborough Country Barn, Inc., which operated from the Marlborough property. During his lifetime, he had made inter vivos transfers of an interest in

these businesses to Leonard and Zirkenbach. In the case of the Marlborough Country Barn Inc., Leonard and her children owned a controlling interest. Decedent had retained a controlling interest in the real estate, known as Country Barn Properties, LLC.

On or about October 9, 2009, the Marlborough Country Barn, Inc. was liquidated. From the liquidation proceeds, Leonard and her children received a portion; however, Zirkenbach did not.

The Country Barn Properties, LLC continues to operate as a landlord, renting space to commercial shops and businesses. Zirkenbach manages the LLC and the property, and owns a 36.5% interest. Leonard has no active role in the business and owns a 12.5% interest.

Under the terms of Decedent's Will, Decedent attempted to distribute the two businesses he owned at the time of his execution of the Will to his two children, with Leonard receiving Marlborough Country Barn, Inc. and Zirkenbach receiving Country Barn Properties, LLC. However, in order to accomplish this objective, Decedent had to make the distribution contingent upon how the two businesses were owned at the time of his death. Decedent's Will instructs his Executor to transfer all of his interest in Marlborough Country Barn, Inc. to Leonard, but only if she had transferred to Zirkenbach all of her interest in Country Barn Properties, LLC, which she had not done. In the event that Leonard still had an interest in the Country Barn Properties, LLC at the time of Decedent's death, his Will instructed the Executor to distribute to Zirkenbach "twenty-five [percent] (25%) ownership of the outstanding shares of Marlborough Country Barn, Inc." As previously noted, that corporation had been dissolved and the liquidated assets distributed on or before October 2009, five years after Decedent's Will was executed, but approximately six years before he died. Neither a codicil, nor any subsequent will has been filed with the Court.

Decedent's Will also directed the Executor to distribute to Zirkenbach "all interest in Country Barn Properties, LLC, which I own . . . ." As previously noted, Decedent owned a 51% interest at the time of his death.

All distributions were to be made after the Executor paid Decedent's "just debts (except such as at the time of my death may be secured by mortgage, if any)."

The issues now presented to the Court concern claims raised by Decedent's two children. The claims originate from Orders set forth in the July 25, 1972, Dissolution of Marriage Judgment entered by Judge Simon S. Cohen in the Superior Court, Judicial District of Hartford. The parties involved were Decedent and his first wife, Margaret Thienes Zirkenbach. Each party was represented by counsel. The Judgment contained various provisions relating to the ownership of the Marlborough Country Barn, Inc., including Decedent's purchase of his wife's interest in the business.

In addition, Decedent agreed as part of the Judgment “without unreasonable delay” to “draw a Will and provide in his said Will that, upon his death, one-quarter of his estate will be left outright and absolutely to each of the children . . . .” The terms of this agreement were further emphasized in the Judge’s specific order: “[t]he plaintiff [Decedent] shall without unreasonable delay, draw a will which shall include the provisions agreed to in the stipulation of record.” Superior Court Order, Section 12 (1972).

The specific terms of the Dissolution Agreement imposed additional obligations upon Decedent regarding the future ownership of his assets, including his businesses. He agreed that “52% of the Marlborough Country Barn, Inc. or any other corporation then owning and operating said facility will be left in equal shares to his said children provided he is the owner . . . .” In addition to these promises regarding the businesses, the Dissolution Agreement also contained restrictions on Decedent’s ability to “transfer” ownership of assets which would “unreasonably diminish the value of his estate.”<sup>1</sup>

This Estate is not at the point where a final Financial Report and intended distribution of the estate has been filed. Therefore, it is premature for the Court to rule on matters that are not yet ripe for decision such as the exact amount of each distributive share due and payable based on the Dissolution Decree. At this time, the Court is addressing the validity of the claims filed by Leonard and Zirkenbach regarding their rights under the Divorce Judgment approved by the Superior Court in 1972.<sup>2</sup>

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<sup>1</sup> The complete section of the stipulation agreement pertaining to the business as well as the non-transfer obligations is set forth as follows:

12. The plaintiff further agrees that he will, without unreasonable delay following a divorce, draw a Will and provide in his said Will that, upon his death, one-quarter of the total value of his estate will be left outright and absolutely to each of the children of the parties. He will further provide in such Will that 52-percent of the common stock in Marlborough Country Barn, Inc. or any other corporation then owning and operating said facility, will be left in equal shares to his said children provided he is the owner of same at said time. If the value of such shares exceeds one-half of his total estate, he shall be obligated to leave the said shares to said children equally, but the difference between the value of such shares and the value of one-half of his estate must also be left in equal shares to the said children. The plaintiff hereby agrees that he will not during his life, by gift, transfer to an inter vivos trust or any other means unreasonably diminish the value of his estate, nor will he allow items of value to be diverted from his ownership so as not to comprise part of his estate at the time of his death. Nothing contained herein, however, shall obligate the plaintiff from disposing of his stock in the said corporation during his life to a bona-fide purchaser for value, whether or not the said purchaser has knowledge of this agreement.

<sup>2</sup> The claim by Zirkenbach for payment of services rendered to the Country Barn Properties, LLC has been withdrawn and therefore will not be addressed. The Court will consider the validity of the claim of both Leonard and Zirkenbach with regard to their right to present a claim based upon the obligations of Decedent contained in the Dissolution Judgment and Stipulation Agreement, but will not calculate a precise claim amount due at this time.

[1] [2] [3] Our statutes define a “claim” as “all claims against a decedent (1) existing at the time of the decedent’s death or (2) arising after the decedent’s death including, but not limited to, claims which are mature, unmatured, liquidated, unliquidated, contingent, founded in tort, or in nature of exoneration, specific performance or replevin.” Conn. Gen. Stat. § 45a-353(d) (2016). A “creditor” is defined as “any person having a claim.” Conn. Gen. Stat. § 45a-353(e) (2016). The scope of the definition of “claim,” as it pertains to an estate, is broad. In addition, it is clear from the broad statutory definitions of a claim and a creditor that “no matter what the form of action, . . . the Probate Court’s jurisdiction of the settlement of decedents’ estates is exclusive . . .” Gayle B. Wilhelm & Ralph H. Folsom, *Gen. Principles of Prob. Ct. Proc., Prob. Jurisdiction and Proc. in Conn.*, § 2:23 (2d ed. 2017). The Court finds that Leonard and Zirkenbach have a “claim” against the Estate of Decedent based upon the 1972 Separation Agreement and Dissolution Judgment.

[4] [5] In addition to the exclusive statutory authority of the probate court to settle estates, the court also can exercise equitable authority when necessary. “The jurisdiction of the probate court or of commissioners appointed by it with respect to equitable claims against the estate is concurrent with the jurisdiction of courts of general equity jurisdiction.” *Id.*; see also *Dettenborn v. Hartford-Nat’l Bank & Trust Co.*, 121 Conn. 388, 391 (1936). Reference should also be made to the expansive grant of authority to probate courts “to make any lawful orders or decrees to carry into effect the power and jurisdiction conferred upon them by the laws of this state.” Conn. Gen. Stat. § 45a-98(a) (2016).

This Court finds that the Estate of the Decedent cannot be probated without taking into account the terms of Decedent’s Dissolution Decree, Settlement Agreement, Judgment from 1972, and actions of Decedent during the intervening years following that Court Order until the date of his death. This Court therefore finds that it has the jurisdiction and the statutory authority to address these claims as presented. All parties of interest have notice and have appeared. All parties of interest have participated in the conduct of the matter before the Court.

The Court is not persuaded by the arguments against consideration of the claim. The Court does not find that the claim is barred by the statute of limitations. Whether Decedent had satisfied his obligations as set forth in the Dissolution Judgment and Separation Agreement, that he make certain provisions in his Will to benefit his children could not be reviewed until after his death and the admission of his Will to probate. There is no argument that the claim was late to be submitted to the Probate Court, nor is there an argument that the Court’s review of the claim fails in any way to comply with the statutory provisions regarding determining and reviewing claims.

The Court is also not persuaded that the terms of the Dissolution Judgment and Stipulation Agreement are ambiguous or otherwise unenforceable. The fact that the orders did not prohibit Decedent from modifying his Will or executing a new Will is irrelevant. The orders imposed obligations upon

Decedent that he and his Executor are required to fulfill.

[6] [7] The Court is also not persuaded that the obligations set forth in the Dissolution Judgment and Stipulation Agreement pertaining to the two children of the marriage were an attempt to provide child support, and that any such obligation would have terminated when the children reached the age of majority. It is not disputed that the children of the marriage are now beyond the age when any support obligation would have legal effect. However, this interpretation fails to account for the fact that the Agreement specifically states in paragraph 2 that child support “shall be suspended since he, [Decedent], is self-supporting as of the date of this agreement.” There is no mention of child support in the later section of the Agreement, which addresses Decedent’s obligations to structure an estate plan in certain ways and to refrain from making inter vivos transfers of his assets. It is reasonable to conclude that if the parties and the court saw those future obligations as the substitute for current child support payments, and that those obligations would have terminated upon the youngest child attaining the age of majority, the Court Order and the Agreement would have stated so. To make such a conclusion without the specific language being contained in the document is unsupported. The Court finds that the Dissolution Agreement, which became the Judgment, constituted not only an order of the court but also a contract between Decedent and his first wife. As such, the Agreement needs to be read in a manner that makes sense and gives credit to the intentions of the parties.

In their Dissolution Agreement, the parties clearly made a significant effort to address the future ownership of the businesses that the parties had established during their marriage, ensuring that a majority ownership in the business they created would be passed to their children. To some extent, Decedent’s Will complied. The business interest owned in part by Decedent at the time of his death was bequeathed to Zirkenbach. The remaining questions for the Court to consider are whether there are assets of the Decedent that were transferred or owned in such a manner as to have violated the terms of the Dissolution Agreement and Judgment, and whether Leonard is entitled to a share in the remaining estate business asset since Marlborough Country Barn, Inc. was not in existence and had no value at the time of Decedent’s death. The case of *Issler v. Issler*, 250 Conn. 226, 235 (1999), supports the Court’s finding that the Dissolution Judgment and Stipulation Agreement impose a contractual obligation on the parties and dictates that the court review the terms of the document in the same manner as it would a binding contract between two parties where the two children of the marriage are the intended beneficiaries of the contract. “A contract must be construed to effectuate the intent of the parties, which is determined from the language used interpreted in the light of the situation of the parties and the circumstances connected with the transaction.” *Id.* (citation omitted).

Therefore, based upon the above findings of fact and law, the Court finds that the claims of Leonard and Zirkenbach arising from the violations, if any, of Decedent’s promises and obligations as set forth in the Dissolution Judgment and Stipulation Agreement, dated July 25, 1972, are valid claims

against the Estate of Carl W. Zirkenbach and that these claims must be resolved prior to the settlement and distribution of the Estate's assets. At this time, the Court finds that it has insufficient information to make a definitive decision on the amount of the claim, if any, which must be paid by the Executor to each claimant. In order to finalize those decisions, the Court will need to conduct further hearings to address the following matters:

1. What assets, if any, of Decedent are alleged to have been "transferred," "gifted," or "unreasonably diminished" during his lifetime in violation of the Dissolution Agreement and Judgment?
2. What assets, if any, of Decedent are alleged to have been "diverted from his ownership so as not to comprise part of his estate at the time of his death" in violation of the Dissolution Agreement and Judgment?
3. Did Decedent's lifetime transfer to Leonard and her children of a controlling interest in Marlborough Country Barn, Inc. constitute an ademption, partial or whole, of Decedent's obligations to Leonard in the Dissolution Agreement and Judgment?<sup>3</sup>
4. If the bequest to Leonard has not been adeemed, is Leonard barred from recovering on her claim, in whole or in part, based upon equitable principles relating to her having received a share of the assets of Marlborough Country Barn, Inc., upon its corporate dissolution while Zirkenbach received no share of those proceeds?
5. What are the amounts of lifetime gifts from Decedent to Leonard (and her children) and to Zirkenbach? Is the best evidence of the amount of such gifts the letter to Decedent dated August 8, 2003? Should the total of lifetime gifts or the other transfers to Leonard and her children as well as to Zirkenbach be considered when calculating the amount of the claim?
6. Should the TD Ameritrade account, which is included in the Inventory, be considered part of Decedent's Estate when calculating the amount of the claim? (The Court has not seen any documentation regarding how this asset was owned and who, if any, the beneficiary is on the account documentation.)
7. What are the appropriate valuations to use for the property and business owned by the Estate, as well as the value of Marlborough

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<sup>3</sup> "[A] particular bequest, although unrevoked, may become practically inoperative, if the testator, in his lifetime, gives to his legatee the specific thing which the will directs to be given after his death . . . . In such case he is said to adeem his bequest . . ." *Jacobs v. Button*, 79 Conn. 360, 364-65 (1906); *See also Simmons v. McKone*, 158 Conn. 71, 73 (1969) ("It is an application of the broad principle that the extinction of, or a material change or alteration in, the subject matter of a specific testamentary gift operates as an ademption of the gift.").

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Country Barn, Inc. at the time of dissolution, or any other assets of Decedent that may be relevant to the satisfaction of the claims?

And it is **ORDERED AND DECREED** that:

In conclusion, at this point in the settlement proceedings, the Court has found that Leonard and Zirkenbach have valid claims against their father's estate for his failure to comply in his Will with the terms of the 1972 Dissolution Agreement and Judgment. The Court will schedule a Hearing to address the questions raised above in order to determine the exact amount of the Claim due to the Claimants herein, if any.

Dated at Willimantic, Connecticut, this 31st day of July 2017.

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/s/

John J. McGrath, Jr., Judge