NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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September 17, 2018

LETTER OPINION

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Re: *Alessia McIntosh vs. Flint Hill School*
Case No. CL-2018-1929

Dear Counsel:

This cause comes before the Court on the Motion of Alessia McIntosh ("Plaintiff") for Summary Judgment to declare invalid a provision in the contract between the parties

OPINION LETTER

at issue which entitles Flint Hill School ("Defendant") to collect attorneys' fees and costs from Plaintiff without limitation in any action arising out of or related to their contract, irrespective of who initiates or prevails in such suit. This dispute raises the questions of whether the case is ripe for adjudication; whether Plaintiff has standing to petition the Court enter a declaratory judgment; whether Plaintiff's husband and co-signatory to the contract is a necessary party; whether the challenged contract clause is unconscionable; and whether the clause is otherwise void as a matter of public policy.

For the reasons as more fully stated herein, this Court holds as follows: (1) the question of the validity of the attorneys' fees and costs provision is ripe for adjudication, as Plaintiff's filing of her lawsuit has triggered the applicability of the contract clause sought to be declared unlawful; (2) Plaintiff has proper standing to petition the Court to enter a declaratory judgment as an aggrieved party with a justiciable controversy; (3) Plaintiff's husband and co-signatory to the contract is not a necessary party to this dispute because Plaintiff is seeking only to determine *her* rights and his rights are not ripe for adjudication; (4) the challenged clause is both procedurally and substantively unconscionable because the Contract is one of adhesion wherein Plaintiff is subject to attorneys' fees and costs even if she litigates a successful claim against the School or is sued by the School and yet prevails, and without regard to whether the attorneys' fees and costs imposed are "reasonable"; and (5) the challenged contract clause is void as against public policy in contravening the public welfare by significantly barring potentially meritorious resort to the courts by Plaintiff, and in flouting the corollary principle discerned

from the Rules of Professional Conduct not to punish the prevailing party in litigation with payment of the loser's expenses.

Consequently, the Court shall by separate order grant Plaintiff's Motion for Summary Judgment declaring the attorneys' fees and costs provision of the parties' contract to be invalid and unenforceable.

BACKGROUND

Plaintiff is the parent of a minor child who attends Flint Hill School, located in Fairfax County, Virginia. On February 12, 2017, Plaintiff and her husband, Robert McIntosh, entered into an Enrollment Contract with Defendant that governed the terms and conditions of the child's enrollment in the School. In the relevant part, the Enrollment Contract states: "We (I) agree to pay all attorneys' fees and costs incurred by Flint Hill School in any action arising out of or relating to this Enrollment Contract." (Pl.'s Ex. 1 at 3, ¶ 16).[1]

Plaintiff filed a complaint for declaratory relief seeking to invalidate the Paragraph 16 clause of her Enrollment Contract entered into with Defendant. Plaintiff has moved for Summary Judgment asking the Court find such clause to be unconscionable and, as such, unenforceable under Virginia law. Plaintiff ultimately aims to assert a breach of contract claim against Defendant arguing that, due to the exclusion of Plaintiff's husband, Mr. McIntosh, from school grounds, the school has "willfully put her child in harm's way"

[1] The Contract is signed electronically on two distinct pages. On page 3, it appears Mr. McIntosh signed twice including in the space where Ms. McIntosh was to sign. Nevertheless, it appears Plaintiff assented to and was a party to the full contract. Her signature appears on "Page 5 of 5." Above her signature is printed "I agree," preceded by "I verify that all the information provided is true and correct to the best of my knowledge."

thus violating Paragraph 13 of the Enrollment Contract. Plaintiff's concern is that because both her current and potential future claims relate to the Enrollment Contract, she will be obligated to pay the attorneys' fees and costs of Defendant regardless of which party is ultimately victorious.

ANALYSIS

I. Plaintiff's claim is ripe for adjudication

"A claim is not ripe for adjudication if it rests upon 'contingent future events that may not occur as anticipated, or indeed may not occur at all.'" *Texas v. United States*, 523 U.S. 296, 300, 140 L. Ed. 406, 411, 118 S. Ct. 1257, 1259 (1998) (citing *Thomas v. Union Carbide Agric. Prod. Co.*, 473 U.S. 568, 581, 87 L. Ed. 2d 409, 105 S. Ct. 3325 (1985)). The "basic rationale [of the ripeness doctrine] is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements ...." *Abbott Labs v. Gardner*, 387 U.S. 136, 148, 18 L Ed. 2d 681, 691, 87 S. Ct. 1507, 1515 (1967). Ripeness turns on two considerations: the fitness of the issues for determination and the hardship to the parties if the court withholds review. *Id.* at 149.

This case poses a difficult question for the Court. Normally, a case must be ripe at the time of filing, but here, arguably, it is the filing itself which first made the claim ripe, by bringing to the fore the controversy of whether attorneys' fees and costs may now be imposed upon Plaintiff. In this case, the incurring of attorneys' fees by Defendant is particularly probable because in a suit against a corporation, the entity must respond through counsel and thus generally pay counsel's fees. The ripening of a claim by the filing of suit is not normal, but neither is the clause for attorneys' fees and costs sought to

be vitiated. Still, it is a troubling concept that the Plaintiff could create the ripening of a cause of action by filing the cause of action.

> At the same time, the Supreme Court of Virginia has made clear:
>
> "[T]he General Assembly created the power to issue declaratory judgments to resolve disputes 'before the right is violated.'" *Charlottesville Area Fitness Club Operators Ass'n*, 285 Va. 87, 98, 737 S.E.2d 1, 7 (2013) (quoting *Patterson v. Patterson*, 144 Va. 113, 120, 131 S.E. 217, 219 (1926)). In other words, "[t]he intent of the declaratory judgment statutes is not to give parties greater rights than those which they previously possessed, but to permit the declaration of those rights before they mature." *Cherrie v. Virginia Health Servs.*, 292 Va. 309, 317-318, 787 S.E.2d 855, 859 (2015) (quoting *Charlottesville Area Fitness Club Operators Ass'n*, 285 Va. at 99, 737 S.E.2d at 7). Accordingly, "where claims and rights asserted have fully matured, and the alleged wrongs have already been suffered, a declaratory judgment proceeding . . . is not an available remedy." *Charlottesville Area Fitness Club Operators Ass'n*, 285 Va. at 99, 737 S.E.2d at 7 (quoting *Board of Supervisors v. Hylton Enters.*, 216 Va. 582, 585, 221 S.E.2d 534, 537 (1976)).

RECP IV WG Land Inv'rs LLC v. Capital One Bank USA, N.A., 295 Va. 268, 281, 811 S.E.2d 817, 824 (2018). Thus, the Plaintiff need not actually be subjected to the claim for attorneys' fees and costs, but rather need only be imperiled with the application of such fees while their validity is decided. The question to be resolved nevertheless cannot be merely theoretical, i.e., dependent on contingencies yet to occur.

> *See Martin v. Garner*, 286 Va. 76, 83, 745 S.E.2d 419, 422 (2013) ("[T]he question involved [in a declaratory judgment action] must be a real and not a theoretical question."[)] (quoting *Patterson*, 144 Va. at 120, 131 S.E. at 219); s*ee also Charlottesville Area Fitness Club Operators Ass'n*, 285 Va. at 107, 737 S.E.2d at 12 (Kinser, J., concurring) ("[R]endering a declaratory judgment in the absence of an actual controversy constitutes an advisory opinion."); *Liberty Mut. Ins. Co. v. Bishop*, 211 Va. 414, 418, 177 S.E.2d 519, 522 (1970) (explaining, in the context of a declaratory judgment, that "the rendering of advisory opinions is not a part of the function of the judiciary in Virginia" (citations omitted)).

RECP IV WG Land Inv'rs LLC, 295 Va. at 282, 811 S.E.2d at 825.

Here, however, the triggering event for ripeness is the occurrence of litigation between the parties, irrespective of who initiates the action. The application of attorneys' fees is no longer theoretical, but now only a matter of whether the Defendant chooses to assert or abandon such right.

The claim asserted is further "purely legal," in that what the Plaintiff seeks is declaration the contract term is *per se* unconscionable, rather than merely when applied to the distinct facts at hand.

> The ripeness doctrine "prevents judicial consideration of issues until a controversy is presented in 'clean-cut and concrete form.'" *Miller*, 462 F.3d at 318-19 (quoting *Rescue Army v. Mun. Ct. of L.A.*, 331 U.S. 549, 584, 67 S. Ct. 1409, 91 L. Ed. 1666 (1947)). Under that inquiry, a court must "balance the fitness of the issues for judicial decision with the hardship to the parties of withholding court consideration." *Id.* at 319 (internal quotations omitted). "A case is fit for judicial decision when the issues are purely legal and when the action in controversy is final and not dependent on future uncertainties." *Id.* In other words, "[a] claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Scoggins v. Lee's Crossing Homeowners Ass'n*, 718 F.3d 262, 270 (4th Cir. 2013) (alteration in original) (quoting *Texas v. United States*, 523 U.S. 296, 300, 118 S. Ct. 1257, 140 L. Ed. 2d 406 (1998)). "The hardship prong," on the other hand, "is measured by the immediacy of the threat and the burden imposed on the [plaintiff]," including "the cost to the parties of delaying judicial review." *Miller*, 462 F.3d at 319 (internal quotations omitted). The plaintiff bears the burden of proving ripeness. *Id.*

Steves & Sons, Inc. v. Jeld-Wen, Inc., 292 F. Supp. 3d 656, 670 (E.D. Va. 2018).

The Plaintiff ultimately seeks to challenge contractually that her husband has been banned from the grounds of the School to which she and he have contracted to send their child. The ban is based on circumstances not known to the Court involving his termination as an employee from the very same School. If Plaintiff's suit involved whether attorneys' fees could be applied against her while she was challenging her husband's exclusion

from the school (assuming for the sake of argument she had standing to do so), such claim would not meet the "immediacy" test until a suit for breach of contract or other potentially viable claim were filed in challenge of his exclusion, because only then would the attorneys' fees and costs provision come into play. However, because the blanket applicability of attorneys' fees and costs clause comes into play upon the filing of *any* suit against Flint Hill School under the Enrollment Contract, this case presents the unusual circumstance where the Plaintiff has created the required immediacy by filing her suit for declaratory action, which must be founded in part on such immediacy.

The fact Plaintiff's claim is not of easy analysis under normal ripeness principles delineating when claims may go forward and when they are merely advisory, likely signals the attorneys' fees clause here existing was not foreseen to be proper within the Commonwealth's public policy. The contractual terms are designed to bar the filing of *any* suit against Flint Hill School, and more glaringly, bar the contracting parents from doing anything which would bring upon them embroilment in a suit pressed against them by the School. The attorneys' fees and costs contract terms pose the prospect of punitively sanctioning Plaintiff's participation in the legal system upon the initiation of an action involving her and the School, and are thus ripe for challenge by declaratory action.

II. The Plaintiff has standing to press her Motion for Summary Judgment

The Court must also determine whether Plaintiff has standing to bring a declaratory judgment action against Flint Hill School. The Declaratory Judgment Act states:

> In cases of actual controversy, circuit courts within the scope of their respective jurisdictions shall have power to make binding adjudications of right, whether or not consequential relief is, or at the time could be, claimed

> and no action or proceeding shall be open to objection on the ground that a judgment order or decree merely declaratory of right is prayed for. Controversies involving the interpretation of deeds, wills, and other instruments of writing, statutes, municipal ordinances and other governmental regulations, may be so determined, and this enumeration does not exclude other instances of actual antagonistic assertion and denial of right.

Va. Code Ann. § 8.01-184. "The authority to enter a declaratory judgment is discretionary and must be exercised with great care and caution." *Liberty Mut. Ins. Co. v. Bishop*, 211 Va. 414, 421, 177 S.E.2d 519, 524 (1970). In *Board of Supervisors v. Town of Purcellville*, the Court reasoned that:

> "The intent of the [Declaratory Judgment Act] is to have courts render declaratory judgments which may guide parties in their future conduct in relation to each other, thereby relieving them from the risk of taking undirected action incident to their rights, which action, without discretion, would jeopardize their interests." *Liberty Mut. Ins. Co. v. Bishop*, 211 Va. 414, 421, 177 S.E.2d 519, 524 (1970). The Act "is to be liberally interpreted and administered with a view to *making the courts more serviceable to the people*," Code § 8.01-191, but courts may only issue declaratory judgments "in cases of actual controversy when there is antagonistic assertion and denial of right." *Treacy v. Smithfield Foods, Inc.*, 256 Va. 97, 103, 50 S.E.2d 503, 506 (1998) (quotation marks and citations omitted). "Thus, the Declaratory Judgment Act does not give trial courts the authority to render advisory opinions, decide moot questions, or answer inquiries that are merely speculative." *Id.* at 104, 506 (citations omitted).

Bd. of Supervisors v. Town of Purcellville, 276 Va. 419, 434 (2008) (emphasis added); *see also Deerfield v. City of Hampton*, 283 Va. 759, 764 (2012) ("Under well-settled principles, '[a] plaintiff has standing to institute a declaratory judgment proceeding if it has a 'justiciable interest' in the subject matter of the proceeding, either in its own right or in a representative capacity.'"). "In order to have a 'justiciable interest' in a proceeding, the plaintiff must demonstrate an actual controversy between the plaintiff and the defendant, such that his rights will be affected by the outcome of the case." *W.S. Carnes, Inc. v.*

Chesterfield County, 252 Va. 377, 383 (1996). "The action must include 'specific adverse claims' that are 'ripe for judicial adjustment.' The plaintiff must be an 'aggrieved party' with a 'justiciable controversy' against another party." *Barnes v. Orange County BOS*, 78 Va. Cir. 392, 393 (2009). "In the absence of an 'actual controversy' between the parties to the case, declaratory judgment is not an available remedy." *Pedigo v. Flattop Mt. Landowners Ass'n*, 73 Va. Cir. 26, 27 (2006).

The test to be applied to whether Plaintiff has standing to bring a declaratory judgment claim against Flint Hill School is fact-dependent. First, there must be an actual controversy to which Plaintiff is a party. Here, Plaintiff has "aggrieved party" status by virtue of being subject to the attorneys' fees and costs provision of the Enrollment Contract upon the initiation of suit against Flint Hill School. Second, declaratory relief in this case can only be exercised if it will relieve Plaintiff "from the risk of [Flint Hill School] taking undirected action" which "would jeopardize" the lawful and legitimate interests of Plaintiff. *Liberty Mut. Ins. Co.*, 211 Va. at 421. Even in such a case, however, the Court must determine whether declaratory relief is appropriate under the circumstances in this case, as the grant of such relief is a discretionary matter.

In determining whether such exercise of discretion is appropriate, this Court must first determine whether under the facts pled "the various claims and rights asserted had all accrued and matured, and [whether] the wrong had been suffered, when [Plaintiff's] petition for a declaratory judgment was filed." *Id.* Discretion must then be restricted to effect the intent of the statutory right to declaratory relief:

> The intent of the declaratory judgment statutes is not to give parties greater rights than those which they previously possessed, but to permit the

> declaration of those rights before they mature. In other words, the intent of the act is to have courts render declaratory judgments which may guide parties in their future conduct in relation to each other, thereby relieving them from the risk of taking undirected action incident to their rights, which action, without direction, would jeopardize their interests. This is with a view rather to avoid litigation than in aid of it.

Id.

Applying such standards, it is clear that declaratory relief will determine the lawfulness of the attorneys' fees and costs provision in the Flint Hill School Enrollment Contract. Such relief is available as the type envisioned and authorized by the Declaratory Judgment Act. By granting Plaintiff such declaratory relief, the Court is not giving her any greater rights than she previously had, but merely determining such rights as they have matured. The Act aims to promote judicial efficiency by declaring parties' rights without unnecessary and burdensome litigation. Here, the Court finds it appropriate to determine Plaintiff's rights under the Enrollment Contract now rather than requiring further litigation, and potentially more attorneys' fees accruing under the Contract.

III. The Plaintiff's husband is not a necessary party to this suit

On March 23, 2018, Judge Thomas P. Mann of this Court heard argument on Defendant's Motion to Dismiss for failure to join Roger McIntosh, Plaintiff's husband and a signatory to the contract at issue. Judge Mann denied the Motion, finding "this case is about what rights if any this particular plaintiff has to a contract, but it's not a contract action." The Defendant raises this issue anew, now in the context of attempting to defeat Plaintiff's prayer for summary judgment. The Rules of the Supreme Court of Virginia well define a "necessary party" to litigation.

> A person who is subject to service of process may be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest of the person to be joined. If such a person should join as a plaintiff but refuses to do so, the person may be made a defendant, or, in a proper case, an involuntary plaintiff.

Va. Sup. Ct. R. 3:12(a). However, "[n]o action or suit shall abate or be defeated by the nonjoinder or misjoinder of parties, plaintiff or defendant ...." Va. Code Ann. § 8.01-5(A). In fact, "Rule 3:12 was intended to govern the exercise of trial court discretion in dealing with cases where a necessary party has not been joined." *Siska Trust v. Milestone Dev.*, 282 Va. 169, 179, 715 S.E.2d 21, 26-27 (2011).

"Virginia recognizes the requirement that joint obligees to a single contract be joined as parties plaintiff in a single action to enforce the contract." *Nash v. Blessing*, 247 Va. 95, 96, 439 S.E.2d 393, 394 (1994) (citing *Carthrae v. Brown*, 30 Va. (3 Leigh) 98, 102 (1831)).

> Necessary parties include all persons, natural or artificial, however numerous, materially interested either legally or beneficially in the subject matter or event of the suit and who must be made parties to it, and without whose presence in court no proper decree can be rendered in the cause. This rule is inflexible, yielding only when the allegations of the bill state a case so extraordinary and exceptional in character that it is practically impossible to make all parties in interest parties to the bill, and, further, that others are made parties who have the same interest as have those not brought in, and are equally certain to bring forward the entire merits of the controversy as would the absent persons.

Jett v. DeGaetani, 259 Va. 616, 619-20, 528 S.E.2d 116, 118 (2000) (internal citations and quotation marks omitted). "But, when there is a death 'or some other sufficient excuse

for not joining' all joint obligees, a suit by one obligee may proceed without joinder." *Nash*, 247 Va. at 96 (citing *Strange v. Floyd*, 50 Va. (9 Gratt.) 474, 475 (1852)).

Here, compelled joinder is not in order. Plaintiff's "interests in the subject matter of the suit, and in the relief sought, are" not "so bound up with" those of her husband, that his "legal presence as" a party "to the proceeding is an absolute necessity, without which the court cannot proceed." *Cf. Bonsal v. Camp*, 111 Va. 595, 597-98, 69 S.E. 978, 979 (1911) (quoting *Barney v. Baltimore City*, 73 U.S. (6 Wall.) 280, 284, 18 L. Ed. 825 (1867)). Judge Mann delineated with precision the distinction to be drawn when a litigant is necessary to adjudication of a claim, or conversely is unnecessary in a separate proceeding to declare the ancillary but related rights of another litigant. This Court agrees with the succinct analysis of Judge Mann previously disposing of the question at issue in ruling on the direct motion of Defendant, that Plaintiff's husband was not a necessary party in the Declaratory Judgment action. Plaintiff is seeking only a declaration of *her* rights. Moreover, the husband could not be joined in the Declaratory Judgment action because his rights are not ripe for adjudication. He has not filed suit against the School and is hence not subject to the attorneys' fees provision. If he were to be declared a necessary party, it would mean his wife may hail him into litigation which he may not desire to join and for which he would be involuntarily liable for attorneys' fees under the terms of the Enrollment Contract (if deemed valid). This is not to say Mr. McIntosh would not be a necessary party should Plaintiff sue Flint Hill School challenging her husband's exclusion from school grounds. However, such claim is not before the Court at this time,

so the Court does not reach the merits of joinder outside the confines of this Declaratory Judgment action.

IV. The attorneys' fees and costs clause of the Enrollment Contract is unconscionable

Plaintiff's Motion for Summary Judgment contends the attorneys' fees and costs provision in Flint Hill School's Enrollment Contract is unconscionable as a "challenger pays" clause, requiring anyone who sues under the Contract to pay the School's attorneys' fees and costs. The clause potentially has much greater breadth in application than to only those cases initiated to challenge the contract.

> "Unconscionability is concerned with the intrinsic fairness of the terms of the agreement in relation to all attendant circumstances." *Philyaw v. Platinum Enters.*, 54 Va. Cir. 264, 367 (2001). A contact is said to be unconscionable "if no person in his senses would make it on the one hand and no fair and honest person would accept it on the other." *Id.* (citing *Hume v. United States*, 132 U.S. 406, 10 S. Ct. 134, 33 L. Ed. 393 (1889)). In practice, this means a court will not enforce a contract or contract provision if [. . .] it is both procedurally and substantively unconscionable. *See, e.g., Boatright v. Aegis Def. Servs., LLC*, 938 F. Supp. 2d 602, 608 (E.D. Va. 2013) (applying Delaware law); *Dan Ryan Builders, Inc. v. Nelson et al.*, 230 W. Va. 281, 289, 737 S.E.2d 550 (2012). "Procedural unconscionability arises from inequities, improprieties, or unfairness in the bargaining process and the formation of the contract . . . . Substantive unconscionability involves unfairness in the terms of the contract itself . . . ." *Dan Ryan Builders*, 230 W. Va. at 289. ... "A contract of adhesion is a standard form contract, prepared by one party and presented to a weaker party—usually, a consumer—who has no bargaining power and little or no choice about the terms." *Philyaw*, 54 Va. Cir. at 367 (citing Black's Law Dictionary 318 (7th ed., 2000)). A contract of adhesion may suggest that a degree of procedural unconscionability exists. *See Sanchez v. Valencia Holding Co., LLC*, 61 Cal. 4th 899, 915, 190 Cal. Rptr. 3d 812, 353 P.3d 741 (2015). ... However, contracts of adhesion are not per se unconscionable; courts also must look to the substance of the agreement.

Sanders v. Certified Car Ctr., Inc., 93 Va. Cir. 404, 405-06 (2016).

"It is well-settled in Virginia that a provision in a contract for attorneys' fees is valid, 'subject always to the power of the court if the fee be unreasonable in amount or unconscionable, to reduce it.'" *Dabu v. York Inv. Co.*, 62 Va. Cir. 135, 138 (2003) (citing *Triplett v. Second Nat'l Bank of Culpeper*, 121 Va. 189, 193, 92 S.E. 897, 898 (1917)). In addition, generally "under contractual provisions … a party is not entitled to recover fees for work performed on unsuccessful claims." *Ulloa v. QSP, Inc.*, 271 Va. 72, 82, 624 S.E.2d 43, 49 (2006) (citing *Chawla v. BurgerBusters, Inc.*, 255 Va. 616, 624, 829 S.E.2d 829, 833 (1998)).

The terms of the Contract are clear—if a party sues Flint Hill School, such party pays all resulting attorneys' fees and costs of the School, without regard to the success of the claim nor the reasonableness or amount of the fees. Furthermore, under this clause the School would be able to assert a claim for attorneys' fees and costs if the School initiated suit, again without regard to outcome or merit. The Defendant argues correctly, "[c]ourts cannot relieve one of the consequences of a contract merely because it was unwise … [or] rewrite a contract simply because the contract may appear to reach an unfair result." *Pelfrey v. Pelfrey*, 25 Va. App. 239, 244 (1997). However, the contract clause before the Court is more than unwise or unfair, it is unconscionable. Procedural unconscionability may exist when as here the Enrollment Contract is a contract of adhesion. As previously mentioned, that a contract is one of adhesion is not in itself enough to establish procedural unconscionability. *Sanders*, 93 Va. Cir. at 406. Paragraph 16 of the Enrollment Contract, however, does rise to such level. Parents are presented with the Contract in order to have their children enrolled in Flint Hill. Assent to the

Contract's terms is done by online electronic signature leaving no room for bargaining. (Pl.'s Ex. 1 at 3).

The Defendant maintains the Contract is not unconscionable because unreasonable suits by the School pursuant to the Enrollment Contract are limited by the bar against frivolous filings under Virginia Code § 8.01-271.1. The averred limitation captures only a subset of instances where assertion of attorneys' fees and costs would be unconscionable, namely in the filing of suits by the School without any merit or which are advanced for improper purpose. The statute also does not speak directly to the Court's authority to decline to enforce contract terms. Even with application of Virginia Code § 8.01-271.1, the Contract still allows the Defendant to collect attorneys' fees and costs from Plaintiff if the School does not prevail in litigation it brings that is not *per se* frivolous. What makes the Contract's terms substantively unconscionable is that the parents are subject to attorneys' fees and costs if they litigate with success against the School or are sued by the School and yet prevail, and without regard to whether the attorneys' fees and costs are "reasonable."

V. The attorneys' fees and costs clause of the Enrollment Contract is void as against public policy

The attorneys' fees and costs clause in Flint Hill School's Enrollment Contract is also void as against Virginia public policy. The justification that the clause keeps tuition lower than it would otherwise be fails in juxtaposition to public policy. If provisions respecting attorneys' fees and costs as in the School's Contract were legally permitted as a general rule, potential wrongdoers could insulate themselves from regulation of their

misconduct by the civil legal system by inserting such effective barriers in their contracts, which, by their cost, make it impractical to file most suits against such wrongdoers.

> The meaning of the phrase "public policy" is vague and variable; courts have not exactly defined it, and there is no fixed rule by which to determine what contracts are repugnant to it. The courts have, however, frequently approved Lord Brougham's definition of public policy as the principle which declares that no one can lawfully do that which has a tendency to be injurious to the public welfare. * * * The very reverse of that which is public policy at one time may become public policy at another time. Hence, no fixed rules can be given by which to determine what is public policy.

Wallihan v. Hughes, 196 Va. 117, 124-125 (1954) (citing 12 Am. Jur., Contracts, § 169, p. 666).

"[C]ourts are averse to holding contracts unenforceable on the ground of public policy unless their illegality is clear and certain." *Id.* (citing *Brown v. Speyers*, 61 Va. 444, 20 Gratt. 296; *McClaugherty v. Water Co.*, 67 W. Va. 285, 289, 68 S.E. 28; 12 Am. Jur., Contracts, §§ 170, 172, pp. 667, 670)). "The Virginia Supreme Court has remarked that '[t]he courts have, however, frequently approved [a] definition of public policy as the principle which declares that no one can lawfully do that which has a tendency to be injurious to the public welfare.'" *Reading & Language Learning Ctr. v. Sturgill*, 94 Va. Cir. 94, 106 (2016) (citing *Wallihan*, 196 Va. at 124).

> In 6 R.C.L., page 712, speaking of contracts which are against public policy, the author says: "What contracts are against public policy? However, under the principles relating to the doctrine of public policy, as applied to the law of contracts, courts of justice will never recognize or uphold any transaction which, in its object, operation or tendency, is calculated to be prejudicial to the public welfare. That sound morality and civic honesty are corner stones of the social edifice is a truism which needs no re-enforcement by argument. It may, therefore, be taken for granted that whenever the courts are called upon to scrutinize a contract which is clearly repugnant to sound morality and civic honesty, they need not look long for a well fitting definition of public policy, or hesitate in its practical application to the law of contracts."

O'Dell v. Appalachian Hotel Corp., 153 Va. 283, 292, 149 S.E. 487, 490 (1929) (citing *Veazey v. Allen*, 173 N.Y. 359, 66 N.E. 103, 62 L.R.A. 362 (1903)).

By dint of Rule 1.5 of the Virginia Rules of Professional Conduct, attorneys' fees must be reasonable. One factor in determining the reasonableness of attorneys' fees is "the amount involved and the results obtained." *See* Va. Sup. Ct. R. pt. 6, sec. II, 1.5(a)(4). It would thus be promotion of the unethical in breach of the spirit of Rule 1.5 for this Court to approve contractual attorney's fees not delimited by reasonableness and to a non-prevailing party. Rule 1.5 thus implies the policy that the non-prevailing party in litigation is not to be rewarded in loss and without limitation. The Enrollment Contract calls for attorneys' fees and costs in favor of Defendant irrespective of their reasonableness and of the results obtained. This provision is void as against public policy in contravening the public welfare by significantly barring potentially meritorious resort to the courts by Plaintiff, and in flouting the corollary principle expressed in the Rules of Professional Conduct not to punish the prevailing party in litigation with payment of the loser's expenses.

CONCLUSION

This Court has considered Plaintiff's Motion for Summary Judgment to declare invalid a provision in the contract between the parties at issue, which entitles Defendant to collect attorneys' fees and costs without limitation from Plaintiff in any action arising out of or related to their contract, irrespective of who initiates or prevails in such suit. For the reasons as more fully stated herein, this Court holds as follows: (1) the question of the

validity of the attorneys' fees and costs provision is ripe for adjudication, as Plaintiff's filing of her lawsuit has triggered the applicability of the contract clause sought to be declared unlawful; (2) Plaintiff has proper standing to petition the Court to enter a declaratory judgment as an aggrieved party with a justiciable controversy; (3) Plaintiff's husband and co-signatory to the contract is not a necessary party to this dispute because Plaintiff is seeking only to determine *her* rights and his rights are not ripe for adjudication; (4) the challenged clause is both procedurally and substantively unconscionable because the Contract is one of adhesion wherein Plaintiff is subject to attorneys' fees and costs even if she litigates a successful claim against the School or is sued by the School and yet prevails, and without regard to whether the attorneys' fees and costs imposed are "reasonable"; and (5) the challenged contract clause is void as against public policy in contravening the public welfare by significantly barring potentially meritorious resort to the courts by Plaintiff, and in flouting the corollary principle discerned from the Rules of Professional Conduct not to punish the prevailing party in litigation with payment of the loser's expenses.

Consequently, the Court shall by separate order grant Plaintiff's Motion for Summary Judgment declaring the attorneys' fees and costs provision of the parties' contract to be invalid and unenforceable.

AND THIS CAUSE CONTINUES AND IS NOT FINAL.

Sincerely,

[redacted]

David Bernhard
Judge, Fairfax Circuit Court

OPINION LETTER