Consideration of Nonsuit Motions in Will Contests

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A motion for a compulsory nonsuit allows the proponent to test the sufficiency of the contestant's evidence at the close of the contestant's case-in-chief. *Burns v. Kabboul,* 407 Pa. Super. 289, 312, 595 A.2d 1153, 1165 (1991). Two sets of rules apply to nonsuits in the Orphan's Court Division. PEF Code § 779 provides:

> (a) In general.—The orphan's court division may enter a nonsuit under the same circumstances, subject to review in the same manner and with the same effect as in an action at law.
>
> (b) Will contest.—A nonsuit may be entered against a contestant in will contest whenever the contestant has the burden of overcoming the presumption of validity arising from due proof of execution as required by law and the contestant has failed to satisfy that burden.

20 Pa. C.S.A. § 779. Given the "under the same circumstances … with the same effect as in an action at law" language, recently modified Rule 230.1 of the Rules of Civil Procedure also applies. In pertinent part, Rule 230.1 provides:

> (a)(1) In an action involving only one plaintiff and one defendant, the court, on oral motion of the defendant, may enter a nonsuit on any and all causes of action if, *at the close of the plaintiff's case on liability*, the plaintiff has *failed to establish a right to relief.*
>
> (2) The court in deciding the motion shall consider only *evidence which was introduced by the plaintiff and any evidence favorable to the plaintiff introduced by the defendant prior to the close of the plaintiff's case*.

Pa. R. Civ. P. 230.1 (effective July 1, 2001)(emphasis added). Together, PEF Code § 779 and modified Rule 230.1 govern the timing of, standard applicable to, and evidentiary issues involved in, nonsuits. This article addresses consideration of nonsuit motions in Will contests.

A. Timing of Motion

Before its recent modification, Rule 230.1 did not include paragraph (a)(2), which now allows courts to consider evidence favorable to a plaintiff introduced by a defendant before the close of a plaintiff's case. Former Rule 230.1 simply provided that the defendant move for a nonsuit "at the close of the plaintiff's case." *See Pa. Rule Civ. P. 230.1 (repealed May 30, 2001, effective July 1, 2001).* Courts interpreted former Rule 230.1 to mean that if a proponent introduced *any* evidence – favorable or unfavorable – during the contestant's case-in-chief, the proponent could not move for a nonsuit. *DiMaio Will (No. 2)*, 10 Fiduc. Rep.2d 18 (O.C. Chester 1989) *aff'd* 406 Pa. Super. 668, 583 A.2d 837 (1990), *accord Atlantic Richfield v. Razumic,* 480 Pa. 366, 390 A.2d 736 (1978).

By allowing courts to consider proponent's evidence favorable to the contestant introduced during the contestant's case, modified Rule 230.1 shifts the nonsuit preclusion point from the proponent's introduction of "any" evidence to the commencement of the proponent's case-in-chief. Now, the critical inquiry is whether proponents have begun their cases-in-chief. As discussed below, in undue influence cases, proponents do not begin their cases-in-chief solely by virtue of proving valid execution; introducing documents during, or straying beyond the proper scope of, cross-examination; or by taking proponents' witnesses out of sequence during contestants' cases-in-chief. Conversely, if a proponent begins its case-in-chief, the proponent cannot protect the right to a nonsuit by invoking the catchphrases "without waiver" or "without prejudice" to the right to a nonsuit.

1. Proponent's Evidence of Execution

In will contests, a proponent's due proof of execution precedes the contestant's case on undue influence. *Estate of Clark,* 461 Pa. at 59, 334 A.2d at 631631. The proponent

bears the burden of proof on that issue and, therefore, must present a case-in-chief on execution before the contestant begins its case-in-chief on undue influence. *Id.* The Orphan's Court has recognized that so long as the proponent limits its evidence *before* the contestant begins its case-in chief to proof of execution, the proponent may move for a non-suit *after* the contestant's case-in-chief. *Fiduciary Review, June 1998.* The premise underlying this exception is that subscribing witnesses are the Court's witnesses, and, therefore, their testimony should not prejudice the proponent. *See Plott's Estate,* 335 Pa. 81, 5 A.2d 901 (1939); *Maganuco Estate,* 1 Fiduc. Rep. 188, 193 (O.C. Phila. 1951).

Modified Rule 230.1 does not alter this practice. Rule 230.1 has always provided for the filing of the nonsuit motion at the "close of the plaintiff's case on liability." *Pa. R. Civ. P. 230.1 (repealed effective July 1, 2001)*. In an undue influence case, the existence of undue influence – not proper execution of the will – is the real liability question. Accordingly, the proponent should be permitted to introduce evidence of proper execution without losing the right to a nonsuit.

2. Taking Witnesses out of Sequence

As in many cases, Orphan's Court Judges and practitioners face the prospect of witnesses such as doctors or other professionals whose availability is limited by exigent circumstances. Traditionally, Courts work around availability issues by taking witnesses out of sequence. But before Rule 230.1 was modified, "if a defense witness [was] heard during the plaintiff's case, [former Rule 230.1] prohibit[ed] the court from entering a compulsory nonsuit." *Pa. R. Civ. P. 230.1, Explanatory Comment (May 30, 2001).* According to the Rules Committee, modified Rule 230.1 "ameliorate[s]" that situation. *Id.*

3. Cross-Examination

Under former Rule 230.1, a proponent could go too far on cross-examination. For example, a proponent could refer to documents during cross-examination, but could not introduce documents into evidence without losing the right to a nonsuit. *Compare Lonsdale v. Joseph Horne Co.,* 403 Pa. Super. 12, 25 587 A.2d 810, 816, *appeal denied*, 528 Pa. 637, 598 A.2d 994 (1991)(not reversible error where nonsuit granted after defendant had referred to document) *to Highland Tank and Mfg. Co. v. Duerr,* 423 Pa. 487, 225 A.2d 83 (1967) (nonsuit precluded by defendant's introduction of document as evidence). And if during cross-examination proponents began to present defenses, they risked their right to move for a nonsuit. *Smith v. Standard Steel Car Co.,* 262 Pa. 550, 106 A. 102 (1919).

Modified Rule 230.1 practically eliminates the above-described dangers. Now, proponents can introduce documents and, assuming the court allows it, venture beyond the scope of direct examination without peril to the their right to seek a nonsuit. This leeway makes sense in an undue influence case, where once the burden of proof switches to the proponent, the proponent can attack the *Clark* prongs and/or attempt to rebut the presumption. Inevitably, during the contestants case-in-chief, the proponent will cross-examine on the *Clark* prongs. Rather than guessing whether such cross-examination initiates the proponent's case-in-chief, modified Rule 230.1 simply requires the courts to disregard such evidence when considering the nonsuit.

4. Motion in Abeyance Without Waiver of Nonsuit

Modified Rule 230.1, and the case out of which it grew, eliminate the practice wherein trial judges would hold a nonsuit in abeyance so as to give it proper consideration, but would allow/compel proponents to proceed with their case in chief. So compelled to move

forward, proponents would assert that they were doing so "without prejudice" to their nonsuit. *See e.g. Davenport Will,* 18 Fiduc. Rep. 2d 154, 155 n.3 (O.C. Lanc. 1998). In *Harnish v. School District of Philadelphia,* 557 Pa. 160, 732 A.2d 596 (1999), the Supreme Court flatly rejected this practice.

In *Harnish,* the defendant moved for a compulsory nonsuit at the end of the plaintiffs' case. The trial court held the motion in abeyance and allowed the defendant to raise it after the recess "without prejudice" on account of any testimony that would be taken in the meantime. The defendant put on two witnesses, after which the trial court heard the nonsuit motion. The trial court granted the motion for nonsuit, stating that it considered only the evidence as it existed at the close of the plaintiffs' case. *Id.* at 161, 732 A.2d at 597.

In reversing the trial judge and remanding for re-trial, the Supreme Court addressed two lines of nonsuit decisions. In one line, courts did not require remand and retrial if the admission of evidence by the defendant was "harmless error," *i.e.*, if the trial court did not consider the defendant's evidence in ruling on the nonsuit motion. *Id.* at 162, 732 A.2d 597 *(citing Kratt v. Horrow*, 455 Pa. Super. 140, 687 A.2d 830 (1996)*)*. In a second line, courts applied a *per se* rule requiring the remand and retrial of any case in which a nonsuit was entered after the defendant had offered any evidence. *Id.* at 162-163, 732 A.2d at 597 *(citing Robinson v. City of Philadelphia*, 149 Pa. Cmwlth. 163, 612 A.2d 630 (1992)*)*. The Supreme Court adopted the *per se* rule, noting that Rule 230.1 did not then contain language allowing courts to consider a nonsuit motion after a defendant had introduced evidence. *Id.* at 166, 732 A.2d at 598.

Responding to *Harnish*, the Rules Committee and Supreme Court enacted modified Rule 230.1. But, modified Rule 230.1 leaves in place language from former Rule 230.1 providing that the nonsuit motion must be made "at the close of the plaintiff's case on liability."

Compare Pa. R. Civ. P. 230.1 (effective Jan. 1, 1984, rescinded effective July 1, 2001) to Pa. R. Civ. P. 230.1 (effective July 1, 2001). Modified Rule 230.1, therefore, does not reverse *Harnish's* holding that the trial court may not entertain a nonsuit motion after proponents have begun their cases-in-chief.

B. Standard

A non-suit may be granted only where it is clear that the contestant presented insufficient evidence to maintain the action. *Estate of Dunlap,* 471 Pa. 303, 380 A.2d 314 (1977). In undue influence cases proven by indirect evidence, if the contestant fails to present evidence sufficient to prove any of the three *Clark* factors, a nonsuit may be granted. *In re Bloch*, 425 Pa. Super. 300, 305-308, 625 A.2d 57, 60-61 (1993).

At first glance, the standard for a successful nonsuit appears imposing. But, the Courts have read "sufficient" in conjunction with the "clear and convincing" standard applicable to will contests. *See e.g. Vanderkraats Will (No. 2),* 12 Fiduc. Rep. 2d 60 (O.C. Chester 1991) , *aff'd* 46 Pa. Super. 644 (1992). Chester County Judge Endy succinctly stated the nonsuit burden:

> Only that evidence which is proffered by the contestant which rises to the level of being clear and convincing will satisfy his burden of overcoming the presumption of validity to avert the entry of a nonsuit. The contestant's burden is the same whether the proponent moves for a nonsuit at the end of contestant's case or not; the contestant must establish his case by clear and convincing evidence or the burden of going forward never shifts to the proponents.

Id. at 62; *see also Estate of Koltowich,* 311 Pa. Super.517, 524, 457 A.2d 1302, 1305 (1983) (contestant did not meet burden of proving *prima facie* case by clear and convincing evidence).

"Clear and convincing" is the highest burden of proof in Pennsylvania's civil law. *Estate of Heske*, 436 Pa. Super. 63, 65 (1994). The standard falls between preponderance of evidence and proof beyond a reasonable doubt. *Riker Will*, 9 Fiduc. Rep. 2d 349, 354 (O.C.

Montg. 1989). The standard is defined as:

> the witnesses must be found to be credible, that the facts to which they testify are distinctly remembered and the details thereof narrated exactly and in due order, and that their testimony is so clear, direct, weighty, and convincing so as to enable the [trier of fact] to come to a clear conviction, without hesitancy, of the truth of the precise facts [at] issue.

In re Estate of Fickert, 461 Pa. 653, 658, 337 A.2d 592, 594 (1975).

Applying a clear and convincing standard, the Orphan's Court has not hesitated to grant nonsuits where a contestant failed to satisfy any one of the *Clark* prongs. For example, in *Kile Estate* the trial court granted a nonsuit on the contestant's undue influence claim: "the contestant has failed to prove by clear and convincing evidence that decedent was of weakened intellect." 19 Fiduc. Rep.2d 22, 36 (O.C. Lanc. 1998); *see also Quigley Estate,* 15 Fiduc. Rep.2d 4 (O.C. Chester Co. 1994).

D. Evidence

Modified Rule 230.1 allows the court to consider "evidence introduced by the plaintiff and any evidence favorable to the plaintiff introduced by the defendant prior to the close of the plaintiff's case." *Pa. R. Civ. P. 230.1(a)(2)(effective July 1, 2001).* Left unaddressed in the Rule itself are (1) whether subscribing witness testimony may affect a nonsuit decision; (2) evidentiary inferences; (3) witness credibility; and (4) the contestant's unfavorable, uncontradicted evidence.

1. The Court's Witnesses

Orphans' Courts have viewed subscribing witnesses and the scrivener as the Court's witnesses in will contests. *See Plott's Estate,* 335 Pa. 88, 5 A.2d at 905; *Maganuco Estate,* 1 Fiduc. Rep. at 193. The Supreme Court has held that the adverse testimony of such witnesses should not bind either side. *Plott's Estate,* 335 Pa. at 88, 5 A.2d at 905. Presumably

then, at nonsuit the Court should not bind the contestant to unfavorable testimony given by the Court's witnesses.

But the Superior Court has upheld at least one trial court decision based in part on the testimony of a subscribing witness. In *Estate of Koltowich,* a subscribing witness testified about execution of the will. The trial court considered that testimony in deciding that the contestant had not made a *prima facie* showing of weakened intellect. This did not trouble the Superior Court:

> As a subscribing witness to the will, however, [the witness] could be called, examined and cross-examined by contestant as will as by proponents, because subscribing witnesses are not regarded as ordinary witnesses, but rather as witnesses of the court. [Citations omitted]. [The witness] therefore, in testifying as to the signing of the will at least, was as much contestant's as proponents' witness. In the particular circumstances of this case therefore we do not find that the court erred in considering the testimony.

311 Pa. Super. at 525, 457 A.2d at 1306. Although the court limited its holding to "the particular circumstances" of the case, *Koltowich* stands as potential precedent for the consideration of Court's witness testimony averse to the contestant.

2. Evidentiary Inferences

"[I]n ruling on a nonsuit the evidence is to be viewed in the light most favorable to the plaintiff and the plaintiff is to be given the benefit of all favorable evidence and all reasonable inferences therefrom." *Estate of Dunlap,* 380 A.2d at 315; *Vanderkraats Will (No. 2),* 12 Fiduc. Rep.2d at 61. Viewing evidence in a light most favorable to the contestant, however, does not require the Court to elevate evidence to the level of "clear and convincing" or to stretch in drawing inferences.

For example, in *Vanderkraats Will (No. 2),* the trial court accepted as true that decedent suffered from cancer and other ailments which impaired his physical abilities. 12

Fiduc. Rep.2d at 62. The court agreed that these ailments led decedent to rely on others to attend to this physical needs. The trial court did not, however, infer from those circumstances that the decedents possessed a weakened intellect:

> An infirm body does not necessarily indicate a weakened mind, , and our evaluation of the evidence … finds it less than clear and convincing that the decedent suffered from a weakened intellect.

Id.

3. Witness Credibility

At nonsuit, any and all inferences regarding credibility are resolved in favor of the contestant. *See Montgomery v. South Philadelphia Med. Group,* 441 Pa. Super. 151 (1995) (*citing Scott v. Purcell,* 490 Pa. 109, 113 , 415 A.2d 56, 58 (1980)). This general rule has several implications. First, at nonsuit the trial court should disregard the proponent's impeachment of any witnesses unless that impeachment resulted in the direct contradiction of a fact to which the witness previously had testified. Second, under Rule of Evidence 607, any party, including the party calling the witness, can attack the credibility of any witness. *Pa. R. Evid. 607.* Accordingly, if the contestant impeaches a witness, the court should resolve credibility issues against that witness.

4. Contestant's Unfavorable Evidence

Rule 230.1's "evidence favorable to the plaintiff" language precedes and modifies the phrase "introduced by the defendant". *Pa. R. Civ. P. 230.s(a)(2)*. No such language precedes or modifies the "evidence which was introduced by the plaintiff" provision of the Rule. *Id.* By logical implication, therefore, the Court can and should consider any and all evidence introduced by the proponent, favorable or unfavorable. If a contestant introduces and does not contradict, or impeach the witness providing, unfavorable testimony, then the contestant is bound by such

testimony.

That interpretation comports with Orphan's Court nonsuit decisions. For example, in *Estate of Koltowich,* the contestant called the proponent "as on cross." The trial court considered the proponent's testimony about the execution of the will in deciding that the contestant failed to prove weakened intellect. On appeal, the contestant argued that the trial court erred in considering the proponent's testimony at the nonsuit stage. The Superior Court disagreed:

> The difficulty with contestant's argument is that the testimony by proponent Susan Suman was elicited by counsel for the contestant, who had called proponent as for cross-examination shortly after the beginning of the trial. Susan Suman's testimony therefore was part of contestant's case.

Koltowich, 311 Pa. Super. at 1306, 457 A.2d at 524-525.

E. Motion to take off nonsuit is prerequisite to appeal

Where nonsuit is granted against contestant, under Pa. R.C.P. Rule 227.1, a motion to remove the judgment of nonsuit must be filed before appeal: *Duffy Will*, 4 Fiduc. Rep.2d 183. An appeal does not lie from the entry of a judgment of compulsory nonsuit, but rather from a refusal to take it off; standard of review on appeal discussed: *Biddle v. Johnsonbaugh*, 664 A.2d 159, 444 Pa. Super. 450.