PHILADELPHIA COURT OF COMMON PLEAS
ORPHANS' COURT DIVISION

Estate of Sarah Katz, Deceased
O.C. No. 1380 DE of 2006
Control No. 065937

OPINION SUR APPEAL

In September 2006, Lois Barish filed a Petition directed to her sister, Doris Katz, to turn over funds to the Estate of their deceased mother, Sarah Katz, who died on June 13, 2005. According to Ms. Barish, both she and the respondent Doris Katz are named beneficiaries under their mother's will. In her petition, Lois Barish states that "[p]rior to November 1, 2004, the decedent had the following joint accounts with Doris Katz, her daughter":

PNC Bank	
CD # 31100215035	$ 6,379.00
CD # 31100216825	$ 2,155.00
CD # 31200180721	$ 11,172.00
Checking 8562018575	$ 27,985.00
Total	$ 47,691.00
Citizen Bank	
CD # 6146217999	$ 26,459.00
CD # 6146563412	$ 33,880.00
Total	$ 60,339.00
Wachovia Bank	
CD# 022041594048	$ 16,202.00
CD # 022051287013	$ 31,038.00
CD #022060958646	$ 37,538.00
CD # 022061089976	$ 22,213.00
Total	$ 106,991.00
Total	$215,021.00[1]

[1] Ex. P-1, Barish 9/25/06 Petition to Turn Over Funds (hereinafter Ex. P-1),¶4. Petitioner attached a copy of Schedule F (Jointly-Owned Property) of the Inheritance Tax Return as Ex. A, which contained this list of joint accounts. Similarly, Ms. Barish's motion for post-trial relief states: "At the time of the decedent's death, as evidenced by her Pennsylvania Inheritance Tax Return attached as an Exhibit to said Petition, virtually all of her liquid assets were in a checking account and/or certificates of deposit listed under the names of the decedent and her daughter, Doris Katz." Barish 7/25/08 Motion for Post-Trial Relief, ¶ 2 (emphasis added).

The assets in these accounts, Ms Barish maintains, should be included in the decedent's estate and Doris Katz should be directed to turn them over to the Estate of Sarah Katz.[2]

To support this claim, Ms. Barish's petition asserts, first, that Sarah Katz had suffered from a weakened intellect, she had been totally dependent on respondent Doris Katz, who had exerted undue influence over her at the time the accounts were formed.[3] In its second count, the petition asserts that at the time she executed her will, "Sarah Katz believed in November 2004 that the bank accounts recited in paragraph 4 herein would be in her estate at her death to fund her bequests."[4]

Doris Katz rejected this claim and asserted that the joint accounts were governed by the Multiple Party Accounts statute, 20 Pa.C.S.A. § 6304," so that as a matter of law the funds contained in those joint accounts "upon the death of Sarah Katz became the sole property of Doris Katz."[5]

After a period of discovery, a hearing was held on July 15, 2008. At that hearing, petitioner Lois Barish presented five witnesses: herself, her daughter Erica Blatnick, her friend, Ralph Metzger, Doris Katz, and Jay Sklar, the attorney who prepared decedent Sarah Katz's will. In her testimony, Lois Barish conceded that she had never seen the certificates of deposit in question until she examined her mother's Inheritance Tax Return, Schedule F. As she observed, " I never saw them before I got these papers," although she was aware that her mother had various accounts since she "always

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[2] Ex. P-1, Wherefore clauses.

[3] Ex. P-1, Count I. In oral argument, counsel for Ms. Barish stated that he had decided not to pursue the undue influence claim "upon my investigation through discovery, that was not, in fact, the case." 11/17/08 N.T. at 8 (Petrilli).

[4] Ex. P-1, ¶ 25. The Petition states that on November 1, 2004, Sarah Katz executed her will. Ex. P-1, ¶ 22.

[5] 1/4/07 Reply to Petition to turn over funds to estate, Ex. P-2 (hereinafter Ex. P-2), ¶¶ 28 & 30 (new matter).

commented on how much she was, you know, going to rollover. They were all her CDs."[6] Ms. Barish testified that she believed the joint accounts at issue were established sometime after her father passed away in May 30, 1977, but she was not present when the accounts were created.[7] She also testified that she was not present when her mother executed her will.[8]

According to all of the witnesses, Sarah Katz had always been in complete control of her finances. Ms. Barish, for instance, expressed no doubt that her mother Sarah Katz was in charge of her own financial affairs. When specifically asked, "[n]ow did your mother control her financial affairs," Ms. Barish responded: "Absolutely, yes she did."[9] She made her own investment decisions, and did not rely on Doris in any way.[10]

These observations by Ms. Barish were confirmed by other witnesses with direct knowledge of the parties. Doris Katz, for instance, noted that her mother took great pains in managing her finances: "She was doing a great job. I let her do what she wanted."[11] Likewise, the petitioner's daughter, Erica Blatnick, when asked whether Sarah Katz controlled her finances, stated: "She reveled in it. She enjoyed it."[12] In elaboration, Ms. Blatnick recalled:

> She would tell me how she would call around to all the different banks because one CD was maturing and she wanted to make sure she got the best rate, and she would tell me, Oh, this bank had 6 percent versus four, and that lady wanted me to do it at four and I told her no. And she just enjoyed it. It was like her hobby.[13]

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6 7/15/08 N.T. at 7 (Barish).
7 7/15/08 N.T. at 20 (Barish).
8 7/15/08 N.T. at 21 (Barish).
9 7/15/08 N.T. at 8 (Barish).
10 7/15/08 N.T. at 9 (Barish).
11 7/15/08 N.T. at 29 (Katz).
12 7/15/08 N.T. at 57 (Blatnick).
13 7/15/08 N.T. at 57 (Blatnick).

The record also indicated a history of ill will and discord among the children of Sarah Katz. Petitioner's daughter Erica Blatnick, who had lived with her grandmother from 1992 to 1997 while going to college,[14] observed that respondent Doris Katz restricted visits from other sisters, but suggested that was because "[m]y grandmother wanted to avoid all conflict. It was easier for her to avoid situations."[15] When asked to explain what she meant by conflict, Ms. Blatnick stated: "Well, arguments among the sisters, just a feeling of uneasiness, uncomfortable."[16]

This ill will among the sisters was apparent from the testimony of both the petitioner and respondent.[17] Lois Barish stated that she had received "nothing" from her mother's estate and believed that she should have received something.[18] Ms. Barish maintained that respondent had a reputation for dishonesty, but the example she gave detracted, as well, from her own credibility. Ms. Barish noted, for instance, that respondent Doris Katz "used my address behind my back to get lower car insurance so she would not have to pay for it in Philadelphia."[19] She also claimed that Doris Katz used her address to avoid paying city wage tax. Finally, she admitted that "[m]y oldest daughter worked for the IRS, and as a favor to Doris, she went in and changed a figure on her income tax, and my daughter was fired from the IRS and almost went to jail."[20]

When asked about these allegations of dishonesty, Doris Katz conceded that she had used the petitioner's address to defraud her automobile insurer, but maintained that it

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14 7/15/08 N.T. at 56 (Blatnick).
15 7/15/08 N.T. at 59 (Blatnick).
16 7/15/08 N.T. at 60-61 (Blatnick).
17 There were 3 sisters: Lois, Doris and Marilyn. 7/15/08 N.T. at 5 (Barish).
18 7/15/08 N.T. at 10-11 (Barish).
19 7/15/08 N.T. at 18 (Barish).
20 7/15/08 N.T. at 19 (Barish).

had been the petitioner's idea.[21] According to Ms. Katz this deceit was accomplished with Ms. Barish's full knowledge: "But she suggested it, it was her idea, it was with full knowledge. She got the mail there, she handed it to me, and now she is trying to make me out a liar. And it's the opposite."[22]

Jay Sklar, an attorney who prepared the will of Sarah Katz, testified that his mother asked him to help a neighbor who wanted to have a will prepared. Prior to meeting with Sarah Katz, Mr. Sklar asked her to prepare a list of assets. When he met with her, Sarah Katz had a list of assets, though she did not give it to Mr. Sklar. Mr. Sklar testified that at this meeting, he learned that there were certificates of deposit in the names of both Sarah and Doris Katz.[23] In preparing the will, he was also aware that Sarah Katz may not have had sufficient individual assets to satisfy certain bequests set forth in the will such as the $1,000 bequests to four specific individuals. He observed, however, that in his experience it is not possible to predict what will happen in the future and frequently a grandmother wishes to remember an heir in a will to express her affection even if ultimately there is no money to satisfy the specific bequest.[24] In any event, he specifically addressed the significance of the joint accounts with Sarah Katz at the time of preparing her will As he recalled:

> The only—I did not speak to Doris about them (i.e. the joint accounts) until after Mrs. Katz passed away, <u>but I said to Mrs. Katz, I am sitting on the sofa in her living room and I said, You know this means that Doris gets the money when you die. She said, I know.</u>[25]

[21] 7/15/08 N.T. at 54-55 (Katz).
[22] 7/15/08 N.T. at 55 (Katz).
[23] 7/15/08 N.T. at 70-72 (Sklar).
[24] 7/15/08 N.T. at 72-73 (Sklar).
[25] 7/15/08 N.T. at 74-75 (Sklar).

At the conclusion of petitioner's case, counsel for respondent moved for entry of a nonsuit or directed verdict based on petitioner's failure to meet her burden of proof under 20 Pa.C.S. § 6304.[26] For the reasons set forth below, that motion was granted.

Legal Analysis

The petitioner has filed an appeal of this court's ruling against her. In her Statement of Matters Complained of on Appeal, she asserts that "the basis of the lower court's decision cannot be readily discerned in consideration of the Order-at-issue" and argues that as "a result, in accordance with Pa.R. A.P. 1925(b)(4)(vi), Appellant/Petitioner may identify errors in this Statement in only general terms, the generality of which shall not be grounds for finding waiver."[27] She then identifies two particular issues for review: (a) "misapplication of the *devisavit vel non* exception to the Dead Man's Act, 42 Pa. C.S. § 5930 (2007) and (b) Incorrect entry of an Order for Nonsuit under the applicable Pennsylvania Rules of Civil Procedure and Orphans' Court Rules regarding the Multiple Party Accounts Act, 20 Pa.C.S. § 6304, applicable common law and available evidence (including the denial of Petitioner's Motion for Post-trial Relief regarding the same)."[28] Guided by this statement, this opinion will therefore address the two issues raised in general terms by petitioner: (1) whether the standard of

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[26] 7/15/08 N.T. at 86-90.

[27] 1/12/09 Appellant/Plaintiffs/Additional Defendants' Concise Statement of the Matters Complained of on Appeal, ¶¶ 1-2.

[28] 1/12/09 Appellants/Plaintiffs/Additional Defendants' Concise Statement of the Matters Complained of on Appeal, ¶ 3. In paragraph 4 of this concise statement, Petitioner raises, once again, in very general terms a misapplication of 20 Pa.C.S. § 6304: "The lower court has also abused its discretion and/or made erroneous findings of fact in connection with its entry of an Order for Nonsuit regarding the Multiple Party Accounts Act, 20 Pa. C.S. §6304, applicable common law and available evidence (including the denial of Petitioner's Motion for Post-Trial Relief regarding the same). Id. at ¶ 4.

review under 20 Pa.C.S. § 6304 was properly applied, and (2) whether this court misapplied the *devisavit vel non* exception to the Dead Man's Act.

1. Petitioner Failed to Meet Her Burden of Proof Under 20 Pa.C.S. § 6304

With the enactment of Chapter 63 of the Probate, Estates and Fiduciaries Code, "the ownership of funds held in a joint account is governed by statute." Estate of Meyers, 434 Pa. Super. 165, 170, 642 A.2d 525, 527 (1994). According to that statute, a joint account "means an account payable on request to one or more of two or more parties whether or not mention is made of any right of survivorship." 20 Pa.C.S. § 6301. An "account" is defined as including certificates of deposit.[29] During the lifetime of all parties, a joint account belongs 'to the parties in proportion to the net contributions by each to the sum on deposit, unless there is clear and convincing evidence of a different intent." 20 Pa.C.S. § 6303(a). Upon the death of one of the parties to the account, however, the statute creates a presumption of a right of survivorship to the assets in the account to the surviving party:

> **§ 6304. Right of survivorship.**
> (a) **JOINT ACCOUNT –** Any sum remaining on deposit at the death of a party to a joint account belongs to the surviving party or parties as against the estate of the decedent unless there is clear and convincing evidence of a different intent at the time an account is created.
> (d) **CHANGE BY WILL PROHIBITED –** A right of survivorship arising from the express terms of an account or under this section, or a beneficiary designation in a trust account cannot be changed by will.

[29] 20 Pa.C.S. § 6301. Petitioner identifies the assets at issue in paragraph 4 of her initial petition, Ex. P-1, as referenced in Ex. A (Schedule F of decedent's Inheritance Tax Return). From that document, there appear to be 9 certificates of deposit and one bank account at issue. Neither party suggests that there would be different standards applicable to joint bank accounts or joint certificates of deposit. Case law suggests they would both fall within the parameters of Chapter 63 of the PEF code. See, e.g., Lessner v. Rubinson, 527 Pa. 393, 399, 592 A.2d 678 (1991); Estate of Young, 480 Pa. 580, n.3, 391 A.2d 1037, 1039, n.3 (1978).

The official comment to section 6304 states that the "underlying assumption is that most persons who use joint accounts want the survivor or survivors to have all balances remaining a death." 20 Pa.C.S. § 6304, official comment; Lessner v. Rubinson, 527 Pa. 393, 398, n.4, 592 A.2d 678, 680 n.4 (1991)("Official comments are to be given weight in the construction of statutes").

To overcome the presumption that Doris Katz had a right of survivorship to the assets in the joint accounts maintained with her mother, Lois Barish therefore had to present "clear and convincing evidence of a different intent at the time" the account was created. This standard of clear and convincing evidence "is the highest burden in our civil law and requires that the fact-finder be able to 'come to clear conviction, without hesitancy, of the truth of the precise fact in issue.'" Estate of Heske, 436 Pa. Super. 63, 65, 647 A.2d 243, 244 (1994)(citation omitted). Based on the record petitioner presented, Ms. Barish failed to meet this burden of proof.

To support her claim that the assets in the joint accounts did not belong to Doris Katz upon the death of Sarah Katz, Ms. Barish presented testimony, inter alia, by herself, her daughter, and Ralph Metzger—all of whom were highly biased in Ms. Barish's favor. Metzger, for instance, characterized himself as Lois' friend or "other half."[30] Not only was Erica Blatnick the petitioner's daughter, but she was also more personally interested based on her testimony that neither of her two minor children received their $1,000 bequest under Sarah Katz's will.[31] Finally, the petitioner, Lois Barish, admitted in her testimony that she had never seen the accounts or certificates of deposit at issue until a

[30] 7/15/08 N.T. at 67 (Metzger).
[31] 7/15/08 N.T. at 62-64 (Blatnick).

year after her mother's death when she saw the inheritance tax form Schedule F.[32] She believed that the joint accounts at issue had been created sometime after her father died in May 1977.[33] As the following colloquy demonstrates, she lacked any personal knowledge of the formation of the joint accounts:

> Q: And have those joint accounts been maintained as joint accounts from approximately May 30, 1977 to the date of your mother's date (sic.)?
> A: No.
> Q: Did they go in and out of joint accounts?
> A: I don't know, but my mother controlled it so they weren't joint.
> Q: They weren't joint?
> A: No.
> Q: They did not use the word "joint." They were in two names, weren't they?
> A: I don't know.
> Q: You don't know?
> A: No.
> Q: Were you present at any time when the accounts in question were created at the bank?
> A: No.
> Q: So if I understand you correctly today, those accounts that are in question, you don't know whether they were joint accounts?
> A: No.[34]

Not only did Ms. Barish admit to a lack knowledge of the formation of the joint accounts, but she also undermined her own credibility regarding the use of her address to defraud her sister's car insurer and her daughter's intermeddling with IRS documents to benefit the respondent.[35]

In contrast to this lack of knowledge about the joint accounts and inherent bias of three of petitioner's witnesses (i.e. Barish, Blatnick and Metzger), Jay Sklar, as the attorney who drafted Sarah Katz's will, offered disinterested insight into her intent not

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[32] 7/15/08 N.T. at 6-7 (Barish).
[33] 7/15/08 N.T. at 20 (Barish).
[34] 7/15/08 N.T. 20-21 (Barish).
[35] *Compare* 7/15/08 N.T. at 18-19 (Barish) *with* 7/15/08 N.T. at 54-55 (Katz). Based on this testimony, this court found Ms. Katz's testimony credible that Ms. Barish had cooperated in these efforts of insurance and tax fraud.

only in regards to her will but also as to her joint accounts. He stated when he met with Sarah Katz to prepare her will, she had prepared a list of her assets. When asked by petitioners' own counsel if he had given her any advice as to the joint certificates or checking accounts, Mr. Sklar replied that he had alerted her that they would go to Doris upon her death and that Sarah Katz had concurred with this result:

> Q: Did you make or give any advice to either Doris or Sarah regarding the alleged joint certificates or checking accounts?
> A: The only—I did not speak to Doris about them until after Mrs. Katz passed away, but I said to Mrs. Katz, I am sitting on the sofa in her living room and I said, You know this means Doris gets the money when you die. She said, I know.[36]

This testimony by Jay Sklar as to Sarah Katz's intent as to the survivorship of her joint accounts is critical as illustrated by the Estate of Dembiec, 321 Pa. Super. 515, 468 A.2d 1107 (1983). In Diembec, the court found testimony by an attorney who had been called to a hospital to discuss matters relevant to preparing a decedent's will controlling as to her intent concerning a joint savings account she had previously opened. The attorney testified that while discussing decedent's will, she indicated that "she had a bank account she thought she had already taken care of which was to go to her sister." Id., 321 Pa. Super. at 522, 468 A.2d at 1111. In affirming the lower court's conclusion that due to this testimony the petitioner challenging the joint account failed to meet her burden of proof under section 6304, the court explained:

> Based on the language of Section 6304(a), appellants argue that it was error for Orphans' Court to consider this statement because it originated subsequent to the creation of the August 31st account. However, Section 6304(a) does not limit the admissibility of evidence of decedent's intent to evidence that existed prior to or contemporaneous with the creation of the account. It merely requires that the evidence disclose the intentions of the decedent 'at the time the account is created.'
> Estate of Dembiec, 321 Pa. Super. at 522, 468 A.2d at 1111 (emphasis added).

[36] 7/15/08 N.T. at 74-75 (Sklar).

The analysis of Dembiec is also dispositive as to petitioner's argument that the accounts at issue should be considered "convenience accounts."[37] A similar argument had been raised in Diembec based on inconclusive testimony by a bank employee as to the decedent's intent in creating a joint account. The court ultimately concluded, however, that the attorney's testimony—like the testimony of Jay Sklar—was conclusive in establishing decedent's intent to create a joint account with a right of survivorship in the surviving party. Dembiec, 321 Pa. Super. at 521-22, 468 A.2d at 1111.

One of the main thrusts of petitioner's argument in the post-trial oral argument is that the accounts at issue were "convenience accounts" as evidenced, inter alia, by respondent's lack of control over the accounts.[38] This argument, however, misconstrues the underlying premise of the Multiple Party Accounts Act (MPAA) set forth in 20 Pa.C.S. §§ 6301-6306. As the Pennsylvania Supreme Court observed:

> The MPAA defines the rights of the parties to a multiple party account using a testamentary transaction rationale. The essence of a testamentary transaction is the transferor's intent to create in his transferee no interest in the property transferred until or after the death of the transferor. Pursuant to Section 6303(a), "a joint account belongs, during the lifetime of all parties, to the parties in proportion to the net contributions by each to the sum on deposit, unless there is clear and convincing evidence of a different intent." 20 Pa. C.S. § 6303(a). Consequently, the depositor in a joint account is presumed to retain ownership of the sums he or she has placed on deposit during his or her lifetime in proportion to the total fund. Upon the death of a party to a joint account, the amount in the account "belongs to the surviving party or parties as against the estate of the decedent unless there is clear and convincing evidence of a different intention at the time the account is created. 20 Pa.C.S. § 6304(a).
> Deutsch, Larrimore & Farnish, P.C. v. Johnson, 577 Pa. 637,642-43, 848 A.2d 137, 140 (2004)(emphasis added).

[37] 7/25/08 Barish Motion for Post-trial Relief, ¶¶ 4 & 6.

[38] 11/17/2008 N.T. at 8 ("My proposition and argument, in short, is that the accounts were convenience accounts, and the elements of duress and undue influence don't necessarily have to be met to show that these, in fact, were convenience accounts")(Petrilli).

The testimony that Sarah Katz maintained control over the joint accounts and was the sole contributor to them thus is not dispositive as to the issue of intent to create a right of survivorship for Doris Katz and petitioner failed to present the requisite "clear and convincing evidence" of a contrary intent.

2. The Petitioner's Reliance on the Devisavit Vel Non Exception to the Dead Man's Rule in Joint Bank Account Cases As Set Forth in Pagnotti v. Old Forge Bank Fails to Acknowledge Contrary Earlier Precedent by the Pennsylvania Supreme Court in Flanagan v. Nash, 185 Pa. 41, 39 A. 818 (1898)

In her motion for post-trial relief, Lois Barish contends that this court "sustained opposing counsel's objections to and/or precluded any fact testimony regarding the decedent's statement regarding her intent, or lack thereof, in gifting practically all of her liquid assets to Respondent Doris Katz during her lifetime."[39] In her statement of matters complained of on appeal, petitioner vaguely states that this court misapplied "the devisavit vel non exception to the Dead Man's Act, 42 Pa. C.S. 5930 (2007).[40] Her motion for post-trial relief asserts more specifically that this testimony should have been admitted under the devisavit vel non exception to the Dead Man's Act as set forth in Pagnotti v. Old Forge Bank, 429 Pa. Super. 39, 42, 631 A.2d 1045 (1993), app.denied, 537 Pa. 623, 641 A.2d 588 (1994).[41] Unfortunately, the precedent regarding the devisavit vel non exception to the Deadman's Rule as it relates to joint bank accounts is not as clear as Petitioner suggests.

The genesis of the present Dead Man's Rule can be traced back to 1887. In fact, the present Act "is almost identical to the original Dead Man's Act of May 23, 1887."[42]

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[39] 7/25/08 Barish Motion for Post-Trial Relief, ¶ 8.
[40] 1/12/09 Statement of Matters Complained of on Appeal, ¶ 3(a).
[41] 7/25/08 Barish Motion for Post-Trial Relief, ¶ 10.
[42] J. Brooke Aker, "Understanding the Dead Man's Rule," 23 Fid. Rep.2d 177, 178 (2003); "The Dead Man's Rule," Fid. Rev. (November 2000) ("The wording of Section 5930 is almost identical to that of the

The parameters of the Dead Man's Rule are presently set forth in 42 Pa.C.S.A.§ 5930, which provides:

> § 5930. Surviving party as witness, in case of death, mental incapacity, etc.
>
> Except as otherwise provided in this subchapter, in any civil action or proceeding, where any party to a thing or contract in action is dead, or has been adjudged a lunatic, and his right thereto or therein has passed, either by his own act or by the act of the law, to a party on the record who represents his interest in the subject in controversy, neither any surviving or remaining party to such thing or contract, nor any other person whose interest shall be adverse to the said right of such deceased or lunatic party, shall be a competent witness to any matter occurring before the death of said party or the adjudication of lunacy….or, unless the issue or inquiry be devisavit vel non, or be any other issue or inquiry respecting the property of a deceased owner, and the controversy is between parties respectively claiming such property by devolution on the death of such owner, in which case all persons shall be fully competent witnesses.

A main rationale for the Dead Man's Rule "is to prevent the injustice that would result from permitting a surviving party to a transaction to testify favorably to himself and adversely to the interest of the decedent, when the decedent's representatives would be hampered in attempting to refute the testimony or be in no position to refute it, by reason of the decedent's death." Estate of Hall, 517 Pa. 115, 129, 535 A.2d 47, 53 (1987). To establish the disqualification of a witness, Pennsylvania courts typically require satisfaction of three conditions: "(1) the deceased must have had an actual right or interest in the matter at issue, i.e. an interest in the immediate result of the suit; (2) the interest of the witness—not simply the testimony—must be adverse; (3) a right of the deceased must have passed to a party of record who represents the deceased's interest." Hendrickson Estate, 388 Pa. 39, 45, 130 A.2d 143, 146-47 (1957).

1887 statute so that the case law from 1887 to enactment of section 5930 remains applicable to section 5930"). See also 42 Pa.C.S. § 5930, Official Comment ("Source: Substantially a reenactment of Act of May 23, 1887 (P.L. 158)(No. 89), § 5(e)(28 P.S.§ 322)

In neither her statement of matters complained of on appeal, her motion for post-trial relief nor her brief in support of her petition for post-trial relief, does Ms. Barish point to specific instances where this court improperly excluded testimony under the Dead Man's Rule.[43] The closest she comes to identifying specific errors is in her motion for post-trial relief where she asserts that "[t]he Court, however, sustained opposing counsel's objections to and/or precluded any fact testimony regarding the decedent's statement regarding her intent, or lack thereof, in gifting practically all of her liquid assets to Respondent Doris Katz during her lifetime."[44]

In support of her general claim that this court improperly excluded testimony under the Dead Man's Rule, Ms. Barish invokes an opinion by the Pennsylvania Superior Court, Pagnotti v. Old Forge Bank, 429 Pa. Super. 39, 631 A.2d 1045(1993), which, she maintains, clarifies the devisavit vel non exception to the Dead Man's Rule when it "broadly defined the term 'devolution' to 'include the transfer of a decedent's property both by operation of law and by will' with no express exception for the Multi-Party Accounts Act or the like."[45] The dispute in Pagnotti involved a bank account initially opened by a mother, who subsequently added her son's name to that account. After her son died intestate, the mother attempted to withdraw funds from the account, but she was precluded from doing so by objections from her son's estate. The son's estate thereafter filed preliminary objections asserting that the mother should not be able to testify because she was not a competent witness under the Dead Man' Act. The Superior Court,

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[43] See, e.g., 7/25/08 Barish Motion for Post-Trial Relief; 10/10/08 Barish Brief; 1/9/09 Barish Statement of Matters Complained Of On Appeal.
[44] 7/25/08 Barish Motion for Post-Trial Relief at ¶ 8.
[45] 10/10/08 Barish Brief at 4-5.

however, affirmed the trial court's conclusion that the mother was competent to testify under the devisavit vel non exception to the Dead Man's Act.

In reaching this conclusion, the Pagnotti court—as Petitioner asserts--gave a broad definition of "devolution" to include the transfer of assets in a joint bank account. More specifically, the court observed:

> The Dead Man's Act renders the witness' testimony competent where the controversy over the decedent's property is between parties respectively claiming such property by 'devolution on the death of the owner.' In re Estate of McClain, 481 Pa. 435, 392 A.2d 1371, 1375 (1978). The definition of the term 'devolution' includes the transfer of decedent's property both by operation of law and by will. Id.
>
> In the present case, the decedent and appellee owned a bank account. Following the decedent's death, appellant and appellee each claimed a right to the money in the account….Each party was claiming the right to the money in the bank account by devolution following the death of an owner of the account. Therefore, all witnesses in the present action were competent to testify.[46] Pagnotti v. Old Forge Bank, 429 Pa. Super. at 42-43, 631 A.2d at 1047.

This broad interpretation of "devolution" set forth by the Superior Court in Pagnotti has been followed and applied by the Commonwealth Court and trial court cases involving the titling of real property in the name of a decedent.[47]

There is, however, earlier precedent by the Pennsylvania Supreme Court that has taken a contrary—or narrower-- position on the application of the devisavit vel non

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[46] Pagnotti v. Old Forge Bank, 429 Pa. Super. at 42-43, 631 A.2d at 1047. In reaching this broad interpretation of "devolution by law" and applying it to bank accounts, the Pagnotti court cited Estate of McClain, 483 Pa. 435, 392 A.2d 1371 (1978), which focused more narrowly on whether the devisavit vel non exception applied to parties claiming an interest in an estate as intestate heirs—or by law—as it did to those who claimed by will. It concluded quite narrowly that "[t]he terms of the statute, therefore do not make a distinction between intestate claims vs. testate claims." Estate of McClain, 481 Pa. at 445, 392 A.2d at 1375.

[47] See In re Estate of Gadiparthi, 158 Pa. Commw. 537, 632 A.2d 942 (1993)(Under devisavit vel non exception to the Dead Man's Rule, husband could testify as to his intent in titling real property in his wife's name prior to her death to protect it from potential malpractice claims); Galluzzo v. Galluzzo, 73 Pa. D.& C. 4th 51, 61 (Fayette Cty. 2005)(Under devisavit vel non exception all parties may testify where the claims involve the right to property by 'devolution' after the death of the owner of the real property). The Superior Court declined, however, to apply the devisavit vel non exception in cases involving ante nuptial agreement. See In re Hartman, 399 Pa. Super. 386, 582 A.2d 648 (1990), app.denied, 527 Pa. 634, 592 A.2d 1301 (1991).

exception to the Dead Man's Rule in a joint bank account case. In Flanagan v. Nash, 185 Pa. 41, 39 A. 818 (1898), the Pennsylvania Supreme Court held that the surviving party claiming title to a joint bank account was not competent to testify under the Dead Man's Rule. In so doing, it explicitly examined the devisavit vel non exception to that rule to conclude that it did not apply. The plaintiff in Flanagan was the administrator of the decedent's estate. The decedent had opened a joint bank account in her name and that of the defendant. Based on this relationship, the Flanagan court concluded the parties were adverse:

> The title of the decedent [joint account holder] to the money has passed to her administrator by an act of the law, and he represents her interests in the subject in controversy. He, as her representative, claims the money in controversy as belonging to her estate, and the defendant claims the same money as his own property. As a matter of course, these claims are antagonistic and adverse. The contest is in no sense a controversy between parties 'respectively claiming such property by devolution on the death of such owner." It is not a contest between two adversary claimants to the property of the former owner, but a contest between the legal representative of that owner, and the one claiming adversely to the title of such owner. Of course, such a claimant is not competent to testify in his own behalf in such a case. The express words of the act of May 23, 1887, P.L. 158, section 5, clause e, exclude him. The words of the act are, "Nor where any party to a thing or contract in action is dead…and his right thereto or therein has passed, either by his own act or the act of the law, to a party on the record who represents his interest in the subject in controversy, shall any surviving or remaining party to such thing or contract…be a competent witness to any matter occurring before the death of such party,…unless the issue or inquiry be devisavit vel non, or be any other issues or inquiry respecting the property of a deceased owner, and the controversy be between parties respectively claiming such property by devolution on the death of such owner, in which case all parties shall be fully competent witnesses."
> Flanagan v. Gallagher, 185 Pa. at 43-44, 39 A. at 818-19 (emphasis added).

Significantly, the statutory language for the devisavit vel non exception that is underlined above and analyzed by the Pennsylvania Supreme Court in Flanagan is virtually identical to the language in the present Dead Man's Act, 42 Pa.C.S. § 5930. In interpreting this language, the Flanagan court concluded that "this proceeding is neither

an issue of devisavit vel non nor an issue or inquiry respecting the property of a deceased owner, between parties claiming an interest in such property by devolution on the death of the owner." Id. The claimant therefore was properly deemed incompetent to testify. Flanagan, however, was decided prior to the enactment of the Multiple Party Account Act. It thus did not analyze the remaining issue—of whether the surviving claimant had title to the account—in terms of the current statutory presumption of survivorship. Instead, it applied a gift analysis to conclude that the surviving party could not claim ownership of the account. This gift analysis, however, would not be appropriate under the statute presently in force, in particular 20 Pa.C.S. § 6304.[48]

A half century later, the Pennsylvania Superior Court in Bohn v. Fund of $1230.10, 178 Pa. Super. 420, 116 A.2d 266 (1955) similarly ruled that a claimant to a joint bank account was incompetent to testify under the Dead Man's Act. In so doing, it invoked Flanagan to conclude that "[as] in Flanagan v. Nash, supra, we are concerned with two parties having adverse interests contesting their rights to a fund. Therefore, the testimony of the living adverse party as to occurrences prior to the time of the deceased's death is not admissible under the Statute." Bohn, 178 Pa. Super. at 425, 116 A.2d at 269. Bohn, like Flanagan, predated the enactment of the Multiple Party Accounts Act and, as a consequence, it also did not apply the statutory presumption of survivorship that presently applies under 20 Pa.C.S. § 6304.[49]

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[48] See Estate of Meyers, 434 Pa. Super. at 170, 642 A.2d at 527 ("The enactment of Chapter 63 of the PEF Code wrought far-reaching changes in the law regarding joint bank accounts); Dickey v. Kundrat, 4 Fid. Rep. 2d 367, 368 (O.C. Dauphin Cty. 1984)(Pennsylvania legislature "radically altered" analysis of joint accounts with the promulgation of Chapter 63 of the PEF code).

[49] The Bohn Superior Court concluded that the joint owners of the bank account were tenants in common, and it affirmed the trial court's direction to the jury that one-half of the account should go to each of the two claimants. Bohn, 178 Pa. Super. at 423,116 A.2d at 268.

Perusing this early precedent is both instructive and perilous. On one hand, these cases grapple with statutory language of the Dead Man's Rule that is essentially unchanged; on the other, they adopt an analysis of the ownership of joint bank accounts that is no longer applicable after the enactment of the Multiple Party Accounts Act in 1976. Consequently, while the analysis in Flanagan and Bohn as to testimony under the Dead Man's Rule appears still viable, their analysis of the ultimate issue of ownership of a joint account after the death of one of the parties is not.

This dichotomy is illustrated by two more recent cases. In Maniero v. Ward, 14 Fid. 2d 373 (O.C. Allegheny Cty. 1994) the court applied both the Dead Man's Act and 20 Pa.C.S. § 6304 to a dispute involving ownership of joint certificates of investment in the name of decedent Pauline Bernat and the surviving party Daria Ward. After the death of Ms. Bernat, the executor of her estate, Florence Mainiero, claimed that the certificates belonged to the estate. The Maniero court, however, rejected the executrix's claim and concluded instead that under 20 Pa.C.S. § 6304, the surviving owner of the account "Daria Ward became the sole owner of the account upon the death of Pauline Bernat," the other co-owner. Id. at 375. In reaching this result that the estate had no claim to the joint account, the executrix was deemed incompetent to testify based on the Dead Man's Act:

> The lips of Florence Mainiero [the executrix] are sealed on the basis of the prima facie case of survivorship raised by the documents, the certificates of investment. Judicial Code of July 9, 1976, P.L. 586, § 2, 42 Pa.C.S.A. 5930 [Dead Man's Act]. Daria Ward stands in the shoes of decedent and Florence Mainiero, estate beneficiary and executrix, whose pecuniary interest is adverse, may not testify. No independent clear and convincing evidence on the stipulated record impugns the title of Daria Ward.
> Id. at 375.

A similar result was reached by an Orphans' Court in Dauphin County which concluded that under 20 Pa.C.S. §6304 a daughter whose name was placed on a joint bank account by her father had title to that account upon the death of her father. With the enactment of section 6304, the court noted, the Pennsylvania legislature radically changed prior case law and "established a presumption of appurtenant survivorship rights whenever a joint account is created." Dickey v. Kundrat, 4 Fid. Rep. 2d 367, 368 (O.C. Dauphin Ct. 1984). While applying the presumption of survivorship under the Multiple Party Accounts Act, the Orphans' Court also applied the Dead Man's Act to preclude testimony by an heir to the deceased father's estate. Id. at 370-71.

Obviously, the ruling by the Superior Court in Pagnotti v. Old Forge Bank that a mother who established a joint bank account was not barred by the Dead Man's Act from testifying under the devisavit vel non exception would control over the rulings of the lower courts' opinions in Dickey v. Kundrat or Maniero v. Ward. But the previously discussed analysis of the Dead Man's Rule by the Pennsylvania Supreme Court in Flanagan v. Nash, 185 Pa. 41, 39 A. 818 (1898) must cast some doubt as to the applicability of the devisavit vel non exception in the present case.

3. The Refusal to Permit Certain Testimony in this Case Would Be Harmless Error Because Even If the Testimony That Was Precluded Under the Dead Man's Rule Were Considered It Would Not Suffice to Meet the Standard of Clear, Precise and Convincing Evidence Required to Rebut the Presumption of Survivorship Under 20 Pa.C.S. § 6304

Petitioner in her statement of matters complained of on appeal and in her post-trial brief does not identify the specific testimony that she believes was improperly excluded at trial. Yet some insight as to the particular testimony at issue was offered

during the post-hearing oral argument where counsel for petitioner argued that "[a]t a minimum, I don't think there was any downside risk or harm in allowing my client, the petitioner, Lois Barish, to discuss her personal knowledge, and the Court, as factfinder, is free to judge her credibility."[50]

On the record presented, Lois Barish's credibility on the dispositive issue of the decedent's intent was, however, severely undermined by the testimony that she did give. As previously discussed, the central issue raised by Ms. Barish's petition is whether she has a valid claim against the joint bank account that was in the name of her mother, Sarah Katz, and sister, Doris Katz. Under 20 Pa.C.S. §6304, to rebut the presumption that any sum remaining in a joint account belongs to the surviving party, a claimant must present clear and convincing evidence of a different intent at the time the account was created "which is the highest burden in our civil law." Estate of Heske, 436 Pa. Super. at 65, 647 A.2d at 244.

In the instant case, Ms. Barish's testimony failed to reach this requisite level of "clear and convincing evidence." Ms. Barish admitted, for instance, that she lacked personal knowledge of the formation of the joint accounts, and in fact, had never seen the bank accounts or certificates of deposit until a year after her mother's death when she saw the inheritance tax form for her mother's estate.[51] Her testimony indicated that she was a highly interested party who believed she should have received "something" from her mother's estate.[52] In attempting to impugn the honesty of Doris Katz by stating that Ms. Katz had used her address to defraud her car insurer and avoid city wage tax, Lois Barish also raised serious questions about her own credibility. Ms. Katz's rebuttal

[50] 11/17/08 N.T. at 3-4 (Petrilli).
[51] 7/15/08 N.T. at 6-7, 20-21 (Barish).
[52] 7/15/08 N.T. at 10-11 (Barish).

testimony that Ms. Barish had knowingly cooperated in the scheme to give an incorrect address was unwittingly supported by Ms. Barish when she confessed knowledge that her oldest daughter who worked with the IRS had changed a figure on Doris Katz's income tax form to benefit Doris Katz.[53] Based on this record, neither Doris Katz nor Lois Barish emerged as credible witnesses whose views of the decedent's intent could be given much weight. Similarly, the credibility of testimony by petitioner's daughter, Erica Blatnick, and her "other half," Ralph Metzger, was undermined by their close relationship to Ms. Barish.

In contrast, the testimony of the disinterested attorney, Jay Sklar, as to his conversations with Sarah Katz were both persuasive and directly relevant to the central issue of decedent's intent regarding the survivorship of the joint account. While in the process of drafting Sarah Katz's will, Jay Sklar specifically asked her about the joint accounts and informed her that that "You know this means Doris gets the money when you die," to which Sarah Katz replied "I know."[54] In the context of the record as whole, this testimony was most compelling as to the central issue of the decedent's intent. Estate of Diembic, 321 Pa. Super. at 522, 468 A. at 1111. It is also directly relevant to the second, remaining count of Lois Barish's Petition to Turn Over Fund which asserted that at the time she executed her will, "Sarah Katz believed in November 2004 that the bank accounts recited in paragraph 4 [of the Barish petition] would be in her estate at her death to fund her bequests."[55]

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[53] *Compare* 7/15/2008 N.T. at 18-19 (Barish) *with* 7/15/08 N.T. at 54-55 (Katz).
[54] 7/15/2008 N.T. at 74-75 (Sklar).
[55] Ex. P-1, ¶ 25.

Conclusion

For these reasons, the nonsuit was properly entered in this matter.

BY THE COURT:

Date: _____ _____
John W. Herron, J.