IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
ORPHANS' COURT DIVISION

O.C. No. 21 DE of 2013
Control # 152623

Estate of LILLIAN POWELL, Deceased

OPINION SUR APPEAL

Helen Kessel and Richard Powell (hereinafter collectively referred to as "Appellants") appeal the Trial Court's Decree dated January 16, 2018 denying their Petition to Enforce Forfeiture Clause as well as the Trial Court's Decree dated December 29, 2016 granting Myrna Dukat's (hereinafter referred to as "Appellee") Motion to Limit Evidence at the Forfeiture Hearing (hereinafter referred to as the "Motion to Limit Evidence").[1]

Facts and Procedural History

Lillian Powell (hereinafter referred to as "Decedent") died on October 29, 2012 and was survived by three children: Appellants and Appellee. During Decedent's lifetime, and specifically from 1989 to 2012, Decedent created a myriad of estate planning documents including five wills with codicils thereto, seven trusts

[1] The Motion to Limit Evidence and the Answer filed thereto were filed in anticipation that a separate forfeiture hearing would be held; however, said Motion was granted by this Court's Decree dated December 29, 2016 thereby limiting the evidence to the record created during the will contest trial.

with amendments thereto, and three powers of attorney, all of which were drafted by various attorneys.[2]

Throughout this same time period, Decedent suffered from a host of health issues including two strokes, macular degeneration, a broken hip, four other bone fractures, hearing loss, and blindness.[3] Appellee took an early retirement to care for Decedent after Decedent's first stroke in 1993 which resulted in permanent left-side paralysis.[4] For approximately eleven years, Appellee assisted Decedent with bathing, dressing, food shopping, and doctor appointments.[5] Appellee took Decedent to Florida for three months every year to make Decedent "feel whole again."[6] Appellee wrote the checks to pay Decedent's bills after Decedent's second stroke in 2010 because Decedent could not see to write her bills.[7]

In the beginning of 2012, while Decedent was receiving hospice care, Appellee's sister, Appellant Helen Kessel, arranged a meeting to have Decedent's estate planning documents revised.[8] On February 2, 2012, Decedent executed a Seventh Amended and Restated Revocable Trust Agreement as well as a Last Will and Testament which contains a penalty clause for contest under Item TWELFTH,

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[2] Exhibit JT-18 summarizing Decedent's estate planning documents.
[3] N.T. 5/20/15, pp. 18-25; N.T. 5/19/15, p. 166.
[4] N.T. 5/20/15, pp. 18-19.
[5] N.T. 5/20/15, pp. 19-21.
[6] N.T. 5/20/15, pp. 19-20.
[7] N.T. 5/20/15, p. 23.
[8] N.T. 5/19/15, pp.125-26.

Paragraph F (hereinafter referred to as the "Forfeiture Clause") and names Appellants as Co-Executors.[9] Approximately two weeks after execution of the aforementioned documents, Decedent executed a new Power of Attorney in which Appellants replaced Appellee as Agent.[10]

Four days after Decedent's death, Decedent's Last Will and Testament dated February 2, 2012 was duly admitted to probate by the Register of Wills of Philadelphia County on November 2, 2012 (hereinafter referred to as the "Probated Will"), and Letters Testamentary were granted to Appellants.[11]

Appellee filed a Petition for Citation and Preliminary Injunction on January 4, 2013 to have Decedent's Probated Will declared null and void alleging undue influence, fraud, constructive fraud, lack of capacity, defamation/undue influence and equitable estoppel. Appellee also demanded that Appellants file an accounting of Decedent's assets and that they be enjoined from transferring or dissipating any of Decedent's assets or records relating thereto.[12]

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[9] Exhibits JT-1 and JT-18.
[10] Exhibit JT-18.
[11] Exhibit JT-2.
[12] Appellants filed Preliminary Objections on March 25, 2013, which were sustained in part and overruled in part by this Court's Decree dated April 22, 2013. The Preliminary Objections to Appellee's request for an accounting and defamation claim were sustained, while the Preliminary Objections to Appellee's request for preliminary injunction and claims of undue influence, fraud, constructive fraud, lack of capacity, and equitable estoppel were overruled. Appellee's claims of constructive fraud and equitable estoppel were later withdrawn at trial. *See* N.T. 5/20/15, pp. 118-19.

Appellants filed an Answer with New Matter on May 28, 2013, seeking enforcement of the Forfeiture Clause against Appellee for lack of probable cause, to which Appellee replied by filing an "Answer to New Matter" on June 17, 2013 requesting that Appellants' New Matter be dismissed with prejudice.

By Decree dated July 9, 2013, the Court ordered all counsel to show cause why the matter should not be dismissed for attacking the validity of Decedent's duly Probated Will without filing an appeal to the Register's Grant of Letters Testamentary. Appellee filed a Notice of Appeal with the Register of Wills on October 2, 2013. Several case management decrees were subsequently issued to set discovery deadlines and schedule conference and trial dates.[13]

A two-day will contest trial was held on May 19-20, 2015, at which time Appellants offered the Register's file into evidence, as is usual in these types of cases, with the Appellee thereafter opening her case. Appellee testified on Decedent's numerous health issues and her role as Decedent's sole caregiver. Lisa Berkowitz, Decedent's granddaughter who is a psychiatric nurse practitioner, also testified as to Decedent's health issues. Appellee offered the testimony from Stephen Green, Esquire, Andrew Peltzman, Esquire and Paul Feldman, Esquire who drafted Decedent's aforementioned estate planning documents.

[13] *See* Court Decrees dated March 6, 2014, April 3, 2014, June 4, 2014, August 6, 2014, and February 19, 2015.

At the close of Appellee's case, Appellants motioned for compulsory nonsuit, which was held under advisement by the Trial Court, and ultimately granted by Decree dated June 30, 2015. A motion to open or strike the nonsuit was not filed.

Appellants filed their Petition to Enforce Forfeiture Clause twenty-nine days later on July 29, 2015 and filed a Petition for Award of Counsel Fees and Costs the following day.[14] Appellee filed Answers on August 19, 2015 and August 20, 2015, respectively. However, before these pleadings were ruled upon, the Court addressed two Motions for Discovery Sanctions and held two off-the-record conferences.[15] Appellee also filed a Motion to Limit Evidence on July 8, 2016, which the Court granted by Decree dated December 29, 2016.

On January 16, 2018, the Court denied Appellants' Petition to Enforce Forfeiture Clause and Counsel for Appellants timely filed this appeal on January 26, 2018. Pursuant to the Trial Court's Decree dated January 26, 2018, Appellants timely filed their Pa. R.A.P. 1925(b) Statement of the Errors Complained of on Appeal on February 14, 2018.

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[14] Upon application of Appellants, and without objection of Appellee, all further action relating to Appellants' Petition for Award of Counsel Fees and Costs has been stayed per this Court's Decree dated February 6, 2018.

[15] *See* Trial Court Decrees dated September 18, 2015, December 3, 2015, December 22, 2015, February 23, 2016, April 19, 2016, and May 24, 2016.

Issues

Appellants filed their Statement of Matters Complained of on Appeal raising the following issues, repeated verbatim from their Pa. R.A.P. 1925(b) Statement:

> **1. The trial court erred as a matter of law when it concluded that probable cause existed to institute the probate appeal filed by Myrna Dukat.**
>
> **2. The conclusion that probable cause existed to institute the probate appeal filed by Myrna Dukat was against the clear weight of the evidence.**
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> **3. The trial court erred as a matter of law when it granted the Motion to Limit Evidence at the Forfeiture Hearing and denied Appellants the right to create a record with respect to the Petition to Enforce Forfeiture Clause.**
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> **4. The trial court abused its discretion when it granted the Motion to Limit Evidence at the Forfeiture Hearing and denied Appellants the right to create a record with respect to the Petition to Enforce Forfeiture Clause.**
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> **5. The trial court denied Appellants' right to procedural due process under the Pennsylvania and United States Constitutions when it granted the Motion to Limit Evidence at the Forfeiture Hearing and denied Appellants the right to create a record with respect to the Petition to Enforce Forfeiture Clause.**

The Trial Court has restated Appellants' issues to address them in a more concise fashion as follows:

> **1. Whether the Trial Court's finding that probable cause existed to institute the probate appeal constituted an error of law and was not supported by the evidence.**
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> **2. Whether the Trial Court erred as a matter of law and abused its discretion when it granted the Motion to Limit Evidence, thereby denying**

Appellants the right to create a record with respect to the Petition to Enforce Forfeiture Clause.

3. Whether the Trial Court denied Appellants' right to procedural due process under the Pennsylvania and United States Constitutions by granting the Motion to Limit Evidence, and by doing so, denied Appellants the right to create a record with respect to the Petition to Enforce Forfeiture Clause.

Discussion

1. The Trial Court's finding that probable cause existed to institute the probate appeal did not constitute an error of law and is supported by the evidence.

The standard of review applied to Orphans' Court findings has been described by this Honorable Superior Court as follows:

> The findings of a judge of the orphans' court division, sitting without a jury, must be accorded the same weight and effect as the verdict of a jury, and will not be reversed by an appellate court in the absence of an abuse of discretion or a lack of evidentiary support. This rule is particularly applicable to findings of fact which are predicated upon the credibility of the witnesses, whom the judge has had the opportunity to hear and observe, and upon the weight given to their testimony. In reviewing the Orphans' Court's findings, our task is to ensure that the record is free from legal error and to determine if the Orphans' Court's findings are supported by competent and adequate evidence and are not predicated upon capricious disbelief of competent and credible evidence.

In re Jackson, 174 A.3d 14, 23 (Pa. Super. 2017) (quoting *In re Paxson Trust I*, 893 A.2d 99, 112 (Pa. Super. 2006)); *In re Estate of Cherwinski*, 856 A.2d 165, 167 (Pa. Super. 2004).

In Pennsylvania, "a provision in a will or trust purporting to penalize an interested person for contesting the will or trust... is unenforceable if probable cause exists for *instituting* proceedings." 20 Pa.C.S. § 2521 (emphasis added). This statute was enacted by the Pennsylvania legislature in 1994 and codified a long line of cases that carved out and expanded upon the probable cause exception to forfeiture clauses.[16]

The probable cause exception was first recognized by our Pennsylvania Supreme Court when it affirmed a trial court's decision to not enforce a forfeiture provision against an unsuccessful will contestant because the contest was "justified under the circumstances." *In re Friend's Estate*, 58 A. 853, 854 (Pa. 1904). The Court observed that even though some courts enforce forfeiture provisions without exception, this would be the better approach to follow in order to avoid injustice to the will contestant as well as the testator's original intent. *Id.* Therefore, the Court held that forfeiture provisions should not be enforced where there clearly existed "*probabilis causa litigandi*." *Id.* at 855.

Although the Court in *Friend's Estate* did not directly define probable cause, it found determinative whether the will contestant "under the information which he

[16] JT. ST. GOVT. COMM. COMMENT (1994). *See, e.g., Appeal of Chew*, 45 Pa. 228 (Pa. 1863); *In re Friend's Estate*, 58 A. 853 (Pa. 1904); *In re Lewis' Estate*, 19 Pa. D. 432 (O.C. Phila. 1910); *McMillin Will*, 8 Pa. Fiduc. 315 (O.C. Lawr. 1958); *In re Estate of Simpson*, 595 A.2d 94 (Pa. Super. 1991); *Estate of Keller*, 629 A.2d 1040 (Pa. Super. 1993); *Vanderkraats Estate (No.3)*, 14 Pa. Fiduc. 2nd 166, 167 (O.C. Chester 1994).

possessed, and in view of what he had to prove in the first instance, was justified in questioning the validity of [the] will." *Id.* at 856. The Court further noted "[i]f the question is to be determined in view of the findings and conclusions reached after the full hearing... it may well be contended that probable cause did not exist; but that is not the test." *Id.*

Since *Friend's Estate,* Pennsylvania courts have attempted to more fully define probable cause in the enforcement of forfeiture clauses in will contests. This Honorable Superior Court has previously held "mere unsubstantiated suspicions certainly cannot rise to the level of probable cause so as to avoid the imposition of the forfeiture clause." *In re Estate of Simpson*, 595 A.2d 94, 99–100 (Pa. Super. 1991). Similarly, the Orphans' Court of Chester County defined probable cause as "a good faith belief, rather than a mere suspicion, disappointment, or resentment." *Vanderkraats Estate (No.3)*, 14 Pa. Fiduc. 2nd 166, 167 (O.C. Chester 1994).

Here, Appellee instituted the will contest, based in part, on the allegation that Decedent lacked testamentary capacity when the Probated Will was executed. At trial, Appellee testified as to her personal knowledge of Decedent's health issues including two strokes suffered by Decedent, Decedent's macular degeneration, and Decedent's blindness.[17] Lisa Berkowitz, the Decedent's granddaughter and a psychiatric nurse practitioner, also testified as to Decedent's second stroke which

[17] N.T. 5/20/15, p. 23.

resulted in ongoing paranoia and increased agitation.[18] Although Appellee's lack of testamentary capacity claim ultimately failed, the Trial Court found Appellee's testimony of her observations and the care provided to Decedent to be credible, and together with changes made to Decedent's estate plan and the credible testimony of members of the Bar, constitutes probable cause for the institution of the will contest action.

Supporting the Trial Court's finding of probable cause was the abrupt reversal of the dispositive scheme of the Decedent's estate plan developed over more than twenty (20) years. Documents marked as Joint Exhibits show that from March 10, 1989 to February 15, 2012, Decedent executed an initial will, a second will with four codicils, three more wills, an initial "Revocable Trust Agreement" with two modifications, an "Amended and Restated Revocable Trust Agreement," a "Second Amended and Restated Revocable Trust Agreement" with four amendments, two of which were subsequently restated, a "Third," "Fourth," and "Fifth" "Amended and Restated Revocable Trust Agreement," a "Sixth Amended and Restated Trust Agreement" with an amendment, a "Seventh Amended and Restated Trust Agreement," and three powers of attorney.[19] Testimony at trial showed that there

[18] N.T. 5/19/15, pp. 165-66, 168.
[19] Exhibit JT-18; *See also* Exhibit JT-3.

were in fact eleven trusts before the "Amendment to the Sixth Amended and Restated Revocable Trust" was executed.[20]

On December 15, 2008, Decedent executed a third Will and the "Sixth Amended and Restated Revocable Trust Agreement," the latter of which gave Appellee a 40% share and each Appellant a 30% share.[21] On February 21, 2011, the Decedent executed a fourth Will, which expressed her feelings of being upset and disappointed with Appellant Kessel, and completely removed her from the estate plan.[22] Appellee testified that the Decedent "wanted a document in her own words stating why" she was making changes to her will.[23] In the fourth Will, Decedent increased Appellee's share to 70% and reduced Appellant Kessel's previous 30% share to 0%.[24] Likewise, a month later, the "Amendment to the Sixth Amended and Restated Revocable Trust Agreement" dated March 11, 2011 completely removed Appellant Kessel and gave Appellee a 70% share.[25] In addition, Appellee was named Successor Trustee after Decedent, followed by Appellant Powell, and then by Appellee's daughter, Lisa Berkowitz.[26]

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[20] N.T. 5/20/15, pp. 63-64.
[21] N.T. 5/19/15, pp. 21, 23; *See also* Exhibits JT-11, JT-12 and JT-18.
[22] N.T. 5/19/15, pp. 37-38; Exhibit JT-13.
[23] N.T. 5/20/15, pp. 33-34.
[24] Exhibit JT-13.
[25] Exhibit JT-14.
[26] N.T. 5/20/15, pp. 87-88.

Stephen Green, Esquire, the scrivener of the aforementioned "Amendment to the Sixth Amended and Restated Revocable Trust Agreement," testified as to having personally met with Decedent alone multiple times to discuss the removal of Appellant Kessel from this document and that Decedent's decision was due to Appellant Kessel's lack of visiting, calling, or taking care of her.[27] Attorney Green's account was bolstered by Appellee's credible testimony about her mother's feeling "very neglected and abandoned by" Appellant Kessel.[28] Moreover, both Attorney Green's and Appellee's testimony were consistent with the strong language of the fourth Will, which details "abusive treatment" and "18 plus years" of abandonment by Appellant Kessel and her family.[29]

Nonetheless, less than a year later, on February 2, 2012, Decedent executed a "Seventh Amended and Restated Revocable Trust Agreement" and the Probated Will, which was Decedent's fifth Will and distributed her estate equally[30] among Appellants and Appellee.[31] The "Seventh Amended and Restated Revocable Trust Agreement" and the Probated Will also named Appellants as Co-Trustees and Co-Executors, respectively.[32] In addition to being removed as Trustee, Appellee was

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[27] N.T. 5/19/15, pp. 21-23.
[28] N.T. 5/20/15, pp. 31, 34.
[29] Exhibit JT-13.
[30] There was one slight exception: Appellant Kessel received a grandfather clock, which was the sole specific bequest in the Probated Will. *See* Exhibit JT-2.
[31] Exhibits JT-2 and JT-3; S*ee also* Exhibit JT-18.
[32] Exhibits JT-2 and JT-3.

also removed as Decedent's Power of Attorney, which she had been since at least October 2010, and was replaced by Appellants.[33]

Further support for the Trial Court's finding of probable cause was provided by credible testimony of two members of the Bar, which demonstrated that Appellant Kessel initiated contact with them to revise Decedent's estate plan. Paul Feldman, Esquire testified that it was Appellant Kessel who contacted him in 2010 as a result of finding Decedent's then-current estate plan "objectionable."[34] However, Attorney Feldman declined to enter into an attorney-client relationship with Decedent and did not make any changes to her estate plan based on concerns that Decedent was caught between her two daughters.[35]

Andrew Peltzman, Esquire was the scrivener of Decedent's Probated Will, "Seventh Amended and Restated Revocable Trust Agreement," and Power of Attorney of February 15, 2012.[36] Mr. Peltzman testified that Appellant Kessel contacted him in 2012 to evaluate Decedent's estate plan while the Decedent was receiving hospice care.[37]

Appellee's observations of Decedent's failing health, the dramatic reversal of Decedent's long developing estate plan, and Appellant Kessel's initiatives to change

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[33] N.T. 5/20/15, pp. 58, 133; *See also* Exhibit JT-18.
[34] N.T. 5/20/15, pp. 82-83.
[35] N.T. 5/20/15, p. 102.
[36] N.T. 5/19/15, p. 101; *See also* Exhibits JT-2, JT-3 and JT-18.
[37] N.T. 5/19/15, p. 126, 128.

the estate plan despite Decedent's ill feelings toward her were based on evidence found credible by the Trial Court and collectively considered probable cause. It is respectfully submitted that in giving credence to the testimony presented by Appellee, which was unwavering under cross-examination and bolstered by otherwise disinterested members of the Bar, it would have been an abuse of the Trial Court's discretion to not credit such testimony.

Despite the failures of the claims of undue influence and lack of testamentary capacity, probable cause to institute the contest, as defined by controlling case law, existed as a matter of law and is supported by the clear weight of the evidence. Therefore, the Trial Court did not err or abuse its discretion when it denied Appellants' Motion to Enforce the Forfeiture Clause.

2. The Trial Court did not err as a matter of law and did not abuse its discretion when it granted the Motion to Limit Evidence, and therefore did not deny Appellants the right to create a record with respect to the Petition to Enforce Forfeiture Clause.

Appellants first raised enforcement of the Forfeiture Clause in their Answer with New Matter filed on May 28, 2013 in response to Appellee's Petition for Citation and Preliminary Injunction, thus earmarking it as an issue from the very onset of the will contest.

After multiple pre-trial filings and decrees, Appellants filed an unprompted Pre-trial Memorandum Regarding Enforcement of Forfeiture Clause and Counsel

Fees on May 15, 2015, four days prior to the scheduled will contest trial, in which they asserted "...consideration of the applicability and enforcement of the Forfeiture Clause *will be an issue before the Court at trial*" (emphasis added).[38] It was clear to the Trial Court and Appellants that enforcement of the Forfeiture Clause was a fundamental issue to be resolved at the time of the will contest trial. In the same Pre-trial Memorandum, Appellants stated "In the event that, following the trial, the Court requests post-trial briefing, Proponents reserve the right to revisit the question of forfeiture more completely, *based on the record created*" (emphasis added).[39] It is unmistakable that Appellants were aware that the forfeiture issue would be dependent on the record created at the time of trial and thus the onus was on Appellants to present all necessary evidence to create the record they felt was necessary to prove entitlement to forfeiture at the time of trial.

On May 20, 2015, at the conclusion of Appellee's case-in-chief, Appellants immediately motioned for compulsory nonsuit on the counts of fraud, lack of testamentary capacity, and undue influence.[40] Appellants failed to make any requests at that time to have a separate hearing on enforcement of the Forfeiture Clause or to bifurcate the forfeiture issue and continue the trial to admit evidence on

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[38] Appellants' Pre-trial Memorandum Regarding Enforcement of Forfeiture Clause and Counsel Fees, p. 2.
[39] Appellants' Pre-trial Memorandum Regarding Enforcement of Forfeiture Clause and Counsel Fees, p. 2, fn. 1.
[40] N.T. 5/20/15, p. 124.

that issue only. It was Appellants' obligation to take action necessary to preserve their forfeiture claim upon moving for nonsuit, but they did nothing.

Consequently, the Trial Court held the Motion for Nonsuit under advisement and properly adjourned court.[41] After careful consideration, the Trial Court granted Appellants' Motion for Nonsuit by Decree dated June 30, 2015. Neither Appellants nor Appellee filed a motion to remove the nonsuit.

Appellants filed a separate Petition to Enforce Forfeiture Clause on July 29, 2015, one day prior to the expiration of the appeal period, and then a Petition for Award of Counsel Fees and Costs which resulted in multiple attorney conferences, the authorization of discovery by mutual consent, and Appellee's subsequent filing of a Motion to Limit Evidence on July 8, 2016. In response, Appellants filed an Answer to the Motion to Limit Evidence on August 12, 2016 arguing that the will contest and the forfeiture action were two distinct legal issues and as such were not the same action. This argument is wholly inconsistent with Appellants' averment in their Pre-trial Memorandum that "enforcement of the Forfeiture Clause will be an issue before the Court at trial."[42]

The Trial Court granted Appellee's Motion to Limit Evidence on December 29, 2016 and afforded both Appellants and Appellee the additional opportunity to

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[41] N.T. 5/20/15, p.134.

[42] Appellants' Pre-trial Memorandum Regarding Enforcement of Forfeiture Clause and Counsel Fees, p. 2.

submit proposed findings of facts and conclusions of law on the Petition to Enforce Forfeiture Clause, which were filed on March 6, 2017 and March 7, 2017, respectively.

Appellants had every opportunity to produce evidence and build a record on the forfeiture issue at the time of trial but instead made the strategic decision to move for nonsuit, and thus admitted no evidence essential to prove entitlement to forfeiture at trial.

The Trial Court committed no error and did not abuse its discretion in limiting the evidence with respect to forfeiture to the record created at the will contest trial when it was clear to all parties, and the Trial Court, that the forfeiture issue was established from the onset of this matter and was ripe for disposition at the time of the trial.

3. The Trial Court did not deny Appellants' right to procedural due process under the Pennsylvania and United States Constitutions when it granted the Motion to Limit Evidence at the Forfeiture Hearing, and therefore did not deny Appellants the right to create a record with respect to the Petition to Enforce Forfeiture Clause.

In attempting to respond to this allegation of error, the Trial Court must assume that the procedural due process issue presented here is limited to the allegation that by granting the Motion to Limit Evidence, Appellants were prevented from creating a record. The Trial Court, therefore, considers any other due process issues waived.

The Pennsylvania Supreme Court has held "the basic elements of procedural due process are adequate notice, the opportunity to be heard, and the chance to defend oneself before a fair and impartial tribunal having jurisdiction over the case." *Commonwealth v. Turner*, 80 A.3d 754, 764 (Pa. 2013).

If Appellants' contention that their Petition to Enforce Forfeiture Clause entitles them to a separate trial with separate discovery, they would obviously be correct, except as previously demonstrated, the New Matter filed in response to the original Petition for Citation and Preliminary Injunction specifically pled the claim for forfeiture, which remained at issue during the will contest trial, and the subsequent Petition to Enforce Forfeiture Clause gave them no greater rights than they already had.

In fact, Appellants had already performed extensive discovery, in which Appellee was deposed, conferences were held and numerous pre-trial submissions were filed. Also, Appellants never asserted that the trial of the properly pled issues did not include forfeiture. It is important to note that by such deposition, the Dead Man's Act had been waived and was, therefore, never a consideration.

Only after the Trial Court granted the Motion for Nonsuit, did Appellants file a separate Petition to Enforce Forfeiture Clause. Coincidentally, this Petition was filed twenty-nine days after nonsuit was granted, long after the ten-day time period permitted for striking a compulsory nonsuit.

Although it is common in Orphans' Court litigation for one estate to generate a multitude of litigation raised by separate petitions, here the issue of forfeiture was raised by Appellants in, and as a part of, the will contest. Since it was raised by Appellants, it was their responsibility to see to its ultimate prosecution or severance/bifurcation from trial.

While the Trial Court was mindful of the unusual issues created by the nonsuit and was desirous of seeing that the interests of justice were served, it could not consider Appellants' after-filed petition as new litigation and afford them a new trial with new discovery as they requested. Not only did the Trial Court have the obligation to consider the issue of expenditure of judicial assets, but it also had to move to protect the procedural due process rights of Appellee, who had timely objected to Appellants' departure from usual trial procedure.

Conclusion

It is respectfully submitted that the Trial Court's finding that Appellee had probable cause to institute the will contest was not an abuse of discretion nor an error of law and was certainly supported by the weight of the evidence. Further, granting the Motion for Nonsuit in no way supports Appellants' claim that probable cause to bring the will contest did not exist. While probable cause did exist for the *institution* of the will contest, Appellee's inability *thereafter* to maintain her burden is

irrelevant.

It has been demonstrated that forfeiture was placed at issue in the will contest by Appellants who, at trial, took no measures to either adjudicate, sever, bifurcate or have this issue litigated until well after the Motion for Nonsuit was granted in the will contest case. Interestingly enough, Appellants' Motion for Nonsuit did not include the forfeiture claim, thus making it the only remaining claim that was viable for trial.

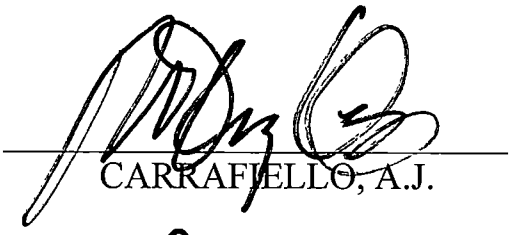
It is respectfully submitted that it was Appellants who erred and infringed upon the due process rights of Appellee by artfully ignoring the presence of their outstanding forfeiture claim and raising it anew with expectation that it be treated as if it had never been previously raised.

Granted that the complexities of these issues are extreme, and definitive case law is all but nonexistent, nevertheless, instead of seeking the timely guidance and/or intervention of the Court with notice to Appellee, Appellants' did nothing until the nonsuit had become final, and the appeal period all but run.

Upon review of the Petition to Enforce Forfeiture Clause, the Trial Court was quite tempted to permit a hearing, if only in the interest of justice. However, in light of the substantial evidence supporting probable cause, coupled with Appellants' insistence on a separate trial with new discovery, the Trial Court entered its decision

herein, finding that Appellants' position was clearly unsupported by any legal precedent or concepts of fairness.

Therefore, it is respectfully submitted that the Trial Court's decision be affirmed.



CARRAFIELLO, A.J.

Dated: April 12, 2018

Adam Gusdorff, Esq.
Thomas Harty, Esq.