

IN THE
SUPREME COURT OF PENNSYLVANIA
SITTING AT PITTSBURGH

AUDREY ROSS,

Respondent

vs.

POLICEMEN'S RELIEF AND
PENSION FUND OF THE
CITY OF PITTSBURGH,

Petitioner

PETITION FOR ALLOWANCE OF APPEAL

Petition for Allowance of Appeal from the order of the Commonwealth Court, entered May 27, 2005 at 1882 CD 2004, denying reargument of the order entered February 25, 2005, affirming the order of the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division, entered August 30, 2004 at G.D. 02-21202.

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PETITION FOR ALLOWANCE OF APPEAL

Introduction

This petition seeks allowance of appeal from the order of the Commonwealth Court, entered April 27, 2005, denying reargument of the order entered February 25, 2005, affirming the order of the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division, entered August 30, 2004 at G.D. 02-21202 (Lutty, J.), granting judgment on the pleadings in a declaratory judgment action. The panel consisted of Judge Colins, Judge Simpson, and Judge Leavitt; Judge Colins authored the opinion, which is reported at 871 A. 2d 277.

Respondent Audrey Ross claims to be the common law widow of Gregory Adams, a retired Pittsburgh police officer who died on June 19, 2001. Her claim was upheld in a prior declaratory judgment action, heard in Orphans' Court, to which the Fund was not a party. In the declaratory judgment action sub judice, filed in the Civil Division, she asked the court to hold that the Fund was bound by the decree entered in the first action and to direct the Fund to pay her surviving spouse benefits. The Court of Common Pleas held that the marital status question had been finally decided in Orphans' Court, and granted Ross judgment on the pleadings. The Commonwealth Court affirmed, holding that it had not been necessary for Ross to join the Fund in the Orphans' Court action because the Fund had no claim, interest, or right that could have been prejudiced in that proceeding, and then *ordered the Fund to pay Ross benefits on the basis of the Orphans' Court decree.*

The Commonwealth Court also upheld an award of interest from the date of Adams' death.

The Fund does not believe that Ross ever married Adams, and believes that it has a right to be heard on that issue before being ordered to pay benefits to Ross. The Fund further believes that, since its actions were taken in good faith reliance on existing law, the award of interest was in error.

Statement of the Case

Ross' current Complaint for Declaratory Judgment was filed on November 6, 2002. The complaint asked that the Fund be held to be bound by the Orphans' Court declaratory judgment, be ordered to pay Ross a surviving spouse benefit, and be ordered to pay damages and counsel fees based on its refusal to honor the Orphans' Court decree. R. 5a-9a.

The Orphans' Court opinion and decree were appended to the complaint. The caption is "Audrey Ross, Plaintiff v. Gregory Williams [sic] Adams, Defendant"; the opinion states:

Audrey Ross (Plaintiff) lived with Gregory Adams for approximately eleven (11) years^[1] before his death on June 19, 2001. . . . After the Decedent's death, the Plaintiff filed for spousal pension benefits from the Fraternal Order of Police (FOP). The FOP informed the Petitioner that since she did not have a formal marriage license^[2], she would have to acquire a court order declaring a common law marriage in order to

¹ The length of the cohabitation has not been pled in this matter and has not been admitted. R. 7a-8a. The Fund has admitted that Adams was living with Ross at the time of his death. R. 60a.

² As more fully set forth *infra*, the Fraternal Order of Police is not involved in this matter. Any communications between Ross and the Fund prior to the first declaratory judgment action are outside the pleadings in this case.

receive the spousal benefits.

The plaintiff brought this action in the nature of a complaint for declaratory judgment to have a common law marriage declared between herself and the Decedent[.] The Decedent's daughters, Cheryl Adams and Mary Morrow (Respondents) oppose the declaration of a common law marriage. [R. 11a.]

The cover page of the opinion indicates that the daughters were represented by Matthew E. Fischer, Esquire of Butler, Pennsylvania. R. 10a. Judge Little based his finding of marriage on the cohabitation period and on the following additional evidence:

(1) Officer Adams' nephew testified that his children referred to Ross as "Aunt Audrey" both verbally and in writing;

(2) Two neighbors of the couple, unrelated to each other, testified that they believed Ross and Adams were married;

(3) Ross' employer testified that he believed Ross and Adams were married, and that Adams would call and ask to speak to his "wife";

(4) Ross testified that Adams purchased an engagement ring and a wedding band for her in December of 1994, and that she purchased a wedding band for him approximately two years later. Ross and Adams always wore their rings. [R. 12a-13a.]

While Ross listed her marital status as single on her tax returns, Judge Little felt that this was adequately explained. R. 13a-14a.

The decree states:

AND NOW, to-wit, this 23rd day of August, 2002, an Opinion having been entered in the above-captioned case, it is hereby ORDERED, ADJUDGED and DECREED that the complaint filed by the Plaintiff, Audrey Ross, to have a common law marriage declared between herself and the Decedent, Gregory Williams Adams, is granted. [R. 16a.]

A September 23, 2003 letter from the Fund's solicitor to

Ross' counsel was also appended to Ross' complaint; the letter states, *inter alia*:

[T]he Fund does not consider itself bound by the order entered by the Orphans' Court finding Audrey Ross to be the common law widow of Gregory W. Adams. . . . The Fund was not made a party to the action, received no notice of it, and had no opportunity to litigate the issue of whether a common law marriage took place between Ms. Ross and Mr. Adams.

Past practice has been for such matters to be filed in the Family Division³ and for the Fund to be named as a defendant. For a claimant to be entitled to surviving spouse benefits, he or she must not only prove a marriage but must show that the marriage took place at least two years prior to the death of the officer.⁴ [R. 17a.]

On November 18, 2002, the Fund filed preliminary objections in the nature of a demurrer, stating:

[P]laintiff asks that defendant be held to be bound by a decree entered in another proceeding. Plaintiff admits that defendant was not a party to that proceeding. The decree, accordingly, cannot bind defendant. [R. 21a.]

The Fund's proposed order would have sustained the preliminary objections but given Ross the opportunity to amend

³ Should this case be remanded, the Fund will request its transfer to the Family Division.

⁴ The Fund is a creature of statute, 53 P.S. § 23644 et seq. 53 P.S. § 23654.2 provides that, if a married participant chooses to provide survivor benefits, a surviving spouse will receive one half of the amount of the pension paid to the participant at retirement, provided that the surviving spouse was married to the participant for at least two years at the time of the participant's death. If there is no eligible surviving spouse, each dependent child shall receive one fourth of the participant's benefit or an equal share of the spousal benefit, whichever is less, until reaching age 18. If there are no children and no surviving spouse, any dependent parents shall receive the payments the surviving spouse would have received. 53 P.S. § 23654.3 extends to all participants the right to elect a survivor benefit. There are no lump sum benefits, and there is never any benefit payable to a participant's estate.

her complaint to state a request for the determination of her alleged common law marriage. R. 28a.

Ross' response, filed January 9, 2003, stated "Defendant is not a necessary party to marriages in Pennsylvania or elsewhere." R. 30a.

The preliminary objections were argued January 21, 2003 before the Honorable Judith L. A. Friedman. When the Fund asserted that the enforcement of the Orphans' Court decree against it would be a denial of due process because it had no opportunity to contest the issues, Judge Friedman responded:

[I]t would only be a denial of due process if it were any of your business[.] [R. 44a.]

She went on to say:

[U]nless you're able to show me where it is written that you are entitled to notice, I don't see how you are. There's nothing in the Orphans' Court rules[.] [R. 45a-46a.]

Undersigned counsel stated:

There are no procedural rules that govern the determination of common law marriage. Every division of the Court has some occasion to make it, even criminal, and sometimes -- [R. 46a.]

Counsel was cut off by the court's ruling:

Once others decide it, the others don't revisit it, and if this decree was back in August, it's a final decree. I don't have any right to question it, and it's not a basis for preliminary objections. [*Id.*]

Ross' counsel suggested that the court grant her immediate relief; the court stated:

They're entitled to answer. Okay?

I'm deleting the last portion of the plaintiff's

proposed order⁵], and they're saying the objections are overruled. The rules require you to file your answer in 20 days. You can do that, right?

[I]f your answer is basically going to be to admit everything, maybe you ought to just pay and get it over with, because I assume he's asked for counsel fees. [R. 47a.]

The court went on to suggest that it would award counsel fees if the Fund had "no defense." Undersigned counsel advised the court that the Fund would appeal to the Commonwealth Court if Ross were ultimately granted judgment. R. 47a. The following then transpired:

THE COURT: All right. I don't want to get ahead of myself, but your answer should not include things that were already raised by preliminary objection.

MS. CHASE: Well, our answer is certainly going to include the fact that we had no notice.

THE COURT: I've already ruled as a matter of law that's the law in the case. That's irrelevant. We have a record here. You have to just file an answer, yes, no, yes, no, denied, admitted, denied, admitted, and what I'm saying is once you do that, there's judgment on the pleadings, it's inevitable that you have to pay.

Then you can appeal that decision, saying that my decision on preliminary objections is wrong, but you can't revisit that. . . . This Court unfortunately has a video record, and so nobody else is going to revisit this. . . . I'll just note that I'm overruling it for the reasons set forth in the video record, so if anybody wants to know what those are, they can transcribe it. [R. 46a-47a.]

The written order stated:

Defendant's Preliminary Objections are overruled for the reason set forth in the video record, in particular that the status of the marriage of plaintiff and her deceased husband has been finally decided and Defendant had no standing to object nor to notice of that Orphans' Court proceeding. [R. 51a; emphasis]

⁵ The deleted language would have directed the Fund to pay widow benefits and counsel fees. R. 51a.

added.][⁶]

The highlighted language was added by hand. The Fund perceived it to be declaratory and took a protective appeal to the Commonwealth Court pursuant to the decision of Your Honorable Court in *Nationwide Mutual Insurance Company v. Wickett*, 563 Pa. 595, 763 A.2d 813 (2000), which holds that orders containing declaratory language are immediately appealable. Following briefing and argument, the Commonwealth Court quashed the appeal on November 26, 2003, taking the position that since the language in question did not put the Fund out of court, it was not declaratory. R. 57a; 836 A. 2d 1091. Reconsideration was denied on January 21, 2004, and allocatur was denied on May 13, 2004 at 98 WAL 2004. 578 Pa. 691, 849 A. 2d 1206.⁷

On May 19, 2004, the Fund filed an Answer to Complaint for Declaratory Judgment with New Matter, endorsed with a Notice to Plead. R. 59a-71a. The Answer denied that Ross was the widow of Adams, stating:

After diligent investigation, defendant does not believe that plaintiff entered into a common law marriage with Mr. Adams, and defendant accordingly denies that Audrey Ross is the widow of Gregory Adams. [R. 61a.]

In other respects, with minor qualifications, it admitted the essential facts set forth in the Complaint (as opposed to the characterizations made and conclusions stated therein). The primary factual qualification was that Adams' daughters were his

⁶ Judge Friedman's opinion in support of the order has been published. *Ross v. Policemen's Relief and Pension Fund of the City of Pittsburgh*, 151 P.L.J. 123, 23 Fiduciary 2d 404 (2003).

⁷ *Wickett* has mercifully ceased to be pertinent to this case.

heirs only in the sense that they would inherit his estate if he had one, absent a will providing otherwise, if there were no surviving spouse. R. 60a-61a. The New Matter set forth further information about the Orphans' Court proceedings, including the fact that Adams left no estate. R. 61a-64a.⁸

Ross did not reply to the New Matter; instead, she filed a Motion for Judgment on the Pleadings and a supporting brief on July 7, 2004. R. 72a-87a. The motion cited Judge Friedman's ruling, stated that Judge Friedman "warned counsel not to raise issues involving the validity of the [Orphans' Court decree]", and asserted that the Answer and New Matter raised no defense to Ross' claim. R. 73a. The supporting brief urged the court to grant Ross pension benefits, interest, punitive damages, and counsel fees. R. 83a-86a.

The Fund then filed its own Motion for Judgment on the Pleadings, with a supporting brief that also responded to Ross' motion, on July 12, 2004. R. 88a-111a. Argument was heard by the Honorable Paul F. Luty, Jr. on August 30, 2004. Judge Luty questioned counsel as to whether the amount of Adams' monthly benefit during his lifetime was affected by his marital status, and was advised that it was not (Note 4, *supra*) and that there was no claim that Adams was overpaid. R. 115a-116a, R. 128a-130a. He stated:

⁸ Judge Friedman was mistaken about her ruling being law of the case. *Goldey v. Trustees of the University of Pennsylvania*, 544 Pa. 150, 675 A. 2d 264, 267 (1996); *Ryan v. Berman*, 572 Pa. 156, 813 A. 2d 792 (2002). Neither her statements from the bench nor her actual order expressly prohibited the Fund from answering the complaint as it saw fit, nor would any such prohibition have been proper.

I would agree with [your argument] if, in fact, it made a difference in the calculation of the benefit the person was entitled to if he were not married and therefore made a difference in it, I might agree with you. He gets the same amount. It doesn't matter. [R. 134a.⁹]

Ross' motion was granted and the Fund's was denied. Judge Luty awarded her interest but declined to award her counsel fees or punitive damages.¹⁰ R. 138a. The appeal to Commonwealth Court was taken on September 1, 2004. On September 9, 2004, Judge Luty issued a supplemental order specifying that the amount due as of August 30, 2004 was \$43,380.65 plus interest.¹¹ R. 139a. On October 1, 2004, Judge Luty granted supersedeas, waiving security. R. 143a.

A pension fund is not bound by a declaratory judgment of surviving spouse status rendered in proceedings to which it was not a party and of which it had no notice.

Ross and the Fund disagree as to whether there was a marriage between Ross and Adams. The alleged marriage, however, is not expressly pled as a fact; only the Orphans' Court decree is. An examination what has actually been pled by each party discloses that there are no significant factual disputes. The

⁹ Judge Luty's opinion does not elaborate upon this line of reasoning.

¹⁰ No cross-appeal was taken from that refusal.

¹¹ The monthly amount that Ross would receive *if* she were found to be entitled to benefits is \$1,172.45. While this figure does not appear in the pleadings, it was stated at oral argument (R. 130a), was referenced in a Motion for Supersedeas in the trial court (R. 141a), and is not in dispute. The supplemental order correctly states the principal amount that would be due as of August 30, 2004. The Fund regards this as an amplification of the order granting judgment on the pleadings and saw no need to take a separate appeal.

facts pled by Ross and admitted by the Fund's Answer are as follows:

- (1) Gregory William Adams, a beneficiary of the Fund, died on June 19, 2001. At the time, he was domiciled at plaintiff's address. R. 7a.
- (2) A decree was entered in Orphans' Court proceedings by the Honorable Walter R. Little finding that Audrey Ross and Gregory William Adams were husband and wife. R. 8a.
- (3) The decree is captioned "Audrey Ross v. Gregory Williams [sic] Adams" and was entered at No. 1232 of 2002. It was filed on August 23, 2002. R. 8a. The opinion indicates that the action was brought in order to establish plaintiff's eligibility for a surviving spouse benefit. The opinion identifies the benefit source as the Fraternal Order of Police. R. 8a, 11a.
- (4) Decedent's two daughters were given notice of the action, appeared, and contested the declaration of marriage. R. 8a.
- (5) The Fund was presented with the decree (R. 8a) and refused to pay benefits, stating its reason as follows:

The Fund was not made a party to the action, received no notice of it, and had no opportunity to litigate the issue of whether a common law marriage took place between Ms. Ross and Mr. Adams. R. 17a-18a.

The Fund's New Matter set forth the following additional facts:

- (1) Adams left no estate either for probate or inheritance tax purposes. R. 61a.
- (2) The question of his marital status was not ancillary to any larger matter before Orphans' Court. R. 61a.
- (3) Ross had filed her original complaint in the Civil Division on September 25, 2001, after Orphans' Court refused the filing, and had named only Adams as a defendant¹². R. 62a.

¹² A dead man cannot be a party to an action, and any such attempted proceeding is completely void and of no effect. *Montanya v. McGonegal*, 757 A. 2d 947 (Pa. Super. 2000).

(4) Ross did not state the purpose for which declaratory judgment was sought. *Id.*

(5) Ross gave notice to Adams' adult daughters by a terminated marriage. *Id.*

(6) The daughters filed an answer contesting the declaration and were treated as parties. *Id.*

(7) Ross' counsel subsequently presented a motion to the Honorable Walter R. Little requesting a hearing date. *Id.*

(8) The motion did not advise the court that the declaration of marital status was being sought solely for pension purposes, and stated "There are substantial questions concerning the marriage and the decedent's estate[.]"¹³ *Id.*

(9) Judge Little granted the motion, which was then assigned an Orphans' Court docket number. All further proceedings took place in Orphans' Court. *Id.*

(10) Neither the Administrative Judge of the Civil Division nor the Administrative Judge of the Orphans' Court Division approved the transfer of the case to Orphans' Court. R. 62a-63a.

(11) At the commencement of the hearing, Ross' counsel advised Judge Little that a pension entitlement claim was the major reason that the action was brought. He mistakenly identified the source of the pension as the "FOP".¹⁴ He went on to tell the court:

Ms. Ross is not making any claims against the estate, etc. There was virtually no estate. So,

¹³ In the Complaint sub judice, Ross cited 20 Pa. C. S. § 711(19) as the justification for the matter being heard in Orphans' Court. Section 711(19) mandates that issues relating to marriage licenses be decided in Orphans' Court. This case does not present any issue relating to a marriage license or to any of the 22 matters enumerated in § 711 as being within the purview of Orphans' Court.

The actions Ross took to get her cause heard, although acquiesced in by Adams' daughters and by Judge Little, reflected an ad hoc approach and were clearly not undertaken in reliance on any established court procedure.

¹⁴ The Fraternal Order of Police, commonly referred to as the FOP, is the collective bargaining agent for City of Pittsburgh police officers; it does not pay them retirement benefits. R. 63a.

it's not a claim contrary to any heirs' claims to the estate, etc. It's strictly an action to establish the marriage to qualify for pension benefits as a widow. [R. 63a.]

(12) Adams' daughters had no financial stake whatsoever in the question of whether there was a marriage between Ross and Adams.¹⁵ R. 63a.

(13) Adams' daughters filed no exceptions to the Orphans' Court decree and did not appeal. The entry of the decree was the last action in Orphans' Court. *Id.*

(14) At no time prior to the entry of the decree was the Fund (or the Fraternal Order of Police) given any notice of either the Civil Division or Orphans' Court proceedings, nor was any notice published. The Fund's first knowledge of the proceedings came when it was advised of the decree on or about September 10, 2002. *Id.*

(15) No process of Orphans' Court has ever issued against the Fund, and the instant action is Ross' first attempt to enforce the Orphans' Court decree against defendant. R. 63a-64a.

Ross never replied to the New Matter, and it has accordingly been admitted.

On these pleadings, only one conclusion of law is possible: the Orphans' Court decree finding a common law marriage between Ross and Adams does not bind the Fund.

The Fund is aware of only one prior Pennsylvania appellate decision discussing the impact of a declaratory judgment of marriage on nonparties, *Allison Park Contractors, Inc. v. Workers' Compensation Appeal Board*, 731 A.2d 234 (Pa. Cmwlth. 1999).¹⁶ In that case, the alleged widow brought a declaratory

¹⁵ The Fund is a defined benefit plan, and benefits are payable either to Ross or to no one.

¹⁶ Contrary to the implication in the Commonwealth Court opinion (Commonwealth Court opinion at 3, 16a *infra*), the Fund has always recognized the factual differences between *Allison Park* and the instant case. R. 17a-18a, R. 26a, R. 104a-105a.

(continued...)

judgment action against the decedent's parents in the Family Division of the Court of Common Pleas of Allegheny County. After a preliminary status conference, the action was resolved with a consent decree finding a common law marriage. The claimant insisted that this decree was controlling in the Workers' Compensation proceedings. The court disagreed, pointing out that the decree was not the result of any evidentiary hearing and adjudication. The opinion included the following footnote:

Employer also contends that the doctrine of collateral estoppel is applicable. Our Pennsylvania Supreme Court in [*Balent, supra*] defined collateral estoppel:

Collateral estoppel or issue preclusion, is a doctrine which prevents re-litigation of an issue in a later action, despite the fact that it is based on a cause of action. The identical issue must have been necessary to final judgment on the merits, and the party against whom the plea is asserted must have been a party, or in privity with a party, to the prior action and must have had a full and fair opportunity to litigate the issue in question. (citations omitted). [*Balent* at 564, 669 A.2d at 313.]

Allison Park, supra, at 236, note 2.

The Commonwealth Court opinion in this case states:

Allison Park supports the proposition that the order Ross secured from the trial court in this matter declaring that she and Adams were married at common law is binding upon the parties to this litigation. [Opinion below at 4, 10a *infra*.]

This would be accurate if the *Allison Park* decision had said "If the Common Pleas order had followed an evidentiary hearing, it would not matter that the employer was not a party." *Allison Park* did not say that or anything else that even remotely

¹⁶(...continued)

The Fund did not rely "solely" on *Allison Park (id.)*; the case was one of 27 cases the Fund cited in its Commonwealth Court brief in support of its contention that it is not bound.

supports binding the Fund.

Neither collateral estoppel nor res judicata applies to a person who was neither a party nor in privity with a party in the prior proceeding: *Balent, supra; Radakovich v. Radakovich*, 846 A. 2d 709 (Pa. Super. 2004). Your Honorable Court has adhered to this principle even with respect to a person who participated as a witness in the prior proceeding: *Capek v. DeVito*, 564 Pa. 267, 767 A.2d 1047 (2001). *Capek* states:

In this case, in the proceedings regarding the Petition to Confirm Settlement, the only parties of record were the defendants and Appellee. "A person who is not a party to the record, or in privity with such party, may be bound by the verdict and judgment in a suit only if such person for purposes and interests of his own openly and actively, with notice to the adverse party, assumes and manages the litigation." [Citation omitted.] Appellant appeared as a witness at the hearing; he was not a party nor in privity with a party in that case. Appellee does not demonstrate that Appellant had the opportunity to present his own defense, or that he controlled the litigation. "Merely to aid in the trial, either personally or through counsel, or to pay the attorney's fees, or to contribute toward the expenses of the litigation, is not enough to cause the person doing so to be bound by the judgment rendered." [*Id.* at 275, 767 A. 2d at 1051; citation omitted.]

The Declaratory Judgment Act, 42 Pa. C. S. § 7531 et seq., states at § 7540(a):

When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding. . . . [¹⁷]

¹⁷ Section 7540(b) creates an exception for taxing authorities. An affected taxing body shall be served with a "copy of the proceeding"; if it does not enter an appearance, the court may proceed without it if the court considers its interests to be adequately represented. If governmental entities were excluded from the joinder requirements of the Act, no exception for taxing bodies would be necessary.

The Commonwealth Court opinion cites the foregoing provision but then states:

The Fund does not tell us what claim or interest it may have had in the Orphans' Court proceeding or what right it may have possessed that could have been prejudiced in that proceeding. [Opinion below at 5, 18a *infra*.]

The Fund is at a complete loss to understand how it can be told that its rights could not have been prejudiced in a proceeding, and then be ordered to pay someone benefits based on the outcome of that proceeding. The Fund is a fiduciary. It has a responsibility to its participants and to its known and future beneficiaries to challenge claims whose validity it doubts, thus preserving its assets in order to meet its statutory obligations. It is subject to audit by the Auditor General and may be penalized financially if it makes an improper disbursement.¹⁸

At first blush, 23 Pa. C. S. § 3306¹⁹ (Proceedings to determine marital status), seems to be in conflict with the joinder requirements of the Declaratory Judgment Act; it states:

When the validity of a marriage is denied or doubted, either or both of the parties to the marriage may bring an action for a declaratory judgment seeking a declaration of the validity or invalidity of the marriage and, upon proof of the validity or invalidity of the marriage, the marriage shall be declared valid

¹⁸ See generally *Hanover Township Police Pension and Benefit Fund Association Case*, 396 Pa. 313, 152 A. 2d 705 (1959) and *Auditor General of Pennsylvania v. Borough of East Washington*, 351 A. 2d 687 (Pa. Cmwlth. 1976); see also 72 P.S. § 403 (power of Auditor General to audit agencies receiving State aid and to penalize unauthorized expenditures).

¹⁹ This provision was originally 23 P.S. § 206. At the time of its enactment, the use of declaratory judgment to resolve disputes that included questions of fact was fairly new: *Liberty Mutual Insurance Company v. S.G.S. Company*, 456 Pa. 94, 318 A. 2d 906 (1974). Declaratory judgment was, nonetheless, occasionally used to establish surviving spouse status. *Taubel Estate*, 21 Pa. D. & C. 2d 446 (1960).

or invalid by decree of the court and, unless reversed upon appeal, the declaration shall be conclusive upon all persons concerned.

Where source material for the Divorce Code of 1980 is concerned, the usual suspects are the Divorce Code of 1929, the Proposed Divorce Code recommended by the Joint State Government Commission in 1961, and the Uniform Marriage and Divorce Act (1970). The Fund has examined all of these without finding any predecessor to § 3306. The Fund believes that the General Assembly adapted language from a sister state, as evidenced by Michigan Statutes Annotated § 552.4, which states:

Marriage of doubtful validity; procedure to affirm.

When the validity of any marriage shall be denied or doubted by either of the parties, the other party may file a bill or petition in the manner aforesaid^[20], for affirming the marriage; and upon due proof of the validity thereof, it shall be declared valid by a decree or sentence of the court; and such decree, unless reversed on appeal, shall be conclusive upon all persons concerned.

While a number of states have marriage validation statutes that have similar wording, including "shall be conclusive upon all persons concerned"²¹, Michigan's is the only one in which that phrase is preceded by "unless reversed on appeal." The Fund has not undertaken to determine just when and where a state legislature first used that combination of phrases; however, Michigan's statute has had that wording at least since 1915.

²⁰ This appears to be a reference to the preceding statute, Mich. Stat. Ann. § 552.3, which deals with annulment procedure.

²¹ South Carolina Code Annotated § 20-1-520; Utah Code Annotated § 30-1-17; Vermont Statutes Annotated Title 15, § 7; Virginia Code Annotated § 20-90; West Virginia Code § 48-3-104; Wisconsin Statutes Annotated § 767.04; Wyoming Statutes § 20-2-103. None of these statutes authorize an action brought jointly by the parties to a putative marriage.

Pillard v. Pillard, 203 N.W. 402 (Mich. 1924) (citing 1915 statute).²²

Pennsylvania made two changes of substance: it permits the action to be brought by both partners, and it states that the action is one for declaratory judgment.

Section 3306 was a small part of a historic divorce reform measure, and was at least primarily concerned with uncertain marriages to which both parties are living. It served several purposes:

- (1) making clear that recognition of a marriage is an appropriate purpose for declaratory judgment, and that denial or doubt as to its existence satisfies the case-or-controversy requirement;
- (2) encouraging individuals in murky marital situations to seek clarification and closure sooner instead of later; and
- (3) warning marital status litigants (and their privies) that the same standards of finality will apply as in any other civil action, thereby dispelling any expectation that a losing litigant who does not appeal may later revisit the issue.

Any doubt that actions under § 3306 are governed by the Declaratory Judgment Act was removed by the December 19, 1990 amendment to the Act, which added the highlighted language to § 7541(c):

Exceptions.--Relief shall not be available under this subchapter with respect to any:

1. Action wherein a divorce or annulment of marriage is sought *except as provided by 23 Pa. C. S. § 3306 (relating to proceedings to determine marital status)*. [Emphasis added.]

²² In 1915, the current plethora of statutory benefit programs did not exist, and it was less likely that a stranger would have a direct financial stake in a couple's marital status. "All persons concerned" may have been intended to include privies.

. . . .

The restriction that this amendment removed would be irrelevant in the case of a putative surviving spouse. Moreover, a person seeking to be formally declared someone's widow or widower is usually bringing the action to resolve a dispute over money or property, and the case-or-controversy requirement presents no problem. The intended beneficiaries of § 3306 are parties to existing marriages. There is nothing in § 3306 to suggest that the legislature contemplated or foresaw its use to establish surviving spouse status; the Divorce Code would be an odd place for a procedure to establish such status. *If* there is a class of marital status litigants to whom the legislature intended to give the ability to bind the world without joinder or notice, it is those whose putative spouses are still living and who have a particularly compelling need for finality.²³

The Fund doubts, however, that the legislature intended this with respect to any class of litigants. Section 3306 is silent on joinder; indeed, it does not even specify that the plaintiff should join the other putative spouse, nor does it state who is to be named as a defendant when both partners bring the action. This would suggest that the legislature intended for the joinder

²³ It is not only for economic reasons that certainty is desirable. A person who may or not be presently married may need to know whether he or she may marry someone else without obtaining a divorce. This problem does not exist when one partner has died.

The Fund does not concede that no constitutional barrier to enforcement of a marital status decree against a stranger exists when the marital status action is litigated during the joint lifetime of the couple. However, that question is not before Your Honorable Court.

standard set forth in the Declaratory Judgment Act to apply. The Fund respectfully submits that the finality language with which § 3306 concludes presupposes compliance with the Declaratory Judgment Act, and that it should be construed as a shorthand reference to those persons whose joinder is required under § 7540(a) of that Act.²⁴ This interpretation reconciles § 3306 with the Due Process Clause.

The construction urged by Ross -- that the world is bound regardless of joinder or notice -- flies in the face of the Clause. The legislature is presumed not to have intended an unconstitutional result. 1 Pa. C. S. § 1922(3).

The Commonwealth Court opinion expresses some concern about multiplicity of parties:

Our General Assembly does not intend an absurd result, [citation omitted], and the Fund's interpretation of Section 3306 leads to the absurd conclusion that every person or entity who must rely on the fact of the marriage of two persons must be a party to the creation or declaration of that marriage. [Opinion below at 5, 18a *infra*.]

Ross argued similarly before Judge Friedman:

Technically, you'd have to notify credit card companies, you'd have to notify grocery stores that these people, in fact, were married, all banks, et cetera. [R. 43a.]

Ross' Brief in Opposition to Preliminary Objections asserted:

²⁴ This construction has been accepted elsewhere in the context of probate proceedings:

Our courts have held that "all persons concerned" is the equivalent of "parties in interest," that same includes "all persons who might be injured by admitting a will or codicil to probate," and that this includes a judgment creditor of a devisee or distributee. [*In re Sycle's Estate*, 195 A. 857, 858 (N.J. Misc. 1937).]

[A joinder] requirement would be nonsensical, inasmuch as numerous individuals and entities would treat parties differently based upon their marital status. [R. 31a.]

The best judicial response is that of the Supreme Court of California in the case of *Schmidt v. Retirement Board of San Francisco*, 37 Cal. App. 4th 1204, 44 Cal. Rptr. 2d 297 (Cal. App. 1 Dist. 1995). In *Schmidt*, a woman claimed to be the widow of a retired county employee. Pursuant to a procedure designed to correct omissions in public records, she obtained an ex parte order declaring her to be the deceased employee's widow. At an administrative hearing on the question of her status, she took the position that the order was binding. The administrative law judge rejected this argument and found that no marriage had occurred. She then sought a writ of mandate directing that the administrative decision be reversed. The trial court granted it. Here is what the Court of Appeals said:

The trial court determined that the marriage order was conclusive . . . , reasoning that if such orders were not conclusive, a party would be subject to the possibility of inconsistent and conflicting determinations regarding an issue that may govern the rights and duties not only of that party, but of third parties. We are persuaded, however, that the possibility of inconsistent and conflicting determinations does not warrant giving conclusive weight to ex parte judicial orders . . . when to do so would threaten the due process rights of third parties. [44 Cal. Rptr. 2d at 302.]

In this instant case, the Commonwealth Court has told the Fund, in essence, "If we required claimants to join you, we'd have to require them to join too many others." The solution to any concern about "absurd result[s]" is a narrow holding: if the effect of the decree on a person would be to require him, her or it to pay money to the claimant, that person should be joined.

There is nothing onerous or cumbersome about such a rule. The issue of whether grocery stores or banks must be joined may be deferred until a case truly presents it. This case does not. Not only is the Fund the *only* known entity affected by the marital status question, but it is being held liable on the basis of a proceeding in which the marriage claim was opposed only by financially disinterested parties.

Judge Luty's opinion states:

[Judge Little] issued a well-reasoned Opinion and Decree ruling that Plaintiff and Decedent were indeed married.

. . . .

This Court accepted and now hereby adopts the findings of fact^[25] and conclusions of law in Judge Little's Opinion and Decree. Based on such, this Court was simply not persuaded that a different legal conclusion would be reached with a second hearing. [12a *infra.*]

What Judge Luty thought would happen at a second hearing is both speculative and irrelevant. The Fund was under no duty to plead evidence, and to impose upon it the burden of showing a probable different outcome would permit the Fund to be prejudiced by Judge Little's decision in violation of § 7540(a) of the Declaratory Judgment Act.²⁶ The Fund knows of no authority for

²⁵ Any judgment on the pleadings that depends on the court's resolution of factual issues is necessarily invalid.

²⁶ Judge Luty's opinion also states:

[T]o require Plaintiff to file a separate and distinct declaratory judgment action against each and every potential party that questions her marriage, after the issue has already been decided by a full adversarial hearing, is plainly unreasonable. [Opinion in Support of Order Granting Judgment on the Pleadings at 3, 13a *infra.*]

(continued...)

the proposition that it matters whether the order is supported by a "well-reasoned sound Opinion" or whether the court considering its effect is convinced that a hearing de novo would produce a different result. The United States Supreme Court said the following in *Carey v. Piphus*, 435 U.S. 247, 266, 98 S. Ct. 1042, 1054, 55 L. Ed. 2d 252, 266 (1978):

[T]he right to procedural due process is "absolute" in the sense that it does not depend upon the merits of a claimant's substantive assertions[.]

Accord: *Hamdi v. Rumsfeld*, ___ U.S. ___, 124 S. Ct. 2633, 159 L. Ed. 2d 578 (2004).

In *Commonwealth v. Powers*, 168 A. 328 (Pa. Super. 1933), the Superior Court stated:

The word "prejudice" means to the injury or detriment of another." [*Id.* at 331.]

Even qualified deference to Judge Little's opinion would obviously be to the detriment of the Fund, and Your Honorable Court has held that a nonparty is not bound "in any manner whatsoever" by a judgment. *Albert v. Lehigh Coal and Navigation Company*, 431 Pa. 600, 611, 246 A. 2d 840, 846 (1968).

The Fund relies on several decisions of the United States Supreme Court to the effect that judgments only bind parties:

The law does not impose upon any person absolutely entitled to a hearing the burden of voluntary intervention in a suit to which he is a stranger. . . . Unless duly summoned to appear in a legal proceeding, a

²⁶(...continued)

The Fund does not contend that a surviving spouse claimant should bring multiple declaratory judgment actions, but rather that such a claimant should join all directly affected parties in a single action as required by the Declaratory Judgment Act. A claimant who fails to do so cannot complain about multiplicity of proceedings.

person not a privy may rest assured that a judgment recovered therein will not affect his legal rights. [*Chase National Bank v. Norwalk*, 291 U.S. 431, 441, 54 S. Ct. 475, 479, 78 L. Ed. 894, 901 (1934).]

It is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process. [*Hansberry v. Lee*, 311 U.S. 32, 40, 61 S. Ct. 115, 117, 85 L. Ed. 22, 26 (1940).]

For more than a century the central meaning of procedural due process has been clear: "Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified." [*Fuentes v. Shevin*, 407 U.S. 67, 80, 92 S. Ct. 1983, 1994, 32 L. Ed. 2d 556, 569 (1972); citation omitted.]

Of particular interest is *Martin v. Wilks*, 490 U.S. 755, 109 S. Ct. 2180, 104 L. Ed. 2d 835 (1989). It involved plaintiffs who were challenging the conclusiveness of the decree entered in a prior action about which they had known and in which they had not chosen to intervene.²⁷ The Court cited *Chase* and *Hansberry* and went on to state:

A judgment or decree among parties to a lawsuit resolves issues as among them, but it does not conclude the rights of strangers to those proceedings.²

² [W]here a special remedial scheme exists expressly foreclosing successive litigation by nonlitigants, as for example in bankruptcy or probate, legal proceedings may terminate preexisting rights if the scheme is otherwise consistent with due process. See *National Labor Relations Board v. Bildisco and Bildisco*, 465 U.S. 513, 529-30, n.10, 104 S. Ct. 1188, 1198, n. 10, 79 L. Ed. 2d 482, 498, n. 10 (1984) ("[P]roof of claim must be presented to the Bankruptcy Court . . . or be lost"); *Tulsa Professional Collection*

²⁷ In Pennsylvania, the right to intervene ends with final adjudication. *Robinson Township School District v. Houghton*, 387 Pa. 236, 128 A. 2d 58 (1956). Intervention, when it is possible, is voluntary. *Walls v. City of Philadelphia*, 646 A. 2d 592 (Pa. Cmwlth. 1994).

Services, Inc. v. Pope, 485 U.S. 478, 108 S. Ct. 1340, 99 L. Ed. 2d 565 (1988) (nonclaim statute terminating unsubmitted claims against the estate). . . . [*Id.* at 762, 109 S. Ct. at 2185, 104 L. Ed. 2d at 844-45.]

The examples given in *Martin* of exceptions to joinder requirements both involve proceedings of a type traditionally classified as *in rem*²⁸; they both present situations where finite assets under the control of the court are to be distributed. Both involve proceedings in which there is some provision for notice to nonlitigants. Creditors are notified in a bankruptcy. 11 U.S.C. § 521; Federal Rule of Bankruptcy Procedure 2002. Personal representatives must give notice of the intended distribution of an estate to all known claimants. 20 Pa. C. S. § 3503.

It is clear from *Martin* that, under limited circumstances, notice and opportunity to intervene may satisfy due process.²⁹ This gives Ross no help; it is undisputed that the Fund had no notice prior to the entry of the decree. Even if notice had been given, our legislature has not seen fit to create any "special remedial scheme" dispensing with joinder where proving marriage is concerned. Such a scheme might be the solution to the problem of entities with peripheral interests in the marital status of an individual or couple. The impact on such entities of a decree of marriage or nonmarriage relates to their future remedies; it does

²⁸ As to bankruptcy, see *Haggerty v. Erie County Tax Claim Bureau*, 528 A. 2d 681 (Pa. Cmwlth. 1987). As to probate, see *Mangold v. Neuman*, 371 Pa. 496, 91 A. 2d 904 (1952).

²⁹ Notice by publication may be adequate under some circumstances; however, *Tulsa*, *supra* holds that such notice is inadequate with respect to known claimants.

not require them to pay money to anyone. Under *Martin*, it might suffice to give them notice and an opportunity to intervene. However, notice without joinder cannot suffice where the consequence of finding a marriage is to impose an immediate and open-ended financial obligation on any individual or entity. It doesn't get any more *in personam* than that.

It is clear from these decisions that the Fund was under no duty to take action in Orphans' Court after learning of the decree. One not bound by an order is not aggrieved by it and may not appeal it. *Beers v. Unemployment Compensation Board of Review*, 534 Pa. 605, 633 A. 2d 1158 (1993); *John G. Bryant Company v. Sling Testing and Repair, Inc.*, 471 Pa. 1, 369 A. 2d 1164 (1977).

Here, Orphans' Court did not even attempt to bind the Fund. It merely found a marriage. It made no finding as to the length of the marriage, an issue that the Commonwealth Court ignores. See Note 4, *supra*. Its decree did not order the Fund (or the Fraternal Order of Police, or anyone else) to do anything and did not dispose of any property. The decree could not, by itself, bring about any consequences that would injure the Fund. The Fund was annoyed to learn of the decree. It was not, strictly speaking, aggrieved.

The Fund knows of no authority for a trial court to grant reconsideration or any other form of post-trial relief³⁰ at the

³⁰ The ten-day exceptions period had expired by the time the Fund learned of the decree. The filing of exceptions within that period is mandatory. *Chalkey v. Roush*, 569 Pa. 462, 805 A. 2d 491 (2002).

behest of a nonparty.³¹

Judge Friedman's opinion concludes with the following ipse dixit:

This Court had, and has, the view that just as the world need not attend a marriage for it to be valid, once a judge has finally ruled there was one, the world, including Defendant, must hold its peace. [Opinion of Judge Friedman at 5, 7a *infra*.]

The Fund shares Judge Friedman's regard for the sanctity of marriage, but respectfully submits that a *finding* of marriage, particularly one made posthumously, is not an event comparable to a marriage. The Commonwealth Court thought otherwise, stating:

Nowhere in its brief does the Fund explain the crucial distinction between the declaration of marriage that Ross produced and the marriage certificates that evidence the marriages of the many widows and widowers to whom the Fund is paying benefits today. It is a distinction without a difference. Ross was married to Adams under our law as surely as if she had married him in a formal ceremony after securing a valid license, and the Fund may not treat her any differently. [Opinion of the Commonwealth Court at 5, 18a *infra*.]

The distinction is, in fact, crucial. The creation and the after-the-fact declaration of a marriage are two very different things.

³¹ Had the decree ordered the Fund to pay benefits, the Fund might have been able to seek review. See *Walker v. Walker*, 523 A. 2d 782 (Pa. Super. 1987) (adult child upon whom custody order imposed obligations had standing to appeal even though child was not named party); *Kelly v. Mueller*, 861 A. 2d 984 (Pa. Super. 2004), (weapon belonging to nonparty father of respondent in Protection from Abuse action ordered seized; father held to have standing to appeal). Even in that event, however, the Fund would have had no obligation to take an appeal. The arguable ability of a person who is blindsided by a court decree to pursue an appeal on a "party by virtue of aggrievement" theory should not, in and of itself, transform that person into a party for issue or claim preclusion purposes. Such a transformation, in addition to violating *Martin*, would legitimize the blindsiding. Such a "party" is not one who has had a full and fair opportunity to litigate the issue.

A marriage ceremony creates a new marital status for the participants. Absent evidence of an impediment, the record of such a ceremony, properly authenticated, is generally treated as conclusive evidence of the marriage. No factfinding is involved.

By contrast, the attempt of a court to determine whether a common law marriage took place between two people is an effort to reconstruct past events from testimony and exhibits. It is particularly difficult when one partner to the alleged marriage has died. It is a factfinding process in which all persons directly affected by the outcome are entitled to participate. Its outcome does not change anyone's marital status; neither a judge nor anyone else has the power to join a living person in matrimony with a dead one.

To put it another way, it is none of the Fund's business whether the marriage of one of its members is a mistake. It is the Fund's business whether a decree finding a *past* marriage of one of its members is a mistake.

As discussed *supra*, reliance interests of living parties to a putative marriage may complicate the question of what right a third party should have to challenge a decree declaring a marriage. However, no such interests are implicated when death has terminated any marriage that existed and the only issue is whether a particular third person has a monetary obligation to the survivor.

To the extent that § 3306 of the Divorce Code, relating to declaration of marital status, permits the Fund to be bound, it is unconstitutional.

If, in fact, § 3306 of the Divorce Code permits the

enforcement of a posthumous decree of marriage against a nonparty to the action in which it was entered -- particularly a nonparty who had no knowledge of the action -- it violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution and Article I, Section 11 of the Pennsylvania Constitution³² for the reasons set forth *supra*.

The Fund is a person within the meaning of the Due Process Clause of the Fourteenth Amendment. See *In re Real Estate Title and Settlement Services Antitrust Litigation*, 869 F. 3d 760 (3rd cir. 1989), wherein the Third Circuit held that school boards were entitled to due process, stating:

Like corporations, and unlike states, the school districts are limited bodies which exist for a particular and circumscribed purpose. [*Id.* at 765, Note 3.]

The same is true of the Fund, and the "circumscribed purpose" of the Fund would be undermined if it were deprived of a fair opportunity to contest a claim of surviving spouse status.

Article I, Section 11 of the Pennsylvania Constitution states in pertinent part:

All courts shall be open; and every man for an injury done him in his lands, goods, person or reputation shall have remedy by due course of law, and right and justice administered without sale, denial or delay.

In *R. v. Department of Public Welfare*, 535 Pa. 440, 636 A.2d 142 (1994) Your Honorable Court stated:

Even though the term "due process" appears nowhere in [Sections 1 and 11], due process rights are considered to emanate from them. [*Id.* at 30, 636 A. 2d at 152; footnote omitted.]

³² The Attorney General of Pennsylvania was given notice of the Fund's constitutional challenge in the Commonwealth Court proceedings, and chose not to participate in the proceedings.

The due process guaranteed by Section 11 and related provisions has been described by the Commonwealth Court as "substantially coextensive" with that guaranteed by the United States Constitution. *Stone v. Edwards Insurance Agency, Inc.*, 636 A. 2d 293, 297 (Pa. Cmwlth. 1994). There is nothing in *Stone* to indicate that it mattered that the due process complainant was a corporation rather than an individual. The Fund is entitled to due process.

Assuming arguendo that the marital status declaration binds the Fund, interest should not be assessed in light of the the Fund's good faith reliance on prior law

If the award of benefits to Ross is upheld, the provision for interest should be deleted. The Complaint did not include any demand for interest, and an award for interest is accordingly not a proper part of a judgment on the pleadings.

Interest may be awarded when there is a statutory or contractual duty to pay it. *Cianfrani v. State Employees' Retirement Board*, 505 Pa. 294, 479 A.2d 468 (1984); *Hutchinson v. Pennsylvania State Employees' Retirement Board*, 738 A. 2d 7 (Pa. Cmwlth. 1998). The statute creating the Fund, while it may create a contractual duty between the Fund and potential beneficiaries, *Hutchinson, supra*, contains no provision for interest. In *Hutchinson* the Commonwealth Court stated:

It is well-recognized under Pennsylvania common law that interest is as much a part of substantive debt as principal. As such, it is impliedly payable as compensation to a creditor for delay of payment by the debtor whenever a liquidated, or fixed, sum of money is unjustly withheld. In other words, interest is a form of damages allowed, in the absence of any express contract, when payment is withheld after it has become

the duty of the debtor to discharge the debt.

Under this definition, there are two prerequisites to the running of interest: the debt must have been liquidated with some degree of certainty, and the duty to pay it must have become fixed. Once these prerequisites are met, any failure by the debtor to timely discharge the principal of the debt at the time fixed for payment will be considered a wrongful withholding of the sum due, warranting an award of interest at the legal rate from the date the money was due and payable. Where one of these prerequisites has not been met, however, any delay in discharging the debt cannot be considered wrongful for purposes of imposing interest. [*Id.* at 12.]

Here, while the monthly amount is not in dispute, the Fund's duty to pay it becomes fixed when (1) a court determines Ross to be entitled to benefits in a proceeding in which the Fund is joined, or (2) it is finally determined that the Orphans' Court decree binds the Fund.

In *Cianfrani, supra*, a legislator convicted of a crime had been held, in prior proceedings, not to have forfeited his pension; the retroactivity provisions in the applicable forfeiture statute were held to be unconstitutional.³³ He then brought a suit for interest based on the delay the dispute had caused. Your Honorable Court rejected this claim, taking the position that SERS had had the right to act pursuant to the statute notwithstanding its subsequent invalidation, and stating:

[T]he Board action cannot be characterized as wrongful and, accordingly, this claim for interest cannot proceed under the common law regarding the award of interest damages. [505 Pa. at 301, 479 A.2d at 471.]

In disputing the effect of the prior decree, the Fund has relied on the plain language of the Declaratory Judgment Act and

³³ *Cianfrani v. State Employees' Retirement Board*, 498 Pa. 204, 445 A.2d 737 (1982).

on universally recognized concepts of procedural due process, as more fully set forth *supra*.³⁴ The Fund has engaged in no wrongful conduct.

The Commonwealth Court opinion stated:

The debt to Ross is fixed with actuarial certainty, and the duty to pay it arose by law and by the order of the trial court of August 30, 2004 as the date Adams died, June 19, 2001. [Opinion below at 6, 19a *infra*.]

If, in fact, the duty to pay arose August 30, 2004, it cannot also have arisen on an earlier date.³⁵ The Commonwealth Court's analysis penalizes the Fund for disputing Ross' claim, and is incompatible with the decision of Your Honorable Court in *Cianfrani*.

Conclusion

The decision in this case is an egregious departure from the longstanding principle that those neither party nor privy to a proceeding are not bound by its result, a principle recognized by numerous decisions of Your Honorable Court, other Pennsylvania courts, and the United States Supreme Court.

Moreover, the decision here adversely affects the fiscal interests of all public employee pension funds within

³⁴ 2 PLE Husband and Wife § 6 (2004 Supp.) does state:

A determination in an adversarial proceeding that two people were married is *res judicata* against persons who were not party to the proceeding.

However, this statement was added only after Judge Friedman's opinion in this case was published, and cites only that opinion as authority.

³⁵ The record does not disclose whether the Fund even knew of Ross' existence on June 19, 2001.

Pennsylvania. It also affects the rights of employers in Workers' Compensation cases by endorsing a modified *Allison Park* approach to the establishment of marital status. Under the rationale of the decision of the Commonwealth Court, a putative surviving spouse who intends to bring a fatal claim petition should first bring a declaratory judgment action against the alternate next of kin of the deceased worker. If a marriage is declared, the employer will have no right to challenge the claimant's status in the Workers' Compensation proceeding.

For the Commonwealth Court to penalize the Fund with an award of interest is likewise an egregious injustice. All the Fund has done is to attempt to be heard as to whether it owes money to Ross. The Fund does not begrudge Ross her day in court. It only wants that day to coincide with its own.³⁶

For the foregoing reasons, the Fund respectfully requests that Your Honorable Court grant allocatur in this case.

Respectfully submitted,

Norma Chase
Attorney for Petitioner

³⁶ The ultimate relief sought by the Fund in this appeal is (1) a holding that the Fund is not bound by the Orphans' Court decree, (2) the reversal of the Commonwealth Court decision to the contrary, and (3) the remand of the case to the Court of Common Pleas with a directive to treat the complaint as one for declaration of marital status and to hear the case de novo. Any remand should be without prejudice to the Fund's right to seek a transfer to the Family Division or Ross' right to oppose that transfer.