

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

1882 C.D. 2004

AUDREY ROSS,

Appellee

vs.

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

Appellant

BRIEF FOR APPELLANT

Appeal from 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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STATEMENT OF JURISDICTION

Your Honorable Court has jurisdiction of this matter by virtue of 42 Pa. C. S. § 762(a)(4)(i)(A); the action was brought to enforce rights asserted under a statute governing a municipal pension fund, 53 P.S. § 23644 et seq.

STATEMENT OF STANDARD AND SCOPE OF REVIEW

The issue is one of law subject to plenary review.

TEXT OF ORDER

AND NOW, this 30th day of August, 2004, after consideration of the pleadings filed in this case, the Motion for the Judgment on the Pleadings filed by Plaintiff and Argument of Counsel it is hereby ORDERED that Defendant is directed to pay the Plaintiff widow benefits retroactive to June 19, 2001 plus interest and to make regular payments during her lifetime.

TEXT OF SUPPLEMENTAL ORDER

AND NOW, this 9th day of September, 2004, upon consideration of the pleadings filed, argument of counsel and Order of Court dated August 30, 2004, it [is] hereby ORDERED that the amount of widow benefits due as of August 31, 2004 is \$43,380.65 plus interest.

STATEMENT OF THE QUESTIONS INVOLVED

Is a pension fund bound by a declaratory judgment of common law marriage that was entered in proceedings to which it was not a party?

Answered in the affirmative below.

To the extent that § 3306 of the Divorce Code permits a person neither joined in the proceeding nor notified of it to be bound by the result, is it unconstitutional?

Implicitly answered in the negative below.

Assuming arguendo that the Fund is now required to pay benefits to plaintiff, does the Fund's prior refusal to pay merit the adding of interest to the award?

Answered in the affirmative below.

STATEMENT OF THE CASE

This case is before Your Honorable Court on an appeal from the order of the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division (Lutty, J.), entered August 30, 2004, granting judgment on the pleadings to the plaintiff, Audrey Ross, and ordering defendant, the Policemen's Relief and Pension Fund of the City of Pittsburgh, to pay her surviving spouse benefits with interest from June 19, 2001.

Ross filed a Complaint for Declaratory Judgment on November 6, 2002. The primary relief sought was a determination that defendant Fund is bound by an Orphans' Court decree holding Ross to be the common law widow of Gregory William Adams, a retired Pittsburgh police officer who died on June 19, 2001. The complaint asked that the Fund be ordered to pay Ross a surviving spouse benefit, and also asked for damages and counsel fees based on the Fund's 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:

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, she would have to acquire a court order declaring a common law marriage in order to 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 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; 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 Division 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.[¹]
[R. 17a.]

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

¹ 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. In no event is there any benefit payable to a participant's estate.

[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 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. 45-46a.]

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 order², 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. Okay? 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. 46-47a.]

The written order stated:

² The deleted language would have directed the Fund to pay widow benefits and counsel fees. R. 51a.

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 added.]

The highlighted language was added by hand. Defendant perceived it to be declaratory and appealed to Your Honorable Court.³ Judge Friedman's opinion noted that the appeal was filed as "a precautionary measure in the event the appellate court concludes that [the] Order was indeed final based upon § 7532 of the Declaratory Judgment Act, 42 Pa.C.S.A. § 7532."⁴ Opinion in Support of Order Overruling Preliminary Objections at 1-2, 3a-4a *infra*, 151 P.L.J. 123 (2003).

On November 26, 2003, following briefing and argument, the appeal was quashed.⁵ R. 52a. The memorandum opinion stated:

[T]he trial court's order has not yet declared "rights, status, and other legal relations" between the parties as it has not yet determined whether the Fund must pay Ross surviving spouse benefits based upon the

³ Pennsylvania Rule of Appellate Procedure 341 states that a final order is any order that disposes of all claims and all parties, or any order that is expressly defined as a final order by statute, or any order not disposing of all claims and all parties but entered as final by the trial court because of the desirability of immediate appellate review. In *Nationwide Mutual Insurance Company v. Wickett*, 563 Pa. 595, 763 A. 2d 813 (2000), the court held that orders containing declaratory language fall into the second category because § 7532 of the Declaratory Judgment Act expressly defines such orders as final. *Wickett* has mercifully ceased to be pertinent to this case.

⁴ Avoiding waiver was the sole purpose of the appeal. The Fund did not seek certification for interlocutory review. If the order was final, the Fund did not need certification. If it was interlocutory, the Fund did not need immediate appellate review.

⁵ Ross never filed a Motion to Quash or otherwise challenged the appealability of the order, and the issue of whether it was final was raised *sua sponte* by Your Honorable Court.

declaration of marriage. Rather, the trial court's order merely overruled the Fund's preliminary objection to Ross' complaint and determined that the status of the marriage of Ross and the decedent was finally decided by the Orphans' Court and that the Fund has no standing to object or to notice of that proceeding. This order has not ended litigation or put the Fund out of court, but merely forecloses further litigation on the Fund's primary defense. Hence, the order is interlocutory. [R. 57a.]

. . . .

Once the trial court issues a final ruling in this matter, the Fund will have a full opportunity to seek review from this court regarding the binding effect of the common law marriage decree. [R. 57a-58a.]

The Fund filed an Application for Reconsideration and/or Clarification; it was denied on January 21, 2004. A Petition for Allowance of Appeal was denied by the Supreme Court of Pennsylvania on May 13, 2004.

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. 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 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.

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 1, *supra*) and that there was no claim that Adams was overpaid. R. 115a-116a, R. 128a-130a. He stated:

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.⁶]

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.⁷ R. 138a. This appeal was taken on September 1, 2004. On September 9, 2004, Judge Luty issued a

⁶ Judge Luty's opinion does not elaborate upon this line of reasoning.

⁷ No cross-appeal was taken from that refusal.

supplemental order specifying that the amount due as of August 30, 2004 was \$43,380.65 plus interest.⁸ R. 139a. On October 1, 2004, Judge Luty granted supersedeas, waiving security. R. 143a.

⁸ 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 below (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.

SUMMARY OF ARGUMENT

The Orphans' Court decree finding a common law marriage between the plaintiff and the decedent does not bind the Fund. The Declaratory Judgment Act, 42 Pa. C. S. § 7531 et seq., requires joinder of all affected persons and provides that no decree shall prejudice the rights of a nonparty.

The provision in the Divorce Code for marital status determinations, 23 Pa. C. S. § 3306, does not create an exception to this requirement; the phrase "all persons concerned" is intended to refer to the persons who must be joined under the Declaratory Judgment Act. The construction urged by plaintiff -- that "all persons concerned" means all the world -- would impute to the General Assembly a disregard for fundamental due process principles.

The purpose of the finality language in § 3306 is to make clear to marital status litigants that the same standards of finality apply as in any other declaratory judgment action. If § 3306 in fact excuses joinder or notice when marriage is the issue, it is unconstitutional.

Since there is no legal theory on which plaintiff can prevail, the court below erred in granting her judgment on the pleadings. Even assuming *arguendo* that she was entitled to such judgment, she was not entitled to interest inasmuch as the Fund acted in good faith throughout, relying on the plain language of the Declaratory Judgment Act and the myriad of cases holding that judgments only bind parties.

ARGUMENT I

A PENSION FUND IS NOT BOUND BY A DECLARATORY JUDGMENT OF COMMON LAW MARRIAGE ENTERED IN PROCEEDINGS TO WHICH IT WAS NOT A PARTY.

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 decree is.⁹ An examination of the facts actually pled by each party discloses that there are no significant factual disputes. The 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) The heirs of decedent -- his 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

⁹ The declaratory relief prayed for was "a decree requiring the Defendant to honor the marriage of the Plaintiff[.]" For this reason, the relief sought by the Fund has consistently been a ruling that the Orphans' Court decree does not bind it and the granting of leave to Ross to amend her complaint to seek a determination of her marital status.

At this juncture, the Fund would not object to the Complaint being treated as a request for determination of marital status without the necessity of amendment.

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 defendant¹⁰. R. 62a.
- (4) Ross did not state the purpose for which declaratory judgment was sought. R. *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[.]"¹¹ *Id.*

¹⁰ 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).

¹¹ In the Complaint sub judice, Ross cited, *inter alia*, 20 Pa. C. S. § 711(19), which mandates that issues relating to marriage licenses be decided in Orphans' Court. This case does not present any issue relating to a marriage license.

(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".¹² He went on to tell the court:

Ms. Ross is not making any claims against the estate, etc. There was virtually no estate. So, 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. [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. At the argument below, her counsel stated:

¹² 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.

I today have still not received a ten-day notice to respond to new matter, which would be required for them to get any kind of reward on the new matter. [R. 121a.]

No ten-day notice is required in order for New Matter to be deemed admitted for failure to respond to it¹³, and there is nothing in the argument transcript that suggests any disagreement as to the facts pled in it. A plaintiff who moves for judgment on the pleadings after letting the time for responding to New Matter lapse is treating the pleadings as closed and thereby disclaiming any interest in replying to the New Matter.¹⁴

On those 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.

Neither *res judicata* nor collateral estoppel applies against a defendant who was neither a party nor in privity with a party in the prior proceeding: *Balent and Barto v. City of Wilkes-Barre*, 542 Pa. 555, 669 A. 2d 309 (1995). Indeed, Ross has disclaimed any reliance on either doctrine. Plaintiff's Brief in

¹³ Pennsylvania Rules of Civil Procedure 1026, 1029. A ten-day notice is only required when a party is asking the Prothonotary to enter a default judgment on praecipe. Pa. R. C. P. 1037.

¹⁴ Counsel stated at the argument below:

. . . Mr. Babyak obviously considers the pleadings closed or he wouldn't file a motion for judgment on the pleadings.

Judge Luty responded:

Oh, he did that because you filed it. [R. 135a.]

The record shows clearly that, in fact, Ross' motion was filed first. R. 3a, 72a, 88a.

Opposition to Preliminary Objections at 1.

In *Allison Park Contractors et al. v. Workers Compensation Appeal Board*, 731 A. 2d 234 (Pa. Cmwlth. 1999), Your Honorable Court held that a determination of marital status made in the Family Division of the Court of Common Pleas of Allegheny County was not binding on the employer. The claimant had named the decedent's parents as defendants in the Family Division proceedings; the outcome was a consent decree recognizing the marriage. The employer had not been a party to the Family Division proceedings. While the discussion emphasizes that the declaratory judgment was a consent decree, the decision also points out, in notes 2 and 3 at 236 and 237, the inapplicability of collateral estoppel to a party who was not involved in the prior action.

The Declaratory Judgment Act, 42 Pa. C. S. § 7531 et seq., states at § 7540(a)¹⁵:

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. . . .

At first blush, 23 Pa. C. S. § 3306¹⁶ (Proceedings to

¹⁵ 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.

¹⁶ This provision, originally 23 P.S. § 206, was enacted as part of the Divorce Code of 1980. At the time, 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).

determine marital status), seems to be in conflict with the foregoing; 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 or invalid by decree of the court and, unless reversed upon appeal, the declaration shall be conclusive upon all persons concerned.

The Fund respectfully submits that the primary purpose of § 3306 was to make clear that the 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. The finality language (which presupposes compliance with the Declaratory Judgment Act) warns marital status litigants that the same standards of finality will apply as in any other declaratory judgment action. "All persons concerned" is a shorthand reference to those persons whose joinder is required under § 7540(a) of the Declaratory Judgment Act.¹⁷

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):

¹⁷ 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).]

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.]

. . . .

The construction urged by plaintiff -- that everybody is bound regardless of joinder or notice -- flies in the face of the Due Process Clause.¹⁸ The legislature is presumed not to have intended an unconstitutional result. 1 Pa. C. S. § 1922(3). If, in fact, § 3306 of the Divorce Code permits the enforcement of a 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

¹⁸ The Fund is a person within the meaning of the Due Process Clause. 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 legislature is always free to accord an entity more process than it is constitutionally due. Nothing in the Declaratory Judgment Act suggests an intention to treat quasi-governmental entities differently from other persons; indeed, if governmental entities were excluded from the joinder requirements of the Act, no exception for taxing bodies would be necessary. Moreover, 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.¹⁹

Judge Luty's opinion states:

This Court accepted and now hereby adopts the findings of fact^[20] 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. 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.]

¹⁹ Article I, Section 11 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) the Supreme Court of Pennsylvania 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.]

The due process guaranteed by Section 11 and related provisions has been described by Your Honorable 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. See Note 18 *supra*.

²⁰ Any judgment on the pleadings that depends on the court's resolution of factual issues is necessarily invalid.

Even qualified deference to Judge Little's opinion would obviously be to the detriment of the Fund.

In *Carey v. Piphus*, 435 U.S. 247, 259, 98 S. Ct. 1042, 55 L. Ed. 2d 252 (1978), the United States Supreme Court stated:

[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[.] [*Id.* at 266, 98 S. Ct. at 1054, 55 L. Ed. 2d at 266.]

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

Procedural due process was explained as follows in *Fuentes v. Shevin*, 407 U.S. 67, 92 S. Ct. 1983, 32 L. Ed. 2d 556 (1972):

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." [*Id.* at 80, 92 S. Ct. at 1994, 32 L. Ed. 2d 556; citation omitted.]

In *Hansberry v. Lee*, 311 U.S. 32, 61 S. Ct. 115, 85 L. Ed. 22 (1940), the United States Supreme Court stated:

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. [*Id.* at 40, 61 S. Ct. at 117, 85 L. Ed. at 26.]

Pennsylvania is part of Anglo-American jurisprudence; in *Kelly v. Mueller*, 2004 Pa. Super. 425, ___ A. 2d ___ (2004), the Superior Court stated:

"Unless the court has the parties before it, by appearance or service of process, it is obvious that it cannot bind them by its adjudications." [Citation omitted.] "Lack of notice and an opportunity to be heard constitutes a violation of due process of law and results in an invalid judgment." [Citation omitted.] [*Id.* at P12.]

Martin v. Wilks, 490 U.S. 755, 109 S. Ct. 2180, 104 L. Ed. 2d 835 (1989) 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.²¹ The Court quoted the above language from *Hansberry* and the following language from *Chase National Bank v. Norwalk*, 291 U.S. 431, 54 S. Ct. 475, 78 L. Ed. 894 (1934):

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 person not a privy may rest assured that a judgment recovered therein will not affect his legal rights. [*Id.* at 441, 54 S. Ct. at 479, 78 L. Ed. 2d at 901.]

The Court reconfirmed this principle, stating:

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 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 Court also stated:

²¹ 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).

Joinder as a party, rather than knowledge of a lawsuit and an opportunity to intervene, is the method by which potential parties are subjected to the jurisdiction of the court and bound by a judgment or decree. The parties to a lawsuit presumably know better than anyone else the nature and scope of relief sought in the action, and at whose expense such relief might be granted. It makes sense, therefore, to place on them a burden of bringing in additional parties where such a step is indicated, rather than placing on potential additional parties a duty to intervene when they acquire knowledge of the lawsuit. [*Id.* at 765, 109 S. Ct. at 2186, 104 L. Ed. 2d at 846; footnote omitted.]

It is clear from the foregoing 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.²² Its decree did not order the Fund (or the FOP, 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 by 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 relief²³ at the

²² See Note 1, *supra*.

²³ 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.²⁴

The examples given by the Supreme Court in *Martin* of exceptions to joinder requirements both involve proceedings of a type traditionally classified as *in rem*²⁵; 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 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. 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

²⁴ Had the decree ordered the Fund to pay benefits, the Fund might have had standing 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, supra* (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.

²⁵ 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).

remedial scheme" dispensing with joinder where proving marriage is concerned.²⁶

Judge Friedman's opinion concludes with the following ipsedixit:

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. To be sure, 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.

Judge Luty's opinion offers a supplemental ipsedixit:

[T]o require Plaintiff to file a separate and distinct declaratory judgment action against each and every

²⁶ Ross has suggested that if the Fund's position is upheld, it would be necessary for persons seeking judicial recognition of a marriage to join credit card companies, grocery stores, and banks. R. 43a. The impact on such entities, if any, relates to their future remedies; the Fund cannot conceive of a situation where a finding of marriage would obligate such an entity to pay money to anybody. The interests of these peripheral entities might, consistently with due process, be adequately protected by a statutory scheme requiring that they be given notice and an opportunity to be heard. But notice without joinder cannot suffice where the consequence of finding a marriage is to impose an immediate financial obligation on any individual or entity. It doesn't get any more *in personam* than that.

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*.]

The Fund shares Judge Luty's distaste for duplicative proceedings. The legislature also shares it, as evidenced by the joinder requirements of the Declaratory Judgment Act. The multiplicity of proceedings in this case is the result of Ross' own failure to comply with those requirements. In *Angle v. Commonwealth*, 396 Pa. 514, 153 A. 2d 912 (1959), Justice Musmanno stated:

Without notice to all parties concerned, a lawsuit is a meaningless aggregation of papers. Without notice to a losing party in a lawsuit, the winner has achieved an empty victory. [*Id.* at 522, 153 A. 2d at 916-17.]

Here, the emptiness of the victory was eminently predictable. The Fund is the *only* known person other than Ross that would be financially affected by a finding of marriage, and collecting benefits based on Adams' police employment was her *sole* purpose in bringing the prior action. Under those circumstances, the failure to join the Fund in that action is utterly indefensible. The Fund should be given its day in court.

ARGUMENT II

ASSUMING ARGUENDO THAT THE FUND IS BOUND BY THE DECREE, AN AWARD OF BENEFITS SHOULD NOT INCLUDE INTEREST IN LIGHT OF THE FUND'S GOOD-FAITH RELIANCE ON EXISTING 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* Your Honorable 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 the widow of Adams 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.²⁷ He then brought a suit for interest based on the delay the dispute had caused. The Supreme 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 Orphans' Court decree, the Fund has relied on the plain language of the Declaratory Judgment Act and on universally recognized concepts of procedural due process, as more fully set forth in Argument I.

Ross argued below, in support of her claim for interest and her rejected claim for counsel fees and punitive damages, that the Fund had been "barred" by Judge Friedman's order from raising the nonjoinder issue in its Answer. R. 84a. Neither Judge

²⁷ *Cianfrani v. State Employees' Retirement Board*, 498 Pa. 204, 445 A.2d 737 (1982).

Friedman's statements from the bench (R. 46a-47a) nor her actual order (1a *infra*) prohibited counsel from further raising the issue raised in the preliminary objections.

It is true that Judge Friedman believed her ruling to be law of the case. However, the law of the case doctrine (which includes the rule that judges of coordinate jurisdiction who sit on the same case should not overrule one another's decisions) is inapplicable to rulings on preliminary objections, except as to subsequent preliminary objections raising the same issue. *Goldey v. Trustees of the University of Pennsylvania*, 544 Pa. 150, 675 A. 2d 264, 267 (Pa. 1996); *Ryan v. Berman*, 572 Pa. 156, 813 A. 2d 792 (2002); *Mellon Bank v. National Union Insurance Company*, 768 A. 2d 865 (Pa. Super. 2000).

Under the circumstances, the record shows no wrongful conduct justifying an award of interest.²⁸

²⁸ If the Fund prevails on the primary issue on this appeal but Ross ultimately prevails on the underlying claim, the issue of interest may be revisited at that time.

CONCLUSION

The order below should be reversed, and the Fund should be held not to be bound by the Orphans' Court decree. Judgment on the pleadings should be granted to the Fund insofar as the Complaint claims otherwise, but Ross should be given the opportunity to seek a declaration of her marital status. In the alternative, the award of interest should be reversed, or such other relief be granted as may be deemed appropriate.

Respectfully submitted,

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PROOF OF SERVICE

I hereby certify that I am this day serving the foregoing document upon the person and in the manner indicated below, which service satisfies the requirements of Pa. R. A. P. 121:

Service in person as follows:

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