

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

Audrey Ross,

Plaintiff

vs.

Policemen's Relief and  
Pension Fund of the City  
of Pittsburgh,

Defendant

Civil Division

G.D. 02-21202

BRIEF IN OPPOSITION TO  
PLAINTIFF'S MOTION FOR  
JUDGMENT ON THE PLEADINGS  
AND IN SUPPORT OF  
DEFENDANT'S MOTION FOR  
JUDGMENT ON THE PLEADINGS

Filed on behalf of  
Policemen's Relief  
and Pension Fund of  
the City of Pittsburgh,  
Defendant

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July 12, 2004

Subject to the penalties of 18 Pa. C. S. § 4904 (unsworn falsification to authorities), I certify that a true and correct copy of the within document has been served this day by hand delivery to the person named below:

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s / Norma Chase

Attorney for Defendant

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

|                          |   |                |
|--------------------------|---|----------------|
| Audrey Ross,             | ) |                |
|                          | ) |                |
| Plaintiff                | ) | Civil Division |
|                          | ) |                |
| vs.                      | ) |                |
|                          | ) |                |
| Policemen's Relief and   | ) | G.D. 02-21202  |
| Pension Fund of the City | ) |                |
| of Pittsburgh,           | ) |                |
|                          | ) |                |
| Defendant                | ) |                |

BRIEF IN OPPOSITION TO PLAINTIFF'S MOTION FOR  
JUDGMENT ON THE PLEADINGS AND IN SUPPORT OF  
DEFENDANT'S MOTION FOR JUDGMENT ON THE PLEADINGS

Procedural History

Audrey 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.

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.

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.

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.<sup>1</sup>

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

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<sup>1</sup> 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.

a decree entered in another proceeding. Plaintiff admits that defendant was not a party to that proceeding. The decree, accordingly, cannot bind defendant.

A supporting brief was attached to the preliminary objections. 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.

Ross' reply, filed January 9, 2003, stated "Defendant is not a necessary party to marriages in Pennsylvania or elsewhere." A brief was attached, along with a proposed order denying the objections.

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[.] [A.T. 9.]

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[.] [A.T. 10-11.]

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 -- [*Id.*]

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 order<sup>2</sup>, 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. [A.T. 12.]

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. 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. [A.T. 12-13.]

The written order stated:

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<sup>2</sup> The deleted language would have directed the Fund to pay widow benefits and counsel fees.

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. [Emphasis added.]

The highlighted language was added by hand.

Defendant appealed to the Commonwealth Court. Judge Friedman's opinion notes that the appeal was filed as "a precautionary measure in the event the appellate court concludes that our Order was indeed final based upon § 7532 of the Declaratory Judgment Act, 42 Pa.C.S.A. § 7532."<sup>3</sup>

On November 26, 2003, following briefing and argument, the appeal was quashed. 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 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. [Memorandum Opinion at 5.]

. . . .

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

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<sup>3</sup> 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 on 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.

the common law marriage decree. [*Id.* at 5-6.]

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. 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. The Fund's New Matter set forth the following facts not already of record:

- (1) Adams left no estate;
- (2) The question of his marital status was not ancillary to any larger matter before Orphans' Court;
- (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 defendant<sup>4</sup>;
- (4) Ross did not state the purpose for which declaratory judgment was sought;
- (5) Ross gave notice to Adams' daughters by a terminated marriage;
- (6) The daughters filed an answer contesting the declaration and were treated as parties;

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<sup>4</sup> 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).

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

(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[.]"<sup>5</sup>

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

(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.

(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". 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.

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

(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.

(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;

(15) No process of Orphans' Court has ever issued against the Fund, and the instant action is Ross' first

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<sup>5</sup> 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.

attempt to enforce the Orphans' Court decree against defendant.

Ross did not reply to the New Matter, and the time for a reply has expired. Ross filed a Motion for Judgment on the Pleadings and a supporting brief on July 7, 2004. The motion cites Judge Friedman's ruling, notes that Judge Friedman "warned counsel not to raise issues involving the validity of the [Orphans' Court decree]", and asserts that the Answer and New Matter raise no defense to Ross' claim. The supporting brief urges Your Honorable Court to grant Ross pension benefits, punitive damages, and counsel fees.

It is the position of the Fund that the undisputed facts mandate a ruling that the Orphans' Court decree does not bind it.

#### The Effect of Judge Friedman's Ruling

Neither Judge Friedman's statements from the bench nor her actual order prohibited counsel from further raising the issue raised in the preliminary objections, and her statements were based on the premise that her ruling was law of the case. They were advisory, and they were an expression of her belief as to the effect of her ruling on subsequent trial level proceedings. That belief was in error.

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. In *Goldey v. Trustees of the University of Pennsylvania*, 544 Pa. 150, 675 A. 2d 264, 267 (Pa.

1996), the Supreme Court of Pennsylvania stated:

Where the motions differ in kind, as preliminary objections differ from motions for judgment on the pleadings, which differ from motions for summary judgment, a judge ruling on a later motion is not precluded from granting relief although another judge has denied an earlier motion. However, a later motion should not be entertained or granted when a motion of the same kind has previously been denied, unless intervening changes in the facts or the law clearly warrant a new look at the question.

*Accord: 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). Whether the first judge has written an opinion is not determinative. *Goldey; Mellon*. Even where the coordinate jurisdiction rule is applicable, departure from it is allowed under limited circumstances, such as "where the prior holding was clearly erroneous and would create a manifest injustice if followed." *Commonwealth v. Starr*, 541 Pa. 564, 664 A. 2d 1326, 1332 (Pa. 1995). *Accord: Zane v. Friends Hospital*, 575 Pa. 236, 836 A. 2d 25 (2003).

Moreover, Judge Friedman later retreated, at least in part, from the position that the issue may not be pursued further below; her opinion states:

In its brief Defendant had two additional arguments which were not brought to the Court's attention during oral argument: that Judge Little's Opinion and Decree do not mention Defendant or order Defendant to do anything and that Judge Little's Opinion and Decree do not include a finding of when the marriage began (which would be necessary for Defendant to determine whether benefits are payable, since Plaintiff and Mr. Adams would have to have been married for two years before his death for Plaintiff to be eligible to receive benefits). . . . These last two items are *matters for an Answer, or are evidence for trial, not for Preliminary Objections*. [Opinion of Judge Friedman at 3-4; emphasis added.]

A judge ruling on preliminary objections in the nature of a

demurrer is operating without the benefit of the particulars of the defense raised. It would be grossly unfair to allow such a ruling to preclude a defendant from pleading those particulars and (at the very least) making a record for appeal, especially when the ruling is one made in Motions Court.

The Commonwealth Court erroneously assumed that the order was, in fact, law of the case. However, that court never accepted jurisdiction to decide the issue<sup>6</sup>; while the appeal was pending before it, it only had jurisdiction to determine jurisdiction. In *Commonwealth v. Miller*, 452 A. 2d 820 (Pa. Super. 1982), a case involving a question of the validity of a supersedeas issued by a court that ultimately decided it did not have jurisdiction, the Superior Court held the supersedeas to be a nullity because it was entered prior to the period during which the court was considering whether it had jurisdiction, stating:

[A]ny act taken by a court without proper jurisdiction is null and void. [*Id.* at 821.]

A court always has jurisdiction to determine whether it has jurisdiction. During the period of such a determination, a supersedeas issued by the court will be valid even if it subsequently determined that the court had no jurisdiction to hear the case on its merits. [Citation omitted.] This was not the situation here. [The court] was considering the jurisdiction issue only for one day, June 21, and that issue had not even been raised on May 14 when the supersedeas was issued. [*Id.* at 822, note 5.]

Here, the only purpose for which the Commonwealth Court ever exercised jurisdiction was to determine appealability; it never

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<sup>6</sup> The court noted:

Commonwealth Court may address the issue of its subject matter jurisdiction over an appeal, *sua sponte*. [Memorandum Opinion of the Commonwealth Court at 2, note 2.]

undertook to instruct the trial court as to what it should do on remand. Once the court determined that the "put out of court" standard applied, and found that the Fund had not been put out of court, the purpose of determining whether subject matter jurisdiction existed had been fulfilled. At that point, jurisdiction to determine jurisdiction had ended. Any further comments on the effect of the order were surplusage.

Accordingly, Your Honorable Court is free to revisit the issue raised in the preliminary objections.

#### Plaintiff's Argument for Counsel Fees

No claim for counsel fees is properly before the court. Ross has not filed a petition for counsel fees, and her Motion for Judgment on the Pleadings does not request any such relief.

Ross' brief claims that the Fund and its counsel have engaged in reckless and vexatious actions and have "repeatedly ignored Court Orders and filed frivolous pleadings and appeals." Brief in Support of Judgment on the Pleadings at 4. The Fund has defied no court orders. Orphans' Court did not direct the Fund to do anything. Judge Friedman did not prohibit the Fund from doing anything. The Fund has, to be sure, disagreed with Ross and with Judge Friedman as to its obligations. That does not justify an award of counsel fees or punitive damages.

Ross has not identified what is frivolous about defendant's pleadings. In fact, Ross has made no argument on the ultimate issue of the effect of the Orphans' Court decree, preferring to

rest on Judge Friedman's opinion.<sup>7</sup>

The quashing of the appeal does not compel the conclusion that the appeal was taken in bad faith. The issue is beyond the scope of a Motion for Judgment on the Pleadings; indeed, the pleadings do not make any reference to the appeal. The facts bearing on the propriety of any such award are in significant part outside the record. Ross may, if she chooses, file a petition for counsel fees at a more appropriate juncture. The Fund will have the right to answer any such petition, and the right to a hearing on any factual issues raised.

#### The Effect of the Orphans' Court Decree

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, plaintiff has disclaimed any reliance on either doctrine. Plaintiff's Brief in Opposition to Preliminary Objections at 1.

In *Allison Park Contractors et al. v. Workers Compensation Appeal Board*, 731 A. 2d 234 (Pa. Cmwlth. 1999), the Commonwealth 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

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<sup>7</sup> Judge Friedman never stated that the Fund's argument was frivolous. Rather, it appears to have been her position that it would be frivolous for the Fund to raise the issue in its Answer after the preliminary objections were overruled.

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 court 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)<sup>8</sup>:

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. § 3306<sup>9</sup> (Proceedings to 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.

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<sup>8</sup> 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.

<sup>9</sup> 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).

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)(7) of the Declaratory Judgment Act.<sup>10</sup>

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.]

. . . .

The construction urged by plaintiff -- that everybody is bound regardless of notice -- flies in the face of the Due

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<sup>10</sup> 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).]

Process Clause.<sup>11</sup> 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 United States Constitution and Article I, Section 9 of the Pennsylvania Constitution.

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.]

*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

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<sup>11</sup> 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.

which they had known and in which they had not chosen to intervene.<sup>12</sup> The Court quoted the foregoing 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.<sup>2</sup>

<sup>2</sup> [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.]

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*

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<sup>12</sup> 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).

*Company v. Sling Testing and Repair, Inc.*, 471 Pa. 1, 369 A. 2d 1164 (1977). Orphans' Court did not even attempt to bind the Fund, and its 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 relief<sup>13</sup> at the behest of a nonparty.<sup>14</sup>

The examples given by the Supreme Court in *Martin* both involve proceedings of a type traditionally classified as *in rem*<sup>15</sup>; 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.

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<sup>13</sup> The exceptions period had expired by the time the Fund learned of the decree.

<sup>14</sup> 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). 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 would legitimize the blindsiding, and such a "party" is not one who has had a full and fair opportunity to litigate the issue.

<sup>15</sup> 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).

It is clear from *Martin* that notice and opportunity to intervene may sometimes satisfy due process. This gives plaintiff 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.<sup>16</sup>

Judge Friedman's opinion states:

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.]

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

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<sup>16</sup> 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. A.T. at 8. 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.

the survivor.

Here, the Fund is the *only* known person other than Ross that would be financially affected by a determination of marriage, and collecting benefits from the Fund was her *sole* purpose in bringing the prior action. Under those circumstances, the failure to join the Fund in that action is utterly indefensible.

Accordingly, Ross' request for declaratory relief should be denied. She should be given leave to amend her complaint to seek a declaration of her marital status.

Respectfully submitted,

Norma Chase  
Attorney for Defendant