

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

APPLICATION FOR REARGUMENT

Application for reargument of the order of the Commonwealth Court of Pennsylvania, 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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APPLICATION FOR REARGUMENT

This application seeks reargument of the panel order of Your Honorable Court, 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 2005 Pa. Cmwlth. Lexis 70.

The Issue

Appellee Audrey Ross claims to be the 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 appellant Fund was not a party. In the 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 below held that the marital status question had been finally decided in Orphans' Court, and granted Ross judgment on the pleadings. The panel affirmed. The panel held 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 ordered the Fund to pay benefits on the basis of the Orphans' Court decree.

The Fund disputes the existence of the marriage, and

believes that it has a right to be heard on that issue before being ordered to pay benefits to Ross.

Factual and Procedural History

The panel opinion summarizes the history of this lawsuit as follows:

On November 15, 2002, Ross filed a declaratory judgment action against the Fund in the trial court asking for a decree requiring the Fund to recognize her marriage to Adams, provide surviving spouse benefits retroactive to June 19, 2001, pay attorney fees and costs, and award such other relief as the court might deem just. The Fund filed preliminary objections alleging that the complaint failed to state a cause of action on the ground that the Fund could not be bound by a decree entered in another proceeding. The trial court overruled the Fund's objections, concluding that the marriage of Ross and Adams had been "finally decided" and that the Fund had "no standing to object nor to notice of [sic] that Orphans' Court proceeding."^[1] The Fund appealed the overruling of its objections to this Court; the appeal was quashed in an opinion and order filed on November 25, 2003 by Senior Judge James R. Kelley. The Fund filed an answer with new matter in the trial court, and both parties moved for judgment on the pleadings. The trial court granted judgment in favor of Ross in an order dated August 30, 2004. That order directed the Fund to pay widow benefits to Ross "retroactive to June 19, 2001 plus interest and to make regular payments during her lifetime." In a supplemental order dated September 7, 2004, the trial court determined that "the amount of widow benefits due as of August 30, 2004 is \$43,380.65, plus interest." The trial court granted supersedeas in an order dated October 1, 2004. This appeal followed.

The Fund has no corrections to the foregoing chronology, but it has a few additions:

The statement about the Fund's lack of standing accompanied the overruling of the preliminary objections; it was added to

¹ The opinion of the Honorable Judith L. A. Friedman overruling the preliminary objections is reported at 151 P.L.J. 123, 23 Fiduciary 2d 404 (2003).

Ross' proposed order by Judge Friedman.² R. 1a. The Fund perceived the language as declaratory, and its appeal was a protective measure pursuant to *Nationwide Mutual Insurance Company v. Wickett*, 563 Pa. 595, 763 A. 2d 813 (2000), which holds that orders containing declaratory language are final and must be immediately appealed.

Following the quashing of the appeal and the remand of the record, the Fund filed an Answer and New Matter that reiterated its position on the joinder issue. With respect to the marriage, the Answer stated:

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.]

The New Matter, endorsed with a Notice to Plead, went on to set forth further information about the history of the previous action, to-wit:

- (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

² Judge Friedman also made statements from the bench to the effect that her ruling was law of the case and that it would accordingly be improper for the Fund to raise the nonjoinder issue in its Answer. R. 46a-47a.

Orders overruling preliminary objections are not, in fact, law of the case. *Ryan v. Berman*, 572 Pa. 156, 813 A. 2d 792 (2002). There was nothing in Judge Friedman's remarks to suggest that she intended to impose any restriction on the Fund's future pleadings over and above that which she erroneously believed arose from the law of the case doctrine. The Fund considered her statements advisory and, as evidenced by its Answer and New Matter, rejected the advice.

Division on September 25, 2001, after Orphans' Court refused the filing, and had named only Adams as a defendant.³ R. 62a.

(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[.]"⁴ *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

³ The Orphans' Court decree and opinion are captioned "Audrey Ross v. Gregory William Adams." R. 16a. The Civil Division docket, showing the same captioning, was appended to the Fund's Answer and is in the record at R. 65a-66a. 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 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 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.

was the major reason that the action was brought. He mistakenly identified the source of the pension as the "FOP".⁵ 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; emphasis added.]

(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 chose not to respond to the New Matter, letting the time for a response lapse and then filing her Motion for Judgment on the Pleadings. The end result is that the only disputed issue is the marriage, and that all facts necessary to determine whether the prior decree bars the Fund from challenging the existence of the marriage have been agreed upon.

⁵ 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.

Reasons for Granting Reargument

It should be understood at the outset that the Fund is a statutory defined benefit plan, with benefits in this case being payable either to Ross or to no one. A surviving spouse must have been married to the participant for at least two years at the time of death to qualify for benefits.⁶ In no event is there any benefit payable to a participant's estate. See generally 53 P.S. § 23644 et seq.

The panel opinion states:

To support its contention that it is not bound by the Orphans' Court order declaring that Ross and Adams were married at common law, the Fund relies solely on our decision in *Allison Park Contractors, Inc. v. Workers' Compensation Appeal Board (Wagner)*, 731 A.2d 234 (Pa. Cmwlth. 1999), petition for allowance of appeal denied, 561 Pa. 678, 749 A.2d 472 (2000), in which, the Fund says in its brief, this Court "held that a determination of marital status made in the Court of Common Pleas of Allegheny County was not binding on the employer." *This is simply not what we said in Allison Park.* [Panel opinion at 3, 9a *infra*; emphasis added.]

The *Allison Park* case *did* involve a determination of marital status made in the Court of Common Pleas of Allegheny County. Your Honorable Court *did* hold that it was not binding on the employer.⁷ That is not the whole story of *Allison Park*, but *the*

⁶ Judge Little did not state when he believed the marriage began; however, it is a reasonable inference from his opinion that he believed it existed for more than two years.

⁷ "Determination" was one of several terms Your Honorable Court used to refer to the order. The decision states, *inter alia*:

The common pleas court's determination that Claimant was the common law wife of Decedent was arrived at by agreement between Claimant and the Wagners after a preliminary status conference and not as a result of an evidentiary hearing and adjudication. [731 A. 2d at 237.]

Fund never said that it was. Here is what the Fund said:

In [*Allison Park*], 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. [Brief for Appellant at 16; emphasis added.]

The first sentence -- the one the panel quoted -- was not intended to be a statement in the abstract of the holding in the case. If it had been so intended, the highlighted sentence would not have been added.

Allison Park was one of 27 cases cited in the section of the Fund's brief addressing the joinder issue. It was not central to the argument, because what it says about who is bound and who is not has been said far more forcefully in other cases. It is, however, the only case in which Your Honorable Court addressed the issue of the effect of a Common Pleas order declaring marital status. And it did point out, however briefly, the inapplicability of collateral estoppel to nonparties.⁸

⁸ Note 2 states:

Employer also contends that the doctrine of collateral estoppel is applicable. Our Pennsylvania Supreme Court in *Balent v. City of Wilkes-Barre*, 542 Pa. 555, 564, 669 A.2d 309, 313 (1995) 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

The panel, after setting forth the particulars of *Allison Park*, said:

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. [Panel opinion 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 supports binding the Fund. It may not give the Fund as much help as the Fund would like, but it gives Ross no help at all. 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, supra; Radakovich v. Radakovich*, 846 A. 2d 709 (Pa. Super. 2004).⁹

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).

[731 A. 2d at 236.]

Note 3 informs the reader that collateral estoppel applies to consent judgments only where the agreement between the parties was manifestly intended to resolve a particular issue, and concludes with:

As noted earlier the parties to the consent order are not the same parties in the present matter. [731 A. 2d at 237.]

⁹ The Fund knows of no authority for the proposition that it matters whether the order is supported by a "well-reasoned sound Opinion" or whether the court considering its effect is "simply not persuaded that a different legal conclusion would be reached with a second hearing." Opinion in Support of Order Granting Judgment on the Pleadings at 2, 11a *infra*. The Fund was not required to plead evidence or to satisfy the court that its participation would result in a different outcome. The United

The panel opinion quotes 23 Pa. C. S. § 3306, which states:

§ 3306. Proceedings to determine marital status.

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. [Panel opinion at 4, 10a *infra*.]

The opinion then states:

The Fund tells us that the phrase "all persons concerned" is "a shorthand reference to those persons whose joinder is required under Section 7540(a) of the Declaratory Judgment[] Act["], 42 Pa. C.S. § 7540(a), that states, in pertinent part,

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.

What the Fund does not tell us is how it reaches that conclusion. [Panel opinion at 4-5, 10a-11a *infra*.]

The Fund reached that conclusion by attempting to reconcile 23 Pa. C. S. § 3306 with the Due Process Clause. The argument

States Supreme Court said 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). See also *Albert v. Lehigh Coal and Navigation Company*, 431 Pa. 600, 611, 246 A. 2d 840, 846 (1968) (nonparty not bound "in any manner whatsoever" by judgment).

The limitations on res judicata and collateral estoppel are grounded in due process, further discussed *infra*.

the Fund made in its brief was as follows:

At first blush, 23 Pa. C. S. § 3306¹⁰ (Proceedings to determine marital status), seems to be in conflict with [42 Pa. C. S. § 7540(a)].

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.^[2]

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 joinder or notice -- flies in the face of the Due Process Clause. [Footnote omitted.] 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 Article I, Section 11 of the Pennsylvania Constitution. [Footnote omitted.]

¹⁰ 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).

² 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).]

[Brief for Appellant at 16-19.]

Section 3306 is silent on joinder. This means one of two things:

(1) The legislature, consistently with due process, intended for the joinder standard set forth in the Declaratory Judgment Act to apply, or

(2) The legislature intended to give marital status litigants the ability to bind the world without regard to whom they join or fail to join.

There *is* one possible reason the legislature might have intended the latter: it may have focused on putative marriages to which both parties are living, and may not have contemplated or foreseen the use of the statute to establish surviving spouse status. Certainly existing marriages were the primary concern; § 3306 was part of a historic divorce reform measure. It served to encourage individuals in murky marital situations to seek clarification and closure¹¹ sooner instead of later. It removed two obstacles to doing so: problems with the case-or-controversy requirement, and the prohibition in the Declaratory Judgment Act (later modified as set forth *supra*) against using the Act to seek divorce or annulment.

¹¹ Certainty is desirable not only for economic reasons; 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.

Those obstacles were of less concern to a putative surviving spouse. 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 divorce and annulment restrictions in the Declaratory Judgment Act would have no effect.

If this is what happened -- the Fund does not claim to know for certain -- § 3306 is unconstitutional as applied to the situation *sub judice*.¹²

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 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

¹² The Fund does not concede that no constitutional problems exist when the action is brought during the joint lifetime of the putative spouses, but that question is not before Your Honorable Court.

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.¹³ 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 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*¹⁴; 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.

¹³ 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).

¹⁴ 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).

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 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.¹⁵ The impact on such entities of a decree of marriage or nonmarriage relates to their future remedies; it does not require them to pay money to anyone. Under *Martin*, it might suffice to give them notice and an opportunity to intervene. However, it is clear that 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 panel opinion 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. [Panel opinion at 5, 11a *infra*.]

The Fund is at a 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

¹⁵ For example, 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.

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.¹⁶

The panel opinion also states:

[T]he 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. 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. [Panel opinion at 5, 11a *infra*.]

The Fund's brief did explain the distinction, albeit briefly:

The Fund [respects] 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. [Brief for Appellant at 24; original emphasis.]

The Fund remains of the view that the creation and the after-the-fact declaration of a marriage are two different things.

¹⁶ 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).

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 considered to be 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 a marriage is a mistake. It *is* the Fund's business whether a decree finding a past marriage is a mistake.

The panel tells 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 or entity would constitute a taking for due process purposes, that person or entity should be joined. There is nothing onerous or cumbersome about such a rule. The issue of whether grocery stores 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.

The decision here adversely affects the fiscal interests of all public employee pension funds within Pennsylvania. Moreover, the decision's endorsement of a modified *Allison Park* approach to the establishment of marital status will adversely impact Workers' Compensation practice: it invites putative surviving spouses who intend to bring fatal claim petitions to first bring declaratory judgment actions against family members of the deceased worker, with a view toward cutting off the right of the employer to contest their status at the Workers' Compensation hearing.

Accordingly, the Fund respectfully submits that this case is a compelling one for reargument en banc or, in the alternative, panel reconsideration.

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:

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