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CASES REPORTED

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without Objection Filed Inter Vivos Gift – Inheritance Tax – Executrix fees



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**In re Estate of
DAVID A. WINGERT, Deceased**

Reduction of Counsel Fees for Estate
Administration without Objection Filed Inter
Vivos Gift – Inheritance Tax – Executrix fees

No. 67-07-1292

1. Decedent is survived by three beneficiaries under the Will: an adult son (Objector), a minor son (Dylan), and a girlfriend (Executrix). Executrix filed an account and Objector brought six objections to trial. The first objection was that the Executrix failed to account for Decedent's wallet and York Area Regional Police badge. The Court rejected Executrix's argument that an inter vivos gift had been made and implemented an equitable solution regarding the distribution of the badge with three beneficiaries. The second objection was to the billing of the estate for the entire cost of a headstone designed for both Decedent and Executrix. The Court granted this objection and directed Executrix to reimburse the Estate for half the cost. The Court denied the next two objections which were to the amount of the funeral costs and to the costs associated with Decedent's Chevy Tahoe. The next objection was to the inheritance tax calculation which objector argued caused the linear beneficiaries to be penalized for Executrix's 15% bracket. The Court granted this objection as well. The last objection was to the amount of the Executrix and litigation fees. The Court reduced the Executrix's fee. The Court approved the litigation fees, but directed that the costs could not come exclusively from the objector and the Minor's shares. Executrix's pro rata share needed to be deducted. Finally, the Court reduced the counsel fees for estate administration from 4.6% of the gross assets of the estate.

2. Executrix's counsel filed a Motion for Reconsideration/Exception on the ruling to reduce of the counsel fees for estate administration despite the absence of an objection. The Court denied the motion noting that the Court has the authority and obligation to review the reasonableness of fees charged to an Estate.

3. Objector filed a Motion for Reconsideration/Exception asking the Court to order the litigation expenses be paid for by Executrix as opposed to having them come out of the residue of the Estate. The Court denied this Motion.

In the Court of Common Pleas of York County Pennsylvania; **In re Estate of DAVID A. WINGERT, Deceased**. Reduction of Counsel Fees for Estate Administration without Objection Filed Inter Vivos Gift – Inheritance Tax – Executrix fees..

JOHN M. CRABBS, Esq.
For the Objector

CHRISTOPHER A. FERRO, Esq.
For the Executrix

BLACKWELL, J., December 30, 2009

OPINION

This matter is before the Court pursuant to several objections to the First and Final Account of Crystal A. Wiland, Executrix of the Estate of David A. Wingert.

BACKGROUND

David A. Wingert ("Decedent" or "Mr. Wingert") died September 8, 2007. Until his death, Mr. Wingert was an officer with the York Area Regional Police Department. He was survived by his adult-son, David Adam Wingert ("Objector" or "David"), and his minor-son, Dylan A. Wingert. Decedent's Last Will and Testament named his girlfriend, Crystal A. Wiland ("Ms. Wiland" or "Executrix"), the Executrix of his Estate. Decedent's Will left all of his property to his residuary estate and designated that 50% of his residuary estate shall go to Ms. Wiland, 25% to his son David, and the remaining 25% to his son Dylan.

Letters testamentary were granted to the Executrix on September 13, 2007. The Executrix filed her First and Final Account and a Petition for Adjudication/Statement of Proposed Distribution on August 14, 2008. Shortly thereafter, she filed a Pennsylvania Inheritance Tax return. When this Court called her First and Final Account for audit and confirmation on September 24, 2008, Objector appeared pro se objecting to the Account and filed his written objections later that day. The Objector also filed supplemental objections, which the Court allowed. A bench trial on those objections was held September 21, 2009.

The total value of gross assets in Decedent's Estate at the time of death was \$283,327.95, as reflected in Executrix's First and Final Account. From this total, Executrix disbursed \$171,397.16 to pay Decedent's debts; \$19,321.54 for funeral expenses; \$19,166.35 for administrative expenses; \$14,390.00 for legal and accounting fees; \$13,490.00 for an Executrix's commission; and \$5,000.00 for federal, state, and local taxes leaving a distributable net estate of \$39,367.56.

ISSUES

Objector has raised eight objections in all but has voluntarily withdrawn two. The remaining objections in the order addressed below by this Court pertain to the following

issues: (1) Failing to inventory and account for Decedent's wallet and his York Area Regional Police badge; (2) Expending Estate assets to purchase a burial headstone designed for two persons; (3) Expending \$14,021.54 of Estate assets for Decedent's funeral and burial; (4) Expending \$3,760.00 of Estate assets for car loan, insurance, and registration payments on the 2006 Chevrolet Tahoe Decedent owned when he died; (5) Paying all Inheritance Taxes from the residue of the Estate instead of charging Ms. Wiland's distributive share with a pro rata share of Inheritance Tax; and (6) Collecting an executrix commission of \$13,490.00 and billing the Estate \$2,140.50 in additional legal fees to represent Executrix in the current objections to her First and Final Account. In addition, the Court reviews the reasonableness of legal fees already collected by Executrix's attorneys and paid out by the Estate.

This Orphans' Court Division has proper jurisdiction over all of these matters related to Decedent's Estate.¹

DISCUSSION

1. DECEDENT'S POLICE BADGE AND WALLET

Objector argues that the Executrix did not inventory nor account for Decedent's wallet and York Area Regional Police Badge. Executrix asserts in her post-trial brief that her trial testimony establishes that the wallet and badge were *inter vivos* gifts to her from Decedent and thus they are not part of Decedent's estate. (Executrix's Brief at 7-8). Objector contends that no "competent evidence" that a gift of the wallet and badge was "presented nor sought to be introduced." (Objector's Brief at 5). In addition, Objector contends that the Dead Man's Statute should preclude Ms. Wiland's trial testimony regarding her ownership of the wallet and badge. (*Id.*). Finally, Objector asserts "it is utterly inconceivable that an active duty police officer would give away his badge and wallet during his life." (*Id.*).

"[C]ourts must look at the apparent title as of the date of death and determine, prima facie, the state of ownership to each piece of property. . . . If, as of the time of death, the circumstances surrounding a piece of property indicate that it belongs to the decedent, then the burden of proof is on the claimant to prove otherwise." *In re Estate of Clay*, 264 A.2d 632, 636 (Pa. 1970).

Here, the circumstances indicate that the police badge and wallet belonged to Decedent and the time of his death. The limited evidence leads to the conclusion that Mr. Wingert was an active police officer having

been vested with at least some degree of title to his police badge and full title to his accompanying wallet up until the time of his death. The burden is on Ms. Wiland, claiming personal ownership of the badge and wallet, to prove otherwise.

"It is the law in this Commonwealth that to establish a valid *inter vivos* gift it is essential that two elements of a gift be shown: (1) an intention to make an immediate gift and (2) such actual or constructive delivery to the donee as will divest the donor of dominion and control of the subject matter of the gift." *Hengst v. Hengst*, 420 A.2d 370, 371 (Pa. 1980) (citing *Estate of Young*, 391 A.2d 1037 (Pa. 1978)).

"Initially, the burden is on the alleged donee to prove a gift *inter vivos* by clear, precise and convincing evidence. Once prima facie evidence of a gift is established, a presumption of validity arises and the burden shifts to the contestant to rebut this presumption by clear, precise and convincing evidence." *Hera v. McCormick*, 625 A.2d 682, 686 (Pa.Super. 1993) (internal citations omitted).²

The Pennsylvania Supreme Court has defined clear and convincing evidence to mean:

[That] the witnesses must be found to be credible, that the facts to which they testify are distinctly remembered and the details thereof narrated exactly and in due order, and that their testimony is so clear, weighty, and convincing as to enable the [trier of fact] to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue.

In re Estate of Fickert, 337 A.2d 592, 594 (Pa. 1975) (quoting *La Rocca Trust*, 192 A.2d 409, 413 (Pa. 1963)).

At trial on recross examination, Ms. Wiland testified that Mr. Wingert purchased a wallet through an employee allowance at the York Area Regional Police Department and that the wallet encloses and keeps Decedent's police badge. (Transcript at 31). On direct examination, Ms. Wiland affirmed that she was currently in possession of a badge and wallet that was at one point owned by Mr. Wingert. (*Id.* at 33). When asked whose property the badge and wallet were at the time Mr. Wingert died, Ms. Wiland responded, "I had it." (*Id.*). When asked whether the badge and wallet were hers at the time Mr. Wingert passed away, Ms. Wiland (after the Court overruled an objection) responded, "Yes." (*Id.*). On redirect examination, Ms. Wiland testified that the badge and wallet did not become her property by sale. (*Id.* at 35).

The Court holds that Ms. Wiland failed to prove by clear, precise and convincing evidence that Decedent's police badge and wallet were *inter vivos* gifts to her. The Court reaches this holding without having to apply the Dead Man's Act to the facts and trial testimony in this case.³ Ms. Wiland presented no evidence that the Decedent intended to make an immediate gift to her. Furthermore, there was no testimony or evidence in the record that Decedent delivered the wallet and badge to Ms. Wiland either directly, constructively, or symbolically. Thus, there was no direct, positive, express, and unambiguous evidence presented that a gift was made. Ms. Wiland's trial testimony only contains her belief that she owned Mr. Wingert's wallet and police badge when he died. She testified that she did not receive the wallet and badge by sale and there was no other testimony or evidence offered to explain why she believed she owned those items or how they came into her possession.⁴

The Court concludes that Decedent's wallet and police badge were Decedent's property at the time of his death and should have been properly inventoried as part of his Estate by the Executrix pursuant to 20 Pa.C.S. § 3301(a). If a valid gift was not made, the property must be included in the inventory as an estate asset. *In re Estate of Miller*, 346 A.2d 761, 764 (Pa. 1975).

Objector prays this Court to order the Executrix "to fully administer the personal property of the Decedent." (Objector's Brief at 10). The issue becomes how the wallet and police badge, personal property of Decedent's Estate and now in the Executrix's possession, should be distributed.

The Probate, Estates and Fiduciaries Code ("PEF Code") gives the Orphans' Court Division mandatory jurisdiction to adjudicate the title to personal property in the possession of a personal representative, or registered in the name of the decedent or his nominee, or alleged by the personal representative to have been in the possession of the decedent at the time of his death. 20 Pa.C.S. § 711(17).

The Orphans' Court Division has all legal and equitable powers required for or incidental to the exercise of its jurisdiction. 42 Pa.C.S.A. § 323; 20 Pa. C.S. § 701. "The jurisdiction of the orphans' court over the settlement and distribution of decedents' estates is exclusive, and necessarily includes the power to determine all questions essential thereto." *In re Crisswell's Estate*, 5 A.2d 577, 579 (Pa. 1939). "Its power to distribute necessarily includes the power to determine all questions essential to a proper distribution." *In re Starz' Estate*, 46 A.2d 486, 487 (Pa. 1946) (quoting *In Re Slagle's Estate*, 7 A.2d 353, 355 (Pa. 1939)).⁵

Decedent's Will makes no specific bequest of his police badge and wallet. His police badge and wallet (like all his other property) are part of his residuary Estate. Decedent's Will designates that 50% of the residue of his Estate shall go to his girlfriend, Ms. Wiland, 25% of the residue shall go to his son David, and the remaining 25% of the residue to his son Dylan. Rather than order the badge and wallet separated or divided, this Court pursuant to its equity powers, creates a more practical and just solution based on additional testimony at trial.

At trial, Executrix testified, somewhat tangentially, that there were actually three badges and that she already gave two of them to Decedent's ex-wife, "one for each of the boys." (Transcript at 34-35). Given that statement, the Court finds that Decedent owned three badges at the time of his death and the Court will order Executrix to collect and inventory all three of these police badges as part of Decedent's Estate.

The record also established that the police badge and wallet retained by Executrix are, in her words, "kind of a single item." (Transcript at 32). Further, the record establishes that Decedent's younger son, Dylan, helped his father to select the wallet and went with him when he purchased it. David testified that the wallet therefore has "some emotional significance" to Dylan and that he "brings it up all the time." (Transcript at 38-39). Finally, the Executrix stated that it is her intention to "someday" give Dylan "the wallet but not the badge." (Transcript at 34).

Given the totality of these circumstances, the Court will order the Executrix to: distribute Decedent's police badge in her possession and the accompanying wallet that goes with that badge to Joann Wingert (Decedent's ex-wife) to be held in trust for Dylan Wingert consistent with Item 3 of Decedent's Will; distribute one of the other two remaining badges to herself personally; and then distribute the third and remaining badge to David Wingert. The Court stresses that this narrow holding is limited to the facts of this case and is the most fair and equitable distribution of the personal property in dispute.

Objector's FIFTH⁶ objection is GRANTED.

2. DOUBLE GRAVESTONE

Executrix purchased with Estate funds a gravestone designed to memorialize two individuals. Objector argues the Executrix should be "surcharged \$2,650" (half the cost of the gravestone) since the Executrix has expressed her intent to be buried beside Decedent and have her estate use half of the double gravestone to memorialize her after her death. (Objector's Brief at 3; Transcript at 18).

Executrix argues that she should not be surcharged because she gave Decedent's Estate, without charge, a cemetery plot she had purchased for \$100 in 1991. (Executrix's Brief at 3; Exhibit 3). She argues that "The minimum economic benefit attributed from [her future] marginal use of this headstone is at least equal to the value of the plot" she gave to Decedent's Estate. (*Id.*) The record is not clear, but it appears to the Court that Executrix purchased two adjacent plots in 1991, giving one plot to Decedent's Estate and retaining the other for her.⁷

In *In re May Estate*, 2 Fiduc. Rep. 2d 232, 233 (O.C. Div. Allegheny 1982), objectors to the administratrix's first and final account complained that "The administratrix purchased a double bronze memorial for both the decedent and herself which was paid for from estate funds." *Id.* After finding that the administratrix had spent \$1,089.74 of estate funds on the memorial, which the administratrix admitted was a double memorial, the court stated:

It is apparent that the portion of the memorial attributable to the administratrix is a benefit to her and shall be treated as an advancement in the amount of one-half of the purchase price of \$544.87. Accordingly, this objection is sustained and any share passing to Mrs. May shall be reduced by the aforesaid sum.

Id.

Based upon Executrix's own testimony and the photographs of the double memorial marking Decedent's grave (Exhibits 8-11), this Court agrees with the reasoning in *May Estate* and finds that half the value of the double memorial Executrix purchased with Estate funds is an intended benefit to her⁸ and should be treated as an advancement. Accordingly, the Court will order Ms. Wiland to reimburse Decedent's Estate \$2,550.00, which represents half of the total cost of the double memorial⁹ less \$100.¹⁰

Objector's SECOND objection is GRANTED.

3. FUNERAL EXPENSES

Executrix charged Decedent's Estate a total of \$14,021.54 to pay for Decedent's funeral expenses, not including the \$5,300 double gravestone discussed above.

Objector challenges the appropriateness of incurring funeral expenses equal to about 50% of the net distributable estate. (Objector's Brief at 4).

Executrix argues "that a man is not measured by the size of his bank account and that

the size of his or her estate should not prohibit a fitting, reasonable and moving final tribute." (Executrix's Brief at 7). Executrix further argues that the casket and burial she selected were not only reasonable, but a "necessary way to pay tribute to a good and honorable man" and that the burial reminded all present of Decedent's service to the military and local police department. (*Id.* at 6-7).

Both parties fail to cite any legal authority to support their respective arguments that the funeral expenses incurred were reasonable or unreasonable.

A decent burial is the right of every individual. *Kitchen v. Wilkinson*, 26 Pa. Super. 75 (1904). When considering a challenge to the reasonableness of funeral-related, the Superior Court counseled that absent testamentary direction providing otherwise,

It [is] for the court to determine from all the circumstances in the case, the situation in life of the decedent, the size of the estate, etc., whether it was reasonable to provide such an expensive burial. Where an undertaker contracts with the executor of a decedent's will, he may, ordinarily hold such person liable for the amount of the bill, and the responsibility for the reasonableness of funeral expenses is transferred to the legal representative who must satisfy the parties interested in the estate and the court in that respect.

In re Ennis's Estate, 76 Pa. Super. 292, 294 (1921); see also *In re Estate of Braun*, 650 A.2d 73, 79 ("It is within the discretion of the Orphans' Court to ascertain the reasonableness of the decedent's funeral costs and expenses, in accordance with equitable principles, so that justice could be accomplished) (internal citations omitted).

A decade later, the Superior Court declared:

Parties interested in estates of the dead will be protected from such a lavish outlay of money for funerals, especially when it is entirely disproportionate to the size of the estate. It has been the wise policy of the courts to approve only claims for funeral expenses that bear a fair and reasonable proportion to the amount of the estate of a deceased and his situation in life.

In re O'Hara's Estate, 180 A. 86, 87 (Pa. Super. 1935).

In evaluating the reasonableness of funeral expenses, the Court has looked closely at the specific goods and services selected by

the Executrix. The \$14,021.54 invoice from Olewiler & Heffner Funeral Home, Inc. admitted at trial, itemizes funeral-related costs (excluding the gravestone) in this manner:

\$8,495.00 - Basic Services of Funeral Director & Staff
 \$2,195.00 – Casket Selected - Platinum Veteran
 \$1,195.00 – Vault selected – salute
 \$72.00 – Death certificates
 \$255.95 – Local Newspapers
 \$68.50 – Out-of-town Newspapers
 \$135.00 – Cemetery Equipment (Tent, Greens, Lowering Device)
 \$667.69 – Advn. Funeral Fund Fee
 \$350.00 – Cemetery Charges
 \$280.00 – Add. BM Folders
 \$307.40 – Flowers

(Exhibit 2). These costs are in addition to the double gravestone purchased by Executrix from Golden Memorials as discussed above. (Exhibit 4).

The nearly \$3,400 billed for the casket and vault included a “special salute” during the funeral to honor Decedent’s service as a police officer and U.S. Marine. The casket was a “veteran’s casket” and had a “flag in the hood.” (Transcript at 11-12). On cross-examination at trial, Objector admitted that the funeral service was an “appropriate” tribute to his father. (Transcript at 40).

The Court has reviewed a host of published Pennsylvania court decisions on the issue of reasonableness of funeral expenses and finds the conclusions reached therein are inconsistent and were driven by the unique facts and larger circumstances of each case.¹¹ After reviewing those cases, the Court finds that the expenses incurred for Decedent’s funeral (excluding the double gravestone) approach the upper end of reasonableness and represent a funeral that may have been perceived by some attendees as “lavish and ostentatious,”¹² to some small degree. However, the Court holds that those funeral expenses totaling \$14,021.54 were not unreasonable under all the circumstances.

Objector’s EIGHTH objection is DENIED.

4. EXPENSES RELATED TO DECEDENT’S CHEVROLET TAHOE

Prior to trial, the parties stipulated the following regarding Decedent’s automobile:

6. At the time of his death, Decedent owned a 2006 Chevrolet Tahoe subject to a lien securing a loan owed to GMAC.
7. The Tahoe was transferred by the Executrix to herself subject to the

security interest securing a loan which was larger than the than [sic] value of the vehicle.

8. Between the date of death and the time of transfer of title to the Executrix, the Executrix continued to use the vehicle as and when she chose and seeks to charge the estate the sum of \$3,760.00 consisting in \$3,365.60 of periodic loan payments, \$358.31 automobile insurance and \$36.00 registration fee.

(Pre-Trial Stipulation of Parties at 2).

Objector contends that “[E]state assets should not have been used to pay the expenses of [Ms. Wiland’s] use of the vehicle for several months during [Estate] administration.” (Objector’s Brief at 6).

The Court finds that in the almost eight months immediately after Decedent’s death, the 2006 Tahoe was driven a total of only 441 miles. Within twelve days of Decedent’s death, Executrix’s attorneys received an appraisal for the Tahoe dated September 19, 2007 from Thornton Chevrolet. Using data from Kelley Blue Book Online, Thornton appraised the 2006 Tahoe at \$23,760 based on a mileage of 26,165. (Exhibit 5). On May 9, 2008, the date title of the vehicle was transferred to Ms. Wiland, mileage on the Tahoe was 26,606. (Exhibit 6). On May 28, 2008, the remaining unpaid balance on the car loan was \$25,717.44. (Exhibit 7).

The Court also finds that during this almost eight-month period, the Executrix made timely loan payments on the vehicle and kept the vehicle registered and insured. In addition, the Executrix maintained the upkeep of the vehicle and had the oil changed. She testified that she drove the vehicle occasionally in order to maintain it in good and working order but that she did not drive the vehicle solely as her own for the period of time that she served as Executrix. (Transcript at 23-28).

Furthermore, the Court finds that the Executrix, based on advice of legal counsel, voluntarily assumed a lien on the 2006 Tahoe that was \$1,957.44 more than the appraised value of the vehicle and that she did not charge the Estate for transfer taxes associated with transferring the title to her personally. (*Id.*; Exhibits 5, 7).

Based on these findings, the Court holds that expenses related to Decedent’s 2006 Chevrolet Tahoe totaling \$3,760.00 and paid out of Estate funds were reasonable and appropriate.

Objector’s FOURTH objection is DENIED.

5. PENNSYLVANIA INHERITANCE TAX

Item 2 of Decedent's Will "gives, devises, and bequeaths" 50% of his "residuary estate" to Crystal A. Wiland, 25% of his "residuary estate" to his son, David A. Wingert, and 25% of his "residuary estate" to his other son, Dylan A. Wingert. Aside from these residuary clauses, Decedent made no other devises or bequests in his Will.

Item 6 of Decedent's Will states, "I direct that any and all inheritance, estate and transfer taxes imposed upon my estate, passing under my Will or otherwise, shall be paid out of the principal of my residuary estate."

The parties stipulate that Ms. Wiland's 50% share of the residuary Estate is taxable at a 15% rate and that David's and Dylan's shares are each taxable at a 4.5% rate. (Pre-Trial Stipulation at 2).¹³ The parties also stipulate that the Inheritance Tax Return was filed on May 22, 2008 and was accepted as filed by the Department of Revenue. (*Id.*)

Objector argues that the Executrix should not have paid all of the state inheritance taxes from the residue of the Estate prior to distribution and that by doing so the proposed distributions to Decedent's sons are now less than they should be. Objector argues that since the proposed distributions are all coming from the residue of the Estate the statute governing this situation places the inheritance tax liability on each transferee, that is, that the share or each beneficiary should be responsible for payment of only that portion of the tax attributable to it. (Objector's Brief at 6-8). By paying the inheritance taxes out of the residue prior to distribution, Objector argues that the sons unjustly participated in payment of inheritance tax on Ms. Wiland's share, which was a larger share taxable at a higher rate. Objector asks the Court to order the Executrix to reimburse the Estate \$1,058.94 and to order that David's and Dylan's distributive shares each be increased by an additional \$529.47. (*Id.*)

Section 9144 of Pennsylvania's Inheritance and Estate Tax Act states, "In the absence of a contrary intent appearing in the will or other instrument of transfer and except as otherwise provided in this section, the ultimate liability for the inheritance tax, including interest, shall be upon each transferee." 72 P.S. § 9144(f).

Executrix argues that Item 6 of Decedent's Will "clearly indicates" Decedent's desire that no beneficiary be responsible for payment of taxes attributable to their share. (Executor's Brief at 5). The Court disagrees.

While the parties have not cited a single court opinion to support their respective argu-

ments, the Court however, has found binding case law which mandates the conclusion that Decedent's Will did not overcome the statutory presumption applicable in this situation that the ultimate liability for the inheritance tax, including interest, shall be upon each transferee.

In *In re Estate of Erieg*, 267 A.2d 841 (Pa. 1970), the Court was asked to decide whether a will's broad "pay tax" provision (which is nearly identical to Item 6 in Decedent's Will) manifested sufficient contrary intent to overcome the statutory presumption that each residuary beneficiary bears the burden of his/her/its own taxes on his/her/its share. Item IV of Mr. Erieg's will stated, "All taxes and interest and penalties thereon payable by reason of my death with respect to property comprising my gross taxable estate, whether or not passing under this Will, shall be paid from my residuary estate." *Id.* at 842.

The governing statute in effect at the time *Erieg* was decided was Section 718(c) of the Inheritance and Estate Tax Act of 1961 (amended 1963) which is nearly identical to current Section 9144(f). Section 718(c) of the 1961 Act stated, "In the absence of a contrary intent appearing in the will or other instrument of transfer and except as provided in subsections (a) and (b) of this section, the ultimate liability for inheritance tax imposed by this act shall be upon each transferee." The only difference between that subsection of the 1961 Act as amended and the corresponding subsection in the current Act is that the current Act imposes on the transferee an additional duty to pay interest.

After considering both Section 718(c) of the 1961 Act and the broad pay tax clause in Mr. Erieg's will, the *Erieg* Court held that beneficiaries' residuary shares are to be established as fractions of the residuary estate prior to payment of taxes thereon, with the individual residuary beneficiaries bearing the burden of their own taxes on such shares. The Court stated, "We do not find that the directive in ITEM IV that 'all taxes . . . shall be paid from my residuary estate,' provides the explicit expression of a contrary intent necessary to render the statutory presumption inapplicable." *Erieg*, 267 A.2d at 845.¹⁴

More recently, the Superior Court followed the *Erieg* Court's reasoning and unequivocally stated that the emergent rule from the cases is "that the testator must use specific language in order to establish a contrary intent; in the absence of such language, a contrary intent will not be implied." *In re Estate of Pyle*, 570 A.2d 1074, 1077 (Pa.Super. 1990); see also *In re Estate of Allen*, 960 A.2d 470, 472-73 (Pa.Super. 2008).

This Court concludes that the Pennsylvania Supreme Court's analysis and holding in *Erieg* applies forcefully and precisely to the instant case. The broad pay tax clause in Item 6 of Decedent's Will was insufficient to overcome the presumption in 72 P.S. § 9144(f) that (since no other statutory subsection applies) the ultimate liability for the inheritance tax, including interest, shall be upon each transferee. The Executrix should not have deducted the inheritance taxes before computation of the residuary shares.

The Court will order Ms. Wiland to reimburse Decedent's Estate \$1,058.93 and acting as Executrix, to increase the distributive shares to David and Dylan each by \$529.47.

Objector's SEVENTH objection is GRANTED.

6. EXECUTRIX'S COMMISSION AND ATTORNEYS' FEES

A. Executrix's Commission

Objector complains that the Executrix collected a \$13,490 commission. Objector argues that the Executrix's commission should "be reduced to not more than one-half (\$6,745)" and that a commission of "\$5,000 would be ample." (Objector's Brief at 9). Objector contends that the Executrix has "utterly failed to carry her burden of justifying the claims of her commission" for at least three reasons. First, Objector argues that the Executrix kept no time records of her official activities. Second, Objector argues that the Executrix was unable at trial to identify any action taken by her on behalf of the Estate. And third, Objector argues that the Executrix has not sought to introduce any evidence suggesting that any administration of the Estate was done by anyone besides the attorneys for the Estate. (*Id.*) *On this last point, the Court notes that in addition to her \$13,490 commission, the Executrix charged the Estate \$13,490 in legal fees for assistance with administering the Estate. The reasonableness of these attorney fees is discussed below.*

In her post-trial brief, the Executrix argues that she was closely involved in several matters of Estate administration. (Executrix's Brief at 8). Further, the Executrix seems to argue that because the commission she collected represents less than 5% (4.76%) of the total gross Estate, it is therefore "reasonable and appropriate" under the circumstances, especially since she must defend the present objections to her First and Final Accounting. (*Id.*) This Court disagrees.

The PEF Code states, "The court shall allow such compensation to the personal representative as shall in the circumstances be

reasonable and just, and may calculate such compensation on a graduated percentage." 20 Pa.C.S. § 3537.

Pennsylvania appellate courts have long held that the basis for determining whether compensation sought by a personal representative is reasonable "depends upon the value of the services actually rendered." *In re Estate of Geniviva*, 675 A.2d 306, 313 (Pa.Super.1996) (*citing In re Estate of Rees*, 625 A.2d 1203 (Pa.Super. 1993)); *see also e.g Estate of Allen*, 412 A.2d 883, 840 (Pa. 1980) (true test of compensation amount is the "actual worth to the estate of the services rendered"); *Williamson Estate*, 82 A.2d 49, 52 (Pa. 1951) (while as a matter of convenience a fiduciary's compensation may be arrived at by way of percentage, the "true test is always what the services were actually worth"); *In re Gardner's Estate*, 185 A. 804 (Pa. 1936) (compensation for the responsibility incurred and the service and labor performed); *In re Estate of Sonovick*, 541 A.2d 374, 376 (Pa.Super. 1988) (fiduciary's entitlement to compensation should be based upon "actual services rendered and not upon some arbitrary formula").

In the seminal case of *In re Reed Estate*, 341 A.2d 108 (Pa. 1975), the Court acknowledged that in a series of cases culminating in *Wallis Estate*, 218 A.2d 732 (Pa. 1966), it held that as a matter of convenience, a rule evolved allowing for executor's fees of 3% of the appraised value of the corpus at the time of transfer to the fiduciary for administration and that 3% was *prima facie* fair and reasonable. However, the *Reed* Court cautioned that this 3% test is "merely a 'rule of thumb,' the true test being what the services are actually worth" and that amount of compensation may be increased or decreased accordingly." *Id.* Less than a year ago, the Superior Court relied on this quoted language from *Reed Estate. In re Estate of Harper*, 975 A.2d 1155, 1163 (Pa.Super. 2009). Applying this "rule of thumb" from *Reed Estate* to Decedent's Estate, a commission based on a flat 3% of the total gross assets here would be \$8,499.84 (which is \$4,990.16 less than what the Executrix is claiming).

More than a decade ago, this Orphans' Court Division refused to approve an executrix's commission that was based on a flat 5% of the value of that estate even when the executrix there was significantly involved in administration of the estate. *Pedrick Estate*, 13 Fiduc. Rep.2d 240, 247 (O.C. Div. York 1993). The executrix there sought a commission of \$18,386.89 based on an estate valued at \$368,000.00. After explaining what the executrix did in her official capacity,¹⁵ Judge Miller concluded he was satisfied that the graduated percentage scale in *Johnson Estate*, 4 Fiduc. Rep.2d 6 (O.C. Div. Chester

1983) would produce a “fair a reasonable compensation” for the executrix. The result of that calculation using the fee schedule in *Johnson Estate* was that the executrix’s commission would be \$14,040.00, which the court held was “reasonable and just under the facts” of that case “even in the absence of the suggested fee schedule.” *Id.* This Court’s reading of *Pedrick Estate* is that the court there determined the executrix’s fee was based on the facts of that case and the services the executrix performed, and was independent of the calculation using *Johnson Estate’s* schedule. This Court observes that the Attorney General has expressly disavowed *Johnson Estate’s* fee schedule, the Superior Court has admonished lower’s court’s reliance on it instead of Pennsylvania statutes and case law precedent, and that our sister Orphans’ Court Divisions have not come to any agreement as to its proper use. See “*Johnson Estate* and its Progeny” in Chapter Nine Outline of LITIGATING IN ORPHANS’ COURT 375-80, PBI No. 2009-5655. Even if this Court solely applied *Johnson Estate’s* graduated percentage fee schedule to Decedent’s Estate, Executrix’s commission here would be \$11,499.84 (which is \$1,990.16 less than what the Executrix is claiming).

Given the facts and record in the instant case, however, this Court is satisfied that a calculation of Executrix’s commission using either the flat 3% rate in *Reed Estate* or the *Johnson Estate* schedule would result in a sum that would not be reasonable and just.

The law is settled that “executors seeking compensation from an estate have the burden of establishing facts which show the reasonableness of their fees and entitlement to the compensation claimed.” *In re Estate of Geniviva*, 675 A.2d 306, 313 (Pa.Super. 1996) (citing *Estate of Rees*, 625 A.2d at 1206). In addition, “all claims against a decedent’s estate must be proved by evidence which is clear, direct, precise and convincing.” *In re Estate of Harper*, 975 A.2d at 1163 (quoting *In re Gadola’s Estate*, 188 A.2d 744, 746 (Pa. 1963)).

Furthermore, the Orphans’ Court Division “also has the authority to reduce to a ‘reasonable and just’ level those fees and commissions claimed by the fiduciary *and their counsel.*” *In re Estate of Geniviva*, 675 A.2d 306, 313 (Pa.Super. 1996) (emphasis added) (citing *Estate of Rees*, 625 A.2d at 1206). Finally, the determination of whether an executor’s fees are reasonable is left to the sound discretion of the Orphans’ Court. *Id.*; *In re Strickler’s Estate*, 47 A.2d 134 (Pa. 1946).

The Court holds that the Executrix has not met her burden of proving by clear, direct, precise, and convincing evidence that she

performed services to Decedent’s Estate equal to the \$13,490 commission she received. She did not present the Court with any evidence of actual hours spent in administering the Estate nor did she provide any direct evidence of what she did to benefit the Estate in her official capacity as Executrix. Further, at trial, the Executrix did not explain what she did in her official capacity to benefit Decedent’s Estate and did not know how her fee was derived or how much time she spent.¹⁶ No testimony was offered by her to clarify these matters.

This Court is left to deduce from the paucity of evidence in the record what the Executrix did in her official capacity and attach a reasonable value to those services. The Court finds based on the parties’ pre-trial stipulation, the Executrix’s trial testimony, and by her name appearing on certain documents in the record that she performed some administrative duties relating to Decedent’s funeral and burial, his automobile, and his police badges. In addition, the Court finds that the Executrix reviewed documents relating to the Estate prepared by her attorneys, and that she is presently involved to some degree in the defense of the instant objections. Aside from these inferences, there has been no proof by clear, direct, precise, and convincing evidence that the Executrix is entitled to the large commission sought.

For all of these reasons, the Court holds that the Executrix’s commission should be reduced to \$5,561.10, which it holds to be a reasonable and just commission in this case. The Court will order Ms. Wiland to reimburse the Estate \$7,928.90.

Objector’s THIRD objection is GRANTED in PART.

B. Attorneys’ Fees in General

The Executrix retained the York law firm of Griest, Himes, Herrold, Schaumann & Ferro LLP to assist her in administering Decedent’s Estate and paid the firm \$13,490 in attorneys’ fees out of Estate assets. In addition to those fees, Executrix’s attorney, Christopher Ferro, seeks an additional \$2,140.50 for his services in defense of the instant objections. The Objector is only challenging the attorney fees “with respect to any additional fees in defense of these objections.” (Objector’s Pre-trial Memorandum at 2).

“It is fundamental that an attorney seeking compensation from an estate has the burden of establishing facts which show that he or she is entitled to such compensation.” *In re Estate of Preston*, 560 A.2d 160, 164 (Pa.Super. 1989) (citing *In re Estate of Sonovick*, 541 A.2d 374, 376 (Pa.Super. 1988)).

Even in the absence of an objection, the Orphans' Court Division "has both the power and duty on its own motion to pass upon the reasonableness of compensation" claimed, and may reduce attorney fees that are unreasonable. *In re Thompson's Estate*, 232 A.2d 625, 628 (Pa. 1967). "An executor or a trustee is an officer of the orphans' court and accountable to such court for all his actions of commission and omission in the performance of his fiduciary duties; such duty to account embraces all payments made from estate or trust funds by way of compensation to himself or his counsel." *Id.*

It is true that the popular case *Johnson Estate*, 4 Fiduc. Rep.2d 6 (O.C. Div. Chester 1983) has "sometimes" been used as a "guide" for computing fiduciary and attorney fees based on a schedule of percentages related to the size and nature of estate assets. 19 WEST'S PA. PRACTICE §17:2 (2009). However, the Superior Court, in dicta, rebuked an Orphans' Court Division for relying solely on that schedule stating "egregious error is committed when a court awards commissions and fees simply on a percentage basis without inquiry into the reasonableness of the compensation." *In re Estate of Preston*, 560 A.2d at 165; *see also* 19 WEST'S PA. PRACTICE §17:2 (*Johnson Estate's* schedule "provides no assurance of approval by the Court").

In determining the reasonableness of attorney fees, the Pennsylvania Supreme Court has directed lower courts to at least consider these facts and factors:

[1] the amount of work performed; [2] the character of the services rendered; [3] the difficulty of the problems involved; [4] the importance of the litigation; [5] the amount of money or value of the property in question; [6] the degree of responsibility incurred; [7] whether the fund involved was 'created' by the attorney; [8] the professional skill and standing of the attorney in his profession; [9] the results he was able to obtain; [10] the ability of the client to pay a reasonable fee for the services rendered; and, very importantly, [11] the amount of money or the value of the property in question.

In re LaRocca's Trust Estate, 246 A.2d 337, 339 (Pa. 1968).

C. \$2,140.50 in Attorney's Fees Related to Defense of Instant Objections

As compensation for his services in representing the Executrix in defense of the instant objections to her First and Final Accounting, Attorney Ferro asks the Court for an additional \$2,140.50 "to be paid equally out of the pro-

posed distributive shares of Petitioners [sic]." (Executrix's Brief at 9). The Court assumes that counsel wants these additional legal fees to come out of David's 25% share and Dylan's 25% share, but not Ms. Wiland's 50% share.

To justify these additional \$2,140.50 in fees, Attorney Ferro filed an invoice dated October 5, 2009 showing 10.3 hours of time was expended and identifying what was done generally during that time. He states he is "entitled" to this sum of fees based on the decision *In re Wormley Estate*, 59 A.2d 98 (Pa. 1948). (Objector's Brief at 9).

The *Wormley* Court stated, "It is well established that whenever there is an unsuccessful attempt by a beneficiary to surcharge a fiduciary, the latter is entitled to an allowance out of the estate to pay for counsel fees and necessary expenditures in defending himself against the attack." *Id.* at 100. This Court does not find the present dispute involving objections to Executrix's First and Final Accounting to be a surcharge action. "Surcharge is the penalty for failure to exercise common prudence, common skill and common caution in the performance of the fiduciary's duty and is imposed to compensate beneficiaries for loss caused by the fiduciary's want of due care." *In re Dobson's Estate*, 417 A.2d 138, 142 (Pa. 1980) (citations omitted). Further, "a surcharge cannot be imposed merely for an error in judgment." *In re Estate of Westin*, 874 A.2d 139, 144 (Pa.Super. 2005).

Even if this was a surcharge action, the Court notes that of the initial eight objections raised, six proceeded to trial, and the Court now grants all but two of them. Thus, it cannot be said Objector's objections have been unsuccessful. To the contrary, four of the objections have benefited Decedent's Estate and its beneficiaries and the Court notes that the Objector has not asked for any attorney fees from the Estate.¹⁷

Nonetheless, the Court has found other authority to support Attorney Ferro's claim for additional fees. The Pennsylvania Supreme Court has stated that when executors are placed in the position to be sued because of duties they had performed for the estate, "it would be unjust to require them personally to bear the reasonable costs of the defense of the suits brought against them solely by reason of their positions as executors." *In re Estate of Browarsky*. 263 A.2d 365, 366 (Pa. 1970). After quoting the above language from *Wormley Estate*, the *Browarsky Court* held, "it is clear that the estate was obligated to pay the reasonable costs of defending against the attempted surcharge of the executors by the residuary beneficiaries." *Id.* Although the present case is not a surcharge action, this Court finds that the rationale in *Browarsky*

Estate governs the present situation. See *Rudy Estate*, 18 Fiduc. Rep. 2d. 135, 148 (O.C. Div. Lebanon 1997). However, the Estate is only obligated to pay the "reasonable" costs, as outlined in *LaRocca Estate*, of the defense to the instant objections.

One of the *LaRocca* factors the Court must consider is the results the Executrix's attorney was able to attain. In this Opinion, the Court is denying only two of Objector's six objections that proceeded to trial meaning that Executrix's attorney was able to obtain only partial success in his defenses to those objections.

Recently, in *McKenna v. City of Philadelphia*, 582 F.3d 447, 455 (3rd Cir. 2009), the Court permitted the reduction of attorney fees in a civil rights case where only partial success on the merits was obtained. There, the Court explained that "an attorney's work on unsuccessful claims not related to the claims on which the attorney succeeded is not compensable, because such work 'cannot be deemed to have been expended in pursuit of the ultimate result achieved.'" *Id.* at 455 (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 434-34 (1983)). However, the Court also explained, "where a [party's] claims [or defenses] involve 'a common core of facts' or are based on 'related legal theories, . . . much of counsel's time will be devoted generally to the litigation as a whole, making it difficult to divide the hours expended on a claim-by-claim basis.'" *McKenna*, 582 F.3d at 458 (quoting *Hensley*, 461 U.S. at 435). Such is the case here. It cannot be determined from Attorney Ferro's invoice of legal services how the attorney time billed was divided among the six issues litigated. More importantly, in this context of estate litigation, the Court finds that the defenses to objections and arguments presented were related and involve a common core of facts.

Here, Executrix's attorney is seeking \$2,140.50 for 10.3 hours of work. This Court emphasizes that "The determination of reasonable compensation for an estate is not relegated to a clock and computer. Time expended does not replace the test of reasonableness . . . it is only one of several factors set forth in *LaRocca Estate*." *In re Estate of Burch*, 586 A.2d 986, 987 (Pa.Super. 1991). Nevertheless, having considered each of the factors in *LaRocca Estate*, the Court holds that the legal fees requested by Executrix's legal counsel in the instant action are not unreasonable.¹⁸ The Court will approve attorney fees in the amount of \$2,140.50 to be paid out of the corpus of the residuary Estate prior to calculating the respective distributions to each residuary beneficiary. Executrix's attorney has not asked for reimbursement for any associated legal expenses and so the Court will not approve any.

Objector's THIRD objection is DENIED in PART.

D. \$13,490 in Attorneys' Fees Related to Estate Administration

In *In re Estate of Sonovick*, 541 A.2d 374 (Pa.Super. 1988), the Court affirmed a lower court decision reducing fiduciary commissions and attorney fees more than 50%. The Superior Court noted that the lower court was especially concerned because the ultimate heirs were minors, the estate and trust were not complex, and there was little evidence of services rendered. On this final point, the lower court said it was "disturbed by the lack of substantiation of fees" noting that the "executrix and her attorney have chosen not to present evidence regarding the reasonableness of their fees." *Id.* at 377.

Recently, a sister Orphans' Court Division reduced by half both the executor's commission the attorney's fees because they each were "unsupported by a factual record" and "excessive." *Janiga Estate*, 28 Fiduc. Rep.2d 219, 222, 226 (O.C. Div. Philadelphia 2007). In *Janiga Estate*, Judge Herron stated that it was impossible to accurately assess the amount of work performed by the estate attorney "because he failed to meet his burden of presenting a factual record." The Court stated that the attorney did not keep any time records. *Id.* at 226. Further, the Court found that the "character of the services" and the "difficulty of the problems" on the record presented were "routine." *Id.* at 226. Finally, in reaching its decision, the Court also scrutinized the results the attorney obtained. *Id.*

Here, like the attorneys in *Sonovick Estate* and *Janiga Estate*, Executrix's attorneys have also failed to meet their burden of presenting a factual record to demonstrate the reasonableness of the \$13,490 fee paid to them, which represents 4.76% of the Estate's gross assets (\$283,327.95).

The Court finds the circumstances in the present case strikingly similar to those in *Sonovick Estate*. Specifically, here also the Court is concerned because one of the three ultimate beneficiaries is Decedent's minor son, this estate is not complex, and there is little evidence of services rendered. In addition, the Court finds it suspiciously coincidental that the sum of the Executrix's commission and the attorneys' fees collected are exactly identical. This fact raises an inference in the Court's view that the commission and fee were calculated based solely on a percentage basis.

The Executrix's attorneys introduced no direct evidence that is clear, precise and convincing, of what legal services they rendered to the Estate and why they are entitled to the compensation received. They introduced no

time or billing records, no client fee agreement,¹⁹ and at no point sought to introduce any written record specifically identifying, even in summary form, what they did to benefit the Estate.

However, despite this lacking record, the Court finds that Executrix's legal counsel performed significant work in administering Decedent's Estate. At trial, the Executrix testified that her attorney set her executrix fee and that "all" the [estate administration] papers were gone over with her (presumably by her attorney). (Transcript at 5). She also testified that she filed the Petition for Adjudication and Statement of Proposed Distribution "with the assistance of [her] counsel, Attorney John Herrold." (Transcript at 6).

A review of the court filings and exhibits in the record confirms the Court's finding that Executrix's legal counsel performed significant work. For example, the appraisal from Thornton Chevrolet is addressed to Attorney Herrold. (Exhibit 5). Attorney Herrold or his law firm's name also appear on all filings related to the inheritance and estate taxes, the Estate inventory, and various other documents filed with the Register of Wills.

In the absence of any client fee agreement, billing records, or other clear, precise and convincing evidence of what legal services were rendered, this Court finds it necessary to turn to *Johnson Estate's* fee schedule as a starting point to attach a reasonable and fair value to the services the Court finds the Executrix's attorneys performed.²⁰ Using *Johnson Estate's* unofficial "commissions" schedule as starting point, the percentage of attorney fees for an estate the size of Decedents' would be \$12,249.83. See *Johnson Estate*, 4 Fiduc. Rep.2d 6, 8 (O.C. Div. Chester 1983). This calculation results in a sum already lower than the \$13,490 fees claimed.

If *Johnson Estate's* fee schedule is used by necessity as a starting point to calculate fees because of the lack of other clear, precise, and convincing evidence of the nature and value of services performed (as it is being used here), then this Court agrees with our sister Orphans' Court Division that to justify fees higher than those in *Johnson Estate*, the attorney and fiduciary must present evidence of extraordinary services. *Carr Estate*, 22 Fiduc. Rep.2d 364, 366-68 (O.C. Div. Montgomery 2002); *Feise Estate*, 21 Fiduc. Rep.2d 317, 319-22 (O.C. Div. Montgomery 2001). Here, the attorneys have not presented evidence of extraordinary services rendered in the administration of Decedent's Estate to justify higher fees than those in *Johnson Estate*.

Turning now to a few of the *LaRocca* fac-

tors which here also weigh against higher fees, the Court specifically finds that the work involved in administering this Estate was routine and straightforward and did not involve complicated matters. Neither the Executrix nor her counsel have expressly suggested otherwise. Regarding the results obtained by the attorneys, the Court finds that the Executrix's attorneys assumed primary responsibility for handling the calculation and payment of state inheritance taxes and in this Opinion, the Court has already granted the objection relating to the payment of those taxes. Offsetting these factors is the professional skill and standing of Attorney Herrold in handling estate work of this kind.

For all of these reasons, the Court reduces the attorneys' fees to \$12,299.83. The Court will order Executrix's legal counsel to reimburse the Estate \$1,190.17.

CONCLUSION

Objector's FIRST and SIXTH objections were voluntarily withdrawn before trial. Objector's SECOND objection (regarding the double gravestone) is GRANTED. Objector's THIRD objection (regarding the Executrix's commission and additional attorney's fees to defend the instant objections) is GRANTED in PART and DENIED in PART, respectively. Objector's FOURTH objection (regarding Decedent's automobile) is DENIED. Objector's FIFTH objection (regarding accounting of Decedent's police badge and wallet) is GRANTED. Finally, Objector's SIXTH objection (regarding the mode of accounting for state inheritance tax) is GRANTED.

An Order will be issued consistent with the holdings in this Opinion.

BY THE COURT,

PENNY L. BLACKWELL, JUDGE

December 3, 2009

ORDER

AND NOW, this 3rd day of December, 2009, for the reasons set forth in the accompanying Opinion, it is hereby Ordered that:

1. The Executrix collect all of Decedent's police badges and file a Supplemental Inventory of Decedent's Estate consistent with the holdings in the accompanying Opinion and directives in this Order.
2. The Executrix distribute Decedent's police badge in her possession and the

accompanying wallet that goes with that badge to Joann Wingert to be held in trust for Dylan Wingert; distribute one of the other two remaining badges to herself personally; and then distribute the third and remaining badge to David Wingert.

3. Crystal A. Wiland reimburse Decedent's Estate \$2,550.00 (relating to cost of the double gravestone).
4. Crystal A. Wiland reimburse Decedent's Estate an additional \$1,058.93 (relating to state inheritance taxes paid).
5. The Executrix increase the distributive shares of David Wingert and Dylan Wingert each by \$529.47. These increases of \$529.47 are in *addition* to other increases to their respective distributive shares that will result from other directives in this Order. Furthermore, any additional inheritance tax liability resulting from an increase to the beneficiaries' residuary shares as a result of other directives in this Order is to be paid by the individual residuary beneficiaries, each bearing the burden of his/her own taxes on such shares.
6. Crystal A. Wiland reimburse Decedent's Estate an additional \$7,928.90 from the Executrix's commission collected.
7. The law firm of Griest, Himes, Herrold, Schaumann, Ferro LLP, Executrix's legal counsel for administering Decedent's Estate, reimburse the Estate \$1,190.17 from the fees collected.
8. The Executrix file an amended First and Final Account and amended Petition for Adjudication/Statement of Proposed Distribution consistent with the holdings in the accompanying Opinion and directives in this Order for the Court's respective confirmation and approval.

The Court further Orders payment of attorney's fees in the amount of \$2,140.50 to Attorney Christopher Ferro of Griest, Himes, Herrold, Schaumann, Ferro LLP for legal services relating to defense to the objections to Executrix's First and Final Account. This \$2,140.50 is to be paid out of the corpus of the residuary Estate prior to calculating the new respective distributions to each residuary beneficiary.

BY THE COURT,

PENNY L. BLACKWELL, JUDGE

FOOTNOTES

¹ By statute, jurisdiction of the Orphan's Court Division is conferred over, *inter alia*, the following:

(1) Decedents' estates. The administration and distribution of the real and personal property of decedents' estates and the control of the decedent's burial.

(12) Fiduciaries. The appointment, control, settlement of the accounts of, removal and discharge of, and allowance to and allocation of compensation among, all fiduciaries of estates and trusts jurisdiction of which is exercised through the orphans' court division . . .

20 Pa.C.S. § 711(1) & (12). Additionally, Decedent was a resident of York County, Pennsylvania.

² "[A] presumptively valid gift may [also] be rebutted by establishing that donor and donee had a confidential relationship at the time the alleged gift was made." *Id.*

³ In *Hera v. McCormick*, 625 A.2d 682, 688 (Pa.Super.1993), the Court stated:

According to the Dead Man's Rule or Dead Man's Statute [42 Pa.C.S.A. § 5930], surviving parties who have an interest which is adverse to decedent's estate are disqualified from testifying as to any transaction or event which occurred before decedent's death. *Matthew's Estate*, 431 Pa. 616, 246 A.2d 412 (1968). Where, as in this case, there is an issue regarding the validity of an *inter vivos* gift, the court may not admit statements of decedent absent independent testimony establishing prima facie evidence of donative intent and delivery. *Friedeman v. Kinnen*, 452 Pa. 365, 305 A.2d 3 (1973). If the alleged donee fails to establish prima facie evidence of a gift or transfer by independent testimony before he takes the stand, he is not competent to testify. *Id.* The purpose of this rule "is to prevent the injustice which would result from permitting a surviving party to testify favorably to himself and adversely to the interest of the decedent when the representative of the decedent would be hampered in attempting to refute the testimony by reason of the decedent." *In re Estate of Cecchine*, 336 Pa.Super. 111, 117, 485 A.2d 454, 458 (1984).

The Court notes that at trial, it did not need to ultimately rule on whether any of Ms. Wiland's potential testimony should be precluded by the Dead Man's Act because her attorney voluntarily withdraw his line of questioning and proceeded in a different manner to "potentially avoid the issue." (Transcript at 33).

⁴ Additionally, the Court notes that the record is also silent as to whether Decedent even had the authority to transfer title to his police badge to a third party prior to his death given his employment as an officer with the York

Area Regional Police Department.

⁵ The Court acknowledges that these quotations come from older court decisions pre-dating Pennsylvania's 1968 Constitution which abolished the Orphans' Court as a separate court and made it a division within the Court of Common Pleas. Nevertheless, this Court believes that *Crisswell's Estate* and *Starz' Estate*, among other cases, remain good law. Post-1968 court decisions have quoted from earlier court decisions granting the Orphans' Court broad authority. In one recent case, the Court held that the present Orphans' Court Division still has "inherent power" aside from its statutory authority to act "where justice and equity require it." *In re Estate of Westin*, 874 A.2d 139, 145 (Pa.Super. 2005) (quoting *In re Bender's Estate*, 122 A. 283, 284 (Pa. 1923)). Indeed, in *Kendall Estate*, 29 Fiduc. Rep.2d 29, 39 (O.C. Div. Montgomery 2008), *aff'd* ___ A.2d ___, 2009 WL 2933762 (Pa.Super. Sept. 15, 2009), Judge Drayer stated, "We have found no authority that supports the supposition that the Orphans' Court lost its inherent equitable powers when its jurisdiction was transferred to a division of the Court of Common Pleas."

⁶ The numbering of Objector's objections in this Opinion corresponds with the numbering order used in Objector's Pre-trial Memorandum.

⁷ See Executrix's Brief at 3 (Executrix "previously purchased the plots in 1981 [sic]" (emphasis added); but see also Transcript at 18 ("your desire to be laid to rest in [Decedent's] plot also").

⁸ The Court notes that the Executrix had approximately 75% of the front surface of the double memorial inscribed with text, a photograph of Decedent, and military and police insignias to honor Decedent, leaving only about 25% of the front surface of the memorial available for future inscription. However, the Court finds based on the record that it was the Executrix's decision to have the double memorial inscribed as it was.

⁹ The invoice from Golden Memorials for "One Impala Black Memorial Installation of Veterans Memorial for David A. Wingert set in Lebanon Cemetery, Felton, PA" (Exhibit 4) lists only a sum total of \$5,300 for the memorial gravestone with the accompanying inscriptions and insignias presently on it. Because the invoice does not specify the costs attributable to the double gravestone versus the costs attributable to the markings placed on it and because the Executrix has not sought to introduce any evidence clarifying the matter, the Court views the value of the gravestone itself as the total cost listed on the invoice.

¹⁰ The Court notes that the value of the plot Executrix gave Decedent's Estate may have increased in value significantly since 1991. However, Executrix did not attempt to introduce any evidence as to the value of that donated plot at the time of Decedent's death

so absent additional evidence, the Court values the donated plot at \$100, the original purchase price.

¹¹ See e.g., cases annotated in 3 PENNSYLVANIA ORPHANS' COURT COMMON-PLACE BOOK, Funeral 1(a) (Hunter 2d); cases annotated in *Fiduciary Review*, 2 (February 1942); cases annotated in *Fiduciary Review*, 4 (April 1940); *Hodge v. Cameron*, 200 A. 238 (Pa.Super. 1938); *In re O'hara's Estate*, 180 A. 86 (Pa.Super. 1935); *Ennis's Estate*, 76 Pa.Super. 292 (1920); *Clark Estate*, 75 Pa. D. & C.2d 525 (O.C. Div. Dauphin 1976); *Vranesevich Estate*, 25 Fiduc.Rep. 654 (O.C. Div. Beaver 1975); *Andrews Estate*, 20 Fiduc.Rep. 163 (O.C. Div. Mifflin 1969); *Scott Estate*, 17 Fiduc.Rep. 372 (O.C. Div. Chester 1966); *Dembicki Estate*, 15 Fiduc.Rep. 443 (O.C. Div. Bucks 1965); *Haftman Estate*, 30 Pa. D. & C.2d 4 (O.C. Div. Washington 1962).

¹² *Caruso Estate*, 72 Pa. D. & C. 411 (O.C. Div. Delaware 1949) ("lavish and ostentatious funerals may be classified as luxuries to be indulged in only when the financial circumstances of the parties involved permit").

¹³ The parties further stipulate that the inheritance tax attributable to each of the residuary beneficiaries is as follows: Ms. Wiland - \$3025.50; David Adam Wingert - \$907.65; and Dylan A. Wingert - \$907.65.

¹⁴ See also PA. INHERITANCE AND ESTATE TAX § 9144(f) (5th ed.); *Fiduciary Review*, 3-4 (August 1970) (*discussing Ereig Estate*).

¹⁵ Judge Miller stated that the executrix there "testified as to her duties as executrix. She met frequently with counsel for the estate and with investors, assisted counsel in preparing the inventory of assets, and performed all administrative tasks requested of her by counsel." *Pedrick Estate*, 13 Fiduc. Rep.2d at 247.

¹⁶ At trial, Objector's legal counsel asked Executrix about the commission she charged Decedent's Estate and this exchange took place:

Q. And on what basis did you set the fee that you seek to charge the estate as a commission?

A. The attorney set that.

Q. So you – Do you have any knowledge of the basis?

A. I'm not sure I understand.

Q. You have no knowledge whatsoever that the number that you seek to charge has any relationship to what you did or the value of your services, is that a true statement?

A. I was instructed that I was entitled to an executor fee or executrix fee.

Q. But – And I don't think anybody disputes that, but you have sought to charge the estate \$13,490.

A. My attorney handled that.

Q. You have no knowledge of the significance of that number; is that correct?

A. Yeah, I do. I was – All the papers were gone over with me.

Q. Do you have – Do you know how much

time you spend in your duties as executrix?

A. Seven months.

Q. Did you keep records of time that you expended in – You don't mean full-time for seven months. You mean that's how long between the death and some other time?

A. Right.

Q. Is that right?

A. That's till the house settled.

Q. But did you – Did you keep records of the time that you expended as executrix?

A. No.

(Transcript at 4-5).

¹⁷ "Indeed, it is only in very exceptional cases that an exceptant to the account of an executor, administrator or trustee in the Orphans' Court will be allowed counsel fees out of the fund." *Edelman Trust* (No.2), 23 Fiduc. Rep.2d 43, 66 (O.C. Div. York 2002) (Uhler, J.) (*citing In re Sowers Estate*, 119 A.2d 60, 64 (1956)).

¹⁸ The Court specifically notes that Attorney Ferro has been practicing law for nearly ten years and has experience handling litigation matters in York County. In addition, based on the invoice of legal services submitted, the Court finds that almost all of the 10.3 hours spent were directly related to litigation matters. ¹⁹ "[I]n the absence of . . . an independent compensation agreement between the parties, the trial court is empowered to determine the value of the fiduciary's services and award reasonable compensation." *In re Estate of Sonovick*, 541 A.2d 374, 376 (Pa.Super. 1988).

²⁰ This Court acknowledges that legal fees can and should vary by locality. The Court finds that attorneys' fees charged in relation to estate work in this county are cast upon a broad spectrum. In the absence of any specific evidence presented in this case and in the absence of any well-established and current local guidelines for fees in this type of work that would be helpful to the bench and members of the local and regional bar, the Court turned to *Johnson Estate's* dated fee schedule as a starting guideline.

DENIAL OF MOTION FOR RECONSIDERATION/EXCEPTION

Before this Court is a Motion for Reconsideration filed December 8, 2009 by counsel on behalf of the Executrix relative to this Court's Opinion and Order dated December 3, 2009.

As an initial procedural matter, Pa.O.C.R. 7.1(g) states, "Exceptions shall be the exclusive procedure for review by the Orphans' Court of a final order, decree or adjudication. A party may not file a motion for reconsideration." However, in the interests of securing the "just, speedy, and inexpensive determination" of this action, Pa.O.C.R. 2.1, the Court will treat counsel's Motion for Reconsideration as a properly filed "exception" to the Court's December 3, 2009 Order.

In the present Motion for Reconsideration/Exception, counsel asks the Court to strike paragraph [6]D of its Opinion and paragraph 7 of its Order. Those paragraphs address the reduction of legal fees related to administration of Decedent's Estate.

Counsel states that the Executrix, through counsel, did not attempt to present a factual record to demonstrate the reasonableness of the fee paid to counsel for the Estate for several reasons: (1) "Objector's Pre-Trial memorandum clearly states that the parties 'have agreed that no objection will be pursued with respect to attorney's fees except with respect to any additional fees in defense of these objections;'" (2) "Prior to trial, the Objector, through counsel appeared in Court and confirmed that Objector was not pursuing any objection with respect to attorneys' fees related to the administration of the estate;" and (3) "Counsel for the Objector, subsequent to receipt and review of the Court's Opinion and Order, confirmed by telephone that he never would have pursued objections to the counsel fees for the estate administration." (Motion for Reconsideration, ¶¶ 7,8,16).

"The amount of fees to be allowed to counsel, always a subject of delicacy if not difficulty, is one peculiarly within the discretion of the court of first instance." *Good's Estate*, 24 A. 623, 623 (Pa. 1892).

The Orphans' Court Division has not only the authority, but also the duty to review the reasonableness of attorney fees when a decedent's estate is involved. *In re Estate of Thompson*, 232 A.2d 625, 628 (Pa. 1967) ("Moreover, the Orphans' Court of Erie County had both the power *and the duty* On its own motion [sic] to pass upon the reasonableness of the compensation claimed.") (emphasis added).¹

This is not the first Orphans' Court Division to follow the Supreme Court's directive in *Estate of Thompson*.² In *Carr Estate*, 22 Fiduc. Rep.2d 364, 365 (O.C. Div. Montgomery 2002), the Court held, "Even though no objections were filed, the Court has a duty of its own to determine the reasonableness of the compensation to be awarded to the executor and counsel: *Thompson Estate*, 426 Pa. 270, 232 A.2d 625 (1967)." In *Crotzer Estate*, 19 Fiduc. Rep.2d 215, 216 (O.C. Div. Mifflin 1995) the Court stated, "the power of the Court to review the fees charged by an executor and its attorney to an estate is not dependent on the filing of formal objections."

Here, the Court exercised its duty to examine legal fees related to the administration of Decedent's Estate, even in the absence of an objection and notwithstanding an apparent agreement by counsel or the par-

ties for several reasons.

First, there was a formal objection and subsequent trial on the reasonableness of the Executrix's commission collected and other legal fees sought in this case. The Court examined all fees and commissions as a whole to determine if they were reasonable given the circumstances and also to determine who performed what services benefiting the Estate. Here, an objection to the Executrix's commission collected was granted for failure of the Executrix (with counsel's assistance) to create a sufficient record of what the Executrix did to earn the commission she collected. It would be unfair and unjust to closely scrutinize the Executrix's commission without conducting a similar review of the attorney's fee.

Second, the legal fees collected appeared to be based solely on a percentage basis and were on their face more than what would be allowed, using as a starting point, the fee schedule in *Johnson Estate*, 4 Fiduc. Rep.2d 6 (O.C. Div. Chester 1983).

Third, one of the three beneficiaries named in Decedent's Will is a minor. That minor's distributive share is directly impacted by the commissions and fees collected.

Our Courts have clearly stated for many decades that, "It is fundamental that an attorney seeking compensation from an estate has the burden of establishing facts which show that he or she is entitled to such compensation." *In re Estate of Sonovick*, 541 A.2d 374, 376 (Pa.Super. 1988) (emphasis added) (quoting *Estate of Wanamaker*, 460 A.2d, 824 825 (Pa.Super. 1983), citing *Hempstead v. Meadville Theological School*, 134 A. 103 (Pa. 1926)).

In the Motion for Consideration/Exception, counsel represents that "Counsel for the estate kept detailed time records and maintained a signed fee agreement by Executrix" and also that "Counsel for the estate dealt with and resolved many unique and time intensive issues relative to the administration of the estate." (Motion for Reconsideration ¶¶ 13,14). These representations by themselves are insufficient to justify the \$13,490 legal fees already collected in this Estate.

For these reasons, the Court will not strike portions of its December 3, 2009 Opinion and Order as requested in the instant Motion for Reconsideration/Exception.

However, the Court will allow counsel, if he so chooses, to file with the Court documentation verifying the representations made in paragraphs 13 and 14 of the Motion for Reconsideration/Exception and other documentation justifying the \$13,490 in legal fees

collected. To be timely, such documentation must be filed with the Clerk of Orphans' Court no later than December 24, 2009.

If no additional documentation is filed by December 24, 2009, the 30-day appeal period pursuant to Pa.R.A.P. 903 from this Court's December 3, 2009 final order will begin to run from the date of entry of this order disposing of the present Motion for Reconsideration/Exception. See Pa.O.C.R. 7.1, explanatory note. If verifying documentation is timely filed, then the 30-day appeal period will begin to run from the date of entry of a later order disposing of the issue raised in the present Motion for Reconsideration/Exception or on the date of a deemed denial pursuant to Pa.O.C.R. 7.1(f).

Copies shall be sent to Attorney Crabbs and Attorney Ferro.

BY THE COURT,

PENNY L. BLACKWELL, JUDGE

December 14, 2009

FOOTNOTES

¹ Although not cited by counsel, this Court is fully aware of the recent decision *In re Adoption of M.M.H.*, 981 A.2d 261 (Pa. Super. Sept. 4, 2009) in which that panel held that the trial court lacked authority to reduce attorney's legal fees in connection with an adoption proceeding on the basis that they were unreasonable or excessive. This Court does not believe *In re Adoption of M.M.H.* has overruled the Supreme Court's holding in *In re Estate of Thompson*, 232 A.2d 625, 628 that the Orphans' Court Division has the power and duty on its own motion to pass upon the reasonableness of compensation claimed by a personal representative, trustee, and his/her legal counsel. In *Adoption of M.M.H.*, the issue before that panel was a pure question of law relating specifically to the Adoption Act. 981 A.2d at 266. Unlike there, here, the matter is one involving a decedent's estate.

² In addition, the Superior Court in *In re Estate of Sonovick*, 541 A.2d 374, 376 (Pa. Super. 1988) has also cited to this portion of *Thompson's Estate*.

DENIAL OF MOTION FOR RECONSIDERATION/EXCEPTION

Before this Court is a Motion for Reconsideration filed December 23, 2009 by Objector's counsel relative to this Court's Opinion and Order dated December 3, 2009.

In its December 14, 2009 Opinion/Order in this case, the Court already explained to the parties and their counsel that "Exceptions shall be the exclusive procedure for review by the Orphans' Court of a final order, decree or adjudication. A party may not file a motion for reconsideration." Pa.O.C.R. 7.1(g). However, in the interests of securing the "just, speedy, and inexpensive determination" of this action, Pa.O.C.R. 2.1, the Court will treat Objector's Motion for Reconsideration as a properly filed "exception" to the Court's December 3, 2009 Order.

In the present Motion for Reconsideration/Exception, Objector asks the Court to Reconsider Section 6C of its Opinion and the corresponding portion of its Order that authorized payment from the residue of the Estate, attorney fees related to defense of the objections. "Objector does not contend that the fees are unreasonable." (Objector's Motion for Reconsideration at ¶13). Instead, Objector's sole contention (raised now for the first time) is that all the legal fees related to defense of the objections "should be paid by the Executrix from her personal funds rather than be paid from the residue" of the Estate. (Objector's Brief in Support of Motion for Reconsideration at 2).

The Court has already addressed Objector's new contention in the Court's December 3, 2009 Opinion at pages 28-31. In his brief, Objector has cited no legal authority that the Court did not already consider and include in its earlier Opinion.

To clarify its earlier Opinion, the Court stresses that its holding on this issue is limited to the facts presented and the pleadings filed in this case. As one example, there has been no judicial finding of malfeasance by the Executrix in connection with this Estate or even a bona fide allegation of the same. Thus, this matter was not a surcharge action as was the context in *In re Estate of Browarsky*, 263 A.2d 365 (Pa. 1970) and *In re Wormley's Estate*, 59 A.2d 98 (Pa. 1948). In the absence of clear authority addressing the issue of whether attorney fees in defense of objections should be granted when the objecting party was *unsuccessful* on slightly more than half of the original objections (4.5 of 8)¹ and the defending party was thus *successful* on the same number, this court adopted the rationale flowing from *Browarsky Estate* that a personal representative should be allowed reasonable counsel

fees and expenses incurred in resisting objections where placed in that position to be sued because of duties they had performed for the estate. "Otherwise, fiduciaries may be chilled into timidity in performing their duties by the prospect of having to defend themselves at their own expense." *Craig Estate*, 10 Pa.D.&C.3d 154, 175 (C.P. Somerset 1978). Again, Objector is not arguing that the legal fees in question are not reasonable.

Also specific to this case is that here, there were no allegations that the Executrix used Estate funds to employ legal counsel to assert or further her own personal interests, in which case expenses related to pursuit of those personal interests might not be allowable out of the Estate. See *In re Pitone's Estate*, 413 A.2d 1012, 1015 (Pa. 1980) (Executrix was under duty to see that her purely private interests were not advanced at estate's expense, and where she claimed ownership of joint bank account and would have received nearly half of estate assets for her own benefit had she prevailed, services were rendered on behalf of her for her individual benefit and costs, including legal fees, were not properly chargeable to estate).

Objector seems to argue that since his objections have resulted in a benefit to the Estate "in excess of \$11,000" and he is paying his own legal fees, the Executrix should not have her legal fees paid for by the Estate since a portion of those fees will come out of Objector's distributive share of the residuary Estate. (Objector's Brief at 2-3). If Objector believed his actions directly and substantially benefited the Estate and created a fund that warranted payment of legal fees out of the Estate, the Objector, through counsel, could have timely petitioned this Court for an allowance of some portion of legal fees from the Estate.² The Objector never did so. Objector's payment of his own legal fees is not a justification for not allowing legal fees for defense of objections when the Executrix was successful, at least part, in defending those objections in her official capacity, and her attorney timely petitioned the Court for an allowance of reasonable fees.

For these reasons, Objector's Motion for Reconsideration/Exception will be denied and dismissed.

Finally, because Executrix's counsel has not timely filed any documentation supplementing certain representations regarding legal services made in its December 8, 2009 Motion for Reconsideration/Exception, that Exception remains denied and dismissed.

The Court will issue an Order consistent with this Opinion.

BY THE COURT,

PENNY L. BLACKWELL, JUDGE

December 30, 2009

**ORDER DISPOSING OF
ALL EXCEPTIONS**

For the reasons set forth in the Court's December 14, 2009 and December 30, 2009 Opinions, all Exceptions to the Court's December 3, 2009 Final Order are DISMISSED.

Specifically, the Court AFFIRMS its prior DENIAL of Executrix's December 8, 2009 Motion for Reconsideration/Exception and DENIES Objector's December 23, 2009 Motion for Reconsideration/Exception.

BY THE COURT,

PENNY L. BLACKWELL, JUDGE

December 30, 2009

FOOTNOTES

¹ Objector admits in his brief that of the original 8 objections, 6 proceeded to trial and of those 6, the Court granted "3 in whole and 1 in part." (Objector's Brief at 2).

² See *Carver Estate*, 22 Fiduc.Rep.22 107, 119-21 (O.C. Div. Somerset 1995) for a discussion of when an Orphans' Court Division, in its discretion, *might* award some portion of legal fees to an objector to an account.

ESTATE NOTICES

ADMINISTRATOR'S AND EXECUTORS NOTICES

FIRST PUBLICATION

WILLIS E. BEAN, SR. a/k/a WILLIS EDWARD BEAN, SR. a/k/a WILLIS E. BEAN a/k/a WILLIS EDWARD BEAN late of Springettsbury Twp., York Co., PA, deceased. Larry E. Bean, c/o 910 South George Street, York, PA 17402, Executor. Bellomo & Platt, LLC. Jeffrey R. Bellomo, Esquire, Attorney. 1-7-3t

MARIAN E. BIDELMAN late of West Manchester Twp., York Co., PA, deceased. M&T, c/o Bonnie Grizzell, Vice President, 21 East Market Street, York, PA 17401, Trustee. Richard R. Reilly, Esquire, Attorney. 1-7-3t

GLENN L. BORTNER late of York City, York Co., PA, deceased. Larry L. Bortner, c/o 135 North George Street, York, PA 17401, Executor. CGA Law Firm, PC. Peter R. Andrews, Esquire, Attorney. 1-7-3t

ARLENE K. BOWERS late of Manchester Twp., York Co., PA, deceased. Robert L. Bowers, 2178 Bayberry Lane, York, PA 17403, Executor. Joseph C. Korsak, Esquire, Attorney. 1-7-3t

JAMES K. DIETZ late of Hellam Twp., York Co., PA, deceased. Lois Dietz and David T. Dietz, c/o 41 East Orange Street, Lancaster, PA 17602, Executors. Gibbel Kraybill & Hess LLP. 1-7-3t

EVELYN M. HOFF late of North Codorus Twp., York Co., PA, deceased. Robert E. Hoff, Jr., c/o 129 East Market Street, York, PA 17401, Executor. Suzanne H. Griest, Esquire, Attorney. 1-7-3t

LOUISE SCANLAN a/k/a LOUISE A. SCANLAN late of Shrewsbury Borough, York Co., PA, deceased. George Blatchley, c/o 120 Pine Grove Commons, York, PA 17403, Executor. Elder Law Firm of Robert Clofine. Erin J. Miller, Esquire, Attorney. 1-7-3t

CLAIR J. SMYSER late of Dover Twp., York Co., PA, deceased. Marsha C. Koch and Sandra J. Albright, c/o 120 Pine Grove Commons, York, PA 17403, Executor. Elder Law Firm of Robert Clofine. Robert Clofine, Esquire, Attorney. 1-7-3t

MARY L. SNYDER late of West Manchester Twp., York Co., PA, deceased. Susan R. Zisfain & Mary Ann Whelan, c/o 56 S. Duke Street, York, PA 17401-1402, Co-Executrices. Richard R. Reilly, Esquire, Attorney. 1-7-3t

SECOND PUBLICATION

HENRY S. ALTLAND late of West Manheim Twp., York Co., PA, deceased. John Dusman, 1475 Jacobs Mill Road, Hanover, PA 17331 and Patricia Keeney, 214 Sunset Avenue, Hanover, PA 17331, Executors. BUCHEN, WISE & DORR. Donald W. Dorr, Esquire, Attorney. 12-31-3t

BRUCE R. ANDERSON late of Franklin Twp., York Co., PA, deceased. Paul R. Anderson, 3176 Freeburg Rd., Middleburg, PA 17842 or David A. Anderson, 217 Chainsaw Rd., Dillsburg, PA 17019, Executors. The Wiley Group, P.C. Jan M. Wiley, Esquire, Attorney. 12-31-3t

BERNICE R. BROWN late of Hanover Borough, York Co., PA, deceased. Barbara Strausbaugh, 380 Wilson Avenue, Hanover, PA 17331, Executrix. Guthrie, Nonemaker, Yingst & Hart. James T. Yingst, Esquire, Attorney. 12-31-3t

JOSEPH D. CAMPBELL of Newberry Twp., York Co., PA, deceased. Teena Campbell and Joseph D. Campbell, II, c/o 2675 Eastern Boulevard, York, PA 17402, Executors. Douglas P. France, Equire, Attorney. 12-31-3t

MARY EDNA COXEN late of Chanceford Twp., York Co., PA, deceased. Roseanna Mary Bloom, c/o 119 East Market St., York, PA 17401, Executrix. Ream, Carr, Markey & Woloshin LLP. Audrey E. Woloshin, Esquire, Attorney. 12-31-3t

ADAM D. CROUMER late of North York Borough, York Co., PA, deceased. John W. Croumer, c/o 100 East Market Street, P.O. Box 15012, Executor. Barley Snyder LLC. Nancy Mayer Hughes, Esquire, Attorney. 12-31-3t

BERNADEAN DeLONG late of Spring Garden Twp., York Co., PA, deceased. Harry M. Ness, 30 Indian Rock Dam Rd., York, PA 17403, Executor. Harry M. Ness, Esquire, Attorney. 12-31-3t

JEAN R. DOLL late of North York Borough, York Co., PA, deceased. Duane E. Doll, 127 Meade Street, York, PA 17404, Executor. Martin Miller, Esquire, Attorney. 12-31-3t

VIRGINIA M. FRANKLIN late of Codorus Twp., York Co., PA, deceased. John L. Franklin, 4226 Cherry Run Road, Glen Rock, PA 17327, Executor. Dorothy Livaditis, Esquire, Attorney. 12-31-3t

MILDRED M. FULKS late of York Twp., York Co., PA, deceased. Terry L. Toomey, 45 Lark Circle, York, PA 17404, Executor. Gregory H. Gettle, Esquire, Attorney. 12-31-3t

BLANCHE M. HAYES late of York City, York Co., PA, deceased. Anthony D. Brooks, c/o 135 North George Street, York, PA 17401, Executor. CGA Law Firm, PC. Timothy J. Bupp, Esquire, Attorney. 12-31-3t

MILDRED B. JAFFE late of Fairview Twp., York Co., PA, deceased. Judith L. Jaffe, Janice E. Weber and Raymond J. Jaffe, c/o One West Main Street, Shiremanstown, PA 17011, Co-Executors. James D. Bogar, Esquire, Attorney. 12-31-3t

JOSEPH H. KLINEDINST of West Manchester Twp., York Co., PA, deceased. Jeanne L. Klinedinst, c/o 110 South Northern Way, York, PA 17402, Executor. Griffith, Strickler, Lerman, Solymos & Calkins. Paul G. Lutz, Esquire, Attorney. 12-31-3t

LA VERNE H. KEUSTER late of Fawn Twp., York Co., PA, deceased. Kimberly W. Kinard, 153 Good Road, Airville, PA 17302, Executrix. Laucks & Laucks, LLP. David M. Laucks, Esquire, Attorney. 12-31-3t

MARIE M. LIGHTNER late of York City, York Co., PA, deceased. Edward A. Lightner, 101 Sherry Drive, McSherrystown, PA 17344 and Sue Ann Dusman, 2020 Alcott Road, York, PA 17406, Executors. Buchen, Wise & Dorr. Donald W. Dorr, Esquire, Attorney. 12-31-3t

JEAN E. LUDWIG late of West Manchester Twp., York Co., PA, deceased. Elwood L. Eycler, c/o 2025 E. Market Street, York, PA 17402, Executors. Richard H. Mylin, III, Esquire, Attorney. 12-31-3t

RICHARD MARKLE late of York City, York Co., PA, deceased. Dorothy Mae Frances Carter, c/o 56 S. Duke Street, York, PA 17401-1402, Executrix. Richard R. Reilly, Esquire, Attorney. 12-31-3t

FLOYD E. NESTLER late of York Twp., York Co., PA, deceased. Fred Bingaman, c/o 129 East Market Street, York, PA 17401, Executor. Griest, Himes, Herrold, Schaumann, Ferro LLP. Laurence T. Himes, Jr., Esquire, Attorney. 12-31-3t

DOMINICK P. PICONE late of East Hopewell Twp., York Co., PA, deceased. Susan Anne Miller, 2099 Rehmeysers Hollow Road, Stewartstown, PA 17363, Executrix. STOCK AND LEADER. Jody Anderson Leighty, Esquire, Attorney. 12-31-3t

MARK A. REAM late of Springettsbury Twp., York Co., PA, deceased. Harry M. Ness, 109 E. Market Street, York, PA 17401, Executor. Harry M. Ness, Esquire, Attorney. 12-31-3t

RUTH R. REBERT late of Hanover Borough, York Co., PA, deceased. Judith R. Enterline, 510 Barberry Drive, York, PA 17404, Executrix. Larry W. Wolf, P.C., Esquire, Attorney. 12-31-3t

DARRELL E. RODE late of Newberry Twp., York Co., PA, deceased. Wendy L. Shearer, 5209 Locust Lane, Harrisburg, PA 17109, Administratrix. Jan L. Brown & Associates. Jan L. Brown, Esquire, Attorney. 12-31-3t

NORMA J. RUDISILL a/k/a NORMA JEAN RUDISILL a/k/a NORMA RUDISILL late of West Manchester Twp., York Co., PA, deceased. Steven A. Rudisill, c/o 40 South Duke Street, York, PA 17401-1441, Executor. Garber & Garber. John M. Garber, Esquire, Attorney. 12-31-3t

AMOS W. SHISSLER late of Washington Twp., York Co., PA, deceased. David A. Shissler and Bonita L. Salm, c/o 129 E. Market St., York, PA 17401, Co-Executors. Griest, Himes, Herrold, Schaumann, Ferro LLP. John C. Herrold, Esquire, Attorney. 12-31-3t

JOHN P. SMITH late of North Codorus Twp., York Co., PA, deceased. Sandra L. Shaffer and Sharon L. Gochenauer, 4948 E. Berlin Rd., Thomasville, PA 17364, Co-Executrices. John W. Stitt, Esquire, Attorney. 12-31-3t

LEWIS E. SNYDER late of Lower Chanceford Twp., York Co., PA, deceased. Robert L. Snyder and Lynn E. Snyder, 901 Delta Road, Red Lion, PA 17356, Co-Executors. Andrea S. Anderson, Esquire, Attorney. 12-31-3t

PATSY LEE SNYDER a/k/a PATSY L. SNYDER a/k/a PATSY LEIGH SNYDER late of York City, York Co., PA, deceased. Stacey Lynn Gabler, c/o 2997 Cape Horn Rd., Suite A-6, Red Lion, PA 17356, Executrix. Eveler & Eveler LLC, Attorney. 12-31-3t

GARNER SORRELL, SR., a/k/a GARNER D. SORRELL, SR., late of North Codorus Twp., York Co., PA, deceased. Garner D. Sorrell, Jr., a/k/a Garber D. Sorrell, Jr., c/o 29 East Philadelphia Street, York, PA 17401, Administrator. Blake & Gross, LLC. Kurt A. Blake, Esquire, Attorney. 12-31-3t

BETTY P. STOUGH late of Springfield Twp., York Co., PA, deceased. Patricia A. Stough, 582 Brighton Drive, Seven Valleys, PA 17360, Executrix. LAUCKS & LAUCKS, LLP. David M. Laucks, Esquire, Attorney. 12-31-3t

DUDLEY L. STOUCH late of Springettsbury Twp., York Co., PA, deceased. James C. Stouch, 360 Waters Rd., York, PA 17403, Executor. Griest, Himes, Herrold, Schaumann, Ferro LLP. John C. Herrold, Esquire, Attorney. 12-31-3t

BETTY L. WASER late of York Twp., York Co., PA, deceased. Philip C. Waser, 925 Castle

Pond Dr., York, PA 17402, Executor. John W. Stitt, Esquire, Attorney. 12-31-3t

HARVEY W. WAYNE late of Lower Chanceford Twp., York Co., PA, deceased. Sally W. Kohlbus a/k/a Sally Jo Wayne, 94 Watson Road, Delta, PA 17314, Executrix. Joseph C. Korsak, Esquire, Attorney. 12-31-3t

ROLAND C. WHISLER late of York City, York Co., PA, deceased. Marilyn W. Faris, c/o 138 East Market Street, York, PA 17401, Executrix. Goldfein & Joseph. Leo E. Gribbin, Esquire, Attorney. 12-31-3t

THIRD PUBLICATION

VIOLET M. HARRIS a/k/a VIOLET MARIE HARRIS late of Mount Wolf Borough, York Co., PA, deceased. Edward A. Harris, 3718 Starview Rd., Mt. Wolf, PA 17347, Executor. KATHERMAN, HEIM & PERRY. Ronald Perry, Esquire, Attorney. 12-23-3t

RUTH E. HEALEY late of Spring Garden Twp., York Co, PA, deceased. Michael P. Healey a/k/a Michael P. Healey, Jr., c/o 120 Pine Grove Commons, York, PA 17403, Executor. Elder Law Firm of Robert Clofine. Robert Clofine, Esquire, Attorney. 12-23-3t

ROBERT M. LEADER late of North Codorus Twp., York Co., PA, deceased. Jason M. Leader, c/o 56 S. Duke Street, York, PA 17401-1402, Executor. Richard R. Reilly, Esquire, Attorney. 12-23-3t

RUTH A. SCHLOSSER late of Conewago Twp., York Co., PA, deceased. Faye Miller, 2940 Westwind Ln., York, PA 17404, Executrix. GRIEST, HIMES, HERROLD, SCHAUMANN, FERRO LLP. John C. Herrold, Esquire, Attorney. 12-23-3t

ROBERT N. TARMAN late of Conewago Twp., York Co., PA, deceased. A. Ruth Tarman, c/o Suite C-400, 555 Gettysburg Pike, Mechanicsburg, PA 17055, Administratrix. James, Smith, Dietterick & Connelly, LLP. Edward P. Seeber, Esquire, Attorney. 12-23-3t

RUTH P. WALTER a/k/a RUTH A. WALTER late of York Co., PA, deceased. Hoyt D. Walter, 3640 Fox Run Dr., Allentown, PA 18103, Executor. 12-23-3t

CIVIL NOTICES

ACTION IN MORTGAGE FORECLOSURE

**TOWER FEDERAL
CREDIT UNION, Plaintiff
v. SHARON DENISE
YARBOUGH, Defendant**

Number 2009-su-004726-06

TO: SHARON DENISE YARBOUGH

PREMISES SUBJECT TO FORECLOSURE: 2727 HUNT CLUB DRIVE, YORK, PENNSYLVANIA 17402

NOTICE

If you wish to defend, you must enter a written appearance personally or by attorney and file your defenses or objections in writing with the court. You are warned that if you fail to do so the case may proceed without you and a judgment may be entered against you without further notice for the relief requested by the Plaintiff. You may lose money or property or other rights important to you.

YOU SHOULD TAKE THIS NOTICE TO YOUR LAWYER AT ONCE. IF YOU DO NOT HAVE A LAWYER, GO TO OR TELEPHONE THE OFFICE SET FORTH BELOW. THIS OFFICE CAN PROVIDE YOU WITH INFORMATION ABOUT HIRING A LAWYER.

IF YOU CANNOT AFFORD TO HIRE A LAWYER, THIS OFFICE MAY BE ABLE TO PROVIDE YOU WITH INFORMATION ABOUT AGENCIES THAT MAY OFFER LEGAL SERVICES TO ELIGIBLE PERSONS AT A REDUCED FEE OR NO FEE.

Lawyer Referral Service
137 East Market Street
York, PA 17401
(717) 854-8755

McCABE, WEISBERG AND CONWAY, P.C.

BY: TERRENCE J. McCABE, ESQUIRE
MARC S. WEISBERG, ESQUIRE
EDWARD D. CONWAY, ESQUIRE
MARGARET GAIRO, ESQUIRE
123 South Broad Street, Suite 2080
Philadelphia, Pennsylvania 19109
(215) 790-1010

1-7-1t

Attorneys for Plaintiff

**DEUTCH BANK NATIONAL TRUST
COMPANY, as Trustee for the
holders of Morgan Stanley Asset-
Backed Certificates, Series 2007-1
4708 Mercantile Drive
Ft. Worth, TX 76137, Plaintiff**

v.

**CARLOS D. SIMMONS and
YOLANDA D. SIMMONS
440 North Burberry Lane
Mount Wolf, PA 17347
10402 Slocus Court
Clinton, MD 20735, Defendants**

NOTICE OF SALE OF REAL PROPERTY

TO: CARLOS D. SIMMONS AND YOLANDA D. SIMMONS, Defendants,
440 North Burberry Lane
Mount Wolf, PA 17347

Your house (real estate) at 440 North Burberry Lane, Mount Wolf, PA 17347 is scheduled to be sold at the Sheriff's Sale on April 12, 2010 at 2:00 P.M. in the York County Judicial Center, 45 North George Street, York, PA, to enforce the court judgment of 274,112.59, obtained by Plaintiff above (the mortgagee) against you. If the sale is postponed, the property will be relisted for the Next Available Sale.

ALL THAT CERTAIN TRACT OF LAND LYING AND BEING SITUATE IN THE TOWNSHIP OF EAST MANCHESTER, YORK COUNTY, PENNSYLVANIA, BEING IDENTIFIED AS LOT 7 SHOWN ON A PLAN OF LOTS KNOWN AS ASBURY PINES, FINAL SUBDIVISION PLAN, AS PREPARED BY STAHLMAN & STAHLMAN, INC., YORK, PA, DRAWING NO. A-02-027, DATED 10/11/04, AND RECORDED AT THE YORK COUNTY RECORDER OF DEEDS OFFICE IN PLAN BOOK 1778; PAGE 230, AND BEING MORE FULLY DESCRIBED AS FOLLOWS:

BEGINNING AT A POINT ON THE WEST SIDE OF NORTH BURBERRY LANE APPROXIMATELY 706.32 FEET NORTHWEST FROM THE CENTERLINE INTERSECTION OF ABBY DRIVE AND BURBERRY LANE, SAID POINT ALSO MARKING THE NORTHWEST CORNER OF LOT 84 ON PLAN OF ASBURY PINES, FINAL SUBDIVISION PLAN HEREIN-ABOVE MENTIONED; THENCE ALONG THE NORTH SIDE OF LOT 6 THE FOLLOWING BEARING AND DISTANCE; SOUTH 31 DEGREES 34 MINUTES 49 SECONDS WEST FOR A DISTANCE OF 141.00 FEET TO AN POINT; THENCE ALONG LANDS NOW OR FORMERLY OF BENJAMIN F. SMITH, NORTH 54 DEGREES 25 MINUTES 11 SECONDS WEST FOR A DISTANCE OF 115.57 FEET TO A POINT; THENCE ALONG THE SOUTH SIDE OF LOT

8 NORTH 30 DEGREES 12 MINUTES 48 SECONDS EAST FOR A DISTANCE OF 120.09 FEET TO A POINT ON THE WESTERN RIGHT-OF-WAY OF NORTH BURBERRY LANE; THENCE ALONG THE WESTERN RIGHT-OF-WAY OF NORTH BURBERRY LANE AND A CURVE TO THE LEFT HAVING A RADIUS OF 580.00 FEET, ARC LENGTH OF 69.32 FEET, AND A CHORD OF SOUTH 63 DEGREES 12 MINUTES 38 SECONDS EAST FOR A DISTANCE OF 69.28 FEET TO A POINT; THENCE ALONG THE SAME RIGHT-OF-WAY LINE SOUTH 66 DEGREES 38 MINUTES 05 SECONDS EAST FOR A DISTANCE OF 49.62 FEET TO A POINT AND THE PLACE OF BEGINNING.

CONTAINING 0.3464 ACRE OR 15,088 SQ. FT. OF LAND.

SUBJECT TO A STORM WATER DRAINAGE EASEMENT LOCATED IN THE REAR YARD AREA AS SHOWN ON THE ABOVE MENTIONED PLAN.

BEING KNOWN AS: 440 North Burberry Lane, Mount Wolf, PA 17347

PROPERTY ID NO.: 26-18-7

TITLE TO SAID PREMISES IS VESTED IN CARLOS D. SIMMONS AND YOLANDA D. SIMMONS, HUSBAND AND WIFE, AS TENANTS BY THE ENTIRETY BY DEED FROM ASBURY PINES PARTNERS, LLC, TITLED OWNER DATED 1/26/07 RECORD-ED 2/1/07 IN DEED BOOK 1872 PAGE 5244.

UPI# 260001800070000000

UDREN LAW OFFICES, P.C.

MARK J. UDREN, STUART WINNEG, LORRAINE DOYLE, ALAN M. MINATO, CHANDRA M. ARKEMA
111 Woodcrest Rd., Ste. 200
Cherry Hill, NJ 08003
856-482-6900

1-7-1t Attorneys for Plaintiff

ARTICLES OF INCORPORATION

NOTICE is hereby given that FRESH SEAS SEAFOOD, INC. has been incorporated under the provisions of the Pennsylvania Business Corporation Law of 1988.

MILLER, POOLE & LORD, LLP

ANDREW J. MILLER, Esquire

1-7-1t Solicitor

PUBLIC NOTICE TO KEVIN EUGENE NESBIT

IN RE: ADOPTION OF: DAMIRA SIERRA NESBIT

TO: KEVIN EUGENE NESBIT, formerly of York, Pennsylvania

A petition has been filed asking the Court to put an end to all rights you have to your child, DAMIRA SIERRA NESBIT. The court has set a hearing to consider ending your rights to your child. That hearing will be held in Courtroom No. 6, Sixth Floor of the York County Judicial Center, 45 North George Street, York, Pennsylvania on Wednesday, February 3, 2010, at 9:00 A.M. before the Honorable Penny L. Blackwell. You are warned that even if you fail to appear at the scheduled hearing, the hearing will go on without you and your rights to your child may be ended by the court without your being present. You have the right to be represented at the hearing by a lawyer. You should take this paper to your lawyer at once. If you do not have a lawyer or cannot afford one, go to or telephone the office set forth below to find out where you can get legal help.

TERRY R. BAKER
Family Court Administer of York County
York County Judicial Center
45 N. George Street
York, PA 17401
Telephone No. (717) 771-9360

VICTOR A. NEUBAUM, Attorney

1-7-3t Solicitor

PUBLIC NOTICE TO TOMMY SMALL a/k/a TOMMY SMALLS

IN RE: ADOPTION OF ARIANNA ALISE STERN, A MINOR

A petition has been filed asking the Court to put an end to all rights you have as a parent to

your child, ARIANNA ALISE STERN. An Involuntary Termination of Parental Rights Hearing has been scheduled for February 9, 2010, at 1:30 p.m., in Hearing Room No. 3, of the York County Judicial Center, 45 North George Street, York, Pennsylvania, to terminate your parental rights to ARIANNA ALISE STERN (DOB 02/27/07), whose putative Father is Tommy Small, a/k/a, Tommy Smalls and whose Mother is Heather Andora Stern. You are warned that even if you fail to appear at the scheduled hearing, the hearing will go on without you and your rights to your child may be ended by the Court without your being present. You have a right to be represented at the hearing by a lawyer. You should take this paper to your lawyer at once. If you do not have a lawyer or cannot afford one, go to or telephone the office set forth below to find out where you can get legal help.

Terry R. Baker
Family Court Administrator
York County Court of Common Pleas
York County Judicial Center
45 North George Street
York, Pennsylvania 17401
Telephone No. (717) 771-9360

LAW OFFICES OF MARTIN MILLER

MARTIN MILLER, Esquire

12-23-3t Solicitor for York County
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David A. Mills, Esquire

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