

**MOM REALLY DID LIKE ME BETTER**

*THE BASICS OF ESTATE LITIGATION*

# Speakers for the Afternoon

- ▶ Judge C. Theodore Fritsch, Jr.

Administrative Judge of the Bucks County  
Orphans' Court

- ▶ Judge Gary B. Gilman

- ▶ Judge Jeffrey Trauger

- ▶ Dianne C. Magee, Esquire

Grim Biehn & Thatcher  
Perkasie, Pennsylvania

- ▶ Michael F. Frisbie, Esquire

Pritchard Law Offices  
Colmar, Pennsylvania



Code Words

Questions

PEF Code refers to 20 Pa.C.S.A. § \_\_\_\_\_

# Will Contests

## 2 paths to challenge the Will

### Caveat

- ▶ PEF Code 906 (20 Pa.C.S.A. § 906)
- ▶ What is it?
- ▶ Why would you file a caveat?
- ▶ Who can file a caveat?
- ▶ When would you file?
- ▶ Bond
- ▶ What does result look like?

### Petition to Appeal from Probate

- ▶ PEF Code 908
- ▶ What is it?
- ▶ Why would you file this Petition?
- ▶ Who can file this Petition?
- ▶ When would you file this Petition?
- ▶ Bond
- ▶ What does result look like?

# Standing –

Who can challenge a will for a Petition for an Appeal from Probate.

A “party in interest”, OR

A contestant to the validity of a will does not have standing to do so unless he can prove he would be entitled to participate in the decedent's estate if the will before the Court is ruled invalid, OR

He must be aggrieved by the probate of a will, the contestant's share of the estate must be smaller because of probate or larger if probate is denied.

In sum, contestant must be either:

- An intestate heir who would inherit if the decedent had no will; OR
- A beneficiary of the decedent's immediately previous will which would be revived by the invalidation of the revocation clause in the contested will

# If you are going to challenge a Will, what are the grounds to challenge ?



## Common Grounds -

1. Lack of Testamentary Capacity;
2. Undue Influence;
3. Fraud;
4. Forgery;
5. Mistake in the Execution;
6. Mistake in the Inducement; and
7. Insane Delusion

# Questions of Will Interpretation

Polestar Rule - “It is now hornbook law (1) that the testator’s intent is the polestar and must prevail; and (2) that his intent must be gathered from a consideration of (a) all the language contained in the four corners of his will and (b) his scheme of distribution and (c) the circumstances surrounding him at the time he made his will and (d) the existing facts; and (3) that technical rules or canons of construction should be resorted to only if the language of the will is ambiguous or conflicting or the testator’s intent is for any reason uncertain.” Burleigh Estate, 175 A.2d 838 (Pa. 1961).

Armchair Rule - “In order to ascertain the actual intent of the settlor or testator, the Court must place itself in his armchair and consider not only the language and scheme of the instrument but also the facts and circumstance with which he was surrounded; and these surrounding facts and circumstances include the condition of his family, the natural objects of his bounty and the amount and character of his property.” Pew Trust, 191 A.2d 399 (Pa. 1963).

PEF Code §§ 2514 and 6114 – Rules of Interpretation – definitions, adopted children, born out of wedlock, etc.’

Precedents are of little value – “no will has a brother...” Lockhart’s Estate, 159 A. 874 (Pa. 1932).

In terrorem clause – largely ineffective. Clause is unenforceable if probable cause exists.

# Statutory Presumptions

Slayers Act	PEF Code §§ 8801-8815
Modification by Circumstance (divorce and pending divorce)	PEF Code §§ 2507 and 6111.1
Order of Abatement	PEF Code § 3541
Income During Administration	PEF Code § 3543
Simultaneous Death	PEF Code § 8501
Death Tax Apportionment	PEF Code § 3701
Fiduciary Investments	PEF Code § 7301 <i>et seq.</i>

# Judicial Presumptions (or judicial aids to interpretation)

## Presumptions Against

Absurd Results – construction of language used without leading to absurd or inconvenient results is preferred.

Superfluous Words – construction which renders a portion idle or nugatory is not to be preferred over one which makes every word operative.

Intestacy – a will is presumed to intend to dispose of entire estate and not leave any portion intestate

Inconsistency – interpret the various provisions of a will as consistent so as to give effect to all provisions.

Disinheritance – presumed that a decedent does not intend to disinherit his or her kin

## Presumptions For

Consistent Language – where words are used more than once, the courts give consistent meaning to the words in all places they are used.

Equal Treatment – where will is capable of more than one interpretation, the law favors a construction which will work equality of distribution among those with equal standing.

Intent to be determined from the entire will – intent to be gathered from the “four corners” of the will.





Form – Pa.O.C. Rule 2.1 accounts shall conform to the Model Rules.

Petition for Adjudication under Rule 2.4 – filed with the OC Clerk at the time of the Account and shall be signed and verified by at least one accountant and signed by counsel.

Notice under Rule 2.5(b) – given to all parties in interest, whether or not represented by counsel and to parties' counsel of record.

Filing under Rule 2.6 – Account is filed with OC Clerk and then at time of Audit, an Entry of Appearance is filed on a separate form. Bucks O.C. Rule 2.6A(3).

Objections under Rule 2.7(a) – filed with the OC Clerk.

Pleadings after Objections under Rule 2.8 – Answer, POs, Answer to the POs. 20 days to file (Rule 2.8(c)).

# Orphans' Court Procedure - Accounts and Audits

# Orphans' Court Procedure - Petition Practice

Citation – Rule 3.5(a) requires issuance of citation to obtain personal jurisdiction.

Response to Citation – Rule 3.6. POs, Answer with New Matter, Reply to New Matter, Answer to POs. POs get adjudicated pursuant to Bucks County Local Rule 208.3(b).

Answers/ POs – Rule 3.7. all responsive pleadings shall be filed w/i 20 days after notice of prior pleading *unless there is a Returnable date in the Citation*.

Amended Pleadings - Rule 3.9. may be filed w/i 20 days of notice POs.

Answers – Rule 3.10(b). a failure to properly deny the facts in the pleading is deemed an admission.

Notice Practice – Rule 3.5(b) where personal jurisdiction is not required to be obtained.

# Bucks County Procedure

Discovery – Bucks County O.C. Rule 7.1A(1) leave for discovery may be granted only on petition upon cause showed, except by agreement of counsel. If it is granted, governed by Pa and Bucks County Rules of Civil Procedure.

Examples - Discovery of Scrivener's File, expert reports, pertinent medical records, financial records, etc. The personal representative stands in the Decedent's shoes and has the authority to obtain all of the Decedent's financial and medical records and waive the attorney client privilege.

Discovery Master - Robert Mancini serves as a discovery master for the Bucks County Orphans' Court.

## Motions

- Judgment on the Pleadings Pa.O.C. Rule 7.2
- Summary Judgment. Pa.O.C. Rule 7.3
- Motions for Reconsideration Pa.O.C. Rule 8.2

PreTrial Conference – Bucks County O.C. Rule 7.1B – after audit, ordered by the Court, or upon Motion of any Party.

**How do you get to Trial or Hearing?**

# Discovery Rules

## State Orphans' Rules

<http://www.pacourts.us/assets/opinions/Supreme/out/682spct-attach.pdf>

Rule 7.1. Depositions, Discovery, Production of Documents and Perpetuation of Testimony The court, by local rule or order in a particular matter, may prescribe the practice relating to depositions, discovery, production of documents and perpetuation of testimony. To the extent not provided for by local rule or an order governing a particular matter, the practice relating to depositions, discovery, production of documents and perpetuation of testimony shall conform to the practice in the Trial or Civil Division of the local Court of Common Pleas.

Note: Rule 7.1 is identical to former Rule 3.6.



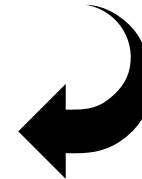
## Bucks County Local Orphans' Court Rules

<http://www.buckscounty.org/Courts/LocalRules>

### **Rule 7.1A Practice as to Depositions, Discovery, Production of Documents and Perpetuation of Testimony**

1. Leave to take depositions, or to perpetuate testimony, or obtain discovery or the production of documents, ***may be granted only on petition upon cause shown except upon agreement of counsel.***

2. Upon *court approval* under paragraph 1 of this Rule, discovery shall be governed by Pennsylvania and Bucks County Rules of Civil Procedure.



State Civil Procedure Rules – Pa.R.C.P. 4001 *et seq.*

## **Pa. O.C. Rule 7.2 Motion for Judgment on the Pleadings.**

After the relevant pleadings are closed, but within such time as not to unreasonably delay the hearing, any party may move for judgment on the pleadings. The court shall enter such judgment or order as shall be proper on the pleadings.

Note: Rule 7.2 has no counterpart in former Orphans' Court Rules, but is derived from Pa.R.C.P. No. 1034.

Explanatory Comment: The Official Note to Pa.R.C.P. No. 1034 is fully incorporated by reference herein, except that the court may, but is not required to, promulgate local rules governing the procedure for these motions.

**Bucks County Orphans' Court Rule 7.2a. Motion for Judgment on the Pleadings.** A motion for judgment on the pleadings shall be moved for disposition pursuant to Bucks County Rule of Civil Procedure 208.3(b).

## **Pa.R.C.P. 1034. Motion for Judgment on the Pleadings.**

(a) After the relevant pleadings are closed, but within such time as not to unreasonably delay the trial, any party may move for judgment on the pleadings.

### **Official Note**

Only the pleadings between the parties to the motion for judgment on the pleadings must be closed prior to filing the motion.

Rule 239.6 requires every court to promulgate Local Rule 1034(a) describing the local court procedure governing motions for judgment on the pleadings.

(b) The court shall enter such judgment or order as shall be proper on the pleadings.

# Motion for Judgment on the Pleadings

# ACCOUNTS AND AUDITS

## Common Objections



1. Fees / Commissions – executors and attorneys’ fees.



2. Breach of Fiduciary Duties and Surcharge



3. Reasonableness of Administrative Expenses



4. Claims of Creditors – creditor serving as Administrator and Caretaker claims

## *Fee Schedule per the Johnson Estate for Executor or Administrator*

Johnson Estate, 4 Fiduc.Rep.2d 6 (O.C. Chester Co. 1983)

\*\*\* Not all counties accept In Re Johnson.  
There is also a calculation for attorneys' fees with Johnson

			<u>Per. Col</u>	<u>Per Total</u>
\$0.00	\$ 100,000	5%	\$ 5,000	\$ 5,000
100,000	200,000	4%	4,000	9,000
200,000	1,000,000	3%	24,000	33,000
1,000,000	To 2,000,000	2%	20,000	53,000
2,000,000	3,000,000	1½%	15,000	68,000
3,000,000	4,000,000	1%	10,000	78,000
4,000,000	5,000,000	½%	5,000	83,000
1% Joint Accounts	3% P.O.D. Bonds	1% Trust Funds		
3% Real Estate converted	5% Real Estate	1% Real Estate		
With aid to broker	Non-converted	Specific Devised		

What is a fair and reasonable fee is sometimes a delicate, and at times a difficult question. The facts and factors to be taken into consideration in determining the fee or compensation payable to an attorney include:

- a. the amount of work performed;
- b. the character of the services rendered;
- c. the difficulty of the problems involved;
- d. the importance of the litigation;
- e. the amount of money or value of the property in question;
- f. the degree of responsibility incurred;
- g. whether the fund involved was 'created' by the attorney;
- h. the professional skill and standing of the attorney in his profession;
- i. the results he was able to obtain;
- j. the ability of the client to pay a reasonable fee for the services rendered; and,
- k. very importantly, the amount of money or the value of the property in question

## For Attorneys' Fees

- what is fair and reasonable
- see the factors

LaRocca Estate, 246 A.2d 337 (Pa. 1968).



# Commonly Raised Objections to Accounts

## Breach of Fiduciary Duties and Surcharge

A court may impose a *surcharge against a personal representative for failing to perform his fiduciary duties*. “A surcharge is a penalty imposed to compensate the beneficiaries for loss of estate assets due to the fiduciary’s failure to meet his duty of care; however, a surcharge cannot be imposed merely for an error in judgment.”

In re Estate of Lux, 480 Pa. 256, 265, 389 A.2d 1053, 1057 (1978).

A personal representative’s basic duties are to *marshal the decedent’s assets, liquidate them as necessary to pay expenses and debts, timely file death tax returns and pay the applicable taxes, and distributed the remaining assets pursuant to the decedent’s will or the intestate law*. The personal representative has no duty to invest and may be surcharged for the loss of value caused by the failure to liquidate assets.

Geniviva Estate, 675 A.2d 306 (Pa. Super. 1996).

# Breach of Fiduciary Duties and Surcharge

## (continued)

A personal representative must “preserve and protect the property for distribution to the proper persons within a reasonable time.”

In re Estate of Campbell, 692 A.2d 1098, 1001 (Pa. Super. 1997)

A personal representative must exercise “judgment, skill, care and diligence that a reasonable or prudent person would ordinarily exercise in the management of his own affairs.

In re Estate of Campbell

Another Commonly Raised Objection –

Reasonableness of Administrative Expenses

# Commonly Raised Objections to Accounts

## Claims of Creditors

Creditor serving as Administrator - pursuant to PEF Code 3155, remember that a creditor, if there are no intestate heirs, may have priority to serve as administrator or to designate the administrator. It is important to search for heirs, noting that the most distant relations to qualify as an heir is a first cousin once removed from the decedent. In serving as administrator, the creditor is a fiduciary with the same duties as any other administrator.

Household Claims by Caretakers or for Household Services – these are common, but often fraudulent. They are difficult to prove. There is a presumption of periodic current payment for personal services rendered in a household setting. Dart Estate, 232 A.2d 724 (Pa. 1967).

In a family relationship, without a written contract, all such services are presumptively gratuitous. Gadola Estate, 188 A.2d 744 (Pa. 1963).

***Caution*** – with claims of creditors, a claimant’s testimony may be barred by the Dead Man’s Rule, 42 Pa.C.S.A. § 5930. For example, a family member attempting to prove a caretaker claim.

Statute of Limitations – remember, the statute of limitations, in general, is extended by one year following the decedent’s death. 20 Pa.C.S. A. § 3383.

Commonly  
Raised  
Objections to  
Accounts  
Claims of  
Creditors -  
continued

# Commonly Raised Objections to Accounts Continued

5. Inter vivos Gifts
6. Joint Accounts/Survivorship
7. Changes to Beneficiary Designations
8. Challenges to Actions taken by Agent under Decedent's Power of Attorney
  - a. How far back will the court's review extend?
9. Issues concerning the Decedent's Residential Real Estate. The personal representative, unless the property is occupied with the decedent's consent at the time of the decedent's death by an heir or devisee, has the right and obligation to take possession of the property and to maintain and administer it. PEF Code § 3311. Rents are not to be collected from an heir or devisee unless needed for payment of claims, but the tenants are required to pay for utilities. Section 3311 does not affect the personal representative's authority to sell the real estate.

# Accounts and Audits Other Information

B. Pursuant to Pa.O.C. Rule 5.5, the court may appoint a guardian ad litem to represent a minor or person who is not sui juris in the litigation.

C. Notice of the account and audit must be given to the Attorney General of any residuary bequest, any pecuniary bequest in excess of \$25,000.00, or any pecuniary bequest which will not be paid in full. Pa.O.C. Rule 4.4.

## D. Alternative Resolutions

1. Pursuant to Pa.O.C. Rule 1.6, all parties having an interest in a matter may participate by written agreement in private mediation or in court-supervised mediation.
2. Robert Mancini is the settlement master for the Bucks County Orphans' Court.

# Accounts and Audits

## Other Information

“Discourage litigation.

Persuade your neighbors to  
compromise whenever you can.

Point out to them how the  
nominal winner is often a real  
loser in fees, expenses, and a  
waste of time.

As a peacemaker the lawyer has  
a superior opportunity of being a  
good man.”

Annenberg Estate, 4 Fid. Rep. 2d 143  
(O.C. Phila. en banc 1984), *quoting*  
*Abraham Lincoln*.

# Enforcement of Orders and Decrees Attachment

A fiduciary who fails to comply with an order, adjudication or decree of the Orphans' Court may be held in contempt of court, and, ultimately, his person may be attached. Attachment of the person requires a five-step process outlined in Commonwealth ex re. Magaziner v. Magaziner, 253 A.2d 263 (Pa. 1969), as follows:

1. A petition with a rule to show cause why the fiduciary should not be held in contempt;
2. A hearing at which the fiduciary must appear;
3. A determination of contempt;
4. A petition with a rule to show cause why the fiduciary should not be attached; and
5. A hearing and entry of a rule absolute for attachment.

► Lang, Incapacitated Persons (No. 2), 16 Fiduc. Rep. 2d 218 (O.C. Montgomery Co. 1996).





# QUESTIONS

# Dianne C. Magee Esquire

## Grim, Biehn & Thatcher

Dianne is a shareholder in the Bucks County law firm of Grim, Biehn & Thatcher in Perkasie, where she practices in the firm's estate department. Her practice emphasizes estate administration, estate planning, elder law and Orphans' Court litigation. Before joining her current firm, Ms. Magee served as Orphans' Court Administrator for Bucks County and as the law clerk to the Honorable Leonard B. Sokolove, the Administrative Judge of the Bucks County Orphans' Court Division. She has been appointed as a member of the Pennsylvania Supreme Court Orphans' Court Rules Committee, beginning in January, 2020.

Ms. Magee has taught law-related classes for Pennsylvania State University and Bucks County Community College and has spoken frequently to professional and community organizations on estates and Orphans' Court topics. She is a member of the Bucks County Bar Association, where she has served on the Board of Directors, and of the Real Property, Probate and Trust Law sections of the Pennsylvania and the American Bar Associations.

Ms. Magee earned her A.B. degree from Stanford University and her J.D. degree from Duke University School of Law. She is licensed to practice law in Pennsylvania, New Jersey and New Mexico.

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# Michael F. Frisbie, Esquire

## Pritchard Law Offices

Mike practices law at Pritchard Law Offices in Colmar, where he provides individuals and businesses with top level legal services for their everyday situations and problems. He takes pride and pleasure in helping people and businesses solve their problems. Mike handles a wide array of different legal matters including estate planning, estate administration, business counseling and litigation including estate litigation.

He is committed to helping individuals and small businesses understand the full array of legal steps they can employ to prosper, transfer wealth, and protect their businesses and families for generations to come. Mike provides reasoned and practical advice to his clients in a manner that is easy to understand. In addition, Mike's litigation experience is a valuable resource for small businesses and individuals who seek his help to employ successful operational and growth strategies with an eye to avoiding costly litigation and conflict.

Mike has presented numerous presentations in the community on the areas of estate planning, the Paycheck Protection Program loans, litigation, and other topics. He has completed the National Institute of Trial Advocacy (NITA).

Mike earned his Bachelor of Arts in History at the Pennsylvania State University where he was a proud member of the Penn State Marching Blue Band. He earned his J.D. from the Rutgers University School of Law in Camden. He earned an Estate Planning Certificate from the Temple University School of Law.

He is active in his community with Scouts BSA, YMCA of Bucks County, and has coached his children at Warrington Soccer and Doylestown Athletic Association.



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