

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

IN RE: THE ESTATE OF  
LELAND W. BENSON, JR.,  
deceased.

: NO. 41-18-0354  
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:  
: ORPHANS' COURT  
: DIVISION  
:  
:  
: *Petition to Intervene*

**DECREE**

AND NOW, following conference, evidentiary hearing, and argument held November 20, 2019, on Petitioner Barry Smith's *Petition of Creditor of the Estate to Intervene*, the Court hereby issues the following DECREE.

***Background***

The instant matter relates to administration of the estate of Leland W. Benson, Jr. ("Decedent"), who died testate on June 19, 2018. Named in Decedent's Will as Executrix of his Estate ("the Estate"), Denise M. Cordes filed a *Petition for Probate and Grant of Letters Testamentary* on June 28, 2018. The Register and Recorder issued the Grant of Letters on that date.

On March 1, 2019, Ms. Cordes filed a *Petition for Citation to Show Cause Why Assets Should Not be Returned to the Estate and for Accounting and Unjust Enrichment* ("Petition to Recover Assets"). Count I of the Petition to Recover Assets alleged that Respondents Leland Wade Benson, III ("Wade Benson"), Stephanie Benson, Joel Lipperini, Maggie Lipperini, and Daniel Lipperini (collectively "Respondents") wrongfully and unlawfully took and retained possession of assets belonging to the Estate, including: four vehicles, vehicle frames and bodies, vehicle parts, molds, tools, and other tangible property.<sup>1</sup> Count II alternately alleged that Decedent made inter vivos transfers of his vehicles and other assets to Respondents in order to render his Estate

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<sup>1</sup> Petition for Citation to Show Cause Why Assets Should Not be Returned to the Estate and for Accounting and Unjust Enrichment ¶¶ 107-109 (March 1, 2019) ("Petition to Recover Assets"). The four vehicles include a Shelby 427 Cobra (VIN# CSX 4017), a Shelby 289 FIA Cobra (VIN# CSX 7007), a

insolvent and default his creditors, in violation of the Pennsylvania Uniform Voidable Transactions Act, 12 Pa.C.S.A. §§ 5101 *et seq.*<sup>2</sup> Count III demanded that Respondents provide an account of assets wrongfully acquired from the Estate, or acquired from Decedent prior to his death in violation of the Pennsylvania Uniform Voidable Transactions Act.<sup>3</sup> Count IV alleged that Respondents were unjustly enriched based on the prior alleged facts.<sup>4</sup>

Creditor Barry Smith filed a *Notice of Claim Against the Estate* on April 11, 2019, entering a claim of \$150,000.<sup>5</sup> Specifically, Mr. Smith claimed that he paid the Estate full price for two vehicles, the CSX7062 and the CSX7064 (“CSX vehicles”), which were not complete. Thereafter, on April 16, 2019, Mr. Smith filed a *Petition of Creditor of the Estate to Intervene* (“Petition to Intervene”) in the action relating to the Petition to Recover Assets, asserting an interest in protecting his rights as creditor. Respondents Wade Benson and Stephanie Benson filed an *Answer to Petition of Creditor of the Estate to Intervene* on May 7, 2019, in which they requested that the Court deny the Petition to Intervene. On May 28, 2019, Ms. Cordes filed a *Petition for Preliminary Injunctive Relief*, requesting that the Court enter a preliminary injunction to prevent the sale, conveyance, disposition, encumbrance, hiding, waste or disposition of Decedent’s vehicles.

Following a conference addressing both the Petition to Intervene and the Petition for Preliminary Injunctive Relief, the Court issued a Decree on July 11, 2019, (“July 11<sup>th</sup> Decree”) granting the preliminary injunction and scheduling an evidentiary hearing on the Petition to Intervene for August 9, 2019 (“August 9<sup>th</sup> Hearing”). At the date of the August 9<sup>th</sup> Hearing, Ms. Cordes provided testimony that her review of Decedent’s records led her to believe that Mr. Barry had a valid claim against the Estate. At the conclusion of Ms. Cordes’ testimony, Mark T. Sottile, counsel for Joel Lipperini, called his client to testify. Christopher H. Kenyon, counsel for Ms. Cordes, objected on the

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Shelby Daytona Coupe (VIN# CSZ 7061), and a Grand Sport Corvette. Pursuant to the Court’s Decree of July 11, 2019, the Grand Sport Corvette was determined to be a shell and not a complete vehicle.

<sup>2</sup> Petition to Recover Assets ¶ 111.

<sup>3</sup> Petition to Recover Assets ¶¶ 113-115.

<sup>4</sup> Petition to Recover Assets ¶¶ 117-118.

<sup>5</sup> Two other parties have asserted claims against the Estate. John Cropper filed a Notice of Claim on July 9, 2018, entering a claim of \$85,000. Reno Rivalta filed a Notice of Claim on October 17, 2018, entering a claim of \$17,825.

basis that Mr. Lipperini was not competent to testify under the Pennsylvania Dead Man's Act. Bryan W. Shook, counsel for Mr. Smith, objected as to the relevancy of Mr. Lipperini's testimony. Rather than summarily rule on these objections, the Court continued the August 9<sup>th</sup> Hearing to another date.

The Court thereafter issued a Decree on August 14, 2019 ("August 14<sup>th</sup> Decree") rescheduling the remainder of the evidentiary hearing to October 11, 2019, which the Court later continued to November 20, 2019 ("November 20<sup>th</sup> Hearing"). The August 14<sup>th</sup> Decree specified that no witnesses, including rebuttal witnesses, would be permitted to testify at the resumed evidentiary hearing unless they had been present at the August 9<sup>th</sup> Hearing. Pursuant to the August 14<sup>th</sup> Decree, Mr. Sottile, Mr. Kenyon, and Marc Drier, counsel for Daniel Lipperini, filed briefs addressing the issues of the Dead Man's Act and relevancy prior to the resumed evidentiary hearing.

On November 20<sup>th</sup>, at conference in chambers held prior to evidentiary hearing and argument, Mr. Sottile proposed that his client Joel Lipperini would offer testimony demonstrating that Mr. Smith was not owed any outstanding money from the Estate in regard to the CSX vehicles because both vehicles are currently complete.<sup>6</sup> At the following evidentiary hearing and argument, Mr. Sottile called Mr. Lipperini and endeavored to have him authenticate four photographs, which were entered into evidence as exhibits 2-5. Counsel for the opposing parties raised multiple objections to the admissibility of Mr. Lipperini's testimony.

This Decree will address the following objections: first, whether Mr. Lipperini's testimony was relevant to Barry Smith's Petition to Intervene; second, whether Mr. Lipperini's testimony should be precluded pursuant to the Dead Man's Act; third, whether Mr. Lipperini properly authenticated exhibits 2-5; fourth, whether the affidavits of Maggie Lipperini and Cheryl Romanell would constitute admissible evidence; and fifth, whether Barry Smith would be qualified to intervene in the foregoing action.

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<sup>6</sup> The Court expresses its disapproval with Mr. Sottile's failure to provide adequate notice of the substance of this testimony prior to the November 20<sup>th</sup> Hearing. The summary statement on the last page of Mr. Sottile's brief that "Respondent, Joel Lipperini will offer testimony that Petitioner, Barry Smith is not

## ***Analysis***

### **A. Relevance**

The Court first notes that the issue of whether Joel Lipperini has standing to object to the intervention of Barry Smith is moot. Even accepting *arguendo* that Mr. Lipperini does have standing, his testimony was not relevant to the Petition to Intervene. Mr. Lipperini's testimony at the November 20<sup>th</sup> Hearing related only to the CSX7062. Even were the CSX7062 complete, that would not reduce Barry Smith's claim to zero. Mr. Sottile conceded that Joel Lipperini's proffered testimony relating to the completeness of the CSX7064 would rely in part on hearsay.<sup>7</sup> The parties alleged to have direct knowledge of the complete status of the CSX7064 had not been called as witnesses at the August 9<sup>th</sup> Hearing, and so could not testify at the November 20<sup>th</sup> Hearing.<sup>8</sup> As Mr. Lipperini's testimony fails to establish that Mr. Smith lacks a valid claim against the Estate, the Court SUSTAINS Mr. Shook's objection to its relevancy. Mr. Lipperini's testimony at the November 20<sup>th</sup> Hearing will be STRICKEN FROM THE RECORD. Further, the Court DISMISSES Mr. Lipperini's objection to Mr. Smith's Petition to Intervene.

### **B. Preclusion under the Dead Man's Act**

While the Court has ruled that it will omit Joel Lipperini's testimony on the basis of relevance, the Court will also address Mr. Kenyon's objection under the Dead Man's Act<sup>9</sup> in order to clarify the application of the Act going forward. The purpose of the Dead

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owed any monies with respect to his purchases of the CSX7064 and CSX7062" was clearly insufficient to apprise the parties of the nature the proffered testimony.

<sup>7</sup> See *In re: Leland W. Benson, Jr.*, 41-18-0354, Transcript of Proceedings 82-84 (Nov. 20, 2019) ("Transcript") (**Court:** Okay. Do we agree, Counsel, that even if I were to accept all these exhibits and testimony with regard to 7062, that, standing alone, does not get Mr. Smith's claim to zero and that the only way to zero is – at least through Mr. Lipperini is that he would have to offer testimony of what other people told him? **Mr. Sottile:** . . . I will acknowledge that with respect to 7062 . . . that would not bring it down to zero. . . . Mr. Lipperini's testimony wouldn't have been exclusively based on hearsay. It would also be based on his personal knowledge, but he also did learn some of that from testimony of other people or statements from other people[.]").

<sup>8</sup> These witnesses were Wade Benson and another unnamed individual who were allegedly present at the auction where Mr. Smith purchased the CSX vehicles. See Transcript 32-33.

<sup>9</sup> See 42 Pa.C.S.A. § 5930 ("Except as otherwise provided in this subchapter, in any civil action or proceeding, where any party to a thing or contract in action is dead, or has been adjudged a lunatic and his right thereto or therein has passed, either by his own act or by the act of the law, to a party on the record who represents his interest in the subject in controversy, neither any surviving or remaining party to such thing or contract, nor any other person whose interest shall be adverse to the said right of such

Man's Act is "to prevent the injustice which might flow from permitting the surviving party to a transaction with a decedent to give testimony thereon favorable to himself and adverse to the decedent, which the latter's representative would be in no position to refute."<sup>10</sup> Subject to the Dead Man's Act, in cases involving claims against a decedent's estate:

[S]urviving 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. 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 and establishing prima facie evidence of donative intent. 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.<sup>11</sup>

The Dead Man's Act does not merely limit surviving parties with interests adverse to the decedent ("adverse parties") from testifying to inter vivos transfers, but extends to "*any relevant matters occurring before the decedent's death*, even though they be independent matters of facts which in no way can be regarded as transactions with, or communications by, the decedent."<sup>12</sup> "The statutory exclusion pertains not only to testimony of an actual transaction or agreement giving rise to a claim against the decedent, but also to any matter occurring before death which has any bearing on the claim being made."<sup>13</sup>

However, there are certain exceptions and limitations to the application of the Dead Man's Act. Adverse parties called upon to testify against their own interests will

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deceased or lunatic party, shall be a competent witness to any matter occurring before the death of said party or the adjudication of his lunacy, unless the action or proceeding is by or against the surviving or remaining partners, joint promisors or joint promises, of such deceased or lunatic party, and the matter occurred between such surviving or remaining partners, joint promisors or joint promises and the other party on the record, or between such surviving or remaining partners, promisors or promises and the person having an interest adverse to them, in which case any person may testify to such matters; or, unless the action is a possessory action against several defendants, and one or more of said defendants disclaims of record any title to the premises in controversy at the time the suit was brought and also pays into court the costs accrued at the time of his disclaimer, or gives security therefor as the court in its discretion may direct, in which case such disclaiming defendant shall be a fully competent witness; or, unless the issue or inquiry be *devisavit vel non*, or be any other issue or inquiry respecting the property of a deceased owner, and the controversy is between parties respectively claiming such property by devolution on the death of such owner, in which case all persons shall be fully competent witnesses.").

<sup>10</sup> *Stathas v. Wade Estate*, 380 A.2d 482, 483 (Pa. Super. 1977) (internal citation omitted).

<sup>11</sup> *Hera v. McCormick*, 625 A.2d 682, 688 (Pa. Super. 1993) (internal citations omitted).

<sup>12</sup> *Hera*, 625 A.2d at 688-89 (quoting *Estate of Cecchine*, 485 A.2d 454, 458 (1984)).

thereafter become fully competent witnesses for either party.<sup>14</sup> Waiver may also occur when a representative of the estate elects to take an adverse party's deposition, request responses to written interrogatories, or cross-examine the adverse party as to matters that occurred during the decedent's lifetime.<sup>15</sup> Failure of the representative of an estate to object to the testimony of an adverse party will result in that testimony becoming admissible.<sup>16</sup>

Additionally, testimony provided by an adverse party relating to events that occurred *following* the lifetime of the decedent is not within the purview of the Dead Man's Act,<sup>17</sup> and therefore failure to object to such testimony does not constitute waiver. Further, an adverse party may testify as to matters that occurred between him or herself and a competent witness, or which occurred in the presence of a competent witness, should that competent witness testify at trial.<sup>18</sup> Finally, "the Dead Man's Statute applies only to testimony. Written evidence offered by an adverse surviving party is not rendered incompetent by the Dead Man's Rule."<sup>19</sup> Testimony offered solely to authenticate documentary evidence does not implicate the Dead Man's Act.<sup>20</sup>

At at the November 20<sup>th</sup> Hearing, the Court permitted Mr. Sottile to question Joel Lipperini regarding certain photographs, entered into evidence as exhibits 2-5, which Mr. Sottile proffered would demonstrate that Mr. Barry had possession of the complete CSX7062 as of 2015-2016. Mr. Kenyon and his associate Andrew Cordes entered an ongoing objection to this testimony, asserting that while Mr. Lipperini could authenticate

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<sup>13</sup> *Cecchine*, 485 A.2d at 458.

<sup>14</sup> 42 Pa.C.S.A. § 5932.

<sup>15</sup> *Olsen v. North American Indus. Supply Inc.*, 658 A.2d 358, 364-65 (Pa. Super. 1995).

<sup>16</sup> See e.g., *Elk Mountain Ski Resort, Inc. v. Workers' Comp. Appeal Bd.*, 114 A.3d 27, 35 (Pa. Commw. 2015) (finding that employer's failure to object to the claimant's testimony before the Worker's Compensation Judge providing evidence establishing a common law marriage between herself and decedent entitling her to survivor benefits constituted a waiver of the Dead Man's Act).

<sup>17</sup> See e.g., *Power v. Grogan*, 81 A. 416 (Pa. 1911) (finding that testimony relating to possession of real estate owned by decedent prior to his death was not barred by the Dead Man's Act as the testimony involved matters that occurred subsequent to decedent's death between decedent's widow and the defendant).

<sup>18</sup> 42 Pa.C.S.A. § 5933.

<sup>19</sup> *In re Rider's Estate*, 487 Pa. 373, 379 (Pa. 1979).

<sup>20</sup> *Keystone Printed Specialties Co., Inc. v. Fischer*, 430 A.2d 650, 652 (Pa. Super. 1981) (holding that adverse party could authenticate the official minutes of shareholders' meetings held during decedent's lifetime).

the photographs based on any elements apparent from the photographs themselves, he would be precluded under the Dead Man's Act from elaborating further.<sup>21</sup>

The Court affirms that while Mr. Lipperini could properly authenticate exhibits 2-5, testimony extending beyond the scope of authentication would violate the Dead Man's Act. Even though Mr. Lipperini does not have any asserted direct interest in the CSX vehicles, Mr. Smith's outstanding claim against the Estate in connection with those vehicles clearly has bearing on the Estate's own allegation that Decedent unlawfully transferred property to Mr. Lipperini in order to defraud his creditors in violation of the Pennsylvania Uniform Voidable Transactions Act. The Court therefore SUSTAINS Mr. Kenyon and Mr. Cordes' objection and holds that any of Mr. Lipperini's testimony that extended beyond mere authentication would be precluded under the Dead Man's Act.

### C. Authentication of Exhibits 2-5

Bryan Shook, counsel for Barry Smith, objected and moved to strike exhibits 2-5 on the basis that the photographs were not properly authenticated, as Joel Lipperini testified that he neither took the photographs nor was present at the time they were taken.<sup>22</sup> Pursuant to the *Pennsylvania Rules of Evidence* Rule 901(a), "to satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is." "To authenticate photographs, motion pictures, and video recordings, Pennsylvania courts have always and without exception held that the photograph or recording must be authenticated through testimony from a witness with personal knowledge who can testify that it fairly and accurately represents that which it purports to depict."<sup>23</sup>

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<sup>21</sup> See Transcript 51-52. ("Mr. Cordes: . . . [T]he Dead Man's Rule is very clear the even if Mr. Lipperini would identify a document, identify a photograph, it stops there. He cannot testify and use that . . . as a launching pad to get into testimony of anything that is pre-death and basically end run the Dead Man's Act. It's very broad in that sense. The Dead Man's Rule is very broad by review of the case law that describes it.")

<sup>22</sup> See Transcript 60-62.

<sup>23</sup> *Com. v. McKellick*, 24 A.3d 982, 995 (Pa. Super. 2011) (internal quotations omitted).

The courts do not require photographs be authenticated by the individual who shot the image.<sup>24</sup> Additionally, there is no per se requirement that an individual be present when the photograph was taken for authentication purposes.<sup>25</sup> However, an individual must establish sufficient familiarity with the object photographed before being qualified to identify the photograph as a fair and accurate reproduction.<sup>26</sup> The Court ruled at the November 20<sup>th</sup> Hearing that Mr. Lipperini had established sufficient foundation as to his familiarity with specialty cars to authenticate the photographed vehicles in exhibits 2-5 as Shelby Coupes. The Court limited this ruling by barring Mr. Lipperini from testifying beyond the scope of what was plainly obvious from the pictures themselves, precluding testimony as to when the pictures were taken, where they were taken, and as to whether the exhibits specifically featured a CSX7062 model Shelby Coupe when not evident within the photograph itself.<sup>27</sup> The Court finds that exhibits 2-5 were properly authenticated and could be admitted as exhibits. However, to the extent that the Court has already ruled that Mr. Lipperini's testimony was inadmissible as irrelevant, the same holds true for these exhibits. Therefore, the Court holds that exhibits 2-5 shall be STRICKEN FROM THE RECORD.

#### D. Affidavits of Maggie Lipperini and Cheryl Romanell

At the November 20<sup>th</sup> Hearing, Mr. Sottile attempted to introduce two affidavits supportive of Joel Lipperini's proposed testimony that Decedent gifted him assets through inter vivos transfer.<sup>28</sup> This included the affidavits of Maggie Lipperini, Joel Lipperini's wife, and of Cheryl Romanell, Decedent's girlfriend.<sup>29</sup> The Court ruled that pursuant to its August 14<sup>th</sup> Decree, such affidavits were not admissible as evidence as

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<sup>24</sup> *Pierce v. Unemployment Compensation Bd. of Review*, 641 A.2d 727, 729 (Pa. Commw. 1994) ("For authentication, proof of every step in making a photographic representation is not required. For example, even the photographer need not be called if another witness can authenticate the content.").

<sup>25</sup> See e.g., *Semet v. Andorra Nurseries, Inc.*, 219 A.2d 357 (Pa. 1966).

<sup>26</sup> See *id.* (holding that plaintiff could not authenticate a picture of a ladder because he only saw the ladder once, in dim conditions, three years prior to trial, and because the ladder was of a common make); *but see Com. v. Reid*, 811 A.2d 530 (Pa. 2002) (holding that a witness could authenticate a picture of a gun *resembling* a gun that she had sold to defendant).

<sup>27</sup> See Transcript 72-76.

<sup>28</sup> As a point of clarification, these affidavits were relevant to the extent that they supported Mr. Lipperini's claim that Decedent made an inter vivos transfer of property to him, providing him legal ownership. As this same property was listed in the Estate's Petition to Recover Assets, Mr. Lipperini asserted that he had a direct interest providing him standing to object to Mr. Smith's Petition to Intervene.



neither Maggie Lipperini nor Cheryl Romanell had been called as witnesses at the August 9<sup>th</sup> Hearing. The Court emphasizes that prohibited testimony does not become admissible merely because it is provided in the form of an affidavit.<sup>30</sup> While the Court affirms that the affidavits of Ms. Lipperini and Ms. Romanell were properly excluded on that basis, it will address counsels' other objections as to the affidavits' admissibility.

As Cheryl Romanell was concededly not present at the time of the inter vivos transfer and only learned of the transfer secondhand, her testimony would be disqualified as hearsay.<sup>31</sup> At the November 20<sup>th</sup> Hearing, Mr. Sottile proposed that Cheryl Romanell's affidavit would be admissible under the *Pennsylvania Rule of Evidence* (Pa.R.E.) Rule 803(15), which provides an exception to the general hearsay rule for:

A statement contained in a document, other than a will, that purports to establish or affect an interest in property if the matter stated was relevant to the document's purpose--unless later dealings with the property are inconsistent with the truth of the statement or the purport of the document.

This exception applies regardless of whether the Declarant is available as a witness. Pa.R.E. 803(15) is nearly identical to the *Federal Rules of Evidence* (F.R.E.) Rule 803(15), with the exception that the Pennsylvania rule also excludes statements in a will.<sup>32</sup> While F.R.E. 803(15), and by extension Pa.R.E. 803(15), are not limited *per se* to dispositive documents--i.e. documents that transfer an interest in property such as a deed, conveyance, or will--they apply only to documents that *establish* or *affect* an interest in property.<sup>33</sup> Ms. Romanell's proffered affidavit does not *establish* an interest in property: Decedent's alleged inter vivos transfer to Mr. Lipperini established the interest. Nor does the proffered affidavit *affect* any interest: Mr. Lipperini's interest in the

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<sup>29</sup> Transcript 5-6.

<sup>30</sup> *Cf. Krolczyk v. Goddard Systems, Inc.*, 164 A.3d 521, 529 (Pa. Super. 2017) ("The admonition that trial by testimonial affidavit is prohibited cannot be emphasized too strongly.") (internal citations omitted).

<sup>31</sup> *Com. v. Manivannan*, 186 A.3d 472, 480 (Pa. Super. 2018) ("Hearsay is an out of court statement offered to prove the truth of the matter asserted.").

<sup>32</sup> See Pa.R.C.P. 803(15), Comment.

<sup>33</sup> *U.S. v. Weinstock*, 862 F. Supp. 1529, 1533 (D. Utah 1994) ("Several cases construing either Rule 803(15), F.R.E. or a state counterpart have not required that the statement be in a dispositive document.").

property would remain identical absent the affidavit.<sup>34</sup> Further, and most obviously, Ms. Romanell's testimony being deemed hearsay does not become admissible simply because she reduces her testimony to a writing. The Court therefore finds that Ms. Romanell's proffered affidavit would not be admissible under Pa.R.E. 803(15).

Mr. Kenyon additionally objected that the Dead Man's Act would bar the testimony of Maggie Lipperini because, as the wife of Joel Lipperini, she would constitute an interested party adverse to the Estate. The Pennsylvania Supreme Court first addressed the issue of whether the Dead Man's Act bars the testimony of the spouse of a surviving party in *Bitner v. Boone*. The Supreme Court held in *Bitner* that the interests of spouses are so closely connected that the testimony of one spouse could be fairly construed as the testimony of the other.<sup>35</sup> On that basis, the Court held that spouses of surviving parties were barred from testifying under the Dead Man's Act.

However, the Pennsylvania Supreme Court expressly overruled *Bitner* almost a century later in *Estate of Grossman*, holding that "[m]odern conditions demand that courts no longer engage in the automatic and unsupported assumption that one's pecuniary or proprietary interest is identical to that of one's spouse."<sup>36</sup> Following *Grossman*, there is no longer a "per se rule disqualifying the testimony of the spouse of a surviving interested party to a transaction with a decedent."<sup>37</sup> Therefore, Maggie Lipperini would not be barred from testifying on the basis of her marital status alone. The burden falls upon the Estate to establish an adverse interest that would bar her testimony.<sup>38</sup>

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<sup>34</sup> *Id.* at 1534 ("The usual meaning of the word 'affect' or 'affecting,' as referred to an object, is to act upon, operate upon, or concern such object[. . .]. See also *Black's Law Dictionary*, Sixth Ed. p. 57 :affect: 'To set upon, influence, change; enlarge or abridge[.]'").

<sup>35</sup> See *Bitner v. Boone*, 18 A. 404, 405 (Pa. 1889) ("So closely connected in interest are [husband and wife], that in equity, in controversies affecting the interests of either, the testimony of both is considered as the testimony of one person only[.]").

<sup>36</sup> *Estate of Grossman*, 406 A.2d 726, 732 (Pa. 1979) (holding that Dead Man's Act did not prohibit the testimony of decedent's daughter's husband regarding alleged oral contract daughter had with decedent to leave her one-half of his estate).

<sup>37</sup> *Id.* at 733.

#### E. Wade and Stephanie Benson's Objection to Barry Smith's Intervention

At argument and hearing, Mr. Zeigler, on behalf of his clients Wade Benson and Stephanie Benson, raised an objection to Mr. Smith's intervention in the forgoing litigation.<sup>39</sup> Mr. Zeigler asserted that while Mr. Smith can validly file a claim against the estate, he lacks standing to intervene in the instant litigation relating to the administration of the Estate.<sup>40</sup> In responding to Mr. Zeigler, Mr. Kenyon, attorney for the Estate, clarified that the Estate does not object to Mr. Smith's intervention.<sup>41</sup>

Before reaching the merits of the objection, the Court addresses whether Wade Benson and Stephanie Benson have standing to object. "Standing requires a party to have a substantial interest in the subject matter of the litigation; the interest must be direct; and the interest must be immediate and not a remote consequence."<sup>42</sup> The Pennsylvania courts have previously held that only the representative of an estate, not the beneficiaries, have standing to assert the rights of the estate.<sup>43</sup>

The foregoing litigation is distinguishable however, as Wade Benson and Stephanie Benson do not object on behalf of the Estate, but on their own behalf as the allegedly lawful owners of property granted to them by Decedent prior to his death. The Estates' Petition to Recover Assets is akin to a civil action for replevin with Respondents situated as defendants. However, as this action also involves the administration of the Estate, it remains within the Orphan Court under the Orphan Court's rules regarding

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<sup>38</sup> See *Estate of Rider*, 409 A.2d 397, 399 (Pa. 1979) ("The party challenging the competency of a witness has the burden of proving incompetency.").

<sup>39</sup> The Court finds that Wade Benson and Stephanie Benson properly preserved their objection by orally raising it at hearing and argument on the Petition to Intervene. See *In re Tax Claim Bureau of Luzerne County*, 104 A.2d 176, 178-79 (Pa. Super. 1954) ("[T]he preliminary objections filed to the petition for leave to intervene were not proper under the Rules of Civil Procedure. No provision is made for pleading to the petition or for making objections to it. All objections can be raised orally at the time of the hearing held on the petition[.]").

<sup>40</sup> Transcript 21.

<sup>41</sup> Transcript 21 ("**Mr. Kenyon:** And so to say that [Mr. Smith] can't [intervene in the current action] – he can only intervene in the estate administration, I think is what Mr. Ziegler is saying, versus a litigation matter that is on the docket number, I think is contrary to the current law in Pennsylvania[.]").

<sup>42</sup> *Rock v. Pyle*, 720 A.2d 137, 1142 (Pa. Super. 1998) (citing *Ken R. on Behalf of C.R. v. Arthur Z.*, 682 A.2d 1267, 1270 (Pa. 1996)).

<sup>43</sup> See *In re Kilpatrick's Estate*, 84 A.2d 339 (Pa. 1951) (holding that administrator of the estate has the right to sue on the estate's behalf and that next of kin have not such interest); *Oudry-Davis v. Findley*, 64 Pa. Super. 92 (1916) (finding heirs lack standing to recover estate assets in the name of decedent, generally, only personal representative has right to bring suit to recover on behalf of the estate).

concurrent jurisdiction.<sup>44</sup> The Court finds that Wade Benson and Stephanie Benson have standing to object to Mr. Smith's Petition to intervene based on their substantial interest as constructive defendants in the proceedings involving the Estate's Petition to Recover Assets. Further, even absent objection, the Court has inherent authority to either grant or deny the Petition to Intervene following argument and hearing based on the Court's determination regarding whether the Petition comports with the Pennsylvania Rules of Civil Procedure.<sup>45</sup>

Pursuant to the *Pennsylvania Rules of Civil Procedure* (Pa.R.C.P.) Rule 2327(4):

At any time during the pendency of an action, a person not a party thereto shall be permitted to intervene therein, subject to these rules if . . . the determination of such action may affect any legally enforceable interest of such person whether or not such person may be bound by a judgment in the action.

Following hearing on a petition to intervene, the Court may either grant the petition or deny it if it finds, pursuant to Pa.R.C.P. 2329, that:

[T]he claim or defense of the petitioner is not in subordination to and in recognition of the property of the action; the interest of the petitioner is already adequately represented; or the petitioner has unduly delayed in making application for intervention or intervention will unduly delay, embarrass or prejudice the trial or adjudication of the rights of the parties.<sup>46</sup>

If the grounds for refusal under Pa.R.C.P. 2329 are not applicable, then intervention becomes mandatory should the intervener fall within the purview of Pa.R.C.P. 2327.<sup>47</sup>

The Court holds that Petitioner Barry Smith does not have a "legally enforceable interest" within the meaning of Pa.R.C.P. 2327(4). A party with only a general interest in the proceeding or with an interest collateral to the basic issues in the case are not

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<sup>44</sup> Transcript 21. Regarding the issue of jurisdiction, pursuant to 20 Pa.C.S.A. § 711(1), the orphan's court division possesses original jurisdiction over matters involving administration a decedent's estates. However, pursuant to 20 Pa.C.S.A. § 712(3), the orphans' court is divested of mandatory jurisdiction in "any case where there are substantial questions concerning matters enumerated in section 711 and also matters not enumerated in that section." In such instances, "[t]he jurisdiction of the court of common pleas . . . may be exercised through either its orphans' court division or other appropriate division[.]"

<sup>45</sup> See *Wilson v. State Farm Mut. Auto. Ins. Co.*, 517 A.2d 944, 947 (Pa. 1986) ("It is well established that a question of intervention is a matter within the sound discretion to the court below.") (internal quotations omitted). Note that hearing the a petition to intervene is mandatory under Pa.R.C.P. 2329 regardless of whether any party files an objection.

<sup>46</sup> *In re Philadelphia Health Care Trust*, 872 A.2d 258, 261 (Pa. Commw. 2005).

<sup>47</sup> *Id.* (quoting *Larock v. Sugarloaf Tp. Zoning Hearing Bd.*, 740 A.2d 308, 313 (Pa. Commw. 1999)).

entitled to intervene.<sup>48</sup> As a general rule, if the relevant interest is in property, the proposed intervener must own an interest or lien upon the property at issue or must have a cause of action which will be affected by the action.<sup>49</sup> An indirect economic motive or interest in the litigation to preserve one's position among competing creditors is insufficient to establish a legally enforceable interest.<sup>50</sup> While Mr. Smith has filed a claim against the Estate that if sustained would allow him to participate in the distribution, he does not have a lien against any of the property listed in the Estate's Petition to Recover Assets. As Mr. Smith's Petition to Intervene does not assert any direct interest in the property claimed in the Estate's Petition to Recover Assets, the Court finds that his interest in the foregoing litigation is purely an indirect economic interest and therefore that he does not have a legally enforceable interest within the meaning of Pa.R.C.P. 2327(4). Additionally, the Court finds that the Estate adequately represents Mr. Smith's interest in the foregoing litigation, obviating the need for intervention.<sup>51</sup> Therefore, the Court DENIES Mr. Smith's Petition to Intervene.

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<sup>48</sup> See e.g. *Penn. R. Co. v. Hughart*, 222 A.2d 736 (Pa. 1966) (holding that petitioner did not have standing to intervene in trespass action when petitioner's sole interest in the litigation was related to the collateral question of whether corporate counsel's representation of his corporate employer in the actions constituted an unauthorized practice of law).

<sup>49</sup> *Marion Power Shovel Co., Div. of Dresser Indus., Inc. v. Fort Pitt Steel Casting Co., Div. of Conval-Penn, Inc.*, 426 A.2d 696, 700 (Pa. Super. 1981) (quoting 8 Goodrich-Amram, Stand.Pa.Prac. § 2327:7 at 373) (holding that union did not have right to intervene in replevin action involving steel casings when union's interest in the casings was limited to calculating indirect incentives owed to laborers for their production output).

<sup>50</sup> *Bank of America v. McCauley*, 23 Pa. D. & C.2d 362, 364 (Alleghany Cty. Op. 1961) ("To properly fall within the class of persons contemplated in rule 2327(4), petitioner's claim must rise above economic motive or interest which she has in preserving her position among competing creditors. If the claim of petitioner does not encompass a right of liability recognized and enforceable at law or in equity as distinguished from an economic motive or interest in seeing one litigant or another prevail in the proceedings, petitioner does not fall within the contemplation of rule 2327(4)[.]") (citing note of Procedural Rules Committee on Pa. R. C. P. 2327(4); *Hassinger v. Hassinger*, 20 Pa. C. C. 485 (Snyder Cty. 1898)); see also *Goldwater v. Lederer*, 34 Pa. D. & C. 179, 182 (Phila. Cty. 1939) ("The interest which an applicant for intervention must possess is generally required to be an enforceable or legally recognized interest as distinct from an economic desire or interest in seeing one litigant or another prevail in the proceedings.") (citing *Andrews v. New Bethlehem Window Glass Co.*, 112 A. 90 (Pa. 1920); *Farmers' Mut. Ins. Co. v. New Holland Turnpike Co.*, 15 A. 563 (Pa. 1888)).

<sup>51</sup> *Keener v. Zoning Hearing Bd. of Millcreek Tp.*, 714 A.2d 1120, 1123 (Pa. Commw. 1998). ("Even if there is a legally enforceable interest under Rule 2327(4), a mere prima facie basis for intervention is not

**Conclusion**

The Court SUSTAINS Mr. Shook's Objection to Joel Lipperini's testimony on the basis of relevance. Mr. Lipperini's testimony as the November 20<sup>th</sup> Hearing will STRICKEN FROM THE RECORD, as will exhibits 2-5, which were admitted on the basis of that testimony. The Court DENIES Mr. Smith's Petition to Intervene. The Court will hereafter provide a date for a scheduling conference on the Petition to Recover Assets by separate order.

IT IS SO DECREED this 22<sup>nd</sup> day of January 2020.

BY THE COURT,

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Eric R. Linhardt, Judge

ERL/cp

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enough and intervention may be denied if the interest of the petitioner is already adequately represented.”).