

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

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

: NO. 41-18-0354
:
:
: ORPHANS' COURT
: DIVISION
:
:
: *Motions for Summary Judgment*
: / *Motions in Limine*

DECREE

AND NOW, on April 6, 2021, the Court held argument on three Motions for Summary Judgment separately filed by: Petitioner, Denise M. Cordes, Executrix of the Estate of Leland W. Benson, Jr.; Respondents Joel and Maggie Lipperini; and Respondent Daniel Lipperini, Jr. Thereafter, on May 6, 2021, the Court held argument on two Motions *in Limine* filed by the Petitioner. The Court will address the parties' three Motions for Summary Judgment and Petitioner's two Motions *in Limine* in the following DECREE.

Background

During his lifetime, Leland W. Benson, Jr. ("Leland Benson") built specialty vehicles as his vocation, operating a business, All Pro Cars, LLC ("All Pro"), from a leased property at 190 Angletown Road, Muncy, Pennsylvania 17756 ("business location").¹ Stored at this business location were several completed vehicles, bodies, frames and parts, molds, tools, and other items related to the manufacturing of specialty vehicles.² Leland Benson also stored vehicles, bodies, frames and parts—including GT-40 frames and parts—chassis, and tools at his personal residence, located at 82 Reservoir Road, Muncy Creek Township, Pennsylvania 17756 ("residence").³

¹ Petition for Show Cause Why Assets Should Not Be Returned to the Estate and for Accounting and Unjust Enrichment ("Petition to Recover Assets") ¶¶ 10-11 (March 1, 2019).

² Petition to Recover Assets ¶¶ 11-13. Prior to 2000, Decedent's business was registered as All Pro Car, Inc. Related trade names include Replica Car Company, All Pro Motorsports, and All Pro Cars.

³ Petition to Recover Assets ¶ 17.

In or about November of 2017, Leland Benson was diagnosed with lung cancer, which progressed and metastasized until the end of his life.⁴ Leland Benson suffered serious financial problems during this time and was likely insolvent.⁵ In late May of 2018, Leland Benson's daughter, Denise M. Cordes ("Denise Cordes") and his son, Leland Wade Benson, III ("Wade Benson"), discussed Estate administration following their father's anticipated passing. Denise Cordes advised Wade Benson that their father's assets would need to be liquidated to pay creditors of the Estate.⁶ At that time, and in several other conversations occurring in May and June of 2018, Wade Benson expressed particular interest in possessing a burgundy and gold Shelby 427 Cobra, and further expressed his intent to establish his own vehicle business following his father's death.⁷ Wade Benson then was an employee of All Pro, but had no ownership interest.⁸

On June 1, 2018, Leland Benson held a meeting at his residence, whereat Denise Cordes, Wade Benson, and Leland Benson's companion, Cheryl Romanell, were present.⁹ At that meeting, Leland Benson asked Denise Cordes whether there was a way he could transfer his assets to Wade Benson, in consideration of Wade Benson's recent statements that he wished to continue his father's business.¹⁰ Denise Cordes advised her father that based on his creditor situation, a transfer of assets would be "improper, unlawful and voidable under Pennsylvania law."¹¹ At that meeting, Leland Benson referenced three Shelby vehicles that he owned, which were located at the All Pros business location.¹² Leland Benson had the title to one of the Shelbys, and Manufacturer's Statements of Origin ("MSOs") for the two other Shelbys.¹³ On June 8, 2018, Denise Cordes met with Wade Benson and his wife, Stephanie Benson, at their

⁴ Petition to Recover Assets ¶ 19.

⁵ Petition to Recover Assets ¶ 20.

⁶ Petition to Recover Assets ¶¶ 21-22.

⁷ Petition to Recover Assets ¶¶ 23-24.

⁸ Petition to Recover Assets ¶ 18.

⁹ Petition to Recover Assets ¶ 28.

¹⁰ Petition to Recover Assets ¶ 29.

¹¹ Petition to Recover Assets ¶ 30.

¹² Petition to Recover Assets ¶¶ 32, 78.

¹³ Petition to Recover Assets ¶ 32. Exhibits B to the Petition to Recover Assets includes the Certificate of Title to the burgundy and gold Shelby 427 Cobra, along with photographs of that vehicle. Exhibit C provides the Manufacturer's Statement of Origin for the blue and white Shelby 289 FIA Cobra. Exhibit D includes photographs of the blue and white Shelby Daytona Coupe.

home, whereat Denise Cordes reiterated that an *inter vivos* transfer of Leland Benson's assets would be unlawful as defrauding creditors.¹⁴

On June 9, 2018, Bryan Shook, Esquire, attorney for Barry Smith, a creditor of Leland Benson, visited the All Pros business location and photographed several vehicle bodies at the site.¹⁵ On the same date, Denise Cordes and Wade Benson met at their father's residence to gather scrap metal to recycle and sell on his behalf.¹⁶ Finally, on that date, Joel Lipperini and his wife, Maggie Lipperini, visited Leland Benson and Cheryl Romanell at Leland Benson's residence.¹⁷

Leland Benson (hereinafter "Decedent") died testate on June 19, 2018. Denise Cordes (hereinafter "Petitioner"), filed a *Petition for Probate and Grant of Letters Testamentary* on June 28, 2018. The Register and Recorder's Office issued a Grant of Letters on the same date. By the terms of Decedent's Will, Petitioner was appointed Executrix of the Estate.¹⁸

Petitioner avers that the following vehicles were located at Decedent's business address at the time of his death: a burgundy and gold Shelby 427 Cobra (VIN# CSX 4017); a blue and white Shelby 289 FIA Cobra (VIN# CSX 7007); a blue and white Shelby Daytona Coupe (VIN# CSX 7061) (collectively "Shelbys"); a shell of an orange Grand Sport Corvette;¹⁹ and a 1962 Austin-Healey MKII.²⁰ On June 28, 2018, Petitioner visited Decedent's residence and the All Pros business location to secure his assets. She then discovered that the three Shelbys, the Grand Sport Corvette frame, a GT-40 frame, and additional car bodies, frames, and other parts, were missing.²¹ Petitioner also learned that two tractor-trailers, along with business contents and assets, were missing from the All Pros business location.²²

¹⁴ Petition to Recover Assets ¶ 35.

¹⁵ Petition to Recover Assets ¶ 37. These photographs are attached as Ex. F to the Petition to Recover Assets.

¹⁶ Petition to Recover Assets ¶ 38.

¹⁷ Petition to Recover Assets ¶ 40.

¹⁸ The Certificate of Grant of Letters is attached as Exhibit A to the Petition to Recover Assets.

¹⁹ While the Petition identifies this as a completed vehicle, this Court's Decree of July 11, 2019, entered by the stipulation of the parties, deems the Grand Sport Corvette a shell, not a complete vehicle. A photograph of the Grand Sport Corvette shell is attached as Exhibit E to the Petition to Recover Assets

²⁰ Petition to Recover Assets ¶¶ 15-16.

²¹ Petition to Recover Assets ¶ 58.

²² Petition to Recover Assets ¶ 59.

Petitioner contacted Wade and Stephanie Benson via text message to inform them of her appointment as Executrix of the Estate and to direct them to return any items they had removed from Decedent's residence or business location.²³ Subsequently, on June 30, 2018, Wade Benson arranged for the return of the two tractor-trailers and their contents.²⁴ However, Petitioner has been unable to confirm that Wade and Stephanie Benson have returned all outstanding items belonging to the Estate.²⁵

On June 30, 2018, Petitioner contacted police seeking the return of missing assets.²⁶ With the investigation still open, on August 25 and 26, 2018, there was an auction of the property remaining at Decedent's residence and business property.²⁷ In October of 2018, Petitioner learned through the police investigation report that several of Decedent's vehicles, shells, molds, and parts were in the possession of Joel Lipperini and Daniel Lipperini, Jr.²⁸ Petitioner believes that Wade Benson and Stephanie Benson also retain parts removed from Decedent's basement, along with business assets and tools.²⁹ Petitioner alleges that Joel and Daniel Lipperini, Jr. are working in concert with Wade and Stephanie Benson to divest the Estate of assets.³⁰

Procedural History

On March 1, 2019, Petitioner, as Executrix of Decedent's Estate, 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" or "Petition"). Count I of the Petition to Recover Assets alleges that Respondents Wade and Stephanie Benson, Joel and Maggie Lipperini, and Daniel Lipperini, Jr. (collectively "Respondents") wrongfully and unlawfully took and retained possession of assets

²³ Petition to Recover Assets ¶ 60.

²⁴ Petition to Recover Assets ¶¶ 61-62. Photographs of the returned trailers with the initials WB scrawled upon them are attached as Exhibit G to the Petition to Recover Assets.

²⁵ Petition to Recover Assets ¶ 63.

²⁶ Petition to Recover Assets ¶ 67.

²⁷ Petition to Recover Assets ¶¶ 68-69.

²⁸ See Petition to Recover Assets ¶¶ 78-80. The investigating officer, Trooper John Maggs, referred this matter to Lycoming County District Attorney Kenneth Osokow, who declined to prosecute on the basis that the case was civil in nature. See pg. 20 of the the Pennsylvania State Police Report attached as Exhibit G to Petitioner's Motion for Summary Judgment.

²⁹ Petition to Recover Assets ¶ 82.

³⁰ Petition to Recover Assets ¶ 81.

belonging to the Estate, including: vehicles, vehicle frames and bodies, vehicle parts, molds, tools, and other tangible property.³¹ Specifically, the Petition avers that Joel and Maggie Lipperini now possess the three Shelys, a Bugatti body, and various additional body parts, molds and other items, which had been previously located at the All Pros business location.³² The Petition alleges that Daniel Lipperini, Jr. possesses the orange Grand Sport Corvette shell, a Cobra frame taken from the All Pros business location, as well as a GT-40 frame taken from the basement of Decedent's residence.³³ The Petition alleges that Wade and Stephanie Benson still possess GT-40 parts and other parts removed from the basement of Decedent's residence, along with Decedent's business assets and tools.³⁴

Count II alternately alleges that Decedent made *inter vivos* transfers of his vehicles and other assets to Respondents in order to render his Estate insolvent and defraud his creditors, in violation of the Pennsylvania Uniform Voidable Transactions Act, 12 Pa.C.S. §§ 5101, *et seq.* ("UVTA" or "Act").³⁵ Count III demands that Respondents provide an account of assets wrongfully taken from the Estate, or acquired from Decedent prior to his death in violation of the UVTA.³⁶ Count IV charges unjust enrichment against all Respondents based on the prior alleged facts.³⁷ Petitioner's request for relief included a demand for accounting of all assets acquired from Decedent on or after November 1, 2017, the return of Decedent's assets to the Estate, monetary damages for any assets sold, and an award of fees and costs.

By Preliminary Decree dated March 11, 2019, the Court issued a citation upon the named Respondents to show cause why the relief sought within the Petition to Recover Assets should not be granted, citation returnable by April 24, 2019. Respondent Daniel Lipperini, Jr. filed an Answer to the citation on April 4, 2019. Respondents Wade and Stephanie Benson filed an Answer on April 15, 2019. Respondents Joel and Maggie Lipperini filed an Answer and New Matter on April 15, 2019. The Court thereafter entered a Decree on July 11, 2019, documenting that

³¹ Petition to Recover Assets ¶¶ 107-109.

³² Petition to Recover Assets ¶¶ 78-79.

³³ Petition to Recover Assets ¶ 80.

³⁴ Petition to Recover Assets ¶ 82.

³⁵ Petition to Recover Assets ¶ 111.

³⁶ Petition to Recover Assets ¶¶ 113-115.

Respondent Joel Lipperini had acknowledged possession of the three Shelbys and Respondent Daniel Lipperini, Jr. had acknowledged possession of the Grand Sport Corvette shell. The Court ordered that Respondents were not to sell or dissipate any Estate assets in their possession pending resolution of the Petition to Recover Assets.

Pursuant to the parties' Joint Stipulation, approved by the Court on November 10, 2020, the close of discovery was set for December 29, 2020, the dispositive motion filing deadline was set for January 18, 2021, and the motion *in limine* filing deadline was set for March 2, 2021. By subsequent Decree dated January 19, 2021, the dispositive motion filing deadline was extended to February 17, 2021. The Court's Decree of February 3, 2021, commensurately extended the motion *in limine* filing deadline to April 9, 2021.

On February 17, 2021, Petitioner filed a Motion for Summary Judgment. Petitioner's Motion for Summary Judgment consists of three separate motions, the first directed against Respondents Joel and Maggie Lipperini, the second against Respondent Daniel Lipperini, Jr. and the third against Respondents Wade and Stephanie Benson. Petitioner subsequently filed a supportive memorandum on March 8, 2021. Also on February 17, 2021, Respondent Daniel Lipperini, Jr. filed a Motion for Summary Judgment directed against Petitioner. He filed a supportive brief on March 5, 2021. On February 19, 2021, Respondents Joel and Maggie Lipperini filed a Motion for Summary Judgment directed against Petitioner, which included a supportive brief.

On March 10, 2021, Respondents Joel and Maggie Lipperini filed a Response to Petitioner's Motion for Summary Judgment. They then filed a brief in support of their Response on March 17, 2021. Petitioner filed a Response in Opposition to Respondents Joel and Maggie Lipperini's Motion for Summary Judgment on March 18, 2021. Petitioner filed a separate Response in Opposition to Daniel Lipperini, Jr.'s Motion for Summary Judgment on March 19, 2021. Petitioner filed two separate briefs in support of these Responses in Opposition on March 22, 2021. On April 5, 2021, Daniel Lipperini, Jr. filed, without leave of Court or opposing counsel, a Supplement to his Motion for Summary Judgment. On the same date, Petitioner filed a Response in Opposition to the Supplement based on its late filing. On April 6, 2021, Respondent

³⁷ Petition to Recover Assets ¶¶ 117-118.

Daniel Lipperini, Jr. filed a further Addendum to his Motion for Summary Judgment. The Court notes that Respondent Wade and Stephanie Benson have not filed a dispositive motion, nor have they filed a response to the Petitioner's Motion for Summary Judgment, although so directed by the Court. The Court held argument on the three Motions for Summary Judgment on April 6, 2021.

On April 9, 2021, Petitioner filed a *Motion in Limine to Preclude Respondents from Offering Any Testimony or Argument at Trial Relative to their Pre-Death Conversations with Decedent Leland W. Benson* ("Petitioner's First Motion *in Limine*"). On the same date, Petitioner filed a *Motion in Limine to Exclude Daniel Lipperini, Sr., Robert "Buzz" Clark, and Donnie Wells from Offering Any Testimony at Trial* (Petitioner's Second Motion *in Limine*"). Respondents Joel and Maggie Lipperini filed separate Responses to the two Motions *in Limine* on April 23, 2021. Respondent Daniel Lipperini, Jr. filed a Response to the Petitioner's First Motion *in Limine* on April 29, 2021. The Court held argument on the two Motions *in Limine* on May 6, 2021.

Thereafter, on May 13, 2021, counsel for Respondents Joel and Maggie Lipperini emailed the Judge's law clerk, having also copied opposing counsel, a Letter Brief supplementing the argument that had taken place on May 6, 2021. The Court issued a Decree on May 18, 2021, providing that counsel should thereafter not submit supplemental materials without leave of Court or consent of opposing counsel, but indicating that it would consider the Letter Brief in this instance, and granting opposing counsel the opportunity, if they so wished, to file their own supplemental briefs. Petitioner thereafter filed a Response to the Letter Brief on May 28, 2021.

Due to a significant overlap of issues, the Court will address several of the Motions jointly. The Court will first jointly consider Petitioner's Motion for Summary Judgment directed against Respondents Joel and Maggie Lipperini, Joel and Maggie Lipperini's Motion for Summary Judgment against Petitioner, and Petitioner's two Motions *in Limine*. The Court will next jointly consider Petitioner's Motion for Summary Judgment directed against Respondent Daniel Lipperini, Jr. and Respondent Daniel Lipperini, Jr.'s Motion for Summary Judgment against Petitioner. The Court will finally consider Petitioner's Motion for Summary Judgment directed against Respondents Wade and Stephanie Benson.

Standard of Review

A. Motion for Summary Judgment

A court may enter summary judgment after the close of the relevant pleadings if the court determines that there is no dispute as to material fact or if the record contains insufficient evidence of facts to make out a *prima facie* cause of action or defense.³⁸ “In considering the merits of a motion for summary judgment, a court views the record in the light most favorable to the non-moving party, and all doubts as to the existence of a genuine issue of material fact must be resolved against the moving party.”³⁹ The Court will only grant summary judgment “where the right to such judgment is clear and free from all doubt.”⁴⁰ However, “[w]here a motion for summary judgment is based upon insufficient evidence of facts, the adverse party must come forward with evidence essential to preserve the cause of action.”⁴¹ “If the non-moving party fails to come forward with sufficient evidence to establish or contest a material issue to the case, the moving party is entitled to judgment as a matter of law.”⁴²

B. Motion in Limine

“A motion *in limine* is a pretrial mechanism to obtain a ruling on the admissibility of evidence, and it gives the trial judge the opportunity to weigh potentially prejudicial and harmful evidence before the trial occurs, preventing the evidence from ever reaching the jury.”⁴³ Generally, evidence will be admissible if it is competent and relevant. “Evidence is competent if it is material to the issue to be determined at trial. Evidence is relevant if it tends to prove or disprove a material fact.”⁴⁴ However, a court may exclude evidence that is irrelevant, confusing, misleading, cumulative, or prejudicial.⁴⁵ Even relevant evidence, “may be excluded if its probative value is

³⁸ *Petrina v. Allied Glove Corp.*, 46 A.3d 795, 798 (Pa. Super. 2012).

³⁹ *Jones v. SEPTA*, 772 A.2d 435, 438 (Pa. 2001).

⁴⁰ *Summers v. Certainteed Corp.*, 997 A.2d 1152, 1159 (Pa. 2010) (quoting *Toy v. Metro. Life Ins. Co.*, 928 A.2d 186, 195 (Pa. 2007)).

⁴¹ *McCarthy v. Dan Lepore & Sons Co.*, 724 A.2d 938, 940 (Pa. Super. 1998) (citing Pa.R.C.P. 1035.2).

⁴² *Id.* (citing *Ertel v. Patriot–News Co.*, 674 A.2d 1038 (Pa. 1996), cert. denied, 519 U.S. 1008 (1996)).

⁴³ *Seels v. Tenet Health Sys. Hahnemann, LLC*, 167 A.3d 190, 206 (Pa. Super. 2017) (citing *Parr v. Ford Motor Co.*, 109 A.3d 682, 690 (Pa. Super. 2014)).

⁴⁴ *Conroy v. Rosenwald*, 940 A.2d 209, 417 (Pa. Super. 2007) (quoting *Am. Future Sys., Inc. v. BBB*, 872 A.2d 1202, 1212 (Pa. Super. 2005), aff’d, 923 A.2d 389 (Pa. 2007)).

⁴⁵ *Pagesh v. Uzman*, 589 A.2d 747, 751 (Pa. Super. 1991) (citations omitted).

outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury[.]”⁴⁶

Dead Man’s Act

A discussion of Pennsylvania’s Dead Man’s Act is first necessary before addressing Petitioner’s Motion for Summary Judgment against Respondents Joel and Maggie Lipperini, Respondents Joel and Maggie Lipperini’s Motion for Summary Judgment against Petitioner, and Petitioner’s two Motions *in Limine*. The Dead Man’s Act is an exception to the general rule that, “no interest or policy of law. . .shall make any person incompetent as a witness.”⁴⁷ Under the relevant provision of the Dead Man’s Act:

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. . .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 deceased. . .party, shall be a competent witness to any matter occurring before the death of said party. . . .⁴⁸

A witness will be incompetent under the Dead Man’s Act if three conditions are met: “(1) the deceased must have had an actual right or interest in the matter at issue; (2) the interest of the witness, not simply the testimony, must be adverse to that of the decedent; and (3) a right of the deceased must have passed to a party of record who represents the deceased’s interest.”⁴⁹ While most claims against a decedent’s estate involve a dispute over assets, the Dead Man’s Act will also apply to a claimant making a claim against a decedent’s estate for compensation for pre-death services.⁵⁰

The purpose of the Dead 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

⁴⁶ Pa.R.E. 403.

⁴⁷ *Davis v. Wright*, 156 A.3d 1261, 1267 (Pa. Super. 2017) (quoting 42 Pa.C.S. § 5921).

⁴⁸ 42 Pa.C.S. § 5930.

⁴⁹ *Olson v. N. Am. Indus. Supply, Inc.*, 658 A.2d 358, 364 (Pa. Super. 1995) (citing *Com. v. DiCio*, 275 A.2d 868, 870 (Pa. Super. 1971)).

⁵⁰ See *Monte Est.*, 2 Fiduc. Rep. 3d 33 (O.C. Alleg. Cty. 2003) (holding Dead Man’s Act rendered claimant incompetent to testify in support of claim for compensation for purported pre-death services performed for the benefit of the decedent).

thereon favorable to himself and adverse to the decedent, which the latter's representative would be in no position to refute.”⁵¹ Subject to the Dead Man’s Act, in cases involving claims against a decedent’s estate, “[t]he 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.”⁵² In other words, the Dead Man’s Act does not merely limit surviving parties with interests adverse to the decedent’s estate 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.”⁵³

However, a party incompetent to testify under the Dead Man’s Act may be rendered competent through independent corroborating *prima facie* evidence of an *inter vivos* gift.⁵⁴ “A valid inter vivos gift requires donative intent, delivery, and acceptance. [T]here must be evidence of an intention to make a [g]ift accompanied by [d]elivery, actual or constructive, of a nature sufficient not only to divest the donor of all dominion over the property, but to invest the donee with complete control.”⁵⁵ For example, “[p]ossession of car keys or title to the car usually is sufficient to prove constructive delivery of a car.”⁵⁶ Donative intent and delivery are separate factors: the Dead Man’s Act will not be satisfied by *prima facie* proof of donative intent absent independent evidence of delivery.⁵⁷ The gift claimant bears the burden of establishing a *prima facie* gift by clear and convincing evidence.⁵⁸

Additionally, the Dead’s Man Act may be subject to waiver. Adverse parties called upon to testify against their own interests will thereafter become fully competent witnesses for either party.⁵⁹ Waiver may also occur when a representative of the estate elects to take an adverse party’s deposition, requests responses to written

⁵¹ *Stathas v. Wade Estate*, 380 A.2d 482, 483 (Pa. Super. 1977) (internal citation omitted).

⁵² *Est. of Cecchine*, 485 A.2d 454, 458 (Pa. Super. 1984).

⁵³ *Hera v. McCormick*, 625 A.2d 682, 688-89 (Pa. Super. 1992) (quoting *Cecchine*, 485 A.2d at 458).

⁵⁴ *In re Est. of Petro*, 694 A.2d 627, 633 (Pa. Super. 1997).

⁵⁵ *In re Est. of Cerullo*, 247 A.3d 52, 55 (Pa. Super. 2021) (quotations and citations omitted).

⁵⁶ *Id.* (citing *Ream’s Est.*, 198 A.2d 556, 558 (Pa. 1964)).

⁵⁷ *Id.* at 56.

⁵⁸ *Petro*, 694 A.2d at 633.

⁵⁹ 42 Pa.C.S. § 5932.

interrogatories, or cross-examines the adverse party as to matters that occurred during the decedent's lifetime.⁶⁰ Failure of the representative of an estate to object to the proffered testimony of an adverse party will result in that testimony becoming admissible.⁶¹

However, 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,⁶² 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.⁶³ 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."⁶⁴ Testimony offered solely to authenticate documentary evidence does not implicate the Dead Man's Act.⁶⁵

Analysis – Respondents Joel and Maggie Lipperini

A. Petitioner's Motion for Summary Judgment as to Respondents Joel and Maggie Lipperini

Respondents Joel and Maggie Lipperini (for the purpose of this section, "Respondents Lipperini") contend that the Decedent gave the three Shelby vehicles to Joel Lipperini as an *inter vivos* gift shortly prior to his death. They further contend that this transfer would not be voidable under the UVTA because the transfer of assets was

⁶⁰ *Olson*, 658 A.2d at 364-65.

⁶¹ 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 the decedent entitling her to survivor benefits constituted a waiver of the Dead Man's Act).

⁶² 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).

⁶³ 42 Pa.C.S. § 5933.

⁶⁴ *In re Rider's Estate*, 487 Pa. 373, 379 (Pa. 1979).

⁶⁵ *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).

in consideration of Joel Lipperini's years of unpaid marketing, consulting, and professional racing services performed for the Decedent.⁶⁶

Petitioner in her Motion for Summary Judgment asserts that Respondents Lipperini's claims are unsupported by competent evidence and must consequently fail as a matter of law. Petitioner first argues that Joel Lipperini is incompetent to testify as to any matter occurring prior to the Decedents' death pursuant to the Dead Man's Act, as Joel Lipperini has a property claim adverse to the Estate's interest.⁶⁷ Petitioner further argues that Maggie Lipperini, Joel Lipperini's wife, "has worked in concert with [her husband] to obtain possession of the vehicles, molds, parts and assets of the Decedent[,]" and should therefore also be barred from testifying under the Dead Man's Act.⁶⁸ In support of this contention, Petitioner notes that Maggie Lipperini notarized Joel Lipperini's General Affidavit, attesting to the transfer of the vehicles, which was improper because a notary is prohibited from performing a notarial act with respect to a record in which the notary or her spouse has a direct pecuniary interest.⁶⁹ Petitioner also notes that it was Maggie Lipperini who communicated to Cheryl Romanell in the fall of 2019 the whereabouts of the Shelby vehicles, telling Cheryl Romanell that the vehicles had been given as gifts or repayment for services rendered by Joel Lipperini.⁷⁰ This was purportedly in an effort to influence Cheryl Romanell to testify on her and her husband's behalf.⁷¹

Petitioner also challenges the admissibility of certain Certifications offered by Respondents Lipperini to establish both Decedent's donative intent and to support Joel Lipperini's claim that the Shelbys were compensation for services rendered. These include the: (1) Certification of Daniel Lipperini, Sr.; (b) Certification of Wade Benson; (c) Certification of Daniel Lipperini, Jr.; (d) Certification of Robert "Buzz" Clark; and (e)

⁶⁶ See Answer and New Matter to Petition for Citation to Show Cause Why Assets Should not be Returned to the Estate and for Accounting and Unjust Enrichment ¶¶ 121-128 (April 12, 2019).

⁶⁷ See Petitioner's Motion for Summary Judgment ¶¶ 55-68 (Feb. 17, 2021).

⁶⁸ Petitioner's Motion for Summary Judgment ¶ 70.

⁶⁹ Petitioner's Motion for Summary Judgment ¶ 71 (citing 57 Pa.C.S. § 304(b)). The General Affidavit of Joel Lipperini is attached as Ex. C to Petitioner's Motion for Summary Judgment.

⁷⁰ Petitioner's Motion for Summary Judgment ¶¶ 73-74 (citing Deposition of Cheryl Romanell at pg. 43, Ins. 4-11; pg. 44, Ins. 1-13). The Deposition of Cheryl Romanell is attached as Exhibit B to Petitioner's Motion for Summary Judgment.

⁷¹ Petitioner's Motion for Summary Judgment ¶ 75.

Certification of Donnie Wells.⁷² Petitioner maintains that the Certifications of Wade Benson and Daniel Lipperini, Jr. should be excluded under the Dead Man's Act, as both have been named as Respondents to this action for purportedly misappropriating property of the Estate.⁷³ Petitioner further attests that the Certifications collectively lack any recollection of direct conversations in which the Decedent stated he was in a contractual relationship with Joel Lipperini such as would entitle Joel Lipperini to the Shelbys or to other Estate assets.⁷⁴ Petitioner thereby challenges both the relevance and admissibility of the proffered testimony.

Petitioner asserts that when excluding incompetent testimony, Respondents Lipperini are unable meet their burden of proof of establishing by clear and convincing evidence Decedent's donative intent as well as *inter vivos* delivery.⁷⁵ Petitioner further contends that, assuming *arguendo* Respondents Lipperini can establish either a transfer by an *inter vivos* gift or under a quasi-contract theory, the transfer would be voidable under the UTVA as made with the purpose of defrauding the Estate's creditors.⁷⁶

Petitioner finally argues that, assuming *arguendo* Respondents Lipperini are pursuing a quasi-contract theory, their claims would be barred by the applicable statute of limitations. Namely, under 42 Pa.C.S. § 5525(a), an action to recover an outstanding debt resulting from a breach of contract must be commenced within four years.⁷⁷ Joel Lipperini testified at deposition, taken on May 30, 2019, that he had ceased serving clients at least three years prior to the date of deposition.⁷⁸ Petitioner contends that as Decedent passed away on June 19, 2018, Joel Lipperini, at best, would only be entitled to compensation for services rendered between June 19, 2014 and May 30, 2015.⁷⁹

Respondents Lipperini provide in their response to Petitioners' Motion for Summary Judgment that the deposition testimony and Certifications of various disinterested witnesses, including Cheryl Romanell, Daniel Lipperini, Sr., Robert "Buzz"

⁷² Petitioner's Motion for Summary Judgment ¶¶ 116. These Certifications are collectively attached as Exhibit F to Petitioner's Motion for Summary Judgment.

⁷³ *Id.*

⁷⁴ See Petitioner's Motion for Summary Judgment ¶¶ 117-120.

⁷⁵ See Petitioner's Motion for Summary Judgment ¶¶ 78-105.

⁷⁶ See Petitioner's Motion for Summary Judgment ¶¶ 122-132.

⁷⁷ Petitioner's Motion for Summary Judgment ¶ 134 (citing 42 Pa.C.S. § 5525(a)).

⁷⁸ Petitioner's Motion for Summary Judgment ¶ 138 (citing Deposition testimony of Joel Lipperini at pg. 8, Ins. 9-24; pg. 9, Ins. 1-16).

⁷⁹ See Petitioner's Motion for Summary Judgment ¶¶ 139-145.

Clark, and Donnie Wells would be admissible and relevant to prove decedent's donative intent and *inter vivos* transfer of the Shelbys.⁸⁰ Respondents Lipperini further contend that Respondents Wade Benson and Daniel Lipperini, Jr. even if barred from testifying as to their own claims, would be qualified to testify in support of another gift recipient, and have offered Certifications in support of Joel Lipperini's claims.⁸¹ Respondents Lipperini next argue that the Petitioner has improperly named Maggie Lipperini as a Respondent, as Petitioner has failed to demonstrate Maggie Lipperini's interest in the three Shelbys extrinsic from her marriage to Joel Lipperini. Respondents Lipperini claim that Maggie Lipperini's testimony if deemed admissible would help establish by clear and convincing evidence Decedent's donative intent and delivery.⁸²

Respondents Lipperini assert that the aforementioned evidence taken as a whole is sufficient to establish a *prima facie* case for decedent's donative intent and the *inter vivos* delivery of the Shelbys to Joel Lipperini, thus rendering Joel Lipperini competent to testify under the Dead Man's Act. Respondents finally counter that Petitioner has failed to establish a *prima facie* case for violation of the UVTA, as Respondents have provided ample evidence of consideration for the transfer of the Shelbys.⁸³ Respondents Joel and Maggie Lipperini argue for analogous reasons that Petitioner has failed to prove her unjust enrichment claim.⁸⁴ The Court notes that Respondents Joel and Maggie Lipperini do not contend that they have a right to the Shelbys or other assets under a breach of contract theory, instead explaining that they have presented evidence as to Joel Lipperini's past services rendered for the decedent to rebut Petitioner's UVTA violation claim.⁸⁵

⁸⁰ See Respondents, Joel and Maggie Lipperini's Brief in Support of their Response to Petitioner's Motion for Summary Judgment at pgs. 5-7 (March 17, 2021).

⁸¹ See Respondents, Joel and Maggie Lipperini's Brief in Support of their Response to Petitioner's Motion for Summary Judgment at pgs. 7-8 (citing *In re Betty J. Fiedler*, 4 Fiduc. Rep. 90, 94 n. 3 (O.C. Lanc. Cty. 2013)).

⁸² See Respondents, Joel and Maggie Lipperini's Brief in Support of their Response to Petitioner's Motion for Summary Judgment at pgs. 8-10.

⁸³ See Respondents, Joel and Maggie Lipperini's Brief in Support of their Response to Petitioner's Motion for Summary Judgment at pgs. 10-21.

⁸⁴ See Respondents, Joel and Maggie Lipperini's Brief in Support of their Response to Petitioner's Motion for Summary Judgment at pgs. 21-22.

⁸⁵ See Respondents, Joel and Maggie Lipperini's Brief in Support of their Response to Petitioner's Motion for Summary Judgment at pg. 11, n.2.

B. Respondents Joel and Maggie Lipperini's Motion for Summary Judgment

Within their Motion for Summary Judgment, Respondents Joel and Maggie Lipperini cover many of the same issues raised defensively in their Response to the Petitioner's Motion for Summary Judgment. First, Respondents Lipperini assert that the Petitioner has failed to demonstrate any evidence of Maggie Lipperini's interest in the contested Shelbys or other Estate assets. Respondents therefore argue that Maggie Lipperini should be stricken as a party to this action and her testimony be deemed admissible under the Dead Man's Act.⁸⁶ Respondents Lipperini next argue that Petitioner has failed to rebut the ample evidence that Joel Lipperini provided extensive, uncompensated advertising and racing services for Decedent during Decedent's lifetime. They contend, therefore, that Petitioner's counts for violation of the UVTA and unjust enrichment must fail.⁸⁷

Respondents Lipperini next argue that they have presented extensive evidence from non-party witnesses as to Decedent's intent to transfer the three Shelbys to Joel Lipperini in compensation for the aforementioned advertising and racing services. This includes the Certifications of Robert "Buzz" Clark, Donnie Wells, and Daniel Lipperini, Sr., as well as the deposition testimony of Cheryl Romanell.⁸⁸ Respondents further argue that fellow Respondents, Daniel Lipperini, Jr. and Wade Benson, who have offered Certifications supportive of Respondent Joel Lipperini's claim to the Shelbys, would not be barred under the Dead Man's Act from testifying in support of the other gift claimants.⁸⁹ Respondents Lipperini conclude that this evidence, taken as a whole, is sufficient to establish a *prima facie* case of Decedent's donative intent and the actual *inter vivos* transfer of the three Shelbys to Joel Lipperini. They contend that Joel Lipperini would therefore be competent to testify in his own behalf, and could thereby offer extensive, corroborative testimony as to his relationship with Decedent and the

⁸⁶ See Respondents, Joel and Maggie Lipperini's Motion for Summary Judgment ¶¶ 26-31 (Feb. 19, 2021).

⁸⁷ See Respondents, Joel and Maggie Lipperini's Motion for Summary Judgment ¶¶ 32-46.

⁸⁸ See Respondents, Joel and Maggie Lipperini's Motion for Summary Judgment ¶¶ 47-84.

⁸⁹ See Respondents, Joel and Maggie Lipperini's Motion for Summary Judgment ¶¶ 85-103.

transfer of the Shelby vehicles.⁹⁰ Joel Lipperini could also explain the extensive documentary evidence demonstrating substantial consideration for the three Shelbys.⁹¹

Petitioner's Response to Respondents Lipperini's Motion for Summary Judgment raises defensively the same issues addressed in Petitioner's own Motion for Summary Judgment, and in Petitioner's two Motions *in Limine*. Across filings, Petitioner challenges the admissibility of the various Respondents' testimony in support of the other gift claimants under the Dead Man's Act, and questions the reliability and relevance of proffered testimony included in the non-party Certifications.

C. Petitioner's Motion *in Limine* to Preclude Respondents from Offering Any Testimony or Argument at Trial Relative to their Pre-Death Conversations with Decedent Leland W. Benson

Petitioner's First Motion *in Limine* seeks to have this Court rule as a matter of law that the Respondents, Joel and Maggie Lipperini, Daniel Lipperini, Jr., and Wade and Stephanie Benson, are incompetent under the Dead's Man's Act to testify to any matter occurring prior to Decedent's death, either in regard to their own claims or to those of the other Respondents. The Court will address at greater length the relevant case law on this issue *infra*.

D. Petitioner's Motion *in Limine* to Exclude Daniel Lipperini, Sr., Robert "Buzz" Clark, and Donnie Wells from Offering Any Testimony at Trial

Petitioner's Second Motion *in Limine* seeks to preclude the testimony of non-party witnesses, Daniel Lipperini, Sr., Robert "Buzz" Clark, and Donnie Wells. Petitioner avers these non-party witnesses' Certifications are devoid of any direct conversations that the individuals had with Decedent in which Decedent specifically indicated he intended to gift the three Shelbys and other parts to Joel and Maggie Lipperini.⁹² Further, the referenced conversations within the Certifications were not contemporaneous to the time when Decedent made the alleged gifts.⁹³ Petitioner acknowledges that while the proffered testimony of the non-party witnesses is relevant to past consideration, Petitioner avers that the Certifications do not establish, as

⁹⁰ See Respondents, Joel and Maggie Lipperini's Motion for Summary Judgment ¶¶ 103-144.

⁹¹ See Respondents, Joel and Maggie Lipperini's Motion for Summary Judgment ¶¶ 145-174.

⁹² Petitioner's Motion *in Limine* to Exclude Daniel Lipperini, Sr., Robert "Buzz" Clark, and Donnie Wells from Offering Any Testimony at Trial ("Petitioner's Second Motion *in Limine*") ¶ 19 (April 9, 2021).

contended by Respondents Lipperini, that the three Shelbys were *inter vivos* gifts, and therefore the proffered testimony is irrelevant.⁹⁴ Petitioner argues that, even assuming *arguendo* that such testimony is relevant, the Court should exclude it as “misleading, confusing, cumulative and unfairly prejudicial” as not relating to the alleged *inter vivos* gift of the three Shelbys and other assets.⁹⁵

Respondents Lipperini in their Response to this Motion *in Limine* contend that Petitioner mischaracterizes the Certifications of Daniel Lipperini, Sr., Robert “Buzz” Clark, and Donnie Wells by claiming they lack direct conversations as to Decedent’s donative intent or delivery.⁹⁶ They also aver that Petitioner fails to cite any legal authority for the proposition that only conversations “contemporaneous” to the transfer may be deemed admissible, further contending that even by that standard, the conversation with Decedent relayed by Daniel Lipperini, Sr., in his Certification was “practically concurrent with the transfer of the Shelbys[.]”⁹⁷ Respondents Lipperini also argue that the extent to which the Certifications touch upon past consideration this is also relevant, as Petitioner has asserted claims of a voidable transfer under the UVTA and unjust enrichment.⁹⁸

The Court is satisfied that Petitioner has met the three factors needed to trigger application of the Dead Man’s Act as to Joel Lipperini.⁹⁹ The Estate has shown by the vehicle title in Decedent’s name and the two MSOs in the name of All Pros that the Estate has an ownership interest in the Shelbys. Joel Lipperini’s claim to the Shelbys is therefore adverse to the Estate. Lastly, the interest of the Decedent has passed to Petitioner, Executrix of the Estate.¹⁰⁰ The burden then, shifts to Respondents Lipperini to prove a valid transfer of assets. There remain, however, several key issues that the Court must resolve in order to make a decision on Petitioner’s Motion for Summary Judgment against Respondents Lipperini, Respondents Lipperini’s Motion for Summary

⁹³ Petitioner’s Second Motion *in Limine* ¶ 20.

⁹⁴ See Petitioner’s Second Motion *in Limine* ¶¶ 21-22.

Petitioner’s Second Motion *in Limine* ¶ 23.

⁹⁶ See Petitioner’s Second Motion *in Limine* ¶ 20.

⁹⁷ Petitioner’s Second Motion *in Limine* ¶ 21.

⁹⁸ Petitioner’s Second Motion *in Limine* ¶ 23.

⁹⁹ The applicability of the Dead Man’s Act as to Respondents Daniel Lipperini, Jr., Wade Benson, and Stephanie Benson is discussed *infra*.

¹⁰⁰ See *Rider’s Est.*, 409 A.2d at 399.

Judgment, and Petitioner's two Motions *in Limine*. Namely, the Court must determine whether Maggie Lipperini has been properly named as a Respondent to this action and is incompetent to testify under the Dead Man's Act. The Court must determine whether the other named Respondents, Daniel Lipperini, Jr. and Wade Benson, who may be precluded from testifying on their own behalf, could still offer testimony in support of Joel Lipperini's claims. Further, the Court must determine whether the testimony of the non-party witnesses, Daniel Lipperini, Sr., "Buzz" Clark, and Donnie Wells, are of sufficient probative value to be admissible. After making these determinations, the Court must ultimately conclude whether the evidence presented is sufficient to establish by clear and convincing evidence decedent's donative intent and an *inter vivos* delivery of the three Shelbys, thus rendering Joel Lipperini competent to testify. The Court will address these issues *in seriatim* below.

i. Admissibility of the Testimony of Maggie Lipperini

Nothing in the plain language of the Dead Man's Act bars the testimony of the spouse of an incompetent party based on marital status alone. Nonetheless, in 1889, the Pennsylvania Supreme Court held in *Bitner v. Boone* that the interests of spouses are so interconnected that the testimony of one spouse could be fairly construed as the testimony of the other, and held on that basis the spouse of an incompetent party was also incompetent under the Dead Man's Act.¹⁰¹ This remained the law for almost a century. In 1979, the Pennsylvania Supreme Court expressly overruled *Bitner* 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."¹⁰² 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."¹⁰³ Instead, the party challenging competency bears the

¹⁰¹ 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[.]").

¹⁰² *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).

¹⁰³ *Id.* at 733.

burden of demonstrating the spouse of an incompetent party has an independent pecuniary or proprietary interest adverse to the decedent's estate.¹⁰⁴

The Court finds that Petitioner has failed to demonstrate that Maggie Lipperini has a pecuniary or proprietary interest in the Shelbys or in other Estate assets. Indeed, Petitioner herself acknowledged in her deposition testimony that she lacks knowledge of Maggie Lipperini having a direct stake or interest in the Shelby vehicles.¹⁰⁵

Nonetheless, Petitioner cites Maggie Lipperini's improper notarization of her husband's General Affidavit as evidence of Maggie Lipperini's adverse interest. Petitioner similarly cites Maggie Lipperini's purported attempt to influence Cheryl Romanell to testify on her husband's behalf as evidence of an adverse interest. However, Petitioner has conflated evidence of Maggie Lipperini's potential bias with evidence of a proprietary or pecuniary interest. "The fact that a witness may be unfriendly to a decedent's cause and partial to that of the survivor may affect credibility, but does not affect competency."¹⁰⁶ To that end, the Court holds that Maggie Lipperini's testimony shall not be subject to exclusion under the Dead Man's Act. Further, as Petitioner has failed to establish that Maggie Lipperini has a pecuniary or proprietary interest in the Estate assets, the Court shall grant summary judgment favor of Maggie Lipperini, and she shall be dismissed as a Respondent to this action.

ii. Admissibility of the Testimony of One Respondent in Support of Another's Claim

The Court must next determine whether a claimant incompetent to testify under the Dead Man's Act in support of his or her own claim is similarly incompetent to testify

¹⁰⁴ See *Rider*, 409 A.2d at 399 ("The party challenging the competency of a witness has the burden of proving incompetency."); see also *Goldman*, 406 A.2d at 733 ("[T]he Bitner rule is contrary to this Court's repeated jurisprudential admonition that competency of witnesses is the rule and incompetency is the exception.") (citation omitted).

¹⁰⁵ The Deposition Testimony of Denise Cordes is attached as Exhibit A to Petitioner's Motion for Summary Judgment. The Court identifies as relevant the following exchange between Attorney Marc Sottile, counsel for Joel and Maggie Lipperini, and Denise Cordes, occurring at pg. 128, Ins. 19-24 through pg. 129, Ins. 1-3:

Q: Do you know whether Maggie Lipperini would directly benefit financially from Joel possessing the three Shelbys?

A: Do I know whether or not she would benefit directly from Joel possessing the three Shelbys? I mean, they're married.

Q: Yeah. Anything beyond that? Do you have any knowledge?

A: Not that I know of.

¹⁰⁶ *Grossman*, 406 A.2d at 732-33 (citing *Billow v. Billow*, 61 A.2d 817 (Pa. 1949)).

in support of another claimant. The Pennsylvania Supreme Court first addressed this issue in 1920 in *In re Gongaware's Estate*. In *Gongaware*, the decedent's widow and children had competing claims as to partial ownership in the decedent's estate. On appeal, the Supreme Court affirmed the trial court's holding, "that the widow and children were severally incompetent to testify in support of their own claims, where the matters occurred during the lifetime of decedent, but that each of them was competent to testify as to the claim of any other, for the reason that such testimony was against the interest of the witness."¹⁰⁷ In other words, the Supreme Court held that an incompetent claimant would be competent to testify in favor of another incompetent claimant if the interests of the two claimants were adverse to each other. This was applicable in *Gongaware*, as an increase of one claimant's proportion of recovery would decrease the recovery portioned to the other claimant (this is distinguishable from the foregoing matter, where the various Respondents' claims are not adverse to each other's, as each makes a claim to different property of the Decedent). However, the Court also reasoned that the trial court was justified in giving little weight to the claimants' testimony in each other's favor. "The opportunity for collusion is always great where two or more people take turn about in testifying for each other, and hence we are not prepared to say the court below clearly erred in refusing to find as facts those conclusions which depended on their testimony only."¹⁰⁸

The Supreme Court next addressed this issue in 1935 in *In re Houston's Estate*. Under the facts of *Houston*, two domestic workers sought to recover against the decedent's estate based on a purported verbal agreement with the decedent promising money for services rendered. Unlike *Gongaware*, the two claimants in *Houston* were not adverse to each other, but rather presented complementary, although not identical claims. On appeal, the Supreme Court affirmed the trial court's determination, "that while each [claimant] was, owing to testator's death, an incompetent witness as to her own claim, each was a competent witness as to the claim of the other."¹⁰⁹ However, the Court in *Houston* cautioned that the probative value of such testimony would be limited. "A situation like the present opens the door wide to the very thing which the [Dead

¹⁰⁷ *In re Gongaware's Est.*, 109 A. 276, 277 (Pa. 1920).

¹⁰⁸ *Id.* (citations omitted).

Man's Act] was intended to prevent[]—the setting up of a contract with a man no longer here to contradict [it.]”¹¹⁰ The Court cited *Gongaware* for the proposition that there is a significant threat of collusion when parties take turns testifying for each other.¹¹¹ The Court ultimately held that “[t]he testimony of these two claimants, each for the other, without any corroboration as to details, certainly falls far short of that ‘direct and positive’ proof required. . .to establish the estate's liability[.]”¹¹²

In contradistinction is the determination of the Montgomery County Orphans’ Court in the 1970 case of *In re Huebner’s Estate*. Under the operative facts of *Huebner*, Arthur F. Peifer owned 88 shares of a corporation known as Litchfield Produce Sales Co., and his son, Robert J. Peifer, owned 87 shares. The Peifers also owned shares in a separate but related corporation known as Litchfield Produce Co. In light of concerns that the Peifers’ ownership of stock in both corporations might present a conflict of interest, the Peifers endorsed blank certificates of their shares in Litchfield Produce Sales Co. and turned them over to Russell J. Huebner. Upon Mr. Huebner’s death, the Peifers filed claims against his estate to recover the shares, claiming that the initial transfer “was made only to permit claimants to present the appearance of having parted with their interest in Litchfield Produce Sales Co., without having actually done so.”¹¹³ The question then arose whether under the Dead Man’s Act, each claimant could testify in support of the other.

While acknowledging the general rule that under the Dead Man’s Act, “the mere fact that the proposed witness also happens to be a claimant against the estate in a separate matter will not bar his testimony[.]” the court in *Huebner* found an exception where the separate claims arose from a single transaction:

Although this matter is presented as two claims, by two claimants, this is merely form; the substance of both claims is that an agreement, one agreement, was made between claimants and decedent regarding the Peifer stock. There is no distinction between the facts of each of these claims; there is no possibility that one could succeed and the other fail; and testimony in support of one automatically and unavoidably supports

¹⁰⁹ *In re Houston’s Est.*, 178 A. 479, 480 (Pa. 1935).

¹¹⁰ *Id.*

¹¹¹ *Id.* at 480-81.

¹¹² *Id.* at 480.

¹¹³ *In re Huebner’s Est.*, 51 Pa. D. & C.2d 611, 614 (O.C. Mont. Cty. 1970).

the other as well. Thus, each claimant, even as a witness for the other, exhibits an interest adverse to the estate and is, therefore, incompetent.¹¹⁴

The court distinguished itself from *Houston* “on the basis that [in *Houston*] there were two separate contracts between decedent and the claimants. . . [that] involved different terms and considerations, although both were apparently made at the same time, and both were made to induce the claimants to remain in the employ of decedent.”¹¹⁵ In contrast, the purportedly sham transfer of the two claimants’ stock in *Huebner* occurred at the same time, in the same manner, and for the same purpose.

In 1997, this question was before the Superior Court in *In re Estate of Petro*. Under the operative facts, Anna and John Petro had eight children. Anna Petro died on April 15, 1990. One month after her death, John Petro executed a notarized Power of Attorney (“POA”) granting two of his daughters, Irene Bucci and Christine Cuniak, general power of attorney over his financial affairs. Thereafter, the two daughters’ names were added to their father’s bank accounts, and the daughters opened a brokerage account with their father’s assets. Assets from this brokerage account were used to purchase municipal bearer bonds that were delivered to the daughters. On March 26, 1991, a permanent guardianship hearing was held for John Petro, at which point Irene Bucci was appointed plenary guardian.¹¹⁶

John Petro died intestate on June 15, 1992, survived by Irene Bucci and Christine Cuniak, four other adult children, and several adult grandchildren born to two deceased sons. The presumptive heirs consented to the appointment of an independent administrator, John Iurlano, Esquire, to prepare an accounting of the estate. Within three months of appointment, John Iurlano filed a petition to recover assets with the Orphan’s Court of Allegheny County, contending that from their appointment under the POA until John Petro’s death, Irene Bucci and Christine Cuniak had embezzled some \$646,000.00, the bulk of the decedent’s estate. The daughters claimed in defense that they had received money and stock as *inter vivos* gifts. Upon consideration of the testimony of Christine Cuniak, among other witnesses, the trial court held in favor of the two sisters, a decision which was upheld following argument

¹¹⁴ *Id.* at 615–16.

¹¹⁵ *Id.* at 616.

¹¹⁶ See *In re Est. of Petro*, No. 5271OF1992, 2000 WL 35500765 (O.C. Alleg. Cty. Mar. 10, 2000).

before the trial court *en banc*. The administrator then appealed to the Pennsylvania Superior Court.¹¹⁷

On appeal, the Superior Court held that of the testimony presented before the trial court, only the testimony of Christine Cuniak supported a conclusion that John Petro had intended to gift money and stock to his two daughters. The Superior Court concluded, “[t]he daughters, however, needed to establish through independent evidence prior to this testimony that their father intended to create inter vivos gifts.”¹¹⁸ For this reason, the Court held that the trial court “erred in admitting the testimony of Christine Cuniak regarding her father’s intention to give her and her sister Irene the bulk of his estate[,]” and remanded the matter for a new hearing on the merits, at which both daughters’ testimony would be excluded.¹¹⁹ The Supreme Court denied *allocator*, and upon remand, the trial court held that the two sisters had breached their fiduciary duties by overstepping their power of attorney, therefore ordering a return of all assets.

Most recently, in 2016, the Superior Court addressed this issue in *In re Fiedler*. Under the operative facts of *Fiedler*, on February 17, 2004, following the death of her husband, Betty Fielder executed a POA naming her two daughters, Latisha Bitts and E. O’Rean Fiedler, as her agents. In July 2006, Betty Fielder authorized gift checks of \$10,000 to both Latisha Bitts and O’Rean Fiedler, purportedly at Latisha Bitts’ request and over O’Rean Fiedler’s objection. Soon after, Betty Fiedler authorized another \$10,000 check to Latisha Bitts’ son, Adam Buckius. On October 11, 2006, Betty Fiedler revoked the POA naming both daughters as her agents, and executed a new POA designating Latisha Bitts as her sole agent.¹²⁰

Over the course of the next several years, until Betty Fiedler’s death on October 11, 2009, Latisha Bitts made various gifts to herself, to her son, Adam Buckius, and his wife, Kimberly Buckius, to her stepson, Sean Bitts, and his wife, Christy Bitts, and to her two granddaughters, Emma and Lydia Buckius. Such were the extent of these gifts that a final account of decedent’s estate filed with the Orphans’ Court of Lancaster County revealed that the estate had been rendered insolvent. O’Rean Fiedler filed objections to

¹¹⁷ See *id.*

¹¹⁸ *In re Est. of Petro*, 694 A.2d 627, 633 (Pa. Super. 1997).

¹¹⁹ *Id.* at 634.

¹²⁰ See *In re Fiedler*, 132 A.3d 1010, 1013-14 (Pa. Super. 2016).

the account and petitioned to have Latisha Bitts submit an accounting as to her transactions under the POA. A subsequent audit revealed that the gifts made by Latisha Bitts through her power of attorney totaled \$480,515.00. O'Rean Fiedler then filed a petition to show cause why Latisha Bitts and the various gift recipients should not be required to return the assets to the estate.¹²¹

Statutorily, an agent under a power of attorney may only make gifts to permissible donees, and such gifts must not have an aggregate value exceeding the annual federal gift tax exclusion over the course a calendar year.¹²² The POA in *Fiedler* defined a permissible donee as, “any donee who has been the recipient of gifts from me[, Betty Fiedler,] or whom my attorney reasonably considers to be the natural object of my bounty.”¹²³ While the majority of the gifts made by Latisha Bitts under the POA were for \$12,000.00 or less annually, which the trial court found did not exceed the Internal Revenue Code (“IRC”) gift tax exclusion and was therefore within the scope of the POA, the question remained whether the gift recipients fell within the definition of a permissible donee. The trial court allowed the gift recipients to testify on their own behalf, and in favor of the other recipients, as to their purportedly close relationship to the decedent, to prove that they were “natural objects of [the decedent’s] bounty.” The gift recipients were also permitted to testify to the decedent’s history of handing out cards containing checks at Christmas gatherings to demonstrate that they were recipients of gifts from the decedent prior to the execution of the POA.¹²⁴

On appeal, the Superior Court considered whether such testimony should have been precluded under the Dead Man’s Act. The Superior Court ultimately concluded that the relatives “could testify about their relationships with Decedent and as non-adverse witnesses under the Dead Man’s Act regarding their observations concerning the gifts given to the other recipients.”¹²⁵ The Superior Court affirmed the trial court’s determination that the gifts recipients’ testimony was sufficient to demonstrate that they

¹²¹ See *id.* at 1014-15.

¹²² *Id.* at 1020-21 (Pa. Super. 2016) (quoting 20 Pa.C.S. § 5603(a)(2)(ii)).

¹²³ *Id.* at 1022.

¹²⁴ See *id.* at 1024-25.

¹²⁵ *Id.* at 1025.

were permissible donees under the POA, and therefore held that all gifts not exceeding the federal gift tax exclusion were valid.¹²⁶

In her agent capacity, Latisha Bitts had also authorized two gifts to her son Adam Buckius that exceeded the federal gift tax exclusion, one a \$5,000.00 gift compounding upon a \$12,000.00 gift made earlier in the same calendar year, and another \$335,000.00 gift. Latisha Bitts conceded at trial that these gifts did not fall within the scope of the POA, but insisted that they had been valid *inter vivos* gifts made at the request of the decedent. Relying on Latisha Bitts' testimony as to the decedent's intent, the trial court held that the \$5,000.00 and \$335,000.00 transfers were valid *inter vivos* gifts.¹²⁷ On appeal, the Superior Court opined that, "an argument may be made that the Dead Man's Act precluded Latisha's testimony regarding Decedent's wishes."¹²⁸ However, the Superior Court concluded that Latisha Bitts' testimony, even if admissible, was self-serving and lacking in credibility, and was therefore insufficient, taken alone, to establish the decedent's donative intent outside the scope of the POA.¹²⁹ The Superior Court ultimately held "that when a designated POA agent writes gift checks from a principal's account, the agent is constrained by the gift-giving limitations listed in the POA document and the statutory requirements of the Code."¹³⁰ The Superior Court consequently held that the 5,000.00 and \$335,000.00 transfers to Adam Buckius from the decedent's account were invalid and must be remitted to the estate.¹³¹ The Supreme Court denied *allocator* as to this decision.

Respondents Joel and Maggie Lipperini cite the decision of the Orphans' Court in *Fiedler*, as affirmed on appeal, for the proposition that, "where gifts to multiple individuals are challenged, each gift recipient may testify as to the circumstances surrounding the gifts to the other recipients but may not testify as to the gifts they

¹²⁶ *Id.* at 1025 ("We have no hesitation in concluding, as did the orphans' court, that the evidence was relevant and that Latisha fairly and reasonably could have determined that Additional Respondents could be considered "the natural object of [Decedent's] bounty."").

¹²⁷ *See id.* at 1017.

¹²⁸ *Id.* at 1026.

¹²⁹ *See id.* at 1025-27.

¹³⁰ *Id.* at 1027-28.

¹³¹ *See id.* at 1028.

allegedly received.”¹³² Petitioner argues in response that *Fiedler* is distinguishable on the facts as it was undisputed that the POA agent, Latisha Bitts, was authorized to sign gift checks within the annual IRC exclusion amount as the decedent’s POA. Petitioner also notes that the Superior Court failed to articulate its reasoning or cite any authority as to why the gift recipients should be permitted to testify to their past personal relationships with the decedent under the Dead Man’s Act, or to decedent’s history of gift giving over the holidays.¹³³ Petitioner finally notes that even in *Fiedler*, the Superior Court held that the Dead Man’s Act should preclude Latisha Bitts from testifying in another’s favor as to decedent’s donative intent regarding gifts exceeding the IRC annual exclusion.¹³⁴ Petitioner instead argues that the Court should regard *Petro* as controlling in this matter. Petitioner further maintains that allowing multiple Respondents, each individually incompetent from testifying under the Dead Man’s Act, to testify on behalf of each other’s claim would be at great disadvantage to Petitioner, who could not cross-examine an otherwise incompetent witness without running risk of waiving the Act by referencing pre-death matters.¹³⁵

The Court agrees that *Fiedler* is not authoritative as to the issue of whether a gift claimant incompetent under the Dead Man’s Act as to his or her own claim is competent to testify on behalf of another claimant. The Superior Court in *Fiedler* focused on the authority of an agent to make gifts on behalf of the principal pursuant to a POA. The Court held that once it was established that a gift fell within the statutory IRC annual exclusion amount, then the gift was among those “Latisha [the POA agent] was authorized to make.”¹³⁶ The Superior Court concluded that as long as the gift amounts were authorized by the POA, then the gifts recipients were not incompetent under the Dead Man’s Act to provide direct testimony as to their own relationship with the decedent to prove that they were permissible donees under the POA, or to testify in

¹³² Respondents, Joel and Maggie Lipperini’s Response to Petitioner’s Motion *in Limine* to Preclude Pre-Death Conversations with Decedent Leland W. Benson at pg. 11 (April 23, 2021) (citing *In re Betty J. Fiedler*, 4 Fiduc. Rep. 3d 90, 94 n.3 (O.C. Lanc. 2013)).

¹³³ See Petitioner’s Response to the Letter Brief Submitted by Respondents’ Joel Lipperini and Maggie Lipperini on May 13, 2021 at pg. 2 (May 28, 2021).

¹³⁴ See Petitioner’s Response to the Letter Brief Submitted by Respondents’ Joel Lipperini and Maggie Lipperini on May 13, 2021 at pgs. 2-3.

¹³⁵ See Petitioner’s Response to the Letter Brief Submitted by Respondents’ Joel Lipperini and Maggie Lipperini on May 13, 2021 at pg. 5.

¹³⁶ *Fiedler*, 132 A.3d at 1020.

support of other claimants. Further, the Superior Court did not apply the Dead Man's Act to bar the testimony of Latisha Bitts regarding the decedent's purported intent to provide as *inter vivos* \$5,000.00 and \$330,000.00 gift checks to Adam Buckius, but rather found her testimony insufficient to overcome the limitations in the POA as to the agent's gifting authority.

However, the Court also finds *Petro* inapplicable to this matter. The Superior Court in *Petro* held that the trial court had erred in allowing Christine Cuniak to testify both in her own behalf and on behalf of her sister, Irene Bucci, as to their decedent father's intent to make to them *inter vivos* gifts of the bulk of his estate. The Superior Court failed to explain its reasoning for why the daughters could not testify in favor of each other, but seemed to treat the interest of the two sisters as one: "Christine Cuniak testified that her father intended to give her and Irene Bucci his money and stocks."¹³⁷ In this manner, *Petro* mirrors *Huebner* in treating one claim as so intertwined with another that, "testimony in support of one automatically and unavoidably supports the other as well."¹³⁸

While *Huebner* is not controlling precedent, the Court finds it logical that a claimant should not be permitted to circumvent the limitations of the Dead Man's Act by testifying on behalf of another as to what is truly a single transaction. However, the case here involves three separate sets of Respondents—(1) Joel Lipperini (Maggie Lipperini having been dismissed); (2) Daniel Lipperini, Jr.; and (3) Wade and Stephanie Benson—each who purportedly retain varying items from the Estate, received through separate transactions. The success of one Respondent or set of Respondents will not inherently bolster the claims of the others. To that extent, the Court finds that the rule established in *Houston* applies and each set of Respondents will be qualified to testify on behalf of the other. The Court however, may afford limited weight to such testimony given the potential for collusion among the Respondents.

Finally, although there is limited case law on this particular issue, pursuant to this Court's interpretation, if a Respondent is called as a witness on direct examination to testify in support of the claim of another, then the Estate could cross-examine the

¹³⁷ *Petro*, 694 A.2d at 633.

¹³⁸ *Huebner's Est.*, 51 Pa. D. & C.2d at 614.

Respondent on the same subject without this constituting a waiver of the Dead Man's Act. Certainly, cross-examination of a witness who a court has permitted to testify in support of another's claim notwithstanding objection, will not be considered a waiver of the Act if cross does not exceed the scope of the examination in chief.¹³⁹ In cases where courts have found waiver on cross-examination, a clamant first calls a witness to testify as to facts occurring after the death of the decedent, and then the estate representative on cross-examination elicits testimony as to facts occurring during the decedent's lifetime.¹⁴⁰

iii. Admissibility of Daniel Lipperini, Sr., Robert "Buzz" Clark, and Donnie Wells' Testimony

The Court next considers Petitioner's challenge to the admissibility of the testimony of non-party witnesses, Daniel Lipperini, Sr., Robert "Buzz" Clark, and Donnie Wells, based on that testimony's purported lack of relevance and its potential to confuse the probative issues. Petitioner acknowledges that the non-party Certifications touch upon past consideration for transfer of the Shelbys, as the non-party witnesses collectively detail the extensive, unpaid racing and advertising services performed by Joel Lipperini on behalf of Decedent. However, Petitioner contends that the Certifications fail to recount any firsthand knowledge of an *inter vivos* gift of the three Shelbys.¹⁴¹ Petitioner has at various times asserted that Respondents Joel and Maggie Lipperini have tried to "have it both ways" and have improperly created a "hybrid theory" by which they claim that they received a valid *inter vivos* gift, but rely on a quasi-contractual notion that said gift was for consideration.¹⁴² Petitioner asserts an *inter vivos* gift is by definition, "a **voluntary transfer** of property by one living person to

¹³⁹ See *In re Snyder's Est.*, 100 A.2d 67, 69 (Pa. 1953), disapproved of on other grounds by *In re Lock's Est.*, 244 A.2d 677 (Pa. 1968) ("It is argued that by reason of the cross-examination of the widow she was made a competent witness, but this is incorrect. She was not called for cross-examination by the estate; and the cross-examination of an incompetent witness, testifying on his own behalf under objection, is not a waiver of the objection[.]"); *In re Goehring's Est.*, 106 A. 60, 61 (Pa. 1919) ("[I]n view of the fact that [cross-examination] was made specifically subject to the objection taken when the witness took the stand in his own behalf, we do not think the counsel for exceptant went beyond this common-law right to cross-examine, nor did he go beyond the scope of the examination in chief.").

¹⁴⁰ See *Est. of Kofsky*, 409 A.2d 1358, 1359 (Pa. 1979).

¹⁴¹ See Petitioner's Second Motion *in Limine* ¶¶ 21-22.

¹⁴² See Responsive Brief of Petitioner Denise M. Cordes, Executrix of the Estate of Leland W. Benson, Jr., Deceased to the Memorandum of Law in Support of Respondents Joel and Maggie Lipperini's Motion for Summary Judgment at pgs. 22-23 (March 22, 2021).

another living person **without any valuable consideration**, which is perfected and becomes absolute during the lifetime of the parties.”¹⁴³ Evidence of past consideration in support of a gift would therefore nullify the gift. Respondents Joel and Maggie Lipperini counter that Petitioner’s attempt to preclude evidence of past consideration while asserting a UVTA violation and unjust enrichment claims within their Petition to Recover Assets is “paradoxical.”¹⁴⁴

The Court agrees with Respondents Lipperini. Petitioner challenges the existence of an *inter vivos* gift, but relies on the proposition that even accepting *arguendo* the existence of a valid *inter vivos* gift, such a gift would be voidable under the UVTA for lack of consideration. Further, Petitioner attempts to recover the assets under the quasi-contractual theory of unjust enrichment.¹⁴⁵ Respondents’ only defense to the UVTA and unjust enrichment counts would be to demonstrate a transfer for valid consideration. The Court will not preclude Respondents Lipperini from presenting defenses predicated on varying, even contradictory theories (namely, that the Shelbys were gratuitous gifts, or they were transfers for value based on a quasi-contract) when Petitioner has attempted to recover Estate assets under those same theories. The Court therefore finds the issue of past consideration probative to this matter and the non-party witnesses’ testimony admissible to the extent that it is relevant to that issue.

The non-party witnesses’ discussion of Joel Lipperini and Decedent’s professional relationship is also relevant to the matters of donative intent and delivery. The Certification of Daniel Lipperini, Sr. recounts an extended professional relationship between Joel Lipperini and Decedent in which Joel Lipperini would perform racing and marketing services for Decedent without payment. Daniel Lipperini, Sr. recalls various conversations with Decedent spanning from “the early 2010s to late 2010s” in which Decedent stated his intention to give Joel cars in compensation for these services, in

¹⁴³ Responsive Brief of Petitioner Denise M. Cordes, Executrix of the Estate of Leland W. Benson, Jr., Deceased to the Memorandum of Law in Support of Respondents Joel and Maggie Lipperini’s Motion for Summary Judgment at pg. 2 (quoting 7 Summ. Pa. Jur. 2d Property § 15:2 (2d ed.) (emphasis added)).

¹⁴⁴ Respondents, Joel and Maggie Lipperini’s Response to Petitioner’s Motion *in Limine* to Preclude the Trial Testimony of Daniel Lipperini, Sr., Robert “Buzz” Clark, and Donnie Wells ¶ 1 (April 23, 2021).

¹⁴⁵ *Stoeckinger v. Presidential Fin. Corp. of Delaware Valley*, 948 A.2d 828, 833 (Pa. Super. 2008) (“A claim for unjust enrichment arises from a quasi-contract. A quasi-contract imposes a duty, not as a result of any agreement, whether express or implied, but in spite of the absence of an agreement, when one party receives unjust enrichment at the expense of another.”).

one instance stating that he had already given Joel a “Cobra.”¹⁴⁶ These recounted conversations with Decedent would be admissible under the hearsay exception allowing statements against the propriety interest of an unavailable witness.¹⁴⁷ However, Daniel Lipperini, Sr.’s summation of a conversation with Joel Lipperini, in which Joel expressly referenced the transfer of the three Shelbys, would be inadmissible hearsay.

The Certifications of Buzz Clarke and Donnie Wells speak more generally to Joel Lipperini and Decedent’s professional relationship, placing it in the context of an industry practice of labor-for-vehicles compensation arrangements. Buzz Clarke also recalls that in approximately 2009, he offered to buy a Daytona Coupe from Decedent, one of the three Shelbys at issue in this case. Decedent declined, allegedly saying the vehicle would be going to Joel Lipperini.¹⁴⁸ While Petitioner objects to the relevance of conversations occurring nearly a decade before the purported transfer of the Shelbys, the Court is of the opinion that the remoteness of the recounted conversations and events go to the weight afforded to this testimony, not to its admissibility. The Court therefore finds that the proffered testimony of Buzz Clarke and Donnie Wells would be admissible.

iv. Admissibility of Joel Lipperini’s Testimony

Having deemed Maggie Lipperini, Daniel Lipperini, Jr., Wade Benson, Daniel Lipperini, Sr., Buzz Clarke, and Donnie Wells competent to testify in support of Joel Lipperini’s claim to the three Shelbys, the Court must determine if the admissible evidence is sufficient to demonstrate a *prima facie* gift by clear and convincing evidence of both donative intent and the *inter vivos* transfer of the Shelbys. If so, Joel Lipperini will be rendered competent to testify.¹⁴⁹ The Court notes that establishing a *prima facie* case by clear and convincing evidence is a stringent standard, “requir[ing] evidence that is so clear, direct, weighty, and convincing that the trier of fact could come to a clear

¹⁴⁶ Certification of Daniel Lipperini, Sr. ¶¶ 19, 47.

¹⁴⁷ Pa.R.E., 804(b)(3)(A); *cf. Corbin v. Cowan* 716 A.2d 614 (Pa. Super. 1998) (holding in ejectment action that the statement of the appellant-landowner’s predecessor that he did not believe he owned an area of land was admissible as a statement against the predecessor’s proprietary interest).

¹⁴⁸ Certification of Robert “Buzz” Clarke ¶¶ 7-12.

¹⁴⁹ *See Petro*, 694 A.2d at 633 (indicating that clear and convincing evidence is standard to use in determining if a *prima facie* case was established).

conviction, without hesitating, concerning the facts at issue.”¹⁵⁰ Only compelling evidence, therefore, will be sufficient for Respondent Joel Lipperini to meet his burden of proof.

The Certifications of the various party and non-party witnesses attest to the close professional and personal relationship between Joel Lipperini and Decedent, as well as to Decedent’s various statements over the span of more than a decade that he intended to “pay back” Joel for unpaid services through a transfer of vehicles. The greater part of this testimony is general, speaking to the nature of Joel Lipperini and Decedent’s relationship and the common industry practice of trading labor for vehicles. However, Daniel Lipperini, Sr. refers more definitively to a conversation occurring in June of 2018 in which the Decedent allegedly stated that he intended to “make things right” with Joel Lipperini by giving him vehicles, mentioning that he had already given Joel a Shelby Cobra.¹⁵¹ Wade Benson’s Certification alleges that approximately two weeks before his death, Decedent told Wade that he intended to give Joel the Shelbys as repayment for unpaid racing and advertising services.¹⁵² Maggie Lipperini attests to having heard parts of a conversation that took place between Joel Lipperini and Decedent on June 9, 2018, in which Decedent spoke to what he wanted Joel to do with the Shelbys in the future and jotted down instructions and drawings relating to the vehicles.¹⁵³ She also attests that her husband left Decedent’s house with a folder with titles and other documents relating to the Shelbys.¹⁵⁴

However, the deposition testimony of Denies Cordes and Cheryl Romanell, as well as Wade Benson’s initial Answer to the Petition to Recover Assets, provide evidence to the contrary, that Decedent in fact intended to transfer his assets to Wade Benson prior to his death.¹⁵⁵ Cheryl Romanell also provided by her deposition

¹⁵⁰ *Com. v. O’Shea-Woomer*, 8 Pa. D. & C. 5th 178 (Lanc. Cty. 2009) (quoting *Com. v. Feucht*, 955 A.2d 377, 380 (Pa. Super. 2008)) (internal quotations omitted).

¹⁵¹ Certification of Daniel Lipperini, Sr. ¶¶ 18-19.

¹⁵² Certification of Wade Benson ¶¶ 34-44.

¹⁵³ Certification of Maggie Lipperini ¶¶ 20-24, attached as Exhibit CC to Respondents, Joel and Maggie Lipperini’s Motion for Summary Judgment. The Court notes that Joel Lipperini’s portion of this conversation may constitute inadmissible hearsay.

¹⁵⁴ Certification of Maggie Lipperini ¶ 26.

¹⁵⁵ Specifically, Respondents Wade and Stephanie Benson admitted in the Answer that at the June 1, 2018 meeting Decedent had asked Petitioner if there was any way he could transfer his business assets

testimony that she did not recall seeing Joel and Maggie Lipperini leave Decedent's house on June 9, 2018 with any documents.¹⁵⁶

While there is a breadth of evidence as to Decedent's donative intent, there is more limited evidence as to *inter vivos* delivery. As per the Certification of Maggie Lipperini, Decedent transferred the title and MSOs for the three Shelby vehicles to Joel after the meeting held on June 9, 2018. However, the vehicles remained in Decedent's name, or in the name of All Pros, despite the purported transfer of ownership. However, this fact is not *per se* fatal to Joel Lipperini's claim of an *inter vivos* gift. In the case of *In re Ream's Estate*, the Pennsylvania Supreme Court held that the claimant had proven a gift of an automobile from the decedent, even though the vehicle's title remained in the name of the decedent. The Court held that there was ample independent testimony corroborating the decedent's donative intent, as well as proof of constructive delivery of the vehicle's title and keys to the claimant during the decedent's lifetime.¹⁵⁷ However, in *Ream* there was independent testimony corroborating that the decedent had gone to a judicial officer with the title to the automobile and expressly stated her intent to transfer her vehicle to the claimant. She then executed an assignment of the title in the presence of the judicial officer while leaving the name of the recipient blank.¹⁵⁸ This is more definitive evidence of donative intent than has been presented in this case. Further, the Court will view with greater scrutiny an alleged *inter vivos* gift where the

to Wade Benson. See Answer to Executrix's Petition for Citation to Show Cause Why Assets Should Not be Returned to the Estate for Accounting and Unjust Enrichment ¶ 29 (April 15, 2019).

Petitioner has recounted in her response to Interrogatory 14 of Wade and Stephanie Benson's Interrogatories that Decedent had asked her how to go about transferring assets, including the three Shelbys, to Wade. See Daniel Lipperini's Addendum to Record for Purpose of Summary Judgment Motions (Pa.R.C.P. 1035.1), enclosing Petitioner Denise M. Cordes' Objections and Supplemental Answers to Respondents Leland Wade Benson and Stephanie Benson's First Set of Interrogatories.

Cheryl Romanell attests to a conversation where Decedent stated he wanted to transfer assets to Wade, although she does not specify the Shelbys as singled out among those assets. See Deposition of Cheryl Romanell at pg. 35, Ins. 1-24 through pg. 36, Ins. 1-4.

¹⁵⁶ See Deposition of Cheryl Romanell at pg. 30, Ins. 1-20.

¹⁵⁷ See *In re Ream's Est.*, 198 A.2d 556, 558 (Pa. 1964); see also *In re Brown's Est.*, 22 A.2d 821, 825 (Pa. 1941) ("The omission on the part of appellee. . .to obtain a certificate of title, issued in his own name. . .would not, of itself, defeat an otherwise valid gift to him of the Dodge sedan automobile by the mother, during her lifetime."); *Thompson v. Thompson*, 16 Pa. D. & C.3d 778, 781-82 (O.C. Del. Cty. 1981) (citing *Braham & Co. v. Steinard-Hannon Motor Co.*, 97 Pa. Super. 19 (1929); *Summer's Est.*, 226 A. 2d 197 (Pa. 1967); *Wasilko v. Home Mutual Casualty Co.*, 232 A. 2d 60 (Pa. Super. 1967)) ("It is clear under Pennsylvania law that although a certificate of title to an automobile is evidence of ownership, it is not conclusive evidence of the ownership of that motor vehicle").

¹⁵⁸ See *id.*

donor adopted a “vague and equivocal” manner of delivery when “more direct, unqualified and equally convenient methods” were available.¹⁵⁹

To conclude, there remain key factual issues in dispute. Maggie Lipperini claims that constructive delivery of the Shelbys occurred by the transfer of title and MSOs after the meeting held on June 9, 2018, while Cheryl Romanell denies having seen Joel and Maggie leave Decedent’s house after that meeting with any documents. Various witnesses speak to Decedent’s alleged statement of intent to leave a vehicle or vehicles to Joel Lipperini and others witnesses aver that Decedent had discussed leaving his assets to Wade Benson. The Court’s finding of facts will rely heavily on its assessment of witness credibility. The Court does not believe that it can properly undertake such an assessment based purely upon deposition testimony or statements made in signed Certifications. To that end, the Court holds that Joel Lipperini has not presently established *prima facie* evidence of an *inter vivos* gift rendering him competent to testify. However, the Court will reassess this question following the presentation of evidence at trial.

E. Conclusion

Having deemed admissible the testimony of Wade Benson, Daniel Lipperini, Jr., Maggie Lipperini, Daniel Lipperini, Sr., Buzz Clarke, and Donnie Wells admissible as to Joel Lipperini’s claims, and considering the record in the light most favorable to the non-moving party, the Court determines that there are outstanding issues of material fact that would preclude summary judgment in favor of the Petitioner. Therefore, Petitioner’s Motion for Summary Judgment against Respondent Joel Lipperini is DENIED.

Respondents Lipperini’s Motion for Summary Judgment relies heavily upon the supportive Certifications. However, “[t]estimonial affidavits of the moving party or his witnesses, not documentary, even if uncontradicted, will not afford sufficient basis for the entry of summary judgment, since the credibility of the testimony is still a matter for the [factfinder].”¹⁶⁰ Therefore, Respondents Lipperini’s Motion for Summary Judgment is DENIED as to Joel Lipperini and GRANTED as to Maggie Lipperini.

¹⁵⁹ *McCandless v. Young*, 84 Pa. D. & C. 49, 56–57 (O.C. Law. Cty. 1953) (quoting *In re Smith’s Est.*, 85 A. 76 (Pa. 1912)).

¹⁶⁰ *DeArmitt v. New York Life Ins. Co.*, 73 A.3d 578, 595 (Pa. Super. 2013) (citation omitted).

Pursuant to the analysis *supra*, Petitioner’s Motion *in Limine* to Preclude Respondents from Offering Any Testimony or Argument at Trial Relative to their Pre-Death Conversations with Decedent Leland W. Benson, and Petitioner’s Motion *in Limine* to Exclude Daniel Lipperini, Sr., Robert “Buzz” Clark, and Donnie Wells from Offering Any Testimony at Trial are both DENIED. Petitioner, however, will not be precluded by this Decree from objecting at time of trial should an otherwise incompetent claimant called to testify in support of another’s claim exceed the permissible scope of testimony and speak in support of his or her own claim. Further, nothing by this Decree precludes any party from making at the time of trial any well-founded evidentiary objection.

Analysis – Respondent Daniel Lipperini, Jr.

A. Petitioner’s Motion for Summary Judgment

Respondent Daniel Lipperini, Jr. (for the purpose of this section, “Respondent Lipperini”) claims that he is entitled to an orange replica Grand Sport Corvette because he helped Decedent restore the vehicle and invested funds into the project.¹⁶¹ Petitioner in her Motion for Summary Judgment first asserts that due to having an interest adverse to the Estate, Respondent Lipperini is incompetent to testify to any matter occurring prior to Decedent’s death pursuant to the Dead Man’s Act.¹⁶² Petitioner further contends that Respondent Lipperini has presented no evidence to support his claim that he invested money into the Grand Sport Corvette or was in a contractual relationship with Decedent.¹⁶³ Petitioner adds that even assuming *arguendo* that Respondent Lipperini can prove a valid contractual relationship with Decedent, the transaction would be voidable under the UVTA as a transfer made without adequate consideration for the purpose of defrauding creditors.¹⁶⁴

B. Respondent Daniel Lipperini’s Motion for Summary Judgment

Respondent Daniel Lipperini, Jr. in his Motion for Summary Judgment “incorporates by reference” the Motion for Summary Judgment and supportive brief filed

¹⁶¹ Petitioner’s Motion for Summary Judgment ¶ 145.

¹⁶² See Petitioner’s Motion for Summary Judgment ¶¶ 147-154.

¹⁶³ See Petitioner’s Motion for Summary Judgment ¶¶ 156-172.

by Respondents Joel and Maggie Lipperini.¹⁶⁵ Moreover, Respondent Lipperini contends that Petitioner has failed to meet her burden of proof by demonstrating that the Grand Sport Corvette frame was not in fact the subject of a voluntary conveyance or retrieval of property made while the Decedent was alive and present at his property.¹⁶⁶ Respondent Lipperini asserts that even assuming *arguendo* that the Estate is proven insolvent, Petitioner has failed to proffer evidence of Decedent's ownership of the outstanding items, has not established the value of those items, and has not demonstrated that the items were transferred without consideration, the elements necessary to establish a fraudulent conveyance.¹⁶⁷ Respondent Lipperini notes that Petitioner has even conceded that the Decedent communicated his intent to provide items in his shop to others prior to his death.¹⁶⁸ Respondent Lipperini reasons that as it is undisputed that Decedent wanted to compensate those he owed for unpaid services, and Respondent Lipperini's possession of the Grand Sport Corvette frame would be in accordance with that wish, Respondent Lipperini lacks an adverse interest that would preclude his testimony under the Dead Man's Act.¹⁶⁹ Additionally, Respondent Lipperini argues that the Estate has in any case waived the Dead Man's Act through Petitioner's responses to Respondents' Interrogatories, and through initiating a police investigation and attaching the police report as an exhibit to her Motion for Summary Judgment.¹⁷⁰

In her Response in Opposition, Petitioner contends that Respondent Daniel Lipperini cannot rely on the Motion for Summary Judgment and brief filed by Respondents Joel and Maggie Lipperini without any explanation of how the facts supporting that Motion would be applicable to his own claim.¹⁷¹ Petitioner further denies

¹⁶⁴ See Petitioner's Motion for Summary Judgment ¶¶ 173-183.

¹⁶⁵ Respondent Daniel Lipperini, Jr.'s Motion for Summary Judgment ¶ 1 (Feb. 17, 2021).

¹⁶⁶ Respondent Daniel Lipperini, Jr.'s Motion for Summary Judgment ¶ 6.

¹⁶⁷ Respondent Daniel Lipperini, Jr.'s Motion for Summary Judgment ¶ 7.

¹⁶⁸ Respondent Daniel Lipperini, Jr.'s Motion for Summary Judgment ¶ 8.

¹⁶⁹ Respondent Daniel Lipperini, Jr.'s Motion for Summary Judgment ¶ 10.

¹⁷⁰ Respondent Daniel Lipperini, Jr.'s Motion for Summary Judgment ¶ 9. Attached to Daniel Lipperini, Jr.'s Motion for Summary Judgment is Petitioner's answer to Wade Benson Interrogatory 14, and Petitioner's supplemental answers to Joel Lipperini Interrogatory 6.

¹⁷¹ Petitioner's Response in Opposition to Respondent Daniel Lipperini, Jr.'s Motion for Summary Judgment ¶ 1 (March 19, 2021).

participation in discovery as would waive the protection of the Dead Man's Act.¹⁷² Petitioner contends that absent Respondent Lipperini's own testimony, which would be inadmissible under the Act, Respondent Lipperini has presented no corroborating evidence as to a co-ownership of the Grand Sport Corvette or other assets, or evidence that Decedent transferred such assets as an *inter vivos* gift.¹⁷³

On April 5, 2021, without leave of Court or concurrence of opposing counsel, Respondent Lipperini filed a Supplement to his Motion for Summary Judgment, which attached the Affidavit of Wade Benson. Wade Benson certifies in this Affidavit that Respondent Lipperini and Decedent had done reproduction car work together for many years, and that Respondent Lipperini kept two donor cars at Decedent's Property.¹⁷⁴ Wade Benson avers that the orange Grand Sport Corvette reproduction was being worked on for Respondent Lipperini's benefit.¹⁷⁵ Wade Benson further attests that on the date before his father's death, Decedent told him he was giving the "Cheetah" fame to Respondent Lipperini.¹⁷⁶ He attests that he relayed this information to Respondent Lipperini, who on the same date removed the frame and other assets that either had been given to him by Decedent or which he already owned.¹⁷⁷

Petitioner filed a Response in Opposition to the Supplement on the same date. Petitioner asserts that the Supplement is untimely, as it was filed over a month after the February 17, 2021 dispositive motion deadline.¹⁷⁸ Petitioner further contends that Wade Benson's testimony would be barred under the Dead Man's Act.¹⁷⁹ Petitioner argues, however, that even if admissible, Wade Benson's statements should be deemed

¹⁷² See Responsive Brief of Petitioner Denise M. Cordes, Executrix of the Estate of Leland Benson, Jr., Deceased to the Memorandum of Law in Support of Respondent Daniel Lipperini, Jr.'s Motion for Summary Judgment at pg. 3 (March 22, 2021).

¹⁷³ See Responsive Brief of Petitioner Denise M. Cordes, Executrix of the Estate of Leland Benson, Jr., Deceased to the Memorandum of Law in Support of Respondent Daniel Lipperini, Jr.'s Motion for Summary Judgment at pgs. 1-2.

¹⁷⁴ Affidavit [sic] of Wade Benson ¶ 1.

¹⁷⁵ Affidavit [sic] of Wade Benson ¶ 2.

¹⁷⁶ Affidavit [sic] of Wade Benson ¶ 3.

¹⁷⁷ Affidavit [sic] of Wade Benson ¶ 4.

¹⁷⁸ See Response of Petitioner, Denise M. Cordes, Executrix of the Estate of Leland W. Benson, Jr., Deceased, in Opposition to Supplement to Daniel Lipperini's Motions and Briefs at pgs. 1-2 (April 5, 2021).

¹⁷⁹ See Response of Petitioner, Denise M. Cordes, Executrix of the Estate of Leland W. Benson, Jr., Deceased, in Opposition to Supplement to Daniel Lipperini's Motions and Briefs at pg. 2.

unreliable as inconsistent with his own prior responses, as well as the testimony of other, disinterested witnesses.¹⁸⁰

Finally, on April 6, 2021, again without leave of Court or concurrence of opposing counsel, Respondent Lipperini filed an Addendum to his Motion for Summary Judgment. This Addendum includes those excerpts of Petitioner's responses to Wade and Stephanie Benson's Interrogatories that Respondent Lipperini contends constitute a waiver of the Dead Man's Act.

i. The Burden of Proof as to Ownership

Clarification is first necessary as to the applicable burden of proof for the implementation of the Dead Man's Act. In a replevin action, the burden first falls upon the representative of the Estate to demonstrate the deceased party's interest in the item subject to the action. However, actual interest need not be proven; evidence of a *prima facie* interest is sufficient.¹⁸¹ This *prima facie* interest may be demonstrated by "competent evidence or by admission[;]" the burden will then shift to the party disputing the decedent's ownership.¹⁸² Further, *prima facie* evidence that the decedent co-owned property with another individual claiming a full ownership right after death is sufficient to preclude the other individual's testimony under the Dead Man's Act.¹⁸³

Unlike the three Shelys for which there are Certificates of Title or MSOs evincing Decedent's ownership, Decedent's purported ownership of the the orange Corvette shell, CSX4018 Cobra frame, and GT-40 frame rests largely on Decedent's possession of these assets prior to his death. Cheryl Romanell details in her deposition

¹⁸⁰ See Response of Petitioner, Denise M. Cordes, Executrix of the Estate of Leland W. Benson, Jr., Deceased, in Opposition to Supplement to Daniel Lipperini's Motions and Briefs at pgs. 3-5.

¹⁸¹ *In re Rider's Est.*, 409 A.2d 397, 400 (Pa. 1979) (citation omitted).

¹⁸² See e.g., *In re Pappas' Est.*, 239 A.2d 298, 300 (Pa. 1968) (citation omitted) (emphasis added) ("Common sense dictates that, once it has been established by competent evidence or by admission, that stock certificates were registered in the decedent's name when he died and in his possession so shortly before he died, the person who disputes decedent's ownership of the stock at that time must come forward with evidence to sustain such lack of ownership."); see also *In re Hendrickson's Est.*, 130 A.2d 143, 145 (Pa. 1957) (holding the decedent's possession of a ring for sixteen years and the ring being listed among the inventory of decedent's possessions was sufficient to prove *prima facie* ownership); *Whitenight v. Whitenight*, 278 A.2d 912, 914 (Pa. 1971) (holding that the stipulation of the parties that the testator had purchased the bonds with money from his individual bank account, corroborated by testimony and by bank records, made out a *prima facie* case of ownership in the testator).

¹⁸³ See e.g., *Rider's Est.*, 409 A.2d at 399-400 (holding that once testator has established a *prima facie* interest in in property co-owned by the decedent as part of a partnership interest, the Dead Man's Act would render the living partner incompetent to testify as to his alleged sole interest in the property).

testimony that Decedent and Daniel Lipperini, Jr. had been working on a Corvette project together dating back to at least 2012.¹⁸⁴ Petitioner represented that the Corvette shell and CSX4018 Cobra frame were located at Decedent's shop as of June 9, 2018, and the GT-40 frame remained in the basement of Decedent's residence on that date.¹⁸⁵ Petitioner further testified at deposition that her father owned the Grand Sport Corvette, and was in the process of building it into a completed vehicle for Reno Rivalta.¹⁸⁶ Petitioner has identified various witnesses she anticipates to call at trial who will testify to the ownership of these items.¹⁸⁷

Respondent Lipperini, for his part, contends that Decedent gave him a reproduction shell, a reproduction car frame, and car parts in compensation for Respondent Lipperini's investment of over \$10,000.00 into a Kit Car building project that he and Decedent had been working on together (the Court assumes this refers to the Grand Sport Corvette). Respondent Lipperini had also brought Decedent two "donor" cars, which Respondent Lipperini had purchased for Decedent to harvest for parts. Respondent Lipperini avers that he retrieved the shell, frame, car parts, and two donor cars at Decedent's direction prior to his death.¹⁸⁸ The Court is satisfied that this admission, in conjunction with the representations of Cheryl Romanell and Denise Cordes, is sufficient *prima facie* evidence that Decedent had a full or partial ownership interest in the contested assets, and therefore holds that the Dead Man's Act will preclude Daniel Lipperini, Jr. from testifying in his own interest lest he render himself competent through independent evidence.

ii. The Burden of Proof as to Insolvency

A presumption of insolvency will occur when a debtor fails to pay debts as they become due for reasons other than a *bona fide* dispute as to the validity of the debt. Once this presumption arises, a gift claimant or party averring a valid transfer of assets

¹⁸⁴ See Deposition of Cheryl Romanell at pg. 32, Ins. 6-24.

¹⁸⁵ See Petitioner Denise M. Cordes' Objections and Supplemental Answers to Respondents Leland Wade Benson and Stephanie Benson's First Set of Interrogatories, Answer to Interrogatory 14.

¹⁸⁶ See Deposition of Denise Cordes, pg. 65, Ins. 11-24; pg. 66, Ins. 1-24; pg. 67, Ins. 1-11.

¹⁸⁷ See Petitioner Denise M. Cordes' Objections and Supplemental Answers to Respondents Leland Wade Benson and Stephanie Benson's First Set of Interrogatories, Answer to Interrogatory 4.

¹⁸⁸ See Brief in Support of Daniel Lipperini's Motion for Summary Judgment at pg. 1 (March 2, 2021).

for consideration must rebut the presumption by proving that the nonexistence of insolvency is more probable than its existence.¹⁸⁹

The record reflects that various claims have been filed against Decedent's Estate.¹⁹⁰ Petitioner represents that the Estate is insolvent, and so a liquidation of assets is necessary to pay the Decedent's debts.¹⁹¹ The Court finds this evidence sufficient to create a presumption of insolvency that Respondent Lipperini now bears the burden of rebutting. However, the Estate's insolvency will only become an issue if Respondent Lipperini can first prove a valid transfer of the contested assets.

iii. Waiver

A representative of an estate may waive the disqualification of an adverse party by deposing the adverse party or requiring the adverse party to answer interrogatories.¹⁹² Moreover, waiver has been found when the decedent's representative has introduced into evidence at trial the adverse party's statement, made at the pretrial conference, as to events transpiring prior to the decedent's death.¹⁹³ The rationale behind the waiver doctrine is that "such forms of discovery are equivalent to placing the adverse party on the witness stand" and would unfairly "enable one party to search the conscience of his adversary, drag to light his private papers and other evidence, and then repudiate the result, if the experiment proved unsatisfactory."¹⁹⁴ However, taking the deposition of a non-party witness without an interest in the outcome of the case will not constitute a waiver.¹⁹⁵ Further, waiver does not apply regarding discovery conducted by a party other than that asserting the privilege afforded by the Dead Man's Act.¹⁹⁶

¹⁸⁹ 12 Pa.C.S. § 5102(b).

¹⁹⁰ These include the claim of John Cropper, filed on July 9, 2018, the claim of Reno Rivalta, filed on October 17, 2018, and the claim of Barry Smith, filed on April 15, 2019.

¹⁹¹ Deposition of Denise Cordes at pg. 130, Ins. 18-23 ("My belief right now is the estate is insolvent, so it doesn't matter what the . . . distribution of will calls for. . . . [B]ecause the estate is insolvent, all of the assets would need to be sold to satisfy the creditors.").

¹⁹² *Davis v. Wright*, 156 A.3d 1261, 1269 (Pa. Super. 2017) (quoting *Schroeder v. Jaquiss*, 861 A.2d 885, 889 (Pa. 2004)).

¹⁹³ *Id.* (citing *Flagship First Nat. Bank of Miami Beach v. Bloom*, 431 A.2d 1082 (Pa. Super. 1981)).

¹⁹⁴ *Id.* (quoting *Perlis v. Kuhns*, 195 A.2d 156, 159 (Pa. Super. 1963) (en banc)).

¹⁹⁵ *See id.* at 1269-70 (holding that the representative of the estate did not waive the protections of the Dead Man's Act by taking the deposition of a police officer who filed the investigation report regarding the car accident that resulted the decedent's death).

¹⁹⁶ *See Kuna v. Lake Sheridan Cottagers Ass'n*, 2 Pa. D. & C. 5th 290, 305 (Lacka. Cty. 2007) (citing *Schroeder v. Jaquiss*, 861 A.2d at 890) ("In *Schroeder*, . . . the court limited an absolute application of the

The Court is unaware of, and Respondent Daniel Lipperini has not cited to any case law holding that an estate representative waives the Dead Man's Act by responding to discovery requests. The Court does not find waiver, therefore, based on Petitioner's responses to the Respondents' Interrogatories. The production of the police report presents another question. Before the filing of the Petition to Recover Assets, Petitioner engaged the police to assist in locating and returning missing Estate assets. The Court finds that Petitioner engaging the police prior to initiating suit does not constitute a waiver of the Dead Man's Act.¹⁹⁷ The police report includes statements of Respondent Lipperini, as well as statements from other Respondents, relating to pre-death interactions with Decedent relevant to the Respondents' claims against the Estate. Introducing such statements into evidence would constitute a waiver of the Dead Man's Act, as it is clear from the case law that Petitioner may not selectively introduce Respondents' statements as to pre-death interactions with the Decedent without affording the Respondents the opportunity to rebut or explain these statements.

However, the police report falls outside the "record" a Court may consider for the purpose of summary judgment. "[A] motion for summary judgment cannot be supported or defeated by statements that include inadmissible hearsay evidence."¹⁹⁸ For the purposes of summary judgment certain limited types of hearsay, such as expert reports, affidavits, or responses to interrogatories are afforded the status of in-court testimony and may be used to support a summary judgment motion.¹⁹⁹ However, Respondent Lipperini's statements as recounted in the police report do not fall into one of these recognized hearsay exceptions. Indeed, because Respondent Lipperini's

Dead Man's Act by providing that waiver of the Dead Man's Act does not apply to discovery not conducted by the party asserting the privilege.").

¹⁹⁷ *Cf. Olson*, 658 A.2d at 364–65. As per *Olson*'s operative facts, David A. Olson and Thomas E. Jones were the sole shareholders and officers of North American Industrial Supply, Inc. ("NAIS"). In 1972, Olson and Jones executed a stock redemption agreement by which each agreed to transfer his NAIS shares back to the company upon his death. The purchase price was to be set at the book value of the corporation, to be reevaluated quarterly, and the goodwill value, to be predetermined yearly. Upon Olson's death, a dispute arose between his the executrix of his estate and Jones as to the appropriate valuation of Olson's shares. The executrix requested documentary evidence as to NAIS' finances, and thereafter filed a declaratory judgment action asking the court to assess the appropriate book and goodwill values. The trial court held that Thomas Jones was precluded under the Dead Man's Act from testifying as to alleged conversations with the decedent in which they orally agreed to maintain the goodwill value at \$10,000.00 per year. On appeal, the Superior Court affirmed that the Dead Man's Act had not been waived, notwithstanding the executrix's document request prior to initiating the suit.

¹⁹⁸ *Botkin v. Metro. Life Ins. Co.*, 907 A.2d 641, 649 (Pa. Super. 2006).

statements are indirectly conveyed through a police report, there is “double hearsay” and Petitioner must establish separate hearsay exceptions by which the police report and statements within are admissible.²⁰⁰ While the statements of Respondent Lipperini would presumably be admissible at trial as the statement of a party opponent under Pa.R.E. 803(25), insufficient evidence has been offered to demonstrate the report itself would fall into the “business record” hearsay exception under Pa.R.E. 803(6) or into another recognized hearsay exception.²⁰¹ Trooper Maggs, who drafted the report, has been listed within Petitioner’s Pretrial Memorandum as a trial witness, presumably so he can relay the contents of his report.

As previously stated, the police report was attached as an exhibit to Petitioner’s Motion for Summary Judgment. However, as the Court does not consider the police report admissible evidence to support Petitioner’s Summary Judgment Motion, it finds no waiver has occurred at this juncture. However, should Petitioner enter the police report into evidence at trial, the Court agrees this would constitute a waiver of the Dead Man’s Act. Petitioner cannot selectively admit the Respondent Lipperini’s prior statement regarding his pre-death interactions with Decedent while precluding Respondent Lipperini from clarifying or elaborating upon that statement. However, the Court holds that Trooper Maggs would be able to testify at trial as to his investigation and Respondents’ statements as to post-death occurrences. Petitioner could also admit into evidence a version of the police report redacting the Respondents’ statements as to their pre-death interactions with Decedent without this constituting waiver.

C. Conclusion

Upon consideration of the record, the Court determines that Petitioner’s Motion for Summary Judgment as to Respondent Lipperini must fail pursuant to the rule in

¹⁹⁹ See Pa.R.C.P. 1035.1.

²⁰⁰ See *D’Alessandro v. Pa. St. Police*, 937 A.2d 404, 416 (2007) (J. Saylor concurring) (citations omitted) (“[W]hen a [police] report contains the out-of-court statements of individuals, those statements constitute ‘double hearsay’ and are admissible only if there is a separate hearsay exception to support the admission of each one.”).

²⁰¹ See e.g., *Liles v. Balmer*, 567 A.2d 691, 693 (Pa. Super. 1989) (affirming trial court’s holding that police report and hospital records were not admissible to support plaintiff’s motion for summary judgment when plaintiff had failed to demonstrate that the documents met all requisite factors of the “business records” exception).

Nanty-Glo.²⁰² It is the well-established principle within the Commonwealth that “oral testimony alone, of the moving party or the moving party’s witnesses, i.e., affidavits or depositions, even if uncontradicted, is generally insufficient to establish the absence of a genuine issue of material fact.”²⁰³ Indeed, *Nanty-Glo* extends even to the testimony of witnesses disinterested in the outcome of the case, “[as] credibility is an issue solely for the jury to determine, whether it be the credibility of an interested or a disinterested witness.”²⁰⁴ While this case is going to bench trial, the same issues are implicated when the Court is asked to assess credibility based purely on written averments. The Court finds that Petitioner cannot establish a *prima facie* case for the Estate’s ownership of the disputed assets, or for Estate’s insolvency but for the testimony of its own witnesses.

The rule in *Nanty-Glo* similarly overcomes Respondent Lipperini’s Motion for Summary Judgment. As previously discussed, when considering the testimony of Denise Cordes, Cheryl Romanell, and admissions of Respondent Lipperini collectively, the Court found the Estate had demonstrated a *prima facie* ownership or co-ownership interest in the disputed assets. The Court also found that Denise Cordes’ testimony, supported by the various claims filed against the Estate, was *prima facie* evidence of the Estate’s insolvency. The burden then falls on Respondent Lipperini either to provide evidence rebutting the Estate’s ownership interest, or to prove a valid *inter vivos* transfer of assets for consideration. Respondent Lipperini’s Motion for Summary Judgment relies solely on the representations made in his own pleadings and the late-filed Affidavit of Wade Benson. Beyond the fact that the Court has determined Respondent Lipperini is incompetent to testify in support of his own claim under the Dead Man’s Act, his testimony, even if admissible, could not support a summary judgment motion. Nor could the testimony of Wade Benson. Ultimately, when witness credibility is at issue, the matter shall be reserved for trial.

²⁰² See *Nanty-Glo v. American Surety Co.*, 163 A. 523, 524 (Pa. 1932) (citation omitted) (“However clear and indisputable may be the proof when it depends on oral testimony, it is nevertheless the province of the jury to decide, under instructions from the court, as to the law applicable to the facts, and subject to the salutary power of the court to award a new trial if they should deem the verdict contrary to the weight of the evidence.”).

²⁰³ *Bailets v. Pa. Tpk. Comm’n*, 123 A.3d 300, 304 (Pa. 2015) (citations omitted).

²⁰⁴ *Garcia v. Savage*, 586 A.2d 1375, 1379 (Pa. Super. 1991) (abrogated on other grounds by *Harber Philadelphia Ctr. City Off. Ltd. v. LPCI Ltd. P’ship*, 764 A.2d 1100, 1103 (Pa. Super. 2000)).

Pursuant to the foregoing, Petitioner's Motion for Summary Judgment against Respondent Daniel Lipperini, Jr. and Respondent Daniel Lipperini Jr.'s Motion for Summary Judgment are both DENIED.

Analysis – Respondents Wade and Stephanie Benson

Within their Answer to the Petition to Recover Assets, Respondents Wade and Stephanie Benson ("Respondents Benson") claim that prior to his death, Decedent gifted two tractor trailers and their contents to Wade Benson. However, Respondents Benson elaborate that in an effort to avoid litigation, Wade Benson turned over the trailers and their contents to Petitioner upon her demand.²⁰⁵ Respondents Benson contend that they do not retain any of the Decedent's assets and "have not acted in any manner with relation to the disappearance of [D]ecedent's assets."²⁰⁶

Petitioner in her Motion for Summary Judgment contends that Respondents Benson, to the extent they claim an ownership interest of any vehicle parts or other assets removed from Decedent's residence or business location, are barred from testifying in support of their claim under the Dead Man's Act.²⁰⁷ Petitioner further asserts that Respondents Benson have failed to demonstrate a valid transfer of the assets via *inter vivos* gift. While acknowledging that the deposition testimony of Denise Cordes and of Cheryl Romanell speaks to Decedent's intent immediately prior to his death to transfer assets to Wade Benson so that Wade could continue the All Pros business, Petitioner contends that no independent evidence demonstrates that Decedent effectuated a gift prior to his death.²⁰⁸

As previously mentioned, Respondents Benson have not filed a response to Petitioner's Motion for Summary Judgment, although so directed by this Court's Scheduling Order docketed February 25, 2021. The Court may enter summary judgment against a party who fails to respond to a summary judgment motion.²⁰⁹ The Court elects to do so in this case.

²⁰⁵ Answer to Executrix's Petition for Citation to Show Cause Why Assets Should Not Be Returned to the Estate for Accounting and Unjust Enrichment ¶ 62 (April 15, 2019).

²⁰⁶ Answer to Executrix's Petition for Citation to Show Cause Why Assets Should Not Be Returned to the Estate for Accounting and Unjust Enrichment ¶¶ 82, 87, 99, 100.

²⁰⁷ See Petitioner's Motion for Summary Judgment ¶¶ 186-194.

²⁰⁸ See Petitioner's Motion for Summary Judgment ¶¶ 195-202.

²⁰⁹ Pa.R.C.P. 1035.3(d) ("Summary judgment may be entered against a party who does not respond.")

Petitioner's Motion for Summary Judgment against Respondents Wade and Stephanie Benson is hereby GRANTED. Respondents Benson are hereby ORDERED and DIRECTED to provide Petitioner within thirty (30) days of the date of this Order a full Accounting, *inter alia*, of any trailers, automobiles, frames, shells, bodies, molds, parts, tools, chassis, or other business assets removed from Decedent's residence or the All Pros business residence from November 1, 2017 to the present date. This Accounting shall, to the fullest extent possible, record the dates these items were removed from Decedent's residence or the All Pros business location and the date they were returned, assuming they were returned. The Accounting shall also record the transfer of assets to any third parties. Respondents are further ORDERED and DIRECTED to return to Petitioner within forty-five (45) days of the date of this Order all items of the Estate that remain within their possession, or which they have temporarily assigned to the possession of a third party. The Court declines to award attorneys' fees at this juncture, but may reconsider this determination upon full development of the factual record at trial. Further, the Court will defer determination as to whether Respondents Benson are liable to compensate the Estate for dissipation of assets.

The Court notes that Respondents Wade and Stephanie Benson have offered to execute and file a release of their interest in any assets of the Estate in order to be rendered competent to testify at trial.²¹⁰ Petitioner in her First Motion *in Limine* cites the decision of the Beaver County Orphans' Court in *Firkaly Estate* for the proposition that a release is valid only, "[if] made prior to the inception of the litigation and not merely for the purpose of qualifying the witness on the eve of or during the trial and further, provided that such [release or extinguishment] is found by the trial judge to have been made in good faith."²¹¹ However, the Court is satisfied that a release of all claims against the Estate would inherently be in good faith. "[A] validly executed and effective release given to the adverse party, as distinguished from a possibly colorable assignment of the interest to a third person, could scarcely be other than in good faith,

²¹⁰ See 42 Pa.C.S. § 5932 ("Any person who is incompetent under section 5930 (relating to surviving party as witness, in case of death, mental incapacity, etc.) by reason of interest. . . shall. . . become fully competent for either party by filing of record a release or extinguishment of his interest.")

²¹¹ Petitioner's Motion in Limine to Preclude Respondents from Offering Any Testimony or Argument at Trial Relative to Their Pre-Death Conversations with Decedent Leland W. Benson ¶ 98 (April 9, 2021) (quoting *Firkaly Est.*, 11 Fiduc. Rep. 565, 566 (O.C. Beaver Cty. 1961)).

the question of motive being immaterial.”²¹² Therefore, should Respondents Benson execute and file such a release, the Court will deem them competent to testify at trial as to all matters, irrespective of any prior claim they may have had against the Estate.

IT IS SO DECREED this 23rd day of July 2021.

BY THE COURT,

Eric R. Linhardt, Judge

ERL/cp

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²¹² *Dellacasse v. Floyd*, 2 A.2d 860, 861–62 (Pa. 1938). Those cases finding a lack of a good faith release of interest involve a claimant’s assignment of estate assets to a third party. For example, in *Philo v. Rought*, 123 A.2d 168 (Pa. 1956), the Pennsylvania Supreme Court held that because a claimant did not release her interest in the estate, but rather assigned her interest to her mother, she would be unable to testify under the Dead Man’s Act absent a showing that the assignment was made in good faith. See also *In re Lynch’s Est.*, 235 A.2d 412, 414 (Pa. 1967) (quoting *Darragh v. Stevenson*, 39 A. 37, 38 (Pa. 1898)) (“[A]n assignment by a party to a controversy, made only for the purpose of enabling him to sustain the suit by his testimony, is not made in that good faith which the [Dead Man’s Act] intends.”).