

But we do not view it as a business record. Special legislation was passed to admit the certificate of the testing station. Ordinarily to show that the testing device was accurate, the person who made the test would have to be called to say what he did and what he found. That could be cumbersome. In light of that problem, the legislature permitted the issuance of a certificate. It seems to be no burden or hardship on the Commonwealth to produce the original certificate with the original signature on it. As to admissibility of business records, generally they are not made in contemplation of a law suit. However, these certificates are made with the full knowledge of the Commonwealth that the accuracy of the testing device will be called in a trial. *Commonwealth v. Gerscheimer*, 276 Pa. Super 418, 419 A.2d 528, 530 (1980) has spoken clearly on the matter in a case involving the testing of radar devices, saying:

[The Commonwealth] must introduce a Certificate of Electronic Device (radar) Accuracy into evidence. The Certificate of Electronic Device (radar) Accuracy must be signed by the person who performed the tests and the engineer in charge of the testing station, must show that the device was accurate when tested. . . .”

This Opinion is filed in support of our decision to dismiss the case because the Commonwealth was not prepared to introduce a certificate of timing device accuracy as required by law.

SHAW ESTATE, C.P., Franklin County Branch, No. 74-1982

*Defeasible Life Estate - Agreement to Sell Real Estate - Unascertained Remainderman*

1. Where a testator bequeaths a life estate in real estate conditioned on the beneficiary residing in the house as a sole, single adult, he creates a defeasible life estate.
2. The beneficiary of a defeasible life estate does not have a life tenancy which is alienable.
3. In reviewing a proposed agreement between the executor of the decedent's estate and the conditional life tenant, the Court has a duty to

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## CHAMBERSBURG TO SPONSOR PBI FIDUCIARY INCOME TAXES PROGRAM

In cooperation with the Franklin County Bar Association, the Pennsylvania Bar Institute will present its specially-produced videotape, "Fiduciary Income Taxes," in Chambersburg on Tuesday, June 28, 1983. The program will be held at the Franklin County Courthouse from 9:30 a.m. to 10:30 a.m. Registration will begin at 9:00 a.m.

Topics to be examined during this session are: Dividing Income Between Decedent, Estate and Beneficiaries; Deductions, including those Unique to Estates; Distributable Net Income; and Estate Planning Techniques.

Tuition is \$20.00. Each registrant will receive course materials. For additional information, call PBI toll-free, (800) 932-4637 or contact your local CLE Chairperson, Robert E. Graham, Jr., (717) 264-1100.



### BAR NEWS ITEM

The editor has received brochures from the Pennsylvania Bar Institute, concerning continuing education seminars available at various locations throughout the summer.

There is quite a wide range of programs available, from Fiduciary Income Taxes, Family Law, Federal Appellate Practice, Bankruptcy, and Public Employee Labor Law, through Pennsylvania Legal Practice and Social Security Disability Compensation, and we are not here attempting to limit the list alphabetically. There are also tape cassettes and other study aids available.

Quite obviously, the PBI wanted us to make a news release about these matters, but the brochures, themselves, are the best source of information. Anyone interested should write The Pennsylvania Bar Institute, P.O. Box 1027, Harrisburg, PA 17108, or telephone the PBI at (800) 932-4637 (calls from Pa., only).

uphold the testator's intentions and to act in the best interests of unascertained remaindermen.

4. Approval of a sale giving part of the proceeds to a conditional life tenant who is legally entitled to nothing, is not in the best interest of unascertained remaindermen.

*Barbara Townsend, Esquire*, Counsel for Estate of James M. Shaw, Sr.

*Denis DiLoreto, Esquire*, Counsel for David Shaw & James Shaw, Jr.

*William Kaye, Esquire*, Counsel for Patricia Slayton

*David Rabauser, Esquire*, Guardian ad litem for Unascertained Heirs

### OPINION AND ORDER

EPPINGER, P.J., February 28, 1983:

This is a petition asking the Court to approve the sale of devised property. James M. Shaw, Sr. died testate on August 5, 1981. His last will and testament was probated on August 11, 1981 and letters testamentary were issued to Maryann Strait, his daughter. The testator left a defeasible life estate to Patricia Slayton, who was not related to him. The third paragraph of his will states:

I give, devise, and bequeath a conditional life estate in my residential property and my personal property contained therein to Patricia A. Slayton conditioned upon her residing in my house as a sole, single adult. Upon her leaving the house to reside elsewhere, cohabiting in my house with another adult, or her marriage, whichever comes sooner, then the remainder of my interest in my house and personal property shall pass into the rest, residue and remainder of my estate.

The fourth paragraph devises and bequeaths the remainder to his legitimate heirs per stirpes.

On May 10, 1982, Patricia Slayton and Maryann Strait entered into an agreement to sell the residential property, which provided that 60% of the proceeds of the sale should go to the estate and the remaining 40% to Slayton. The agreement further provides that it shall be submitted to this court for approval. This court has the jurisdiction and duty to determine whether the sale is in the best interest of the beneficiaries. *In re Estate of Penrose*, 486 Pa. 9, 403 A.2d 982 (1979).

The executrix alleges that a sale is desirable because the conditional life tenant, Slayton, is younger than the testator's children; that the sale would provide prompt and certain receipt of funds and permit prompt distribution of the estate. The very fact of Slayton's age raises the distinct possibility that some of testator's children may predecease her should she fulfill all of the conditions and continue to live in the home until her death.

The court has a duty to the unascertained remaindermen and it is not clear that it would be in their best interest to approve this sale. The court also has a duty to uphold the testator's intentions which are clearly not to sell the property and give 40% of the proceeds to Slayton. *Lifter Estate*, 377 Pa. 227, 103 A.2d 670 (1954). Slayton does not have a life tenancy which is alienable. She is given the right to reside in the residence upon certain conditions. Should she not violate those conditions, she may stay there for her lifetime. What is proposed here is a direct violation of those conditions. If the property is sold, she moves out and her interest is defeated. The interest she has is not alienable and she would not be entitled to any of the proceeds from the sale. *Sinnott's Estate*, 53 Pa. Super 383, (1913). *McMaster's v. Shellito*, 14 Pa. Super 302 (1900). To approve such a sale which would give Slayton 40% when she would be entitled to nothing is not in the best interests of the remaindermen, ascertained and unascertained.

The estate alleges that the unborn issue are not a bar to such a sale because the only requirement is that a trustee ad litem be appointed. Clearly, a trustee ad litem is appointed for a reason: to protect the interests of such unborn issue. In this case, the trustee ad litem has been appointed and opposes such sale as not being in their best interests. Moreover, certain of the decedent's children have appeared and object to the sale. Their choice may be a risky one; that is that they may never come into any part of the inheritance because Slayton may survive one or all of them. But that is their decision to make and the court respects it.

The estate contends that the sale is desirable since in the event of nonpayment or default on the mortgage by Slayton, the estate would be liable for the remaining mortgage payments. Even if this were the case, this argument is not so weighty as to convince the court that a sale would be in the best interests of the unborn issue or the protesting remaindermen.

Accordingly this court declines to approve the agreement between Slayton and Strait.

#### ORDER OF COURT

February 28, 1983, the prayer of the petition to approve the sale is denied. Costs including the guardian ad litem's fee shall be paid by the estate. The guardian shall submit his fee for approval before it is taxed.

SANDERS V. CARBAUGH, C.P., Franklin County Branch, No. 1982 - 175

*Trespass - Amended Complaint - Statute of Limitations*

1. The general rule is that a plaintiff may not amend a complaint to introduce a new cause of action after the statute of limitations has run.
2. A new cause of action is alleged where the same defense is not open to each, the same proof is not required and the measure of damages are not the same.
3. Averments alleging ordinary negligence may not be amended after the statute of limitations has run in order to allege negligence per se.

*John N. Keller, Esquire, Counsel for the Plaintiff*

*William F. Martson, Esquire, Counsel for the Defendant*

#### OPINION AND ORDER

EPPINGER, P.J., March 3, 1983:

Bryan A. Sanders was injured in a one-car collision which occurred on September 21, 1980. The complaint alleging that Carbaugh, the driver, was careless and negligent, was filed on August 23, 1982 within the two-year statute of limitations. 42 Pa. C.S.A. Sec. 5524(2). On December 22, 1982, Sanders filed a petition for leave to amend the complaint to add allegations of negligence by reason of violations of specific sections 3361, 3301 and 3714 of the Vehicle Code, 75 Pa. C.S.A. and further damages.

The general rule is that a plaintiff may not amend a complaint to introduce a new cause of action after the statute of limitations has run. *Mussolino v. Coxe Bros. and Co., Inc.*, 357 Pa. 10, 53 A.2d 93 (1947). A new cause of action is alleged where the same defense is not open to each, the same proof is not required and the measure of damages are not the same. *Arlia v. Philadelphia Transportation Company (No. 1)*, 77 D&C 21 (1951).