substantial rights of the parties." Plaintiff does not argue that he has been prejudiced by the delayed response. We will, therefore, proceed to rule on the merits of the discovery request here at issue.

Pa.R.C.P. No. 4011(e) limits the scope of discovery where a request "would require the making of an unreasonable investigation by . . . any party . . ." The standard of unreasonableness to be applied by the courts is an indefinite one. An inquiry may be found to be unreasonable if it necessitates sifting through large numbers of records or documents. The proper limits of a search, however, requires a case-by-case analysis. Pennsylvania Standard Practice 2d §34:23-24. It bears noting that the issue of reasonableness is strongly linked to that of relevancy. *Id.*

Plaintiff argues in his brief in support of the motion to compel that his request for production of documents is not unduly burdensome since it is believed that accident report files, separate from the individual machine history files, are maintained by Defendant. Defendant has conceded that such accident reports do, in fact, exist. Post-argument correspondence directed to the Court by counsel for both parties indicates some common ground regarding a search of accident or other reports maintained by Defendant. Based on this correspondence, we will order that a search be conducted of any accident or incident reports, including any notices related thereto, which are maintained by Defendant. Any such report or notice which relates to the sudden, rapid, undesired or unexpected descent of a boom in which an orifice was not installed must be produced for inspection by Plaintiff. To the extent that machine history files must be individually searched. we will limit the extent of that search to those 40-foot lifts in which an orifice was not installed at the time of production. This limitation is intended to narrow the search to those lifts which remained unaffected by the 1975 engineering release form. If Defendant finds that such a search remains overly burdensome, it may seek further direction from the Court.

With respect to the motion for release of deposition transcripts, the Court is satisfied that Plaintiff has already been provided with those portions of the transcripts which relate to Defendant's record-keeping practices.

The requested relief in Plaintiff's motion is that the depositions be released for use "in the fair determination of the two Motions currently pending before the Court in this matter." We find that the depositions have been utilized as requested in Plaintiff's motion and that no further order regarding the depositions is necessary.

We will, accordingly, enter the attached order.

ORDER OF COURT

AND NOW, this 5th day of February, 1991, it is hereby ordred that Plaintiff's Motion for Leave to File Amendment to Complaint is denied, Plaintiff's Motion to Compel Discovery is granted, subject to the limitations set forth in the foregoing opinion, and Plaintiff's Motion for Order Authorizing Release of Deposition Transcripts is denied.

FIRST NATIONAL BANK AND TRUST COMPANY OF WAYNESBORO, TRUSTEE V. LONG, ET AL., C.P. Civ. D., Franklin County Branch, No A.D. 1991-31*

Declaratory Judgment - Interpretation of Trust - Closing of Class

1. Where nothing appears to the contrary, the members of the class will be ascertained as of the date of death of the testator.

Jeffrey S. Evans, Esquire., Attorney for Plaintiff
Joseph A. Macaluso, Esquire, Guardian for Living great-grandchildren
Richard K. Hoskinson Esquire, Guardian for unborn great-grandchildren

KAYE, J., September 24, 1991:

OPINION

On February 4, 1976, Hazel M. Rinehart (hereafter "testatrix") executed her last will and testament. Thereafter, on April 9, 198

* Editor's Note: See, also, O.C. #90 Of1991, O.C. Doc Vol. 097 page 769, for transferred record.

she executed a codicil to the will. Testatrix died on August 10, 1989.

Testamentary documents alluded to above provided, *inter al.*, as follows:

> III. I give, devise and bequeath the rest and residue of my proprty, real and personal, to First National Bank & Trust Company, Waynesboro, Pennsylvania, in trust, nevertheless to administer, invest, reinvest and distribute for the following purposes:
>
> A. To pay the net income therefrom quarterly to or *for the benefit of my grandchildren and my great-grandchildren who may survive me* per capita and not per stirpes.
>
> B. Upon the youngest *of my surviving grand-children* reaching the age of twenty-five (25) years, their portion of this trust shall terminate as to *my surviving grand-children* and their portion of the principal and undis-tributed income shall be distributed to them per capita and not per stirpes. That portion of *my surviving great-grandchildren* shall be continued to be held in trust until the youngest of them reaches the age of eighteen (18) years, at which time, their portion of the principal and undistributed income shall be distributed to them per capita and not per stirpes. [Emphasis added].

First National Bank & Trust Company, Waynesboro, Pennsylvania (hereinafter "trustee") has brought the instant action for a declaratory judgment, alleging that a dispute exists between it and the defendant-beneficiaries. The complaint avers that the youngest of the testatrix's grandchildren has reached twenty-five (25) years of age, thereby requiring distribution of a portion of the principal and undistributed income to the grandchildren. The dispute which is sought to be resolved herein involves what portion of the trust corpus and income currently is distributable to the grandchildren. A determination of that issue also requires our resolution of the question of when the class of great-grandchildren closes (or closed) under the terms of the will and codicil. A determination regarding the size of the class of great-grandchildren will, of course, directly affect the amount of the

distribution to be made at the present time to the testatrix's grandchildren, as the documents which created the trust provided for a per capita distribution. We note that the testatrix's five grandchildren, two great-grandchildren and yet unborn great-grandchildren, who are prepresented by a guardian ad litem, have all been joined as defendants. Briefs have been filed by all parties and accordingly, we find that the matter is ripe for our resolution.

We observe preliminary that this action was not filed with the Orphans' Court Division of the Court. As the issues involved require our interpretation of the terms of a testamentary trust, we believe that exclusive jurisdiction properly lies before the Orphans' Court. *See* Section 711(2) of the Probate, Estates and Fiduciaries Code, 20 Pa. C.S. §711(2). We will, therefore, order that this case be transferred to our Orphans' Court Division.

In construing the terms of a testamentary trust, the goal is to determine the actual intent of the testatrix. "[W]here the language used by the testator is plain and clearly disclosed his intention, no rules of construction are necessary to arrive at an interpretation..." *Earle Estate,* 369 Pa. 52, 56, 85 A.2d 90, 92 (1951). In determining testamentary intent "'a court examines the words of the instrument and, if necessary, the scheme of distribution, the circumstances surrounding execution of the will and other facts bearing on the question.'" *McDowell National Bank v. Applegate,* 479 Pa. 300, 304, 388 A.2d 66, 668 (1978) [quoting *Estate of Sykes,* 477 Pa. 254, 257, 383 A.2d 920, 921, 1978)].

We believe the intent of the testatrix in establishing the trust at issue is clear from the language employed by the testatrix. The terms provide that the class of grandchildren and great-grandchildren who are beneficiaries of the trust are those "who may survive me". The testatrix repeatedly refers to the trust beneficiaries as "my surviving grandchildren" and "my surviving great-grandchildren". We think it is clear that the intent of the testatrix was that the class of beneficiaries be closed and determined as of the date of her death, which occurred on or about August 10, 1989. Such an interpretation is consistent with the general rule that "where nothing appears to the contrary the members of the class will be ascertained as of the date of the death

of the testator. . ." *In re Trattner's Estate,* 394 Pa. 133, 136, 145 A.2d 678, 680 (1958).[1] Moreover, "[o]ur rule of construction, applied to survivorship, has been held to refer to the time of death of the testator unless a contrary intent appears in the will. . ." *Nass's Estate*, 320 Pa. 380, 382, 182 A.401, 403 (1936). Thus, we conclude that the class of beneficiaries of the trust here at issue consists of the testatrix's grandchildren and great-grandchildren who were alive at the time of her death. The parties agree that testatrix's five grandchildren and two great-grandchildren named as party defendants in the instant case were all alive at the time of testatrix's death in August, 1989. The class, accordingly, consists of seven members. Since the will provides for a per capita distribution of the principal and undistributed income, such should be divided into seven equal parts for distribution. Five-sevenths of the principal and undistributed income is currently subject to distribution to the testatrix's grandchildren under the terms of the testamentary trust. The remaining portion of the principal should remain in trust for the benefit of the testatrix's two surviving great-grandchildren until the yonger of them reaches the age of eighteen (18) years. At that time the remaining two-sevenths of the principal and undistributed income will be subject to distribution.

We will, accordingly, enter the attached order granting declaratory relief to the Trustee pursuant to the foregoing opinion.

ORDER OF COURT

NOW, this 24th day of September, 1991, it is hereby ordered that the above-captioned matter be transferred to the Orphans' Court Division of the Court. It is further ordered that Plaintiff's request for declaratory relief be granted in accordance with the foregoing opinion.

[1] Although not in issue in the instant case, the class *prima facie* includes ". . . a child *en ventre sa mere*, unless it appears, by particular expressions in the will, that the testator intended the contrary, and confined it to children then born."

KRUGH, AND WIFE, V. LAURICH COMPANY, INC., C.P. Civ. D. Franklin County Branch, No. A.D. 1989-225

Warranty of Habitability and Workmanship - New Home - Demurrer

1. The implied warranty of habitability applies to a builder - vendor of a home.
2. To sustain a claim of breach of warranty of habitability, it is not necessary to allege the home is uninhabitable.
3. An alleged defect must present a major impediment to habitation in order for an implied warranty to be applicable.
4. The claim of breach of warranty of good workmanship requires less serious defects than the warranty of habitability.

Fred H. Hait, Esq., Counsel for Plaintiffs
Jan G. Sulcove, Esq., Counsel for Defendant

Kaye, J., February 11, 1991:

OPINION

Eugene W. Krugh, Jr. and his wife, Cynthia Krugh, (hereinafter "Plaintiffs"), have filed an action against Laurich Company, Inc., (hereinafter "Defendant"), for breach of implied warranties of good workmanship and habitability in the construction of Plaintiffs' current residence. Defendant has filed two preliminary objections to the complaint which are presently before the Court for disposition. First, Defendant demurs to the cause of action for breach of implied warranty of habitability on the ground that the alleged defects in Plaintiffs' home do not render it unfit for habitation. The second objection is in the nature of a request for a more specific pleading.

In ruling on preliminary objections, we must accept as true every well-pleaded material fact set forth in Plaintiffs' pleading as well as all inferences reasonably deducible therefrom. *Powers v. Pa. Department of Health,* 121 Pa. Cmwlth. 321, 550 A.2d 857 (1988), *allocatur denied,* 524 Pa. 636, 574 A.2d 75 (1989). In order to sustain a demurrer, it must appear with certainty that the law will not permit recovery upon the facts as averred. Where there is any doubt as to whether a preliminary objection should be sustained, that doubt should be resolved by denying the objection. *Harkins v. Zamichieli,* 266 Pa.Super. 401, 405 A.2d