which holds all conveyances to the corporation of Home Tech Improvements are void in the suit against Plaintiffs.

Order of Court

NOW, this 30th day of December, 1999, the preliminary objections filed by the defendants are hereby DENIED in accordance with the attached Opinion.

IN RE: ESTATE OF LOUISE E. JOHNSON, C.P. Franklin County Branch, O.C. Division, No. 53-1997

Johnson Estate

Timely filing of exceptions; Joiner of parties to bring an action in Orphans' Court;
Husband and wife joinder; Exception to spouse joinder; Power of appointment
Will interpretation; Extrinsic evidence; Inconsistent clauses; Auditor's duties; Equity

1) Exceptions raised to an Auditor's Report must be timely filed; in the case of an Amended Auditor's Report, exceptions may only be filed against amended parts of the report if no exceptions were preserved by filing against the original report.

2) Where a will names two people together to act or hold a power, one of them does have standing to act alone.

3) Where specific rules on pleading or practice are not set forth under the Orphans' Court, the Rules of Civil Procedure apply.

4) Where two people, such as a husband and wife, have a joint interest in a matter, they must bring an action before the court together; either does not have standing to act alone.

5) There are some limited exceptions to the general rule of the necessity to join spouses in an action that concerns both of them, in that courts have found some circumstances where one spouse can bring suit as a representative of both spouses for their joint benefit.

6) In order for limited exception allowing one spouse to bring suit for the benefit of both spouses to apply, there can be no evidence rebutting the authority for one spouse to act on behalf of both.

7) The intention to create a power of appointment must appear from the will as a whole.

8) In interpreting a will, extrinsic evidence will not be utilized where logical meaning can found to all of the will's provisions from its four corners, and all of the will's words can be given effect.

9) A will must be constructed in such a way as to avoid inconsistencies, allow all of its provisions to take effect, and not to disinherit an heir; it should be

not to be treated as repugnant to another,

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and do justice between the parties.

ounsel for Objectors
unsel for Nancy Johnson
ounsel for Estate
tor for Estate
sel for Dwight Johnson and

AND ORDER

2000* :

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estate of Louise E. Johnson has
parties have exhausted their pre-
pointed auditor. The parties were
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Order are followed by "Opinion and Order
udge Van Horn, dated March 9, 2000, and
ning at page 218.

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Decedent, Louise E. Johnson, died on March 31, 1996. She survived her husband, but predeceased her six children: Dwight, Walter, Shirley, Larry, Lawrence and Eugene. Decedent left a holographic will, which reads as follows:

> Dwight & Shirley is to be the ex to settle my estate. To sell the Bird [Burd] place and pay Production Credit off. Dwight is to get 1 acre of ground or more. And Shirley is to get 1 acre of ground or more. Dwight Nancy & Shirley has the right to stay 1 year or longer. Dwight & Nancy is to get what they think they should have for what they have done Shirley is to get 5,000 for what she has don [sic]. Then sell every thing and divide the money to Dwight Walter Shirley Larry Lawrence and Eugene Shirley is to have my personal things.
>
> This is my Will, [signed] Louise E. Johnson, Feb. 1, 1991.

This will was admitted to probate on May 20, 1996. Decedent's children, Shirley and Dwight, were appointed executors of the estate pursuant to the will. An appeal was taken from the Decree of Probate and Grant of Letters, and a petition to remove the executors was filed by Decedent's other four children, Walter, Larry, Lawrence and Eugene. A hearing on these issues resulted in a Decree Nisi and Opinion, issued September 10, 1997 by Judge William H. Kaye, which denied the relief requested in both petitions. The will remains valid as probated, and Dwight and Shirley are the executors of the estate. As executors, Dwight and Shirley were ordered by the court to file an account within thirty days.

Dwight and Shirley prepared the First and Final Account, which was filed on January 21, 1998 and presented to the court for confirmation on March 5, 1998. Shortly thereafter objections were filed by the other four children against the account and the proposed distribution of the estate, along with

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construed as a whole, and one part is not to be treated as repugnant to another, if it is possible for both parts to stand.

10) In the event that it becomes impossible to give effect to all provisions in a will because clauses are in direct conflict, the latter of the two clauses will be taken to represent the last expression of the testator, and therefore the latter clause will take effect over the former. The inconsistent clause rule is only to be invoked as a last resort.

11) An Auditor's duties include examining and auditing an estate account and determining distribution of assets as bestowed in the will; an Auditor is not charged with investigating circumstances and extrinsic evidence beyond the words of the will.

12) The historical notion of a court of equity is to enforce the requirements of good faith and fashion relief as justice, fairness and good conscience dictate; it has wide discretion to seek the truth and do justice between the parties.

William C. Cramer, Esq., Counsel for Objectors
Karl E. Rominger, Esq., Counsel for Nancy Johnson
H. Anthony Adams, Esq., Counsel for Estate
J. Dennis Guyer, Esq., Auditor for Estate
David A. Green, Esq., Counsel for Dwight Johnson and Shirley Johnson

OPINION AND ORDER

VAN HORN, J., February 2, 2000* :

Background

The matter to settle the estate of Louise E. Johnson has reached this court after the parties have exhausted their pre-trial remedies with a court-appointed auditor. The parties were heard by the auditor, received the Auditor's Report, then filed exceptions to that report. The auditor responded by filing an Amended Auditor's Report, to which the parties again filed

* Editor's note: This Opinion and Order are followed by "Opinion and Order on Reconsideration," by the Hon. Judge Van Horn, dated March 9, 2000, and appearing in this publication, beginning at page 218.

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Dwight and Shirley prepared the First and Final Account, which was filed on January 21, 1998 and presented to the court for confirmation on March 5, 1998. Shortly thereafter objections were filed by the other four children against the account and the proposed distribution of the estate, along with

a request for surcharge. Walter, Larry, Lawrence and Eugene protested that they were not named as distributees in the account and did not receive a one-sixth share of the estate as the will provided. Instead, the account showed distribution of the entire estate to Shirley, Dwight and Dwight's wife, Nancy. Dwight and Nancy contended that the will created a general power of appointment in them which allowed this outcome. Walter, Larry, Lawrence and Eugene also averred that the account of decedent's personal property and monies was not accurate. They asserted that the executors should be surcharged for interest and penalties for failing to timely administer the estate and file tax returns.An auditor was appointed by the court to hear the matter.

The auditor concluded in his report that the will did not create a general power of appointment in Dwight and his wife, Nancy. The auditor further ordered that the executors had remained in possession of the family farm for over one year, long enough to administer the estate, and should immediately take all necessary steps to liquidate the remaining assets, including the farm, and to divide the net proceeds equally among Decedent's six children. Shirley was awarded the personal items of Decedent, as the will directed, and Shirley and Dwight (along with Nancy) were awarded specific bequests of $5000. The will also provided for Shirley and Dwight to each retain one acre of land on the farm. The auditor confirmed this devise, with costs for the conveyance to be paid from Decedent's estate. The auditor found that the executors' fees were not unreasonable. Additionally, the parties all agreed that the executors would be surcharged $1522.04 for penalties and interest related to the untimely filing of the tax returns, and also that they would be surcharged for loss of income for failure to put the sale proceeds of the Burd farm into an interest bearing account. The executors were ordered to file an amended account in accordance with the Auditor's Report.

The Auditor's Report was filed on July 2, 1999. On July 16, 1999, exceptions were timely filed by Dwight's wife Nancy, and by Walter, Larry, Lawrence and Eugene. Nancy continued to assert that the language of the will creates a general power of appointment in her and Dwight, and claimed furthermore that extrinsic evidence of Decedent's intent should have been used to interpret the will. Walter, Larry, Lawrence and Eugene contended that the executors should be surcharged for rent for the time they remained on the farm beyond the one-year period after Decedent's death, and for proceeds from hay and other crops produced on the farm after Decedent's death. Additionally, they wanted the executors removed for failing to carry out the provisions of the will, or at least, to receive no commission. They also wanted the cash value of one acre of land each to be given to Dwight and Shirley, instead of the having the estate incur the expenses for surveying and subdividing, and further delaying the sale of the farm.

An Amended Auditor's Report was filed on October 15, 1999. All provisions of the original report were confirmed except one. The auditor amended the provision directing the costs of conveying the one-acre devises to allow Dwight and Shirley to either take the cash equivalent of one acre of land, or to pay the costs assessed in connection with the conveyance out of their own distributive shares.

On October 27, 1999, exceptions to the Amended Auditor's Report were filed by Walter, Larry, Lawrence and Eugene, again requesting that the executors be surcharged rent for staying on the farm, that executors be surcharged for the sale of crops, and that the executors be removed from duty, or not be paid commission. Additionally, they contend that the one-acre devises should be paid out in cash equivalents or the land should be taken from a different, unimproved, parcel. Nancy filed exceptions again asserting that a general power of appointment was created in her and Dwight, and that extrinsic

evidence should have been used to interpret the will. Dwight and Shirley filed exceptions together, claiming that Dwight and Nancy's bequest should not be the same as Shirley's $5000, that extrinsic evidence should have been considered, and that the costs of conveying the one-acre devises should be paid by the estate. Walter, Larry, Lawrence and Eugene moved to strike Dwight and Shirley's exceptions for untimely filing.

The filing of these exceptions to the Amended Auditor's Report now procedurally brings the matter before this court for resolution.

Discussion

The court will first address the issue of whether Dwight and Shirley are time barred from raising exceptions to the Amended Auditor's Report when they raised no exceptions to the original Auditor's Report. The Pennsylvania Orphans' Court Rule 7.1 reserves exception procedures to the local courts. The local policy, under Franklin County Orphans' Court Rule 39-8.6(a), provides that

> "the report awaits the filing of exceptions, if any, thereto, which must be filed with the clerk within fourteen (14) days of the date of the said notice . . . and that any party who fails to file exceptions within the time allowed shall thereafter be precluded from excepting to the report . . . ."

Dwight and Shirley did not file exceptions within this time period to the first Auditor's Report, nor did they petition the court to allow a late filing, or in any way attempt to protest that report.

Dwight and Shirley waited until after the Amended Auditor's Report, which was generated due to exceptions taken by Larry, Lawrence, Eugene and Walter, and Nancy, to file their exceptions. After an Amended Auditor's Report, the only exceptions permitted are renewed exceptions that were

preserved by filing against the first report, and new exceptions taken to any changed portions of the amended report. Franklin County Orphans' Court Rule 39-8.6(c) states:

> After disposing of the exceptions to this report, the auditor shall refile the report, or file the report as amended . . . and unless exceptions thereto be renewed (or new exceptions be filed to the report as amended by the parties aggrieved by the amendment) within fourteen (14) days . . . ."

It is obvious from this language that new exceptions can only be filed against amended portions of the report, and thus, the court finds that Dwight and Shirley waived their rights to object to issues that were confirmed in the amended report by not objecting to them in the original report. *See Estate of McGrorey*, 474 Pa. 402, 378 A.2d 855 (1977) (holding that where no exceptions were filed in the Orphans'Court, issues were not preserved for review); *Estate of Stanley*, 470 Pa. 483, 368 A.2d 1259 (1977) (finding that no issues were properly preserved for the appeal because no exceptions had been taken); *Logan v. Cherrie*, 444 Pa. 555, 282 A.2d 236 (1971) (holding that appeal was waived on all issues to which exceptions were not filed). Dwight and Shirley may take exception to only the one issue that was reconsidered by the auditor in his amended report. That is the issue regarding the costs of conveying the one-acre devises. The auditor determined those costs would be paid from the estate in his original report, then concluded the costs should be paid by Dwight and Shirley from their respective distributive shares in his amended report.

The court holds that the auditor's first report was correct, and now redirects the costs of the one-acre conveyances to be paid from the estate as administrative costs. It is clear from the language of the will that Decedent intended for Dwight and Shirley to retain actual land from the farm, not the land's value in cash. It is the usual procedure for such conveyances to be

paid from the estate. The court sees no reason to vary that procedure here. The court further determines that the language "1 acre of ground or more" refers to possible inaccuracies with the surveying process, in that Decedent would prefer Dwight and Shirley to take a little more than an acre, as opposed to less, if it is necessary in determining boundaries because of the lay of the land. If decedent had wanted Dwight and Shirley to have much more than one acre, she would have so stated. Additionally, the language "1 acre of ground" is determined to mean unimproved land only. The acres may be taken from any parcels still held by the estate, but should be chosen to have at least one side of each acre on an outside property line, so as not to break up or cause a major loss in property value to the farm. The acres should also be chosen, if possible, at a location where they are accessible without having to create an easement by necessity through the larger parcel. Alternatively, Dwight and Shirley may elect to take the cash equivalent of the value of an acre each, if they prefer.

The next issue before the court is whether Nancy has standing to file exceptions on her own behalf. The will states "Dwight Nancy & Shirley has the right" and "Dwight & Nancy is to get." The will never mentions Nancy standing alone or makes any bequest to just her; she is always named in conjunction with her husband, Dwight, Decedent's son. Thus, she could not hold a power of appointment alone, if such a power were found to exist, because it is clear from Decedent's language that she named Dwight and Nancy in a joint capacity. *Dormer's Estate*, 46 D&C 687 (Phila. 1942). The court concludes from the language of the will that it was Decedent's intent to make her bequests and devises to Dwight and Nancy together. This creates an issue as to whether Dwight and Nancy were compelled to bring their exceptions jointly.

The Orphans' Court rules dictate that rules of pleading and practice should conform to the rules of pleading and practice in

equity. Pa.O.C.Rule 3.1. The rules for Actions in Equity, in turn, follow the Rules of Civil Procedure where they are not otherwise provided for. Pa.R.C.P. 1501. As there are no specific rules for joinder in either the local or state Orphans' Court or Equity Court rules, Pa.R.C.P. 2227, compulsory joinder, becomes the default rule under these circumstances. Rule 2227(a) states: "Persons having only a joint interest in the subject matter of an action must be joined on the same side as plaintiffs or defendants." As Dwight and Nancy have a joint interest in the subject matter, according to Rule 2227, Dwight was an indispensable party and Nancy would not have standing to bring the action alone. This result has been buttressed by Pennsylvania common law. In *Mitchell v. Prudential Prop. & Cas. Ins.*, 346 Pa.Super. 327, 499 A.2d 632 (1985), compulsory joinder is required where the owners of the subject property are tenants by the entireties. *See also DeCoatsworth v. Jones*, 414 Pa.Super. 589, 607 A.2d 1094 (1992) (holding that both tenants by the entireties were indispensable parties in a fraudulent transaction regarding real estate owned as tenants by the entireties); *Brandt v. Hershey*, 198 Pa.Super. 539, 182 A.2d 219 (1962) (holding that both spouses were indispensable parties and had to be joined in an action to recover entireties property).

However, recent common law has made limited exceptions and allowed one spouse to bring an action for the benefit of both spouses. *Miller v. Benjamin Coal Co.*, 425 Pa.Super. 316, 625 A.2d 66 (1992). In *Miller*, the court held that where marriage continues to exist, one spouse can act as agent for the entireties estate in bringing an action for damages to entireties property where the action benefits both spouses. This case expands on previous case law that allows one spouse to contract for the benefit of both spouses, *J.R. Christ Construction Co. v. Olevsky*, 426 Pa. 343, 232 A.2d 196 (1967), or allows one spouse to terminate a lease of property

held by both spouses, *Kennedy v. Erkman*, 389 Pa. 651, 133 A.2d 550 (1957).

For *Miller* to be applicable, however, there may be no evidence rebutting the presumption of authority for one spouse to act on behalf of both spouses. In the instant case, the fact that Dwight filed his exceptions to the Amended Auditor's Report with his sister Shirley, and not with his wife, shows strong evidence that Nancy was not acting on behalf of Dwight when she filed either set of her own exceptions. The court recognizes that Dwight may have decided to file exceptions with his sister Shirley because they stand together as executors of the estate, but their exceptions were filed as legatees taking under the estate, not in their capacity as executors. There was nothing to prevent Dwight from filing an action jointly with his wife to protect their joint interests under the will. *In re Stachnick's Estate*, 376 Pa. 592, 103 A.2d 765 (1954).

The court concludes in this matter that Nancy does not have standing alone to bring exceptions to the reports. Either her husband Dwight had to be joined in that action, or the presumption of Nancy's authority to act for both spouses was rebutted when Dwight and Nancy filed exceptions separately. While Orphans' Court matters primarily follow the rules of equity, under which courts are reluctant to dismiss a case on a procedural mistake when a review is sought on the merits, *Estate of Bruner*, 456 Pa.Super. 705, 691 A.2d 530 (1997), in this matter, the court believes Dwight has had ample time and opportunity to be joined in his wife's exceptions or to show cause for a late filing.

Because we have determined that Nancy did not have standing to bring her exceptions separately, the court does not have to address the issues of whether the will gave Dwight and Nancy a general power of appointment or whether extrinsic evidence should have been used in interpreting the will. For

argument's sake, however, the court will note that if it were to rule on these substantive issues, the auditor's original findings would again be confirmed. The court agrees with the auditor that the phrase "Dwight and Nancy is to get what they think they should have for what they have done . . . ," does not create a general power of appointment in Dwight and Nancy. As the auditor stated, such an interpretation would render the remainder of the will meaningless. Although no special language is necessary, the intention to create a power of appointment must appear from the will as a whole. *Estate of Bruner*, 456 Pa.Super. 705, 691 A.2d 530 (1997). The law provides that a will should be interpreted to give effect to all of its provisions, and each clause must be considered in connection with the entire document. *In re Fisher's Will*, 355 Pa. 105, 49 A.2d 376 (1946).

The issue of the use of extrinsic evidence is also without merit. The auditor's interpretation of the will from its four corners gave logical meaning to all of Decedent's provisions, which bestowed extra benefits on Dwight, Nancy and Shirley for taking care of her and the farm, and then concluded by dividing the remainder of her assets between her six children.

In a related issue, attorneys for both sides have submitted post-trial letters to the court on whether the auditor was in some way charged with ferreting out and investigating evidence beyond what was presented by counsel. The court has determined this argument has no basis in law. It is the auditor's job to act in a quasi-judicial capacity to rule on the facts and evidence submitted to him by the parties. More specifically, the Probate, Estates and Fiduciaries Code at 20 Pa.C.S.A. § 751 states that the auditor's duty is "to examine and audit an account and to determine distribution." No investigatory powers are appointed to that position.

Additionally, the assertion that the auditor was bound to follow Judge Kaye's declaration that further evidence would be necessary to interpret the will is wrong. In the context of his opinion, the learned Judge's impressions on the matter were merely dicta. The ambiguity of the will was not an issue before the court at that time. It was the Auditor who was given the task of interpreting the provisions of the will, and his interpretation will stand. *In re Estate of Bryan*, 513 Pa. 554, 522 A.2d 40 (1987) (holding that findings of fact by an auditor will not be set aside by the court, except on grounds that would justify a new trial). The matter will not be resubmitted to the auditor to hear extrinsic evidence. The auditor's findings of fact and conclusions of law are the complete record for review by the court. *In re Sweeney*, 695 A.2d 426 (Pa.Super. 1997).

The final issue to be decided is whether the executors, Dwight and Shirley, should be surcharged and denied their executor's commission. Walter, Larry, Lawrence and Eugene believe the executors should pay rent for staying on the farm past the one year recommended in the will, should account for the sale of crops from the farm, should pay any tax penalties for late filing, should pay the estate for loss of income for not investing the proceeds from the Burd Farm, and should be denied commission as executors.

The court acknowledges that several of these matters were stipulated by the parties in the first Auditor's Report under Findings of Fact, number 11, and will reconfirm those terms. The parties agreed at that time that a surcharge of $1522.04 will be levied on executors for penalties and interests assessed for filing the estate tax returns late. The parties further agreed that executors would be surcharged for interest on the proceeds of the Burd Farm from August 15, 1997, until such proceeds are finally distributed. It was ordered in the Auditor's Report, and reconfirmed herein, that interest for the Burd Farm proceeds shall be calculated at the average money market rates

paid by Fulton County financial institutions. The court orders these sums be calculated and paid to the estate.

The court finds it must go beyond the findings in the auditor's reports on the issues of rent and crop proceeds, because at the time the reports were filed, the farm was to be sold, thereby making rents and crop proceeds a minor issue. As the executors have made no move towards sale for almost four years, they must now account to the estate for remaining on and operating the farm. The court finds that executors should pay rent for the time they have occupied the farm beyond one year of the death of Decedent. The rental value of the real estate was agreed to by the parties in the first Auditor's Report as being correct as stated on the Pennsylvania Inheritance Tax Return filed by the executors. Rent payments are due from March 31, 1997 to the present, and shall be calculated on a monthly pro rata basis and paid to the estate. The court takes notice that facts in Judge Kaye's Opinion of September 10, 1997, indicate that executors have been paying the mortgage and insurance on the property. *In re Estate of Louise E. Johnson*, No. 49898, Franklin County Orphans' Ct. Div., at 9 (53-1997). There is also a reference in the transcript of the Auditor's Hearing that they have been paying the property taxes. *Transcript of Auditor's Hearing*, October 23, 1998, at 55. Executors are entitled to deduct these mortgage, property insurance, and tax payments from the amount of rent due, if such payments were made from their own funds, from March 31, 1997 to the present, and shall account to the estate for same. Executors are not, however, entitled to credit if the amount of mortgage and insurance they are currently paying exceeds the fair rental value of the property as agreed upon.

Further, the court orders that proceeds from selling crops produced on the farm be accounted for from the time of Decedent's death. If the crop proceeds were used to cover farming expenses, this should be indicated. A record of the

profits, losses, and expenses of the farming operation should be maintained in detail by the executors from this time until the farm is sold, or farming operations cease, whichever is later, and as accurate a record as possible should be constructed from the date of decedent's death through the present. Whenever possible, the executors should retain invoices, receipts, cancelled checks and other documentation showing expenses and profits incurred with operating the farm. Any surplus after farming operations cease under the estate will be added to the residue of the estate to be divided among the six children.

Finally, the court will reserve the decision of whether to remove the executors until the matter is reviewed at hearing, scheduled for February 17, 2000. Additionally, the court finds no basis for awarding attorney fees at this time.

Order of Court

AND NOW, this 2nd day of February, 2000, after review of briefs and oral argument by counsel,

IT IS HEREBY ORDERED THAT:

1) Dwight Johnson and Shirley Johnson are time barred from bringing exceptions against any specific issues in regard to this action other than the manner of distribution of their one-acre devises because they did not file exceptions to the original Auditor's Report in the prescribed statutory time period.

2) Dwight Johnson and Shirley Johnson may elect to take one acre of land each, as the will provides, under the limitations set forth in the attached opinion, with costs of the devises to be paid as administrative expenses of the estate, or to take the cash equivalent of one acre of land.

3) Nancy Johnson, Dwight Johnson's wife, is named a legatee in the will only in her capacity as Dwight Johnson's wife, and

therefore does not have standing to bring an action alone to protect the joint interests of her husband and herself.

4) There is no basis to impose an investigatory role on the auditor in this matter.

5) **IT IS FURTHER ORDERED THAT** the executors, Dwight Johnson and Shirley Johnson, will be liable for surcharge penalties and estate accounting as follows:

a) They are bound by their stipulation reported in the Auditor's Report of July 2, 1999, to pay to the estate $1522.04 for penalties and interest charged for the late filing of tax returns;

b) They are bound by their stipulation reported in the Auditor's Report of July 2, 1999, to pay the estate for interest on the proceeds from the sale of the Burd Farm from August 15, 1997 until final distribution takes place, at a rate calculated to be the average money market rates paid by Fulton County financial institutions;

c) They will pay rent to the estate for the time they have occupied the farm beyond the one-year period after Decedent's death, starting from March 31, 1997, to continue until they vacate the property. Rent will be calculated on a monthly pro rata basis, to be reduced by the amount of mortgage, insurance and taxes on the property that they have paid from their own funds. Rental rates shall be those agreed to by the parties on the estate's Pennsylvania Inheritance Tax Return and in the first Auditor's Report. A record of the rental payments due and paid, along with deductions for mortgage, insurance and taxes, will be kept by the executors for the estate and furnished to all named beneficiaries within thirty (30) days of the date of this Order; and

d) They will account to the estate for proceeds earned from selling crops produced on the farm, as well as expenses incurred in operating the farm. All profits, losses, and expenses should be recorded in detail until such time as the farm is sold or farming operations cease, whichever is later and a report shall be furnished to all named beneficiaries within (30) thirty days of the date of this Order.

OPINION AND ORDER ON RECONSIDERATION

Background

This matter is brought before the court by Nancy Johnson for reconsideration of issues decided in an Opinion of this court, dated February 2, 2000 pertaining to the estate of Louise E. Johnson. The issues before the court for reconsideration are 1) whether Nancy's husband Dwight Johnson was an indispensable party to be joined in Nancy's action to determine that a general power of appointment was granted in Testator's will to Dwight and Nancy; 2) whether the court erred in determining that Testator's will did not create a general power of appointment in Dwight and Nancy with the words "Dwight and Nancy is to get what they think they should have for what they have done".

Opinion

The court has reviewed the reconsideration briefs and supporting materials cited, and now confirms its original ruling that 1) Nancy did not have standing alone to bring the issue before the court, and Dwight and Nancy should have brought the action together to determine if a general power of appointment was created in them; and 2) the Auditor was correct in his original report that determined Testator did not intend to create a general power of appointment in Dwight and Nancy.

On the matter of whether the joinder rule applies to Nancy's action, the court refers to its Opinion, *In re Estate of Louise E. Johnson*, Franklin County Court of Common Pleas, No. 53-1997 (O.C. Div.), dated February 2, 2000, at pages 7-9, which discusses why Pa.R.C.P. 2227 applies. The court further notes that Pa.R.C.P. 1501, under Action in Equity, which applies to the Orphans' Court through Pa.O.C. Rule 3.1, sets forth in the note specific rules which apply to all actions at law and in equity, which includes joinder of parties, Rules 2226 to 2250. This includes Rule 2227, which has been held applicable to matters involving claims of spouses.

Petitioner cites *Rundle v. Daily*, 2 D.&C. 4th 370 (1989) as support for the position that Nancy does not have to be joined with Dwight to bring suit to determine whether a general power of appointment was created in the will for both of them. The *Rundle* case is not applicable to the instant situation. The *Rundle* action is a claim for a portion of an estate, not for exercising a power over an estate, such as an executor, administrator, or one who has a general power of appointment. Rundle was one of five children of a decedent who had transferred land prior to his death when he was in a questionable physical and mental condition. Rundle's action asked to have that transaction set aside and have the property distributed pursuant to the Probate and Fiduciaries Code. Under the Code, Rundle's other four siblings would also receive a portion of the property. The other four siblings were not joined in the suit, and defendant brought an action to dismiss the case for failure to join indispensable parties. The *Rundle* court determined that the other siblings did not need to be joined because their rights were not prejudiced by the claim of one sibling, and each possessed an ability to present his own claim to protect his interest.

The only part of this case that is applicable to the present action is the paragraph that states

> "[i]t is clear that a party is indispensable when his or her interest in the proceedings is of such nature that a final decree cannot be made without affecting it or leaving the controversy in such a condition that a final determination may be wholly inconsistent with equity and good conscience."

Rundle, *supra* at 371. In *Rundle*, the court found that the other siblings were not indispensable parties because they had separate interests in the claim, and the ability to protect their interests.

In the instant matter, this court finds that Dwight needed to be joined in Nancy's action to determine whether a general power of appointment exists. Whatever Testator intended to grant was granted to Dwight and Nancy together. It is a general rule that when husband and wife have a claim to pursue or an action to defend, that they must be joined in those proceedings. *DeCoatsworth v. Jones*, 414 Pa.Super. 589, 607 A.2d 1094 (1992); *Mitchell v. Prudential Prop. & Cas. Ins.*, 346 Pa.Super. 327, 499 A.2d 632 (1985); *Brandt v. Hershey*, 198 Pa.Super. 539, 182 A.2d 219 (1962). There are limited exceptions to this rule, but none that are applicable to the instant case. *See Miller v. Benjamin Coal Co.*, 425 Pa.Super. 316, 625 A.2d 66 (1992) (allowing one spouse to bring an action for damages to entireties property). Even if this power was not granted to them in a "husband and wife" capacity, they were still named together, and therefore should have defended their position together.

Nancy argues that simply because the power must be exercised jointly, it does not follow that both parties together must bring the action to determine if the power exists. She claims that an indispensable party is one whose rights are so directly connected with and affected by litigation that he must

be a party of record to protect such rights,[1] then claims that Dwight is not such a party. This is a disingenuous argument. Dwight's rights are directly affected by this litigation, as are the rights of Testator's other children. Dwight is not in front of the court to claim a right of appointment and to have it bestowed upon him. The court only has Nancy before it on this matter, and could only grant the power to Nancy. It was clearly not Testator's intent that Nancy alone should have power of appointment over her estate.

Further, the court finds that making a determination that Nancy could exercise a general power of appointment over the Johnson estate would be "wholly inconsistent with equity and good conscience." *Rundle*, *supra* at 371. The Orphans' Court follows the rules of equity, and equity will not allow such a result. The historical notion of a court of equity is that it is a vehicle for affirmatively enforcing the requirements of conscience and good faith. *Giddings v. State Board of Psychology*, 669 A.2d 431 (Cmwlth 1995). An equity court may fashion relief as justice and good conscience dictate. *Israelit et al v. Montgomery County*, 703 A.2d 722 (Cmwlth 1997). In equity, a court has wide discretionary authority to seek the truth and to do justice between the parties. *Weissman v. Weissman*, 384 Pa. 480, 484-85, 121 A.2d 100, 102-03 (1956) ("Equity courts . . . possess broad powers and should exercise them so as to do substantial justice."). The historic distinction between a court of law and a court of equity is the ability of the latter to fashion a remedy based upon considerations of fairness, justness, and right dealing. *Armstrong School District v. Armstrong Education Ass'n*, 528 Pa. 170, 595 A.2d 1139 n.2 (1991).

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[1] *Mechanicsburg Area School District v. Kline*, 431 A.2d 953, 957 (Pa. 1981).

Nancy is not a blood relation of Testator's. Nowhere in the will has Testator given anything to just Nancy. All bequests were made to Dwight and Nancy together. If a court were to determine a power of appointment existed, it could only be exercised by Dwight and Nancy together. Dwight chose not to pursue this matter and the court finds again that Nancy does not have standing to pursue it alone.

The rules of equity also support the Court's position that a general power of appointment was not created by Testator's language. Such an interpretation would cause four of Testator's six children to be effectually disinherited. The court finds this would be an unjust result because the Testator specifically names all of her children in her will, with the apparent intent that all would receive something from the estate.

The canons of will construction more directly allow the court to reach the same result. A will should be construed to avoid inconsistencies, to not disinherit an heir, and in such a way that all its provisions may take effect. *In re Moore's Estate*, 241 Pa. 253, 88 A. 432 (1913); *In re Murray's Estate*, 313 Pa. 359, 169 A. 103 (1933). Nancy argues that by finding a general power of appointment was not created in her and Dwight, a sentence of the will becomes ineffective. The court disagrees. The auditor gave that sentence effect by interpreting it to mean that Dwight and Nancy should have something extra from the estate. The auditor gave them a bequest similar to Shirley's bequest of $5000, because Dwight and Nancy were similarly situated to Shirley in their relationship to Testator. She had allowed all three of these people to live on her farm. All three of them helped her, ran the farm and provided companionship. Nancy seems to feel that she deserves more, although her husband and sister-in-law (Testator's son and daughter) are not pursuing a greater portion of the estate. Perhaps Dwight and

Shirley feel that having Testator provide a home for them in exchange for their work on the farm was fair compensation.

To interpret the will as granting a general power of appointment to Dwight and Nancy would render the remainder of the will meaningless. Such an interpretation would allow Dwight and Nancy to claim everything from the estate. After the disputed sentence "Dwight & Nancy is to get what they think they should have for what they done," Testator goes on to leave $5000 and her personal items to Shirley, then divides the remainder of the estate among her six children. These three sentences would have no effect if the will were interpreted as Nancy wants.

Counsel for Nancy has provided a single case where a court has allowed a general power of appointment to stand, even though it would obliterate bequests to other parties in the will. *Grammes Estate*, 62 D.&C. 388 (1947). The Court finds this case highly distinguishable from the instant matter. The power of appointment in *Grammes Estate* is to the decedent's husband. It is a natural and normal event in the majority of wills among spouses for each spouse to leave all to the other spouse first, then set forth provisions for distributing the estate to others in the event that the beneficiary-spouse may predecease the testator-spouse. The court in *Grammes* interpreted decedent's intent was to allow her husband to have what he wanted from the estate, if anything, then divide the remainder according to her wishes.[2] The specific facts of *Grammes* indicates not only that there were no surviving children or grandchildren, but that the husband was

[2]The Court notes that the result in *Grammes* may also be due to consideration for underlying intestate laws that do not allow a spouse to be disinherited. If the Johnson estate had passed through intestacy law, each of the children would have received an equal share, with no special provisions for Dwight, Nancy and Shirley.

financially well off and very old. The decedent's assets were left to friends, siblings and charities. The court believed at the time decedent in *Grammes* made provisions for distributing her estate, she was under the assumption that her surviving husband would have no need for her assets. At the time Mrs. Grammes passed, her husband decided he wanted a portion of her estate, and the court, acting on what was fair and just in that situation, granted it to him.

This is not the situation in the Johnson estate. The Johnson estate does not involve a spouse, but the six children of Testator, who would stand on equal ground under intestacy law. Furthermore, all six children are specifically named in the will to receive some part of the estate. It is a familiar rule of law that [a child] cannot be disinherited except by express words or necessary implication. *In re Robison's Estate*, 266 Pa. 251, 109 A. 924 (1920) (holding that the term "children" included a son from testator's first marriage, whom testator had not seen for twenty-two years.). The court is not inclined to interpret a will in such a way that would not only render most of the words meaningless, but would have the effect of disinheriting four of Testator's six children.[3]

Alternatively, if the court were to interpret the disputed sentence to create a power of appointment in Dwight and Nancy, the sentence could be considered inconsistent with the latter sentence that provides "sell everything and divide the money to Dwight Walter Shirley Larry Lawrence and Eugene".

[3]"[W]e give due regard to the natural impulses and feelings of mankind and consideration for the general laws of descent and rules for the disposition of estates in determining the testator's intention for the purpose of construing a will." *In re Clark's Estate*, 359 Pa. 411, 59 A.2d 109 (1948).

In the former sentence, Testator would essentially be allowing Dwight and Nancy to take everything. In the latter sentence, she is directing that everything be sold. Such a discrepancy may invoke the will interpretation rule that states that where there are inconsistent clauses in a will, the latter of the two clauses must be taken to represent the last expression of the testator's intent, and therefore, the latter clause takes effect over the former. *In re Phillips' Estate*, 205 Pa. 504, 55 A. 210 (1903). However, this rule is to be applied

> "[o]nly in the event that it becomes impossible to give effect to all of the provisions of a will . . . the will is to be construed as a whole, and one part is not to be treated as repugnant to another, if it be possible for both to stand."

In re Fisher's Will, 355 Pa. 105, 49 A.2d 376 (1946). The inconsistent clause rule is never invoked except as a last resort. *In re Moore's Estate*, 241 Pa. 253, 88 A. 432 (1913). The will should be interpreted, whenever possible, to avoid repugnancy. *Id.*

The Court believes this is what the Auditor was attempting to do by determining that no general power of appointment was created, yet granting Shirley, Dwight and Nancy an extra portion of the estate, which is what it appears Testator intended to do. In interpreting a will, the law must conform to testator's probable intention and determine the meaning that will be most agreeable to reason and justice. *In re Clark's Estate*, 359 Pa. 411, 59 A.2d 109 (1948). The court believes it is most agreeable to reason and justice to interpret the will to give meaning to all of Testator's words and, thereby, bequests to all of Testator's children.

Order of Court

AND NOW, this 9th day of March, 2000, after review of briefs by counsel and reconsideration by the Court,

IT IS HEREBY ORDERED THAT:

1) Nancy Johnson does not have standing to bring an action alone to determine if a general power of appointment was created in her with Dwight Johnson;

2) A general power of appointment was not created in Dwight and Nancy Johnson by Testator's words.

The Court's prior Order dated February 2, 2000, is **REAFFIRMED.**

BOROUGH OF SHIPPENSBURG. COMMONWEALTH OF PENNSYLVANIA v. RICHARD C. KELLEY, SR. v. DONALD JOHNSON, C. P. Franklin County Branch, Criminal Action-Law, Vol. 2, Page 200

Shippensburg v. Kelley v. Johnson

Petition requesting review of the District Attorney's disapproval of two private criminal complaints.

1) The trial court does not have authority to change a prosecutor's policy-based decision to disapprove a private criminal complaint absent a showing of bad faith, fraud or unconstitutionality; proper deference must be given to the discretion of the prosecutor who is a member of the executive branch of government.

2) A "policy" is a definite course or method of action selected in light of certain conditions as a guide for present and future decisions.

3) The court must not substitute its judgment for that of the District Attorney absent a showing of bad faith, fraud or actions beyond constitutional limits when the District Attorney conducts a fair examination of the evidence and decides in a calculated manner in light of his experience not to prosecute given the likelihood of obtaining a conviction and the availability of both prosecutorial resources and civil remedies.

4) Although the court must intervene for the good of the public when a prosecutor exhibits a wilful failure to act or a neglect of his duties, the court cannot second-guess a prosecutor's good faith decision not to prosecute; the prosecutor's duty to exercise independent discretion uncontrolled by the judgment and conscience of others is at the heart of democracy which is founded on the separation of powers.

Charles E. Shields, III, Esquire, Counsel for the Borough of Shippensburg
J. McDowell Sharpe, Esquire, Counsel for the Borough of Shippensburg
John F. Nelson, District Attorney

OPINION AND ORDER OF COURT

HERMAN, J., January 27, 2000:

INTRODUCTION