COURT OF COMMON PLEAS OF PHILADELPHIA
ORPHANS' COURT DIVISION
O. C. No. 1327 DE of 1994
Estate of Earl Wallace, Deceased

Opinion

Introduction

Presently before this court is the long pending petition to determine heirs, to close the class of heirs and to obtain a refund of funds paid to the Commonwealth of Pennsylvania under 20 Pa.C.S.A. § 3540. The petitioners are Robert K. Rose, Executor of the Estate of Regina Rose, deceased and William Mercer, Jr., Power of Attorney for Edith L. Gordon, Executrix of the Estate of Lionel Willard Gordon, deceased. For the reasons set forth below, this court concludes that the petitioners have established that Regina Rose, deceased, and Lionel Willard Gordon, deceased, are the equal intestate heirs of Earl Wallace as the paternal first cousins who survived him.

Procedural Background

Earl A. Wallace died intestate in 1985 leaving neither wife nor children. The Administrator of his estate, George T. Guarnieri, ("the Accountant" or "Administrator") filed an Account that was placed on the December 1994 Audit List. The Accountant stated in his petition that he was unable to locate any heirs and therefore proposed that the balance of the estate be awarded to the Commonwealth as statutory heir under 20 Pa.C.S.A.§ 2112.[1] He supported this conclusion with a report by a genealogist, Herbert U. Davis of the Gwirtz-Davis Genealogical Service Company ("Davis Report") dated September 20, 1991. An adjudication subsequently issued by the Honorable

1 See Adjudication dated April 7, 1995 by the Honorable Frank O'Brien and documents attached thereto. Section 2112 was repealed in 1976. Under 20 Pa.C.S.A. § 2103(6), the Commonwealth would take in default in the absence of other statutory heirs such as "issue" or "parents."

Frank O'Brien on April 7, 1995 awarded the balance of principal and interest totaling $128,847.64 minus a reserve of $1,000.00 to the State Treasury, through the Department of Revenue, to be held in a custodial capacity subject to refund pursuant to Section 24 of Article III of the Pennsylvania Constitution.

Nearly two years later, the petitioners filed their petition seeking a refund of the funds that were paid to the Commonwealth under section 3540. They claimed that Regina Rose and Lionel Willard Gordon had been paternal first cousins of Earl Wallace and that both had survived him. A hearing was subsequently held on January 22, 1998 before the Honorable Frank O'Brien. The petitioners began by presenting a letter from an attorney for the Commonwealth stating that it did not oppose their petition. The Estate's attorney stated that the Administrator's position "is that we enlighten the Court's attention what we feel is the deficiency in proof, not argue violently, because we are doing it only as an officer of the Court." 1/22/98 N.T. at 5-6 . At the hearing, the petitioners presented the researcher's affidavit of Arthur J. Forster, and its amended version, as well as supporting documentation. The genealogist, however, did not testify and was thus not available for cross-examination. Because Regina Rose and Lionel Willard Gordon died after Earl Wallace but prior to the hearing, they obviously were unavailable to testify. Instead, petitioners presented testimony by Rena Aldridge, a paternal first cousin once removed. 1/22/98 N.T. at 19-20. At the hearing, the petitioners conceded that her testimony would not "be conclusive on the whole family history," but was offered to buttress the other documents presented. Id.

The Estate's attorney expressed reservations about the adequacy of this record as to the national origin of Earl Wallace's paternal ancestors and the prevalence of the "Wallace" name since

the Davis Report had noted there were 64 Wallaces on the 1900 Census. 1/22/98 N.T. at 38-39. Additional memoranda were subsequently submitted, but inexplicably no ruling on the petition was issued by Judge O'Brien.

More than five years later, the petitioners sought a ruling by this court. Because there had been no testimony at the first hearing by the genealogist that could be subjected to cross-examination and because the testimony of Ms. Aldridge was inconclusive, a supplemental hearing was held on December 10, 2003. The petitioner's original genealogist, Arthur J. Forster, was unavailable in Florida. The parties were unable to agree on a genealogist so they were requested to submit three names to his court to be randomly selected. The genealogist selected was Michael S. Ramage, J.D., a certified genealogical research specialist. The petitioners thereafter supplemented the existing record with a series of reports by Michael S. Ramage who then testified on his research at the December 2003 hearing and submitted to cross-examination. The evidence presented by the petitioners at the December 2003 hearing and the record support the following findings of fact.

Findings of Fact

1. On October 13, 1994, George Guarnieri, the Administrator and Accountant for the Estate of Earl Wallace, filed an Account and Petition for Adjudication that stated that the Accountant was unable to locate any heirs of Earl Wallace. He proposed that the balance of the Estate be distributed to the Commonwealth of Pennsylvania as Statutory Heir under PEF section 2112. This petition attached a September 20, 1991 report by genealogist Herbert U. Davis that did not include documents or a family tree.
2. By Adjudication dated April 7, 1995, the Honorable Frank O'Brien awarded the balance

of $128,847.64 minus a reserve of $1,000 to the State Treasury, through the Department of Revenue, to be held in a custodial capacity subject to refund without appropriation pursuant to Section 24 of Article III of the Pennsylvania Constitution.

3. On November 10, 1997 the petitioners filed their petition requesting a hearing and seeking a refund of the funds deposited with the Commonwealth to the Estates of Regina Rose and Lionel Willard Gordon. That petition was supported by a report/affidavit by genealogist Arthur J. Forster with supplementary paternal and maternal family trees as well as 36 death certificates.

4. The Administrator of the Estate of Earl Wallace filed objections to the petition, asserting that the Davis Report had concluded that the name "William Wallace" (i.e. decedent's paternal grandfather) was too common to trace.

5. A hearing was held on this petition before the Honorable Frank O'Brien on January 22, 1998. The petitioner's genealogist did not testify, and the Estate's attorney raised questions as to the adequacy of the record. The petitioners presented a letter dated November 21, 1997 by Lora A. Kulik, Assistant Counsel for the Department of Revenue, Commonwealth of Pennsylvania stating that the Commonwealth had no objection to the petition. That letter stated that based on the census reports, death certificates and other documents used to prepare the family tree, "this Office has no objection to the Pethtion or the Court's finding that the Estates of Regina Rose and Lionel Willard Gordon should be paid the $129,847.64 previously awarded to the

Commonwealth."[2]

6. Following the hearing, the Estate's attorney submitted memoranda disputing the petitioners' claim based, inter alia, on the lack of testimony by the genealogist and conflicting evidence as to the national origin of Earl Wallace's paternal grandparents.

7. No ruling was issued by Judge O'Brien after the hearing.

8. Petitioners subsequently requested a ruling by this court. After a conference between the petitioners and the Estate attorney, no compromise was achieved. A hearing was therefore scheduled for testimony by the genealogist.

9. The petitioners' genealogist, Arthur J. Forster. was unable to attend. The petitioners and Estate attorney were unable to decide between themselves on an independent genealogist to present a supplemental investigation and testimony. This court requested counsel to submit the names of three experts and then randomly chose Michael S. Ramage. Coincidentally, the expert chosen had been submitted by the attorney for the Estate. 12/10/03 N.T. at 14-15.

10. All parties stipulated that Michael S. Ramage, J.D. is an expert in the field of genealogical research. 12/10/2003 N.T. at 12.

11. During his testimony, Michael Ramage presented vital records such as relevant death certificates, paternal and maternal genealogical charts, obituaries and U.S. census reports of Philadelphia for 1880, 1900, 1920, and 1930 which were admitted into evidence. 12/10/03 at 17-22 & 102.

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2 See November 21, 1997 Letter by Lora A. Kulik, attached as Ex. A to petitioners' response to the Fee Petition by the Estate's Attorney and

12. Based on this evidence, Mr. Ramage expressed the opinion based on a reasonable degree of genealogical certainty that the intestate heirs of Earl Armstrong Wallace were two paternal first cousins: Lionel Willard Gordon, who lived between 1894 through 1986, and Regina Koeberle Rose, who lived from 1905 until 1992. 12/10/03 N.T. at 20.

13. In reaching this conclusion, Mr. Ramage traced through the 1880 Census to identify the paternal grandparents of Earl Wallace as William Wallace and Mary Gibson Wallace 12/10/03 N.T. at 24-25, 29 & Ex. P-D, Ex. P-K, Ex. P-K-1.

14. Earl Wallace's paternal grandparents had the following children as established by the 1880 Census and other documents: Sarah Ann (b. 9/19/1859); Mary D.(b. 7/1864); Thomas J. (b. 7/11/1863); Agnes G (b.6/16/1865); Frances H. (Fannie) (b. 2/16/1867); Jacob G. (John)(b. 2/16/1869); Martha E. (b. 5/18/1873); Catherine C. (Katie)(b.7/26/1872); Lugenia E. (Lily)(b. 10/20/1876); Elizabeth B. (b. 1875); Regina C.M. (Rena)(b. 11/1/78 or 1880/81) and Howard D.R. (b. 6/19/83).12/10/03 N.T. at 29, 30, 44-46 & Ex. P-D, Ex. P-K, Ex. P-K1, Ex. P-F-30, Ex. P-F-28.

15. The 1880 Census characterized William and Mary Wallace as being of Irish origin. It listed their then living children which included a son, Jacob, who the genealogist concluded was the father of decedent Earl Wallace. It also listed a daughter, Francis A. Wallace, the mother of the intestate heir Lionel William Gordon. 12/10/03 N.T. at 29. Mr. Ramage presented a death certificate as well as a 1920 Census for the Koeberle household to establish that Regina Wallace Koeberle was the daughter of William and

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Administrator. This letter was referenced in the notes of testimony of the 1/22/98 hearing but was not affixed to the transcript. See 1/22/98 N.T. at 3.

Mary Wallace and the mother of the other intestate heir, Regina Koeberle Rose. EX. P-C; Ex. P-F-28, Ex. P-V & 12/10/93 N.T. at 29-30.

16. The parents of Earl Wallace were Jacob G. Wallace and Catherine Vogt. There is documentary evidence that Earl's father used the name John and Jacob interchangeably. 12/10/03 N.T. at 33, 37; Ex. P-F-19; Ex. P-H. See also 1/22/98 N.T. at 44. See Davis Report.

17. John/Jacob Wallace died December 6, 1949. His death certificate stated that his father, William Wallace, and mother, Mary Gibson, were from Scotland. The informant for this death certificate was his wife, Catherine Vogt. Ex. P-F-17. The petitioners presented other compelling documentary evidence to establish that William Wallace had emigrated from Ireland and that he and his wife Mary were of Irish-Scottish descent. See 12/10/03 N.T. at 101-103 (and documents cited).

18. Earl Wallace had a sister, Myrtle Agnes Wallace. She predeceased Earl and was never married. Ex. P-C; Ex. P-F-20; Ex. P-T (1920 Census); Ex. P-I and Ex. P-I-1 (1910 Census).

19. Counsel for the Wallace Estate focused on the discrepancies as to the national origin of Earl Wallace's paternal relatives as a reason for rejecting petitioners' genealogical conclusions. See, e.g. 12/10/03 N.T. at 63-64. He did not, however, present a genealogist to support a contrary opinion at the hearing. 12/10/03 N.T. at 26.

20. Earl Wallace's paternal grandfather was William Wallace, who died on February 3, 1909. 12/10/03 N.T. at 31, Ex. P-F-13, Ex. P-T. See also Davis Report.

21. Earl Wallace's paternal grandmother was Mary Gibson Wallace, who died on March 7, 1923. 12/10/03 N.T. at 32, Ex. P-F-14.

22. One of the daughters of William and Mary Gibson Wallace was Rena/Regina Wallace who married Robert J. Koeberle. They had a daughter, Regina Koeberle Rose, who died in 1992, thereby surviving her paternal first cousin, Earl Wallace. 12/10/03 N.T. at 42-44; Ex. P-V (1920 Census of Robert Koeberle household); Ex. P-F-29; 1/22/98 N.T. at 26-27(testimony by Regina Aldridge identifying "Aunt Rena" as a Wallace who was married to Robert Koeberle and was the mother of Regina Rose).

23. Another daughter of William and Mary Gibson Wallace was Frances, "Fannie," Wallace who married Joseph H. Gordon. They had a son, Lionel Willard Gordon, who lived until November 20, 1986, thereby surviving his paternal first cousin Earl Wallace. 12/10/03 N.T. at 38-41; Ex. P-F-12; Ex. P-F-15; Ex. P-T (William Wallace's consent to the marriage of his daughter Frances to Joseph Gordon).

24. Petitioners traced the descendants of the other children of William and Mary Gibson Wallace to conclude that none of them would qualify as intestate heirs to the Estate of Earl Wallace:

    a. Sarah Ann Wallace Streeton died on October 4, 1948. She had three children: Imogene Streeton, William Wallace Streeton and Edith Lily Streeton, all of whom predeceased Earl Wallace. Ex. P-F-1, 2, 3, 4; Ex. P-D.

    b. Mary D. Wallace Carty, who died in 1916, had one daughter, Ethel M. Carty; she predeceased Earl Wallace without issue. Ex. P-F-5, 6; Ex. P-D.

c. Thomas J. Wallace died in infancy from cholera on August 19, 1864. Ex. P-F-7; Ex. P-D.

d. Agnes G. Wallace Nichols, who died on October 18, 1915, had three children (Lillian Nichols, Lyle Wallace Nichols and Charles Darell Nichols). They all died in early childhood and thus predeceased Earl Wallace. Ex. P-F-8, 9, 10, 11; Ex. P-D.

e. Martha E. Wallace died in 1965 and left no children. Ex. P-F-21, Ex. P-C.

f. Catherine G (Katie) Wallace Smith, who died on December 31, 1937, had two children: Ernest Wallace Smith and Anna May Smith. Both of these children predeceased Earl Wallace. Ex. P-C, Ex. P-D, Ex. P-F-23; Ex. P-F- 24; Ex. P-F-22.

g. Lugenia E. (Lilly) Wallace Calker, who died on July 5, 1961, had two children: Darrell Wallace Calker and Rena Calker. They both died before Earl Wallace without issue. Ex. P-C, Ex. P-D, Ex. P-F-26, 27.

h. Elizabeth Wallace appeared on the 1880 census, but petitioners could find no other trace of her. Ex. P-V; Ex. P-K-1; Petitioners' Proposed Findings of Fact, ¶ 59.

i. Howard D. R. Wallace died on October 30, 1928 with no evidence of any children. Ex. P-F-30, Ex. P-C.

25. Petitioners also presented evidence as to Earl Wallace's maternal relatives. They stated that his mother, Catherine C. Vogt (Wallace) died on October 29, 1962. She had only one sibling, a half-brother Clayton who died on October 11, 1917 without leaving any children. Ex. P-G-1,2, 3, Ex. P-C, Ex. P-E.

26. The Estate Administrator and Attorney filed a fee petition seeking the following sums for

time and expense in "defending the decedent's estate:" copy paper ($15.00); Phone ($20.00); Letters ($30.00); Census Report ($13.55); Typing ($40.00); Three hearings ($1,800.00); 30 sleepless nights ($1,000.00); Research and study ($3,000) for a Total of $5,911.50. They also proposed that the Administrator and Attorney be permitted to divide the $2,012.00 being held in the Beneficial Savings Bank, after noting that the prior Adjudication had ordered that $1,000.00 be held back for the distributions to the Commonwealth.

27. Petitioners objected to this fee petition.

Legal Analysis

Petitioners Have Met Their Burden of Proof to Establish That Regina Rose and Lionel Willard Gordon Were Intestate Heirs of Earl Wallace

Pennsylvania courts "are extremely zealous," Judge Klein has observed, "in their efforts to protect the rights of a decedent's blood relatives and will not award a fund to the state as statutory heir unless it is fully satisfied that there are in fact no surviving next of kin." Onyshochenko Estate, l64 Pa. D. & C. 2d 87, 24 Fid. Rep. 63, 65 (Phila. Orphans' Court 1974). Consequently, to safeguard the interests of surviving heirs, the Pennsylvania Supreme Court adopted Orphans' Court Rule 13.3 which requires a fiduciary to make a written report of his investigation. This rule is supplemented by Philadelphia Orphans' Court Rule 13.3.A. which requires the following:

> (1) *Unknown Distributee* If it appears that the identity or whereabouts of a distributee is unknown, or there are no known heirs, the fiduciary shall submit a written report at the audit, verified by affidavit of the fiduciary or counsel for the fiduciary, in which it shall be set forth:
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> (a) the nature of the investigation made to locate the heirs of the decedent, in

complete detail; and

(b) in cases of intestacy, or where there are no known heirs, a family tree, as complete as possible under the circumstances, supported by such documentary evidence as the fiduciary has been able to obtain.

The term "investigation" as used by this Rule, shall include inquiry of or as to as many of the following as may be pertinent and feasible: residents of the household in which the decedent resided; friends and neighbors; labor union membership; places of employment; social fraternal or beneficial organizations; insurance records; church membership; school records; social security, Veterans' Administration, or military service records; naturalization records, if not native born; and such other sources of information as the circumstances may suggest. Philadelphia Orphans' Court Rule 13.3.A.

A claimant seeking to establish his status as an intestate heir to a decedent has the burden of proving kinship by "a fair preponderance of credible evidence." In re Estate of Bokey, 412 Pa. 244, 249, 194 A.2d 194, 197 (1963); In re Davis' Estate, 365 Pa. 605, 608, 76 A.2d 643, 645 (1950). In an earlier case, the Pennsylvania Supreme Court characterized the burden of proof as a "fair preponderance of trustworthy and satisfying evidence." In re Link's Estate, 319 Pa. 513, 516, 180 A. 1, 2 (1935). Moreover, the evidence "must be so clear, precise and definite in quality and quantity as to satisfy the court below that the relationship claimed existed." Estate of Kasula, 456 Pa. 62, 66. 318 A.2d 338, 340(1974). In analyzing whether this burden has been satisfied, courts recognize an exception to the hearsay rule for such documents as death certificates, birth certificates and family Bibles. In re Garrett's Estate, 371 Pa. 284, 287-88, 89 A.2d 531, 532 (1952), cert denied, 344 U.S. 860 (1952).

In cases involving intestacy a claimant must establish both that a qualified statutory heir exists and that he is that heir. In re Kasula, 456 Pa. at 66, 318 A.2d at 340. Moreover, if a court concludes that certain individuals qualify as intestate heirs entitled to share in the estate funds, it is necessary to determine their share. Those related to the decedent in the same degree, as are the

petitioners in the instant case, are entitled to equal shares. See 20 Pa.C.S.A. §2103(5) & 2104(1); In re Cremer's Estate, 156 Pa. 40, 43, 26 A. 782 (1893).

When George Guarnieri, the Administrator of the Earl Wallace Estate. filed his account in October 1994 nearly 9 years after Earl Wallace's death, he stated that he was unable to find any heirs and proposed distribution to the Commonwealth as statutory heir pursuant to 20 Pa.C.S.A. § 2112. The auditing judge, however, did not distribute the funds to the Commonwealth as statutory heir but elected instead the less draconian approach provided for by 20 Pa.C.S.A. § 3540. This section provides that the "moneys shall be held in a custodial capacity subject to refund, without appropriation, pursuant to section 24 of Article III of the Constitution." 20 Pa.C.S.A. §3540.[3] The report submitted by the accountant of his investigation of the heirs of Earl Wallace consisted of a genealogical study by Herbert U. Davis. The Davis Report stated that Earl's father was John Wallace, who was born on February 16, 1869 and died on December 6, 1949. It identified John's parents as William Wallace and Mary Gilson, both from Scotland, but gave no further details about William Wallace, ostensibly because it was daunted by the number of "William Wallaces" (i.e. 64) in the 1900 city directory. The report stated that it was unable to locate any maternal heirs "after extensive research" but it failed to outline that research in any detail. See September 20, 1991 Report re Estate of Earl Wallace by Herbert U. Davis. This report was not accompanied by any family tree or documents, as is

3 Consequently, in his adjudication Judge O'Brien provided that the account balance of $128,847.64 less a $1,000.00 reserve should be "awarded to the State Treasury, through the Department of Revenue, to be held in a custodial capacity subject to refund, without appropriation, pursuant to Section 24 of Article III of the Constitution." See Adjudication for the Estate of Earl Wallace, O.C. No. 1327 of 1994 (December 5, 1994, O'Brien, J.).

currently required by Philadelphia Orphans' Court Rule 13.3.A in cases of intestacy.

The petitioners, in seeking to establish that Regina Rose and Lionel Willard Gordon were intestate heirs who survived after the death of Earl Wallace, filed a petition supported by a report by the genealogist Arthur J. Forster. That report gave more details about decedent's grandfather—William Wallace—by identifying his children and subsequent heirs. It was supported by paternal and maternal genealogical charts and a proof package consisting of thirty six death certificates. Significantly, the Commonwealth did not oppose this petition. In fact, an Assistant Counsel for the Department of Revenue of the Commonwealth of Pennsylvania, Lora Kulick, by letter dated November 21, 1997 stated that "this Office has no objection to the Petition or to the Court's finding that the Estates of Regina Rose and Lionel Willard Gordon should by paid the $129,847.64 previously awarded to the Commonwealth." [4] The Commonwealth's attorney noted the proof that had been presented, including census reports and death certificates. Counsel for the Estate, in contrast, expressed doubts as to the sufficiency of this record both at the initial hearing and in supplementary memoranda filed thereafter.

When this court was subsequently asked to address the unresolved issues, counsel for the Estate once again persisted in raising doubts as to the petitioners' claim. At the second hearing held to consider this petition on December 10, 2003, the petitioners presented an expert genealogist, Michael Ramage, to testify and respond to these questions. Based on that testimony and the supporting documentation, the petitioners have met their burden of proof with the requisite preponderance of credible, trustworthy and satisfying evidence.

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4 See Ex. A. to Petitioners' Reply to the Administrator's Petition for Additional Fees.

In the initial report presented by the Administrator, the genealogist, Herbert U. Davis, identified William Wallace as Earl's paternal grandfather, but then essentially threw up his hands in despair at the sheer number (i.e. 64) of William Wallaces living in Philadelphia in 1900 as evidenced by the city directory. He, in essence, abandoned his inquiry as to the decedent Earl Wallace's paternal relatives, although he did identify a paternal Aunt Lilly Wallace Calker. The petitioners' genealogist, Arthur Forster and the genealogist Michael Ramage, in contrast, carefully traced Earl's lineage from Earl's father (John a/k/a Jacob) back to John's father, William Wallace. A key source of information is the 1880 Census, presented as petitioners' Exhibits P-K and P-K-1, which list the Wallace Family living in Philadelphia. That family included William and Mary Wallace and their then living nine children. One of those children was Jacob, whose age of 12 would coincide with the documentary evidence presented by the Accountant with the Davis Report as well as petitioners' documentary evidence.[5] The petitioners, in contrast to the Accountant, also presented a paternal family tree tracing the progeny of William and Mary Wallace. The genealogists Forster and Ramage presented documentary support in the form of death certificates and census reports to establish that of the many issue of those paternal grandparents, Earl Wallace was survived by two intestate heirs: the paternal first cousins Lionel Willard Gordon (1894-1986) and Regina Koeberle Rose (1905-1992). In other words, the evidence presented by all the genealogists—including the accountant's Davis Report--is complementary as to certain key elements. The difference is that

5 In the Davis Report, the Administrator's genealogist identified Earl Wallace's father as John/Jacob G. Wallace born on February 16, 1869 in Pennsylvania. The petitioners' genealogist identified the same John/Jacob Wallace as Earl's father and presented a death certificate listing the same birth date, i.e. February 16, 1869. Ex. P-F-17.

the petitioners' expert and Michael Ramage did not abandon the search merely because of the prevalence of the "William Wallace" name in 1900. Instead, they pieced together a variety of sources to map out the broad structure of Earl Wallace's paternal lineage.

A second concern expressed by the attorney for the estate was the conflicting reports as to the national origins of these paternal ancestors as either Scottish or Irish. The death certificate of Earl's father, John/Jacob,(Ex. P-F-17) for instance, identifies John/Jacob's father, William Wallace, as having a national origin of Scotland while the 1880 census focused on a William Wallace from Ireland. In his testimony, however, petitioners' expert, Michael Ramage, explained that the reliability the information for both death certificates and census reports would depend on the source or informant. In the case of John Wallace's death certificate, the informant was his wife, Catherine Wallace. 12/10/2003 N.T. at 55-56. The expert explained, however, that when the relevant documents of other members of the paternal family lineage were sifted and analyzed, the great weight of these documents support the conclusion that William Wallace, Earl's grandfather, was born in Ireland of Scottish descent. 12/10/2003 N.T. at 66. The documents for each individual was not presented in isolation but rather were matched, with analysis of such factors as age and marital relationships. As Mr. Ramage explained:

> You have to look at all the relevant census schedules. But when you compare the age of a person, where they are born, the family members, such as wife and children, it's not that difficult a task. It's just makes it more time consuming. 12/10/2003 N.T. 68.

Based on the "great bulk of the evidence," Mr. Ramage concluded that this key paternal link—William Wallace (Earl's grandfather) was born in Ireland of Scotch heritage; hence, he was Scots-Irish. 12/10/2003 N.T. at 68. The great bulk of documents Mr. Ramage relied on included

death certificates of William and Mary Wallace; the 1880 Census; the 1900, 1920, and 1930 Census for the household of their son-in-law Robert Koeberle; the 1910 Census for the household of their son-in-law Charles Nichols; the 1910 Census for the household of their son-in-law Samuel Smith and the 1930 Census of the household of their grandson Lionel Gordon. [6] These documents combined demonstrate the intricate family web.

Based on these documents as explained through expert testimony, the petitioners' have established their claim. Although the petitioners have met their burden in establishing their claims, they shall be required under 20 Pa.C.S..A. §3540 to file a refunding bond in the amount of $95,000.00 (without security) to protect the interest of any other intestate heir who might appear within 7 years from the date of this opinion and order. See generally MacCarthy Estate, 30 Fiduciary Rep. 307, 321 (Phila. Orphans' Court 1979)(recognizing the benefit of requiring a refunding bond).

The Petition for Additional Fees for the Estate Administrator and Attorney Is Denied As to Fees Charged "In Defending Decedent's Estate" But Not For Expenses Incurred in the Administration of the Estate

6 See 12/10/03 N.T. at 101-103 and exhibits cited therein. Although the issue of conflicting documentary evidence as to the national origin of Earl Wallace's paternal relatives was raised by counsel for the Wallace Estate, Petitioners presented impressive support for their claim that the grandparents of Earl Wallace were William and Mary Wallace. In demonstrating that Earl Wallace's paternal grandparents had emigrated from Ireland and were of Irish-Scotch descent, Mr. Ramage relied on and presented the following: the death certificates of William and Mary Wallace indicating that they were born in Ireland, P-F-13 & 14; the 1880 Census indicating that William and Mary Wallace were from Ireland, Ex. P-K-1; the 1900 Census of son-in-law Robert Koeberle indicating that his wife Regina's parents were from Ireland, Ex. P-M-1; the 1920 census of son-in-law Robert Koeberle indicating that his mother-in-aw Mary Wallace was born in Ireland, Ex. P-V; the 1930 census of son-in-law Robert Koeberle stating that his wife Rena's parents were from Northern Ireland, Ex. P-T; the 1910 census of son-in-law Charles H. Nichols indicating that mother-in-law Mary Wallace came from "IRE" or Ire-Scotch, Ex. P-T; the 1910 census of Samuel Smith indicating that his wife Catherine's parents were born in Ire-Eng., Ex. P-T; the 1930 census of Lionel Gordon, indicating that his mother Francis (daughter of William and Mary Wallace) born in Ireland, Ex. P-T. Petitioners also presented a paternal family tree for Earl Wallace which provides critical assistance in tracing his various relations. See Ex. P-D.

The attorney and the administrator of the Estate of Earl Wallace have filed a petition seeking additional fees in the amount of $5,911.50 "for defending the decedent's estate." In addition, they ask that approximately $2,012.00 being held in escrow be divided between them. The petitioners emphatically object to this fee petition. They argue that the Estate attorney incorrectly stated that there had been 3 hearings on this matter when in fact there had been 2 hearings lasting 1.5 hours and 2.6 hours respectively. More significantly, they argue that once the Commonwealth indicated that it would not challenge the petitioners' claims based on the documents presented, the Estate representatives should have realized the validity of those claims and avoided their "frivolous" challenge to them. Moreover, despite the estate representatives' request for the second hearing, they presented no new, conflicting evidence nor did they effectively cross-examine petitioners' expert.[7] This court agrees that the Estate attorney and administrator are not entitled to the $5,911.50 requested as compensation for "defending decedent's estate," where, as in this case, the Commonwealth has decided not to challenge the claims of the petitioners and the Estate offers no evidence of an additional diligent search for intestate heirs.

An executor or administrator of a decedent's Estate is an officer of Orphans' court who is accountable for the performance of his fiduciary duties, including payments from the estate to compensate himself or his counsel. Estate of Thompson, 426 Pa. 270, 275, 232 A.2d 625, 628 (1967)(citations omitted). Therefore, it "is not enough that the executor approve counsel fee, but the Orphans' Court which has jurisdiction over the estate from which the fee is to be paid must

7 See Petitioners' Reply to the Attorney Fee Petition.

also approve its reasonableness." Dorsett v. Hughes, 353 Pa. Super. 129, 135, 509 A.2d 369, 372 (1986).

Similarly, the Orphans' court has the authority to approve compensation for the administrator of an Estate under 20 Pa.C.S.A. § 3537, which provides that the "court shall allow such compensation to the personal representative as shall in the circumstances be reasonable and just, and may calculate such compensation on a graduated percentage."

The petitioning intestate heirs essentially argue that the Estate administrator and attorney were not true parties in interest with a stake in the proceeds, but instead the other party with a viable claim was the Commonwealth. Since the Commonwealth decided not to contest the petitioners claim to the funds deposited with it, the "defense" of the Estate by the Administrator and his attorney was "unnecessary, frivolous and non-meritorious." 1/28/04 Reply of Petitioners at ¶7D. Although petitioners fail to cite any precedent to support this argument—and there appears to be no precedent directly on point, there is case law to support their assertion.

Pennsylvania courts have recognized the duty of an administrator of an intestate estate to conduct a careful search for possible heirs. See e.g., Crawford Estate, 12 Pa. D. & C. 2d 709, 8 Fiduciary Reporter 169, 170-71 (Phila. Orphans' Court 1958). The parameters of this responsibility are outlined in Pennsylvania Orphans' Court Rule 13.3, and supplemented by Philadelphia Orphans' Court Rule *13.3 which requires that a family tree be presented in cases of intestacy. In the initial report presented by the Administrator, no family tree was presented. Indeed, the initial Davis report did not definitively state that there were no heirs to the Wallace heir, but that none could be located by Davis due to the prevalence of the "William Wallace"

name in 1900. Nonetheless, the Administrator requested that the estate funds be distributed to the Commonwealth of Pennsylvania as statutory heir under 20 Pa.C.S.A. §2112. Fortunately, Judge O'Brien opted instead in his Adjudication to award the account balance to the Commonwealth to be held in a custodial capacity under Section 24 of Article III of the Constitution. Such action is proper where the search for heirs is inconclusive and potential heirs might exist. As Judge Klein observed in his audit memorandum for the Crawford Estate:

> As the auditing judge apprehends the state of the law in these matter, the Commonwealth's claim as a so-called "heir" under Section 3(6) of the Intestate Act should only be asserted in cases where positive, or reasonably conclusive evidence establishes the failure of heirs. Where, as here, there is simply a lack of evidence, the Commonwealth should merely claim the fund for payment into the State Treasury without escheat, leaving the door open for the possible future discovery of qualified heirs.
> Crawford Estate, 8 Fiduciary Rep. at 172-73.

When the petitioners subsequently sought to establish their claim to the Estate of Earl Wallace by filing a petition supported by the requisite documentation and family tree, the Commonwealth's attorney wrote a letter dated November 21, 1997 stating that it had no objections to that petition or to a finding that the Estates of Regina Rose and Lionel Willard Gordon should be paid the $129,847.64 previously awarded to the Commonwealth. Nonetheless, at a hearing subsequently held before Judge O'Brien on January 22, 1998, the Estate's attorney raised various issues about the adequacy of the petitioners' claim, focusing on the documentary discrepancy as to the national origin of Earl Wallace's paternal ancestors and the difficulty presented by the commonness of the "Wallace" name. Regrettably, the petitioners did not present their genealogist at the initial hearing before Judge O'Brien to testify and answer these

concerns. Moreover, because that genealogist was unavailable for a subsequent hearing, a new genealogist was selected to give expert testimony that would meet the petitioners' burden of proof. While the Estate attorney's questions at the December 2003 hearing regarding the national origins of Earl's paternal ancestors were legitimate, they were not new. They did not reflect additional research or reading. Instead, these questions harked back to the Davis Report that the Administrator originally presented when he filed his account in 1994. That report was not only inconclusive but unsupported by documentation. Consequently, the request by the Estate's attorney for compensation in the amount of $5,911.50 out of estate funds for the efforts spent resisting the petitioners' claims is without merit for two reasons.

First, there is precedent that an executor or an administrator of a decedent's estate lacks the requisite stake in a dispute involving distribution that would justify awarding him or his attorney legal fees. It is well established, for example, that an executor lacks standing to appeal an Orphans' Court order awarding distribution to decedent's daughter where the executor had no beneficial interest in the decedent's estate. Estate of Fleigle, 444 Pa. Super. 632, 664 A.2d 612 (1995).[8] Moreover, while attorney fees may be charged against the estate for services in its administration, the executor "has no authority, at the expense of the estate, to employ legal counsel *in a will contest."* In re Faust's Estate, 364 Pa. 529, 531, 73 A.2d 369, 370 (1950). The rationale for this general principle[9] is that "[s]uch a contest is between the testamentary

8 If, however, the Executor had been surcharged in the Court's decree, he would have standing to appeal since that charge would give him a stake in the issue. Id., 444 Pa. Super. at 635, 664 A.2d at 614. See also Estate of Bokey, 412 Pa. 244, 247 n.5, 194 A.2d 194, 196 n.5 (1963)(although an administrator has no standing to take an appeal from a decree regarding distribution, he would have standing if he were also a beneficiary).

9 This general principle is subject to exceptions based on the facts of a particular case. For instance, if an Executor is named as a legatee, he would

beneficiary and the heirs or next of kin. An executor is, therefore, not a party." Id. See also Leonhard Estate's, 56 Pa.D & C.2d 185, 187 (Lebanon Cty. O.C. 1972)("an executor has no authority at the expense of the estate to employ legal counsel in a will contest"). As the Pennsylvania Supreme Court explained in the very early opinion regarding Mumper's Appeal, 3 Watts & Serg. 441, 1842 WL 4740 (Pa. 1842):

> The person named as executor in the writing, when advised that its validity as a will is about to be contested, ought to give notice to those who are named in its as legatees or devisees, so that they may employ counsel, if deemed requisite, or authorize him to do so at their expense. If they, after being so notified, do not choose to employ counsel, or authorize any to be employed on their behalf, they must abide by the consequences. . . . Mumper's Appeal, 1842 WL 4740 at *2.

In the instant case, the parties in interest (i.e. the Commonwealth and the petitioners) had employed counsel and thus were able to litigate the issue of distribution at their own expense. It was thus not necessary for the estate to assume this expense to the detriment of the interests of the petitioners whose claim was unopposed by the other party in interest, the Commonwealth.

Admittedly, the facts of the present controversy involving the claims of intestate heirs, though analogous to a will contest, also differ from such cases. Unfortunately, there appears to be scant precedent on point. In the ancient case of Hartzell v. Brown's heirs, 1812 WL 1237 (Pa. 1812), the Pennsylvania Supreme Court refused to allow the attorney fees incurred by administrators of a decedent's estate in resisting the successful claims of intestate heirs. In so doing, however, the court declined to lay down a general principle, while recognizing the benefit of resisting unjust claims. The facts of Hartzell are distinguishable in the key respect that the administrators in Hartzell stood to benefit personally by resisting the claims. Its holding that the administrators

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have a direct, ascertainable interest in a will contest. See Mumper's Appeal,

should not be able to charge the estate with their legal expenses in resisting the claims of intestate heirs while instructive is not dispositive. Nonetheless, the rationale of the will contest cases would support the same result: that an administrator should not be able to charge his legal expenses in resisting the claims of intestate heirs that were ultimately deemed valid against the estate, especially where the party in interest, the Commonwealth, concedes that these claims were valid and did not oppose them.

As an alternative grounds, the administrator and his attorney have not established the reasonableness of the $5,911.50 legal fee. The question of the reasonableness of attorney fees is often delicate and difficult. Guidelines have been set forth as follows by the Pennsylvania Supreme Court in The Estate of LaRocca, 431 Pa. 542, 246 A.2d 337 (1968):

> The facts and factors to be taken into consideration in determining the fee or compensation payable to an attorney include: the amount of work performed; the character of the services rendered; the difficulty of the problems involved; the importance of the litigation; the amount of money or value of the property in question; the degree of responsibility incurred; whether the fund involved was 'created' by the attorney; the professional skill and standing of the attorney in his profession; the results he was able to obtain; the ability of the client to pay a reasonable fee for the services rendered; and very importantly, the amount of money or the value of the property in question. The Estate of LaRocca, 431 Pa. at 546, 246 A.2d at 339.

In the instant case, $5,911.50 fee is not reasonable for several reasons. The Estate Attorney has requested $1,800 for three hearings, $1,000 for "30 sleepless nights" and $3,000 for 15 hours of research and study. When these claims are analyzed under the first three LaRocca criteria, they do not establish the requisite amount of work performed, character of services or difficulty of services that would justify the fees claimed for the following reasons. First, there were not three hearings, as the Estate attorney claimed, but 2

1842 WL 4740 at *2(Pa. 1842).

hearings. Secondly, at neither of these hearings did the Estate attorney present new witnesses or documentary evidence in fulfillment of his obligation to locate heirs to the Estate. Estate of Alexander, 2000 Pa. Super. 206, 758 A.2d 182 , 187(2000)("The statute and rule presuppose that a personal representative, as an officer of the court and a fiduciary for the heirs and distributees, would make an honest effort to determine those persons entitled to the estate"). In fact, the Estate attorney conceded at the hearing before Judge O'Brien that he had been instructed by the Administrator "not to push too hard" in enlightening "the court's attention" to the deficiencies of the record. 1/22/98 N.T. at 5-6 & 18, Moreover, the cross-examination of the petitioners' expert witness was ineffective in its confusion as to key facts[10]and repetitious in its invocation of the findings of the inconclusive Davis report.[11] Although the Estate's attorney argues that a letter from Doris Emmons, a close family friend who gave the information for Earl Wallace's death certificate, establishes that there were no known heirs, that letter merely suggests that Ms. Emmons was unaware of any heirs. Moreover, the attorney did not call her to testify at the December 2003 hearing.[12]

Finally, it is disturbing that the Estate Representatives failed to recognize or acknowledge the inconclusive nature of their own initial genealogical investigation.

10 The questioning reflected confusion as to key facts concerning the paternal heirs Jacob and William Wallace. See 12/10/03 N.T. at 51, 63. A glaring example of Estate attorney's refusal to consider the evidence presented is paragraph 2 of his proposed findings of fact where he states that the declarant for the death certificate of Jacob or John Wallace was his son, Earl Wallace. The relevant death certificate (Ex. P-F-17), in fact, lists John's wife, Catherine as the declarant. This was clarified at least once during the December 2003 hearing.12/10/2003 N.T. at 53. Counsel's stubborn refusal to confront the actual evidence was a fatal flaw in his presentation. It also casts doubt on his claim for compensation for 15 hours of research and study.

11 See 12/10/03 N.T. at 73-75.

12 See Proposed Findings of Fact on Behalf of the Estate of Earl A. Wallace, ¶ 1; Ex. P-Q(copy of letter from Doris Emmons).

Especially when informed of the Commonwealth's decision not to contest the petitioners' claims, they should have taken a more careful look at the documentary evidence marshaled by the petitioners. Consequently, under the first three LaRocca criteria involving the amount of work, the nature of services and the difficulty of the problems involved, the litigation fees claimed cannot be awarded.

Nonetheless, the Estate's counsel did attend 2 hearings relating to the petitioners' claims. The first hearing had been specifically requested by the petitioners. The second hearing was necessitated by the petitioners' failure to present their expert genealogist to answer the legitimate questions raised as to the national origin of Earl Wallace's paternal ancestors. Ultimately, Mr. Ramage presented convincing testimony as to these concerns. Nonetheless, in raising these issues, the Estate's attorney can be seen as performing an administrative function as an officer of the court for which he would be entitled to compensation. Since $1,800 was requested for 3 hearings, when in fact there were 2 hearings, the appropriate compensation is $1,200. Although the attorney requests $3,000 for research and study, there was no evidence at either hearing of any additional research or study except for reliance on the Davis report submitted in 1994. (See, e.g., n.10 infra). This element of the claim therefore is disallowed, as are the other claims for typing, sleepless nights and copy paper.

There remains, however, the money that was placed in escrow which both parties identify as approximately $2,012.00. Since no breakdown was presented by the Estate attorney or administrator as to the basis of their claim for this sum, it is not possible to

dispose of this claim on the present record. If, for instance, the claim relates to administrative services, it would most likely be recoverable; if the claim involves the previously analyzed litigation expenses, it in most likelihood would not be recoverable. In re Faust's Estate, 364 Pa. at 53 0, 73 A.2d at 370. Before this final element of the fee request may be resolved, the Estate representatives must formally file an amended fee petition within 20 days outlining the services they performed which would entitle them to the $2,012.00 claim.

Conclusions of Law

1. Petitioners satisfied their burden of proof by clear preponderance of the creditable, trustworthy and satisfying evidence that Regina Rose and Lionel Willard Gordon survived the decedent, Earl A. Wallace, and were his paternal first cousins.
2. Petitioners met their burden of proof that Regina Rose and Lionel Willard Gordon were the persons of the closest degree of kinship who survived the decedent, Earl Wallace, as his intestate heir pursuant to 20 Pa.C.S.A § 2103. See 20 Pa.C.S.A. § 2104(2).
3. Because Regina Rose and Lionel Willard Gordon are deceased, their Estates are entitled to a refund of funds paid to the Commonwealth of Pennsylvania in the amount of $127,847.64 less the inheritance tax due to the Commonwealth of Pennsylvania. Each Estate is entitled to an equal share or $63,923.82 minus the

inheritance tax due to the Commonwealth.

4. Pursuant to 20 Pa.C.S.A. §3540 (b), the Estates of Regina Rose and Lionel Willard Gordon shall file a refunding bond (without security) in the amount of $95,000.00 to protect the interest of any potential distributee who may appear within 7 years of the date of this opinion and order.
5. The request by the Administrator and Attorney for the Estate for $5,911.50 for the "defense of the estate" is denied because they have failed to establish either that the Estate should bear the burden of these litigation expenses or that they are reasonable. Estate of LaRocca, 431 Pa. 542, 546, 246 A.2d 337,339 (1968). They are entitled, however, to compensation in the amount of $1,200.00 for attendance of two hearings which can be construed as acts in fulfillment of their administrative obligations.
6. Additional documentation is required concerning the request by the Administrator and Attorney for the sum of $2,012.00 that is being held by the Beneficial Savings Bank. The Administrator and Attorney shall file an amended petition within twenty (20) days of this opinion/order outlining the services they performed that would entitle them to this sum.

Date:_____ BY THE COURT:

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John W. Herron, J.