SUMMARY OF ARGUMENT

The Orphans' Court decree finding a common law marriage between the plaintiff and the decedent does not bind the Fund. The Declaratory Judgment Act, 42 Pa. C. S. § 7531 et seq., requires joinder of all affected persons and provides that no decree shall prejudice the rights of a nonparty.

The provision in the Divorce Code for marital status determinations, 23 Pa. C. S. § 3306, does not create an exception to this requirement; the phrase "all persons concerned" is intended to refer to the persons who must be joined under the Declaratory Judgment Act. The construction urged by plaintiff -- that "all persons concerned" means all the world -- would impute to the General Assembly a disregard for fundamental due process principles.

The purpose of the finality language in § 3306 is to make clear to marital status litigants that the same standards of finality apply as in any other declaratory judgment action. If § 3306 in fact excuses joinder or notice when marriage is the issue, it is unconstitutional.

Since there is no legal theory on which plaintiff can prevail, the court below erred in granting her judgment on the pleadings. Even assuming arguendo that she was entitled to such judgment, she was not entitled to interest inasmuch as the Fund acted in good faith throughout, relying on the plain language of the Declaratory Judgment Act and the myriad of cases holding that judgments only bind parties.

ARGUMENT I

A PENSION FUND IS NOT BOUND BY A DECLARATORY JUDGMENT OF COMMON LAW MARRIAGE ENTERED IN PROCEEDINGS TO WHICH IT WAS NOT A PARTY.

Ross and the Fund disagree as to whether there was a marriage between Ross and Adams. The alleged marriage, however, is not expressly pled as a fact; only the decree is.[1] An examination of the facts actually pled by each party discloses that there are no significant factual disputes. The facts pled by Ross and admitted by the Fund's Answer are as follows:

> (1) Gregory William Adams, a beneficiary of the Fund, died on June 19, 2001. At the time, he was domiciled at plaintiff's address. R. 7a.
>
> (2) A decree was entered in Orphans' Court proceedings by the Honorable Walter R. Little finding that Audrey Ross and Gregory William Adams were husband and wife. R. 8a.
>
> (3) The decree is captioned "Audrey Ross v. Gregory Williams [sic] Adams" and was entered at No. 1232 of 2002. It was filed on August 23, 2002. R. 8a. The opinion indicates that the action was brought in order to establish plaintiff's eligibility for a surviving spouse benefit. The opinion identifies the benefit source as the Fraternal Order of Police. R. 8a, 11a.
>
> (4) The heirs of decedent -- his two daughters -- were given notice of the action, appeared, and contested the declaration of marriage. R. 8a.
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> (5) The Fund was presented with the decree (R. 8a) and refused to pay benefits, stating its reason as follows:

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[1] The declaratory relief prayed for was "a decree requiring the Defendant to honor the marriage of the Plaintiff[.]" For this reason, the relief sought by the Fund has consistently been a ruling that the Orphans' Court decree does not bind it and the granting of leave to Ross to amend her complaint to seek a determination of her marital status.

At this juncture, the Fund would not object to the Complaint being treated as a request for determination of marital status without the necessity of amendment.

> The Fund was not made a party to the action, received no notice of it, and had no opportunity to litigate the issue of whether a common law marriage took place between Ms. Ross and Mr. Adams. R. 17a-18a.

The Fund's New Matter set forth the following additional facts:

> (1) Adams left no estate either for probate or inheritance tax purposes. R. 61a.
>
> (2) The question of his marital status was not ancillary to any larger matter before Orphans' Court. R. 61a.
>
> (3) Ross had filed her original complaint in the Civil Division on September 25, 2001, after Orphans' Court refused the filing, and had named only Adams as a defendant[2]. R. 62a.
>
> (4) Ross did not state the purpose for which declaratory judgment was sought. R. *Id.*
>
> (5) Ross gave notice to Adams' adult daughters by a terminated marriage. *Id.*
>
> (6) The daughters filed an answer contesting the declaration and were treated as parties. *Id.*
>
> (7) Ross' counsel subsequently presented a motion to the Honorable Walter R. Little requesting a hearing date. *Id.*
>
> (8) The motion did not advise the court that the declaration of marital status was being sought solely for pension purposes, and stated "There are substantial questions concerning the marriage and the decedent's estate[.]"[3] *Id.*
>
> (9) Judge Little granted the motion, which was then assigned an Orphans' Court docket number. All further proceedings took place in Orphans' Court. *Id.*

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[2] A dead man cannot be a party to an action, and any such attempted proceeding is completely void and of no effect. *Montanya v. McGonegal*, 757 A. 2d 947 (Pa. Super. 2000).

[3] In the Complaint sub judice, Ross cited, *inter alia*, 20 Pa. C. S. § 711(19), which mandates that issues relating to marriage licenses be decided in Orphans' Court. This case does not present any issue relating to a marriage license.

(10) Neither the Administrative Judge of the Civil Division nor the Administrative Judge of the Orphans' Court Division approved the transfer of the case to Orphans' Court. R. 62a-63a.

(11) At the commencement of the hearing, Ross' counsel advised Judge Little that a pension entitlement claim was the major reason that the action was brought. He mistakenly identified the source of the pension as the "FOP".[4] He went on to tell the court:

> Ms. Ross is not making any claims against the estate, etc. There was virtually no estate. So, it's not a claim contrary to any heirs' claims to the estate, etc. It's strictly an action to establish the marriage to qualify for pension benefits as a widow. [R. 63a.]

(12) Adams' daughters had no financial stake whatsoever in the question of whether there was a marriage between Ross and Adams. [R. 63a.]

(13) Adams' daughters filed no exceptions to the Orphans' Court decree and did not appeal. The entry of the decree was the last action in Orphans' Court. *Id.*

(14) At no time prior to the entry of the decree was the Fund (or the Fraternal Order of Police) given any notice of either the Civil Division or Orphans' Court proceedings, nor was any notice published. The Fund's first knowledge of the proceedings came when it was advised of the decree on or about September 10, 2002. *Id.*

(15) No process of Orphans' Court has ever issued against the Fund, and the instant action is Ross' first attempt to enforce the Orphans' Court decree against defendant. R. 63a-64a.

Ross never replied to the New Matter. At the argument below, her counsel stated:

> I today have still not received a ten-day notice to respond to new matter, which would be required for them to get any kind of reward on the new matter. [R. 121a.]

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[4] The Fraternal Order of Police, commonly referred to as the FOP, is the collective bargaining agent for City of Pittsburgh police officers; it does not pay them retirement benefits. R. 63a.

No ten-day notice is required in order for New Matter to be deemed admitted for failure to respond to it[5], and there is nothing in the argument transcript that suggests any disagreement as to the facts pled in it. A plaintiff who moves for judgment on the pleadings after letting the time for responding to New Matter lapse is treating the pleadings as closed and thereby disclaiming any interest in replying to the New Matter.[6]

On those pleadings, only one conclusion of law is possible: the Orphans' Court decree finding a common law marriage between Ross and Adams does not bind the Fund.

Neither res judicata nor collateral estoppel applies against a defendant who was neither a party nor in privity with a party in the prior proceeding: *Balent and Barto v. City of Wilkes-Barre*, 542 Pa. 555, 669 A. 2d 309 (1995). Indeed, Ross has disclaimed any reliance on either doctrine. Plaintiff's Brief in Opposition to Preliminary Objections at 1.

In *Allison Park Contractors et al. v. Workers Compensation Appeal Board*, 731 A. 2d 234 (Pa. Cmwlth. 1999), Your Honorable

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[5] Pennsylvania Rules of Civil Procedure 1026, 1029. A ten-day notice is only required when a party is asking the Prothonotary to enter a default judgment on praecipe. Pa. R. C. P. 1037.

[6] Counsel stated at the argument below:

> . . . Mr. Babyak obviously considers the pleadings closed or he wouldn't file a motion for judgment on the pleadings.

Judge Lutty responded:

> Oh, he did that because you filed it. [R. 135a.]

The record shows clearly that, in fact, Ross' motion was filed first. R. 3a, 72a, 88a.

Court held that a determination of marital status made in the Family Division of the Court of Common Pleas of Allegheny County was not binding on the employer. The claimant had named the decedent's parents as defendants in the Family Division proceedings; the outcome was a consent decree recognizing the marriage. The employer had not been a party to the Family Division proceedings. While the discussion emphasizes that the declaratory judgment was a consent decree, the decision also points out, in notes 2 and 3 at 236 and 237, the inapplicability of collateral estoppel to a party who was not involved in the prior action.

The Declaratory Judgment Act, 42 Pa. C. S. § 7531 et seq., states at § 7540(a)[7]:

> When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding. . . .

At first blush, 23 Pa. C. S. § 3306[8] (Proceedings to determine marital status), seems to be in conflict with the foregoing; it states:

> When the validity of a marriage is denied or doubted, either or both of the parties to the marriage may bring an action for a declaratory judgment seeking a

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[7] Section 7540(b) creates an exception for taxing authorities. An affected taxing body shall be served with a "copy of the proceeding"; if it does not enter an appearance, the court may proceed without it if the court considers its interests to be adequately represented.

[8] This provision, originally 23 P.S. § 206, was enacted as part of the Divorce Code of 1980. At the time, the use of declaratory judgment to resolve disputes that included questions of fact was fairly new: *Liberty Mutual Insurance Company v. S.G.S. Company*, 456 Pa. 94, 318 A. 2d 906 (1974).

> declaration of the validity or invalidity of the marriage and, upon proof of the validity or invalidity of the marriage, the marriage shall be declared valid or invalid by decree of the court and, unless reversed upon appeal, the declaration shall be conclusive upon all persons concerned.

The Fund respectfully submits that the primary purpose of § 3306 was to make clear that the recognition of a marriage is an appropriate purpose for declaratory judgment, and that denial or doubt as to its existence satisfies the case-or-controversy requirement. The finality language (which presupposes compliance with the Declaratory Judgment Act) warns marital status litigants that the same standards of finality will apply as in any other declaratory judgment action. "All persons concerned" is a shorthand reference to those persons whose joinder is required under § 7540(a) of the Declaratory Judgment Act.[9]

Any doubt that actions under § 3306 are governed by the Declaratory Judgment Act was removed by the December 19, 1990 amendment to the Act, which added the highlighted language to § 7541(c):

> Exceptions.--Relief shall not be available under this subchapter with respect to any:
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> > 1. Action wherein a divorce or annulment of marriage is sought *except as provided by 23 Pa. C. S. § 3306 (relating to proceedings to determine marital status)*. [Emphasis added.]

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[9] This construction has been accepted elsewhere in the context of probate proceedings:

> Our courts have held that "all persons concerned" is the equivalent of "parties in interest," that same includes "all persons who might be injured by admitting a will or codicil to probate," and that this includes a judgment creditor of a devisee or distributee. [*In re Sycle's Estate*, 195 A. 857, 858 (N.J. Misc. 1937).]

. . . .

The construction urged by plaintiff -- that everybody is bound regardless of joinder or notice -- flies in the face of the Due Process Clause.[10] The legislature is presumed not to have intended an unconstitutional result. 1 Pa. C. S. § 1922(3). If, in fact, § 3306 of the Divorce Code permits the enforcement of a decree of marriage against a nonparty to the action in which it was entered -- particularly a nonparty who had no knowledge of the action -- it violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution and Article I, Section 11 of the Pennsylvania Constitution.[11]

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[10] The Fund is a person within the meaning of the Due Process Clause. *See In re Real Estate Title and Settlement Services Antitrust Litigation*, 869 F. 3d 760 (3rd cir. 1989), wherein the Third Circuit held that school boards were entitled to due process, stating:

> Like corporations, and unlike states, the school districts are limited bodies which exist for a particular and circumscribed purpose. [*Id.* at 765, Note 3.]

The same is true of the Fund, and the legislature is always free to accord an entity more process than it is constitutionally due. Nothing in the Declaratory Judgment Act suggests an intention to treat quasi-governmental entities differently from other persons; indeed, if governmental entities were excluded from the joinder requirements of the Act, no exception for taxing bodies would be necessary. Moreover, the "circumscribed purpose" of the Fund would be undermined if it were deprived of a fair opportunity to contest a claim of surviving spouse status.

[11] Article I, Section 11 states in pertinent part:

> All courts shall be open; and every man for an injury done him in his lands, goods, person or reputation shall have remedy by due course of law, and right and justice administered without sale, denial or delay.

In *R. v. Department of Public Welfare*, 535 Pa. 440, 636 A.2d 142 (1994) the Supreme Court of Pennsylvania stated:

Judge Lutty's opinion states:

> This Court accepted and now hereby adopts the findings of fact[12] and conclusions of law in Judge Little's Opinion and Decree. Based on such, this Court was simply not persuaded that a different legal conclusion would be reached with a second hearing. [12a *infra*.]

What Judge Lutty thought would happen at a second hearing is both speculative and irrelevant. The Fund was under no duty to plead evidence, and to impose upon it the burden of showing a probable different outcome would permit the Fund to be prejudiced by Judge Little's decision in violation of § 7540(a) of the Declaratory Judgment Act. In *Commonwealth v. Powers*, 168 A. 328 (Pa. Super. 1933), the Superior Court stated:

> The word "prejudice" means to the injury or detriment of another." [*Id.* at 331.]

Even qualified deference to Judge Little's opinion would obviously be to the detriment of the Fund.

In *Carey v. Piphus*, 435 U.S. 247, 259, 98 S. Ct. 1042, 55 L. Ed. 2d 252 (1978), the United States Supreme Court stated:

> [T]he right to procedural due process is "absolute" in the sense that it does not depend upon the merits of a claimant's substantive assertions[.] [*Id.* at 266, 98 S. Ct. at 1054, 55 L. Ed. 2d at 266.]

> Even though the term "due process" appears nowhere in [Sections 1 and 11], due process rights are considered to emanate from them. [*Id.* at 30, 636 A. 2d at 152; footnote omitted.]

The due process guaranteed by Section 11 and related provisions has been described by Your Honorable Court as "substantially coextensive" with that guaranteed by the United States Constitution. *Stone v. Edwards Insurance Agency, Inc.*, 636 A. 2d 293, 297 (Pa. Cmwlth. 1994). There is nothing in *Stone* to indicate that it mattered that the due process complainant was a corporation rather than an individual. *See* Note 18 *supra*.

[12] Any judgment on the pleadings that depends on the court's resolution of factual issues is necessarily invalid.

Accord: *Hamdi v. Rumsfeld*, ___ U.S. ___, 124 S. Ct. 2633, 159 L. Ed. 2d 578 (2004).

Procedural due process was explained as follows in *Fuentes v. Shevin*, 407 U.S. 67, 92 S. Ct. 1983, 32 L. Ed. 2d 556 (1972):

> For more than a century the central meaning of procedural due process has been clear: "Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified." [*Id.* at 80, 92 S. Ct. at 1994, 32 L. Ed. 2d 556; citation omitted.]

In *Hansberry v. Lee*, 311 U.S. 32, 61 S. Ct. 115, 85 L. Ed. 22 (1940), the United States Supreme Court stated:

> It is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process. [*Id.* at 40, 61 S. Ct. at 117, 85 L. Ed. at 26.]

Pennsylvania is part of Anglo-American jurisprudence; in *Kelly v. Mueller*, 2004 Pa. Super. 425, ___ A. 2d ___ (2004), the Superior Court stated:

> "Unless the court has the parties before it, by appearance or service of process, it is obvious that it cannot bind them by its adjudications." [Citation omitted.] "Lack of notice and an opportunity to be heard constitutes a violation of due process of law and results in an invalid judgment." [Citation omitted.] [*Id.* at P12.]

Martin v. Wilks, 490 U.S. 755, 109 S. Ct. 2180, 104 L. Ed. 2d 835 (1989) involved plaintiffs who were challenging the conclusiveness of the decree entered in a prior action about which they had known and in which they had not chosen to intervene.[13] The Court quoted the above language from *Hansberry*

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[13] In Pennsylvania, the right to intervene ends with final adjudication. *Robinson Township School District v. Houghton*, 387 Pa. 236, 128 A. 2d 58 (1956). Intervention, when it is possible,

and the following language from *Chase National Bank v. Norwalk*, 291 U.S. 431, 54 S. Ct. 475, 78 L. Ed. 894 (1934):

> The law does not impose upon any person absolutely entitled to a hearing the burden of voluntary intervention in a suit to which he is a stranger. . . . Unless duly summoned to appear in a legal proceeding, a person not a privy may rest assured that a judgment recovered therein will not affect his legal rights. [*Id.* at 441, 54 S. Ct. at 479, 78 L. Ed. 2d at 901.]

The Court reconfirmed this principle, stating:

> A judgment or decree among parties to a lawsuit resolves issues as among them, but it does not conclude the rights of strangers to those proceedings.[2]
>
> [2] [W]here a special remedial scheme exists expressly foreclosing successive litigation by nonlitigants, as for example in bankruptcy or probate, legal proceedings may terminate preexisting rights if the scheme is otherwise consistent with due process. *See National Labor Relations Board v. Bildisco and Bildisco*, 465 U.S. 513, 529-30, n.10, 104 S. Ct. 1188, 1198, n. 10, 79 L. Ed. 2d 482, 498, n. 10 (1984) ("[P]roof of claim must be presented to the Bankruptcy Court . . . or be lost"); *Tulsa Professional Collection Services, Inc. v. Pope*, 485 U.S. 478, 108 S. Ct. 1340, 99 L. Ed. 2d 565 (1988) (nonclaim statute terminating unsubmitted claims against the estate). . . . [*Id.* at 762, 109 S. Ct. at 2185, 104 L. Ed. 2d at 844-45.]

The Court also stated:

> Joinder as a party, rather than knowledge of a lawsuit and an opportunity to intervene, is the method by which potential parties are subjected to the jurisdiction of the court and bound by a judgment or decree. The parties to a lawsuit presumably know better than anyone else the nature and scope of relief sought in the action, and at whose expense such relief might be granted. It makes sense, therefore, to place on them a burden of bringing in additional parties where such a step is indicated, rather than placing on potential additional parties a duty to intervene when they acquire knowledge of the lawsuit. [*Id.* at 765, 109 S. Ct. at 2186, 104 L. Ed. 2d at 846; footnote omitted.]

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is voluntary. *Walls v. City of Philadelphia*, 646 A. 2d 592 (Pa. Cmwlth. 1994).

It is clear from the foregoing that the Fund was under no duty to take action in Orphans' Court after learning of the decree. One not bound by an order is not aggrieved by it and may not appeal it. *Beers v. Unemployment Compensation Board of Review*, 534 Pa. 605, 633 A. 2d 1158 (1993); *John G. Bryant Company v. Sling Testing and Repair, Inc.*, 471 Pa. 1, 369 A. 2d 1164 (1977).

Here, Orphans' Court did not even attempt to bind the Fund. It merely found a marriage. It made no finding as to the length of the marriage.[14] Its decree did not order the Fund (or the FOP, or anyone else) to do anything and did not dispose of any property. The decree could not, by itself, bring about any consequences that would injure the Fund. The Fund was annoyed by the decree. It was not, strictly speaking, aggrieved.

The Fund knows of no authority for a trial court to grant reconsideration or any other form of post-trial relief[15] at the behest of a nonparty.[16]

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[14] *See* Note 1, *supra*.

[15] The ten-day exceptions period had expired by the time the Fund learned of the decree. The filing of exceptions within that period is mandatory. *Chalkey v. Roush*, 569 Pa. 462, 805 A. 2d 491 (2002).

[16] Had the decree ordered the Fund to pay benefits, the Fund might have had standing to seek review. *See Walker v. Walker*, 523 A. 2d 782 (Pa. Super. 1987) (adult child upon whom custody order imposed obligations had standing to appeal even though child was not named party); *Kelly*, *supra* (weapon belonging to nonparty father of respondent in Protection from Abuse action ordered seized; father held to have standing to appeal). Even in that event, however, the Fund would have had no obligation to take an appeal. The arguable ability of a person who is blindsided by a court decree to pursue an appeal on a "party by virtue of aggrievement" theory should not, in and of itself, transform that person into a party for issue or claim preclusion

The examples given by the Supreme Court in *Martin* of exceptions to joinder requirements both involve proceedings of a type traditionally classified as *in rem*[17]; they both present situations where finite assets under the control of the court are to be distributed. Both involve proceedings in which there is some provision for notice to nonlitigants. Creditors are notified in a bankruptcy. 11 U.S.C. § 521; Federal Rule of Bankruptcy Procedure 2002. Personal representatives must give notice of the intended distribution to all known claimants. 20 Pa. C. S. § 3503.

It is clear from *Martin* that, under limited circumstances, notice and opportunity to intervene may satisfy due process. This gives Ross no help; it is undisputed that the Fund had no notice prior to the entry of the decree. Even if notice had been given, our legislature has not seen fit to create any "special remedial scheme" dispensing with joinder where proving marriage is concerned.[18]

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purposes. Such a transformation, in addition to violating *Martin*, would legitimize the blindsiding. Such a "party" is not one who has had a full and fair opportunity to litigate the issue.

[17] As to bankruptcy, *see Haggerty v. Erie County Tax Claim Bureau*, 528 A. 2d 681 (Pa. Cmwlth. 1987). As to probate, *see Mangold v. Neuman*, 371 Pa. 496, 91 A. 2d 904 (1952).

[18] Ross has suggested that if the Fund's position is upheld, it would be necessary for persons seeking judicial recognition of a marriage to join credit card companies, grocery stores, and banks. R. 43a. The impact on such entities, if any, relates to their future remedies; the Fund cannot conceive of a situation where a finding of marriage would obligate such an entity to pay money to anybody. The interests of these peripheral entities might, consistently with due process, be adequately protected by a statutory scheme requiring that they be given notice and an opportunity to be heard. But notice without joinder cannot

Judge Friedman's opinion concludes with the following ipsedixit:

> This Court had, and has, the view that just as the world need not attend a marriage for it to be valid, once a judge has finally ruled there was one, the world, including Defendant, must hold its peace. [Opinion of Judge Friedman at 5, 7a *infra*.]

The Fund shares Judge Friedman's regard for the sanctity of marriage, but respectfully submits that a *finding* of marriage, particularly one made posthumously, is not an event comparable to a marriage. To be sure, reliance interests of living parties to a putative marriage may complicate the question of what right a third party should have to challenge a decree declaring a marriage. However, no such interests are implicated when death has terminated any marriage that existed and the only issue is whether a particular third person has a monetary obligation to the survivor.

Judge Lutty's opinion offers a supplemental ipsedixit:

> [T]o require Plaintiff to file a separate and distinct declaratory judgment action against each and every potential party that questions her marriage, after the issue has already been decided by a full adversarial hearing, is plainly unreasonable. [Opinion in Support of Order Granting Judgment on the Pleadings at 3, 13a *infra*.]

The Fund shares Judge Lutty's distaste for duplicative proceedings. The legislature also shares it, as evidenced by the joinder requirements of the Declaratory Judgment Act. The multiplicity of proceedings in this case is the result of Ross' own failure to comply with those requirements. In *Angle v.*

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suffice where the consequence of finding a marriage is to impose an immediate financial obligation on any individual or entity. It doesn't get any more *in personam* than that.

Commonwealth, 396 Pa. 514, 153 A. 2d 912 (1959), Justice Musmanno stated:

> Without notice to all parties concerned, a lawsuit is a meaningless aggregation of papers. Without notice to a losing party in a lawsuit, the winner has achieved an empty victory. [*Id.* at 522, 153 A. 2d at 916-17.]

Here, the emptiness of the victory was eminently predictable. The Fund is the *only* known person other than Ross that would be financially affected by a finding of marriage, and collecting benefits based on Adams' police employment was her *sole* purpose in bringing the prior action. Under those circumstances, the failure to join the Fund in that action is utterly indefensible. The Fund should be given its day in court.