UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0545

September Term, 2014

CARLTON GREEN

v.

HELEN NASSIF

Kehoe,
Leahy,
Kenney III, James A.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Leahy, J.

Filed: October 4, 2016

Walter L. Green died in 1993, but his son and widow are still fighting over his assets. In 2012, Judge Adkins writing for the Court of Appeals in *Green v. Nassif*, stated that the Court was "put[ting] to an end decades of litigation by a personal representative attempting to secure an unfair portion of a multi-million dollar estate for himself and his sister." 426 Md. 258, 262 (2012). In that case, the estate had been open for 19 years. *Id.* Four years later, the controversy has wound its way back to this Court, again. Apart from the sheer volume of papers and filings involved in this case, because of the length of this estate's lifespan, we must apply and interpret statutory and case law a quarter of a century old. We emphasize that this is not a situation—a 23-year old estate—that is encouraged by the law, which favors "the avoidance of all unnecessary delays in the settlement of decedents' estates." *Matthews v. Fuller*, 209 Md. 42, 56 (1956) (citations omitted).

In their respective appeals[1] and cross-appeal, the parties, Carlton Green and Helen Nassif, have presented a combined 12 questions for our review. Several of these issues are duplicative, and many interrelate. We will address every question the parties have presented, but we have distilled from their briefing the four primary issues presently at controversy in this appeal:

1. Whether the circuit court erred in its calculation of the enforceable claims of the net estate and whether the circuit court erred in denying Carlton Green an equitable adjustment.

2. Whether the changing fraction method or the fixed fraction method should be applied in the administration of this estate.

[1] Carlton Green, the son of the decedent, filed two separate sets of briefing and appears before us in two capacities—*pro se* as a legatee of the estate and as the personal representative of the estate. Carlton's son, Walter W. Green, represents Carlton in Carlton's capacity as personal representative.

3. Whether the circuit court erred by deducting the estate taxes from the estate at the end of administration, rather than as they were paid.

4. Whether the circuit court erred in striking Carlton Green's second amended complaint.[2]

[2] Carlton Green's questions, as personal representative, as originally presented, are as follows:

1. "Did the Circuit Court err in failing to calculate the amount of enforceable claims that are to be deducted in the elective share formula under the Court of Appeals' definition announced in *Green v. Nassif*, 426 Md. 258, 275, 44 A.3d 321 (2012)?"
2. "Did the Circuit Court err in striking the Appellants' Second Amended Complaint?"
3. "Did the Circuit Court err in the method it employed to calculate the elective share in the Estate?"
4. "Does the Uniform Principal and Income Act of 2000 apply to this Estate?"

Carlton Green's questions, in his individual capacity, as originally presented, are as follows:

1. "Does the date of death of the decedent determine the applicable statutory law which governs the administration of decedent's estate?"
2. "Did the lower court err when it granted the motion to strike the second amended complaint?"
3. "Are the paid enforceable claims $10,625,058 that should be deducted in the calculation of the elective share?"
4. "Was it proper to distribute the income during the administration of this estate one-third (1/3) to the electing spouse and one-third (1/3) to each of the decedent's children?"
5. "Are the legatees entitled to be distributed two-thirds (2/3) of the principal proceeds of the Nationsbank stock used as an incident to administration to satisfy claims, with the electing spouse being entitled to the remaining one-third (1/3) share; should the recovery of assets for the estate be equitably adjusted among the three stakeholders in the estate?"

Helen Nassif's questions, as originally presented in her cross-appeal, are as follows:

(cont.)

As will be discussed in detail below, we affirm the judgments of the Circuit Court for Prince George's County. We hold the circuit court did not err in its calculation of the enforceable claims and in refusing to grant Carlton Green an equitable adjustment, or in deducting the estate taxes from the estate at the end of administration, or in applying the changing fraction method to the estate. As for the subsidiary issues, we hold that the 2000 Orphans' Court order is not binding as to whether the fixed or changing fraction method is applicable to the estate, and that it was not legal error for the circuit court to rely on equitable considerations to time the deduction of estate taxes from the estate. Finally, we determine that the circuit court did not abuse its discretion in striking Carlton Green's second amended complaint. It is unnecessary to reach whether the Maryland Uniform Principal and Income Act applies to this estate or whether a justiciable controversy has been presented concerning its application.

1. "Did the trial court err by approving the deduction of estate taxes 15 years after they were paid, rather than when paid, which resulted in the fiction that, for those 15 years, the Estate contained $8 million more in assets than it actually did and cause substantial income received on existing assets to be reallocated from Nassif to the Residuary Legatees?"
2. "Did the trial court err by concluding it was bound by an Orphans' Court's interim order and elevating that Order over controlling law of the case as expressed in the appellate opinions of this Court and the Court of Appeals?"
3. "Did the trial court err by substituting its judgment for that of the Legislature, effectively imposing the tax burden on Nassif in violation of ET 3-203, and in determining that Gibber's method gave Nassif more than her one-third statutory share?"

BACKGROUND

Walter L. Green ("Walter") died testate on March 9, 1993, leaving a $29,408,295.00 estate ("the Estate"). To describe the Estate, the Court of Appeals' previous opinion in this case, *Green*, 426 Md. at 263-64, quoted this Court's opinion in *Nassif v. Green*, 198 Md. App. 719, 722-23 (2011) in which we quoted from the personal representative's brief:

> The four inventories in the Maryland probate estate totaled $28,494,093 and consisted of thirty-five real properties, located in Prince George's County, Montgomery County, Wicomico County and Worcester County; three closely held corporations, which owned real property in Florida and the District of Columbia, owned and operated a motel in Salisbury, Maryland, managed a chicken farm in Salisbury, Maryland, and owned an undeveloped shopping center site in Bowie, Maryland. At the time of decedent's death he operated a general partnership that owned a 100 room hotel near Busch Gardens in Tampa, Florida; he owned and managed a stock portfolio that consisted of eighty publicly traded corporations; two stock brokerage accounts; he owned and operated a partnership owning fifty (50) subsidized apartments in Elwood, Indiana; and what caused the major problems in this Estate, he owned a 50% interest in a general partnership known as West Laurel Partnership that owned and operated a 205 room Best Western Hotel and a 37.5% interest in West Laurel Corporation that owned the hotel restaurant in Laurel, Maryland. Other assets in the Maryland Estate consisted of thirteen other partnerships; eighteen separate bank accounts; thirteen escrow accounts; and various mortgages, deeds of trust, and notes receivable. In addition to the Maryland probate estate, the decedent individually owned real property interests in Delaware, Iowa, Florida, Indiana and Pennsylvania which were the subject of ancillary administrations in those states.
>
> Further complicating the administration of this Estate, at the time of the decedent's death, the economy was in the midst of the savings and loan crisis. The Resolution Trust Corporation . . . had been appointed receiver of many federal savings banks that failed, including Second National Savings Bank to which decedent had personal liability on outstanding loans exceeding $12 million. Like the savings and loans, the hotel business was suffering. The $4.5 million second trust loan pertaining to the 205 room Best Western Hotel and restaurant in the hotel was in default at decedent's death.

Walter Green's will, executed on November 6, 1987, provided for three heirs to receive one-third each of the residuary Estate: (1) Walter's son, Carlton M. Green, who is the appellant and cross-appellee ("Carlton"); (2) Walter's daughter, Anne G. Fotos ("Fotos");[3] and, (3) Walter's wife, should he be married at the time of his death. At the time of his death, Walter was married to Helen G. Nassif, who is the appellee and cross-appellant ("Nassif").[4] The will also provided that Carlton and Fotos receive specific bequests under the will, including certain real property leased to Sunoco and McDonald's. On February 4, 1993, Walter executed a codicil that provided that Carlton and Fotos are each to receive a specific bequest of half of his Nationsbank stock.

A petition for probate was filed in the Orphans' Court of Prince George's County after Walter's death. Carlton was appointed personal representative of the Estate on March 19, 1993. On May 3, 1993, as the wife of the decedent, rather than take her share pursuant to the will, Nassif timely elected to take her statutory share—one-third of the net estate—pursuant to Maryland Code (1974, 1991 Repl. Vol., 1993 Supp.), Estates and Trusts Article ("1993 ET"),[5] § 3-203. While administering the Estate, Carlton prepared six inventories and 23 accounts reporting the property held in the Estate, each reflecting the

[3] Fotos was a party in previous proceedings in this long and serpentine litigation, but she is not a party in this current appeal.

[4] Nassif is only mentioned in the will by name once: Item II of the will provides that she is to receive the 1984 Oldsmobile 98 Regency that was in her possession at the time of the will's execution.

[5] We cite to various volumes of the Estates and Trusts Article throughout this opinion as we differentiate between statutes in effect at different times during the course of this long-running estate.

receipt, payment, or distribution of income and assets during specific periods, and no party disputes the amounts as reported.

A. Enforceable Claims History

Although Walter left an Estate with a value of over $29,000,000.00, there were claims against the estate of over $26,000,000.00. *Green*, 426 Md. at 264-65. Many of these claims, however, were the result of loans that Walter had personally guaranteed, and, in these cases, the primary obligor was a business in which Walter had an interest. *Id.* Therefore, the Estate's liability was contingent upon the primary obligors—the various businesses—paying the underlying debts. *Id.* at 265. Carlton, as personal representative of the estate, was able to settle many of these claims so that the estate was only reduced in value by $102,869.00. *Id.* Nonetheless, in this appeal Carlton argues that the enforceable claims that are to be deducted from the net estate prior to calculating Nassif's elective share, equal $10,655,058.00.[6] We turn, therefore, to the history of these claims.

1. Citizens National Bank - $267,230.42

On June 8, 1993, Citizens National Bank filed a $267,486.86 claim against the Estate with the Register of Wills for Prince George's County ("Register"). This claim arose out of a personal guaranty that Walter had made on a loan from Citizens National Bank to the West Laurel Partnership, which was operating a Best Western hotel. The Estate

[6] In the prior case before the Court of Appeals, Carlton claimed that he was entitled to a deduction of $13,204,136.00 in enforceable claims from the net estate before calculating Nassif's elective share. *Green*, 426 Md. at 265. The "net estate" was defined at "the property of the decedent exclusive of the family allowance and enforceable claims against the estate, except as used in § 3-102." 1993 ET §1-101(n).

had a 50% interest in West Laurel Partnership. The Estate paid Citizens National Bank $135,740.76 to satisfy this claim. The Best Western hotel and the Brass Duck Restaurant were sold for $11,950,000.00 on December 21, 2004, and the Estate was reimbursed in full for this expenditure in 2004.

2. Citizens National Bank - $396,910.00

On June 8, 1993, Citizens National Bank filed a second claim against the Estate with the Register, this one for $396,910.00. This claim arose out of Walter's personal guaranty of a loan from Citizens National Bank to the West Laurel Corporation. The West Laurel Corporation was operating the Brass Duck Restaurant, which ran in connection with the Best Western Hotel. The Estate paid Citizens National Bank $249,785.68 to satisfy this claim. After the Best Western hotel and the Brass Duck Restaurant were sold for $11,950,000.00, the estate was fully reimbursed for this expenditure.

3. Resolution Trust Corporation (Gremar) - $1,832,273.65

On December 1, 1993, the Resolution Trust Corporation ("RTC") filed a $1,832,273.65 claim against the Estate with the Register. This claim arose out of Walter's personal guaranty of a promissory note to the Second National Federal Savings Bank.[7] This loan related to the operation of a Safari Hotel in Florida, and the Estate had a 20% interest in the entity that owned the hotel. The Estate paid $509,921.81 to settle this claim and set the transaction up as a loan in its accounting. The Safari Hotel was actually sold

[7] RTC was acting as conservator for the Second National Federal Savings Association.

before the money was paid. At the first trial, Carlton testified that, as of 2004, the Estate was reimbursed for the money it paid on this claim, except for $102,869.00.

4. Resolution Trust Corporation (Second Trust Note) - $4,588,292.01

On December 1, 1993, the RTC, this time acting as conservator for the Second National Federal Savings Association, filed with the Register a claim of $4,588,292.01. This claim arose out of Walter's general partnership and guarantor liability from the West Laurel Partnership's second trust note. Carlton purchased the second note, in 1995, for $3,250,000.00, and the RTC marked the claim as satisfied on December 19, 1995. In 2005, the Best Western Hotel was sold, and the Estate made back all of the money it spent on this claim.

5. Second National Federal Savings Bank-First Trust Claim – $5,748,170.69

On September 9, 1993, the Second National Federal Savings Bank made a claim against the Estate for $5,748,170.69, which arose out of a loan to the West Laurel Partnership. Accord, LLC, which was a successor entity to the West Laurel Partnership, refinanced the loan on June 12, 1997, with Suburban Capital Markets, Inc. Accord, LLC, repaid the $5,748,170.69 from the proceeds of that refinancing. The Estate is not currently diminished from this claim.

6. Loyola Federal Savings Bank Claim ($371,302.15)

In August 1993, Loyola Federal Savings Bank made a claim for $371,302.15 against the Estate. Salisbury Enterprises, Inc. ("Salisbury"), a corporation in which Walter Green had an interest, was the maker of the promissory note and the borrower in the loan underlying the claim, and Walter Green was the guarantor of the loan in his individual

capacity. The Estate advanced Salisbury money to pay the Loyola claim and recorded this advance as a loan in the Estate's books as a loan to Salisbury.

Carlton testified at the trial in 2008 (discussed below), that Salisbury paid interest on the note to the Estate. Carlton is the President of Salisbury, and, if any money is outstanding on the loan from the Estate to Salisbury, it is within Carlton's power to pay it back.

We will provide more information on the individual claims and payments in the discussion section.

B. Litigation History of the Estate

Proceedings Leading to 2012 Decision of the Court of Appeals

In 2000, pursuant to a February 18, 2000 order from the Orphans' Court, Carlton, as personal representative, distributed certain specific bequests pursuant to the will, including a Sunoco gasoline station property, a McDonald's restaurant property, and Nationsbank stock. This order also purported to address the timing of the estate tax deductions and whether the fixed fraction or changing fraction method was proper. Nassif did not appeal that 2000 Orphans' Court order. Outside of these particular disbursements, several other pecuniary and charitable bequests, and distributions of income, the Estate has remained largely undistributed since 2000.

On January 28, 2005, Carlton, as personal representative, filed an Amended Petition to Fix Percentage Shares of Residuary Heirs and for Authority to Distribute Residuary Assets in Kind in the Orphans' Court. Stating that the enforceable claims at that time were $13,389,573.00, the petition set forth the applicable percentage shares of the Estate at

14.6% (Nassif), 44% (Carlton), and 41.4% (Fotos). On May 17, 2006, the Orphans' Court filed an order dismissing this petition.

On July 21, 2006, Carlton, in his individual capacity and in his capacity as personal representative, filed a two-count complaint in the Circuit Court for Prince George's County for a declaratory judgment, thereby launching a proceeding parallel to the ongoing proceedings in the Orphans' Court. In his complaint, Carlton asserted $13,721,705.86 as the amount of enforceable claims deducted in the calculation of the net estate. In his second count, Carlton sought to pay Nassif her statutory share in cash,[8] rather than specific property, as per 1993 ET § 3-208(b). Carlton argued that this one-third share of the Estate should be valued as of the date of election, not the date of distribution.[9]

Nassif, however, disputed that these claims were "enforceable claims" against the Estate. Nassif argued that the total amount of enforceable claims was, instead, $102,869.00 because that was the actual amount that the Estate was diminished due to actual, out-of-pocket payment of claims. She argued that certain Estate expenses were recouped before distribution of Estate assets and that such claims should not be included as "enforceable claims," instead arguing that "enforceable claims" meant "paid claims." She also argued

[8] On October 11, 2006, Carlton and Anne Fotos filed, in the Orphans' Court, an election to pay Nassif in cash.

[9] On November 30, 2006, Carlton was removed as personal representative in the Orphans' Court. Carlton appealed to the Court of Special Appeals, but the Court of Appeals granted certiorari before this Court decided the matter. In October, 2007, the Court of Appeals found that the appeal had become moot because Carlton had been reinstated as personal representative and, thus, dismissed the appeal. *Green v. Nassif*, 401 Md. 649, 654 (2007).

that the diminution of the Estate was determined at the point of distribution, not at the point of election, death, or any other time during the administration of the estate.

Meanwhile, on November 30, 2006, the Orphans' Court issued an opinion following a hearing on (1) the Personal Representative's (Carlton) Amended Petition to Fix Percentage Shares of Residuary Heirs and for Authority to Distribute Residuary Assets in Kind, and (2) Petitioner's (Nassif) Petition to Determine Amount of Statutory Share. The Orphans' Court was generally of the opinion that Carlton "ha[d] mismanaged the property of the estate and violated his fiduciary duties to the legatees in truthfully accounting and managing the assets for the benefit of the legatees" and stated that the evidence "highlighted a significant number of fiduciary transgressions[.]" In its written opinion, the Orphans' Court engaged in an historical analysis of Walter's estate and concluded that "enforceable claims" were to be calculated as claims actually paid as of the date of distribution, that Nassif was able to share in income on her share of the estate property, that the Maryland Uniform Principal and Income Act ("MUPIA") applied to the estate, and that the decision by the legatees to pay Nassif in cash was void. *Green*, 426 Md. at 266**.** Carlton appealed the decision of the Orphans' Court to the circuit court,[10] and the two actions—the

[10] Maryland Code (1974, 2013 Replacement Vol.), Courts and Judicial Proceedings Article ("CJP"), § 12-501 allows a party to appeal a judgment from the Orphans' Court directly to the Court of Special Appeals. Meanwhile, CJP § 12-502, allows a party to appeal a judgment of the Orphans' Court to the circuit court, which hears the case *de novo*, "treat[ing the case] as if it were a new proceeding and as if there had never been a prior hearing or judgment by the Orphans' Court." Here, Carlton chose the latter of these two options.

declaratory judgment action in the circuit court and the appeal of the Orphans' Court decision—were eventually partially consolidated on October 23, 2007.[11] *Id.* at 267.

The consolidated cases went to trial beginning on April, 1, 2008 and proceeded over a two month period through June 3, 2008. On June 30, 2009, the circuit court issued its opinion and order, phrasing the central question in the case as follows: "[i]s an enforceable claim only a claim that diminished the Estate at the date of final distribution?"[12,13] The circuit court held that the term "enforceable claims" meant "those claims that are capable of being enforced against the Estate." The court described Carlton's efforts as personal representative to manage the estate, and determined that $13,204,436.00 was the correct amount of enforceable claims. The court also ruled that according to the 1991 statute that was in effect at the time of Walter's death, Nassif was not entitled to income on her elective

[11] Some proceedings remained in the Orphans' Court, and those were stayed on February 8, 2007, and that stay was lifted on February 21, 2013.

[12] The circuit court further set out the issues before it as follows:

1. "What are the enforceable claims in this case?"
2. "When are enforceable claims determined?"
3. "Whether an electing spouse is entitled to income under the 1991 statute that was in effect at the time of the decedent's death?"

[13] Prior to issuing the June 30, 2009 order, the court granted summary judgment on March 28, 2008, in favor of Carlton on some issues, including a ruling stating that Carlton's election in October 2006—over 13 years after Nassif had originally elected to take her statutory share—to pay Nassif her elective share in cash, rather than in kind, was permissible because the statute contained no express time limit for this decision. In granting summary judgment, the court also ruled that the 2000 Orphans' Court order on specific bequests was a final order that Nassif could not then challenge because she did not appeal it at the time. The court also ruled, contrary to Orphans' Court, that the MUPIA, which had been enacted in 2000, did not apply to Walter's estate.

share. On October 28, 2009, the circuit court issued an amended order, revising the language of the previous order and making a few further declarations, but keeping the same result and generally keeping the previous order in full force and effect.

On November 5, 2009, Nassif appealed this declaratory judgment to the Court of Special Appeals. She presented six contentions, summarized by this Court as follows:

> (1) claims that were timely filed but not allowed and paid were not "enforceable claims" within the meaning of the relevant statute and could not reduce the value of appellant's interest in the estate; (2) the court permitted a double deduction of enforceable claims; (3) appellant is entitled to share in income earned by the estate, and the [MUPIA] applies to income and distributions after Oct. 1, 2000; (4) Mr. Green and Ms. Fotos cannot cash out appellant's share pursuant to ET 3-208(b); (5) appellant's challenge to the valuation of specific bequests used to calculate the amount of the elective share is not barred by res [judicata] because of the orphan's court 2000 opinion and order; and (6) appellant's elective share is to be valued as of the date of distribution.

Nassif, 198 Md. App. at 727-28.

This Court reversed in part and affirmed in part the circuit court's judgment. *Id.* at 722. We held that the term "enforceable claims" is defined as "claims that are valid and are required to be paid or paid" stating that, before claims are paid, such claims are only potentially enforceable.[14] *Id.* at 731. We also held that, up to the date of payment, Nassif was entitled to share in the income of the assets subject to Nassif's payment. *Id.* at 734. We further held that the MUPIA applied to the Estate. *Id.* at 736.

[14] The holding on this issue mooted Nassif's double deduction issue. *Nassif*, 198 Md. App. at 732.

In affirming certain parts of the circuit court's decision, we noted that although we believed the legislature did not contemplate that ET § 3-208 (b) would be applied many years after the estate had been opened, because of the statute's silence on the matter, there was no time limit for the legatees to choose to pay the elective share in cash, rather than in property in kind. *Id.* at 733. Further, we held that assets were to be valued at the date of distribution when paid in kind and that assets were to be valued at the date of election when paid in cash. *Id.* Finally, we affirmed the decision of the circuit court in holding that the 2000 Orphans' Court order was a final order with respect to the specific bequests in that order, and that the specific bequests addressed in the order could not be revisited at that juncture. *Id.* at 737-38.

On June 10, 2011, Carlton filed a petition for *certiorari*. On June 27, 2011, Nassif opposed this petition, and filed a cross-petition for *certiorari*.[15] The Court of Appeals granted *certiorari* on August 15, 2011. *Green v. Nassif*, 426 Md. at 268-269. Carlton presented the following questions on appeal:

> (1) As a matter of first impression, what are "enforceable claims" in ET § 1–101(n) (renumbered § 1–101(p)) and what enforceable claims are to be properly deducted in calculating the net estate for the elective share in this case?
> (2) Did the Court of Special Appeals err in holding that the elective share is entitled to income?
> (3) Does the [MUPIA] apply to the elective share?

Id. at 268-69. The Court of Appeals rephrased Nassif's questions as follows:

> (1) Did the Court of Special Appeals err in holding that there is no time limit on a legatee's decision to pay a spouse's elective share in cash?

[15] And, on July 6, 2011, Carlton filed an opposition to Nassif's cross-petition for *certiorari*.

> (2) Did the trial court err by allowing certain claims to be deducted twice when calculating the net estate?

Id. at 269 (footnote omitted). Nassif also argued that Carlton, as personal representative, did not have standing to appeal, but the Court declined to address this argument because she did not raise it in her opposition to petition or cross-petition for *certiorari*. *Id.* at 269-70 n.12. The Court opined, however, that Nassif was free to attack Carlton's capacity as personal representative in the Orphans' Court. *Id.*

The Court of Appeals affirmed in part, reversed in part, and vacated in part the decision of this Court. *Id.* at 262. On the issue of the definition of "enforceable claims," the Court agreed with this Court, holding that "enforceable claims" is defined as "claims that in fact reduce the assets in the estate or are allowed by the Court under Section 8-107." *Id.* at 277. The Court also agreed with our decision that an electing spouse was entitled to share in the appreciation of the assets of her elective share at the time of distribution when the electing spouse is given property in kind and that such a spouse was not entitled to the assets' appreciation when the legatees timely elect to pay the spouse in cash. *Id.* at 283-84. The Court further held that the electing spouse was entitled to income on the elective share assets. *Id.* at 291.

The Court reversed the part of our decision on the timeliness of the legatees' election to pay Nassif in cash, "infer[ring] a reasonable time limit to avoid an absurd and unjust result." *Id.* at 285. The Court stated that "the Legislature did not intend to allow legatees

to enjoy their 'risk free investment'[16] at the spouse's expense, for more than a decade," a result that would occur if legatees were permitted to exercise the election to pay the spouse cash 13 years after the spouse's original election. *Id.*

Finally, the Court vacated the part of our decision addressing the MUPIA, stating that no justiciable controversy presented itself on that issue because the parties had not presented any specific set of facts that would be affected by the Court's decision on that issue. *Id.* at 293-94.

The Court of Appeals remanded the case to the Court of Special Appeals with instructions to vacate the decision of the circuit court for further proceedings consistent with the Court's opinion. *Id.* at 294. In response to this, Carlton filed a motion for reconsideration on May 17, 2012, which the Court of Appeals denied via order dated June 21, 2012.[17]

Proceedings on Remand

On remand in the Circuit Court for Prince George's County, Carlton filed a two-count second amended complaint on November 9, 2012, requesting a declaratory judgment on the calculation of the net estate and Nassif's elective share and the method of

[16] If the estate's assets appreciated, the legatees would elect to pay the spouse in cash; however, if the assets depreciated, the legatees would have an incentive to pay the spouse in kind. *Green*, 426 Md. at 285 (citing Allan J. Gibber, *Gibber on Estate Administration* § 9.38 (3rd ed. 1991)).

[17] On November 13, 2012, the Supreme Court of the United States denied a petition for *certiorari* to hear the case, *Green v. Nassif*, 133 S.Ct. 618, 184 L.Ed.2d 395 (2012), but information in the record on this is scarce.

distribution. In response, on November 27, 2012, Nassif filed a motion to strike Carlton's second amended complaint. On December 20, 2012, Carlton filed an opposition to Nassif's motion. After oral argument on this issue on April 30, 2013, in which the court orally granted Nassif's motion, the docket reflects that, on May 22, 2013, the court granted Nassif's motion to strike Carlton's second amended complaint.

The court entered an order on December 18, 2012, stating that total amount of all enforceable claims was $102,869.00, pursuant to the instructions of the Court of Appeals.[18] The court then held another trial for the remaining issues, this one taking place over ten days beginning in April and concluding in August 2013. The remaining issues included a *de novo* appeal from a 2006 Orphans' Court order regarding attorney's fees and expert witness fees for Nassif.

In this trial, Carlton and Nassif presented conflicting expert testimony on how to distribute the estate and how to calculate the elective share. Carlton presented himself as an expert, and Nassif presented the expert testimony of Allan J. Gibber, the author of the leading text on Maryland probate administration.

In its April 30, 2013 opinion, the court framed the questions presented as follows:

1. "What is the appropriate amount of enforceable claims to deduct from the property of the decedent in order to determine the net estate?"

[18] This figure did not include administrative expenses, attorney's fees, and Personal Representative commissions.

Carlton actually appealed from this order, but the Court of Special Appeals entered a consent order stating that the December 18, 2012 order was only a partial declaration of rights, remanding the case to the circuit court and preserving any potential appeal rights to the December 18, 2012 order.

2. "Whether or not the February 18, 2000 Order entered by Judge Albert W. Northrop has *res judicata* effect on any other issues in this case beyond the treatment of the specific property bequests."
3. "Whether or not a justiciable issue has been generated which would require this Court to invoke the [MUPIA]. If so, does the Act apply to the Estate of Walter L. Green?"
4. "What method must this Court employ to calculate Ms. Nassif's elective share?"
5. "Whether or not Ms. Nassif shall be awarded attorney fees and expert witness fees in connection with the Preliminary Exceptions filed on her behalf on the Thirteenth Account of the Estate."

On the first issue, the court determined that the total amount of enforceable claims was $102,869.00, despite Carlton's argument that the Estate purchased assets to settle claims, including a note on the West Laurel Partnership. The court reasoned that the Estate received financial benefits and was enriched by such purchases. Further, Carlton had previously stated, in a letter to Nassif's former attorney, George Meng, that the purchase of the note would benefit the entire Estate. The court thus concluded that the net estate was $28,380,269.00, determined by taking $28,488,138.00 (the value of the Estate) and subtracting $5,000.00 (the family allowance) and $102,869.00 (enforceable claims, *i.e.*, claims actually paid or allowed by the court to be paid).

Second, the court held that the February 18, 2000 Orphans' Court order had binding effect on the parties "on the issue of calculating Ms. Nassif's elective share with respect to the timing of the federal and state estate taxes and the fixed one-third fraction in calculation [of] the elective share." The court held that, because the Orphans' Court order was a final order that was not appealed, it had *res judicata* effect as to the timing of the estate tax deduction and the fixed one-third elective share, specifically that Nassif would receive her

share before deducting those taxes from the legatees and that her share would be calculated with a fixed one-third fraction, rather than a changing fraction method.[19]

The court found, however, that, as a result of its decision concerning the binding effect of the February 2000 Orphans' Court order, that a justiciable controversy had presented itself as to the MUPIA. Nassif had argued that, in order for her to receive her full one-third share of the remaining estate, her percentage share might increase more than 33 percent without altering the elective share one-third fraction, but that this would not be possible with the fixed one-third fraction the 2000 Orphans' Court order mandated. Carlton had argued that the fixed one-third fraction must be applied to Nassif's share as per the 2000 Orphans' Court order. The court noted that the MUPIA "expressly states that [it] applies to estates and trusts in existence on October 1, 2000 the date the [MUPIA] became effective" and that the MUPIA was enacted eight months after the February 2000

[19] As discussed in greater detail *infra*, when using the fixed fraction method, "'the principal is distributed and the gains and losses are changed according to the statutory percentage . . .,'" while the "'changing fraction method allocates the gains and losses realized on the principal of an estate among those who are in fact the owners of the principal at that time in the same proportions as their respective interest in the existing balance.'" *Estate of Greenfield*, 398 A.2d 983, 985-86 (Pa. 1979) (citation omitted). *See also* Charles C. Marvel, Annotation, *Extent of Rights of Surviving Spouse Who Elects to Take Against Will in Profits of or Increase in Value of Estate Accruing After Testator's Death*, 7 A.L.R.4th 989 n.21 (1981). ("The [*Greenfield*] court set forth an illustration developed by the trial judge whereby it was assumed that a net estate was $300,000 and the widow's one-third was therefore $100,000, but after payouts of $100,000, the amount of principal remaining in the estate was $200,000, so that the elective and nonelective shares became $100,000 each. Upon an appreciation of this $200,000 by the amount of $150,000 to reach an appreciated total of $350,000, the widow would receive by the 'fixed fraction' method only one-third or $50,000 appreciation (representing a 50-percent increase in her share), whereas by the 'changing fraction' method, both her share and the nonelective share would each appreciate by the equal amount of $75,000, or 75 percent each.").

orphan's court order. Because the Estate in this case was in existence in October 1, 2000 and the enactment of the MUPIA could have an effect on the way income on the assets of the Estate was calculated, in contravention of the 2000 order,[20] the court ruled that 1. a justiciable issue was presented on whether the UPIA applied to the estate and 2. the MUPIA applied to the Estate.

The court reviewed the evidence presented in the trial on the proper method for calculating Nassif's elective share. The Estate had called Carlton to testify as an expert witness on this issue. Nassif called Allan J. Gibber, the noted Maryland trusts and estates authority, to testify as an expert on the proper calculation of her elective share.

In his testimony, Gibber, upon the instructions of Nassif's counsel, assumed that the February 18, 2000 order would not be binding. Gibber used the February 2000 order to set the values of the specific and pecuniary bequests.[21] Gibber deducted these values from the Estate at the beginning of the calculation, not as they were paid, because the bequests share in no income under Maryland law. The court agreed with Gibber on this point and found that these specific property bequests should be deducted from the Estate before the first accounting.

[20] Citing *Price v. Nesbitt*, 29 Md. 263, 266 (1868), the court noted the legal proposition that "[i]f a legislative act changes the law espoused by a court order the new statute would govern that issue."

[21] These were the Sunoco, McDonald's, and Nationsbank Stock mentioned above, as well as fixed amounts of money given to various people and charitable organizations.

Gibber also testified that he used historical values for these specific bequests, instead of current fair market values because this was a more accurate manner of determining the three shares relative to each other. The court also agreed with this method. Gibber adopted the changing fraction method and allocated income to Nassif and the Legatees in percentages corresponding to the remaining assets to which each person was entitled, and the court agreed with this.

Because Gibber assumed the February 18, 2000 order would not be binding, he deducted the estate taxes from the Estate as they were paid, rather than at the end before the distribution, and this had the effect of increasing Nassif's share at the expense of the legatees. The court, however, disagreed with Gibber on the timing issue and found that estate taxes should be deducted from the legatees[22] at the end of the calculation so that the income would be more evenly distributed among the beneficiaries for a fairer distribution. The court further found that this would be consistent with the February 18, 2000 Orphans' Court order. Thus, the court adopted Gibber's basic calculation method, excepting the timing of the tax deduction.

Finally, the court denied Nassif's request for attorney's fees paid from the Estate for several reasons, the first of which was that her attorney was not the attorney for the personal representative, who may recover fees from the Estate. Second, her attorneys were advancing Nassif's interests and did not seek to benefit the entire estate. Third, to recover

[22] Regardless of any decision on this issue, the legatees, not Nassif, would be paying the estate taxes; the question is only when the estate taxes would be deducted from the Estate in the calculation.

attorney's fees because of a "benefit to the estate," the person requesting attorney's fees must demonstrate "but for" causation, *i.e.*, but for the attorney's actions, the estate would have suffered harm. As such, the court denied Nassif's request for attorney's fees.[23]

The opinion and order of the circuit court is dated April 30, 2014, but it was not entered until May 1, 2014. On Monday, May 12, 2014, Carlton filed a motion to alter or amend the judgment, and Nassif filed a memorandum in opposition on May 23, 2014. Carlton filed a notice of appeal on May 30, 2014, and Nassif filed a notice of cross-appeal on June 3, 2014. On June 4, 2014, the court denied Carlton's motion to alter or amend the judgment as untimely, being filed more than 10 days after April 30, 2014, apparently believing that its previous order had been entered on April 30, 2014, rather than May 1, 2014, and the order further stated that, even if it were timely, there was insufficient basis to amend its opinion on this. Thereafter, on June 9, 2014, Carlton filed a motion for reconsideration, which Nassif opposed, regarding the April 30-May 1 discrepancy. On June 16, 2014,[24] the court entered an amended order, changing nothing of substance, but stating that the May 12, 2014 motion to alter or amend was timely and that there was still insufficient basis to amend the prior opinion. On June 27, 2014, and July 1, 2014,

[23] Nassif has not appealed from the circuit court's decision on attorney's fees.

[24] The order itself is dated July 16, 2014, but this does not fit into the timeline of the docket.

respectively, Carlton and Nassif filed notices of appeal and cross-appeal,[25] and the parties presented oral argument on October 13, 2015.

We include additional facts in the discussion relevant to the issues there examined.

DISCUSSION

I.

Nassif's Motion to Dismiss Carlton Green in his Personal Representative Capacity for Lack of Standing

Preliminarily, we must address Nassif's Motion of Appellee to Dismiss Appeal of Carlton M. Green in His Capacity as Personal Representative for Lack of Standing filed in this Court on September 11, 2014. Nassif's motion asserts that Carlton has no standing in his personal representative capacity because a personal representative is bound to distribute the Estate's assets in accordance with a decision of the circuit court and is not an aggrieved party that may appeal the decision of the circuit court.[26]

In riposte, Carlton asserts that he does have standing as personal representative for several reasons, chief amongst them are that (1) this is an appeal from a declaratory judgment action and the Declaratory Judgment Act provides that a personal representative

[25] Apparently in an abundance of caution concerning the timely filing of their appeals, both parties filed several notices of appeal during this timeframe.

[26] As discussed above, Nassif made this argument in her brief before the Court of Appeals, but the Court did not consider the argument because she did not raise it in her petition for *certiorari*. *Green*, 426 Md. at 269-70 n.12. The Court suggested, however, that she was free to contest Carlton's standing in his capacity as PR in the Orphans' Court, especially with regard to a personal representative fee petition. *Id.* (citing Allan J. Gibber, *Gibber on Estate Administration* § 7.16 (3rd ed. 1991)).

We note that Nassif does not dispute Carlton's standing to appeal as a legatee.

has standing to appeal, and (2) the cases that Nassif relies upon in her motion, chiefly *Alston v. Gray*, 303 Md. 163 (1985) and *Frater v. Paris*, 156 Md. App. 716 (2004), address appeals from decisions of Orphans' Courts, not decisions of circuit courts.

Maryland Code (1974, 2013 Replacement Vol.), Courts and Judicial Proceedings Article ("CJP"), § 3-408 provides that:

> **Any person interested as or through a personal representative**, trustee, guardian or other fiduciary, creditor, devisee, legatee, heir, next of kin, or beneficiary of a trust, in the administration of a trust, or **of the estate of a decedent**, a minor, a disabled person, or an insolvent**, may have a declaration of rights or legal relations in respect to the trust or the estate of the decedent**, minor, disabled person, or insolvent in order to:
>
> (1) Ascertain any class of creditors, devisees, legatees, heirs, next of kin, or others;
>
> (2) Direct the personal representative, guardian, or other fiduciary or trustees to do or abstain from doing any particular act in their fiduciary capacity; or
>
> **(3) Determine any question arising in the administration of the estate or trust, including questions of construction of wills and other writings.**

(Emphasis supplied). Thus, by its terms, CJP § 3-408 gives a personal representative a right to bring a declaratory judgment action concerning the administration of an estate. *Id.*

In *Alston*, the appellant was appointed personal representative of her brother's intestate estate. 303 Md. at 165 (declined to follow on a different point of law by *Piper Rudnick LLP v. Hartz*, 386 Md. 201 (2005)). Prior to distribution of the estate, the appellant received a letter from the attorney for the unborn appellee, who may have been the daughter of the decedent. *Id.* The appellant filed a petition for instructions in the Orphans' Court, at which point the court conducted a legitimacy hearing, and, after testimony and argument, determined that the decedent had openly and notoriously recognized the unborn child as

his own. *Id.* at 165-66. The court ordered the appellant to furnish the unborn child with her intestate share. *Id.* at 166. The appellant appealed the decision of the Orphans' Court in her representative capacity, not in her capacity as an intestate heir. *Id.*

After granting *certiorari* on its own initiative, the Court of Appeals noted that only aggrieved parties may appeal from orders of Orphans' Courts adjudicating estates and that "an executor or personal representative is *not* an aggrieved party entitled to appeal." *Id.* (emphasis in original) (citations omitted). The Court reasoned that a personal representative is bound to distribute the estate in accordance with an order of distribution after a court makes its determination and, also, that unrestricted rights of appeal subject courts to endless collateral matters. *Id.* at 166-67. The Court also noted that the appellant could have appealed in her capacity as an heir, *id.* at 167, and then dismissed the appeal because the appellant had no standing to appeal as personal representative. *Id.* at 169.

In *Frater v. Paris*, the decedent's widow elected to take her statutory share of her testate husband's estate. 156 Md. App. at 717. The Circuit Court for Montgomery County, exercising the jurisdiction of the Orphans' Court,[27] directed the personal representatives to give the widow her statutory one-half of the net estate. *Id.* at 717-18. The personal representatives appealed the order of the circuit court, but, because no legatees appealed, the Court of Special Appeals dismissed the personal representatives' appeal for want of standing. *Id.* at 723.

[27] In Montgomery County and Harford County, the judges of the circuit courts sit as judges of the Orphans' Court. Md. Const. art. 4 § 20.

As Carlton correctly asserts, *Frater* and *Alston* both concern the standing of a personal representative appealing from an order of an Orphans' Court, and do not address the right to appeal from a circuit court rendering a declaratory judgment. The controlling statute, CJP § 3-408, gives to "[a]ny person interested as or through a personal representative . . . in the administration . . . of the estate of a decedent . . . [the right to] a declaration of rights or legal relations in respect to . . . the estate of a decedent." We have found no Maryland cases that apply CJP § 3-408, nor do any cases qualify the right implied by that statute of a personal representative to appeal from an adverse declaratory judgment. If the language of the statute is clear and unambiguous, courts will give effect to the plain meaning of the statute and "no further sleuthing" of statutory interpretation is needed. *Breslin v. Powell*, 421 Md. 266, 286–87 (2011) (citations omitted). We decline Nassif's invitation to expand the reach of *Alston* and *Frater*, and deny her motion to dismiss Green's appeal in his personal representative capacity.

II.

Foundational Principles

Before we analyze the issues the parties have been presented for our review, it will be useful to present a few foundational principles in this area. In 1993, when Walter Green died, a surviving spouse could "elect to take a one-third share of the net estate if there [was] also a surviving issue, or a one-half share of the net estate if there [was] no surviving issue." 1993 ET § 3-203(a). "Net estate" was defined as "the property of the decedent exclusive of the family allowance and enforceable claims against the estate," 1993 ET § 1-101(n),

and the elective share was to be calculated without a deduction of the estate tax. 1993 ET § 3-203(c).

The Court of Appeals, in its previous review of this case, made it clear that an electing spouse in Nassif's circumstances is entitled to share in income on assets from the assets from the net estate. *Green*, 426 Md. at 291. The current version of the statute that governs the elective share clearly states elective spouse's right to share in the income of the net estate. *See* Maryland Code (2001, 2011 Replacement Vol.), Estates and Trusts Article ("2015 ET"), § 3-203(e) ("a surviving spouse who has elected to take against a will shall be entitled to the surviving spouse's portion of the income earned on the net estate during the period of administration based on a one-third or one-half share, whichever is applicable.").

Over the history of this controversy, the parties have disputed whether the personal representative should distribute income pursuant to a fixed fraction method or a changing fraction method, and it is useful now to explain the difference between the two methods. Application of the fixed fraction method would require distributions of one-third of any income to the spouse, no matter whether the estate's assets were distributed to legatees disproportionately. *Greenfield*, *supra*, 398 A.2d at 986 n.2. It does not take into account the fact that, over the life of the estate, the spouse may have an interest in the estate that is larger or smaller than one-third of the estate. *Id.*

The changing fraction method recognizes that, over the course of administering an estate, an estate's assets may be distributed disproportionately. *Id.* Therefore, it apportions

the estate's income in percentages based on the spouse's and legatees' interest in the estate at any given time. *Id.*

The Supreme Court of Pennsylvania, in *Greenfield*, described the differences between the fixed fraction method and the changing fraction method in the following manner:

> "Let us assume that the net probate estate of a decedent is $300,000 and the widow's statutory elective share is one-third. Thus, upon her election she becomes entitled to $100,000. If federal taxes and legacies are paid out of the non-elective share (as they must be) in the amount of $100,000, there remains in the estate $200,000 in principal. The elective and non-elective shares then are $100,000 each. However, if this principal increases by $150,000 and becomes $350,000, under the fixed fraction method, the widow receives one-third of the increase and her distributive share is $150,000. The non-elective share would get two-thirds of the increase, and its distributive share would be $200,000. Thus, the value of the non-elective share increased by 100% and the value of the elective share increased 50% although both shares had exactly the same amount of money attributable to their respective shares in the estate. We can envision the problem had this been a $150,000 loss rather than gain.
>
> Under the changing fraction method, each would receive a proportionate share, i. e. $175,000. The method would also function if there were a loss of $150,000. Each would get $25,000, thus sharing in the loss proportionately.
>
> The fairness and logic of the changing fraction method is further illustrated when we apply it to the distribution of income whereas it is difficult, if not impossible, to justify the fixed fraction method. This, again, is best illustrated by the same sample as above. Assuming the elective share as $100,000 and the remaining non-elective share as $100,000 and an annual income of $12,000, under the fixed fraction method, the elective share would get $4,000 and the non-elective $8,000. This is not fair, equitable or logical."

Id. (quoting *Estate of Greenfield*, 28 Fiduc.Rep. 314, 326-27 (O.C. Phila.1978)).

Although in 1993 it was arguably uncertain whether the fixed fraction method or changing fraction method applied to an elective share,[28] it is certainly clear under current law that the changing fraction[29] method applies in this context. According to 2015 ET § 3-203(e)(2), "[i]f one or more distributions have been made to a surviving spouse or another person that require an adjustment in the relative interests of the beneficiaries, the applicable share shall be adjusted." This provision, however, when enacted in 2003 specifically provided that it would only have prospective effect. *See* 2003 Md. Laws ch.234 (S.B. 312) ("AND BE IT FURTHER ENACTED, That this Act shall be construed to apply only prospectively and may not be applied or interpreted to have any effect on or application to an estate of a decedent who dies before the effective date of this Act.").

A review of the history of MUPIA, however, lends support for the view that the changing fraction method has long applied to calculating relative shares in an estate. The MUPIA, now codified at Maryland Code, (1974, 2011 Repl. Vol.), Estates and Trusts Article, § 15-501 *et seq.*, took effect on October 1, 2000. 2000 Md. Laws ch.292 (S.B. 636). Notably, the enactment, which took effect on October 1, 2000, specifically states that "this Act applies to each trust or decedent's estate existing on the effect[ive] date of

[28] 1993 ET § 7-304(b)(2) did provide, however, that income "to all other legatees" was to be distributed "in proportion to their respective interest in the undistributed property of the estate computed at the times of distribution on the basis of inventory value." This suggests that, even in 1993, the changing fraction method was appropriate. Gibber testified at trial that, because of this statute, the changing fraction method would have been appropriate even in 1993.

[29] Given that the changing fraction method seeks to apportion income in proportion to each person's proportionate interest in the underlying assets of the estate, "proportionate fraction method" would perhaps be a more apt term for this method.

this Act, except as otherwise expressly provided in the will or terms of the trust or under this Act." 2000 Md. Laws ch.292 (S.B. 636).

The MUPIA invokes the changing fraction method under ET § 15-504(b)(1), which provides that "[t]he beneficiary is entitled to receive a portion of the net income **equal to the beneficiary's fractional interest in the undistributed principal assets** immediately before the distribution date, including assets that later may be sold to meet principal obligations." (Emphasis supplied). Further, ET § 15-504(a) states that:

> Each beneficiary described in § 15-503(3) of this subtitle is entitled to receive a portion of the net income equal to the beneficiary's fractional interest in undistributed principal assets, using values as of the distribution date. If a fiduciary makes more than one distribution of assets to beneficiaries to whom this section applies, each beneficiary, including one who does not receive part of the distribution, is entitled, as of each distribution date, to the net income the fiduciary has received after the date of death or terminating event or earlier distribution date but has not distributed as of the current distribution date.

In other words, if disproportionate distributions of assets are made over the life of an estate, the 2000 MUPIA requires that income still be distributed in proportion to the remaining assets of the estate—in accordance with the changing fraction method.

III.

Enforceable Claims and Equitable Adjustment

A. Enforceable Claims

Carlton maintains that the total enforceable claims in the estate now total $10,655,058.00 after applying the Court of Appeals's definition for "enforceable claims." He maintains that on remand the circuit court failed to calculate seven enforceable claims: (1.) Citizens National Bank 1 ($249,786.00), (2.) Citizens National Bank 2 ($135,741.00),

(3.) RTC-Gremar ($509,922.00), (4.) Resolution Trust Corporation-Second Trust ($3,250,000.00), (5.) Second National Federal Savings Bank-First Trust ($332,115.00), (6.) Loyola Federal Savings Bank/Crestar ($332,115.00), (7.) and Sims ($500,000.00). Nassif, meanwhile, argues that the correct amount of enforceable claims totals $102,869.00, consistent with the opinion of the Court of Appeals.

As we have discussed, a surviving spouse may elect to take a one-third share of the net estate if the decedent has children. 1993 ET § 3-203(a). The "net estate" is defined as "the property of the decedent **exclusive** of the family allowance and **enforceable claims against the estate** . . ." 1993 ET § 1-101(n) (emphasis supplied). The definition of "enforceable claims" was one of the major issues presented the last time this case was before the Court of Appeals. *Green*, 426 Md. at 270-77.

The Court of Appeals, in holding that "enforceable claims" were "claims that in fact reduce the assets in the estate or are allowed by the court . . .[,]" *id.* at 262, noted that "[t]here is nothing in the statute's text or history to suggest that the Legislature intended to . . . create an illogical system in which claims may be deducted from the "net estate" even though they do not in fact reduce the value of the estate." *Id.* at 277. The Court detailed Carlton's efforts to manage the estate during difficult economic times:

> In all, the claims against the estate exceeded $26 million. Many of the larger claims related to loans that the decedent had personally guaranteed, where the primary obligor was a corporation or other business organization in which he had an interest. Thus, the liability of the estate was conditional and dependent upon the capacity of the business entity to pay the debt.
>
> **Green was able to reduce or settle many of the claims, and the estate was ultimately diminished by only $102,869.** Nevertheless, he claims that he is entitled, under the law in effect when the decedent died, to

> deduct $13,204,136 in claims from the estate before calculating Nassif's elective share.

Id. at 264-65 (emphasis supplied).

Later, the Court stated:

> Green wants to deduct approximately $13,204,136 from the gross estate as claims, most of which were contingent, and reduce Nassif's share by one-third of that ($4,401,378.66) but ultimately pay only $102,869 of the claims, refusing to make any adjustment to the one-third statutory share. Common sense and fair play dictate that we not countenance such machinations.

Id. at 275.

Thus, the Court of Appeals provided a definition for "enforceable claims" and suggested, in the text quoted above, that $102,869.00 was the amount of enforceable claims in this estate. The case was remanded to the circuit court "for a calculation of enforceable claims consistent with this opinion." *Id.* at 277.

On remand, without a new evidentiary hearing, the circuit court entered an interlocutory order on December 20, 2012, declaring, amongst other things, "that the total amount of all enforceable claims, exclusive of all administrative expenses, attorney[']s fees, and Personal Representative commissions, to be included in the calculation of the net estate . . . is $102,869 . . . ." Later at trial, Carlton made a proffer that the paid enforceable claims actually total $10,655,058.00, but this proffer was not accepted into evidence because the circuit court refused to re-litigate the facts underlying each claim.[30]

[30] On April 30, 2013, the court stated:

> I mean before we go any further, because it is not my intent to relitigate the trial we had before. So I want to make sure that's (cont.)

On questions of fact, the Court of Special Appeals "will not set aside the judgment of the trial court on the evidence unless clearly erroneous, and will give due regard to the opportunity of the trial court to judge the credibility of the witnesses." Md. Rule 8-131(c). "'A finding of a trial court is not clearly erroneous if there is competent or material evidence in the record to support the court's conclusion.'" *Goss v. C.A.N. Wildlife Trust, Inc.*, 157 Md. App. 447, 455-56 (2004) (quoting *Lemley v. Lemley*, 109 Md. App. 620, 628 (1996)). Pursuant to the clearly erroneous standard of review, "'this Court does not sit as a second trial court, reviewing all the facts to determine whether an appellant has proven his case,'" and it is not this Court's task to weigh the conflicting evidence of the parties. *Id.* at 456 (quoting *Lemley*, 109 Md. App. at 628). "Findings of fact that are clearly erroneous are marked by a lack of competent and material evidence in the record to support the decision." *In re Dany G.*, 223 Md. App. 707, 719 (2015) (citation omitted).

Here, the trial court heard testimony and evidence during the first trial about each claim and the circumstances surrounding the resolution of each claim. Those core facts did not change between the first trial and the second trial on remand from the 2012 decision of the Court of Appeals. Indeed, the trial court observed in its earlier 2009 opinion, there

> clear to everyone. And notwithstanding how the Court of Appeals rules, there's certain factual findings that I made that are really not changing. And I know, I went through all the claims and I heard the claims, and there was an issue about the delay and what, how the personal representative handled those claims. And I think it was fairly clear on this court's ruling on how those things were handled. So there's no need to relitigate that part . . . . And we have to go by what the Court of Appeals has spoken on that. So that is the law of this case now. . . . I'm not going to allow you to relitigate what happened in each and every one of those claims.

was no dispute as to the facts surrounding the claims or their eventual satisfaction; there was only dispute as to whether the claims were "enforceable," as per the statute.[31] We will now address the claims *seriatim*.

1. The First Claim of Citizens National Bank

The first claim of Citizens National Bank against the Estate was for $396,910.00, and Carlton claims to have paid $249,785.68. This claim arose from a personal guaranty from Walter Green, in his individual capacity, on a loan from Citizens National Bank to the West Laurel Corporation, in which Walter Green had an interest.

In a response by Carlton in to a request for admissions in January 2007, the following exchange occurred:

> REQUEST 50. The Estate is not out of pocket any amount with respect to this $396,910 claim of Citizens National Bank.
>
> RESPONSE 50. Admitted.

In responses by Carlton to requests for admissions in October 2007, the following exchange transpired:

> REQUEST 139. In December, 2004, the Estate was fully repaid for its loan to West Laurel Corporation for the Estate's payment of $249,785.86 to Citizens National Bank on January 6, 1997, with interest, out of the proceeds of the sale of the Best Western restaurant owned by West Laurel Corporation.
>
> RESPONSE 139. Denied. The January 6, 1997 pay off was $249,785.68. The Estate was fully repaid from the December, 2004 sale for the restaurant owned by West Laurel Corporation known as the Brass Duck Restaurant.

[31] In the memorandum and opinion of the circuit court in the first trial, the court stated: "Although [Nassif] disagrees that they are *enforceable* claims, there is no dispute as to the resolution of the 'claims.'"

* * *

> REQUEST 149. The Estate never paid any amount for the $396,910 claim of Citizens National Bank for which it was not fully reimbursed.
>
> RESPONSE 149. Admitted.

Carlton admitted that this claim did not ultimately "reduce the assets in the estate," *Green*, 426 Md. at 262, and that the Estate was reimbursed any money it expended when the Brass Duck Restaurant was sold. There was competent and material evidence to support the circuit court's finding as to this claim.

2. <u>The Second Claim of Citizens National Bank</u>

Citizens National Bank's second claim was for $267,486.86, and Carlton contends that the Estate paid $135,740.76. This claim arose out of a loan from Citizens National Bank to the West Laurel Partnership. Walter Green had guaranteed this loan in his individual capacity and as a partner in the partnership.

In a response by Carlton to requests for admissions in January, 2007, the following exchange occurred:

> REQUEST 56. The Estate never paid any amount for this $267,486.86 claim of Citizens National Bank for which it was not fully reimbursed.
>
> RESPONSE 56. Admitted.
>
> REQUEST 57. The Estate is not out of pocket with respect to this $267,486.86 claim of Citizens National Bank.
>
> RESPONSE 57. Admitted.

And, in responses by Carlton to requests for admissions in October, 2007, the following exchange transpired:

> REQUEST 141. In December, 2004, the Estate was fully repaid for its loan to West Laurel Corporation for the Estate's payment of $135,740.76 to Citizens National Bank on January 6, 1997, with interest, out of the sale of the Best Western Hotel owned by West Laurel Partnership.
>
> RESPONSE 141. Denied. The January 6, 1997 payment of $135,740.76 by the Estate was for a loan by Citizens National Bank to West Laurel Partnership, not West Laurel Corporation. The Estate was repaid this amount with interest from the sale of the hotel owned by Accord LLC, successor to West Laurel Partnership.
>
> REQUEST 142. The Estate never paid any amount for the $267,486.86 claims of Citizens National Bank for which it was not fully reimbursed.
>
> RESPONSE 142. Admitted.

Therefore, Carlton admitted that this claim did not ultimately "reduce the assets in the estate," *Green*, 426 Md. at 262, and that the Estate was reimbursed any money it expended when the Best Western Hotel was sold. There was competent and material evidence to support the circuit court's finding as to this claim.

3. <u>RTC – Gremar</u>

The RTC claimed $1,832,273.65 from the estate, and Carlton claims that the estate paid $509,922.00. During trial, on April 7, 2008, the following exchange occurred between Nassif's counsel and Carlton:

> [NASSIF'S COUNSEL:] Well, I think we only have one more to talk about, Mr. Green, and that is the RTC loan of Gre[]mar Associates. Okay? Now, that loan was made with respect to the Safari Hotel in Florida, correct?
>
> [CARLTON:] That's correct.
>
> [NASSIF'S COUNSEL:] And the RTC filed a claim in the estate for the amount that was remaining due on the loan, didn't it?
>
> [CARLTON:] It did.

[NASSIF'S COUNSEL:] Did you deny the claim?

[CARLTON:] I believe I did. The only thing was that when I denied it, it had already been paid off. I denied it, I think, in December of 1994, and we had paid it, I believe, in May of '94.

[NASSIF'S COUNSEL:] Right. So, the Safari Hotel actually got sold before the claim was denied, isn't that right?

[CARLTON:] That's right. The denial of it was to get rid of it from the claims registry.

[NASSIF'S COUNSEL:] And as a result of the sale, . . . there was a 479,000, approximately, deficiency to pay off the note, wasn't there?

[CARLTON:] I believe it was closer to $444,000.

[NASSIF'S COUNSEL:] Okay. You think it's 444.

[CARLTON:] I think the check is here somewhere in these records.

[NASSIF'S COUNSEL:] Okay. And that was paid off by the estate, wasn't it?

[CARLTON:] The estate advanced the money to get the Safari Inn sold.

* * *

[NASSIF'S COUNSEL:] Now, the estate had a 20 percent interest in the . . . Safari Hotel?

[CARLTON:] We had a 20 percent interest in the partnership, and a guarantee 100 percent on the loan.

[NASSIF'S COUNSEL:] Okay. And Abbot Corporation had the remaining 80 percent, didn't it?

[CARLTON:] It had acquired that, yes.

[NASSIF'S COUNSEL:] Okay. And when the estate paid off the deficiency of $479,000, it set up a receivable on its books from Abbott Corporation for the 80 percent, didn't it?

[CARLTON:] It treated it as a loan to the Abbott Corporation –

THE COURT: I'm sorry –

[CARLTON:] -- for the 80 percent on what the estate advanced.

* * *

[NASSIF'S COUNSEL:] So, the 80 percent was treated as a loan by the corporation to Abbot Corporation, and it reflected that way on the books of the estate?

[CARLTON:] No. The way it worked was it was a loan to Abbott Corporation by the estate of Walter Green for 80 percent of what the estate advanced, which I believe was $444,000, when the Safari Inn was sold.

[NASSIF'S COUNSEL:] So, we agree that what the estate paid was $102,869 of that $444,000 because it received a, or recorded as a note back from Abbott from the difference?

[CARLTON:] It paid a total of 440-some thousand dollars when the hotel was sold. There was a check that came from Merrill Lynch that went to the title company in Florida to pay the shortfall. And whatever 20 percent of that check is, that's the estate's part of it. The other 80 percent was treated as a loan advanced by the estate to Abbott Corporation for its share of the shortfall.

* * *

[NASSIF'S COUNSEL:] Mr. Green, let me show you . . . a copy of a check – a check and a settlement sheet for the sale of the Best Gate property, isn't it?

[CARLTON:] Yes.

[NASSIF'S COUNSEL:] And when that property was sold, money was paid to Abbott Corporation, which it used to pay off its obligation to the estate, isn't that correct?

[CARLTON:] In 2004, after this money was received, the money was then paid back to the estate for what the estate advanced some ten years earlier on Gre[]mar.

[NASSIF'S COUNSEL:] **Okay. So, except for the $102,869, the estate had been fully reimbursed for any monies that it had advanced with respect to the Gre[]mar Associates Loan, isn't that right?**

[CARLTON:] **As of 2004, it got Abbott's portion back.**

[NASSIF'S COUNSEL:] **Okay. So, as of now, before any distribution is being made of the elective share, the estate has been fully reimbursed for any advances it made to Abbott arising out of the deficiency of the Gre[]mar Associates loan?**

[CARLTON:] **It took it until 2004, but yes.**

[NASSIF'S COUNSEL:] So, except for the $102,869, the estate has suffered no loss with respect to the claim.

[CARLTON:] Which claim?

* * *

[NASSIF'S COUNSEL:] **. . . So, except for the 102,000, the estate has suffered no loss with respect to that Gre[]mar Associates loan and the RTC claim?**

[CARLTON:] **It lost 102,869, and it lost a lot of money that it – my father had invested in the thing before it was sold.** All that went down the drain.

[NASSIF'S COUNSEL:] Well, that was a risk of the investment, wasn't it?

[CARLTON:] I'm afraid it was.

[NASSIF'S COUNSEL:] And it had nothing to do with the RTC claim, did it?

[CARLTON:] Well, it had something to do with the RTC claim. . . .

[NASSIF'S COUNSEL:] **Okay. But, the claim of the RTC has nothing to do whatsoever or financially with the amount of money which the decedent invested in the property and may have lost, does it?**

> [CARLTON:] That's the amount it paid – it started out being a 2 million dollar loan. He had paid down 200-some thousand – I think he paid down 500-some thousand dollars when they initially called it, just before his death, in 1992. He had to curtail it by $500,000 for them not to call the loan at that point. So, you know, he was the one who lost that amount. **The estate lost the 102,869 by the time it was all over with.**

(Emphasis supplied).

Here, despite his evasive answers, Carlton ultimately testified that the assets of the Estate were only reduced by $102,869.00 because of the RTC-Gremar loan. Again, there was competent and material evidence on this issue before the circuit court during the first trial.

4. <u>RTC-Second Trust</u>

The Resolution Trust Corporation also made a claim on the estate for $4,588,292.01, and Carlton claims $3,250,000.00 to be an enforceable claim.

On this claim, Carlton responded in January 2007 to requests for admissions in the following manner:

> REQUEST 81. The Estate never paid any amount for this $4,588,292.01 claim of the Resolution Trust Corporation for which it was not fully reimbursed.
>
> RESPONSE 81. Admitted.
>
> REQUEST 82. The Estate is not out of pocket any amount with respect to this $4,588,292.01 claim of the Resolution Trust Corporation.
>
> RESPONSE 82. Admitted.

And, during trial on April 7, 2008, the following exchange occurred between Nassif's counsel and Carlton:

[NASSIF'S COUNSEL:] Okay. With respect to the second deed of trust note, then, the claim for $4,588,282.01, the estate has been fully reimbursed in the amounts that it either advanced or paid, isn't that true?

[CARLTON:] **Through the sale of the hotel, it has gotten all of its money back that it advanced for the $3,250,000.**

[NASSIF'S COUNSEL:] And I think as you described, once the estate received back, it's been paid every penny that it invested, is that correct?

[CARLTON:] That's what I tried to do.

[NASSIF'S COUNSEL:] And you got it, didn't you?

[CARLTON:] I sure tried.

[NASSIF'S COUNSEL:] **Did you get every penny that the estate had put out or invested?**

[CARLTON:] **According to what the accounts told me was owed and how I applied it, as far as I'm concerned, I got every penny, yes.**

[NASSIF'S COUNSEL:] And so, presently, the estate is not out of pocket any amount for the second deed of trust [note] –

* * *

[CARLTON:] As of today, when this thing was originally acquired, it was out of pocket $3,250,000.

[NASSIF'S COUNSEL:] Well, I'm talking about in the early summer 2005, when you said the transaction was completed, at that time, the estate was not out of pocket any amount with respect the claim for $4,588,000, was it?

[CARLTON:] The money the estate was owed was paid back then.

[NASSIF'S COUNSEL:] Well, we agree that the estate is not now out of pocket, with respect to his loan, any amount, is it?

[CARLTON:] You keep using the word out of pocket, the phrase out of pocket. **The estate has been paid back all the money that it advanced to get rid of these claims and to deal with these problems.**

> [NASSIF'S COUNSEL:] . . . Do you recall my (indiscernible) requesting that you admit the following statement? The estate is not out of pocket any amount with respect to this $4,588,292.01 claim of the Resolution Trust Corporation. Do you recall being asked to admit or deny that statement?
>
> [CARLTON:] **If you said now, in that reading or whatever, the request for admissions, my answer is yes, today, there is nothing owed.**

Once again, despite Carlton's evasive answers, there is competent and material evidence that the RTC second trust claim is not an enforceable claim because it did not ultimately "reduce the assets in the estate," *Green*, 426 Md. at 262.

5. <u>Second National Federal Savings Bank-First Trust</u>

The Second National Federal Savings Bank claimed $5,748,170.69 against the Estate, and Carlton claims that the Estate was diminished by $5,677,494.00.

In January, 2007, responded as follows to requests for admissions regarding the Second National Federal Savings Bank claim:

> REQUEST 83. Second National Federal Savings Bank made a claim against the Estate for $5,748,170.69.
>
> RESPONSE 83. Admitted.
>
> REQUEST 84. The $5,748,170.69 claim of Second National Federal Savings bank arose out of a loan to West Laurel Partnership.
>
> RESPONSE 84. Admitted.
>
> REQUEST 85. West Laurel Partnership secured the $5,748,170.69 loan by giving a lien against real property owned by West Laurel Partnership.
>
> RESPONSE 85. Admitted.

* * *

REQUEST 87. Accord, LLC, successor to West Laurel Partnership, repaid the $5,748,170.69 claim of Second National Federal Savings Bank in full from part of the proceeds of the $7,600,000 refinancing of the loan to Accord, LLC with Suburban Capital Markets, Inc.

RESPONSE 87. Admitted.

REQUEST 88. The Estate never paid any amount for this $5,748,170.69 claim of Second National Federal Savings Bank for which it was not fully reimbursed.

RESPONSE 88. Admitted.

REQUEST 89. The Estate is not out of pocket any amount with respect to this $5,748,170.69 claim of Second National Federal Savings Bank.

RESPONSE 89. Admitted.

At trial, on April 7, 2008, the following exchange transpired regarding the claim:

[NASSIF'S COUNSEL:] . . . Is it true that the estate is not out of pocket any amount with respect to the $5,748,170.69 claim of Second National Federal Savings Bank?

[CARLTON:] The five – at this time? We've recovered for the estate whatever it was out.

* * *

[NASSIF'S COUNSEL:] Okay. Mr. Green, so, at this time, the estate is not out of pocket and is fully reimbursed any amounts with respect to the $5,748,170.69?

[CARLTON:] When the hotel was sold, that's when we recovered the money that the estate had to advance to make this transaction and all these claims go away.

[NASSIF'S COUNSEL:] So, could you answer my question now, please, yes or no?

[CARLTON:] Today, it's not out of pocket any money for the 5,748,170.69.

Given Carlton's admissions in discovery and at trial that the Second National Federal Savings Bank claim did not diminish the value of the estate, there was competent and material evidence that this claim was not an enforceable claim, as per the definition of the Court of Appeals. Carlton may be equivocal as to whether the Estate was paid back by the refinancing, or by the sale of the hotel, but he admits that the Estate is not "out of pocket" from this claim.

6. Loyola Federal Savings Bank

Loyola Federal Savings Bank ("Loyola") claimed $373,302.15 against the Estate, and Carlton claims to have paid $332,114.61.

In responses to requests for admissions in January, 2007, Carlton admits that Loyola claimed the above amount against the estate, and that Salisbury Enterprises, Inc. ("Salisbury"), a corporation in which Walter Green had an interest, was the maker of the promissory note and borrower of the loan underlying the claim. Carlton also admits that Walter Green personally guaranteed the loan in his individual capacity, as with many of the other loans involved in this Estate. Carlton also admitted that "[t]he Estate advanced Salisbury Enterprises, Inc. sufficient funds to pay the $373,302.15 claim of Loyola Federal Savings Bank in full and recorded this advance in the Estate's books and records as a loan to Salisbury Enterprises, Inc." Carlton, however, denies that the Estate has been made whole for this loan.

In his testimony at the trial, Carlton admitted once again that the Estate paid off the note on behalf of Salisbury and noted in its books that this was a loan to Salisbury. Carlton agreed that Salisbury paid interest on the note to the Estate. Although Nassif attempted to

get Carlton to admit that Salisbury had fully paid the loan by 2002, Carlton would not admit this and continued to state that it was his "understanding" that Salisbury has continued to pay interest to the Estate on the loan to the present day. However, when presented with a sheet of the accounts of the estate, Carlton could not point to any interest payments that Salisbury had made after 2002. Carlton also admitted to being the President of Salisbury, and, presumably, had control over the management of Salisbury. He stated that he "[hasn't] called that note" and "let it stay in place."

Thus, whatever outstanding balance remains on the Loyola loan is completely within the control of Carlton to pay back the Estate, and, in the face of conflicting testimony, the circuit court was free to make the factual determination it did. It was not clear error to make the factual determination that the estate was not ultimately diminished by this claim.

7. Edgar Sims Claim

Carlton argues that there was an enforceable claim of $500,000.00 from Edgar Sims. This claim, however, does not even appear in Carlton's Amended Complaint, which is the operative document after the Court struck the Second Amended Complaint.

During the first trial, however, the circuit court analyzed the Sims claim and wrote the following in its opinion:

> All of the claims at issue herein were capable of being enforced against the Estate with the exception of the claim filed by Edgar Sims. Mr. Sims's claim or the agreement reached with Mr. Sims was in the nature of a conditional enforceable claim. In other words, it operated in the nature of an indemnification. The statute does not provide for a conditional enforceable claim. Under the reading of the 1991 Code, a claim either is or [] is not an enforceable claim.

The circuit court, in the first trial, found that this claim was not an enforceable claim. Carlton did not appeal from the judgment of the trial court in 2009; only Nassif did. Therefore, the enforceability of this claim is not even preserved for our review.

In conclusion, we cannot say that the circuit court's treatment of these seven claims was clearly erroneous. We hold that there was material and competent evidence to support the circuit court's finding that the enforceable claims against the estate were $102,869.00.

B. Equitable Adjustment

Carlton argues for an equitable adjustment in the estate to reflect the proceeds of the Nationsbank stock specific bequest. The circuit court denied the request for an equitable adjustment.[32] Carlton advances a tracing theory to support his claim of equitable adjustment: because proceeds of the Nationsbank stock were used in different manners to benefit the estate, the residuary legatees should get a greater portion of all proceeds from the Nationsbank stock. Carlton cites the following statutory provisions for supporting an equitable adjustment in the present case. First, he points to 1993 ET § 9-103, which provided the general order of abatement and ademption for legacies, and provided for contribution:

[32] *Hall v. Elliott*, 236 Md. 196 (1964), the leading Maryland case on equitable adjustment, does not specify the appropriate standard of review for this issue. We conclude that we review the legal analysis of the circuit court *de novo*, but we review the decision as to whether to grant the equitable adjustment for abuse of discretion. *See Schisler*, *supra*, 394 Md. at 535 ("Therefore, while the trial court is granted broad discretion in granting or denying equitable relief, where an order involves an interpretation and application of Maryland constitutional, statutory or case law, our Court must determine whether the trial court's conclusions are 'legally correct' under a *de novo* standard of review." (Citation omitted).

> (c) Contribution – When the subject matter of a preferred legacy is sold or used as an incident to administration, appropriate adjustments in, or contributions from, other interests in the remaining assets shall be effected.

1993 ET § 9-104(c). Next, he cites 1993 ET §7-304(b), which provided that income from the assets of an estate, including income from property that is used to discharge liabilities, shall be determined under Title 14, Subtitle 2, which provided general rules regarding principal and income. Also, 1993 ET § 14-202(a)(3) provided that, if the terms of the trust instrument or the terms of the subtitle were inapplicable, the trust was to be administered

> in accordance with what is reasonable and equitable in view of the interests of those entitled to income as well as of those entitled to principal, and in view of the manner in which men of ordinary prudence, discretion and judgment would act in the management of their own affairs.

Finally, 1993 ET § 3-208(b) provided, in relevant part:

> Unless specifically provided in the will, a legatee is not entitled to sequestration or compensation from another legatee, or from another part of the estate of the decedent, **except that an interest renounced by the surviving spouse and not included in the share of the net estate received by the surviving spouse** under this section may be subject to sequestration for the benefit of individuals who are the natural objects of the bounty of the decedent, in order to avoid a substantial distortion of the intended dispositions of the testator.

(Emphasis supplied).

Carlton argues that the statutory provisions quoted above, together with the Court of Appeals's decision in *Hall v. Elliott*, 236 Md. 196 (1964) call for an equitable adjustment because he sold part of the Nationsbank specific bequest to purchase the second trust note on the Best Western. He maintains that the legatees bore the risk in using the stock in such a manner and should receive all recovery from the proceeds of that transaction, and that, at most, Nassif is entitled to one-third of the loan principal.

Carlton also contends that a further equitable adjustment is warranted because proceeds of the stock were used to pay federal and Maryland estate tax. Because Nassif was given one-third of the value of the Nationsbank stock in 2000 and the Nationsbank stock was also used to pay estate taxes, Carlton claims that an equitable adjustment of $438,440.00 is appropriate because this is the amount of interest due after the federal tax payment was deferred on account of the claims filed against the estate.

Carlton also argues for an equitable adjustment for his using the Nationsbank stock to handle the $13 million in claims. This argument mostly restates his position on the enforceable claims as a whole. Finally, Carlton states that an equitable adjustment is needed because proceeds of the Nationsbank stock have remained in the estate since the Best Western was sold in 2004.

Nassif contends that an equitable adjustment is not appropriate because of the factual finding of the circuit court that the note was purchased with estate assets and was for the benefit of the entire estate, pursuant to Carlton's letter to Meng, mentioned *supra*. She also argues that the equitable adjustment arguments are just a repackaging of Carlton's enforceable claims arguments made throughout the proceedings. She contends that Maryland law does not support an equitable adjustment in these circumstances. Gibber also testified below that there is no basis in 1993 ET § 9-103 or in other Maryland law for the tracing theory that Carlton is pressing.

We conclude that none of the statutory provisions cited by Carlton support the sort of equitable adjustment that he requests. *Hall* is equally unavailing. In *Hall*, the Court of Appeals considered whether equitable adjustment was appropriate where a surviving

spouse took her elective share. 236 Md. at 196. In that case, the testator, at the time of his death, owned 106 of the 210 shares of the outstanding stock of the company of which he was president. *Id.* at 200. The testator executed a will in which he gave 10 shares to his second wife and 96 shares to a trust for the benefit of nine employees in the hope that these employees would continue to manage the company. *Id.* at 200-01. The will also contained a three-tiered residuary clause benefitting relatives, his first wife, and some charities. *Id.* at 201. Upon the testator's death, the testator's second and current wife renounced the will and elected to take the elective share of the estate, which was one-half in that case because the testator had no children. *Id.* at 202. The wife thus received 53 shares of stock because that was half of the combined 106 shares given to the employee-legatees and her. *Id.*

The Court stated that specific legacies ordinarily have priority over general bequests, but that "a specific legacy is subject to certain legal disqualifications and disadvantages, for if a specific legacy fails, the specific legatee is not entitled to be compensated out of the personal estate of the testator. In such a case, the legacy is said to have been adeemed." *Id.* at 204-05 (citations omitted). The Court noted that a spouse electing to take her statutory share negatively impacts specific legatees because those legatees have to give up a proportionate share of their legacy to satisfy the elective share, and that only the testator could provide otherwise by, for instance, specifically providing that specific legacies are to be indemnified by the residuary estate. *Id.* at 205.

The Court stated, however, that

> this is not an inflexible rule because sequestration, which is a corollary or facet of the equitable doctrine of election, has been applied by this Court whenever it was found proper to do so. Sequestration means that so much of

> a devise or legacy as does not pass to a renouncing spouse by virtue of the renunciation is made available by the courts to indemnify or compensate other beneficiaries whose legacies have been diminished as a result of the renunciation.

Id. at 205-06. In *Hall*, the employee-legatees received five shares through sequestration because those shares were the shares from the electing spouse's original bequest that she lost in renouncing the will.[33] *Id.* at 206. The Court further stated that "[i]f the renunciation causes a substantial distortion of the testator's plan of distribution, and his intention is sufficiently clear that the beneficiaries whose legacies have been diminished should receive what the testator desired to give them, the courts apply this doctrine in an effort to carry out such intention." *Id.* at 206.

The Court then analyzed the testamentary scheme and concluded that the testator intended to prefer the employee-legatees over the residuary legatees and stated that, in such a circumstance, "where both specific and residuary legacies suffer, the specific legatees are entitled to be compensated first." *Id.* at 214 (citing *Read v. Maryland Gen. Hosp.*, 157 Md. 565, 570 (1929)). "[I]f specific legatees cannot be compensated out of property which has been renounced, they are entitled to compensation out of the residuary estate." *Id.* at 215 (citing *Mercantile Trust Co. of Baltimore v. Schloss*, 165 Md. 18, 29 (1933)). The court held

> that if a specific legatee whose legacy has been diminished by renunciation can be made whole by means of sequestration where, as here, it is shown that such was the intention of the testator (as has always been the law of this state), there is no reason why such a specific legatee cannot be made whole

[33] These five shares are analogous to the "interest renounced by the surviving spouse and not included in the net estate received by the surviving spouse" mentioned in 1993 ET § 3-208(b), *supra*.

> from the rest and residue, or from money and other property given to general legatees, where, as here, the testator so intended . . . .

Id. Thus, there, the employee-legatees were to be entitled to be indemnified from the residuary estate for the value of the 53 shares. *Id.*

Hall, however, was a case that weighed the interests of specific legatees against residuary legatees. The Court held that the specific legatees could be indemnified from the residuary. *Id.* With the exception of those five shares of stock, it was not a case weighing the interests of the electing spouse against specific legatees or the residuary. Thus, it is inapposite here.

In the case *sub* judice, the trial court rejected Carlton's equitable adjustment theory, finding that proceeds of the sale will benefit all of the Estate's beneficiaries. The court also relied on a December 11, 1995, letter that Carlton sent to George Meng, Nassif's attorney at that time, stating that "[t]he investment in the second trust note will be for the Estate, not any one beneficiary."

We determine that the law does not support Carlton's theory of equitable adjustment; the law he cites does not back the tracing theory he proposes. Further, Carlton is seeking an **equitable** adjustment here, and "[i]t long has been held that 'he who comes into equity must come with clean hands.'" *Hill v. Cross Country Settlements, LLC*, 402 Md. 281, 309 (2007) (quoting *Thomas v. Klemm*, 185 Md. 136, 142 (1945)). Although there is no finding or suggestion that Carlton has done anything illegal here, the record supports—as the Court of Appeals noted, *see Green*, *supra*, 426 Md. at 262 ("In this case, we put to an end decades of litigation by a personal representative attempting to secure an

unfair portion of a multi-million dollar estate for himself and his sister."),—that he has acted inequitably in managing the estate, and therefore is not entitled to equitable relief. For all these reasons, we conclude that it was not legal error for the circuit court to deny Carlton an equitable adjustment.

IV.

Fixed Fraction or Changing Fraction Method

We now turn to the second major issue presented on appeal: whether it was appropriate to apply the changing fraction method or the fixed fraction method to the Estate. Because Carlton argues that the 2000 order mandates that the fixed fraction method be used and that that order was an appealable final judgment, we first address the finality of the 2000 Orphans' Court order.

A. The 2000 Orphans' Court Order

Carlton argues that the 2000 Orphans' Court order is a final judgment and is therefore preclusive because of its finality and also because of the doctrines of the law of the case and *res judicata*. Carlton contends that, because Nassif did not appeal that order in 2000, it is currently binding upon her. Carlton also argues that Nassif's attempt in 2003 to sue her former counsel for malpractice for not appealing the 2000 order bar her from litigating that issue under judicial estoppel—because the two positions are inconsistent—and collateral estoppel, because the malpractice suit determined that the 2000 order was final.

Nassif disagrees. In her cross-appeal, Nassif first argues that the 2000 order does not refer to a temporal component for the deduction of the estate taxes. She argues that the

language from the order "instead reflects that the estate taxes are never deducted in the calculation [of] the net estate for purposes of determining the elective share," as, she claims, 1993 ET § 3-203 provided. She argues that, because estate taxes are never deducted from her elective share, there is no temporal component to the word "first" in the order.

Nassif then contends that the 2000 order is not binding as the law of the case because the law of the case only applies to appellate decisions and that it has no *res judicata* effect because it is not a final order. She also points out that, in our last opinion in this case, we said that the order did not have binding effect beyond the specific bequests.

Finally, Nassif maintains that, even if the February 2000 order is final and has preclusive effect, the subsequent passage of MUPIA changes the law and makes that finality irrelevant. The trial judge, on remand, agreed with that assessment with respect to the changing fraction or fixed fraction method and stated that the MUPIA, enacted eight months after the February 2000 order, governed the issue.

The circuit court concluded that the 2000 orphans' court order was a final, appealable judgment, but that the 2000 order did not preclude the circuit court from deciding whether the fixed fraction or the floating fraction approach should be used in deciding the amount of Nassif's distributive share. Determining (1) whether a court's judgment is final and, if it is, (2) the extent to which the judgment has claim and issue preclusive effect, are questions of law, and, thus, "we must determine whether the trial court's conclusions are 'legally correct' under a *de novo* standard of review." *Schisler v. State*, 394 Md. 519, 535 (2006).

In *Banashak v. Wittstadt*, 167 Md. App. 627, 655 n.14 (2006) we noted the tautological nature of CJP § 12-101(f) defining a "final judgment" as "a judgment, decree, sentence, order, determination, decision, or other action by a court, including an Orphans' Court, from which an appeal, application for leave to appeal, or petition for certiorari may be taken." Judge Moylan, writing for this Court in *Banashak*, aptly stated that:

> That definition could have been written by Lewis Carroll. It's a tautology. The basic rule is that an appeal may be taken only from a final judgment. "Final judgment" is then defined as a judgment from which an appeal may be taken. The only thing sillier than that definition is a judge or lawyer who quotes § 12-101(f) as if it actually said something.

176 Md. App. at 655 n.14. In spite of the statute's total lack of clarity and guidance, we must nevertheless decide whether the 2000 Orphans' Court order was a final judgment that might have been appealed in 2000.

To begin, it is clear that the standard for appealability of an order of an Orphans' Court is different from the standard for a court of general jurisdiction. *Id.* at 656 (citing *Hegmon v. Novak*, 130 Md. App. 703, 708-09 (2000)). For caveat proceedings, the Court of Appeals has defined a final judgment from an Orphans' Court as "those judgments, orders, decisions, etc. which, in caveat proceedings, finally determine the proper parties, the issues to be tried and the sending of those issues to a court of law."[34] *Schlossberg v. Schlossberg*, 275 Md. 600, 612 (1975) (citation omitted). In *Banashak*, this Court provided a "representative" list of final judgments:

> In general an appeal will lie from any decision of the Orphans' Court which transcends its restricted powers and from its act done in contravention of a

[34] In *Banashak*, we stated that that quotation was the "standard definition" of a final judgment in an Orphans' Court. 167 Md. App. at 657.

> statute. It has been held that an appeal may be taken from an order appointing an administrator ad litem, from an order revoking the probate of a will, from an order revoking letters, from an order refusing to revoke letters, from an order dismissing a petition asking that the Court refuse to grant letters testamentary or of administration on the ground of the decedent's non residence, from an order granting or refusing to grant issues, from the ratification of a separate administration account on an appeal by a co-executor and a distributee, from an order relating to the allowance of counsel fees, and from an order directing the mode of distribution of a decedent's estate among his creditors.

Banashak, 167 Md. App. at 658 (quoting 1 Philip L. Sykes, *Probate Law and Practice* (1965), § 243, pp. 251-52).

The purpose of litigation in a court of general jurisdiction is to produce a final judgment that encompasses all issues contested between the parties that then sets the stage for an appeal of all disputed issues. *Id.* Proceedings in an Orphans' Court are very different because much of the administration of an estate does not occur in the courtroom and "the need for judicial adjudicative intervention is frequently intermittent and only on a very *ad hoc* basis." *Id.*

In *Banashak*, Judge Moylan explained that:

> Because adjudicative decisions as to bits and pieces of the larger enterprise may be the only court judgments ever rendered, however, there is not the same expectation of an apocalyptic last judgment. Appeals from some, though not from all, of the adjudicative decisions taken along the way may be necessary in this fundamentally different legal environment. The two arenas are simply not the same.

Id. at 659.

In *Banashak*, we held that an order denying a motion to dismiss fee petitions was not a final, appealable judgment and that its effect was interlocutory. *Id.* If not for that

appeal, the Orphans' Court in that case would simply have held a hearing on the fee petitions' merits, the decision on which might have been appealable. *Id.*

We now turn to the facts of the instant case. On February 18, 2000, the Orphans' Court entered the order that has been the subject of much controversy in this case. In it, the Orphans' Court ordered that the personal representative was to use the fixed fraction method, and, ordered "that in calculating the net estate for purposes of determining the elective share, estate taxes shall not first be deducted."[35] The Orphans' Court rationale for this was as follows:

> Now we look to one of the more vexing problems and that is the method of determining the calculation of the elective share. Ms. Nassif suggest what is known as the "Changing fraction method." The estate opposes this. The court is unable to find where, under current law, Maryland has adopted any particular method for this calculation. Accordingly, this court has looked at the elective share statute as it fits into the larger scheme of distribution and has also looked at cases from other jurisdictions and the reasoning provided from their review. It is noted that the changing fraction method could give the electing spouse a greater share of the distribution while other methods, notably the "fixed fraction method" can give a smaller share. It is also noted that Ms. Nassif seeks the changing fraction method like the Uniform Probate Code's "augmented estate" concept. In that regard it is noted that the Maryland legislature has for three or four years running declined to adopt augmented estate legislation in Maryland.
>
> The more persuasive analysis takes into account the treatment of federal estate taxes. Estates and Trusts §3-203(c) provides that in calculating the net estate for purposes of the spouse's election, there shall be no deduction for the tax as defined in §7-308 of the Tax General Volume of the code. Accordingly, Ms. Nassif will take her one third share prior to the deduction of federal estate taxes. Using a fixed fraction method may result in the non-spouse legatees taking a higher fraction of the gain or appreciation realized during the administration of the estate. However, this anomaly occurs in part because of the effect of the estate tax treatment. Given the

[35] The order also addressed personal representative commissions and the valuation and distribution of several specific bequests, including the Nations Bank stock and the Sunoco and McDonald's properties. *Nassif*, 198 Md. App. at 737.

> tremendous benefit the electing spouse receives due to the calculation of net estate without deducting the federal estate tax, the court finds the more equitable method of calculation of the elective share, and the one more in tune with the trend elsewhere, is the fixed fraction method.

No one appealed this order. *Nassif*, 198 Md. App. at 737.

The last time this case was before us, we stated that the "order[] [was] **final and appealable with respect to the distribution of specific bequests** and cannot be revisited."[36] *Id.* (emphasis supplied). We observed that Nassif had filed a malpractice action against her former counsel for not appealing the order and that she had treated the order as a final appealable judgment. *Id.* We stated:

> Appellant cannot now take an inconsistent position and re-adjudicate the distribution of the specific bequests and the payment of her share attributable to those bequests. **The effect of our decision on this issue is that the valuation and distribution of the specific bequests referred to in the 2000 order and in the fifth and eleventh accounts cannot be revisited. We perceive no binding effect beyond the specific bequests that is relevant to the issues before us.**

Id. at 737-38 (emphasis supplied; internal citation omitted).

On appeal, the Court of Appeals noted that neither party challenged our discussion of the 2000 Orphans' Court order. *Green*, 426 Md. at 279 n.19. In its opinion, the Court also wrote the following sentence: "As the Court of Special Appeals observed, the February 2000 order had 'no binding effect beyond the specific bequests,' and neither party appealed from it." *Id.* at 279 (quoting *Nassif*, 198 Md. App. at 737-38). The Court omitted our "relevant to the issues before us" language. *Id.* This was not part of our opinion that the

[36] We were also addressing a March 2, 2004, order that is not currently at issue. *Nassif*, 198 Md. App. at 737.

Court of Appeals reversed or vacated. Thus, our holding that the 2000 order had "no binding effect beyond the specific bequests" constitutes the law of the case, a concept that we will discuss shortly.

On remand, the circuit court analyzed our statements and the statement of the Court of Appeals on the binding effect of the 2000 Orphans' Court order. The circuit court specifically noted the "relevant to the issues before us" language and analyzed the issues that were before this Court in that appeal. First, the court concluded that the income and appreciation issues, which this Court later decided and were thus "relevant to the issues" before this Court, were not before the orphan's court in the 2000 order and, thus, the order had no effect on income and appreciation. Second, the court listed the issues that were addressed in the 2000 order but were not addressed by this Court: "(1) the appropriate timing to deduct federal and state estate taxes in calculating the elective share and (2) whether or not the fixed one-third fraction can be used the calculate the elective share." The court further noted that Nassif did not appeal this order and later sued her former attorneys for malpractice for not doing so. The court held that, because the February 18, 2000 orphan's court order was a final order that was not appealed, it had *res judicata* effect as to the federal and state estate taxes and the fixed one-third elective share, specifically that Nassif would receive her share before deducting those taxes from the legatees and that her share would be calculated employing the fixed fraction method rather than the changing fraction method.

We conclude that, despite the "modified final judgment rule" in Orphans' Court proceedings, *see Green v. McClintock*, 218 Md. App. 336, 363 n.25 (2014) (citing

Schlossberg, 275 Md. at 612), the February 2000 order presently subject to our scrutiny is not a final judgment with respect to the issue of the fixed fraction method.[37] The order did not "finally determine the proper parties, the issues to be tried and . . . send[] those issues to a court of law." *Schlossberg*, 275 Md. at 612. The 2000 order is not similar to any of the laundry list of final judgments mentioned in *Banashak*, 167 Md. App. at 658.

The last time these parties were before us, we stated that "[w]e perceive no binding effect beyond the specific bequests that is relevant to the issues before us," *Nassif*, 198 Md. App. at 738, and the Court of Appeals echoed these sentiments, *Green*, 426 Md. at 279. Because the two appellate courts of Maryland decided that this order was not final except as to the specific bequests, we conclude that the February 2000 Orphans' Court order was not a final judgment, except as to those bequests.

In light of this conclusion, we further hold that, contrary to Carlton's argument, *res judicata* does not bar our consideration of the fixed fraction/changing fraction issue. *Res judicata* has three elements:

[37] We take this moment to note that the order is certainly not a model of clarity and is slightly ambiguous as to its effect. It compares the changing fraction method to "the Uniform Probate Code's 'augmented estate' concept" and notes that the General Assembly had declined to adopt the augmented estate approach. The Uniform Probate Code's augmented estate approach addresses the amount of a decedent's property that is subject to the elective share. *See* John P. Ludington, *Determination of, and charges against, "augmented estate" upon which share of spouse electing to take against will is determined under Uniform Probate Code § 2-202*, 63 A.L.R. 4th 1173 (1988); *see also* Vince Snowbarger, *1994 Legislative Update*, 63 J. Kan. B. A. 34 (Aug. 1994). The augmented estate approach does not concern the fixed fraction method or the changing fraction method, which address the amount of income to which each beneficiary of the estate is entitled. We only note the order's ambiguity to say that, even if the 2000 order were a final judgment, we are not sure that we would agree with Carlton's contentions regarding the substance of the order.

> (1) the parties in the present litigation are the same or in privity with the parties to the earlier litigation; (2) the claim presented in the current action is identical to that determined or that which could have been raised and determined in the prior litigation; and (3) **there was a final judgment on the merits in the prior litigation.**

R & D 2001, LLC v. Rice, 402 Md. 648, 663 (2008) (emphasis supplied). Because the 2000 order was not a final judgment, the doctrine of *res judicata* is inapplicable here; the third element is not satisfied. Furthermore, *res judicata* is inapplicable here because the doctrine applies to relitigation of claims between the same parties in *subsequent* proceedings, not the same proceeding. *Brown v. Mayor*, 167 Md. App. 306, 320 (2006) ("*Res judicata*, or claim preclusion, applies when a proceeding between parties involves the same cause of action as a proceeding between the same parties in a *prior* case. Then, a judgment in the first case is conclusive in the *second case* as to all matters actually litigated or that could have been litigated in the *first case*." (Emphasis supplied) (citations omitted)). *Res judicata* has no application in this context of this case.

Carlton's contentions regarding the law of the case doctrine fall short as well. "'The law of the case doctrine is one of appellate procedure. Once an appellate court rules upon a question presented on appeal, litigants and lower courts become bound by the ruling, which is considered to be the law of the case.'" *Dept. of Public Safety and Correctional Servs. v. Doe*, 439 Md. 201, 216 (2014) (quoting *Garner v. Archers Glen Partners, Inc.*, 405 Md. 43, 55 (2008)). "The law of the case doctrine differs from *res judicata* in that it applies to court decisions made in the same, rather than a subsequent, case." *Scott v. State*, 379 Md. 170, 182 n.6 (2004) (citing *Tu v. State*, 336 Md. 406, 416 (1994)).

Carlton relies on *Ralkey v. Minnesota Min. & Man. Co.*, 63 Md. App. 515 (1985) to argue that the February 2000 order is binding under the law of the case doctrine. In *Ralkey*, a motions judge denied a defendant's motion for summary judgment before the trial judge granted it, and the appellant contended that the second judge was bound by the law of the case. *Id.* at 519-20. This Court stated that "[t]he law of the case doctrine generally provides that a 'legal rule of decision between the same parties in the same case' controls in subsequent proceedings between them." *Id.* at 520 (quoting 21 C.J.S. § 195 at 330 (1940)). The Court continued, stating that, "[t]ypically, a ruling by the trial court remains binding until an appellate court reverses or modifies it." *Id.* (citing 21 C.J.S. § 195 at 332 (1940)). The Court stated that, normally, the law of the case refers to appellate holdings, but that a trial court ruling may qualify for law of the case status if it is not appealed. *Id.* at 521 (citing *Acting Director, Dept. of Forests & Parks v. Walker*, 39 Md. App. 298, 302 (1978)). Continuing, the Court stated that the law of the case doctrine does not apply between courts of coordinate jurisdiction before one of those courts had entered a final judgment. *Id.* (citation omitted). However, the Court instructed that "the law of the case doctrine does not apply to trial court decisions in Maryland unless a statute or rule renders the decision binding or **when no appeal is taken from the final judgment**." *Id.* at 522 (emphasis supplied; citations omitted).

As stated in *Ralkey,* a ruling of a trial court is final until an appellate court "reverses or modifies it." *Id.* at 520 (citation omitted). In the present case, two appellate courts spoke on the binding nature of the order in controversy and determined that it was not binding except with respect to the specific bequests. *See Green*, 426 Md. at 279; *Nassif*,

198 Md. App. at 737-38. We conclude, therefore, that the February 2000 Orphans' Court order is not preclusive under the law of the case doctrine, except with regard to the specific bequests.

As an alternate arguments, Carlton invokes the doctrines of non-mutual defensive collateral estoppel and judicial estoppel to argue that the 2000 order is binding. Without any record extract citation whatsoever,[38] he states that Nassif filed a malpractice suit, in the Circuit Court for Prince George's County, against her former counsel for failing to appeal the February 2000 order, but that her former counsel's motion for judgment was granted "on the basis that Nassif had failed to prove damages." He provides us with the docket number of the malpractice action, which is CAL03-03103, and states that he provided this Court with information concerning the malpractice case in the last time this case was before us, in 2011. For the following reasons, we cannot agree with Carlton on either preclusion issue.

We first turn to collateral estoppel. "'[W]hen an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim.'" *Cassidy v. Board of Educ. of Prince George's*

[38] Maryland Rule 8-501(a) provides that an appellant "shall prepare and file a record extract . . . in every civil case in the Court of Special Appeals," subject to certain excepts, none of which are applicable here. Maryland Rule 8-501(c) requires that "[t]he record extract shall contain all parts of the record that are reasonably necessary for the determination of the questions presented by the appeal and any cross-appeal." Maryland Rule 8-504(a)(4) states that "[r]eference shall be made to the pages of the record extract supporting the [factual] assertions."

Cnty., 316 Md. 50, 62 (1989) (quoting Restatement (Second) of Judgments § 27 (1980)). The Court of Appeals has set forth a four-part test for determining whether it is appropriate to apply non-mutual collateral estoppel:

> 1. Was the issue decided in the prior adjudication identical with the one presented in the action in question?
> 2. Was there a final judgment on the merits?
> 3. Was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication?
> 4. Was the party against whom the plea is asserted given a fair opportunity to be heard on the issue?

Standard Fire Ins. Co. v. Berrett, 395 Md. 439, 458 (2006) (quoting *Colandrea v. Wilde Lake Community Ass'n, Inc.*, 361 Md. 371, 391 (2000)).

In *Rollins v. Capital Plaza Associates, L.P.*, this Court dismissed an appeal for non-compliance with several Maryland rules of appellate procedures, including Rule 8-501(c), and observed that there was a complete lack of citation to the record extract for factual assertions necessary to determine an entire issue. 181 Md. App. 188, 199, 202-03 (2003). We stated that "[w]e cannot be expected to delve through the record to unearth factual support favorable to [the] appellant." *Id.* at 201 (citation and internal quotations omitted; brackets in original).

Although we will certainly not dismiss this appeal for violation of Rule 8-501(c), we do conclude that Carlton has not provided enough factual support for his argument that Nassif is collaterally estopped. Although we do take judicial notice of the docket entries of the prior malpractice suit, CAL03-03103, and can discern that there was a judgment against Nassif on August 11, 2004, we have no information on what any oral or written opinion in that case actually said or what factual findings the circuit court made in that

case. We note that, especially in light of the labyrinthine nature of this litigation, (the record in this case consists of at least 21 boxes), Carlton must provide factual support for his position because "[w]e cannot be expected to delve through the record to unearth factual support favorable to [the] appellant." *Id.* at 201. All this Court has is Carlton's bare assertion that the issue of the order's finality was decided in a previous case. The burden is on Carlton to support this contention. We cannot conclude that "the issue decided in the prior adjudication [was] identical with the one presented in" this action. *Standard Fire Ins. Co.*, 395 Md. at 458 (citation omitted).

Turning to judicial estoppel, we understand that "[j]udicial estoppel [is] defined as a principle that precludes a party from taking a position in a subsequent action inconsistent with a position taken by him or her in a previous action." *Underwood-Gary v. Mathews*, 366 Md. 660, 667 n.6 (2001) (citing *WinMark Ltd. P'Ship v. Miles & Stockbridge*, 345 614 (1997)). To apply judicial estoppel, there are three circumstances that must be present:

> (1) one of the parties takes a factual position that is inconsistent with a position it took in previous litigation;
> (2) the previous inconsistent position was accepted by a court; and
> (3) the party who is maintaining the inconsistent position must have intentionally misled the court in order to gain an unfair advantage.

Mona v. Mona Elec. Group, Inc., 176 Md. App. 672, 726 (2007) (emphasis omitted) (quoting *Dashiell v. Meeks*, 396 Md. 149, 171 (2006)).

We conclude that Nassif is not judicially estopped from arguing about the binding nature of the February 2000 order for similar reasons as for collateral estoppel. As with his argument on collateral estoppel, Carlton simply has not provided us with enough information to make this conclusion, and the burden rests on him for this issue. Further,

we see no evidence that Nassif has "intentionally misled" any court at any stage of this litigation.[39] *Id.*

In summary, and after much ink, we conclude that the February 2000 order was only a final judgment as to the specific bequests, not to any other issue it might have addressed. In light of this, Nassif is not precluded by *res judicata*, law of the case, collateral estoppel, or judicial estoppel from arguing that the February 2000 Orphans' Court order is not a final order.

B. The Actual Issue at Work—Whether to Apply the Fixed Fraction Method or the Changing Fraction Method to this Estate

After disposing of the issues surrounding the preclusive effect of the February 2000 order, we are finally able to turn to the real issue at play here—whether to apply the fixed fraction method or the changing fraction method to the Estate of Walter L. Green.

Carlton argues that the law in force at the date of the decedent's death, March 9, 1993, applies to the estate, and that, as a result of this application of law, as well as the 2000 Orphans' Court order, the fixed fraction method must be applied to the estate. Carlton also argues that there is no justiciable controversy before us regarding the applicability of

[39] As an aside, we note that Carlton himself has taken inconsistent positions in this litigation. We find it curious that he accuses Nassif of doing the same—which, admittedly, Nassif has done, *see Nassif*, 198 Md. App. at 737-38—when Carlton himself previously argued before this Court and the Court of Appeals, in 2011 and 2012, that Nassif was entitled to no income, but, several years later, now argues that the February 2000 order was final regarding the fixed fraction method for income accrual. Apparently, he did not believe that that order was binding as to income accrual for 12 years, but now finds it advantageous to argue that it is. "'A man shall not be allowed to blow hot and cold, to claim at one time and deny at another.'" *Van Royen v. Lacey*, 266 Md. 649, 652 (1972) (citation omitted).

the MUPIA and further makes a statutory argument that the MUPIA does not apply to an elective share. In riposte, Nassif maintains that it is appropriate for the changing fraction method to be used, and that the MUPIA applies to the Estate by its express terms.

The circuit court found that the MUPIA applied to the estate, and that, as a result, the changing fraction method was to be used. Because this is a question of law, our review is *de novo*. *Schisler*, *supra*, 394 Md. at 535.

We conclude that it was legally correct to apply the changing fraction method in this case. In 1993, the Estates and Trusts article provided:

> To all other legatees, except legatees (other than a surviving spouse) of pecuniary legacies not in trust, the balance of the income, less taxes, ordinary repairs, and other expenses of management and operation relating to all other property from which the estate is entitled to income, the balance of interest accrued since the death of the decedent, and the balance of taxes imposed on income which accrued during the period of administration, **in proportion to their respective interests in the undistributed property of the estate** computed at the times of distribution on the basis of inventory value. . . .

1993 ET § 7-304(b)(2) (emphasis supplied). Thus, under this provision, legatees receive income based on the proportion of their respective interest in the undistributed property of the estate. *Id.* Although the provision does not specifically mention electing spouses, we determine that it applies to the share of an electing spouse. In *Green*, the Court of Appeals determined that this statutory section generally applied to a spouse's elective share, with respect to the question of whether an electing spouse is entitled to income. 426 Md. at 286-91. Therefore, we have no difficulty in concluding that, in these circumstances, § 7-304(b)(2)'s statement that a legatee is entitled to income based on the legatee's proportionate interest in the estate also applies to an electing spouse. *Id.*

It is also clear that, in analyzing this under the MUPIA, the MUPIA also applies a changing fraction method, especially in light of the decision reached by this Court the last time we analyzed this issue. Carlton makes a definitional argument (as he did in his last round through the courts) based on the terms "beneficiary," "heir," and "legatee," maintaining that the MUPIA does not apply to an elective share.

This argument is unavailing. Much of the MUPIA's sections turn on one being a beneficiary. *See, e.g.*, 2015 ET § 15-504 (describing how income should be distributed to beneficiaries). The term "beneficiary," "includes, in the case of a decedent's estate, an heir and legatee . . . ." 2015 ET § 15-501(c). "Heir" is defined as "a person entitled to property of an intestate decedent pursuant to [the intestate succession section] of this article." 2015 ET § 1-101(h). "Legatee" is defined as "a person who under the terms of a will would receive a legacy.[40] It includes a trustee but not a beneficiary of an interest under the trust." 2015 ET § 1-101(m).

First, as discussed above, the MUPIA, by its express terms, applies to all estates that do not expressly opt out of coverage that are in existence at its enactment in 2000. 2000 Md. Laws ch.292, section 4 (S.B. 636). The will in the present case does not expressly opt out of the MUPIA.

Second, in our previous opinion the last time these parties appeared before us,

> we conclude[d] that, for purposes of the [MUPIA], the concepts of heir and legatee include an electing spouse. We perceive[d] no intention to exclude

[40] "Legacy" is defined as "any property disposed of by will, including property disposed of in a residuary clause and assets passing by the exercise by the decedent of a testamentary power of appointment." 2015 ET § 1-101(l).

> electing spouses and no reason to exclude electing spouses from what is intended to be a broad uniform act establishing a default mechanism governing trusts and estates.

Nassif, 198 Md. App. at 735. Although that portion of our opinion was vacated because no justiciable issue was presented, our analysis on this issue has not changed.

It is also explicitly clear that, under current law, the changing fraction method would be applied to the Estate. 2015 ET § 3-203(e)(2) provides that "[i]f one or more distributions have been made to a surviving spouse or another person that require an adjustment in the relative interests of the beneficiaries, the applicable share shall be adjusted."[41]

Therefore, because the 1993 version, the MUPIA, and the modern version of the applicable Estates and Trusts provisions provide for the changing fraction method to be used, it was not legal error for the circuit court to apply the changing fraction method in this context. As such, it is not necessary for us to reach the question of whether there is a justiciable issue concerning the MUPIA.

V.

Timing of the Estate Tax Deduction

As with the discussion of justiciability and the MUPIA, this is a question of law, and we will review the circuit court's determinations *de novo*. *Schisler*, 394 Md. at 535.

[41] We note that 2015 ET § 3-203(e)(2) does not apply to this Estate because the General Assembly enacted this provision in 2003 and specifically provided that it would only have prospective effect, so we may not apply this particular provision here. *See* 2003 Md. Laws ch.234 (S.B. 312) ("AND BE IT FURTHER ENACTED, That this Act shall be construed to apply only prospectively and may not be applied or interpreted to have any effect on or application to an estate of a decedent who dies before the effective date of this Act."). Despite this provision's solely prospective effect, the foregoing analysis notes that prior law would also apply the changing fraction method.

At trial, both parties presented expert testimony. Nassif called the Maryland estate attorney Allan J. Gibber, and the Estate called Carlton Green as its expert. Gibber used the accounts and the inventories that Carlton filed as personal representative of the estate, and all parties have accepted the amounts reported on these inventories and accounts. In his calculation, Gibber did not give any binding effect to the 2000 Orphans' Court order, apart from the valuation of the specific bequests, because that was his instruction from Nassif's counsel. Gibber deducted the estate taxes as they were paid from the estate, toward the beginning of the life of the estate, rather than at the end, after the distribution of Nassif's elective share. Thus, under Gibber's methodology, the proportions of the interests of Nassif, Carlton, and Fotos are shifted very early in the life of the Estate because the estate taxes are deducted from the residuary estate, but not Nassif's elective share. As a result, Nassif receives more income throughout the life of the estate because her proportionate share of the estate is larger.

Gibber subtracted all specific bequests, pecuniary bequests, and the family allowance at the beginning of administration, before the first account, and at the amounts the 2000 order set or at the amount paid. He testified that he subtracted the pecuniary bequests and the family allowance the beginning of the calculation because they do not share in income, as per 1993 ET § 7-304, and he testified that he subtracted the values of the specific bequests at the beginning of the calculation, before the first account pursuant to court orders because "[t]here [were] some special applications that the court applied to, special calculations that they applied, that the court applied to how they should be satisfied. So those were paid separately."

Gibber next subtracted expenses shown on individual accounts and subtracted a ratable amount of expenses from the elective share and the residuary, based on the percentage interest that each had in the estate at the time. As for income, Gibber gave Nassif and the residuary estate proportional shares of income, based on their respective interests in the assets of the estate at any given account. Using this methodology, Gibber added ratable income and subtracted ratable expenses to each account until the final account, to arrive at the current shares of the assets of the estate. At the end of the calculation, Gibber stated that Nassif's percentage share of the current assets in the estate is 56.0309%.

Carlton, on the other hand, argued that the pecuniary bequests and specific bequests should be deducted as they occurred, rather than at the beginning of the calculation. Carlton also argued that it is impossible to calculate the net estate or elective share at any point before the conclusion of probate and final distribution because that is when the final valuation, using fair market values of the assets, could occur. As for income, Carlton argued that Nassif's income remains fixed at a one-third share over the life of the estate.

The circuit court generally accepted Gibber's methodology, with the exception of the timing of the estate tax deductions from the estate. The court found that Gibber's methodology properly allocated income over the life of the estate, in light of the disproportionate disbursements and allocations that actually occurred, and that the "change in the overall percentage is the result of undistributed assets remaining the Estate, but [that it did] not grant Ms. Nassif more than her statutory elective share." The court stated, that, because of the 2000 order, estate taxes must be deducted only before final distribution, not

as they were actually paid. The court also relied on equitable considerations to reach this result, stating that, "by deducting the estate taxes from the Residuary Legatees at the end, the income is more evenly distributed among the beneficiaries. The result is a more equitable distribution of estate assets."

Here, Carlton argues, once again, that a fixed fraction method is appropriate for distribution of income and that estate taxes must be deducted at the end of calculation, due to the binding effect of the 2000 Orphans' Court order. He relies on *Weinberg v. Safe Deposit and Trust Co. of Baltimore*, 198 Md. 539 (1951), a case from the 1950s interpreting superseded statutes and holding that an electing spouse is responsible for her share of the estate taxes, to argue that the estate taxes should be deducted at the very end of administration. Carlton also argues that the net estate cannot be calculated until the date of final distribution because of the holding of the Court of Appeals and that the proper formula is 'net estate = Maryland situs property of decedent (with a deduction for mortgages and debts) without a deduction for estate taxes – (family allowance + enforceable claims + administrative expenses). Carlton also states that "[t]he Legislature further provided a 'limitation' on the amount of the elective share and capped the elective share for all purposes at no more than one-half share of the net estate."[42]

Nassif argues that Gibber's methodology of basing of income on the proportionate interest in the estate's assets, which the trial court mostly adopted, is correct. Her brief's argument on this point is mostly dedicated to explaining Gibber's methodology. She

[42] Although Carlton states this legal proposition without citation, he appears to be referring to 1993 ET § 3-203(b), reproduced *supra*.

argues that the changing fraction method is appropriate because of our last opinion in this case and because of the disproportionate distributions that have occurred in this estate. Nassif also argues that, because the distribution is to be made in-kind and the electing spouse receives a proportionate share of each asset, final distribution automatically recognizes appreciation or deprecation of values of the asset; therefore, a final valuation is not necessary. Nassif states, as well, that Carlton's argument concerning the 50% limitation on the net estate is inappropriate, given that there is a difference between Nassif's entitlement to 1/3 of the net estate and Nassif's percentage entitlement to her share of the assets remaining in the estate, and that that Carlton has conflated these two concepts. Gibber, in his testimony at the trial level, agreed that this 50% limitation does not refer to assets remaining in the estate.

On the timing of the taxes issue, Nassif states that, by 1998, the estate taxes were paid, but that the trial court's calculation methodology inappropriately and fictitiously keeps those taxes in the estate until final distribution, giving the residuary estate an unfair proportion of income. She argues that this decision causes Nassif to be charged with part of the tax burden because it dilutes the income that she is entitled to and shifts that income to the residuary estate. Finally, Nassif takes issue with the "equitable" considerations that the trial court relied on in determining the correct timing of the deduction of estate taxes. Nassif states that the legislature unambiguously has decided that an elective share is not responsible for estate taxes and that the trial court cannot rely on fairness or equity to give Nassif some responsibility for payment of taxes.

The parties have not pointed us to any particular statutory provision, and our independent research has found none, that address when estate taxes should be deducted in the calculation of the Estate assets. Neither version of ET § 3-203 addresses this point, nor does Maryland Code (1988, 1992 Supp.), Tax – General Article ("TG"), § 7-308. In these circumstances, we conclude that the circuit court's reliance on equitable considerations to time the deduction at the very end was reasonable. We conclude that it was not legal error for the circuit court to deduct the estate taxes at this time.

VI.

Striking the Second Amended Complaint

Finally, we turn to the last issue before us: Carlton's contention that the circuit court erred in striking its second amended complaint. Nassif argues that the trial court did not abuse its discretion in striking the second amended complaint. Carlton argues that the correct standard of review is whether the trial court was legally correct, but, in doing so, he is conflating the standard of review for a motion to dismiss with that of a motion to strike an amended complaint. It is clear that abuse of discretion is the proper standard of review for this issue.

"'[The Court of Appeals has] said that amendments should be freely allowed in order to promote justice, *Earl v. Anchor Pontiac Buick, Inc.*, 246 Md. 653, 656, 229 A.2d 412, 414 (1967) so that cases will be tried on their merits rather than upon the niceties of pleading, *Hall v. Barlow Corp.*, 255 Md. 28, 39-40, 255 A.2d 873, 878 (1969)." *Crowe v. Houseworth*, 272 Md. 481, 485 (1974).

Maryland Rule 2-341 is an embodiment of Maryland's liberal stance on allowing amendment of pleadings. It provides, in part:

> **(a) Without Leave of Court.** A party may file an amendment to a pleading without leave of court by the date set forth in a scheduling order or, if there is no scheduling order, no later than 30 days before a scheduled trial date. Within 15 days after service of an amendment, any other party to the action may file a motion to strike setting forth reasons why the court should not allow the amendment. If an amendment introduces new facts or varies the case in a material respect, an adverse party who wishes to contest new facts or allegations shall file a new or additional answer to the amendment within the time remaining to answer the original pleading or within 15 days after service of the amendment, whichever is later. If no new or additional answer is filed within the time allowed, the answer previously filed shall be treated as the answer to the amendment.
> **(b) With Leave of Court.** A party may file an amendment to a pleading after the dates set forth in section (a) of this Rule only with leave of court. If the amendment introduces new facts or varies the case in a material respect, the new facts or allegations shall be treated as having been denied by the adverse party. The court shall not grant a continuance or mistrial unless the ends of justice so require.

Despite this liberality in allowing amendments to pleadings, the standard of review for the grant of a motion to strike an amended pleading is abuse of discretion. "[T]he allowance or refusal of an amendment is ordinarily within the discretion of a trial court[,] and [] no appeal will lie from the action, in the absence of a clear showing of an abuse of discretion." *Crowe*, 272 Md. at 489 (citations omitted). Appellate courts "review for abuse of discretion a court's decision to allow or disallow amendments to pleadings or to grant or deny leave to amend pleadings." *Hendrix v. Burns*, 205 Md. App. 1, 45 (2012) (citing *Schmerling v. Injured Workers' Ins. Fund*, 368 Md. 434, 443-44 (2002)).

In *Bacon v. Arey*, 203 Md. App. 606, 671 (2012), the Court of Special Appeals held that the trial court properly struck the appellant's fourth amended complaint. In that case,

the appellant filed the fourth amended complaint while the case was on remand from the Court of Special Appeals who had "ordered the circuit court to enter 'a declaration of the respective rights of the parties and adjudicate[e] all of the claims [including the cross-claim.]'" *Id.* at 670 (brackets in original). The Court of Special Appeals in that case did not provide the appellant with the opportunity to file a new amended complaint in the remand order, and "the stated purpose of remand was to adjudicate existing matters, not start anew with another amended complaint." *Id.* In that circumstance, in which the case was on remand in the trial court, we held that it was proper and not an abuse of discretion to strike the fourth amended complaint. *Id.* at 670-73; *see also Broadwater v. State*, 303 Md. 461, 469 (1985) (judgment of trial court vacated and case remanded with specific instructions to allow for the amendment of the complaint after trial court granted motion to dismiss).

In this case, the Court of Appeals stated its goal of "put[ting] to an end decades of litigation by a personal representative attempting to secure an unfair portion of a multi-million dollar estate for himself and his sister." *Green*, 426 Md. at 262. The Court remanded to the Court of Special Appeals "WITH DIRECTIONS TO VACATE THE JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AND FOR FURTHER PROCEEDINGS CONSISTENT WITH [THE] OPINION." *Id.* at 294. Nowhere in its opinion did the Court evince any desire to have the parties on remand file amended pleadings. *Id.* at 294.

On remand in the circuit court, Carlton filed a two-count second amended complaint on November 9, 2012. In this amended complaint, Carlton stated that there was a "need to

have a declaration by this Court as to what the law of the case is at this point since the judgment of the Circuit Court was vacated" and that there was a need to determine the law on enforceable claims, method of distribution of the estate, and method of distribution of income. Count 1 addressed the "Calculation of 'Net Estate and Elective Share,'" and Carlton sought to argue enforceable claims and equitable distribution in this count. Count Two addressed "Method of Distribution."[43]

In response, on November 27, 2012, Nassif filed a motion to strike Carlton's second amended complaint. In this motion, Nassif argued that amendment on remand was not proper, as per *Bacon*, that Carlton's amendment was an attempt to circumvent the rulings of the Court of Appeals, and that Carlton was retreading the same arguments that he had made throughout the multi-decade litigation.

On December 20, 2012, Carlton filed an opposition to Nassif's motion, in which he argued that the second amended complaint was needed to set forth the legal issues at work and that further proceedings were necessary for the calculation of enforceable claims because of the purported ambiguity of the ruling of the Court of Appeals and for the distribution of the elective share.

[43] We note that, in Count 2, Carlton also argues that

> [t]he Court of Appeals [sic] opinion in *Green v. Nassif*, 426 Md. 258, 262, 44 A.3d 321 (2012) in connection with the elimination of the cash out option under Estates and Trusts Section 3-208(b)(2) is a violation of equal protection, separation of powers principles, impairment of contracts prohibition, imposition of an ex post facto law, and due process clause under the United States Constitution and Maryland Declaration of Rights.

The court heard argument on this issue on April 30, 2013. As personal representative, Carlton argued that "[t]he second amended complaint sets forth what we believe really are the issues at this time for the court to decide." Carlton, in his *pro se* capacity, argued:

> So the reason for having the second amended complaint is to narrow the issues so that the court knows what's really at issue at this point in the proceedings. It's for the benefit of the court. The pleadings are there to identify what the plaintiffs in the case are asking the court in the way of relief. And it pares it down from what was originally a voluminous situation caused by the counterclaims. And it identifies, it's going to be before this court or whatever appellate court it goes to next, it narrows it. So anybody can see what's really at issue here. Pleading in a case is extremely important because [the] court's not able to grant relief beyond what the pleading is. As a practical matter, the issues that are in the second amended complaint are still in the prior pleadings. It's not a matter of you're changing horses in the middle of the stream. What's significant is you used one definition, the plain meaning of enforceable claims. The appellate courts have sent it back, saying there's a different meaning of enforceable claims. And that's still an ongoing issue. And ultimately, you have entered a order that said the estate was diminished by 102,000 dollars. That does not solve the issue in this. Whether you ultimately stick with that, which we would prefer that you not and listen to the evidence, take the evidence that shows that this is absolutely not the end, the correct end result in this case, listen to it, and then maybe reserve on your, I've asked you to reconsider it. . . . And furthermore, that if it has to go further than this, that the appellate court can see what the real evidence in the case is. So that's the reason that we'd prefer to proceed under the second amended complaint rather than the prior pleadings. And it makes total sense to do it that way. What we're trying to do is to resolve as much as we can here in this proceeding so that we don't have to go any further. Everybody's getting tired of this litigation.
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> * * *
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> And if we don't get [the questions] answered now, I don't think there's any secret that one or both parties is going to ask for the appellate courts to review it, and then we're going to be doing it again. And nobody wants to do this again. So the second amended complaint was filed to present the claims as the plaintiffs see them after remand.

He also argued that amendments to pleadings are "freely allowed to promote justice" and that the Court of Appeals remanded for further proceedings for more factual determinations.

In response, Nassif argued that Carlton had no right to amend his complaint on remand from an appellate court. Second, Nassif argued that the second amended complaint was an attempt to evade the ruling of the Court of Appeals on enforceable claims and to create an inconsistency and ambiguity between the previous rulings of the Court of Appeals and the Court of Special Appeals. She also argued that appellate courts had already rejected Carlton's equitable adjustment/recoupment and income arguments. Finally, Nassif argued that Carlton had no right to argue that the decision of the Court of Appeals was unconstitutional because "[t]hat's completely new. There is no right to bring that claim anymore, and it's the wrong forum to bring that claim, I think, at this time in any case."

The court granted Nassif's motion to strike the second amended complaint, stating that, "at this juncture, after listening to all the arguments, reviewing the amended complaint, and reviewing the opinions of the Court of Appeals and Court of Special Appeals, we're now on remand, the motion to strike the amended complaint is granted." The order to strike Carlton's second amended complaint was entered on May 22, 2013.

It was well within the discretion of the circuit court to grant Nassif's motion to strike the amended complaint. This case in a similar procedural posture to *Bacon*, 203 Md. App. at 671-73, in which this Court held that it was not abuse of discretion for the court in that case to strike an amended complaint after remand when the appellate court did not provide opportunity for amendment of pleading on remand. Further, the Court of Appeals, in

Green, stated that it intended to "put to an end decades of litigation" before the case was remanded to the circuit court. 426 Md. at 262. Despite Maryland's liberal allowance of amendment of pleading, it was not an abuse of discretion for the circuit court to strike a second amended complaint in this context.

In the alternative, Nassif argues that, should we decide that striking the second amended complaint was an abuse of discretion, it was still harmless error. She argues that the errors Carlton ascribes in granting a motion to strike to amend his complaint,[44] were all either addressed by the court in its opinion or futile because they were meritless. We do not address this contention because we conclude that the circuit court did not abuse its discretion in striking Carlton's second amended complaint.

CONCLUSION

Because of the length of this opinion, not to mention the length of the litigation itself, we summarize our holdings and conclusions here. In short, we affirm the circuit court in all respects, but not necessarily for the same reasons provided by that court. We conclude that there was competent and material evidence that the enforceable claims in the estate totaled $102,869.00. We also hold that Carlton and Ms. Fotos are not entitled to an equitable adjustment. We conclude that the 2000 Orphans' Court order is not preclusive

[44] As Nassif presents them, Carlton's errors ascribed to the amendment of the complaint are:

> (1) the parties' rights under ET §§ 3-208, 9-103, and 9-104; (2) the discretion, if any, for Green and Fotos to select property to be distributed to Nassif to satisfy her elective share; (3) the percentage of the remaining Estate assets to be distributed to Nassif to satisfy her elective share; and (4) the manner in which Nassif's entitlement to income is calculated.

except as to the specific bequests, and determine that the changing fraction method is the appropriate way to distribute income. Further, we hold that it was not incorrect for the circuit court, in this context, to deduct the estate taxes at the end, just before the close of the Estate. Finally, we hold that it was not an abuse of discretion for the circuit court to strike Carlton's second amended complaint.

We earnestly hope that this opinion marks the end of this controversy between the parties and that the Estate can finally be settled and distributed in 2016, twenty-three years after Walter Green's death.

JUDGMENTS OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED. EACH PARTY TO PAY THEIR OWN COSTS.