STATEMENT OF FACTS AND PROCEDURAL HISTORY

On May 11, R.V. (hereinafter "defendant"), a City of N.J. police officer for seventeen (17) years, shot and killed B.E.V. (hereinafter "victim" or "decedent"), his wife of sixteen (16) years in the kitchen of their home in New Jersey.[1] The victim was pronounced dead at a hospital after being shot twice at close range in the chest by the defendant. Their two sons, D.E.V., DOB: x/xx/xxxx (age 14 at the time, now 17) and D.E.V., DOB: x/xx/xxxx (age 4 years, 9 months at the time, now 7 years, 8 months) were nearby at the home of a neighbor when their father killed their mother. At the time of the crime, the parties were in the process of finalizing the issues that would lead to a divorce between them.

Defendant attempted to fabricate a self defense to his crime. After shooting the victim twice with his police service revolver, he cut himself with a kitchen knife, and then claimed that he was attacked by the victim. Furthermore, when he called for 911 emergency assistance, he did not give his name, and according to reports of the County Prosecutor's Office, he refused to answer the telephone when the 911 operator called him back. By the time the medical assistance personnel arrived, the victim had a faint pulse and ultimately expired.

The County Prosecutor caused the defendant to be examined by two experts who concluded that he was being untruthful and the cuts on him were self inflicted. Nevertheless, the defendant maintained his lies for almost three years during which time he was free on bail as he and his criminal defense lawyers pursued a public attack on the victim as the aggressor in her death and a bad mother to her children.

[1] The facts contained herein have been verified with the office of the County Prosecutor. They are also based on the personal knowledge of plaintiff, K.S. as stated in her attached Certification. Police reports and other records within the possession of the County Prosecutor and will not be released to plaintiff under the Open Public Records Act until sometime after defendant's sentencing on May 1.

In November, defendant was arrested for the murder of his wife. On or about February 28, he was indicted by the County Grand Jury on murder and other charges stemming from the May shooting death of the victim, including the charges of criminal restraint, possession of a weapon for unlawful purposes, hindering apprehension or prosecution, tampering with physical evidence and obstructing the administration of justice.

For three years, the defendant stood firm on his disparagement of the victim until it was time to begin the criminal trial in March. Confronted with having to now tell his unconvincing lies under oath before a judge and jury, the defendant sought and received a plea bargain that required him to admit killing the victim without the self defense assertion.

On March 30, defendant abandoned his self defense claim and entered a plea of guilty in the Superior Court of New Jersey, Criminal Part, N.J. County, New Jersey to the felonious homicide of B.E.V., specifically to the second degree charge of passion provocation manslaughter in violation of N.J.S.A. 2C:11-4(b) (2) and the fourth degree charge of tampering with evidence in violation of N.J.S.A.2C:28-6. (A-1 to A-5). In his plea before the court, and without his victim to correct the truth, R.V. said, *"My wife, B.E.V., and I had a heated argument in the kitchen of our home. She grabbed the kitchen steak knife. I lost it. I overreacted and shot her 2 times. . . .There was an argument over who was going to leave and who was going to stay with the children."* (A-6, A-7).

It is was the prosecutor's position, as it is the plaintiff's position in this matter, that the victim did not attack the defendant in any manner, and his self serving comments about the victim picking up a steak knife were as false as his attempt to inflict wounds to himself.

The assistant prosecutor K.P. advised the court at a sentencing hearing on Monday April 27, that after hearing the defendant's version of the crime that the defendant related to the N.J. County Probation Office in preparation of the pre-sentence investigation report, he would not

have offered a plea bargain, and he would have pursued the original murder charge. The defendant admitted that he provoked an argument with the victim and after shooting her twice with his service revolver, he permitted her to lie on the floor and die. By the time that the paramedics arrived, the victim still had a pulse. (Pl's Cert. pg. 2, par. 2).

On May 1, the defendant was sentenced by the Superior Court to eight (8) years in prison for the manslaughter crime[2] and one (1) year for the tampering with evidence crime. The sentences are to be served consecutively. He should not be eligible for parole for at least seven (7) years.

K.S. is the mother of the victim, and the plaintiff in this matter. She has filed this wrongful death action and claim for life insurance proceeds on behalf of her two grandsons who have been exposed to the public verbal assassination of their mother by the defendant and several of his supporters. As she has stated in her certification to this Court:

8. There is no question that the estate of my daughter has a wrongful death claim against the defendant. My two grandchildren lost their mother at the hands of the defendant. For almost three years since the crime, the defendant has had custody and control over his children. He has deliberately caused the children's mother to be demeaned; perhaps in furtherance of his desire to protect himself from a long prison term. My husband and I have had to file a separate custody and visitation claim in order to see our grandchildren. My grandchildren have not been given the opportunity to grieve over the loss of their mother. They are hurt and confused. The fact that during this three year period, there has been a continuous attack on my daughter's character by the defendant, his family and friends have hurt the children even more.

9. Since the death of B.E.V., she has never been perceived as a victim by the defendant or many of his supporters. Each effort by plaintiff and B.E.V. family to console, heal and endear B.E.V. children has been met with resistance by the defendant and those supporting him. In this lawsuit where the defendant, after killing the victim, nevertheless, continues to lay claim to her home, the insurance proceeds on her life and almost every tangible bit of evidence that B.E.V. ever existed, the rights of the innocent victims, her sons and my grandsons, must be fairly protected and asserted.

[2] Under the No Early Release Act (NERA), N.J.S.A. 2C:43-7.2, defendant must serve at least 85% of the eight year sentence before he is eligible for parole.

10. The objective of the defendant to save his skin from going to prison is now over. It is time for the rights of his children to be considered paramount. The purpose of this lawsuit is to secure and protect the interests of B.E.V. children. During the many years the defendant will be in prison, the children will hopefully, with the help of all those who love, support and wish to place them first, be able to confront the loss of their mother without the interests of the defendant taking priority. Hopefully, they will be able to heal and survive their terrible loss. My grandchildren, like any other victims, should be able to have their interests protected not only for them but against the control of the defendant, directly or through any of his relatives. When the defendant saw that my daughter was going to divorce him, and he could no longer control her, he killed her. He will go to any length to protect what he believes is solely his, and that includes denying his children what is rightfully theirs.

11. Any monies received by B.E.V. children should be protected and under the control of the court. If not, their father will victimize them once again. I have no objective except to protect the interests of my grandchildren. Any member of the defendant's family would have a clear conflict of interest.

On November 13, Letters of General Administration (A-8) were issued by the County Surrogate to the plaintiff pursuant to the order of the Superior Court of New Jersey, Chancery Division-Probate Part, County, dated November 2, appointing plaintiff Administrator of the Estate of B.E.V, Deceased. The matter in the Probate Court was a contested matter in which the defendant opposed the appointment and sought to have his sister appointed administrator. For a reason unknown to plaintiff, her attorney at the time did not also seek her appointment as *administrator ad prosequendum.*

Simultaneously with the filing of this wrongful death lawsuit, plaintiff has filed a motion in the Chancery Division Probate Part action to be appointed administrator *ad prosequendum, nunc pro tunc,* of the estate of her daughter, B.E.V. for the purpose of bringing this action against R.V. on behalf of the two children, who are likewise victims under the law.[3]

In this civil action, plaintiff seeks the following relief:

[3] N.J. Const., Article 1, par. 22.

1. Damages for wrongful death and survival pain and suffering and loss of enjoyment of life on behalf of the heirs and next of kin of B.E.V., namely, her two minor children.
2. A declaration of rights under the two life insurance policies on the life of the victim totaling $357,000 in proceeds. The first policy of $107, 000.00 names the defendant as beneficiary and the children as successor beneficiaries. The second policy of $250,000.00 names the defendant as beneficiary and his mother, N.V.[4] as successor beneficiary
3. A judgment prohibiting the defendant from inheriting from the victim or taking as a surviving joint tenant or beneficiary on a life insurance policy. In addition to personal property owned by the decedent, either solely or jointly with the defendant, she also owned the marital home located at 0000 Road, TOWN OF, New Jersey, as co-tenant by the entirety with the defendant.
4. A temporary and permanent injunction against the defendant restraining him from receiving and dissipating any assets that belong or will belong to the two minor children as a result of their mother's death.
5. Equitable distribution on behalf of her daughter's estate in all property legally and beneficially acquired by the defendant during the marriage.

Since the death of B.E.V., she has never been perceived as a victim by the defendant. At his sentencing, he showed no remorse nor did he express any apology for killing his children's mother and plaintiff's daughter. In this lawsuit where the defendant, after killing the victim, nevertheless, continues to lay claim to her home, the insurance proceeds on her life and almost every tangible bit of evidence that B.E.V. ever existed, the rights of the innocent victims, her sons, must be protected and asserted.

[4] Accordingly, N.V. is a named defendant for this purpose.

POINT 1

PLAINTIFF IS ENTITLED TO BE APPOINTED ADMINISTRATOR *AD PROSEQUENDUM* BYFOR THE PURPOSE OF PROSECUTING THE WRONGFUL DEATH ACTION IN THE LAW DIVISION.

While the relief the plaintiff seeks in the Law Division Action is substantive, that which she seeks before the Probate Court is essentially procedural in nature. It is limited to being appointed Administrator *ad Prosequendum* so that she can pursue on behalf of the children of B.E.V. the substantive claims for damages against R.V., the admitted killer of the victim.[5]

Plaintiff, K.S. was required by law to file the wrongful death and survival action in the Law Division. Pursuant to N.J.S.A 2A:31-2, in order for plaintiff to maintain that action she had to be appointed administrator *ad prosequendum* by the County Surrogate. The only individuals who could have a priority over plaintiff in being named administrator *ad prosequendum* are R.V. and the victim's two minor children. R.V. has no intention of suing himself, and since the victim's sons are minors, plaintiff, as the victim's mother and the children's grandmother is the individual who has no conflict of interest with R.V., and will best pursue and secure the interests of her grandchildren. She is, without question, is the most appropriate person to be named administrator *ad prosequendum*. The fact that plaintiff filed the Law Division action prior to being appointed administrator *ad prosequendum* does not create a defect in the Law Division Action. The Courts of New Jersey have held that it is not necessary to be appointed administrator

[5] N.J.S.A. 2A:31-4 provides that:

> "The amount recovered... shall be for the exclusive benefit of the persons entitled to take any intestate personal property of the decedent, and in the proportions in which they are entitled to take the same."

ad prosequendum as a prerequisite to filing a wrongful death action. Letters of Administration issued after the actual institution of the death action will become effective *nunc pro tunc*. In re Strong, 65 N.J. Super. 576 (App. Div. 1961); Cammarata v. Public Service Coordinated Transport, 124 N.J.L. 38 (1940).

The heirs and next of kin of B.E.V. are entitled to be compensated for their pecuniary loss as a result of the defendant's tortuous conduct. The courts have held that the *administrator ad prosequendum* is "merely a nominal representative" and a "trustee" for those entitled to recover pursuant to N.J.S.A. 2A:31-4. See, e.g., Wright v. Cion Corp. Peruna Desvaportes, 171 F. Supp. 735 (D.C.N.J. 1959); Kasharian v. Wilentz, 93 N.J. Super. 479 (App. Div. 1967); and Loughney v. Thomas, 117 N.J.L. 169 (1936). The issue of dependency and the amount of damages, if any, to be recovered on behalf of plaintiff will be a question for the jury in the Law Division matter and not by the Court in this matter. See N.J.S.A. 2A:31.5; Capone v. Norton, 21 N.J. Super. 6 (App. Div. 1952) and Franklin v. Rowan, 10 N.J. Misc. 964 (1932).

Plaintiff was appointed the general administrator of the estate her daughter on November 13, by the County Surrogate pursuant to the order of the Superior Court of New Jersey, Chancery Division-Probate Part, County, dated November 2, in a contested matter in which the defendant's sister, D.L., formerly D.B. also sought the appointment. The injunctive relief sought by plaintiff in this action is under her authority as general administrator. It would be impractical, cumbersome and unfair to the heirs of the decedent to have anyone other than plaintiff named as administrator *ad prosequendum* for the purpose of pursuing the wrongful death and survivor damage claims.

POINT II

R.V. IS PRECLUDED FROM RECEIVING ANY FINANCIAL BENEFIT OCCURING AS A RESULT OF THE DEATH OF B.V. BECAUSE A WRONGDOER CANNOT PROFIT FROM HIS ILLEGAL AND CRIMINAL CONDUCT.

A. Defendant and his relatives are precluded from taking under the authority of the common law.

One, who intentionally causes the death of another, cannot receive any benefit, including insurance proceeds upon the life of his victim. Swavely v. Prudential Insurance Co. of America, 10 N.J. Misc. R. 1 (1931). In Swavely, the court held that it would exercise its equitable powers to impose a constructive trust on monies obtained through the wrongdoer's own conduct. Judge O. stated the reasoning behind the law:

> The underlying principle is obvious. It is the policy of the law to protect human life, and to that and to discourage rather than encourage, the unlawful taking of it. Id. at 4.

The court in Swavely referred to the numerous decisions throughout the country and the various legal treatises as support for its holding, including the often cited decision of the United States Supreme Court in Mutual Life Insurance Company of New York v. Julia Armstrong, Admx., 117 U.S. 591, 6 S.Ct. 877 (1886), in which the Court stated:

> "It would be a reproach to the jurisprudence of the country, if one could recover insurance money payable on the death of the party whose life he had feloniously taken." 117 U.S. at 600, 6 S.Ct. at 881. Swavely, 10 N.J. Misc. R. at 3.

The court also adopted the language of the Supreme Court of Iowa in Schmidt v. Northern Life association, 83 N.W. 800 where the court referred to the rule denying recovery to the wrongdoer as "the unbroken voice of authority", stating that:

> Any other rule would furnish the strongest temptation to crime and give to the party interested the most potent incentive to bring about the death of the insured that he might profit thereby." Swavely,10 N.J. Misc. R. at 3.

Two years later in Merrity v. Prudential Ins. Co. of America, 110 N.J.L. 414 (E&A 1933), the Court of Errors and Appeals followed the reasoning of the court in Swavely and commented that, "The rule may be considered generally and thoroughly settled." Id at 415. In Whitley v. Lott, 134 N.J. Eq. 586 (1944) the court followed Merrity in denying a claim by the heirs of an individual who killed his wife and then took his own life. His heirs claimed that they were innocent parties and they had a right to take from the wife's estate even though her death was brought about by the intentional acts of her husband. The Court denied them recovery, relying on the policy of the common law that "no one should be allowed to profit by his own wrong." Id. at 589.

The court noted that this legal principle "has been accorded a very general application in equity and indeed, also at law.", and further commented:

> The doctrine itself, so essential to the observance of morality and justice, has been universally recognized in the laws of civilized communities for centuries and is as old as equity. Its sentiment is ageless. Id at 589.

This issue was addressed by the New Jersey Supreme Court in Neiman v. Huff, 11 N.J. 55 (1952), where Chief Justice Vanderbilt, speaking for the court, opined:

> "To permit the murderer to retain title to the property acquired by his crime as permitted in some states is abhorrent to even the most rudimentary sense of justice. It violates the policy of the common law that no one shall be allowed to profit by his own wrong 'nullus commondum capere protest de injuria sua propria.'" See Merrity v. Prudential Insurance Co., 110 N.J. L. 414 (E. & A. 1933), and Swavely Prudential Insurance Co., 10 N.J. Misc. 1

(Sup. Ct. 1931). Id at 60.

See also, Turner v. Prudential Insurance Co. of America, 60 N.J. Super. 175 (Ch. Div. 1960).

Former Justice Pashman, sitting as Judge of the Equity Court in the case of In re Estate of Kalfus, 81 N.J. Super 435 (Ch.Div. 1963), denied the claim of the victim's spouse against the decedent's estate, and summarized the scope of the common law rule:

> The analogous situations which have arisen in this State are felonious homicide of (1) a testator by a devisee,(2) a tenant by the entirety by his spouse, and (3) an insured by the beneficiary under the policy. In all three situations our courts have held the wrongdoer to be divested of any rights he or she might have had if the natural course of events had been allowed to follow.
>
> In the insurance cases the courts have impressed a constructive trust on the proceeds of the policy by invoking the age-old maxim of the common law that "no man can profit by his own wrongdoing." See Merrity v. Prudential Insurance Co., 110 N.J.L. 414 (E.&A. 1933); Swavely v. Prudential Insurance Co., 157 A. 394, 10 N.J. Misc. 1 (Sup. Ct. 1931); Turner v. Prudential Insurance Co. of America, 60 N.J. Super. 175 (Ch.Div. 1960). Id. at 437.[6]

In Jackson v. Prudential Ins. Co. of America, 106 N.J. Super. 61 (Law Div. 1969) the insured's death was caused from a gunshot wound inflicted by his wife. The wife was indicted for manslaughter, tried and convicted. She then filed suit to obtain the proceeds of the policy of insurance on her husband's life which, under normal circumstances, would have been paid to her.

The Court held against the decedent's spouse, denying her any right to benefits under the insurance policy. In Jackson, the court's decision evidenced the distinction between the criminal

[6] The court's decision in Kalfus was also followed in Campbell v. Ray, 102 N.J. Super. 235, 237 (Ch.Div. 1968) where the court followed the sole exception to the general rule that one, who murders another, may collect the insurance proceeds on the life of the decedent, if the named beneficiary was insane at the time he committed the act.

and civil proceedings involving the intentional killing of the insured and the different standards of proof in each case. The court addressed the factual situation where the individual was found guilty of manslaughter and not murder. In referring to the decisions of other states throughout the country, the court stated:

> It is clear from these cases that the underlying principle is not so much whether the homicide is technically classified as murder or manslaughter, or, in the latter case, whether the manslaughter is voluntary or involuntary, although the essential elements of each offense are of importance. The true test is whether the beneficiary intentionally took the life of the insured. (citations omitted) Thus, in the present case the court must determine from the conflicting proofs what actually occurred on the night in question, and whether the homicide was accidental or otherwise unintentional, or intentional. Id. at 72-3. (Emphasis supplied).

In applying this test, the court concluded:

> Regardless of the category in which the homicide in this case is to be placed, the killing resulted from an intentional act on the part of Mrs. Jackson, and not from accident or carelessness. As was said in Prudential Insurance Co. of America v. Harrison, supra, public policy abhors settlement of disputes by violence. Mrs. Jackson ought not to be permitted to profit from her wrongdoing in the existing circumstances. The court concludes, therefore, that she is precluded from receiving the proceeds of the policy of insurance on the decedent's life. Id. at 74. (Emphasis supplied).

In Small v. Rockfeld, 66 N.J. 231 (1974), the plaintiff brought a wrongful death action, on behalf of her grandchildren, against the spouse of her deceased daughter, alleging that he caused her daughter's death in a manner which was either intentional, reckless or grossly negligent. The New Jersey Supreme Court again followed the general rule, that a person who murders another is barred from claiming a share of the estate of the deceased. The court

recognized the strong public policy behind the general rule and rejected the husband's defenses of interspousal and intrafamilial immunity, holding that a constructive trust could be imposed upon any property unjustly obtained by the husband. The court also noted that while the defendant had never been criminally charged with his wife's killing, this fact did not preclude the civil relief requested by the plaintiff. Id. at 245.

In D'Arc v. D'Arc, 164 N.J. Super 226 (Ch. Div. 1978), the Chancery Court cited Small v. Rockfeld as authority in applying this rule of unjust enrichment in the context of a matrimonial action. In D'Arc, the Court held that where the wealthy wife had proven by a preponderance of the evidence that her husband sought to solicit her murder, his request for alimony would be barred. Relying on the court's decision in Small, the court questioned: "Should such a bar vanish if the attempt to murder one's spouse was unsuccessful?" D'Arc, 164 N.J. Super. 240. In answering its own question, the court stated:

> Here the "fault" is an attempt by Dr. D'Arc to commit one of the most heinous crimes known to mankind--murder. . . .
>
> [W]here a spouse has committed an act that is so evil and outrageous that it must shock the conscience of everyone, it is conceivable that this court should not consider his conduct when distributing the marital assets equitably.
>
> "The obligation of this court is to implement the purpose of law, which is to do justice, and not to mechanically apply established principles of law, even when they compel an absurd result. To ignore the facts of this case would be tantamount to permitting Dr. D'Arc to obtain through the back door that which he is barred from taking through the front door." Id at 241-42.

This common law rule has been a rule of general application throughout this country for many years. Courts in other states have denied recovery in a diverse number of matters. See, e.g., Carter v. Carter, 88 So. 2d 153 (Fla. 1956) where the court held that the beneficiary could

be denied recovery even though she was acquitted of murder charges; Greer v. Franklin Life Insurance Co., 221 S.W. 2d 857 (Tex. 1949) where the beneficiary was denied insurance proceeds despite the justification of self defense.

In Matter of Eliasen's Estate, 668 P.2d 110 (Idaho 1983), the court held that the beneficiary's acquittal of the criminal charges and the fact that he did not physically cause the death of the decedent did not preclude a subsequent civil action to bar him from taking the insurance proceeds. In re Estate of Walker, 847 P.2d 162 (Colo. App. 1992) held that where the devisee planned and facilitated the murder, yet did not actually inflict the fatal wounds, he would, nevertheless, be precluded from recovery under the intentional killing provisions of the statutory law. In this case, the devisee was convicted of conspiracy to commit murder and murder while another did the physical act of killing the victim. The court rejected the argument that the conspirator enjoyed any better status under this law than the person who did the actual killing.

In Metropolitan Life Insurance Co. v. McDavin, 39 F. Supp. 228 (E.D. Mich. 1941) the court was faced with an issue of first impression where the beneficiary caused the death of her husband while in the heat of passion produced by a reasonable provocation. The claimant was convicted of involuntary manslaughter. Relying upon the general rule which was recited in the Restatement of Restitution, the court held that, while the crime of manslaughter did not technically involve the element of intent, nevertheless, the actions of the beneficiary were intentional and she would be denied recovery in this civil proceeding. This case is one of the earlier reported cases holding that a conviction for passion/provocation manslaughter will preclude recovery for any claims for insurance proceeds.[7]

[7] The defendant in Metropolitan Life was not convicted of passion/provocation manslaughter which is the intentional killing of the victim under the New Jersey murder statute, N.J.S.A. 25:5-2. See discussion, infra at p. 19.

B. Defendant and his relatives are precluded from taking under the authority of the Slayers Act, N.J.S.A.3B:7-1.1, et. seq.

N.J.S.A.3B:7-1.1(a) provides:

> An individual who is responsible for the intentional killing of the decedent forfeits all benefits under this title with respect to the decedent's estate, including an intestate share, an elective share, an omitted spouse's, domestic partner's or child's share, exempt property and a family allowance. If the decedent died intestate, the decedent's intestate estate passes as if the killer disclaimed his share.

Furthermore, the "intentional killing of the decedent . . . .severs the interests of the decedent and the killer in property held by them at the time of the killing as joint tenants with the right of survivorship or as tenants by the entireties, transforming the interests of the decedent and killer into tenancies in common." N.J.S.A. 3B:7-1.1(a)(2).

As to all other interests the killer may have, N.J.S.A.3B:7-5 states:

> Any other acquisition of property or interest by the decedent's killer or by a relative of the killer not covered by this chapter shall be treated in accordance with the principle that a killer or a relative of a killer cannot profit from the killer's wrongdoing.

Thus, if the court determines that the actions of the defendant are "intentional", neither he nor "a relative" can recover anything.

The defendant pled guilty to passion provocation manslaughter and was sentenced to a stated term in prison for this crime. The Supreme Court of New Jersey has held that the crime of passion provocation manslaughter involves the "intentional**"** killing of the decedent. In State v. Robinson, 136 N.J. 476 (1994) the New Jersey Supreme Court held that passion/provocation manslaughter "is an intentional homicide." Id. at 481. In discussing the intentional nature of this crime, the Court stated:

He was convicted of involuntary manslaughter, which under the Michigan statute, was a negligent killing. Nevertheless, the court denied recovery in the civil matter.

> Passion/provocation manslaughter, however, is an intentional crime. Unlike other lesser-included offenses of murder, such as aggravated manslaughter and reckless manslaughter, a finding of guilt of passion/provocation manslaughter does not suggest that a defendant did not intend to kill.
>
> Rather, a conviction of the lesser-included offense of passion/provocation manslaughter indicates that the defendant, while acting with an intent to kill, did not act with the level of culpability necessary for a murder conviction, due to circumstances present at the time of the killing. Id. at 486.

C. The defendant's criminal conviction is conclusive for establishing liability.

The judgment of conviction of the defendant for the crime of passion provocation manslaughter " is conclusive under the law for establishing the fact that the defendant committed the intentional crime. N.J.S.A. 3B:7-6. (Emphasis supplied). Whether the term "conclusive presumption" "conclusive evidence" or simply "conclusive" is used in a statute or judicial decision, the intent and effect is the same; i.e., to establish a valid rule of substantive law. See, e.g., McCormick, Evidence 966 (3rd.ed. 1984); Mueller & Kirkpatrick, Evidence Under the Rules 756 (2nd. ed. 1993). Where the legislature enacts a rule of substantive law, it is to be given its full effect. See, Howard Savings Institution v. Kielb, 38 N.J. 186, 197-8 (1962) and Ward v. Marine National Bank of Wildwood, 38 N.J. 132, 136-7 (1962). In its primary legal signification the word has been defined as meaning beyond dispute, or question; decisive, irrefutable, or incontrovertible; final; leading to a conclusion or decision, not admitting of explanation or contradiction putting an end to the inquiry debate or question, also shutting up a matter or shutting out all further evidence. See, 15 C.J.S. 802; See also DiMieri v. Metafield, 126 N.J.L., 484, 487 aff'd 127 N.J.L. 597 (1942), Edwards v. Shreveport Creosoting Co., Inc. 21 So.2d 878 (La. 1945); and Amalgamated Housing

Corporation v. Kelly, 193 Misc. 961, 82 N.Y.S. 2d 577 (1948).

The New Jersey Wills and Probate Reform Act, L.1977, c. 412, codified as N.J.S.A. 3A:2A-1 et seq., was adapted from the Uniform Probate Code.[8] In 1982 the statutory provisions of Title 3A became part of Title 3B. N.J.S.A. 3B:7-1 et seq. succeeded N.J.S.A. 3A:2A-83 with similar language relating to the intentional killing of the decedent. These statutory provisions are almost identical to Section 2-803(c) of the Uniform Probate Code.[9] The New Jersey statutory scheme was further amended in 2005 to broaden restriction on killer recovery.[10]

One of the earliest cases to address the provisions of the New Jersey Wills and Probate Reform Act was In re Karas, 192 N.J. Super 107 (Law Div. 1983), aff'd as mod., 197 N.J. Super. 642 (App.Div. 1984). In Karas, the victim's husband caused her death. He was indicted, tried and acquitted of her murder. In applying the provisions of the former statute (N.J.S.A. 3B:7-2 which denies the right to benefit on the part of a "joint tenant who criminally and intentionally kills another joint tenant"), the Court held that the statutory provision did not change the court's common law authority to impose a constructive trust on the husband's one-half interest. The court further held that even if the husband was acquitted in the criminal case, which required a more substantial burden of proof, the equity court would, nevertheless, conduct a hearing to determine if the killing was intentional.

The court in Karas emphasized the continued reliance by the courts of New Jersey on the compelling equity principles found in the common law decisions, stating:

---

[8] See, Assembly Judiciary, Law, Public Safety and Defense Committee Statement to Assembly Bill 1712 of 1977.

[9] U.L.A. PROB. CODE sec. 2-803(c) uses the phrase "feloniously and intentionally kills", while the present New Jersey statutory counterpart, N.J.S.A. 3B:7-3 uses the term "criminally and intentionally kills". N.J.S.A. 3A:2A-1 did not include the word "criminally" and the phrase used was "intentionally kills." See discussion, In re Estate of Vadlamudi, 183 N.J. Super. 342 (Law Div. 1982).

[10] N.J.S.A. 3B:7-1 to 4 were **r**epealed by L.2004, c. 132, § 94, eff. Feb. 27, 2005.

> There is nothing in the Probate Reform Act of 1978 to indicate an intent to invert the strong public policy expressed in Neiman v. Hurff, 11 N.J. 55, 60 (1952). There was no statement accompanying the legislation to indicate such intent; no commentators have suggested that conclusion. Under those circumstances it is presumed that the legislature did not intend to change the pre-existing common law. Blackman v. Iles, 4 N.J. 82, 89 (1950). Before such intent may be found it must appear clearly and plainly from the legislation. (citing Blackman at 89). Id. at 112.

The court further concluded:

> The principle remains the same--the killer may not benefit financially from his wrongful and awful act. Id at 113.

The intent of the New Jersey Legislature, through the enactment of the Wills and Probate Reform Act was to follow the Uniform Probate Code which restated the prevailing common law in New Jersey and throughout the country. The common law decisions remain totally viable today and must be applied in conjunction with the statutory law in assessing the rights of the parties. It is a well established principle relating to statutory construction that, unless there is a specific statement of a different legislative intent, statutes are to be construed in accordance with the principles of common law, and there is an inference in the law that a statute does not intend to make any change to the common law other than specifically stated. See State v. Western Union Tel. Co., 12 N.J. 468, 486 (1953), App. dism. 346 U.S. 869, 74 S.Ct. 124 (1953); In re Estate of Vadlamudi, 183 N.J. Super. 342 (Law. Div. 1982). The decisions of the common law and the statutory provisions are completely apposite to the case at bar to establish that the defendant may not inherit, take joint property or receive as a beneficiary under any policy of insurance on the decedent's life. Furthermore, his mother, Nancy Vanaman likewise, may not receive insurance proceeds. N.J.S.A. 3B:7-5, supra.

The decedent's interest of all joint property should pass to her children. The interest of the defendant in any property should further be restrained from transfer or sale to a third party in

order to secure the rights of the children in collecting on any wrongful death and survivor claim against the defendant.

POINT III

THE ESTATE OF BARBARA ELKE VANAMAN IS ENTITLED TO EQUITABLE DISTRIBUTION OF ALL MARITAL ASSETS LEGALLY AND BENEFICIALLY OWNED BY DEFENDANT ROBERT VANAMAN.

The estate of a wife, who is slain by her husband, is entitled to the equitable distribution of marital assets held in husband's name, including his retirement and pension accounts, just as she would have been if the marriage terminated as result of divorce rather than the husband's killing her. Wasserman v. Schwartz, 364 N.J.Super. 399, 836 A.2d 828 (Law Div. 2001). In Wasserman, the defendant husband was convicted of aggravated manslaughter and the estate of the victim wife brought suit for wrongful death damages, for injunctive relief to prevent the wrongdoer from recovering under the Slayer's Act and common law,[11] and for equitable distribution under N.J.S.A.2A:34-23. Considering the same issues the court in the instant matter is asked to consider, the court in Wasserman ruled as follows:

1. The victim's estate was entitled to partial summary judgment on the wrongful death and survival action claims against for compensatory and punitive damages.
2. Under the Slayer's Act and common law decisions,[12] the defendant was precluding from taking any property from the victim by way of intestacy and joint ownership.[13]

[11] Formerly N.J.S.A. 3B:7-1, et. seq. (now N.J.S.A. 3B:7-1.1, et. seq.). See discussion, PPINT II, supra.
[12] The court relied on the cases cited as authority in POINT II of this brief, such as Neiman v. Hurff, 11 N.J. 55, 93 A.2d 345 (1952) and Whitney v. Lott, 134 N.J.Eq. 586, 589, 36 A.2d 888 (Ch.1933).

3. The victim's estate was entitled to equitable distribution in all assets of the defendant, including his pension and retirement accounts, no matter how he tried to label or shield them. The court noted:

> "No matter how [the killer] may label assets held in his name or for his benefit, it is clear that if any such assets or portions thereof represent a benefit to him or profit by him, directly or indirectly, as a result of killing his wife, he must return them to plaintiff's estate."
>
> Wasserman, supra, 364 N.J.Super. 404, 836 A.2d 831.

In the case at bar, the defendant took for himself every item of property that belonged to him and/or to the victim. Her estate has received nothing. It is incumbent on this court to safeguard all assets from the defendant and for the benefit of the heirs of the victim, her two children.

POINT 1V

PLAINTIFFS' FILING OF THE ORDER TO SHOW CAUSE WITH TEMPORARY RESTRAINTS PURSUANT TO RULE 4:52 IS PROPER; DEFENDANT MUST BE RESTRAINED FROM DISSIPATING HIS CHILDREN'S INHERITANCE AND OTHER ASSETS PENDING THE CONCLUSION OF THIS ACTION.

A. PLAINTIFF SHOWS A REASONABLE PROBABILITY OF ULTIMATE SUCCESS ON THE MERITS OF HER WRONGFUL DEATH LAWSUIT, AND OTHER CLAIMS FOR RELIEF, AND THE FACTS PURSUANT TO SAME ARE UNDISPUTED.

Plaintiff has a valid cause of action under the Wrongful Death and Survival Act, N.J.S.A. 2A:31-1 et seq. In addition, as fully set forth in the aforesaid points of law in this brief, the

plaintiff's claims under the Slayer's Act, common law and equitable distribution laws are uncontroverted and indefensible by the defendant.

A rule of law states that in order for a court to grant a preliminary injunction, an applicant must establish that his or her claim is based on a settled legal right, and that the material facts are substantially undisputed. See Crowe v. DeGioia, 90 N.J. 126, 133 (1982); Ispahani v. Allied Domecq Retailing USA, *et al*, 320 N.J. Super. 494, 498 (App. Div. 1999). In the case at bar, plaintiff has established that the claim is based on a settled legal right to file a wrongful death lawsuit against the person who feloniously killed the decedent and the material fact that defendant Robert Vanaman is the killer is undisputed.

B. THE ESTATE OF PLAINTIFF'S DECEDENT WILL SUFFER IMMEDIATE AND IRREPARABLE HARM IF RESTRAINTS ARE NOT ORDERED.

Paragraph 13 of plaintiff's certification states:

> "The defendant has taken every asset that belonged to my daughter and appropriated it as his own. On information and belief he has liquidated certain assets, applied to receive his pension and may very well sell assets presently being held by the prosecutor's office. As a result of his conduct, any claims of ownership he may make should be subject to the claims of my daughter's estate and for the benefit of heirs, her two children. The defendant will sell whatever he can, to the detriment of Barbara's heirs unless he is restrained by the court. I respectfully request that in order to prevent irreparable harm to my grandchildren, the defendant be restrained from selling or otherwise disposing of any assets pending the outcome of this litigation."

If defendant is not restrained from dissipating the assets that rightfully belong to the decedent's estate, including such items as the life insurance proceeds in the amount of $357,000, the marital home, defendant's pension, his vehicles and such other assets of which plaintiff is not aware, then the rightful owners of these assets will be irreparably harmed and denied what is rightfully theirs. Plaintiff may not be able to recover monetary damages from the defendant in the wrongful death lawsuit, so it is imperative that all assets be preserved at this time.

The fact that Robert Vanaman is now incarcerated does not stop him from dissipating his assets to the detriment of his children. Even if he cannot spend the money himself from prison, can direct that it be given to whomever he wishes. It would be a miscarriage of justice if plaintiff was to be awarded civil damages on behalf of the victim's children, only to find that defendant Robert Vanaman is judgment proof because he gave, spent or gave away funds and assets that can no longer belong to him before plaintiff's decedent's estate could receive it.

The purpose of injunctive relief is to "maintain the parties in substantially the same condition 'when the final decree is entered as they were when the litigation began.'" See Crowe, supra, 90 N.J. at 134, quoting Peters v. Public Service Corp. of N.J., 132 N.J. Eq. 500 (Ch. Div. 1942), *aff'd o.b.,* 133 N.J. Eq. 283 (E. & A. 1943). Defendant Robert Vanaman must remain in the same condition as when the final decree in the wrongful death action is entered. The only way to accomplish that is for the court to order the restraints plaintiff seeks and to freeze defendant Robert Vanaman's assets.

C. THE HARM TO PLAINTIFFS IN DENYING THE RESTRAINTS IS GREATER THAN THE HARM TO DEFENDANT IN GRANTING THE RESTRAINTS.

The final test in considering the granting of a preliminary injunction is the relative hardship to the parties in granting or denying the relief. See Crowe, supra, 90 N.J. at 134, citing Isolantite Inc., v. United Elect. Radio & Mach. Workers, 130 N.J. Eq. 506, 515 (Ch. 1941) *modified on other grounds,* 132 N.J. Esq. 613 (A. & E. 1942). See also Ispahani, supra, 320 N.J. Super. at 498. In balancing the relative hardship factors, equity overwhelmingly favors the imposition of restraints on the defendant. Plaintiff's decedent's estate, and therefore, Barbara Vanaman's children will be more harmed than defendant if the restraints are denied. The children of the decedent will have no recourse if the defendant dissipates their assets.

CONCLUSION

The plaintiff respectfully requests that the relief requested in the complaint and order to show cause be granted.

Dated: May 6, 2009

_____

RICHARD D. POMPELIO, ESQ.
POMPELIO, FOREMAN & GRAY, L.L.C.
Attorneys for Plaintiff, Karin Shaffer