PROPOSED

WILLS ACT OF 1947

REPORT

OF THE

COMMITTEE ON DECEDENTS' ESTATES LAWS

OF THE

JOINT STATE GOVERNMENT COMMISSION

OF THE GENERAL ASSEMBLY

OF THE COMMONWEALTH OF PENNSYLVANIA

CAPITOL BUILDING

HARRISBURG, PA.

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(Created in 1937, P. L. 2460, as last amended 1943, P. L. 13)

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INTRODUCTION

This is the second of a series of reports issued by the Committee on Decedents' Estates Laws of the Joint State Government Commission in pursuance of Senate Resolution Serial No. 46 of the regular session of the Legislature of 1945, which directed the Joint State Government Commission of the General Assembly to "study, revise and prepare for reënactment the Orphans' Court Partition Act, the Orphans' Court Act, the Revised Price Act, the Wills Act, the Register of Wills Act, the Intestate Act and the Fiduciaries Act, together with all of their supplements and amendments and all separate laws that should properly be incorporated therein, and to present them for the consideration of the General Assembly at its next session". The first report contained the "Proposed Intestate Act of 1947".

Pursuant to the said resolution, the Commission established a special "Committee on Decedents' Estates Laws" to carry out the mandate of the General Assembly. Hon. Thomas H. Lee, of Philadelphia, was designated as Chairman, and Hon. John M. Walker, Allegheny County, was designated as Vice Chairman.

The Committee recognized immediately the need for coöperation, advice and assistance of the Orphans' Court judges and the practitioners in the field of decedents' estates laws familiar with the problems involved in administering and construing the laws. Therefore, an Advisory Committee, consisting of judges and attorneys, distributed geographically throughout the Commonwealth of Pennsylvania, was appointed, and Robert Brigham, Esq., of Philadelphia, was designated as Chairman; Shippen Lewis, Esq., of Philadelphia, as Secretary, and M. Paul Smith, Esq., Norristown, Research Consultant. A list of the members of the Joint State Government Commission, the Committee on Decedents' Estates Laws and the Advisory Committee will be found at the beginning of this report. Both committees proceeded promptly with the study of the various decedents' estates laws.

After the Advisory Committee had completed its draft of a proposed new Wills Act, it was submitted to the Committee on Decedents' Estates Laws of the Joint State Government Commission.

This report, therefore, contains the draft of the proposed "Wills Act of 1947", and is distributed to the bench, the bar, and the public for their consideration. The first report as pointed out above was issued heretofore and contained the new "Proposed Intestate Act of 1947".

In addition to changes in general arrangement, which are intended to make the Act more readily understandable, there are

several substantial changes recommended by the Proposed Wills Act of 1947.

The general contents of the 1917 and 1947 Acts are similar, but the 1947 Act includes new features wholly lacking in the 1917 Act, and omits several sections included in the 1917 Act. The new features, of which there are no counterparts in the 1917 Act, include the following:

Section 3(b) deals with the revival of revoked or invalid wills and is intended to solve the problem of *Burtt Will*, 353 Pa. 217, and *Ford's Est.*, 301 Pa. 183.

Section 4(a) saves certain gifts for religious or charitable purposes contained in wills executed within thirty days of death where the religious or charitable gift is a carry-over from an earlier will.

Section 4(b) includes divorce with later marriage, birth and adoption as an occasion for automatic modification of the will.

Section 6(d) defines "heirs" and "next of kin", etc., to include the surviving spouse, and also includes the provisions of the Act of 1923, P. L. 914, 21 PS §11, extended to include heirs of persons other than testators.

Section 6(g) gives illegitimates the rights of legitimate children in wills of members of the mother's family and also of the father's family when the parents marry.

Section 9, like section 2(g) of the proposed Intestate Act, has been added to make it clear that alienage of itself is no handicap to the acquisition of property under a will.

By Section 10, all persons are given the right to appoint a guardian of property left by them to minor children. But even the surviving parent has no right to appoint a general guardian of the estate.

Lengthy consideration was given to the advisability of the inclusion of a section on foreign execution of wills as is provided in the Model Execution of Wills Act. Such provision and similar provisions are a part of the law of numerous states. By the terms of the Model Act, wills executed in accordance with the laws of other states would be recognized as valid in disposing of Pennsylvania property. It was finally concluded that no such provision should be included in Pennsylvania law. It was thought that recognition of any foreign will which does not comply with the liberal Pennsylvania standards would be too hazardous.

Several provisions included in the Wills Act of 1917 are omitted entirely in the proposed Act. Provision for a will which could not be signed because of extremity of the last illness has been omitted because considered too hazardous. Forfeiture of rights of a legatee or devisee who murders testator is omitted as that

subject is covered by the Slayer Act of 1941, P. L. 816. Section 19 of the 1917 Act, dealing with spendthrift trusts is omitted because it is declaratory of the common law *(Moorehead's Est.*, 289 Pa. 542) and should be included in a general statute applicable alike to inter vivos trusts as well as to wills.

Changes also have been made in provisions which are included both in the 1917 Act and in the present draft. Mariners and persons in military service must now comply with the safeguards of the Wills Act but during wartime the age limit for such persons is lowered from twenty-one to eighteen years of age. Greater precautions are required for a valid execution of a will by mark, but some of the arbitrary requirements of the 1917 Act having no substance have been removed. Requirements for nuncupative wills have been revised to limit oral wills to those which dispose of personal property not exceeding five hundred dollars in value. It is believed that under the present draft, nuncupative wills as so limited would now become of some practical value.

Provision for automatic alteration of a will by later birth or adoption has been changed so that such event will not reduce the share given to the surviving spouse or disrupt the plan of a will where testator evidences a contrary intent. A spouse electing to take against the will cannot benefit under a power of appointment exercised by the will in his behalf. The mechanics of election to take against a will have been clarified and simplified, and the rights of grantees and lienholders have been defined. Children adopted prior to the testator's death are given the status of natural children without distinction between children adopted by testator and by others.

Provisions for disposition of lapsed and void devises and legacies have been clarified. The lien of pecuniary legacies on real estate not specifically devised is limited to legacies in excess of $100. General powers of appointment are exercised by general pecuniary legacies to the extent necessary to provide funds for payment of such legacies.

Each section of the proposed Act is followed by comments on the reasons for the proposed changes and is annotated with pertinent decisions.

It is the intention of this Committee and the Advisory Committee to give consideration to any additional suggestions and recommendations for further revisions of this draft of the "Wills Act of 1947" before it is finally adopted and drafted for introduction during the regular legislative session of 1947.

The Committee again acknowledges the excellent work performed by the Advisory Committee and M. Paul Smith, the Re-

search Consultant, in the preparation of the proposed draft of the Wills Act, as it did in the case of the proposed draft of the Intestate Act. The members of the Committee of the Commission attended the meetings of the Advisory Committee, joined in the discussions, and heard at first hand the careful and thorough consideration given to every section of the proposed Act. It expresses its sincere appreciation for the time contributed, as well as the interest displayed and the industry with which the Advisory Committee pursued this study.

THOMAS H. LEE, *Chairman*
JOHN M. WALKER, *Vice Chairman*
Committee on Decedents' Estates Laws

HOMER S. BROWN
REUBEN E. COHEN
CHARLES H. EALY
THOMAS H. LEE
JACK J. MCDOWELL
BERNARD B. MCGINNIS
JOHN H. MCKINNEY
ALBERT S. READINGER
CHARLES L. ROBERTSON
O. J. TALLMAN

A. ALFRED WASSERMAN, *Counsel*

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TITLE

AN ACT

Relating to the form, execution, revocation, operation, and interpretation of wills; to nuncupative wills; to the appointment of testamentary guardians; to elections to take under or against wills and the procedure in reference thereto.

COMMENT:

The title to the proposed Act differs from the Act of 1917, which reads:

"AN ACT

"Relating to the form, execution, revocation, and interpretation of wills; to nuncupative wills; to the appointment of testamentary guardians; to spendthrift trusts; to forfeiture of devise or legacy in case of murder of testator; to elections to take under or against wills, and to the recording and registering of such elections and of decrees relative thereto, and to the fees therefor."

The General Assembly of the Commonwealth of Pennsylvania hereby enacts as follows:

Section 1. *Who May Make a Will.* (a) *Persons Twenty-one or Older.* Any person of sound mind twenty-one years of age or older may by will dispose of all his real and personal estate subject to payment of debts and charges.

(b) *Additional Persons During Wartime.* During any war in which the United States is engaged, a person of sound mind eighteen years of age or older and being in the military service in the Armed Forces of the United States in active service at home or abroad, or being a mariner on land or at sea, may by will dispose of all his real and personal estate subject to payment of debts and charges.

COMMENT:

Section 1 as proposed takes the place of Sections 1, 5, and 7 of the 1917 Act, which read:

"Section 1. Every person of sound mind of the age of twenty-one years or upwards, whether married or single, may dispose by will of his or her real estate, whether such estate is held in fee simple or for the life or lives of any other person or persons, and whether in severalty, joint tenancy or common, and also of his or her personal estate."

"Section 5. Notwithstanding this act, any mariner being at sea, or any soldier being in actual military service, may dispose of his movables, wages, and personal estate as he may have done before the making of this act."

"Section 7. The emblements, or crops, growing on lands held by a widow in dower, or by any other tenant for life, may be disposed of by will as other personal estate. Rents and other periodical payments accruing to any tenant for life, or to any other person entitled under the laws of this Commonwealth regulating the descent and partition of real estate, may, so far as the same may have accrued on the day of death of such tenant for life or other person, be disposed of by will in like manner."

"*His real and personal estate*" is considered more inclusive than the language contained in Sections 1 and 7 of the 1917 Act. "*Subject to payment of debts and charges*" conforms with a similar provision in Section 1 of the proposed Intestate Act of 1947.

Subsection (b) is a change in existing law in the following respects:

1. It permits a person in military service or a mariner, in time of war, to dispose of real as well as personal estate if he is eighteen years of age or older.

2. It prevents the making of wills by all persons who have not attained eighteen years of age.

3. It makes all persons comply with the safeguards of the Wills Act. For further discussion see comments to the introductory clause of Section 2.

4. It permits mariners and soldiers between eighteen and twenty-one years of age to have their wills written at home without requiring them to be in "actual military service".

Section 2. *Form and Execution of a Will.* Every will, including wills of mariners and persons in the military service in the Armed Forces of the United States, shall be in writing and shall be signed by the testator at the end thereof, subject to the following rules and exceptions:

(a) *Words Following Signature.* The presence of dispositive or testamentary words or directions, or the appointment of an executor, or the like, after the signature to a will, whether written before or after its execution, shall not invalidate that which precedes the signature.

(b) *Signature by Mark.* If the testator is unable to sign his name for any reason, a will to which his name is subscribed in his presence, and to which he makes his mark, shall be as valid as though he had signed his name thereto: Provided, He makes his mark in the presence of two witnesses who shall sign their names to the will in his presence.

(c) *Signature by Another.* If the testator is unable to sign his name or to make his mark for any reason, a will to which his name is subscribed in his presence and by his express direction shall be as valid as though he had signed his name thereto: Provided, That the testator shall declare the instrument to be his will in the presence of two witnesses who shall sign their names to the will in his presence.

(d) *Nuncupative Wills.* (1) *When Permissible.* A nuncupative will may be made only by a person in imminent peril of death, whether from illness or otherwise, shall be valid only if the testator died as a result of the peril, and must be declared to be his will by the testator before two disinterested witnesses, reduced to writing by or under the direction of both of the witnesses within ten days after such declaration, and submitted for probate within three months of the death of the testator.

(2) *Property Disposable.* A nuncupative will attempting to dispose of personal property of an aggregate value in excess of five hundred dollars, or of real estate in any amount, shall be wholly void.

(3) *Effect on Prior Will.* A nuncupative will shall neither revoke nor change an existing written will.

(e) *Witnesses.* No will shall be valid unless proved by the oaths or affirmations of two competent witnesses.

GENERAL COMMENTS:

Section 2 as proposed takes the place of Sections 2, 3, 4, and 5 of the 1917 Act which read as follows:

"Section 2. Every will shall be in writing, and, unless the person making the same shall be prevented by the extremity of his last sickness, shall be signed by him at the end thereof, or by some person in his presence and by his express direction; and, in all cases, shall be proved by the oaths or affirmations of two or more competent witnesses; otherwise, such will shall be of no effect; Provided, That the presence of dispositive or testamentary words or directions, or the appointment of an executor, or the like, after the signature to a will, whether written before or after the execution thereof, shall not invalidate that which precedes the signature.

"Section 3. If the testator be unable to sign his name, for any reason other than the extremity of his last sickness, a will to which his name is subscribed in his presence, by his direction and authority, and to which he makes his mark or cross, unless unable so to do,—in which case the mark or cross shall not be required,—shall be as valid as though he had signed his name thereto; Provided, That such will shall be proved by the oaths or affirmations of two or more competent witnesses.

"Section 4. Personal estate may be bequeathed by a nuncupative will, under the following restrictions:

"(a) Such will shall in all cases be made during the last sickness of the testator, and in the house of his habitation or dwelling, or where he has resided for the space of ten days or more next before the making of such will, except where such person shall be surprised by sickness, being from his own house.

"(b) Where the sum or value bequeathed shall exceed one hundred dollars, it shall be proved that the testator, at the time of pro-

nouncing the bequest, did bid the persons present, or some of them, to bear witness that such was his will, or to that effect; and, in all cases, the foregoing requisites shall be proved by two or more witnesses who were present at the making of such will.

"(c) No testimony shall be received to prove any nuncupative will after six months elapsed from the speaking of the alleged testamentary words, unless the said testimony, or the substance thereof, were committed to writing within six days after the making of said will.

"Section 5. Notwithstanding this act, any mariner being at sea, or any soldier being in actual military service, may dispose of his movables, wages, and personal estate as he might have done before the making of this act."

It has been accepted generally that Sections 2 and 3 of the 1917 Act have been difficult of interpretation and need a complete overhauling. See reports of Pennsylvania Bar Association Committee on Law of Decedents' Estates, Pennsylvania Bar Association Quarterly, June 1938, page 317, and June 1942, page 248, and article by Hutton, 47 Dick L. R. 23. The plan of the proposed Section 2 is to enunciate the general rule that all wills must be signed by the testator at the end thereof, and then to consider the exceptions thereto.

Subsection (a) deals with the form of the will. Other subsections deal with execution, and each subsection becomes operative only when the testator is unable to meet the requirements of the preceding subsections. To complete this plan of presentation, it was thought best to include nuncupative wills within the section. Insofar as advisable, the language of the 1917 Act was retained.

SPECIFIC COMMENTS:

"Section 2. *Form and Execution. Every will, including wills of mariners and persons in the military service in the Armed Forces of the United States, shall be in writing and shall be signed by the testator at the end thereof, subject to the following rules and exceptions:*"

"*Every will . . . shall be in writing and shall be signed by the testator at the end thereof*" has been taken from Section 2 of the 1917 Act. The clause "*including wills of mariners and persons in the military service in the Armed Forces of the United States*" is intended to take the place of Section 5 of the 1917 Act and changes the policy of the law in respect thereto. It is thought that with the liberal provisions concerning the form and execution of written and oral wills as now contained in this proposed section, the exception already made under Section 1(b) of this proposed Act, and the liberal provisions for surviving spouses contained in the proposed Intestate Act of 1947, and the facilities for those in military service to write wills, it is better to omit a further distinction for those in service.

"(a) *Words Following Signature. The presence of dispositive or testamentary words or directions, or the appointment of an executor, or the like, after the signature to a will, whether written before or after its execution, shall not invalidate that which precedes the signature.*"

This is almost identical with the proviso in Section 2 of the 1917 Act. Between the Act of 1833, P. L. 249, which first required that wills be signed "at the end thereof" and the Wills Act of 1917, any writing of a testamentary

nature after signature invalidated the whole will: *Wineland's Ap.*, 118 Pa. 37. This proved to be too harsh and hence the proviso in Section 2 of the 1917 Act which is hereby preserved. What is considered to precede or follow a signature will of necessity be a matter for judicial determination in each case, but the numerous decisions and articles on the subject will be helpful: See *Covington Est.*, 348 Pa. 1, 92 Pa. L. Rev. 217; *Coyne Will*, 349 Pa. 331, 93 Pa. L. Rev. 110.

"(b) *Signature by Mark. If the testator is unable to sign his name for any reason, a will to which his name is subscribed in his presence, and to which he makes his mark, shall be as valid as though he had signed his name thereto: Provided, he makes his mark in the presence of two witnesses who shall sign their names to the will in his presence.*"

This is taken in part from Section 3 of the Wills Act of 1917. The requirement that two *witnesses* sign the will in the presence of testator is new. It is believed that no mark should be recognized in the absence of *subscribing* witnesses.

The subsection as proposed is intended to eliminate arbitrary requirements without removing any of the essential safeguards. Testator's name must still be subscribed in his presence. If it has been typed on the will or signed in advance, the execution will be faulty: cf. *Orlady's Est.*, 336 Pa. 369. The mark must be made in the presence of the witnesses. A later acknowledgment to one or to both of them would not suffice.

"(c) *Signature by Another. If the testator is unable to sign his name or to make his mark for any reason, a will to which his name is subscribed in his presence and by his express direction shall be as valid as though he had signed his name thereto: Provided, that the testator shall declare the instrument to be his will in the presence of two witnesses who shall sign their names to the will in his presence.*"

This also is taken in part from Section 3 of the Wills Act of 1917. Reasons for the precautions are slightly greater in this case than where execution is by mark. The requirements in addition to those when execution is by mark are: (1) Testator's name must be subscribed at his "express direction", and (2) Testator must "declare the instrument to be his will" in the presence of the witnesses. As a practical matter this subsection will be employed infrequently. Whether testator is able to sign his name or make his mark will depend largely upon his own decision. See *Rosato's Est.*, 322 Pa. 229, where the court at page 231 said, "As we view the act the sufficiency of the reason for not signing his name is for the testator's determination; 'any' reason which moves him not to sign is sufficient provided there is compliance with the other requisites of the act."

No provision is made for probate of a written will which could not be signed by reason of the extremity of the decedent's last illness, as is authorized by sections 2 and 3 of the 1917 Act. If the testator is so ill that he can neither make his mark nor direct another to sign for him, it would seem apparent that the testator would be lacking in testamentary capacity.

"(d) *Nuncupative Wills.* (1) *When Permissible. A nuncupative will may be made only by a person in imminent peril of death, whether from illness or otherwise, shall be valid only if the testator died as a result of the peril, and must be declared to be his will by the testator before two disinterested witnesses, reduced to writing by or under the direction of both of the witnesses within ten days after such declaration, and submitted for probate within three months of the death of the testator.*

"(2) *Property Disposable. A nuncupative will attempting to dispose of personal property of an aggregate value in excess of five hundred dollars, or of real estate in any amount, shall be wholly void.*

"(3) *Effect on Prior Will. A nuncupative will shall neither revoke nor change an existing written will.*"

This is similar to Section 6 of the Model Execution of Wills Act, 9 Unif. Laws Ann. 280.

It appears to be a substantial improvement over Wills Act Section 4 which reads:

> "Section 4. Personal estate may be bequeathed by a nuncupative will, under the following restrictions:
>
> "(a) Such will shall in all cases be made during the last sickness of the testator, and in the house of his habitation or dwelling, or where he has resided for the space of ten days or more next before the making of such will, except where such person shall be surprised by sickness, being from his own house.
>
> "(b) Where the sum of value bequeathed shall exceed one hundred dollars, it shall be proved that the testator, at the time of pronouncing the bequest, did bid the persons present, or some of them, to bear witness that such was his will, or to that effiect; and, in all cases, the foregoing requisites shall be proved by two or more witnesses who were present at the making of such will.
>
> "(c) No testimony shall be received to prove any nuncupative will after six months elapsed from the speaking of the alleged testamentary words, unless the said testimony, or the substance thereof, were committed to writing within six days after the making of said will."

In putting a top limit on the amount which can be disposed of, there is reason to believe that subsection (d) may serve a useful purpose, and still not encourage perjury. See *McClellan's Est.*, 325 Pa. 257, for a general discussion of the difficulties of establishing a nuncupative will under the Wills Act of 1917, Section 4.

"(e) *Witnesses. No will shall be valid unless proved by the oaths or affirmations of two competent witnesses.*"

This is declaratory of Pennsylvania law.

Section 3. *Revocation and Revival of a Will.* (a) *Revocation.* No will or codicil in writing, or any part thereof, can be revoked or altered otherwise than

(1) *Will or Codicil.* By some other will or codicil in writing,

(2) *Other Writing.* By some other writing declaring the same, executed and proved in the manner required of wills, or

(3) *Act to the Document.* By being burnt, torn, canceled, obliterated, or destroyed, with the intent and for the purpose of revoking it, by the testator himself or by another person in his presence and by his express direction. If such act is done by any

person other than the testator, the direction of the testator must be proved by the oaths or affirmations of two competent witnesses.

(b) *Revival of Revoked or Invalid Will.* If, after the making of any will, the testator shall make and execute a later will, the revocation of the later will shall not revive the earlier will, unless the revocation is in writing and declares the intention of the testator to revive the earlier will, or unless, after such revocation, the earlier will shall be re-executed. Oral republication of itself shall be ineffective to revive a will.

COMMENT:

Section 3(a) is in the language of Section 20 of the Wills Act which reads:

> "Section 20. (a) No will in writing, concerning any real estate, shall be repealed, nor shall any devise or directions therein be altered, otherwise than by some other will or codicil in writing, or other writing declaring the same, executed and proved in the manner hereinbefore provided; or by burning, canceling, obliterating, or destroying the same by the testator himself, or by someone in his presence and by his express direction.
>
> "(b) No will in writing, concerning any personal estate, shall be repealed, nor shall any bequest or direction therein be altered, otherwise than as hereinbefore provided in the case of real estate, except by a nuncupative will made under the circumstances set forth in section four of this act, and also committed to writing in the lifetime of the testator, and, after the writing thereof, read to or by him and allowed by him, and proved to be so done by two or more witnesses."

Two changes are made. No distinction is made between wills of realty and wills of personalty. Thus a written will of personalty cannot be revoked by a nuncupative will. This is also confirmed by Section 2(d)(3) of this proposed Act. In subsection (a)(3) the word "torn", a frequent method of destruction, has been added as declaratory of the present law: cf. *Kapp's Est.*, 317 Pa. 253; *Ford's Est.*, 301 Pa. 183. The last sentence of subsection (a)(3) in requiring proof by two witnesses is also declaratory of present law: *Simrell's Est.*, 154 Pa. 604.

Subsection (b) is suggested by the problem of *Burtt Will*, 353 Pa. 217, and *Ford's Estate*. As the law now stands there is a chance, depending on oral evidence, that a will which has been "revoked" and forgotten may be given new life by revocation of a later will.

The language used is suggested by the wording of Nevada and New York statutes to which reference is made at pages 239 and 240 of *Burtt Will*. However, the last sentence does not appear in either of the statutes to which reference is made. It has been added to eliminate any doubt on the open question of oral republication. Cf. *Baum's Est.*, 269 Pa. 63; *Holmes' Est.*, 240 Pa. 537; *Broe v. Boyle*, 108 Pa. 76; *Shaeffer's Est.*, 240 Pa. 83; 8 Temple L. Q. 80.

Section 4. *Modification by Circumstances.* Wills shall be modified upon the occurrence of any of the following circumstances, among others:

(a) *Death Within Thirty Days—Religious and Charitable Gifts.* Any bequest or devise for religious or charitable purposes included in a will or codicil executed within thirty days of the death of the testator shall be invalid unless all who would benefit by its invalidity agree that it shall be valid. The thirty-day period shall be so computed as to include the day on which the will or codicil is written and to exclude the day of death. Unless the testator directs otherwise, if such a will or codicil shall revoke or supersede a prior will or codicil executed at least thirty days before the testator's death, and not theretofore revoked or superseded and the original of which can be produced in legible condition, and if each instrument shall contain an identical gift for substantially the same religious or charitable use, the gift in the later will or codicil shall be valid; or if each instrument shall give for substantially the same religious or charitable purpose a cash legacy or a share of the residuary estate or a share of the same asset, payable immediately or subject to identical prior estates and conditions, the later gift shall be valid to the extent to which it shall not exceed the prior gift.

(b) *Divorce.* If the testator is divorced from the bonds of matrimony after making a will, all provisions in the will in favor of the testator's spouse so divorced shall be thereby revoked.

(c) *Marriage.* If the testator marries after making a will, the surviving spouse shall receive the share of the estate to which he would have been entitled had the testator died intestate, unless the will shall give him a greater share.

(d) *Birth or Adoption.* If the testator fails to provide in his will for a child born or adopted after the making of his will, unless it expressly appears from the will that the failure so to provide was intentional, such child shall receive out of the testator's property not passing to a surviving spouse, such share as he would have received if the testator had died unmarried and intestate owning only that portion of his estate not passing to a surviving spouse.

GENERAL COMMENTS:

The grouping of what were several separate sections of the 1917 Act in one section is believed to be logical and convenient. A will may be affected vitally by the happening of any one of the circumstances listed in the subsections. In addition it may be changed by the election of the surviving spouse. All of the circumstances to which reference is made in this section must occur at the moment of, or prior to, testator's death. The importance of the surviving spouse's election warrants separate consideration, and therefore is excluded from this section.

Another change of circumstance occurring prior to or at death is where testator was wilfully or unlawfully killed by a beneficiary under the will. This is covered by the "Slayer" Act of 1941, P. L. 816, which repealed Section 22 of the 1917 Wills Act. As in the case of the Intestate Act, it seems inadvisable to attempt to incorporate the provisions of that Act in the Wills Act.

While marriage of the parents of children born illegitimate and death of legatees or devisees are changes in circumstances, they also concern rules of construction and are included thereunder in Section 6 so that they can appear with other rules with which they are closely associated and which are properly included in that section alone.

SPECIFIC COMMENTS:

"(a) *Death Within Thirty Days—Religious and Charitable Gifts. Any bequest or devise for religious or charitable purposes included in a will or codicil executed within thirty days of the death of the testator shall be invalid unless all who would benefit by its invalidity agree that it shall be valid. The thirty-day period shall be so computed as to include the day on which the will or codicil is written and to exclude the day of death. Unless the testator directs otherwise, if such a will or codicil shall revoke or supersede a prior will or codicil executed at least thirty days before the testator's death, and not theretofore revoked or superseded and the original of which can be produced in legible condition, and if each instrument shall contain an identical gift for substantially the same religious or charitable use, the gift in the later will or codicil shall be valid; or if each instrument shall give for substantially the same religious or charitabe purpose a cash legacy or a share of the residuary estate or a share of the same asset, payable immediately or subject to identical prior estates and conditions, the later gift shall be valid to the extent to which it shall not exceed the prior gift.*"

The first two sentences as proposed, take the place of Wills Act, Section 6, as amended, which reads:

> "Section 6. No estate, real or personal, shall be bequeathed or devised to any body politic, or to any person in trust for religious or charitable uses, except the same be done by will at least thirty days before the decease of the testator, which period shall be so computed as to exclude the first and to include the last day thereof; and all dispositions of property contrary hereto shall be void and go to the residuary legatee or devisee, heirs or next of kin, according to law."

"And go to the residuary legatee or devisee, heirs or next of kin according to law" in the 1917 Act has been omitted as unnecessary, especially since the Wills Act as proposed expressly provides the manner in which void devises and legacies will be distributed. "*For religious or charitable purposes*" has been substituted for "to any body politic, or to any person in trust for religious or charitable uses" for simplicity. "*The thirty-day period shall be so computed as to include the day on which the will or codicil is written and to exclude the day of death*" is necessary because under the Statutory Construction Act "Whenever the last day of any such period shall fall on Sunday, or on any day made a legal holiday by the laws of this Commonwealth or of the United States, such day shall be omitted from the computation". In some instances the Statutory Construction Act allows thirty-one days. For the purposes of this subsection, it is believed there is no reason to extend the period beyond thirty days.

This subsection takes care of the situation where a testator has been charitably inclined and then changes his will in some respect within thirty days of death. The present unfortunate situation is illustrated by *Hartman's Est.*, 320 Pa. 321. The rule of Section 6 of the Wills Act of 1917 is considered sound, and it is believed the proposed subsection in avoiding certain inequitable situations does not weaken the effectiveness of the rule forbidding last minute "charitable" and "religious" influences. When the devise or bequest for religious or charitable purposes remains the same in the earlier and later will there should be no difficulty in applying the proviso—the later charitable gift will be good.

The addition of the words *"unless all who would benefit by its invalidity agree that it shall be valid"* may serve to preserve the testator's wish with the least mechanical difficulties where all parties are agreed.

If the beneficiaries do not agree, then the situation nevertheless is saved when:

1. The charitable or religious beneficiary is identical or substantially the same in both instruments, and

2. The gifts in both instruments are: (a) Identical, or (b) in cash, or for (c) shares of the residue, or (d) shares of the same assets and payable immediately or subject to identical prior estates and conditions; and in (b), (c) or (d) the later gift shall be good to the extent it does not exceed the prior gift.

The subsection permits the testator to provide expressly in his new will that it shall not revoke charitable gifts in his former will if he dies within thirty days.

"(b) Divorce. If the testator is divorced from the bonds of matrimony after making a will, all provisions in the will in favor of the testator's spouse so divorced shall be thereby revoked."

This is taken from the Model Probate Code. There is no similar provision in the Wills Act of 1917. A will in favor of a spouse remains good in Pennsylvania without regard to a subsequent divorce: *Jones's Est.*, 211 Pa. 364. It is not a complete answer to say that the will can be changed or revoked. The same reasoning can be employed to show that he who wishes to recognize his divorced spouse can rewrite his will after his divorce. There may be circumstances where a divorced spouse is not competent to change his will. It is believed that the real question is whether most persons so circumstanced (as in the case of later marriage or birth) would wish their wills changed or whether most such persons would wish them to remain the same, and that the answer is that most would wish them changed. It should be noted that in the rule as stated, no exception is made even if the will shows an intent that the spouse should receive a share of the estate regardless of divorce. In such cases the will could be rewritten after divorce.

Legislation to the effect that a divorce revokes a will is not common but does exist in a few states. See Kan. Gen. Stat. (Supp. 1943) Sec. 59-610; Minn. Stat. (1941) Sec. 525.191; Wash. Rev. Stat. (1932) Sec. 1399.

"(c) Marriage. If the testator marries after making a will, the surviving spouse shall receive the share of the estate to which he would have been entitled had the testator died intestate, unless the will shall give him a greater share."

Subsections (c) and (d) as proposed take the place of Section 21 of the 1917 Act, as amended, which reads:

"*Section 21.* When any person, male or female, shall make a last will and testament, and afterward shall marry, or shall have a child or children, either by birth or by adoption, not provided for in such will, and shall die leaving a surviving spouse and such child or children, or either a surviving spouse or such child or children, although such child or children be born after the death of their father, every such person, so far as shall regard the surviving spouse or child or children born or adopted after the making of the will, shall be deemed and construed to die intestate; and such surviving spouse, child, or children shall be entitled to such purparts, shares, and dividends of the estate, real and personal, of the deceased, as if such person had actually died without any will."

It is believed that the unscrambling of what was Wills Act Section 21 into two subsections is a step toward clarity. This is especially necessary with the substantive changes recommended.

The Model Probate Code makes no provision for the after-married spouse, because it is considered that his right to take against the will is a full protection. Pennsylvania places the after-married spouse in the more gracious position of receiving a full intestate share, including the spouse's allowance *(Shestock's Est.*, 267 Pa. 115), without requiring that there be an election to take against the will.

The share of the estate acquired by the surviving spouse is a share in each piece of real estate. Cf. *Williams' Est.*, 45 D. & C. 207; *Price's Est.*, 26 D. & C. 141.

"*Or unless the will shall give him a greater share*" is declaratory of existing law. See *Lintner's Est.*, 297 Pa. 428, where a will written prior to marriage gave the surviving spouse the entire estate which he was permitted to retain. In most instances it will be obvious which is the greater share and such share of personal property will be awarded in the adjudication or decree of distribution.

"*(d) Birth or Adoption. If the testator fails to provide in his will for a child born or adopted after the making of his will, unless it expressly appears from the will that the failure so to provide was intentional, such child shall receive out of the testator's property not passing to a surviving spouse such share as he would have received if the testator had died unmarried and intestate owning only that portion of his estate not passing to a surviving spouse.*"

This subsection is believed to be a distinct improvement over Section 21 of the 1917 Act. It avoids the necessity for nominal gifts to after-born or after-adopted children or the re-execution of wills after the birth of a child. As now written it gives ample protection to the child and will avoid frequent occasions for the disruption of well laid plans.

Section 5. *Change by Election of Surviving Spouse.* When a married person dies testate as to any part of his estate, the surviving spouse while living shall have a right of election under the limitations and conditions hereinafter stated.

(a) *Share of Estate.* The surviving spouse, upon an election to take against the will, shall be entitled to one-third of the real

and personal estate of the testator, if the testator is survived by more than one child, or by one or more children and the issue of a deceased child or children, or by the issue of more than one deceased child, and in all other circumstances the surviving spouse shall be entitled to one-half of the real and personal estate of the testator.

(b) *Powers of Appointment.* The surviving spouse, upon an election to take against the will, shall not be entitled to any share in the property of someone other than the testator passing under a power of appointment exercised by the will of the testator whether or not such power has been exercised in favor of the surviving spouse and whether or not the appointed and individual estates have been blended.

(c) *Forfeiture of Right.* (1) *By Husband.* No husband, who for one year or upwards previous to the death of his wife, shall have wilfully neglected or refused to provide for her, or who for that period or upwards shall have wilfully and maliciously deserted her, shall have the right of election given by this section.

(2) *By Wife.* No wife, who for one year or upwards previous to the death of her husband shall have wilfully and maliciously deserted him, shall have the right of election given by this section.

(3) *Surviving Spouse as Witness.* The surviving husband or wife shall be a competent witness as to all matters pertinent to the issue of desertion or non-support under this subsection.

(d) *How Election Made.* The surviving spouse electing to take under or against the will shall manifest the election by a writing or writings signed by him and acknowledged before an officer authorized by law to take acknowledgments of deeds. A copy of the election shall be mailed or delivered to the personal representative of the testator or his attorney. The election shall be filed in the office of the clerk of the orphans' court of the county where the will was probated, and a record shall be made of such filing by the clerk. When the estate includes real estate the election or a duplicate original or a certified copy thereof shall be recorded in the office of the recorder of deeds of each county in which any of the real estate of the testator lies, and shall be indexed by the recorder in the grantors' index under the name of the testator, and in the grantees' index under the name of the surviving spouse. The costs of filing and recording the election shall be paid out of the estate as a part of the administration expenses.

(e) *Time for Making Election.* As between the surviving spouse and other legatees and devisees, the spouse's election shall be in time if within one year after the probate of the will the surviving spouse shall (1) mail or deliver the election or a copy thereof to the personal representative of the testator or his attorney or (2) file it with the clerk of the orphans' court and mail or deliver a copy to the personal representative or his attorney or (3) record such election or a duplicate original or certified copy thereof in the office of the recorder of deeds of any county in which real estate of the testator lies and mail or deliever a copy to the personal representative or his attorney. The orphans' court, on application of the surviving spouse made within one year after the probate of the will, may extend the time for making the election for such period and upon such terms and conditions as the court shall deem proper under the circumstances. A certified copy of the decree of the court extending the time for making the election may be recorded and indexed in the office of the recorder of deeds in any county in which any of the real estate of the testator lies in the manner provided in subsection (d) hereof.

(f) *Failure to Make an Election.* Except as provided in section 4(c) hereof, failure to make an election in the manner and within the time limits set forth in subsection (e) hereof shall be deemed an election to take under the will or an acquiescence in the provisions thereof. No payment or distribution from the estate, except the exemption allowed by law to the widow, shall be required to be made to the surviving spouse within one year after the probate of the will unless his election to take under or acquiesce in the will shall have been made and filed as provided in subsection (d) hereof.

(g) *Personal Right.* The right of election under this section shall be personal to the surviving spouse and shall not be exercised after his death.

(h) *Grantee or Lienholder.* An election shall be void as against a bona fide grantee of or holder of a lien on real estate in any county unless (1) the election or a duplicate original or certified copy thereof is recorded in such county within one year after the probate of the will or before the recording or entering of the instrument or lien under which such grantee or lienholder claims, or (2) a certified copy of the decree of the court extending the time for making the election has been recorded in such county within one year after the probate of the will or before the

recording or entering of such instrument or lien and the election or a duplicate original or certified copy thereof has been recorded in such county within the time set by the court or before the recording or entering of such instrument or lien.

COMMENTS:

"Section 5. *Change by Election of Surviving Spouse. When a married person dies testate as to any part of his estate, the surviving spouse while living shall have a right of election under the limitations and conditions hereinafter stated.*

"(a) *Share of Estate. The surviving spouse, upon an election to take against the will, shall be entitled to one-third of the real and personal estate of the testator, if the testator is survived by more than one child, or by one or more children and the issue of a deceased child or children, or by the issue of more than one deceased child, and in all other circumstances the surviving spouse shall be entitled to one-half of the real and personal estate of the testator.*"

In accordance with the decision reached in Section 1 (a) (3) of the proposed Intestate Act of 1947, the exact share of the surviving spouse upon election to take against the will has been set forth in brief language in this section. This is necessary in order to make it clear that a spouse taking against the will does not receive the $10,000 allowance. The definition of the share of the spouse is in accordance with the language of Section 1(a) of the proposed Intestate Act of 1947.

Consideration was given to the inclusion of the proviso of Section 23(a) of the 1917 Act, which reads:

> "Provided, That nothing herein contained shall affect the right or power of a married woman, by virtue of any authority or appointment contained in any deed or will, to bequeath or devise any property held in trust for her sole and separate use."

It was concluded that it should be omitted, especially because of the provisions of subsection (b) as recommended.

"(b) *Powers of Appointment. The surviving spouse, upon an election to take against the will, shall not be entitled to any share in the property of someone other than the testator passing under a power of appointment exercised by the will of the testator whether or not such power has been exercised in favor of the surviving spouse and whether or not the appointed and individual estates have been blended.*"

The only statutory precedent for this subsection is the proviso of Section 23(a) of the 1917 Act hereinbefore set forth. It is declaratory of existing law to the extent that it refuses the surviving spouse the right to share in property passing under a power not exercised in favor of the surviving spouse whether or not the appointed and individual estates of the testator are blended: *Kates's Est.*, 282 Pa. 417. However, in refusing to permit the surviving spouse who elects to take against the will to share in property appointed to him, a change is made in the law as enunciated in *Huddy's Est.*, 236 Pa. 276, where the surviving husband who elected to take against his

wife's will was nevertheless permitted to share in an estate appointed by the will to him.

"(c) *Forfeiture of Right.* (1) *By Husband. No husband, who for one year or upwards previous to the death of his wife, shall have wilfully neglected or refused to provide for her, or who for that period or upwards shall have wilfully and maliciously deserted her, shall have the right of election given by this section.*

"(2) *By Wife. No wife, who for one year or upwards previous to the death of her husband shall have wilfully and maliciously deserted him, shall have the right of election given by this section.*

"(3) *Surviving Spouse as Witness. The surviving husband or wife shall be a competent witness as to all matters pertinent to the issue of desertion or non-support under this subsection.*"

Subsection (c) is almost identical with Section 4 of the proposed Intestate Act of 1947. It is believed that it is necessary in the Wills Act as the share of the surviving spouse is no longer measured by rights under the Intestate Act.

"(d) *How Election Made. The surviving spouse electing to take under or against the will shall manifest the election by a writing or writings signed by him and acknowledged before an officer authorized by law to take acknowledgments of deeds. A copy of the election shall be mailed or delivered to the personal representative of the testator or his attorney. The election shall be filed in the office of the clerk of the orphans' court of the county where the will was probated, and a record shall be made of such filing by the clerk. When the estate includes real estate the election or a duplicate original or a certified copy thereof shall be recorded in the office of the recorder of deeds of each county in which any of the real estate of the testator lies, and shall be indexed by the recorder in the grantors' index under the name of the testator, and in the grantees' index under the name of the surviving spouse. The costs of filing and recording the election shall be paid out of the estate as a part of the administration expenses.*"

Subsection (d) as proposed should be compared with the first sentence of Section 23(b) and Section 23(e) of the 1917 Act, which read:

> "(b) A surviving spouse electing to take under or against the will of the decedent, shall, in all cases, except where such surviving spouse is the sole legatee and beneficiary under the will, manifest the election by a writing signed by him or her, duly acknowledged before an officer authorized by law to take the acknowledgment of deeds, and delivered to the executor or administrator of the estate of such decedent within one year after the issuance of letters testamentary or of administration."
>
> "(e) The election by a surviving spouse, or a certified copy of the final decree of any orphans' court in cases where there shall have been an election in accordance with clause (d) hereof, or a neglect or refusal to elect within the time prescribed by the order of the said court shall, except when the decedent died seised and possessed of personal property only, at the cost of the estate, be recorded, by the personal representative of the decedent, in the office for the recording of deeds of the county where the decedent's will is probated, in the deed book, and shall be indexed by the recorder in the grantors' index under the

name of the decedent, and in the grantees' index under the name of the surviving spouse, and shall be registered in the survey bureau, or with the proper authorities empowered to keep a register of real estate, if any there be in said county. The charges for recording and registering shall be the same as are provided by law for similar services. The election, or decree of the court, or a certified copy of either, may also be recorded in any office for the recording of deeds within this Commonwealth, with the same effect as if a duly signed and acknowledged declaration to the effect stated therein had been made by the person authorized to elect, and, at his or her request, recorded in said office according to law. After the said election shall have been recorded in the office for the recording of deeds, as aforesaid, the said election, at the cost of the estate, shall be filed in the office of the clerk of the orphans' court and a record made of such filing by the said clerk. In cases where the decedent died possessed of personal property only, the election by a surviving spouse, or a certified copy of the final decree of any orphans' court in cases where there shall have been an election in accordance with clause (d) hereof, or a neglect or refusal to elect within the time prescribed by the order of the said court, shall, at the cost of the estate, be filed in the office of the clerk of the orphans' court, and a record made of such filing by the said clerk."

It is believed that subsection (d) as proposed provides simply and clearly what shall be done to perfect the election. Later subsections define the time limits and the effect of failure to comply with the procedure herein directed.

"(e) *Time for Making Election. As between the surviving spouse and other legatees and devisees, the spouse's election shall be in time if within one year after the probate of the will the surviving spouse shall (1) mail or deliver the election or a copy thereof to the personal represntative of the testator or his attorney or (2) file it with the clerk of the Orphans' Court and mail or deliver a copy to the personal representative or his attorney or (3) record such election or a duplicate original or certified copy thereof in the office of the recorder of deeds of any county in which real estate of the testator lies and mail or deliver a copy to the personal representative or his attorney. The Orphans' Court, on application of the surviving spouse made within one year after the probate of the will, may extend the time for making the election for such period and upon such terms and conditions as the court shall deem proper under the circumstances. A certified copy of the decree of the court extending the time for making the election may be recorded and indexed in the office of the recorder of deeds in any county in which any of the real estate of the testator lies in the manner provided in subsection (d) hereof.*"

The method of presentation which is followed here seems more orderly than that used in Section 23 of the 1917 Wills Act. The comparable provisions of the Wills Act of 1917 are:

Section 23(b) ". . . Provided, however, that in the event there is a contest of the will, an election by a surviving spouse may be made, as above provided, at any time within thirty days after the final adjudication of the contest, notwithstanding that the limitation of one year above provided has expired."

Section 23(f) "The orphans' court, on the application of a surviving spouse of any decedent, made within seven months from the

death of the testator, may issue a citation to the executor or administrator of the estate of such decedent and all parties, other than the petitioner, interested therein, to appear at a certain time to be fixed by the court and show cause why the time for the filing of such election should not be extended for such period and upon such terms and conditions as the court, aided, if desired, by reference to auditors, or otherwise, may deem proper, and the final decree of the court entered thereon shall be filed and recorded of record and shall be conclusive. Thereafter the date thus fixed by the court within which an election must be filed shall supersede to all intents and for all purposes the period of one year as provided under clause (b) of this section."

Section 23(d) "The orphans' court, on the application of any person interested in the estate of a decedent, may issue a citation, at any time after six months from the death of the testator, to the surviving spouse of the testator, to appear at a certain time not less than one month thereafter, in the said court, to make his or her election to take under or against the will, which election shall be filed of record and shall be conclusive. If the surviving spouse shall neglect or refuse to appear on such citation, then, upon due proof being made to the court of the service thereof, the said neglect or refusal shall be deemed an election to take under the will, and the decree of the court to that effect shall be conclusive."

The proviso of Section 23(b) of the 1917 Act has not been preserved. It was considered unnecessary because of the privilege of applying to the court for extension of time to file the election. This avoids the uncertainties of when there is a "final adjudication of the contest."

The provisions of section 23(f) of the 1917 Act, added by amendment of 1939, P. L. 705, have been preserved but the time of making application to the court has been extended from seven months to one year from the date of probate. This gives the surviving spouse a better opportunity to know what his share will be and whether there will be a will contest. Compelling action to be taken within one year is not considered unduly harsh. If a will contest is initiated within the year, application may be made to extend the time. If the contest is initiated after the year, the surviving spouse will have his share under the election if the will is sustained. If the will is not sustained, he will have an additional period of one year from the probate of a former will, or in event of intestacy, will have an intestate share which may be more than the share which would be acquired by an adverse election.

The provisions of Section 23(d) of the 1917 Act have been omitted in their entirety. The circumstances where such provisions would be of assistance to persons interested in the estate are considered so remote that their retention does not seem justified.

Under the procedure now provided a time limit is retained for making the election without requiring that all formalities be completed within the one-year period. Assuming these simple requirements have been met, the spouse is protected against legatees and devisees. His rights against third persons are covered in the following subsections.

"(f) *Failure to Make an Election. Except as provided in Section 4(c) hereof, failure to make an election in the manner and within the time limits set forth in subsection (e) hereof shall be deemed an election to take under the will or an acquiescence in the provisions thereof. No payment or dis-*

tribution from the estate, except the exemption allowed by law to the widow, shall be required to be made to the surviving spouse within one year after the probate of the will unless his election to take under or acquiesce in the will shall have been made and filed as provided in subsection (d) hereof."

Comparable provisions of the 1917 Act are found in Section 23(b) which reads, "Neglect or refusal or failure to deliver such writings within said period shall be deemed an election to take under the will", and Section 23(c) which reads:

> "No payment from the estate of such decedent, except the exemption allowed by law to the widow, shall be required to be made to any surviving spouse unless his or her election shall have been first duly executed, acknowledged and delivered as provided in clause (b) of this section."

"(g) *Personal Right. The right of election under this section shall be personal to the surviving spouse and shall not be exercised after his death."*

This subsection is declaratory of existing law, and while probably unnecessary, may prove helpful to persons examining the Act. This section will not interfere with the right of the Common Pleas Court to direct the election which shall be made by the guardian of an incompetent surviving spouse.

"(h) *Grantee or Lienholder. An election shall be void as against a bona fide grantee of or holder of a lien on real estate in any county unless (1) the election or a duplicate original or certified copy thereof is recorded in such county within one year after the probate of the will or before the recording or entering of the instrument or lien under which such grantee or lienholder claims, or (2) a certified copy of the decree of the court extending the time for making the election has been recorded in such county within one year after the probate of the will or before the recording or entering of such instrument or lien and the election or a duplicate original or certified copy thereof has been recorded in such county within the time set by the court or before the recording or entering of such instrument or lien."*

The purpose of this subsection which is new is to protect grantees, mortgagees, and judgment creditors when the election is recorded in the county where the real estate is located after the one-year period has expired. The spouse who has failed to record his election is allowed to take ahead of devisees, if he has complied with the minimum requirements of subsection (e) but must perfect the election in each county where real estate lies if he wishes to be protected against bona fide grantees, mortgagees or judgment creditors of the devisee.

Section 6. *Rules of Interpretation.* In the absence of a contrary intent appearing therein, wills shall be construed as to real and personal estate in accordance with the following rules:

(a) *Wills Construed As If Executed Immediately Before Death.* Every will shall be construed, with reference to the testator's real and personal estate, to speak and take effect as if it had been executed immediately before the death of the testator.

(b) *After-Acquired Property.* The real and personal estate acquired by a testator after making his will shall pass by a general devise or bequest.

(c) *Devises of Real Estate.* All devises of real estate shall pass the whole estate of the testator in the premises devised, although there be no words of inheritance or of perpetuity.

(d) *Meaning of "Heirs" and "Next of Kin", etc.—Time of Ascertaining Class.* A devise or bequest of real or personal property, whether directly or in trust, to the testator's or another designated person's "heirs", or "next of kin", or "relatives", or "family", or "the persons thereunto entitled under the intestate laws", or to persons described by words of similar import, shall mean those persons, including the spouse, who would take under the intestate laws if the testator or other designated person were to die intestate at the time when such class is to be ascertained, a resident of the Commonwealth, and owning the property so devised or bequeathed: Provided, however, That the share of a spouse, other than the spouse of the testator, shall not include the ten thousand dollar allowance. The time when such class is to be ascertained shall be the time when the devise or bequest is to take effect in possession or enjoyment.

(e) *Meaning of "Die Without Issue" and Similar Phrases.* In any devise or bequest of real or personal estate, the words "die without issue", "die without leaving issue", "have no issue", or other words importing either a want or failure of issue of any person in his lifetime or at the time of his death, or an indefinite failure of his issue, shall be construed to mean a want or failure of issue in his lifetime or at his death, and not an indefinite failure of his issue.

(f) *Adopted Children.* In construing a will making a devise or bequest to a person or persons described by relationship to the testator or to another, any person adopted before the death of the testator shall be considered the child of his adopting parent or parents and not the child of his natural parents: Provided, That if a natural parent shall have married the adopting parent before the testator's death, the adopted person shall also be considered the child of such natural parent.

(g) *Illegitimates.* In construing a will making a devise or bequest to a person or persons described by relationship to the testator or to another, an illegitimate person shall be considered the child of his mother and not of his father: Provided, That

when the parents of a person born illegitimate shall have married each other, he shall thereafter be considered legitimate.

(h) *Lapsed and Void Devises and Legacies.* (1) *Substitution of Issue.* A devise or bequest to a child or other issue of the testator or to his brother or sister or to a child of his brother or sister whether designated by name or as one of a class shall not lapse if the beneficiary shall fail to survive the testator and shall leave issue surviving the testator but shall pass to such surviving issue who shall take per stirpes the share which their deceased ancestor would have taken had he survived the testator; provided, that a devise or bequest to a brother or sister or to the child of a brother or sister shall lapse to the extent to which it shall pass to the testator's spouse or issue as a part of the residuary estate or under the intestate laws.

(2) *Shares Not in Residue.* A devise or bequest not being part of the residuary estate which shall fail or be void because the beneficiary fails to survive the testator or because it is contrary to law or otherwise incapable of taking effect or which has been revoked by the testator or is undisposed of or is released or disclaimed by the beneficiary, if it shall not pass to the issue of the beneficiary under the provisions of paragraph (1) hereof, shall be included in the residuary devise or bequest, if any, contained in the will.

(3) *Shares in Residue.* When a devise or bequest described in paragraph (2) hereof shall be included in a residuary clause of the will and shall not be available to the issue of the devisee or legatee under the provisions of paragraph (1) hereof, it shall pass to the other residuary devisees or legatees, if any there be, in proportion to their respective shares or interests in the residue.

(4) *Adopted Persons and Illegitimates.* For the purposes of the foregoing paragraphs of this subsection (h), the words "child" or "issue" shall include persons claiming by or through adoption and an illegitimate person shall be considered the child of his mother and not of his father; provided, that when the parents of a person born illegitimate shall have married each other, he shall thereafter be considered legitimate.

(i) *Real Estate Subject to a Mortgage.* The devisee of real estate which is subject to a mortgage shall take subject thereto, and shall not be entitled to exoneration out of the other estate of the testator, real or personal; and this whether the mortgage was created by the testator or by a previous owner or owners, and notwithstanding any general direction by the testator that his debts be paid.

(j) *Lien of Pecuniary Legacies.* Pecuniary legacies of one hundred dollars or less shall not be a charge on any of testator's real estate. All pecuniary legacies in excess of the principal sum of one hundred dollars shall be charged upon, and payable out of, any real estate not specifically devised, where the personal estate is or becomes insufficient for their payment.

(k) *Power of Appointment.* A general devise of the real estate of the testator, or of the real estate of the testator in any place, or in the occupation of any person mentioned in his will, or otherwise described in a general manner, shall be construed to include any real estate, or any real estate to which such description shall extend, as the case may be, which he shall have power to appoint in any manner he shall think proper, and shall operate as an execution of such power. In like manner, a bequest of the personal estate of the testator, or any bequest of personal property described in a general manner, shall be construed to include any personal estate, or any personal estate to which such description shall extend, as the case may be, which he shall have power to appoint in any manner he shall think proper, and shall operate as an execution of such power. In like manner a general pecuniary legacy, when the assets of the individual estate of the testator are not sufficient for its payment, shall, to the extent necessary to make possible the payment of the legacy, be construed to include any estate which the testator shall have power to appoint in any manner he shall think proper, and shall to such extent operate as an execution of such power.

COMMENTS:

This section includes rules for the interpretation of wills, some of which are new and some of which are now separate sections of the Wills Act of 1917. The grouping of these rules in one section tends toward clarification.

"Section 6. Rules of Interpretation. In the absence of a contrary intent appearing therein, wills shall be construed as to real and personal estate in accordance with the following rules:

"(a) Wills Construed as if Executed Immediately Before Death. Every will shall be construed, with reference to the testator's real and personal estate, to speak and take effect as if it had been executed immediately before the death of the testator."

Subsection (a) as proposed is identical with Section 9 of the 1917 Act.

"(b) *After-Acquired Property. The real and personal estate acquired by a testator after making his will shall pass by a general devise or bequest."*

Subsection (b) as proposed is similar to Section 10 of the 1917 Act, except that it has been made applicable to personal estate as well as real estate.

"(c) *Devises of Real Estate. All devises of real estate shall pass the whole estate of the testator in the premises devised, although there be no words of inheritance or of perpetuity.*"

This is Section 12 of the 1917 Act with some changes in the style of language employed. Section 12 of the 1917 Act reads:

> "Section 12. All devises of real estate shall pass the whole estate of the testator in the premises devised, although there be no words of inheritance or of perpetuity, unless it appear by a devise over, or by words of limitation or otherwise in the will, that the testator intended to devise a less estate."

"(d) *Meaning of 'Heirs' and 'Next of Kin', etc.—Time of Ascertaining Class. A devise or bequest of real or personal property, whether directly or in trust, to the testator's or another designated person's 'heirs', or 'next of kin', or 'relatives', or 'family', or 'the persons thereunto entitled under the intestate laws', or to persons described by words of similar import, shall mean those persons, including the spouse, who would take under the intestate laws if the testator or other designated person were to die intestate at the time when such class is to be ascertained, a resident of the Commonwealth, and owning the property so devised or bequeathed: Provided, however, that the share of a spouse, other than the spouse of the testator, shall not include the ten thousand dollar allowance. The time when such class is to be ascertained shall be the time when the devise or bequest is to take effect in possession or enjoyment.*"

This subsection is new. It is based in part upon the Act of 1923, P. L. 914, 21 PS §11, extended to include gifts in remainder to heirs of a person other than the testator. In all cases it is desirable to have the class determined as of the time the remainder falls in, unless the testator directs otherwise.

It also is suggested by the recommendation of the Pennsylvania Bar Association Committee on the Law of Decedents' Estates, submitted in June 1942, which is as follows:

> "It is not intended to treat here the many applicable rules of construction but reference might be made to one problem which is a recurrent one. The present law is by no means clear as to what is normally meant by a testator's use of the word 'heirs'. The Superior Court a few years ago had the occasion to point out that as to personalty 'heirs' does not mean 'children' or 'issue', (The Statutory Construction Act, Section 101 (56) defines 'issue' as meaning lineal descendants but no definition of 'heirs' is given), but rather means the persons entitled to take in case of intestacy (Bowen's Est., 139 Pa. Super. 523 (1939)). The inference to be drawn as to the rule with regard to a disposition of realty is not too clear, (See 'Effect of the Intestate Act of Pennsylvania Upon Husband and Wife as Heirs of Each Other' (1935) 9 Temp. L. Q. 214). Yet there is no real reason why any difference should exist today.
>
> "Recommendation No. 15. Unless indicated otherwise, the word 'heirs', whether applied to realty or personalty should mean those persons including spouses who would take in case of an intestacy."

"Provided, however, that the share of the spouse other than the spouse of the testator, shall not include the ten thousand dollar allowance", is

suggested by the recommendation of the Bar Association Committee on the Law of Decedents' Estates, submitted in June 1941, which reads:

"The allowance of $5,000 to the spouse if there is no issue is stated to be applicable 'only to cases of actual intestacy of husband or wife.' (Act of June 17, 1917, P. L. 429, Sec. 2, 20 PS §11). Yet, it has been held, and it seems properly held, that the allowance is applicable where a spouse directs that the remaining spouse shall take so much 'as she could claim under the intestate laws'. (Morris's Est., 298 Pa. 25 (1929); Carrell's Est., 264 Pa. 140 (1919). But cf. Erk's Est., 311 Pa. 185 (1933), where the will gave such portion which is required by Pennsylvania Law, but no more.) It is doubtful, however, whether this should apply when there is a similar devise or bequest to a person other than the surviving spouse. For example, if a testator leaves property to A for life and then to the heirs, next of kin or persons entitled to take from A under the intestate laws, it is doubtful whether the testator intended the spouse of A to get the $5,000 allowance. The problem is apt to become of much greater importance because of the repeal of the Rule in Shelley's case. (Act of July 15, 1935, P. L. 1013, 20 PS §229).

"Recommendation No. 3. The provisions for the $5,000 allowance should not apply to a gift by will or deed to a class described as those entitled under the intestate laws or to a person whose share is described as the part he is entitled to under the intestate laws, except where the beneficiary is the spouse of the donor."

"(e) *Meaning of 'Die Without Issue' and Similar Phrases. In any devise or bequest of real or personal estate, the words 'die without issue', 'die without leaving issue', 'have no issue', or other words importing either a want or failure of issue of any person in his lifetime or at the time of his death, or an indefinite failure of his issue, shall be construed to mean a want or failure of issue in his lifetime or at his death, and not an indefinite failure of his issue.*"

This is Section 14 of the 1917 Act. See Restatement, Property, Sections 266 et seq., for illustrations of the necessity for continuing the statutory rule.

"(f) *Adopted Children. In construing a will making a devise or bequest to a person or persons described by relationship to the testator or to another, any person adopted before the death of the testator shall be considered the child of his adopting parent or parents and not the child of his natural parents; provided, that if a natural parent shall have married the adopting parent before the testator's death, the adopted person shall also be considered the child of such natural parent.*"

This subsection (g) takes the place of Section 16 of the Wills Act of 1917 which reads:

"Section 16(a). Whenever in any will a bequest or devise shall be made to the child or children of the testator, without naming such child or children, such bequest or devise shall be construed to include any adopted child or children of the testator, unless a contrary intention shall appear by the will.

"(b) Whenever in any will a bequest or devise shall be made to the child or children of any person other than the testator, without naming such child or children, such bequest or devise shall be construed to include any adopted child or children of such other person who were

adopted before the date of the will, unless a contrary intention shall appear by the will."

The subsection as proposed makes several important changes: (1) It makes no distinction, as did the 1917 Act, between adopted children of the testator, and adopted children of others. (2) It permits children of others adopted after the date of the will and before testator's death to be included. In requiring adoptions to be made before testator's death it avoids the possibility of adoptions for the sole purpose of preventing a gift over in default of issue. (3) It prevents adopted children from receiving gifts as natural children, except through a natural parent who is the spouse of an adopting parent.

The purpose of the proposed subsection is to conform with the theory of adoption as expounded in *Cave's Est.*, 326 Pa. 358, and as adopted in the proposed Intestate Act of 1947. The child is considered the child of the adopting family, and not of the natural parents.

"(g) *Illegitimates. In construing a will making a devise or bequest to a person or persons described by relationship to the testator or to another, an illegitimate person shall be considered the child of his mother and not of his father: provided, that when the parents of a person born illegitimate shall have married each other, he shall thereafter be considered legitimate.*"

This provision is new. It is intended hereby to give the illegitimate (whose parents do not marry each other) full rights as a child of his mother, but not of his father, the same as in the proposed Intestate Act of 1947, Section 5. Heretofore an illegitimate has had no standing in a will under any general description such as "issue" or "children" except possibly under the will of his mother. Cf. *Seitzinger's Est.*, 170 Pa. 500. The proviso, however, is believed to be declaratory of existing law (cf. *Thorn Est.*, 353 Pa. 603) except that cohabitation is not required. The Act of 1857, P. L. 507, 48 PS §167 which requires cohabitation plus marriage was repealed only insofar as it relates to inheritance by the Intestate Act of 1917. As heretofore, legitimation of a child by marriage of the parents after testator's death may alter rights which have not vested. Cf. *Thorn Estate.*

"(h) *Lapsed and Void Devises and Legacies. (1) Substitution of Issue. A devise or bequest to a child or other issue of the testator or to his brother or sister or to a child of his brother or sister whether designated by name or as one of a class shall not lapse if the beneficiary shall fail to survive the testator and shall leave issue surviving the testator but shall pass to such surviving issue who shall take per stirpes the share which their deceased ancestor would have taken had he survived the testator: provided, that a devise or bequest to a brother or sister or to the child of a brother or sister shall lapse to the extent to which it shall pass to the testator's spouse or issue as a part of the residuary estate or under the intestate laws.*"

This paragraph takes the place of Wills Act Sections 15(a) and (b) which read:

> "No devise or legacy in favor of a child or children, or other lineal descendant or descendants of any testator, whether such children or descendants be designated by name or as a class, shall lapse or become void by reason of the decease of such legatee or devisee in the lifetime of the testator, if such devisee or legatee shall leave issue surviving the testator; but such devise or legacy shall be good and available in favor of such surviving issue, with like effect as if such devisee or legatee had

survived the testator, unless the testator shall in the will direct otherwise.

"(b) Where any testator shall not leave any lineal descendants who would receive the benefit of any lapsed or void devise or legacy, no devise or legacy made in favor of a brother or sister, or of brothers or sisters, of such testator, or in favor of the children of a brother or sister of such testator, whether such brothers or sisters, or children of brothers or sisters, be designated by name or as a class, shall be deemed or held to lapse or become void by reason of the decease of such devisee or legatee in the lifetime of the testator, if such devisee or legatee shall leave issue surviving the testator; but such devise or legacy shall be good and available in favor of such surviving issue, with like effect as if such devisee or legatee had survived the testator, unless the testator shall in the will direct otherwise."

In addition to simplifying the language, paragraph (1) as proposed states expressly that the issue shall receive their shares "per stirpes". The proviso as proposed, unlike the condition of Section 15(b) of the 1917 Act, includes the spouse as well as issue among those who will defeat the rights of issue of deceased brothers, sisters, nephews or nieces if they would benefit as residuary beneficiaries, or by intestacy upon lapse of such gift.

Under 15(b) of the 1917 Act the words "shall not leave any lineal descendants who would receive the benefit of any lapsed or void devise or legacy" presented the question of whether the lapsed share would go wholly to the issue of testator or partially to others sharing in the residue. The language proposed is intended to make it clear that the gift to the named collaterals will fail only to the extent that the spouse and issue will benefit by the lapse. For example, $250 of a $500 bequest to a predeceased nephew will be paid to the nephew's issue and $250 to the surviving widow if the residuary estate is given one-half to the widow and one-half to a charity.

Gifts to named individuals who were dead when the will was written will remain available for their issue *(Spencer's Est.*, 37 Pa. Super. 67), but when the gift is to a class, issue will not take the ancestor's share unless the ancestor was living when the will was written or prior to the testator's death: See *Harrison's Est.*, 202 Pa. 331, 334. Substituted beneficiaries will still receive their shares subject to any indebtedness owing by their ancestor to the testator: *Callery's Est.*, 333 Pa. 258, and where a power of appointment is exercised it is the relationship between the donee, not the donor, of the power and the appointee which controls whether there will be a substitution or lapse: *Rowland's Est.*, 17 D. & C. 477.

"(2) *Shares Not in Residue. A devise or bequest not being part of the residuary estate which shall fail or be void because the beneficiary fails to survive the testator or because it is contrary to law or otherwise incapable of taking effect or which has been revoked by the testator or is undisposed of or is released or disclaimed by the beneficiary, if it shall not pass to the issue of the beneficiary under the provisions of paragraph (1) hereof, shall be included in the residuary devise or bequest, if any, contained in the will.*"

This takes the place of the first sentence of Section 15(c) of the 1917 Act which reads:

"Unless a contrary intention shall appear by the will, such real or personal estate, or interests therein, as shall be comprised or intended

to be comprised in any devise or bequest in such will contained, which shall fail or be void by reason of the death of the devisee or legatee in the lifetime of the testator, or by reason of such devise or bequest being contrary to law, or otherwise incapable of taking effect, or which shall be revoked by the testator, shall be included in the residuary devise or bequest, if any, contained in such will."

The wording has been changed for clarity, and additions have been made. *"or is undisposed of"* has been added to avoid the disposition of such shares to the heirs and next of kin and to make them the same as lapsed shares: Cf. *Rickenbach Est.*, 348 Pa. 121. *"or is released or disclaimed by the beneficiary"* through an abundance of caution has been added to make it clear that subsection (h) will apply to such shares. The words *"released or disclaimed"* rather than "renounced" are used because they are the words employed in Act No. 431 of 1945, 68 PS §581.

"(3) *Shares in Residue. When a devise or bequest described in paragraph (2) hereof shall be included in a residuary clause of the will and shall not be available to the issue of the devisee or legatee under the provisions of paragraph (1) hereof, it shall pass to the other residuary devisees or legatees, if any there be, in proportion to their respective shares or interests in the residue.*"

This replaces the second sentence of Section 15(c) of the 1917 Act which reads:

"In any case where such devise or bequest which shall fail or be void, or shall be revoked as aforesaid, shall be contained in the residuary clause of such will, it shall pass to and be divided among the other residuary devisees or legatees, if any there be, in proportion to their respective interests in such residue."

The only change, other than changes in style, is the addition of the words *"and shall not be available to the issue of the devisee or legatee under the provisions of paragraph (1) hereof"*. This gives statutory recognition to the conclusion of *Desh's Est.*, 321 Pa. 286, which held that other residuary shares are not increased so long as issue of the favored relatives survived the testator.

"(4) *Adopted Persons and Illegitimates. For the purposes of the foregoing paragraphs of this subsection (h), the words 'child' or 'issue' shall include persons claiming by or through adoption and an illegitimate person shall be considered the child of his mother and not of his father; provided, that when the parents of a person born illegitimate shall have married each other, he shall thereafter be considered legitimate.*"

This is intended to give adopted children the same right of substitution as natural children, thus avoiding the effect of *Russell's Est.*, 284 Pa. 164, where an adopted child of a niece was not permitted to receive the niece's share, and *Corr's Est.*, 34 D. & C. 255, where an adopted child given the residuary estate was not such a lineal descendant as would defeat the substitution of issue for a deceased brother and sister. So also it should give full rights of substitution to illegitimates and their issue in the mother's family if there is no marriage, and in both families if they marry, thus avoiding the decision of *Wettach v. Horn*, 201 Pa. 201, which denied such right.

Subsection (h) as proposed is not a cure-all. Questions will remain as to what is a residuary clause (cf. *Armstrong's Est.*, 347 Pa. 23; *Carson's*

Est., 130 Pa. Super. 133; *Wenner's Est.*, 17 D. & C. 784), what becomes of void income accumulations and of remainders void for violation of the rule against perpetuities. It is believed that any attempt to remedy these further questions in this subsection should be approached with considerable caution. The "Slayer" Act of 1941, P. L. 816, 20 PS §3441, sections 4 and 10, has provided a statutory solution to preserve gifts for the issue of the slayer. It is not intended that subsection (h) should change those rules. Disposition of void accumulations of income is also controlled by separate legislation: Act of 1853, P. L. 503, Section 9, 20 PS §3251.

"(i) *Real Estate Subject to a Mortgage. The devisee of real estate which is subject to a mortgage shall take subject thereto, and shall not be entitled to exoneration out of the other estate of the testator, real or personal; and this whether the mortgage was created by the testator or by a previous owner or owners, and notwithstanding any general direction by the testator that his debts be paid.*"

This is section 18 of the 1917 Act. It was new in that Act. Prior thereto the devisee was entitled to call upon the personal estate for exoneration when the mortgage was made by the testator.

"(j) *Lien of Pecuniary Legacies. Pecuniary legacies of one hundred dollars or less shall not be a charge on any of testator's real estate. All pecuniary legacies in excess of the principal sum of one hundred dollars shall be charged upon, and payable out of, any real estate not specifically devised, where the personal estate is or becomes insufficient for their payment.*"

This is similar to section 17 of the 1917 Act. Prior to the 1917 Act, real estate was not available for payment of pecuniary legacies unless they were made a charge upon it. The 1917 Act made all legacies a lien. It is now proposed to make a distinction between the larger and the smaller legacies. This seems justified as a reasonable classification. We will thus avoid the necessity of recording releases of small legacies to perfect title to real estate. This is a frequent source of annoyance, particularly in the case of $1.00 legacies. The words "*principal sum*" were used to avoid any possible question when income has accumulated. It is to be noted that a legacy of $100 would not be a charge on real estate, but that a legacy of $101 would be. As a practical matter the smaller legacies are usually paid first.

"(k) *Power of Appointment. A general devise of the real estate of the testator, or of the real estate of the testator in any place, or in the occupation of any person mentioned in his will, or otherwise described in a general manner, shall be construed to include any real estate, or any real estate to which such description shall extend, as the case may be, which he shall have power to appoint in any manner he shall think proper, and shall operate as an execution of such power. In like manner, a bequest of the personal estate of the testator, or any bequest of personal property described in a general manner, shall be construed to include any personal estate, or any personal estate to which such description shall extend, as the case may be, which he shall have power to appoint in any manner he shall think proper, and shall operate as an execution of such power. In like manner a general pecuniary legacy, when the assets of the individual estate of the testator are not sufficient for its payment, shall, to the extent necessary to make possible the payment of the legacy, be construed to include any estate which the testator shall have power to appoint in any manner he shall think proper, and shall to such extent operate as an execution of such power.*"

This is based upon Section 11 of the 1917 Act which was derived from Section 3 of the Act of 1879, P. L. 88. The last sentence is new and is intended to clarify the situation where the will, as in *South's Est.*, 248 Pa. 165, does not include a residuary clause.

Section 7. *Devise in Fee Tail Abolished.* Whenever by any devise an estate in fee tail would be created according to the common law of the Commonwealth, it shall pass an estate in fee simple, and as such shall be inheritable and freely alienable.

COMMENT:

This is based on Section 13 of the 1917 Act, which reads:

"Whenever by any devise an estate in fee tail would be created, according to the common law of this State, such devise shall be taken and construed to pass an estate in fee simple, and as such shall be inheritable and freely alienable."

Section 8. *Rule in Shelley's Case.* The rule in Shelley's Case and its corollaries shall not be applied, and a devise or bequest directly or in trust which shall express an intent to create an estate for life with remainder to the life tenant's heirs or the heirs of his body, or his issue or his next of kin, or persons described by words of similar import, shall not operate to give such life tenant an estate in fee or an estate in tail in real estate or an absolute estate in personalty.

COMMENT:

The Act of 1935, P. L. 1013, reads:

"Grants or devises in trust, or otherwise, becoming effective hereafter, which shall express an intent to create an estate for life with remainder to the heirs of the life tenant, shall not operate to give such life tenant an estate in fee."

Section 12 of the Uniform Property Act, 9 Unif. Laws Ann. 616, reads:

"Section 12. *The Rule in Shelley's Case Abolished.* Whenever any person, by conveyance, takes a life interest and in the same conveyance an interest is limited by way of remainder, either mediately or immediately, to his heirs, or the heirs of his body, or his issue, or next of kin, or some of such heirs, heirs of the body, issue, or next of kin, the words 'heirs', 'heirs of the body', 'issue', or 'next of kin', or other words of like import used in the conveyance, in the limitation therein by way of remainder, are not words of limitation carrying to such person an estate of inheritance or absolute estate in the property, but are words of purchase creating a remainder in the designated heirs, heirs of the body, issue or next of kin."

"*The Rule in Shelley's Case and its corollaries shall not be applied*" has been included in the proposed subsection because it is feared that the subsequent language might not of itself cover all of the ramifications of the rule. The importance of covering all possibilities is emphasized by the history of such legislation in other states. The statutes have been strictly con-

strued because they are in derogation of the common law. See Simes, Section 136 et seq., on these statutes. Any attempt to spell out all of the situations without some such general provision as suggested here is bound to meet with difficulties. For example, the 1935 Act quoted failed to specify heirs of the body. See *Federal Land Bank v. Walker*, 345 Pa. 185, for Pennsylvania cases showing some of the ramifications of the rule. *"or bequest"* was included in line 2 to make doubly certain that if the rule applies to personal property, it is terminated also as to it. See *Appeal of Cockins v. Harper*, 111 Pa. 26; *Hurd's Est.*, 305 Pa. 394.

Section 9. *Alienage.* Real and personal estate shall pass without regard to whether the testator, or any devisee or legatee is, or has been, an alien.

COMMENT:

This section is based upon Section 2(g) of the proposed Intestate Act of 1947.

Section 10. *Testamentary Guardian.* (a) *Guardian of the Person.* A person competent to make a will, being the sole surviving parent, or adopting parent of any unmarried minor child, may appoint a testamentary guardian of the person of such child during his minority, or for any shorter period. Provided, That no father who, for one year or upwards previous to his death, shall have wilfully neglected or refused to provide for his child, and no mother who, for a like period, shall have deserted her child or wilfully failed to perform her parental duties, shall have the right to appoint a testamentary guardian of the person of such child.

(b) *Guardian of the Estate.* Any person may by will appoint a testamentary guardian of the real or personal estate which he shall devise or bequeath to a minor.

COMMENT:

This new Section 10 takes the place of Section 8 of the 1917 Act which, as amended by the Act of 1925, P. L. 689, reads:

> "(a) Every person competent to make a will, being the sole surviving parent or adopting parent of any minor child unmarried, may appoint a testamentary guardian of the person or property or both of such child during his or her minority, or for any shorter period: Provided, That either parent may by will appoint a testamentary guardian for the estate, either real or personal, which he or she shall leave to such child, whether the other shall be living or dead.
>
> "(b) No father who shall have, for one year or upwards previous to his death, wilfully neglected or refused to provide for his child or children, and no mother who shall have for a like period deserted her child or children or failed to perform her parental duties, shall have the right to appoint any testamentary guardian for such child or children."

Section 10 as proposed differs from the 1917 Act in the following respects:

(1) Authority in the surviving parent to appoint a general guardian of the estate has been omitted. This has proved to be a source of confusion and of no substantial value.

(2) Right to appoint a testamentary guardian is given to all testators but restricted to the property passing by their wills to the minors. This is frequently attempted by grandparents, and there would seem to be no objection to it as long as it is confined to property passing under the testator's will. This is consistent with Act No. 113 of 1945, 20 PS §1178, which reads:

> "Any person, who hereafter makes a deed or gift inter vivos or exercises a right under an insurance or annuity policy to designate the beneficiary to receive the proceeds of such policy, may in such deed or in the instrument creating such gift or designating such beneficiary, appoint a guardian of the estate or interest of each beneficiary named therein who shall be a minor or otherwise incompetent. Payment by an insurance company to the guardian of such beneficiary so appointed shall discharge the insurance company to the extent of such payment to the same effect as payment to an otherwise duly appointed and qualified guardian."

Section 11. *Personal Estate of Non-Resident.* Nothing contained in this act shall be construed to apply to the disposition of personal estate by a testator whose domicile at the time of his death is out of the Commonwealth.

COMMENT:

This is Section 24 of the 1917 Act which in turn was derived from Section 17 of the Act of 1833.

Section 12. *Short Title.* This act shall be known and may be cited as the Wills Act of 1947.

COMMENT:

This is similar to Section 25 of the 1917 Act.

Section 13. *Effective Date.* This act shall take effect on the first day of January, nineteen hundred and forty-eight, and shall apply only to the wills of all persons dying on or after that day. As to the wills of persons dying before that day, the existing laws shall remain in full force and effect.

COMMENT:

This is the same as Section 26 of the 1917 Act.

Section 14. *Repealer.* The following acts and parts of acts of assembly are hereby repealed as respectively indicated, but so far only as relates to the estates, real and personal, of any person or persons dying on or after the first day of January, nineteen hundred and forty-eight.

(Here will follow a list of the acts to be repealed or partially repealed.)