

PROPOSED
INCOMPETENTS' ESTATES
ACT OF 1951

REPORT
OF THE
SUBCOMMITTEE ON DECEDENTS' ESTATES LAWS



OF THE
JOINT STATE GOVERNMENT COMMISSION
OF THE GENERAL ASSEMBLY
OF THE COMMONWEALTH OF PENNSYLVANIA

CAPITOL BUILDING
HARRISBURG, PA.

NOVEMBER, 1950

The Joint State Government Commission was created by Act of 1937, July 1, P. L. 2460, as amended 1939, June 26, P. L. 1084; 1943, March 8, P. L. 13, as a continuing agency for the development of facts and recommendations on all phases of government for the use of the General Assembly.

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INTRODUCTION

Pursuant to House of Representatives Concurrent Resolution No. 74 of the 1949 Session of the General Assembly, the Joint State Government Commission was directed to study and revise the Orphans' Court Act, Orphans' Court Partition Act, Register of Wills Act and Revised Price Act with their supplements and related statutes.

Heretofore the Joint State Government Commission, as directed by Senate Resolution Serial No. 46 of the 1945 Session of the General Assembly, submitted drafts of an intestate act, a wills act, an estates act and a principal and income act, all of which were enacted in 1947. These, with comments, are contained in the Commission's report, "*Decedents' Estates Laws of 1947*". And, as directed by Senate Resolution Serial No. 34 of the 1947 Session of the General Assembly, the Joint State Government Commission submitted drafts of a fiduciaries act and a fiduciaries investment act both of which were enacted in 1949. These, with comments, are contained in the Commission's report, "*Decedents' Estates Laws of 1949*".

Under date of May 10, 1950, there was submitted an interim report containing a draft of a proposed "Orphans' Court Act of 1951" and under date of July 10, 1950, a proposed "Register of Wills Act of 1951". Herewith is submitted a third interim report in the form of a proposed "Incompetents' Estates Act of 1951", distributed to the bench, the bar, and the public for their consideration.

Section 301(5) of the Proposed Orphans' Court Act of 1951 gives the orphans' court exclusive jurisdiction of the "administration and distribution of the real and personal property of the estates of incompetents, except when the jurisdiction thereof already has been acquired by another Pennsylvania court before" January 1, 1952. Provision is also made in that act for the transfer to the orphans' court of incompetents' estates already

within the jurisdiction of the common pleas court, of course with the consent of both courts. As stated in the introduction to the Proposed Orphans' Court Act of 1951, it is believed that the orphans' court, because of its procedures and experience in the administration of minors' estates, trusts and decedents' estates, is better equipped to administer incompetents' estates, and the same reasons that have prompted transfer of inter vivos trusts to the orphans' court prompt a similar transfer of incompetents' estates.

With the inclusion of incompetents' estates within the jurisdiction of the orphans' court, it is essential that provision be made for the administration of such estates and for the powers and duties of guardians thereof. Existing law on the subject, found largely in the Act of 1836, providing for inquisitions and appointments of committees, and the Act of 1907, dealing only with estates of weak-minded persons, is inadequate, cumbersome and confusing.

The provisions of the Fiduciaries Act of 1949 dealing with trust estates, insofar as possible, followed the exact language of the sections thereof dealing with decedents' estates, and in the case of minors' estates, the sections on trust estates were followed. The resemblance between the administration of incompetents' estates and that of minors' estates is closer than in either of the foregoing instances, and the provisions of this Act therefore are based largely on comparable sections of the Fiduciaries Act of 1949 dealing with minors' estates.

Under the plan submitted, the common pleas court, except in the instances where the estate is transferred to the orphans' court, will retain jurisdiction of existing estates of incompetents. Also, the existing law will continue to apply to estates within the jurisdiction of the common pleas court. The provisions of this act will apply only to estates within the jurisdiction of the orphans' court.

It is the intention of the Joint State Government Commission, through its Subcommittee on Decedents' Estates Laws, and the Advisory Committee composed of orphans' court judges and

practitioners familiar with decedents' estates laws, to give careful consideration to suggestions and recommendations concerning this draft of the "Proposed Incompetents' Estates Act of 1951" before it is finally submitted to the General Assembly.

Suggestions and recommendations should be addressed to the research consultant, M. Paul Smith, Norristown-Penn Trust Building, Norristown, Pennsylvania.

Subcommittee on Decedents' Estates Laws

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PROPOSED INCOMPETENTS' ESTATES ACT OF 1951

AN ACT

Relating to the administration and distribution of incompetents' estates, both as to real and personal property, and the procedure relating thereto; including the disposition of such estates or portions thereof and the determination of title thereto without the appointment of a guardian in certain cases; the appointment, bond, removal and discharge of guardians of such estates, their powers, duties and liabilities, the rights of persons dealing with such guardians, and the rights of persons claiming an interest in such estates or in property distributed therefrom whether as claimants or distributees, and containing provisions concerning the determination of incompetency and the powers, duties and liabilities of foreign guardians; and also generally dealing with the jurisdiction, powers and procedure of the orphans' court and the common pleas court relating to incompetents' estates.

Comment. This is suggested by the title of the Fiduciaries Act of 1949.



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

ARTICLE I.

PRELIMINARY PROVISIONS

SECTION 101. *Short Title.*—This act shall be known and may be cited as the Incompetents' Estates Act of 1951.

SECTION 102. *Definitions.*—The following words when used in this act, unless the context clearly indicates otherwise, shall have the meanings ascribed to them in this section:

(1) "Clerk" means the clerk of the orphans' court having jurisdiction.

(2) "Court" means the orphans' court having jurisdiction of the appointment of the guardian.

(3) "Incompetent" means a person, who, because of mental infirmities of old age, mental illness, mental deficiency, drug addiction or inebriety, is unable to manage his property, or is liable to dissipate it or become the victim of designing persons.

Comment. See Section 102(6) of the Orphans' Court Act of 1951; Section 67 of the Act of 1836, P. L. 589, 50 PS §706; Section 1 of the Act of 1907, P. L. 292, 50 PS §941; and Procedural Rules, Rule 2051, for other tests of incompetency.

(4) "Guardian" means a fiduciary appointed by a court of competent jurisdiction to have the care and management of the estate of an incompetent.

Comment. A guardian is defined in the Statutory Construction Act to be "a fiduciary who legally has the care and management of the person, or the estate, or both, of another under legal disability".

(5) "Foreign guardian" means a guardian, or one performing the function of a guardian, who is subject primarily to the control of the court of another jurisdiction and has not received ancillary authority in the Commonwealth.

Comment. This is suggested by the definition of "foreign fiduciary" in Section 102 of the Fiduciaries Act of 1949.

SECTION 103. *Title to Real and Personal Estate.*—Legal title to all real estate and personal property of an incompetent shall remain in him, subject, however, to all the powers granted to his guardian by this act, and to all orders of the court.

Comment. This is suggested by Sections 103 and 104 of the Fiduciaries Act of 1949.

SECTION 104. *Effective Date.*—This act shall take effect on the first day of January, one thousand nine hundred fifty-two, except that as to the estate of any incompetent person of which a Pennsylvania court of common pleas has acquired jurisdiction before that date, the existing law on the topics included within this act shall remain in effect so long as that court retains jurisdiction.

Comment. Compare Section 301(5) of the Orphans' Court Act of 1951 under which another court may transfer jurisdiction of estates of persons adjudged incompetent before January 1, 1952, to the orphans' court. Estates remaining in the jurisdiction of the common pleas courts would remain subject to prior law.

SECTION 105. *Severability.*—If any provision of this act or the application thereof to any person or circumstances is held invalid, the remainder of this act and the application of such provision to other persons or circumstances shall not be affected thereby, and to this end the provisions of this act are declared to be severable.

Comment. This is similar to Section 18 of the Estates Act of 1947 and to Section 106 of the Fiduciaries Act of 1949.

ARTICLE II.

SMALL ESTATES

SECTION 201. *When Guardian Unnecessary.*—When the entire real and personal estate, wherever located, of a resident or nonresident incompetent has a gross value of one thousand dollars or less, all or any part of it may be received and held or disposed of by the person or institution maintaining the incompetent without the appointment of a guardian or the entry of security, in any of the following circumstances:

(1) *Award from Decedent's Estate or Trust.* When the court having jurisdiction of a decedent's estate or of a trust in awarding the interest of the incompetent shall so direct;

(2) *Interest in Real Estate.* When the court having jurisdiction to direct the sale or mortgage of real estate in which the incompetent has an interest shall so direct as to the incompetent's interest in the real estate;

(3) *Other Circumstances.* In all other circumstances, when the court which would have had jurisdiction to appoint a guardian of the estate of the incompetent shall so direct.

Comment. This is suggested by Section 1001 of the Fiduciaries Act of 1949.

SECTION 202. *Power of Person or Institution Maintaining Incompetent.*—The court may authorize or direct the person or institution maintaining the incompetent to execute as natural guardian, any receipt, deed, mortgage, or other appropriate instrument necessary to carry out a decree entered under Section 201, and, in such event, may require the deposit of money in a savings account or the care of securities in any manner considered by the court to be for the best interests of the incompetent. The decree so made, except as the court shall expressly provide otherwise, shall constitute sufficient authority to all transfer agents, registrars and others dealing with property of the incompetent to recognize the persons named therein as entitled to receive the property, and shall in all respects have the same effect as an instrument executed by a duly appointed guardian under court decree.

Comment. This is suggested by Section 1002 of the Fiduciaries Act of 1949.

ARTICLE III.

GUARDIAN: APPOINTMENT, BOND, REMOVAL AND DISCHARGE; EVIDENCE.

A. Appointment.

SECTION 301. *Petition and Hearing.*—

(a) *Resident.* The court, upon petition and a hearing at which good cause is shown, may find a person domiciled in the Commonwealth to be incompetent and appoint a guardian or guardians of his estate. The petitioner may be the alleged incompetent's spouse, a relative, a creditor, a debtor, or, any person interested in the alleged incompetent's welfare. Notice of the petition and hearing shall be given, in such manner as the court shall direct, to the alleged incompetent, to all persons residing within the Commonwealth who are sui juris and would be entitled to share in the estate of the alleged incompetent if he died

intestate at that time, and to such other parties as the court may direct. The alleged incompetent shall be present at the hearing unless (1) the court is satisfied, upon the presentation of positive testimony that, because of his physical or mental condition, his welfare would not be promoted by his presence; or (2) it is impossible for him to be present because of his absence from the Commonwealth. It shall not be necessary for the alleged incompetent to be represented by a guardian ad litem in the proceeding.

Comment. This is suggested by Section 14 of the Act of 1836, P. L. 589, 50 PS §731 and Section 1 of the Act of 1907, P. L. 292, as amended, 50 PS §941. The contents of the petition and the form of notice should be governed by rule of court. No special mention is made of the right to trial by jury recognized in Section 748 of the Orphans' Court Act of 1951.

(b) *Nonresident.* The court may find a person not domiciled in the Commonwealth having property in the Commonwealth to be incompetent and may appoint a guardian of his estate. The appointment may be made after petition, hearing and notice as in the case of a person domiciled in the Commonwealth or upon the submission of an exemplified copy of a decree establishing his incompetency in another jurisdiction. The court shall give preference in its appointment to the foreign guardian of the nonresident incompetent unless it finds that such appointment will not be for the best interests of the incompetent.

Comment. This is suggested by the Act of 1909, P. L. 185, 50 PS §991-994. The guardian of the nonresident, whether ancillary or original, has the same powers as a domiciliary guardian appointed under Subsection (a) of this Section. Cf. Section 2 of the Uniform Ancillary Administration of Estates Act.

SECTION 302. *County of Appointment.*—

(a) *Resident Incompetent.* A guardian of the estate of an incompetent may be appointed by the court of the county in which the incompetent is domiciled.

Comment. This is suggested by Section 1011(a) of the Fiduciaries Act of 1949. Cf. Section 2, cl. III of the Act of 1836, P. L. 589, 50 PS §694.

(b) *Nonresident Incompetent.* A guardian of the estate within the Commonwealth of an incompetent domiciled outside of the Commonwealth may be appointed by the court of the county having jurisdiction of a decedent's estate or of a trust in which the incompetent has an interest. When the nonresident incom-

petent's estate is derived otherwise than from a decedent's estate or a trust within the Commonwealth, a guardian may be appointed by the court of any county where an asset of the incompetent is located.

Comment. This is suggested by Section 1011(b) of the Fiduciaries Act of 1949. See also Sections 17 and 18 of the Act of 1836, P. L. 589, 50 PS §735, §736 and Article XI of the Fiduciaries Act of 1949.

(c) *Exclusiveness of Appointment.* When a court has appointed a guardian of an incompetent's estate pursuant to subsections (a) or (b) no other court shall appoint a similar guardian for the incompetent within the Commonwealth.

Comment. This is suggested by Section 1011(c) of the Fiduciaries Act of 1949. See also Section 16 of the Act of 1836, P. L. 589, as amended, 50 PS §733.

SECTION 303. *Nonresident guardian.*—When a guardian is or becomes a nonresident of the Commonwealth, the acceptance of his appointment or the act of becoming a nonresident, as the case may be, shall constitute the secretary of the Commonwealth his attorney-in-fact upon whom service of process and notices may be made as to all causes of action relating to the incompetent's estate.

Comment. This is suggested by Section 1014 of the Fiduciaries Act of 1949.

B. *Bond.*

SECTION 311. *Necessity, Form and Amount.*—Except as hereinafter provided, every guardian of the estate of an incompetent shall execute and file a bond which shall be in the name of the Commonwealth, with sufficient surety, in such amount as the court considers necessary, having regard to the value of the personal estate which will come into the control of the guardian, and conditioned in the following form:

(1) *When One Guardian.* The condition of this obligation is, that if the said guardian shall well and truly administer the estate according to law, this obligation shall be void; but otherwise, it shall remain in force.

(2) *When Two or More Guardians.* The condition of this obligation is, that if the said guardians or any of them shall well and truly administer the estate according to law, this obligation

shall be void as to the guardian or guardians who shall so administer the estate; but otherwise, it shall remain in force.

Comment. This is suggested by Section 1021 of the Fiduciaries Act of 1949. See also Section 15 of the Act of 1836, P. L. 589, 50 PS §732 and Section 2 of the Act of 1909, P. L. 185, 50 PS §992.

SECTION 312. *Fiduciary Estate.*—The court in its discretion, upon the application of any party in interest, in addition to any bond required for the incompetent's individual estate, may require a separate bond in the name of the Commonwealth, with sufficient surety, in such amount as the court shall consider necessary for the protection of the parties in interest in an estate of which the incompetent is a fiduciary, and conditioned in the following form:

(1) *When One Guardian.* The condition of this obligation is, that if the said guardian shall well and truly account for property held by the incompetent as fiduciary according to law this obligation shall be void; but otherwise, it shall remain in force.

(2) *When Two or More Guardians.* The condition of this obligation is, that if the said guardians or any of them shall well and truly account for property held by the incompetent as fiduciary according to law, this obligation shall be void as to the guardian or guardians who shall so account; but otherwise, it shall remain in force.

Comment. This is suggested by Section 322 of the Fiduciaries Act of 1949.

SECTION 313. *When Bond not Required.*—

(a) *Corporate Guardian.* No bond shall be required of a bank and trust company or of a trust company incorporated in the Commonwealth, or of a national bank having its principal office in the Commonwealth, unless the court, for cause shown, deems it advisable.

Comment. This is suggested by Section 1022(b) of the Fiduciaries Act of 1949.

(b) *Nonresident Corporation.* A nonresident corporation or a national bank having its principal office out of the Commonwealth, otherwise qualified to act as guardian, in the discretion of the court, may be excused from giving bond.

Comment. This is suggested by Section 1022(c) of the Fiduciaries Act of 1949.

(c) *Other Cases.* In all other cases, the court may dispense with the requirement of a bond when, for cause shown, it finds that no bond is necessary.

Comment. This is suggested by Section 1022(d) of the Fiduciaries Act of 1949.

SECTION 314. *Requiring or Changing Amount of Bond.*—The court, for cause shown, and after such notice, if any, as it shall direct, may require a surety bond, or increase or decrease the amount of an existing bond, or require more or less security therefor.

Comment. This is suggested by Section 1023 of the Fiduciaries Act of 1949.

C. Removal and Discharge

SECTION 321. *Grounds for Removal.*—The court shall have exclusive power to remove a guardian when :

(1) He is wasting or mismanaging the estate, is or is likely to become insolvent, or has failed to perform any duty imposed by law; or

(2) He has been adjudged incompetent; or

(3) He has become unable to discharge the duties of his office because of sickness or physical or mental incapacity and his disability is likely to continue to the injury of the estate; or

(4) He has removed from the Commonwealth or has ceased to have a known place of residence therein, without furnishing such security or additional security as the court shall direct; or

(5) For any other reason, the interests of the estate are likely to be jeopardized by his continuance in office; or

(6) The incompetent of whose estate he is guardian is adjudged competent.

Comment. This is suggested by Section 331 of the Fiduciaries Act of 1949. Cf. Section 43 of the Act of 1836, P. L. 589, 50 PS §759.

SECTION 322. *Procedure for and Effect of Removal.*—The court on its own motion may, and on the petition of any party

in interest alleging adequate grounds for removal shall, order the guardian to appear and show cause why he should not be removed, or, when necessary to protect the rights of creditors or parties in interest, may summarily remove him. Upon removal, the court may appoint a substituted guardian and may, by summary attachment of the person or other appropriate orders, provide for the security and delivery of the assets of the estate, together with all books, accounts and papers relating thereto. Any guardian summarily removed under the provisions of this section may apply, by petition, to have the decree of removal vacated and to be reinstated, and if the court shall vacate the decree of removal and reinstate him, it shall thereupon make any orders which may be appropriate to accomplish the reinstatement.

Comment. This is suggested by Section 332 of the Fiduciaries Act of 1949. Cf. Sections 63, as amended, 64 and 65 of the Act of 1836, P. L. 589, 50 PS §§891-893.

SECTION 323. *Adjudication of Competency.*—The court, upon petition and after such notice as it shall direct, may find, after a hearing at which good cause is shown, that a person previously adjudged incompetent has become competent.

Comment. This is suggested by Section 63 of the Act of 1836, P. L. 589, 50 PS §891 and Section 7 of the Act of 1907, P. L. 292, 50 PS §963. No special mention is made of the right to trial by jury recognized in Section 748 of the Orphans' Court Act of 1951.

SECTION 324. *Discharge of Guardian and Surety.*—After confirmation of his final account and distribution to the parties entitled, a guardian and his surety may be discharged by the court from future liability.

Comment. This is suggested by Section 333 of the Fiduciaries Act of 1949.

D. *Evidence.*

SECTION 331. *Evidence of Mental Condition.*—In any hearing relating to the mental condition of a person whose competency is in question the deposition of, or sworn statement by a superintendent, manager, physician or psychiatrist of any state-owned mental hospital or veterans administration hospital shall be admissible in evidence as to the condition of an inmate of such

hospital, in lieu of his appearance and testimony, unless by special order, the court directs his appearance and testimony in person.

Comment. This is suggested by the Act of 1947, P. L. 293 as amended by the Act of 1949, P. L. 1409. See Section 811 of the Proposed Mental Health Act of 1951.

ARTICLE IV.

GUARDIAN: POWERS, DUTIES AND LIABILITIES.

A. In General.

SECTION 401. *Possession of Real and Personal Property.*—

The guardian of the estate of an incompetent, until it is distributed or sold, shall have the right to, and shall take possession of, maintain and administer each real and personal asset of the incompetent, collect the rents and income from it, and make all reasonable expenditures necessary to preserve it. He shall also have the right to maintain or defend any action with respect to such real or personal property of the incompetent.

Comment. This is suggested by Section 1041 of the Fiduciaries Act of 1949. Compare Section 20 of the Act of 1836, P. L. 589, 50 PS §753.

SECTION 402. *Inventory.*—Every guardian, within three months after real or personal estate of his ward comes into his possession, shall verify by oath and file with the clerk, (1) an inventory and appraisal of such personal estate, (2) a statement of such real estate, and (3) a statement of any real or personal estate which he expects to acquire thereafter.

Comment. This is suggested by Section 1042 of the Fiduciaries Act of 1949. Cf. Section 19 of the Act of 1836, P. L. 589, 50 PS §752.

SECTION 403. *Abandonment of Property.*—When any property is so burdensome or is so encumbered or is in such condition that it is of no value to the incompetent, the court may authorize the guardian to abandon it.

Comment. This is suggested by Section 502 of the Fiduciaries Act of 1949.

SECTION 404. *Liability Insurance.*—The guardian, at the expense of the estate, may protect himself, his employees and

the incompetent by insurance from liability to third persons arising from the administration of the estate.

Comment. This is suggested by Section 933 of the Fiduciaries Act of 1949.

SECTION 405. *Continuation of Business.*—The court, aided by the report of a master if necessary, may authorize the guardian to continue any business of the incompetent. The order may be with or without notice. If prior notice is not given to all persons residing within the Commonwealth who are sui juris and would be entitled to share in the estate of the incompetent if he died intestate at that time and to any other persons directed by the court, it shall be given to all such persons within five days after the order or within such extended time as the court, for cause shown, shall allow. Any person to whom notice is required to be given may, at any time, petition the court to revoke or modify the order. The order may provide

(1) For the conduct of the business, by the guardian alone or jointly with others, or as a corporation to be formed;

(2) The extent of the liability of the estate or any part thereof, or of the guardian, for obligations incurred in the continuation of the business;

(3) Whether liabilities incurred in the conduct of the business are to be chargeable solely to the part of the estate set aside for use in the business or to the estate as a whole;

(4) The period of time the business may be conducted; and

(5) Such other regulations including accountings, as the court shall deem advisable.

Comment. This is suggested by Section 934 of the Fiduciaries Act of 1949.

SECTION 406. *Incorporation of Business.*—After notice to all persons residing within the Commonwealth who are sui juris and would be entitled to share in the estate of the incompetent if he died intestate at that time and to any other persons directed by the court, the court, aided by the report of a master if necessary, may authorize the guardian alone or jointly with others, to organize a corporation to carry on a business held in the estate, whether the business is owned solely by the incompetent

or with others, and may contribute for stock of the corporation, as capital, all or part of the property of the estate which was invested in the business.

Comment. This is suggested by Section 935 of the Fiduciaries Act of 1949.

SECTION 407. *Claims Against Co-Guardian.*—When one of two or more guardians shall be individually liable to the incompetent, the other or others shall take any legal action against him necessary to protect the incompetent.

Comment. This is suggested by Section 936 of the Fiduciaries Act of 1949.

SECTION 408. *Proceeding Against Guardian.*—Any proceeding may be brought against a guardian or the surety on his bond in the county of the court having jurisdiction of the incompetent's estate, and if the guardian or surety does not reside in that county, process may be served on either of them personally, or as follows:

(1) *When Resident of Another County.* By a duly deputized sheriff of any other county of the Commonwealth in which he shall be found;

(2) *When a Nonresident of the Commonwealth.* By the sheriff of the county of the court having jurisdiction of the estate sending, by registered mail, return receipt requested, a true and attested copy of the process to the secretary of the Commonwealth, accompanied by the fee prescribed by law, and to the guardian or surety at his last known address, with an endorsement thereon showing that service has been so made upon the secretary of the Commonwealth.

Comment. This is suggested by Sections 621 and 937 of the Fiduciaries Act of 1949.

SECTION 409. *Revival of Judgment Against Guardian.*—When the incompetent holds a judgment which is a lien on real estate owned by the guardian individually, any party in interest may suggest his interest in the judgment upon the record thereof and bring an appropriate action to revive it and to continue its lien. Any judgment so revived shall remain for the use of all parties in interest.

Comment. This is suggested by Section 938 of the Fiduciaries Act of 1949.

SECTION 410. *Liability of Guardian on Contracts.*—Unless he expressly contracts otherwise, in writing, a guardian shall not be personally liable on any written contract hereafter entered into which is within his authority as guardian and discloses that he is contracting as guardian of a named incompetent. Any action on such a contract shall be brought against the guardian in his fiduciary capacity only, or against his successor in such capacity, and execution upon any judgment obtained therein shall be had only against property of the incompetent.

Comment. This is suggested by Section 939 of the Fiduciaries Act of 1949.

SECTION 411. *Investments.*—The powers and duties of guardians in making, retaining and managing investments shall be as prescribed by law generally for fiduciaries.

Comment. This is suggested by Section 940 of the Fiduciaries Act of 1949.

SECTION 412. *Power of Attorney.*—A guardian may convey real estate, transfer title to personal estate, or perform any other act of administration by an attorney or attorneys-in-fact: Provided, that this provision shall not authorize him to delegate the exercise of any discretionary power.

Comment. This is suggested by Section 941 of the Fiduciaries Act of 1949.

SECTION 413. *Voting Stock By Proxy.*—The guardians or a majority of them, either in person or by proxy, may vote stock owned by the incompetent.

Comment. This is suggested by Section 942 of the Fiduciaries Act of 1949.

SECTION 414. *Nominee Registration; Corporate Fiduciary As Attorney-in-Fact.*—

(a) *Corporate Guardian.* A bank and trust company or a trust company incorporated in the Commonwealth, or a national bank with trust powers having its principal office in the Commonwealth, may keep investments or fractional interests in investments held by it, either as sole guardian or as co-guardian, in the name or names of the guardians or in the name of a nominee of the corporate guardian: Provided, the consent thereto of the co-guardians, if any, is obtained: And provided further, that all such

investments shall be so designated upon the records of the corporate guardian that the estate to which they belong shall appear clearly at all times.

(b) *Individual Guardian.* A guardian serving jointly with a bank and trust company or a trust company incorporated in the Commonwealth, or with a national bank having its principal office in the Commonwealth, may authorize or consent to the corporate guardian having exclusive custody of the assets of the incompetent and to the holding of such investments in the name of a nominee of such corporate guardian, to the same extent and subject to the same requirements that the corporate guardian, if it were the sole guardian, would be authorized to hold such investments in the name of its nominee.

(c) *Corporate Fiduciary As Attorney-in-Fact.* An individual guardian may employ a bank and trust company or a trust company incorporated in the Commonwealth, or a national bank with trust powers having its principal office in the Commonwealth, to act as his attorney-in-fact in the performance of ministerial duties, including the safe-keeping of estate assets. Such attorney-in-fact, when so acting, may be authorized to hold such investments in the name of its nominee to the same extent and subject to the same requirements that such attorney-in-fact, if it were the guardian, would be authorized to hold such investments in the name of its nominee.

Comment. This is suggested by Section 943 of the Fiduciaries Act of 1949.

SECTION 415. *Acceptance of Deed in Lieu of Foreclosure.*—The guardian may take for the incompetent from the owner of property encumbered by a mortgage owned by the incompetent, a deed in lieu of foreclosure, in which event the real estate shall be considered personalty to the same extent as though title had been acquired by foreclosure at sheriff's sale.

Comment. This is suggested by Section 944 of the Fiduciaries Act of 1949.

SECTION 416. *Compromise of Controversies.*—Whenever it shall be proposed to compromise or settle any claim, whether in suit or not, by or against an incompetent, or to compromise or settle any question or dispute concerning property of the incompetent, the court, on petition of the guardian or by any party in

interest setting forth all the facts and circumstances, and after such notice as the court shall direct, aided if necessary by the report of a master, may enter a decree authorizing the compromise or settlement to be made.

Comment. This is suggested by Section 945 of the Fiduciaries Act of 1949.

SECTION 417. *When Guardian Dies or Becomes Incompetent.*—The fiduciary of the estate of a deceased or incompetent guardian by reason of such position shall not succeed to the administration of, or have the right to possess, any asset of an incompetent which was being administered by the deceased or incompetent guardian, except to protect it pending its delivery to the person entitled to it. The account of the deceased or incompetent guardian may be filed by the fiduciary of his estate and it shall be filed if the court shall so direct.

Comment. This is suggested by Section 946 of the Fiduciaries Act of 1949.

SECTION 418. *Surviving or Remaining Guardians.*—Surviving or remaining guardians shall have all the powers of the original guardians.

Comment. This is suggested by Section 948 of the Fiduciaries Act of 1949.

SECTION 419. *Disagreement Among Guardians.*—

(a) *Decision of Majority.* If a dispute shall arise among guardians, the decision of the majority shall control. A dissenting guardian shall join with the majority to carry out a majority decision requiring affirmative action and may be ordered to do so by the court. A dissenting guardian shall not be liable for the consequences of any majority decision even though he joins in carrying it out, if his dissent is expressed promptly to all the other co-guardians: Provided, that liability for failure to join in administering the estate or to prevent a breach of trust may not be thus avoided.

(b) *When No Majority.* When a dispute shall arise among guardians as to the exercise or non-exercise of any of their powers and there shall be no agreement of a majority of them, the court, upon petition filed by any of the guardians or by any party in interest, aided if necessary by the report of a master, in its dis-

cretion, may direct the exercise or non-exercise of the power as the court shall deem for the best interest of the incompetent.

Comment. This is suggested by Section 949 of the Fiduciaries Act of 1949.

SECTION 420. *Inherent Powers and Duties.*—Except as otherwise provided in this act, nothing in this act shall be construed to limit the inherent powers and duties of a guardian.

Comment. This is based on Section 1044 of the Fiduciaries Act of 1949.

B. Sales, Mortgages, Leases, Options and Exchanges

SECTION 441. *Power to Sell Personal Property.*—A guardian may sell, at public or private sale, any personal property of the incompetent.

Comment. This is suggested by Section 1061 of the Fiduciaries Act of 1949. The guardian would have to use a reasonable discretion having in mind the possible return to sanity of his ward and existing case law which clearly indicates that property which has a special value to the incompetent should be preserved in every instance where he may recover his competency unless sale is required to provide funds for his maintenance or funds for the maintenance of those whom he is under a legal duty to support.

SECTION 442. *Power to Lease.*—A guardian may lease any real or personal property of the incompetent for a term not exceeding five years after its execution.

Comment. See Sections 962 and 1062 of the Fiduciaries Act of 1949. A lease for more than five years could be granted by the court under Section 443.

SECTION 443. *Order of Court.*—Whenever the court finds it to be for the best interests of the incompetent, a guardian may, for any purpose of administration or distribution, and on the terms, with the security and after the notice directed by the court: (1) Sell at public or private sale, pledge, mortgage, lease or exchange any real or personal property of the incompetent, (2) grant an option for the sale, lease or exchange of any such property, (3) join with the spouse of the incompetent in the performance of any of the foregoing acts with respect to property held by the entireties, or (4) release the right of the incompetent in the property of his spouse and join in the deed of the spouse in behalf of the incompetent.

Comment. This is suggested by Section 1063 of the Fiduciaries Act of 1949. It is contemplated that the court will not authorize sales of property

which the incompetent may wish to receive in kind if his competency is regained unless the sale is necessary for his maintenance or for some other compelling reason. In reaching its decision the court will be influenced by existing case law, by the fact that title to the incompetent's property under Section 103 remains in him and by Section 14 of the Fiduciaries Investment Act of 1949 which authorizes retention of assets received in kind. Because of the power to sell personal property under Section 441 the court should approve sales thereof under this section only when the court agrees that the guardian is entitled to the protection of its decree either because the circumstances are unusual or because the nature of the property is such that the incompetent may wish to have it in kind if he should regain his competency. It is contemplated that the guardian under clause 4 may be authorized to assist the competent spouse in the disposition of real estate without any consideration passing to the incompetent's estate in the instances where the incompetent if competent would have joined in the conveyance without any consideration passing to him.

SECTION 444. *Restraint of Sale.*—The court, on its own motion or upon application of any one in behalf of the incompetent, in its discretion may restrain a guardian from selling or carrying out any contract of sale of any personal property of the incompetent. The order may be conditioned upon the applicant giving bond for the protection of the incompetent's estate.

Comment. This is suggested by Section 1064 of the Fiduciaries Act of 1949.

SECTION 445. *Purchase by Guardian.*—A guardian in his individual capacity, may bid for, purchase, take a mortgage on, lease, or take by exchange, real or personal property belonging to the incompetent, subject, however, to the approval of the court, and under such terms and conditions and after such reasonable notice to relatives of the incompetent or to persons having an interest in the welfare of the incompetent as the court shall direct. When the purchaser, mortgagee, or lessee is the sole guardian, the court may make an order directing its clerk to execute a deed or other appropriate instrument to him.

Comment. This is suggested by Section 1065 of the Fiduciaries Act of 1949.

SECTION 446. *Title of Purchaser.*—If the guardian has given the bond, if any, required in accordance with this act, any sale, pledge, mortgage, or exchange by him, whether pursuant to a decree or to a power under this act, shall pass the full title of the incompetent therein free of any right of his spouse, unless otherwise specified. Persons dealing with the guardian shall have

no obligation to see to the proper application of the cash or other assets given in exchange for the property of the incompetent. Any sale or exchange by a guardian pursuant to a decree under Section 443 shall have the effect of a judicial sale as to the discharge of liens, but the court may decree a sale or exchange freed and discharged from the lien of any mortgage otherwise preserved from discharge by existing law, if the holder of such mortgage shall consent by writing filed in the proceeding. No such sale, mortgage, exchange, or conveyance shall be prejudiced by the subsequent removal of the guardian.

Comment. This is suggested by Section 1066 of the Fiduciaries Act of 1949.

SECTION 447. Collateral Attack.—No decree entered pursuant to this act shall be subject to collateral attack on account of any irregularity if the court which entered it had jurisdiction to do so.

Comment. This is suggested by Section 1067 of the Fiduciaries Act of 1949.

SECTION 448. Record of Proceedings; County Where Real Estate Lies.—Certified copies of proceedings of any court of the Commonwealth relating to or affecting the real estate of any incompetent may be recorded in the office of the recorder of deeds in any county in which the real estate lies.

Comment. This is suggested by Section 1068 of the Fiduciaries Act of 1949. Cf. Act of 1836, P. L. 589, §18, 50 PS §736, *In re MacGregor*, 40 D. & C. 519.

ARTICLE V.

PROPERTY RIGHTS AND OBLIGATIONS OF ESTATES OF INCOMPETENTS.

A. *Control of Actions.*

SECTION 501. Substitution of Guardian in Pending Action or Proceedings.—

(a) *Voluntary Substitution.* The guardian of the estate of an incompetent party to a pending action or proceeding in the orphans' court may become a party thereto by filing of record

a statement of the material facts on which the right to substitution is based.

(b) *Compulsory Substitution.* If the guardian does not voluntarily become a party, the clerk, upon the praecipe of an adverse party setting forth the material facts, shall issue a citation upon the guardian to show cause why he should not be substituted as a party.

(c) *Status of Guardian; Continuance.* If the guardian voluntarily becomes a party to the action or proceeding, or if the citation upon him is made absolute, he shall have all the rights and liabilities of a party to the action or proceeding. The court may order such continuances and extensions as may be necessary to afford him a reasonable opportunity to appear and prosecute or defend the action or proceeding.

Comment. This is suggested by Section 602 of the Fiduciaries Act of 1949, but limited to actions and proceedings in the orphans' court. See Procedural Rules 2352-2354 and 2375(7). No provision is made for service of citation or proof of service or notice which would be regulated by Sections 705, 706 and 711 of the Orphans' Court Act of 1951.

SECTION 502. *Death or Removal of Guardian.* —An action or proceeding in the orphans' court to which a guardian is a party is not abated by his death or resignation or by the termination of his authority. The successor of the guardian may be substituted in the action or proceeding in the same manner as though the incompetent were a party.

Comment. This is suggested by Section 604 of the Fiduciaries Act of 1949, but limited to actions and proceedings in the orphans' court. See Procedural Rules 2352-2354 and 2375(4).

B. Claims; Rights of Creditors.

SECTION 511. *Effect of Determination of Incompetency.*—An incompetent shall be incapable of making any contract or gift, or any instrument in writing after he is adjudged incompetent and before he is adjudged to have regained his competency. This section shall not impair the interest in real estate acquired by a bona fide grantee of, or bona fide holder of a lien on, real estate, in a county other than that in which the decree establishing the incompetency is entered, unless the decree or a duplicate original or certified copy thereof is recorded in the office of the recorder of deeds in the county in which the real estate lies before

the recording or entering of the instrument or lien under which the grantee or lienholder claims.

Comment. The first sentence is suggested by Section 5 of the Act of 1907, P. L. 292, 50 PS §945. The words "incapable of making any contract or gift, or any instrument in writing" are suggested by similar language in the 1907 Act as it is the intention that the existing case law on the subject shall be preserved. Thus, it would remain possible for an incompetent in some circumstances to execute or revoke a will: cf. *Mohler's Est.*, 343 Pa. 299. The second sentence is suggested by similar language protecting the rights of grantees and lienholders in Section 13 of the Wills Act of 1947 and in Section 216 of the Fiduciaries Act of 1949. Cf. also Section 16 of the Act of 1836, P. L. 589, as amended, 50 PS §733, and the Act of 1913, P. L. 358, 50 PS §734.

SECTION 512. *Specific Performance of Contracts.*—

(a) *Application to Court.* If any person makes a legally binding agreement to purchase or sell real or personal estate and is adjudged incompetent before its consummation, his guardian shall have the power to consummate it, but if he does not do so, the court, on the application of any party in interest and after such notice and with such security, if any, as it may direct, in its discretion, may order specific performance of the agreement if it would have been enforced specifically had there been no adjudication of incompetency.

(b) *Execution and Effect of Deed or Transfer.* Any necessary deed or transfer shall be executed by the guardian or by such other person as the court shall direct. The title of any purchaser under an agreement in which the incompetent was the vendor shall be the same as though the incompetent had conveyed or transferred such property while competent.

(c) *Indexing in Judgment Index.* When any petition for specific performance of an agreement to purchase or sell real estate is filed, the prothonotary of the court of common pleas where the real estate or any part of it lies, upon the receipt of a certificate of such fact by the clerk of the court where the petition was filed, shall enter the petition upon the judgment index against the defendants and shall certify it as *lis pendens* in any certificate of search which he is required to make by virtue of his office.

Comment. This is suggested by Section 620 of the Fiduciaries Act of 1949.

SECTION 513. *Notice to Commonwealth and Political Subdivisions.*—When the Commonwealth or a political subdivision thereof has a claim for maintaining an incompetent in an institution, the guardian within three months of his appointment shall give notice thereof to the department of revenue or to the proper officer of such political subdivision, as the case may be.

Comment. This is suggested by Section 623 of the Fiduciaries Act of 1949.

ARTICLE VI.

ACCOUNTS, AUDITS, REVIEWS, DISTRIBUTION—RIGHTS OF INCOMPETENT AND DISTRIBUTEES.

A. *Accounts.*

SECTION 601. *Accounting Required.*—A guardian shall file an account of his administration of real and personal property promptly at the termination of his guardianship, or at such earlier time or times as shall be directed or authorized by the court.

Comment. This is suggested by Section 1081 of the Fiduciaries Act of 1949. Compare Sections 40, 41 and 42 of the Act of 1836, P. L. 589, 50 PS §§756-758, and Section 1 of the Act of 1909, P. L. 391, 20 PS §2853.

SECTION 602. *Where Filed.*—All accounts of guardians shall be filed in the office of the clerk.

Comment. This is suggested by Section 1082 of the Fiduciaries Act of 1949. When the guardian has received payments from the United States Veterans' Administration, notice and copies of accounts should be given and supplied as required by the Act of 1929, P. L. 647, 20 PS §788.

SECTION 603. *Notice to Parties in Interest.*—The guardian shall give written notice of the filing of his account and of its call for audit or confirmation to the former ward if he has been declared competent, and otherwise to his succeeding guardian or personal representative and to such other persons as the court by general rule or special order shall direct.

Comment. This is suggested by Section 703 of the Fiduciaries Act of 1949.

B. Audits.

SECTION 611. *Audits in Counties Having Separate Orphans' Court.*—In any county having a separate orphans' court, the account of a guardian shall be examined and audited by the court without expense to the parties, except when all parties in interest in a pending proceeding shall nominate an auditor whom the court may in its discretion appoint.

Comment. This is suggested by Section 711 of the Fiduciaries Act of 1949.

SECTION 612. *Audits in Counties Having No Separate Orphans' Court.*—In any county having no separate orphans' court, the account of a guardian shall be confirmed by the court or by the clerk, as local rules shall prescribe, if no objections are presented within a time fixed by general rule of court. If any party in interest shall object to the account, or shall request its reference to an auditor, the court, in its discretion, may appoint an auditor.

Comment. This is suggested by Section 712 of the Fiduciaries Act of 1949.

SECTION 613. *Recognition of Claims.*—Upon the audit of the account of the guardian of a person who has died during incompetency, the auditing judge or auditor passing on the account shall not pass upon any claims against the estate of the incompetent other than necessary administration expenses including compensation of the guardian and his attorney. All claims remaining unpaid at the incompetent's death shall be presented to the personal representative.

Comment. Section 613 is intended to clarify existing case law which remains in some confusion because of uncertainty as to when the claim should be presented to the guardian and when to the personal representative. Except when distribution can be made under Section 201, all questions concerning claims, other than those paid by the guardian prior to death and those incurred for necessary administration expenses, should be presented to the personal representative. This is especially advisable when the estate is insolvent.

SECTION 614. *Statement of Proposed Distribution.*—A guardian filing an account shall file a statement of proposed distribution or a request that distribution be determined by the court or by an auditor, as local rules may prescribe. The statement of proposed distribution shall be in such form, and such notice

thereof shall be given by advertisement or otherwise and objections thereto may be made, as local rules prescribe.

Comment. This is suggested by Section 713 of the Fiduciaries Act of 1949.

SECTION 615. *Confirmation of Account and Approval of Proposed Distribution.*—No account shall be confirmed, or statement of proposed distribution approved, until an adjudication or a decree of distribution is filed in conformity with local rules by the court or by the clerk of the court, expressly confirming the account or approving the statement of proposed distribution and specifying or indicating by reference to the statement of proposed distribution the names of the persons to whom the balance available for distribution is awarded and the amount or share awarded to each.

Comment. This is suggested by Section 714 of the Fiduciaries Act of 1949.

C. *Review.*

SECTION 621. *Rehearing; Relief Granted.*—If any party in interest shall, within five years after the final confirmation of any account of a guardian, file a petition to review any part of the account, or of an auditor's report, or of the adjudication, or of any decree of distribution, setting forth specifically alleged errors therein, the court shall give such relief as equity and justice shall require: Provided, that this section shall not authorize review as to any property distributed by the guardian in accordance with a decree of court before the filing of the petition. The court or master considering the petition may include in his adjudication or report findings of fact and of law as to the entire controversy, in pursuance of which a final order may be made.

Comment. This is suggested by Section 721 of the Fiduciaries Act of 1949.

D. *Distribution.*

SECTION 631. *Award Upon Final Confirmation of Account.*—A guardian shall be relieved of liability with respect to all real and personal estate distributed in conformity with a decree of court or in accordance with rule of court after confirmation of an account.

Comment. This is suggested by Section 733 of the Fiduciaries Act of 1949.

SECTION 632. *Recording and Registering Decrees Awarding Real Estate.*—A certified copy of every adjudication or decree awarding real estate or an appropriate excerpt from either of them may be recorded, at the expense of the estate, in the deed book in the office of the recorder of deeds of each county where the real estate so awarded lies, and if recorded shall be indexed by the recorder in the grantor's index under the name of the decedent and in the grantee's index under the name of the distributee, and shall be registered in the survey bureau or with the proper authorities empowered to keep a register of real estate in the county: Provided, that no adjudication or decree awarding real estate subject to the payment of any sum by the distributee shall be recorded or registered unless there is offered for recording, concurrently therewith, written evidence of the payment of such sum.

Comment. This is suggested by Section 736 of the Fiduciaries Act of 1949. It differs from Section 736 in that recording and registering decrees is made permissive rather than mandatory. This is because title will remain in the incompetent until his death under Section 103.

E. Rights of Incompetent and Distributees.

SECTION 641. *Liability of Guardian for Interest.*—A guardian who has committed a breach of duty with respect to estate assets shall, in the discretion of the court, be liable for interest, not exceeding the legal rate on such assets.

Comment. This is suggested by Section 754 of the Fiduciaries Act of 1949.

SECTION 642. *Transcripts of Balances Due by Guardian.*—

(a) *Filing in Common Pleas.* The prothonotary of any court of common pleas shall, on demand of any party in interest, file and docket a certified transcript or extract from the record showing that an orphans' court has adjudged an amount to be due by a guardian, and such transcript or extract shall constitute a judgment against the guardian from the time of its filing with the same effect as if it had been obtained in an action in the court of common pleas. If the amount adjudged to be due by the guardian shall be increased or decreased on appeal, the prothonotary shall, if the decree of the appellate court is certified to him, change his records accordingly, and if the appellate court has increased

the amount, the excess shall constitute a judgment against the guardian from the time when the records are so changed.

(b) *Satisfaction and Discharge.* If the orphans' court shall order the guardian to be relieved from any such judgment, the prothonotary shall, on demand of any party in interest, enter on his records a certified copy of such order, which shall operate as a satisfaction of the judgment.

Comment. This is suggested by Section 755 of the Fiduciaries Act of 1949.

SECTION 643. *Disposition of Trust Income.*—Except as otherwise provided by the trust instrument, the trustee of an inter vivos or testamentary trust with the approval of the court having jurisdiction of the trust, may pay income distributable to an incompetent beneficiary for whose estate no guardian has been appointed directly to the incompetent, or expend and apply it for his care and maintenance or the care, maintenance, and education of his dependents.

Comment. This is suggested by Section 984 of the Fiduciaries Act of 1949 dealing with disposition of minor's income.

SECTION 644. *Distributions of Income and Principal During Incompetency.*—All income received by a guardian of the estate of an incompetent, in the exercise of a reasonable discretion, may be expended in the care and maintenance of the incompetent without the necessity of court approval. The court, for cause shown, may authorize or direct the payment or application of any or all of the income or principal of the estate of an incompetent for the care, maintenance or education of the incompetent, his spouse, children or those for whom he was making such provision before his incompetency, or for the reasonable funeral expenses of the incompetent's spouse, child or indigent parent. In proper cases, the court may order payment of amounts directly to the incompetent for his maintenance or for incidental expenses and may ratify payments made for these purposes.

Comment. This is suggested by Section 1084 of the Fiduciaries Act of 1949. Compare Sections 20 and 21 of the Act of 1836, P. L. 589, 50 PS §§753, 754, Section 6 of the Act of 1907, P. L. 292, 50 PS §961 and the Act of 1915, P. L. 661, as amended, 71 PS §1781.

ARTICLE VII.

FOREIGN GUARDIANS.

A. Powers and Duties.

SECTION 701. *In General.*—A foreign guardian may institute proceedings in the Commonwealth (subject to the conditions and limitations imposed on nonresident suitors generally) and may exercise all the other powers of a local guardian. Except in the case of powers with respect to securities, for which special provision is made in Section 702, the maintenance of a proceeding or the exercise of any other power by a foreign guardian shall be subject to the following additional conditions and limitations:

(1) *Copy of Appointment.* The foreign guardian shall file with the register of the county where the power is to be exercised or the proceeding is instituted or the property concerning which the power is to be exercised is located an exemplified copy of his appointment or other qualification in the foreign jurisdiction.

(2) *Affidavit.* The foreign guardian shall execute and file an affidavit with the register of said county stating that after diligent search and inquiry, the estate of which he is guardian is not, to his knowledge or so far as he has been able to discover, indebted to any person in the Commonwealth, and that he will not exercise any power which he would not be permitted to exercise in the jurisdiction of his appointment. The affidavit shall be attached to the copy of appointment.

(3) *Taxes.* When the foreign guardian exercises a power to sell or mortgage any Pennsylvania real estate, all taxes due thereon to the Commonwealth or to any subdivision thereof must be paid or provided for.

Comment. This is suggested by Section 1101 of the Fiduciaries Act of 1949. Cf. Sections 17 and 18 of the Act of 1836, P. L. 589, 50 PS §§735, 736.

SECTION 702. *Security Transfers*—When there is no guardianship in the Commonwealth, a foreign guardian, upon submission of a certificate of his appointment, shall have all the powers of a similar local guardian with respect to stock, bonds and other securities of a Pennsylvania corporation or a federal corporation

located in Pennsylvania and shall not be required to comply with the conditions and limitations of Section 701.

Comment. This is suggested by Section 1102 of the Fiduciaries Act of 1949.

SECTION 703. *Service of Process.*—The acceptance by a foreign guardian of the privilege extended by the laws of the Commonwealth of exercising any of his powers within the Commonwealth shall constitute the secretary of the Commonwealth his attorney-in-fact upon whom service of process and notices may be made in any suit or proceeding instituted in the courts of the Commonwealth arising out of, or by reason of, the exercise of any of his powers or the performance or nonperformance of any of his duties as such fiduciary.

Comment. This is suggested by Section 1103 of the Fiduciaries Act of 1949.

SECTION 704. *Proof of Authority in Court Proceedings.*—Upon commencing any proceeding in any court of the Commonwealth, the foreign guardian, in addition to the requirements of Section 701, shall file with the court in which the proceeding is commenced, an exemplified copy of his official bond, if he has given a bond. If the court believes that he should furnish security or additional security in the Commonwealth or in the domiciliary jurisdiction, it may, at any time, order the action or proceeding stayed until sufficient security is furnished.

Comment. This is suggested by Section 1104 of the Fiduciaries Act of 1949.

SECTION 705. *Effect of Local Proceedings.*—No person who, before receiving actual notice of local administration or of application therefor, has changed his position by relying on the powers granted to foreign guardians by this act shall be prejudiced by reason of the application for or grant of local administration.

Comment. This is suggested by Section 1105 of the Fiduciaries Act of 1949.

B. *Distribution to Foreign Fiduciaries.*

SECTION 711. *To Foreign Personal Representative.*—When a share of an incompetent's estate administered in the Common-

wealth is distributable to a deceased nonresident creditor or other distributee, the court may award it to his domiciliary personal representative or to some other person performing the function of a personal representative, unless it shall appear that the rights of any resident of the Commonwealth may be adversely affected or the court shall determine that for any reason ancillary administration within the Commonwealth is advisable.

Comment. This is suggested by Section 1111 of the Fiduciaries Act of 1949.

SECTION 712. *To Foreign Trustee, Guardian or Committee.*

—When a share of an incompetent's estate administered in the Commonwealth is distributable to a nonresident minor, a trustee subject to the jurisdiction of a foreign court, or a nonresident incompetent, the court may award it to the guardian or committee of the nonresident appointed in the foreign jurisdiction, or to such trustee: Provided, that the court shall be satisfied, that adequate security or other protection has been provided in the domiciliary jurisdiction by the domiciliary law for the protection of the persons beneficially interested in the share so awarded.

Comment. This is suggested by Section 1112 of the Fiduciaries Act of 1949. Cf. Act of 1868, P. L. 94, 50 PS §762.

C. Transfer of Administration.

SECTION 721. *Award to Foreign Guardian When Incompetent Becomes a Nonresident.*—When the incompetent for whose estate a guardian has been appointed by the court is or becomes a nonresident of the Commonwealth, the court, upon satisfactory proof that it will be for the best interests of the incompetent and that no rights of a resident of the Commonwealth will be adversely affected and that removal of the property will not conflict with any limitations upon the right of the incompetent to such property, may direct the locally appointed guardian to transfer the assets of the incompetent within his control to a duly qualified guardian or guardians in the jurisdiction where the incompetent resides.

Comment. This is suggested by Section 1121 of the Fiduciaries Act of 1949.

ARTICLE VIII.

REPEALER.

SECTION 801 (a). *Specific Repeals.*—The following acts and parts of acts and all amendments of each are hereby repealed as respectively indicated :

(1) The act, approved the thirteenth day of June, one thousand eight hundred and thirty-six (Pamphlet Laws 589), entitled, "An act relating to lunatics and habitual drunkards", as applied to estates of incompetents subject to the jurisdiction of the orphans' court.

Comment. This is the basic act which has remained substantially unchanged since its original enactment. It is understood that a proposed Mental Health Law will include an Article IX on "Guardian of the Person" and that this will retain the portions of the 1836 and subsequent acts which deal with control of the persons of incompetents.

(2) Section one of the act, approved the sixteenth day of April, one thousand eight hundred and forty-nine (Pamphlet Laws 663), entitled, "A supplement to the act relating to lunatics and habitual drunkards; to punish alderman and justices of the peace for misdemeanors; relating to arbitrations in the district court in the city and county of Philadelphia; relative to deeds of assignment; relative to judgment liens; relating to limitation of actions; and relating to liens and terre tenants; and for the more effectual punishment of the crime of arson," absolutely, and section two thereof insofar as it affects estates of incompetents.

Comment. Section 1 (50 PS §794) deals with sale of timber; Section 2 (50 PS §705), with costs and witness fees.

(3) Section 7 of the act, approved the fifteenth day of April, one thousand eight hundred and fifty-one (Pamphlet Laws 713), entitled, "An act to annul the marriage contract between William Mead and Eliza his wife, to the uniformed militia of Perry and Luzerne Counties, to the Cumberland Valley Railroad, to the sale of the real estate of John Berge, deceased, to lunatics and habitual drunkards, and to the Susquehanna Canal Company," insofar as it affects estates of incompetents.

Comment. This section (50 PS §697) states who may apply for a commission of lunacy or drunkenness when there are no relatives residing in the Commonwealth.

(4) The act, approved the twenty-second day of March, one thousand eight hundred and sixty-five (Pamphlet Laws 31), entitled, "An act relating to the committees of the estates of lunatics and habitual drunkards," except as to committees subject to the jurisdiction of courts of common pleas.

Comment. This act (50 PS §760) gave committees of lunatics and habitual drunkards the same powers as guardians of minors in partition proceedings.

(5) Section one of the act, approved the twentieth day of February, one thousand eight hundred and sixty-seven (Pamphlet Laws 30), entitled, "An act to confer upon the committee of a lunatic, or a habitual drunkard, the power to institute actions of partition, and prosecute those already commenced," absolutely.

Comment. This act (50 PS §761) gave the committees of lunatics or habitual drunkards the right to institute partition proceedings. This has been suspended by Procedural Rule 2075.

(6) The act, approved the thirteenth day of April, one thousand eight hundred and sixty-eight (Pamphlet Laws 94), entitled, "An act respecting the estates of non-resident lunatics," absolutely.

Comment. This act (50 PS §762) gave the foreign committee the power to remove property from the Commonwealth. This is covered by Article VII hereof.

(7) The act, approved the eighth day of May, one thousand eight hundred and seventy-four (Pamphlet Laws 122), entitled, "An act limiting the time within which inquisitions of lunacy or habitual drunkenness may be traversed," insofar as it affects estates of incompetents.

Comment. The purpose of this act (50 PS §§708, 709) is protected by Section 748 of the Orphans' Court Act of 1951.

(8) The act, approved the twenty-fifth day of May, one thousand eight hundred and seventy-eight (Pamphlet Laws 154), entitled, "An act to enable married women whose husbands are lunatics to dispose of their separate estates," insofar as it applies to property of a married woman whose husband's estate is subject to the jurisdiction of the orphans' court.

Comment. When the husband's estate is subject to the jurisdiction of the orphans' court, sale or other disposition may be authorized under Sec-

tion 443. This act (50 PS §799) will remain in effect to cover instances where no guardian has been appointed or when the estate remains within the jurisdiction of the common pleas court.

(9) The act, approved the twenty-eighth day of March, one thousand eight hundred and seventy-nine (Pamphlet Laws 14), entitled, "An act enabling wives of lunatics to release their right of dower in the real estate of their husbands," insofar as it applies to estates of incompetents subject to the jurisdiction of the orphans' court.

Comment. This act (50 PS §796) seems unnecessary because the competent spouse may join with the guardian in making the conveyance. If any doubt remains it is dispelled by clause 4 of Section 443.

(10) The act, approved the tenth day of June, one thousand eight hundred and ninety-seven (Pamphlet Laws 137), entitled, "An act giving priority in the trial of lunacy cases traversing inquisitions of sheriff's juries in the courts of this Commonwealth," insofar as it affects estates of incompetents.

Comment. The purpose of this act (50 PS §711) is now accomplished by Rules 214 and 215 of the Procedural Rules.

(11) The act, approved the tenth day of June, one thousand eight hundred and ninety-seven (Pamphlet Laws 138), entitled, "An act providing for the taking, filing and reviewing of the testimony taken before sheriff's juries in inquisitions of lunacy in and by the several courts of this Commonwealth," insofar as it affects estates of incompetents.

Comment. This act (50 PS §707) is more properly the subject of a rule of court.

(12) The act, approved the fifteenth day of July, one thousand eight hundred and ninety-seven (Pamphlet Laws 301), entitled, "An act regulating applications for commissions to inquire into the lunacy or habitual drunkenness of inmates of any soldiers' and sailors' home, almshouse, home for the friendless, or other charitable institution," insofar as it affects estates of incompetents.

Comment. The subject of this act (50 PS §712) would seem to be covered by the more general language of Section 301 hereof.

(13) The act, approved the twenty-seventh day of April, one thousand nine hundred and three (Pamphlet Laws 325), entitled,

"An act entitled an act providing for the sale of the real estate of lunatics, at private sale, and empowering courts of common pleas to order, direct and approve such private sales," as to estates of incompetents subject to the jurisdiction of the orphans' court.

Comment. This act (50 PS §793) is supplied by Section 443 of this act.

(14) Sections one, two, three and four of the act, approved the twenty-eighth day of May, one thousand nine hundred and seven (Pamphlet Laws 292), entitled, "An act to provide for the protection of insane persons, feeble-minded persons, and epileptics, and the appointment of a guardian for the said insane persons, feeble-minded persons, and epileptics, unable to care for their own property; authorizing the guardian to support the wife and children of the said insane persons, feeble-minded persons, and epileptics; defining the powers of the guardian, and authorizing the sale of real estate of the ward," absolutely, and sections five, six and seven thereof as to estates of incompetents subject to the jurisdiction of the orphans' court.

Comment. This act (50 PS §§941-964), dealing with the estates of weak-minded persons and making reference to the Act of 1836, P. L. 589, is supplied by the new act. Sections 8 and 9 are not repealed as they continue to be applicable in the case of estates of incompetents subject to the jurisdiction of common pleas courts.

(15) Sections one and two of the act, approved the twenty-seventh day of April, one thousand nine hundred and nine (Pamphlet Laws 185), entitled, "A supplement to an act, entitled 'an act for the protection of persons unable to care for their own property,' approved the twenty-fifth day of June, anno domini one thousand eight hundred and ninety-five; authorizing the appointment of guardians of the estates of weak-minded persons non-resident of this Commonwealth, and extending to said guardians the powers conferred upon guardians of weak-minded persons by the said act, approved June twenty-fifth, one thousand eight hundred and ninety-five, and its supplements, so far as relates to the real and personal property of said non-resident weak-minded persons, situate in the Commonwealth of Pennsylvania," absolutely, and sections three and four thereof as to estates of incompetents subject to the jurisdiction of the orphans' court.

Comment. This act (50 PS §§991-994) is supplied by Article VII hereof.

(16) The act, approved the twenty-eighth day of May, one thousand nine hundred and thirteen (Pamphlet Laws 358), entitled, "An act relating to the competency as evidence of certain findings in proceedings in lunacy," as to estates of incompetents subject to the jurisdiction of the orphans' court.

Comment. This act (50 PS §734) is not required since no provision is made for establishing incompetency at an earlier date.

(17) Clauses 1 and 8 of Subsection (a) of Section 2 of the act, approved the seventh day of June, one thousand nine hundred and seventeen (Pamphlet Laws 388), entitled, "An act relating to the jurisdiction, powers, and procedure of the orphans' court and the court of common pleas as to sales, mortgages, conveyances on ground-rent, leases, extinguishment of ground-rents, partition, exchange, squaring and adjusting of lines between adjoining owners, consolidation and combination of mining lands and the leasing thereof, the joining by owners of undivided interests in making and taking conveyances in order to change the route or location of any right of way or passage over adjoining or other lands, and the subdivision of premises so as to command the highest price or greatest rents, and, for such purpose, the laying out or dedication of roads, streets, and alleys, or the vacation of such as have not been accepted by the public authorities, where the court shall be of opinion that such decree will be to the interest and advantage of all those interested; and where the legal title is held by minors, lunatics, habitual drunkards, or weak-minded persons, a married person whose spouse is a lunatic, or has abandoned him or her for one year or has been absent and unheard of for seven years; by corporations having no capacity to convey or by any unincorporated association, by any religious, beneficial, or charitable society or association, incorporated or unincorporated, and the title is subject to forfeiture if real estate is held in excess of the amount prescribed by its charter or by law; by a corporation, or individual or individuals, and is subject to a trust of any description whatever; by any person as to whom a presumption of death may have arisen, or any interest wherein is held by any person under legal disability to dispose thereof; where the legal title is an estate tail or is subject to the lien of debts of a decedent not of record, contingent remainders, executory devises, or remainders to a class, some or all of whom may not be in being or ascertained; where estates shall have been

devised or granted for special or limited purposes, where there is a power of sale but the time may not have arrived for its exercise, any preliminary act may not have been done to bring it into exercise, the time limited for its exercise may have expired, or any one or more persons required to consent or join in its exercise may be non compos mentis, have removed out of the state, have died, refuse to act, unreasonably withhold consent, or be absent and unheard of; where there has been or shall be a defective appointment in any deed or will, and the necessary power is not given to the executor, devisee, or appointee to make sale and conveyance; where a trust has been created, and no power conferred on the trustee to do any of the acts which the court is hereby empowered to authorize or confirm; and to the effects of such decrees," as to estates of incompetents subject to the jurisdiction of the orphans' court.

Comment. These clauses are repealed to make it clear that when there is a guardian for the incompetent subject to the jurisdiction of the orphans' court, application is made to the orphans' court under this act and not to the common pleas court under the Revised Price Act.

(b) *General Repeal.* All other acts and parts of acts inconsistent herewith are hereby repealed.

(c) *Saving Clause.* This act shall not repeal or modify any of the provisions of the following acts or parts of acts or any of their amendments:

(1) The act, approved the eleventh day of April, one thousand eight hundred and sixty-six (Pamphlet Laws 780), entitled, "An act authorizing persons, whose wives, or husbands, are non compos mentis, to sell, mortgage, lease for years and convey, upon ground rent, real estate held in their own right."

Comment. This act (50 PS 795) must be preserved because there are circumstances when no guardian has been appointed for the incompetent spouse.

(2) The act, approved the sixth day of April, one thousand nine hundred and twenty-one (Pamphlet Laws 99), entitled, "An act relating to the jurisdiction, powers, and procedure of the court

of common pleas as to sale, mortgage, conveyance upon ground rent, and lease for years of real estate, where the legal title is held by a married person whose spouse is an habitual drunkard, and providing for the disposition of the proceeds thereof."

Comment. This act (50 PS 797, 798) is the companion act to the Act of 1866, P. L. 780 and deals with the estates of habitual drunkards.