

PROPOSED
ORPHANS' COURT 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.

JOINT STATE GOVERNMENT COMMISSION

The Joint State Government Commission was created by Act No. 459, Session of 1937, as amended by Act No. 380, Session of 1939, and Act No. 4, Session of 1943, as a continuing agency for the development of facts and recommendations on all phases of government for the use of the General Assembly.

HONORABLE BAKER ROYER, *Chairman*

HONORABLE JOHN M. WALKER, *Vice Chairman*

HONORABLE W. STUART HELM, *Secretary-Treasurer*

Senate Members

JOSEPH M. BARR
LEROY E. CHAPMAN
JOHN H. DENT
ANTHONY J. DISILVESTRO
JAMES A. GELTZ
FREDERICK L. HOMSHER*
A. EVANS KEPHART
JOHN G. SNOWDEN
O. J. TALLMAN
M. HARVEY TAYLOR
PAUL L. WAGNER
JOHN M. WALKER
T. NEWELL WOOD

House Members

HIRAM G. ANDREWS
ADAM T. BOWER
CHARLES H. BRUNNER, JR.
EDWIN C. EWING
W. STUART HELM
EARL E. HEWITT, SR.
THOMAS H. LEE
JAMES E. LOVETT
ALBERT S. READINGER
BAKER ROYER
CHARLES C. SMITH
HERBERT P. SORG
IVAN C. WATKINS

* Deceased.

GUY W. DAVIS, *Counsel and Director*

PAUL H. WUELLER, *Associate Director in Charge of
Research and Statistics*

ANTOINETTE S. GIDDINGS, *Administrative Assistant*

ADVISORY COMMITTEE TO THE SUBCOMMITTEE ON
DECEDENTS' ESTATES LAWS

ROBERT BRIGHAM, ESQ., *Chairman*

SHIPPEN LEWIS, ESQ., *Secretary*

M. PAUL SMITH, ESQ., *Research Consultant*

PHILIP A. BREGY, ESQ., *Associate Research Consultant*

*ROBT. W. ARCHBALD, JR., ESQ.	HON. FREDERICK A. MARX
PAUL BEDFORD, ESQ.	J. PAUL MACELREE, ESQ.
HON. W. WALTER BRAHAM	RALPH D. MCKEE, ESQ.
REUBEN E. COHEN, ESQ.	HON. KARL E. RICHARDS
WILLIAM H. ECKERT, ESQ.	WILLIAM M. ROBINSON, ESQ.
ROLAND FLEER, ESQ.	JAMES G. SCHMIDT, ESQ.
HON. ETHAN A. GEARHART	C. L. SHAVER, ESQ.
W. PITT GIFFORD, ESQ.	BOYD LEE SPAHR, ESQ.
HON. ANDREW HOURIGAN	THOMAS STOKES, ESQ.
HON. DAVID G. HUNTER	*HON. THOMAS P. TRIMBLE
A. J. WHITE HUTTON, ESQ.	HON. EDW. LEROY VAN RODEN
MARK E. LEFEVER, ESQ.	PAUL C. WAGNER, ESQ.
WILLIAM W. LITKE, ESQ.	HON. J. COLVIN WRIGHT
ALAN S. LOOSE, ESQ.	ADOLPH L. ZEMAN, ESQ.

* Deceased.

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*".

Herewith is submitted an interim report in the form of a proposed "Orphans' Court Act of 1951" distributed to the bench, the bar, and the public for their consideration. In addition to changes of arrangement and clarification of language, there are several changes in existing law, the reasons for which either are obvious or are explained in the comments to the sections involved. Of the changes suggested, the most important deal with the enlargement and clarification of the jurisdiction of the orphans' court, which, until 1931, did not include the administration and distribution of inter vivos trusts. In the draft herewith submitted, jurisdiction is enlarged to give the orphans' court exclusive jurisdiction of inter vivos trusts, except in limited instances when the common pleas court already has jurisdiction, and to include the administration and distribution of the estates of incompetents. It is contemplated that a future report to be submitted during the year 1950 will recommend legislation governing the administration and distribution of incompetents' estates in the orphans' court. It is believed that the orphans' court is better fitted 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. It is not contemplated that there should be any transfer from the quarter sessions court of proceedings for the commitment of incompetents to institutions.

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 Orphans' Court 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

THOMAS H. LEE, *Chairman*

JOHN M. WALKER, *Vice Chairman*

Senate Members

JOHN W. LORD, JR.
MAXWELL S. ROSENFELD
O. J. TALLMAN
JOHN M. WALKER
LLOYD H. WOOD

House Members

HOMER S. BROWN
GEORGE W. COOPER
THOMAS H. LEE
JOHN H. MCKINNEY
EDWIN W. TOMPKINS

GUY W. DAVIS, *Counsel*

PROPOSED ORPHANS' COURT ACT OF 1951

TABLE OF CONTENTS

ARTICLE I.

PRELIMINARY PROVISIONS.

	Page
Section 101. Short Title	1
Section 102. Definitions	1
Section 103. Effective Date	3
Section 104. Severability	3

ARTICLE II.

ORGANIZATION OF ORPHANS' COURT.

Section 201. Orphans' Court in Every County.....	4
Section 202. Counties Having Separate Orphans' Courts.....	4
Section 203. Counties Having No Separate Orphans' Courts.....	4
Section 204. Court of Record; Seal.....	4
Section 205. Sessions; Terms	4
Section 206. Rules	5

ARTICLE III.

JURISDICTION.

Section 301. Exclusive Jurisdiction	5
(1) Decedents' Estates	5
(2) Testamentary Trusts	5
(3) Inter Vivos Trusts	5
(4) Minors' Estates	6
(5) Incompetents' Estates	6
(6) Absentees' and Presumed Decedents' Estates.....	6
(7) Fiduciaries	6
(8) Guardian of Person of Minors.....	6
(9) Custody of Minors.....	7
(10) Specific Performance of Contracts.....	7
(11) Legacies, Annuities and Charges.....	7
(12) Construction of Administrative Power.....	7
(13) Disposition of Title to Real Estate to Render it Freely Alienable	7
(14) Title to Personal Property.....	7
(15) Appeals and Proceedings from Registers.....	8

TABLE OF CONTENTS—*Continued*

	Page
(16) Birth Records	8
(17) Adoptions	8
(18) Marriage Licenses	8
(19) Inheritance and Estate Taxes.....	8
Section 302. Concurrent Jurisdiction—Title to Real Estate.....	8
Section 303. Conflict of Laws.....	9
Section 304. Incidental Powers	9
Section 305. Venue of Decedents' and Minors' Estates.....	9
(1) Decedents' Estates	9
(2) Minors' Estates	9
Section 306. Venue of Trust Estates.....	10
Section 307. Situs of Testamentary Trust.....	10
Section 308. Situs of Inter Vivos Trust.....	10
(a) When Provided For in Trust Instrument.....	10
(b) Not Provided For in Trust Instrument.....	10
(1) Resident Settlor	10
(2) Nonresident Settlor	10
Section 309. Change of Situs—Order of Court.....	11

ARTICLE IV.

JUDGES.

Section 401. Powers	12
Section 402. Sitting in Other Courts.....	12
Section 403. Powers When the Court is Not in Session.....	12
Section 404. When President Judge Unable to Act.....	12

ARTICLE V.

CLERK—SHERIFF.

A. Clerk.

Section 501. Duties	13
Section 502. Dockets	13
Section 503. Bill of Costs	13
Section 504. Translation of Foreign Language Documents.....	13
Section 505. Advertisement of Accounts.....	13
(a) Requirement of Notice—Contents of Notice.....	13
(b) Places of Advertisement	14
(c) Order of Court	14
(d) Cost of Advertisement.....	14
Section 506. Money Paid Into Court.....	14

TABLE OF CONTENTS—*Continued*

B. Sheriff.

	Page
Section 511. Powers and Duties.....	15
Section 512. Fees	15

ARTICLE VI.

MASTERS, AUDITORS, EXAMINERS, GUARDIANS AD LITEM
AND TRUSTEES AD LITEM.

Section 601. Appointment; Purpose	15
(1) Masters	15
(2) Auditors of Accounts of Fiduciaries.....	15
(3) Auditors to State Accounts.....	15
(4) Examiners of Assets.....	15
(5) Guardians and Trustees Ad Litem.....	16
Section 602. Compensation	16
Section 603. Subpoenas	16
Section 604. Power to Administer Oaths.....	16

ARTICLE VII.

PROCEDURE.

A. Institution of Proceedings and Original Process.

Section 701. Petitions	16
Section 702. Accounts	17
Section 703. Writs of Habeas Corpus.....	17
Section 704. Citation	17
Section 705. Issue and Service of Citation.....	17
Section 706. Proof of Service.....	17

B. Notice.

Section 711. Service of Notice.....	18
-------------------------------------	----

C. Action Upon Default of Respondent.

Section 721. Power of Court.....	18
----------------------------------	----

D. Summary Decree—Injunction.

Section 731. Decree Without Prior Hearing—Attachment—Sequestration	18
Section 732. Injunctions	18

E. Witnesses, Evidence, Hearings, Trials.

Section 741. Subpoenas	19
Section 742. Depositions and Discovery.....	19
Section 743. Perpetuation of Testimony and Court Records.....	19
Section 744. Testimony in Proceedings Removed From Register.....	19

TABLE OF CONTENTS—*Continued*

	Page
Section 745. Jury Trial—When Available.....	20
(a) Right to Jury Trial—Waiver.....	20
(b) When Not of Right.....	20
(c) Trials in Common Pleas.....	20
Section 746. Trials in the Orphans' Court.....	20
(a) Jury	20
(b) Rules of Court	20
(c) Verdict or Judgment.....	21
(d) Effect of Entry of Judgment.....	21
Section 747. Will Contest	21
Section 748. Determination of Incompetency.....	21
F. Enforcement of Orders and Decrees.	
Section 751. Methods of Enforcement.....	22
Section 752. Procedure on Attachment of the Person.....	22
(a) Direction of Writs.....	22
(b) Discharge of Person Attached for Contempt.....	22
Section 753. Procedure on Sequestration of Real or Personal Property..	22
Section 754. Procedure on Execution on Personal Property.....	23
Section 755. Procedure on Attachment Execution.....	23
Section 756. Procedure on Execution on Real Estate.....	23
(a) Filing in Common Pleas.....	23
(b) Satisfaction and Discharge.....	23
(c) Executions	23
G. Costs.	
Section 761. Allowance and Allocation	24
H. Appeals.	
Section 771. Right of Appeal.....	24
Section 772. Effect of Appeal.....	24
Section 773. Disposition of Cases on Appeal.....	25
ARTICLE VIII.	
REPEALER.	
Section 801. (a) Specific Repeals	25
(b) General Repeal	26
(c) Saving Clause	26

PROPOSED ORPHANS' COURT ACT OF 1951

AN ACT

Relating to the orphans' courts, conferring exclusive jurisdiction on such courts over the administration and distribution of decedents' estates, trust estates, minors' estates, absentees' estates and incompetents' estates; providing for the organization of orphans' courts, the procedure therein, the powers and duties of the judges thereof, and appeals therefrom.

Comment. In addition to including the substance of the title of the Orphans' Court Act of 1917, reference is made to the orphans' court's exclusive jurisdiction of the enumerated types of estates. This addition was considered advisable particularly because of the expansion of the jurisdiction of the orphans' court to include incompetents' estates.

ARTICLE I.

PRELIMINARY PROVISIONS.

SECTION 101. *Short Title.*— This act shall be known and may be cited as the Orphans' Court 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.

(3) "Register" means the register of wills having jurisdiction to grant letters testamentary or of administration.

(4) "Fiduciary" includes personal representatives, guardians, and trustees, whether domiciliary or ancillary, individual or corporate, subject to the jurisdiction of the orphans' court.

(5) "Trust" means any trust, whether testamentary or inter vivos, subject to the jurisdiction of the orphans' court.

Comment. The definitions for clauses 1 to 5 are identical with definitions in the Fiduciaries Act of 1949.

(6) An "incompetent" is any person who has been adjudged unable to manage his property.

Comment. With the enlargement of the jurisdiction of the orphans' court to include the estates of incompetents, a definition thereof is essential. The procedure for the administration of an incompetent's estate will be set forth either in separate legislation, or as an amendment to the Fiduciaries Act of 1949.

(7) "Inter vivos trust" means an express trust other than a trust created by a will, taking effect during the lifetime or at or after the death of the settlor. It includes:

(i) A life insurance trust;

Comment. Life insurance trusts are included by definition rather than by separate provision as in Section 9(o) of the 1917 act.

(ii) A trust created under a deed, agreement, or declaration except as hereinafter excluded;

Comment. Existing case law makes no distinction between written and oral trusts: *Tober's Est.*, 82 Pitts. L. J. 91; *Gorkiewicz's Est.*, 43 D. & C. 40; 45 D. & C. 91. There will be many instances where the trust is not wholly evidenced by the written instrument.

(iii) A common trust fund or mortgage investment fund created by a corporate fiduciary for the investment of funds held by it as fiduciary or co-fiduciary;

Comment. The court which has jurisdiction of most of the trusts which hold investments in the common fund is considered best fitted to administer it: Cf. *Keppelman's Est.*, 27 Berks 299.

(iv) A tentative trust whose settlor is deceased; and

Comment. Existing case law is not clear concerning the orphans' court's jurisdiction of tentative trusts: Cf. *Brown's Est.*, 343 Pa. 230; 352 Pa. 1; *Tunnell's Est.*, 325 Pa. 554; *Smith's Est.*, 141 Pa. Superior Ct. 571.

(v) Similar trusts.

It does not include:

(i) A resulting or constructive trust created by operation of law;

Comment. This accords with existing case law: *Shaffer's Est.*, 21 D. & C. 90; *Stief Est.*, 32 D. & C. 289.

(ii) A trust for creditors;

Comment. This accords with existing case law: *Musser's Acct.*, 39 D. & C. 475; *Leinenbach's Pet.*, 24 D. & C. 443; *Weber's Trust*, 50 D. & C. 538.

(iii) An escrow relationship;

Comment. This accords with existing case law: *Jernigan's Trust*, 55 Montg. 231; *Moorshead, Trustee*, 1 Del. Co. L. J. 45 (straw party).

(iv) A temporary trust to hold disputed property;

Comment. This accords with existing case law: *In re Stief*, 32 D. & C. 289.

(v) A principal and agent relationship;

Comment. There is no distinction whether or not the relationship is created by letter of attorney: *Miller's Est.*, 19 D. & C. 141; *Jenkins' Est.*, 20 D. & C. 671.

(vi) A trust primarily for the benefit of business employees, their family or appointees, under a stock bonus, pension, disability or death benefit, profit-sharing or other employee benefit plan;

Comment. Pension and profit sharing trusts are of sufficient importance to justify a separate listing. The definition here included conforms with Sections 4(b)(3) and 6(6) of the Estates Act of 1947 and the Act of June 5, 1947, P. L. 477. In the only known reported decision dealing with an employees' pension trust, jurisdiction was assumed by the common pleas court: *Luden, Inc. Employees' Trust Fund*, 42 Berks 1.

(vii) A trust for bondholders;

Comment. This accords with existing case law: *Reading National Bank & Trust Co.'s Acct.*, 22 D. & C. 654.

(viii) A mortgage in possession relationship; and

Comment. This accords with existing case law: *Reading National Bank & Trust Co.'s Acct.*, 22 D. & C. 654.

(ix) Similar trusts or fiduciary relationships.

General Comment. The definition of inter vivos trust becomes important because under Section 301(3) hereof the orphans' court is given exclusive jurisdiction thereof. Heretofore the jurisdiction of the orphans' court over inter vivos trusts has been indefinite, the case law defining jurisdiction being restricted almost entirely to lower court opinions.

SECTION 103. Effective Date.—This act shall take effect on the first day of January, one thousand nine hundred and fifty-two.

SECTION 104. 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 Section 106 of the Fiduciaries Act of 1949.

ARTICLE II.

ORGANIZATION OF ORPHANS' COURT.

SECTION 201. *Orphans' Court in Every County.*—In each county of the Commonwealth there shall continue to exist, as heretofore, a court of record, which shall be called "The Orphans' Court of [] County."

Comment. This is based on Section 1(a) of the 1917 act.

SECTION 202. *Counties Having Separate Orphans' Courts.*—The separate orphans' courts heretofore established shall continue to exist in the Counties of Allegheny, Berks, Cambria, Dauphin, Delaware, Erie, Fayette, Lackawanna, Lancaster, Lehigh, Luzerne, Montgomery, Philadelphia, Schuylkill, Washington, Westmoreland, and York. Each separate orphans' court shall have the number of judges provided by law.

Comment. This is based on Section 1(b) of the 1917 act, altered to include additional counties and to omit reference to the method of election and salaries, which are now taken care of by separate legislation. As thus altered, Section 202 will avoid conflict with other separate legislation on those subjects.

SECTION 203. *Counties Having No Separate Orphans' Courts.*—The orphans' court of each county in which no separate orphans' court is established shall be composed of the judges of the court of common pleas of that county.

Comment. This is based on Section 1(c) of the 1917 act.

SECTION 204. *Court of Record; Seal.*—The orphans' court of each county, whether separate or not, shall be a court of record with all the qualities and incidents of a court of record at common law. Its proceedings and decrees in all matters within its jurisdiction shall not be reversed or avoided collaterally in any other court, but they may be reversed, modified or altered on appeal. Each orphans' court shall have a seal engraved with the same device as is on the great seal of the Commonwealth and with the name of the court.

Comment. This is based on Sections 2 and 6 of the 1917 act.

SECTION 205. *Sessions; Terms.*—Each orphans' court shall be in session as often as its judges shall think necessary or proper. There shall be no terms of the orphans' court.

Comment. This is based on Section 11 of the 1917 act. The last sentence is declaratory of existing case law: *Kretzer v. Murry*, 297 Pa. 451.

SECTION 206. *Rules.*—Rules and forms of procedure, not inconsistent with the Constitution and laws of the Commonwealth and with rules of the Supreme Court, may be made and prescribed by each orphans' court for the conduct of proceedings before it.

Comment. This is based on Section 10 of the 1917 act. Existing Supreme Court rules are those adopted December 30, 1942, effective the first Monday of July 1943, 345 Pa. lv.

ARTICLE III. JURISDICTION.

SECTION 301. *Exclusive Jurisdiction.*—The orphans' court shall have exclusive jurisdiction of:

(1) *Decedents' Estates.* The administration and distribution of the real and personal property of decedents' estates.

Comment. This is suggested by Sections 9(d) and 9(e) of the 1917 act.

(2) *Testamentary Trusts.* The administration and distribution of the real and personal property of testamentary trusts whether created before or after the effective date of this act, except any testamentary trust created before the effective date of the Fiduciaries Act of 1917, jurisdiction of which already has been acquired by another Pennsylvania court. Another court which has acquired jurisdiction of the trust may transfer it to the orphans' court.

Comment. This is suggested by Section 9(b) of the 1917 act. The exception for testamentary trusts created before the effective date of the Fiduciaries Act of 1917 is required because it was not until the Act of 1917 that the jurisdiction of the Orphans' Court over testamentary trusts became exclusive. See comments of the Commissioners to Section 46(g) of the Fiduciaries Act of 1917 which refers to *Simpson's Estate*, 253 Pa. 217, as an example of an instance where the common pleas as late as 1916 was found to have exclusive jurisdiction of a testamentary trust.

(3) *Inter Vivos Trusts.* The administration and distribution of the real and personal property of inter vivos trusts whether created before or after the effective date of this act, except any inter vivos trust created before the effective date of this act, jurisdiction of which already has been acquired by another Pennsylvania court. Another court which has acquired jurisdiction of the trust may transfer it to the orphans' court.

Comment. This is suggested by Sections 9(n) and 9(o) of the 1917 act which, however, did not, as here, give the orphans' court exclusive jurisdiction. The definition of inter vivos trusts in Section 102(7) is essential to an understanding of this clause (3).

(4) *Minors' Estates.* The administration and distribution of the real and personal property of minors' estates.

Comment. This is suggested by Section 9(a) of the 1917 act and by Section 59(a) of the Fiduciaries Act of 1917.

(5) *Incompetents' Estates.* 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 the effective date of this act. Another court which has acquired jurisdiction of the estate may transfer it to the orphans' court.

Comment. This has no counterpart in the 1917 act. It is a substantial change in policy and does in one jump what is accomplished by two jumps (1931 and 1951) in the case of inter vivos trusts. The step here taken, however, has been under consideration for many years. See Hawkins, *Orphans' Court Principles and Practice* (1914), p. 7. For the period between the Act of 1901, P. L. 574, and the Act of 1907, P. L. 292, the orphans' court had concurrent jurisdiction with the common pleas of the estates of persons "utterly unable to take care of his or her property."

(6) *Absentees' and Presumed Decedents' Estates.* The administration and distribution of the real and personal property of the estates of absent persons and of presumed decedents.

Comment. This is suggested by Section 9(c) of the 1917 act. See also Article XII of the Fiduciaries Act of 1949. It is to be noted that death is not a jurisdictional requirement: cf. *Hutton, Death as a Jurisdictional Fact Before the Register of Wills and the Orphans' Court in Pennsylvania*, 53 Dick. L. R. 108.

(7) *Fiduciaries.* The appointment, control, settlement of the accounts of, removal and discharge of, and allowance to and allocation of compensation among, all fiduciaries of estates and trusts of which the court has jurisdiction, except that the grant of letters testamentary and of administration to personal representatives shall remain within the jurisdiction of the register as heretofore.

Comment. See Act of 1917 Sections 9(d) and 9(1), and *Kelley v. McGurl*, 13 D. & C. 350. Cf. Section 53(a) of the Fiduciaries Act of 1917 and Section 331 of the Fiduciaries Act of 1949.

(8) *Guardian of Person of Minors.* The appointment, control and removal of the guardian of the person of any minor.

Comment. See Section 1011 of the Fiduciaries Act of 1949 and Section 59 of the Fiduciaries Act of 1917.

(9) *Custody of Minors.* The determination of the right to the custody of a minor in connection with any proceeding for his adoption or for the appointment of a guardian of his person.

Comment. This is based on the Act of 1949, P. L. 793, adding Section 9(q) to the Orphans' Court Act of 1917.

(10) *Specific Performance of Contracts.* To enforce specifically the performance by either party of any agreement made by a decedent or by a person adjudged incompetent to purchase or sell real or personal property.

Comment. This is suggested by Section 18(b) of the 1917 Fiduciaries Act, which has no counterpart in Section 620 of the Fiduciaries Act of 1949. See also Orphans' Court Act of 1917, Section 9(i).

(11) *Legacies, Annuities and Charges.* Proceedings for the enforcement of legacies, annuities and charges placed on real or personal property by will, inter vivos trust, or orphans' court decree, or for the discharge of the lien thereof.

Comment. See Article VIII of the Fiduciaries Act of 1949. "Enforcement" rather than "payment" is used to make it clear that clause (11) is not limited to money legacies, annuities or charges.

(12) *Construction of Administrative Power.* The construction of an administrative power as to real estate proposed to be exercised by a fiduciary subject to the jurisdiction of the orphans' court.

Comment. This has no statutory precedent. It is included here to make it clear that the orphans' court has jurisdiction to determine the extent of an administrative power exercised by fiduciaries subject to its jurisdiction when an interest in real estate is proposed to be created. Clause (12), being restricted to administrative powers, does not apply to powers of appointment.

(13) *Disposition of Title to Real Estate to Render It Freely Alienable.* The disposition of any interest in real estate of one disabled from dealing with it when title to it has been acquired by descent or will, or is in an estate or trust subject to the jurisdiction of the orphans' court.

Comment. This is based on Section 9(g) of the 1917 act. See also Section 1 of the Revised Price Act of 1917.

(14) *Title to Personal Property.* The adjudication of the title to personal property in the possession of the personal representative, or registered in the name of the decedent or his nom-

inee, or alleged by the personal representative to have been in the possession of the decedent at the time of his death.

Comment. This is intended to obviate, whenever possible, a preliminary dispute as to whether the Orphans' Court has jurisdiction to determine the title to the disputed property. There is no statutory precedent for it.

(15) *Appeals and Proceedings from Registers.* Appeals from and proceedings removed from registers.

Comment. This is based on Section 9(m) of the 1917 act. For references in the Register of Wills Act of 1917 to appeals to the Orphans' Court and certification of proceedings thereto, see Sections 18, 19 and 21(a).

(16) *Birth Records.* Matters relating to birth records, as provided by law.

Comment. See Act of 1941, P. L. 383, 35 PS §§481-484, and Act of 1941, P. L. 405, 35 PS §§491-496. Clauses 16-19 are included in this section for purpose of notice only. The subjects are covered by separate statutes and there is no intention to interfere therewith.

(17) *Adoptions.* Adoptions, as provided by law.

Comment. See Adoption Act of 1925, P. L. 127, as amended, 1 PS §1. In Philadelphia adoptions are in the Municipal Court: 17 PS §693.

(18) *Marriage Licenses.* Marriage licenses, as provided by law.

Comment. See 48 PS §§1-19.

(19) *Inheritance and Estate Taxes.* Matters relating to inheritance and estate taxes, as provided by law.

Comment. See Inheritance Tax Act of 1919, P. L. 521, Sections 13, 15, 72 PS §§2327, 2351, as amended.

SECTION 302. *Concurrent Jurisdiction—Title to Real Estate.*—The orphans' court shall have concurrent jurisdiction of the determination of the persons to whom the title to real estate of a decedent or of the creator of an estate or trust subject to the jurisdiction of the orphans' court has passed by devise or descent or by the terms of the trust instrument, provided that nothing herein shall be construed to restrict the exclusive jurisdiction of the orphans' court to distribute real estate in an estate or trust within its jurisdiction.

Comment. This section is intended to eliminate any doubt concerning the orphans' court's jurisdiction to deal with real estate for the purposes of Sections 734, 756, 983, and 1083 of the Fiduciaries Act of 1949.

SECTION 303. *Conflict of Laws.*—Nothing contained in this act shall be construed to interfere with the rules of law applicable to the determination of the question of whether Pennsylvania courts have jurisdiction of the subject matters enumerated in this act.

Comment. There is no statutory precedent for this section. It is added out of an abundance of caution.

SECTION 304. *Incidental Powers.*—The orphans' court shall have all legal and equitable powers required for or incidental to the exercise of its jurisdiction.

Comment. This is based on what was originally Section 9(n) of the 1917 act.

SECTION 305. *Venue of Decedents' and Minors' Estates.*—When a Pennsylvania orphans' court has jurisdiction of a decedent's or a minor's estate, except as otherwise provided by law, the venue shall be as follows:

(1) *Decedents' Estates.* In the case of a decedent's estate, in the county where the letters are granted to the personal representative, and in the absence of such letters then where the decedent had his last family or principal residence, and if the decedent had no domicile in the Commonwealth, then in any county where any of his property is located.

Comment. This is taken in part from Section 301 of the Fiduciaries Act of 1949.

(2) *Minors' Estates.* In the case of a guardian of a minor appointed by the court, in the county of the court where the guardian was appointed. In the case of a guardian of a minor not appointed by the court, or when there is a minor's estate but no guardian, in the county of any court which would have jurisdiction to appoint a guardian of the estate.

Comment. This is based on Sections 9(a) of the Orphans' Court Act of 1917 and 59(a) of the Fiduciaries Act of 1917. See also Section 18(b) of the Wills Act of 1947 and Act of 1945, P. L. 253, 20 PS §1178, which provide for the appointment of a guardian by will and inter vivos instrument. Case law on the jurisdiction of testamentary guardians is somewhat confused. *Rively's Est.*, 7 Del. 522, holds that jurisdiction is in the court of the county where the guardian resides. It is considered advisable that insofar as possible, only one court have jurisdiction of the assets of a minor, and that this court be the court of the county where the minor resides. This will assure that all applications for maintenance or other purposes of the minor will come before one court.

SECTION 306. *Venue of Trust Estates.*—When a Pennsylvania orphans' court has jurisdiction of any trust, testamentary or inter vivos, except as otherwise provided by law, the venue shall be in the county where at the time being is the situs of the trust. The situs of the trust shall remain in the county of the court which first assumed jurisdiction of the trust, unless and until such court shall order a change of situs under the provisions of this act.

Comment. Section 309 makes provision for change of situs.

SECTION 307. *Situs of Testamentary Trust.*—The situs of a testamentary trust shall be in the county where letters were granted to the personal representative, and in the absence of such letters, then in a county where such letters could have been granted, and if no such letters could have been granted, then in a county in which any trustee resides or is located.

Comment. This is suggested in part by Section 46(g) of the Fiduciaries Act of 1917.

SECTION 308. *Situs of Inter Vivos Trust.*—

(a) *When Provided For in Trust Instrument.* If the trust instrument expressly provides for the situs of the inter vivos trust, its situs shall be at the place within or without the Commonwealth which is in accord with such provision.

Comment. Since the original situs of an inter vivos trust is largely within the control of the settlor, it seems advisable to recognize the right to provide for it in the trust instrument.

(b) *Not Provided For in Trust Instrument.* If the trust instrument does not expressly provide for the situs of the inter vivos trust, its situs shall be:

(1) *Resident Settlor.* In the case of an inter vivos trust whose settlor is domiciled in the Commonwealth (i) in the settlor's lifetime either in the county of his principal residence or in the county in which any of the trustees resides or is located, and (ii) after the settlor's death either in the county in which letters have been granted to his personal representative, or in a county in which letters could have been granted, or in a county in which any trustee resides or is located.

(2) *Nonresident Settlor.* In the case of an inter vivos trust whose settlor is not domiciled in the Commonwealth at the time of the first application to a court during his lifetime or at the

time of his death, in a county in which any trustee resides, and if there be no such trustee, then in a county where property of the trust is located.

Comment. There is no statutory precedent for this clause. Confusion would not arise between counties because under Section 306, jurisdiction after it is once assumed would be confined to one county. The Act of 1931 which gave the Orphans' Court concurrent jurisdiction with the common pleas over inter vivos trusts dodged the problem of venue by its complete silence. Section 15 of the Act of 1836, P. L. 628, 20 PS §2741, in dealing with trusts subject to the jurisdiction of the common pleas, provided that the court of common pleas of the county in which any such trustee resides or is located should have jurisdiction of inter vivos trusts.

This act has been applied by analogy in the orphans' court, but apparently the orphans' courts consider only the residence of the trustee or trustees when jurisdiction is assumed, and do not give particular concern to the residence of the trustees "at the commencement of the trust". Cf. *Mathew's Trust*, 339 Pa. 219; *Cassone's Est.*, 19 D. & C. 272. Under the procedure hereinabove provided, it is believed that in most instances it will be possible to place the jurisdiction of inter vivos trusts in the same county where the decedent's estate is being administered without making a hard-and-fast rule to cover all cases. If the decedent's estate and trust estate are administered in the same county, the difficulties of adjusting the rights of creditors and taxing authorities and of interpreting inter-related testamentary and inter vivos provisions will be substantially reduced.

SECTION 309. *Change of Situs—Order of Court.*—A court having jurisdiction of a testamentary or inter vivos trust, on application of a trustee or of any party in interest, after such notice to all parties in interest as it shall direct and aided if necessary by the report of a master, and after such accounting and such provision to insure the proper payment of all taxes to the Commonwealth and any political subdivision thereof as the court shall require, may direct notwithstanding any of the other provisions of this act, that the situs of the trust shall be changed to any other place within or without the Commonwealth if the court shall find the change necessary or desirable for the proper administration of the trust. Upon such change of situs becoming effective by the assumption of jurisdiction by another court, the jurisdiction of the court as to the trust shall cease and thereupon the situs of the trust for all purposes shall be as directed by the court.

Comment. The right of the court to change situs when changed circumstances make the change desirable may be particularly important in trusts of long duration where the changed circumstances could not have been anticipated and provided for.

ARTICLE IV.

JUDGES.

SECTION 401. *Powers.*—Any judge of an orphans' court, learned in the law, whether or not the court is separate and whether or not it consists of more than one judge, may hear and determine all matters of which the court has jurisdiction. His determination thereof shall be a final decree, unless exceptions thereto are authorized by rule of court.

Comment. This is based on Sections 1(b) and 1(c) of the Orphans' Court Act of 1917.

SECTION 402. *Sitting in Other Courts.*—Subject to regulation by the Supreme Court, any judge of an orphans' court may hear and determine any matter in any court of record except an appellate court with state-wide jurisdiction on call by the president judge of the court in which he is to sit, and any judge of a court of common pleas may hear and determine any matter in an orphans' court on call by its president judge. A judge shall not be required to accept any such call.

Comment. This is based on Sections 3, 4, and 5 of the 1917 act. See Act of 1911, P. L. 101, 17 PS §§226-229, 20 PS §2127, for the mechanics regulating the assignment and payment of services of judges to different districts. That act apparently deals only with fiscal matters and does not empower an orphans' court judge to hear and determine matters in a common pleas court of the same judicial district. For the situation when there is an entire vacancy in the orphans' court, see Act of 1925, P. L. 328, 20 PS §2141.

SECTION 403. *Powers When the Court Is Not in Session.*—Any judge of an orphans' court, learned in the law, shall have power, whether or not the court is in session, to administer *ex parte* business and to issue process.

Comment. This is suggested by Section 15 of the 1917 act. Cf. Supreme Court Equity Rule 4.

SECTION 404. *When President Judge Unable to Act.*—Whenever the president judge of an orphans' court is unable to act, the judge next oldest in commission who is able to act shall have the powers of the president judge.

Comment. This is based on Section 4(c) of the 1917 act.

ARTICLE V.
CLERK—SHERIFF.

A. Clerk.

SECTION 501. *Duties.*—The clerk shall have custody of the records and of the seal of the court, shall faithfully perform, under the direction of the court, all the duties of his office, and may appoint an assistant clerk or clerks, but only with the consent and approval of the court. He shall attest in the name of the president judge alone all process, subpoenas, certificates, copies of records and other documents which shall be issued out of the court.

Comment. This is suggested by Section 8(a) and 8(b)1 of the 1917 act. The General County Law of 1929, 16 PS §220, et seq., provides when the register shall be the clerk of the orphans' court. Cf. 20 PS §§2182, 2183, regarding counties of over 150,000. The last sentence is based on Section 13 of the 1917 act.

SECTION 502. *Dockets.*—The clerk shall keep in the dockets provided for that purpose a record of all proceedings of the court. Local rules may prescribe the recording of all or parts of instruments filed with the court or the clerk, or may prescribe that any instrument be filed in duplicate, and that the duplicates be bound into volumes and preserved in lieu of recording, or may prescribe that any instrument be copied by photographic or other mechanical process.

Comment. This is suggested by Section 8(b)2 of the 1917 act.

SECTION 503. *Bill of Costs.*—Each orphans' court may establish a bill of costs to be charged for the services of the clerk not otherwise provided for by law.

Comment. This is suggested by Section 8(c) of the 1917 act.

SECTION 504. *Translation of Foreign Language Documents.*—A writing not in English shall not be filed in the court or in the office of the clerk unless there is attached to it and filed with it a translation into English sworn to be correct. A writing filed in violation of this section shall not constitute notice to any person.

Comment. This is based on Section 8(b)3 of the 1917 act.

SECTION 505. *Advertisement of Accounts.*—

(a) *Requirement of Notice—Contents of Notice.* The clerk shall give notice by advertisement of the time when accounts

filed with him and with the register will be presented at court for confirmation stating in the advertisement the names and capacities of the respective accountants.

(b) *Places of Advertisement.* The notice shall be advertised at least once a week during the four weeks immediately preceding the time for presentation of the accounts to the court in the case of accounts filed with the register, and at least once a week during the two weeks immediately preceding the time for presentation of the accounts to the court in the case of accounts filed with the clerk

(1) In the legal publication if any designated by rule of court for the publication of legal notices, and

(2) In at least one newspaper of general circulation published within the county, and if no such newspaper is published in that county, then in one such newspaper published nearest to that county.

(c) *Order of Court.* The court, by general order, may limit the number of advertisements in the case of accounts filed with the clerk to not less than two, and in the case of accounts filed with the register to not less than four.

(d) *Cost of Advertisement.* The expense of the advertisement and of the proof thereof shall be charged to the estate or trust and allowed to the clerk who shall pay the publication costs to the newspapers upon delivery of the proofs of publication.

Comment. This is suggested by Sections 46(d), 46(i) and 47(a) of the Fiduciaries Act of 1917.

SECTION 506. *Money Paid Into Court.*—The clerk shall have custody of all funds paid into court. Pending the distribution thereof, the clerk may invest the funds but shall have no duty to do so. Any such investment, except as the court shall otherwise direct, shall be restricted to obligations of the United States or the United States Treasury, or of the Commonwealth.

Comment. See Section 803 of the 1949 Fiduciaries Act as an instance when money is paid into court. Cf. Section 506 of the 1949 Fiduciaries Act for analogous language. See Act of 1878, P. L. 156, 12 PS §621, which is repealed insofar as it applies to the Orphans' Court by Section 801(3). For fees to be received by the clerk, see 20 PS §§2222, 2223.

B. Sheriff.

SECTION 511. *Powers and Duties.*—The sheriff shall serve process and execute orders directed to him pursuant to the provisions of this act.

Comment. There is no statutory precedent for this section.

SECTION 512. *Fees.*—The fees and allowances of the sheriff shall be as provided by law or in the absence thereof as fixed by rule of court.

Comment. This is based on Section 19 of the 1917 act.

ARTICLE VI.

MASTERS, AUDITORS, EXAMINERS, GUARDIANS
AD LITEM AND TRUSTEES AD LITEM.

SECTION 601. *Appointment; Purpose.*—The court may appoint:

(1) *Masters.* A master to investigate any issue of fact and to report his findings of fact, conclusions of law and recommendations to the court.

Comment. This is based on Section 20(b)1 of the 1917 act.

(2) *Auditors of Accounts of Fiduciaries.* Except in the circumstances prohibited by law, an auditor to examine and audit an account and to determine distribution.

Comment. This is based on Section 47(b) and (c) of the Fiduciaries Act of 1917. Cf. Sections 711 and 712 of the Fiduciaries Act of 1949.

(3) *Auditors to State Accounts.* An auditor to state an account when a proper account cannot be obtained from a fiduciary or other person required to state an account.

Comment. This is suggested by Section 17(i)2 of the Orphans' Court Act of 1917. It becomes an important power when a fiduciary, because of physical or mental inability, is unable to state an account, or when there is no fiduciary or other person having an obligation to state an account. See *Smith's Est.*, 324 Pa. 575; *Witman's Ap.*, 28 Pa. 376; *Welsh's Est.*, 24 Dist. 489. No provision is made for the appointment of an auditor by the Supreme Court as provided in Section 22(b) of the 1917 act.

(4) *Examiners of Assets.* By general rule or special order, an examiner or examiners to make periodic or special examination of assets of estates or trusts, and to require all persons in whose custody or control such assets may be held to present them for examination.

Comment. This is based on Section 46(b) of the Fiduciaries Act of 1917. No special provision is made here for an examiner taking oral depositions outside of the Commonwealth, as provided in Section 20(b)3 of the 1917 Act.

(5) *Guardians and Trustees Ad Litem.* On petition or on its own motion, a guardian or a trustee ad litem to represent the interest, not already represented by a fiduciary, of (i) a person not sui juris, or (ii) an absentee, or (iii) a presumed decedent, or (iv) an unborn or unascertained person.

Comment. This is based on Section 17(j) of the 1917 act added by amendment in 1943. See also Sections 704 and 1085 of the Fiduciaries Act of 1949.

SECTION 602. Compensation.—Any person appointed by the court as master, auditor, examiner, guardian ad litem, or trustee ad litem, shall be compensated by reasonable fees fixed by the court and paid from such source as the court shall direct.

Comment. This is suggested in part by Section 46(b) of the Fiduciaries Act of 1917 relating to compensation to be paid to examiners.

SECTION 603. Subpœnas.—Masters, auditors and examiners shall have the power to issue subpœnas with or without a clause of duces tecum to witnesses to appear before them when necessary for the performance of any of their duties. If any person who has been duly subpœnaed fails to obey the subpœna, the master, auditor or examiner issuing the subpœna may report the neglect or refusal to the court. The court upon receiving such report shall have power to issue an attachment in the same manner as is provided in the case of subpœnas issued by it.

Comment. This is suggested by Section 4 of the Act of 1848, P. L. 506, 17 PS §1745.

SECTION 604. Power to Administer Oaths.—Masters, auditors, and examiners shall have the power to administer oaths to parties and witnesses.

Comment. This is suggested by the last clause of Section 47(c) of the Fiduciaries Act of 1917.

ARTICLE VII.

PROCEDURE.

A. Institution of Proceedings and Original Process.

SECTION 701. Petitions.—All applications to the court shall be by petition in the form prescribed by rules of the Supreme Court.

Comment. Compare Pennsylvania Rules of Orphans' Court, Section 3, and Section 17 of the 1917 act.

SECTION 702. *Accounts.*—The court may decide or dispose of any question relating to the administration or distribution of an estate or trust and exercise any of its powers in respect thereof upon the filing of an account or in any other appropriate proceeding. The account may be a complete accounting of the estate or trust or of only the transactions which raise the question to be determined.

Comment. There is no statutory precedent for this section. It may, however, be merely a statement of existing law. See *Cassatt Est.*, 105 Pa. Superior Ct. 14, where the record reveals that the accounting there involved included only the stock transaction giving rise to the apportionment dispute.

SECTION 703. *Writs of Habeas Corpus.*—In any proceeding for the adoption of a minor or for the appointment of a guardian of his person, the court may award a writ of habeas corpus.

Comment. This is suggested by Act of 1949, P. L. 793. See Section 301(9), *supra*.

SECTION 704. *Citation.*—The court may obtain jurisdiction of the person, or the appearance of any person already subject to its jurisdiction, by citation. The citation shall direct the party named therein to file in the office of the clerk a full and complete answer under oath to the averments of the petition on or before a day certain which shall be not less than ten days after the service thereof and to show cause as the decree of the court shall provide.

Comment. This is based in part on Section 17(a) of the 1917 act.

SECTION 705. *Issue and Service of Citation.*—A citation may be awarded by the court upon application of any party in interest and may be served by any adult person, or by the sheriff of the county personally or by deputization, in any county of the Commonwealth in the same manner as a writ of summons in an action of assumpsit in the court of common pleas. When no other time is specially fixed by the court, the citation shall be void unless served within thirty days of its award.

Comment. This is based on Section 17(a), (b), (c), (d), (e), (g) and (h) of the 1917 act. See Rules of Civil Procedure, Sections 1009 and 1010.

SECTION 706. *Proof of Service.*—Proof of service shall be by affidavit of the person or the return of the sheriff making

service, and shall set forth the same information as a sheriff's return in an action of assumpsit.

Comment. This is based on Section 17(f) of the 1917 act.

B. Notice.

SECTION 711. *Service of Notice.*—Citations to obtain the appearance of a person already subject to its jurisdiction, and notices of any proceedings in the orphans' court in addition to the manners provided by Sections 705 and 706 may be served, and proof of service made, as the court shall direct by general rule or special order.

Comment. See Pa. Rules of Orphans' Court, Section 5, Rule 1, and Section 12 of the 1917 act.

C. Action Upon Default of Respondent.

SECTION 721. *Power of Court.*—Should the respondent fail to comply with the requirements of citation or notice, the court, upon proof of service thereof, shall have the power to make such order as to right and justice may belong.

Comment. This is suggested by Section 17(i)1 and 2 of the 1917 act.

D. Summary Decree—Injunction.

SECTION 731. *Decree Without Prior Hearing—Attachment—Sequestration.*—The court, without a prior hearing, may allow the issuing of a writ of attachment of the person or a writ of sequestration, or both, against any one who the court is satisfied is about to leave the Commonwealth or conceals his whereabouts to the prejudice of the complainant or to an estate or trust within the jurisdiction of the court. On the return of the writ the court may proceed as on the return of a citation or make such order as it shall deem appropriate. An attachment or sequestration issued without a prior hearing may be dissolved at any time by the court upon the respondent's giving security, to the satisfaction of the court, for his appearance on a day certain to answer the petition and to abide the orders and decrees of the court in the premises.

Comment. This is suggested by Section 18(b)6 and 7 of the 1917 act. See *infra*, Sections 752 and 753 when summary action is not required.

SECTION 732. *Injunctions.*—The court may issue injunctions for the protection of property within its jurisdiction in the same manner as the court of common pleas of the same county.

Comment. This is based on Section 16 of the 1917 act.

E. Witnesses, Evidence, Hearings, Trials.

SECTION 741. *Subpœnas*.—The court may issue subpœnas with or without a clause of duces tecum into any county of the Commonwealth to witnesses to appear before it or any master, auditor, or examiner appointed by it.

Comment. This is based on Section 20(a) and (c) of the 1917 act. Section 20(a) of the 1917 act was based on Section 22 of the Act of 1836, P. L. 784, 17 PS §2079. Section 22 of the 1836 act makes no special mention of subpœnas duces tecum but apparently applies to them also: Cf. *Abernathy v. Pittsburgh Press Co.*, 91 Pitts. 187. Cf. Register of Wills Act of 1917, Section 9, which includes reference to subpœnas duces tecum. Under Section 603 of this act, subpœnas can be issued by masters, auditors, and examiners. The fact that there is authorization to issue subpœnas from both sources is not considered objectionable.

SECTION 742. *Depositions and Discovery*.—The court, by general rule or special order, may prescribe the practice relating to depositions, discovery, and the production of documents. To the extent not provided for by general rule or special order, the practice relating to such matters shall conform to the practice in the local court of common pleas.

Comment. This is suggested by Sections 20(b) (2) and 3 and 20(c) of the 1917 act. See also Supreme Court Rules, Section 3, Rule 6. Supreme Court Equity Rules, Rule 60, and Rules 4001-4024 of the Procedural Rules.

SECTION 743. *Perpetuation of Testimony and Court Records*.—The court by general rule or special order may prescribe the practice relating to the perpetuation of testimony and to the perpetuation of lost or destroyed court records. When proved, such court records shall have the same legal effect as original records would have had. Notice of proceedings for the perpetuation of testimony and for the perpetuation of lost or destroyed court records shall be given in such manner as the court shall direct.

Comment. This is based on Section 20(d) of the 1917 act. See *Baker v. Weiss*, 43 D. & C. 707, as an instance where the court authorized the taking and perpetuation of testimony.

SECTION 744. *Testimony in Proceedings Removed from Register*.—On appeal from the register, or in a proceeding removed from the register, the court shall hear the testimony de novo unless all parties appearing in the proceeding agree that the case be heard on the testimony taken before the register. In the latter event the court may require witnesses already examined and other witnesses to appear before it.

Comment. This is based on Section 20(e)1 and (2) of the 1917 act.

SECTION 745. *Jury Trial.—When Available.—*

(a) *Right to Jury Trial—Waiver.* A person entitled to a trial by jury may make demand therefor prior to the hearing of the issues of fact. The right to trial by jury is waived if such a demand is not so made, or if the person claiming the right fails to appear at the hearing or fails to object to trial by the court before the introduction of evidence is commenced.

Comment. This is suggested by Section 18(a) of the Model Probate Code. The right to dispense with jury trial by agreement is recognized in Art. V, Section 27 of the Pennsylvania Constitution.

(b) *When Not of Right.* When there is no right to trial by jury or when the right is waived, the court in its discretion may require a jury to decide any issue of fact, but the verdict in such a case shall be advisory only.

Comment. This is Section 18(b) of the Model Probate Code. See also Section 21(a) of the 1917 act.

(c) *Trials in Common Pleas.* In any case begun before, certified, or appealed to the court, it may send an issue of fact to the court of common pleas for trial by jury.

Comment. This is based on Section 21(a), (b) and (c) of the 1917 act. Provision for separate treatment of facts arising on appeal from the register, distribution of proceeds of sales of real estate, and investment of funds pendente lite are omitted as not warranting separate consideration. The form of the precept for an issue is considered a matter of detail for the court which can be carried through as a matter of course. The investment of funds pendente lite is a general problem, not a special problem for this section. See Section 506 of the Fiduciaries Act of 1949, and the Fiduciaries Investment Act of 1949.

SECTION 746. *Trials in the Orphans' Court.—*

(a) *Jury.* When a trial by jury is necessary or advisable, the court may draw a jury and preside at the trial of the issue. The panel of jurors drawn for service in the common pleas court of the county in which the orphans' court is located shall be available for such service in the orphans' court when required, and in counties where there is a separate orphans' court the orphans' court and the court of common pleas shall by appropriate rules provide for and regulate the manner in which the jurors shall be made available and sent to the orphans' court when required for the trial of issues therein.

(b) *Rules of Court.* Unless and until the orphans' court otherwise directs, the appropriate rules of the common pleas

courts of the same county shall apply to jury trials of issues in the orphans' court, and matters relating to such trials shall be heard and disposed of by the orphans' court.

(c) *Verdict or Judgment.* Whenever a verdict or judgment is entered in any such case in the orphans' court, the clerk shall forthwith certify it to the prothonotary who shall file the certificate in his office and shall docket and index the verdict or judgment in the same manner as a verdict or judgment in the court of common pleas.

(d) *Effect of Entry of Judgment.* The entry of judgments in such cases shall have the same force and effect and be subject to appeals in the same manner as appeals in like cases are now taken in the common pleas courts from judgments on issues certified by the orphans' court except that only one appeal shall be taken and that shall be from the final decree of the orphans' court upon which appeal all alleged errors may be assigned whether arising in the jury trial or otherwise.

Comment. This is based on Section 21(d) of the 1917 act added by the Act of 1937, P. L. 2665, and amended by the Act of 1939, P. L. 94.

SECTION 747. *Will Contest.*—When a substantial dispute of fact shall arise concerning the validity of a writing alleged to be testamentary, any party in interest shall be entitled to a trial of this fact by a jury.

Comment. This is suggested by Section 21(b) of the 1917 act and is included herein to insure that the right to trial by jury in such circumstances is preserved. The absolute right to trial by jury in will contests was not a right recognized at common law: See Hutton, *Wills in Pennsylvania*, p. 385, et seq. Since the Constitution (Article I, Section 6) merely guarantees that "Trial by jury shall be as heretofore" and since there is doubt as to the extent of this right in will contests before the effective date of the Constitution, it seems advisable to preserve the legislative provision and not depend solely upon the constitutional guarantee.

SECTION 748. *Determination of Incompetency.*—Any person against whom proceedings have been taken to establish his incompetency shall be entitled to a trial of such fact by a jury.

Comment. This is suggested by Section 4 of the Act of 1907, P. L. 292, 50 PS 944, under which a person alleged to be incompetent is entitled to a jury trial if demand therefor is made in writing "prior to the decision of the court". Under Section 745(a) hereof the demand would have to be made before the hearing. Circumstances similar to those prompting the inclusion of Section 747 to which reference is made in the comments to Section 747 prompt the inclusion of this Section.

F. Enforcement of Orders and Decrees.

SECTION 751. *Methods of Enforcement.* — Compliance with an order or decree of the court may be enforced by

- (1) attachment of the person;
- (2) sequestration of real or personal property;
- (3) execution on personal property;
- (4) attachment execution; or
- (5) execution on real estate

Comment. This is based on Section 18(a) of the 1917 act.

SECTION 752. *Procedure on Attachment of the Person.*—

(a) *Direction of Writs.* A writ of attachment of the person shall be directed to and executed by the sheriff of the county in which the court is located or of any county where the person to be attached is located.

Comment. This is based on Section 18(b)1 and 2 of the 1917 act.

(b) *Discharge of Person Attached for Contempt.* Any person attached for contempt may be discharged from custody by the court upon purging himself of contempt to the satisfaction of the court by whose order he was attached.

Comment. This is based on Section 18(b)8 of the 1917 act. See Rules of Civil Procedure 2076, et seq.

SECTION 753. *Procedure on Sequestration of Real or Personal Property.*—A writ of sequestration of real or personal property of an estate or trust, or of the respondent, to enforce an order or decree of the court in the administration of the estate or trust shall be allowed by the court as fully as in any court of equity, directed to and executed by the sheriff of the county in which the court is located or of any county where property to be sequestered is located. The court by general rule or special order may prescribe the practice relating to sequestration of real and personal property. To the extent not provided for by general rule or special order, the practice relating to sequestration shall conform to the practice in the local court of common pleas.

Comment. This is based on Section 18(b) of the 1917 act. Since the procedure for sequestration, as set forth in the 1917 act, has been employed very infrequently, and can be included in rules of court if deemed necessary,

Section 753 has been set forth in an abbreviated form. The language employed is suggested in part by Section 2 of the Act of 1818, P. L. 285, 7 Sm. L. 131, 39 PS §200.

SECTION 754. *Procedure on Execution on Personal Property.*—Writs of execution on personal property shall be allowed by the court and directed to and executed by the sheriff of the proper county. The proceedings thereon shall be the same as on execution on personal property issued out of the court of common pleas of the same county.

Comment. This is based on Section 18(a)3 and Section 18(d) of the 1917 act.

SECTION 755. *Procedure on Attachment Execution.*—Writs of attachment execution shall be allowed by the court and directed to and executed by the sheriff of the proper county. The proceedings thereon shall be the same as attachment executions issued out of the court of common pleas of the same county.

Comment. This is based on Section 18(a)4 of the 1917 act.

SECTION 756. *Procedure on Execution on Real Estate.*—

(a) *Filing in Common Pleas.* The prothonotary of any court of common pleas shall, on demand of the fiduciary or 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 any person, and such transcript or extract shall constitute a judgment against such person 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 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 from the time when the records are so changed.

(b) *Satisfaction and Discharge.* If the orphans' court shall order such person 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.

(c) *Executions.* Execution may be issued on the judgment out of the court of common pleas against the real estate of such respondent by any interested party for the recovery of so much

as may be due to him in the same manner as upon a judgment rendered by the court of common pleas.

Comment. This is based on Section 18(e) of the 1917 act altered to conform to the style adopted in Section 755 of the Fiduciaries Act of 1949.

G. Costs.

SECTION 761. Allowance and Allocation.—The allowance and allocation of costs incident to proceedings before the court or to the administration of estates or trusts within the jurisdiction of the court shall be as now or hereafter provided by law, and in the absence thereof, as fixed by the court by general rule or special order.

Comment. This section has no counterpart in the 1917 act.

H. Appeals.

SECTION 771. Right of Appeal.—Any party in interest who is aggrieved by a final order or decree of the orphans' court, or a fiduciary whose estate or trust is so aggrieved, may appeal therefrom to the proper appellate court. An appeal in like manner may be taken from a decree of distribution of the orphans' court which is not final within the meaning of this section, provided the orphans' court shall certify that the decree is sufficiently definite to determine the substantial issues between the parties.

Comment. The first sentence of Section 771 is based on the first portion of Section 22(a) of the 1917 act. It is not intended that a fiduciary who is a mere stakeholder shall have the right to appeal, but it is intended that he shall have the right to appeal from an allowance of a claim against the estate. The second sentence is added to change the rule established by case law (cf. *Hood's Est.*, 323 Pa. 253; *Brusstar's Est.*, 123 Pa. Superior Ct. 45), which in some instances has caused unnecessary delay to the appeal when a schedule of distribution has been directed.

SECTION 772. Effect of Appeal.—No appeal from an order or decree of an orphans' court concerning the validity of a will or the right to administer shall suspend the powers or prejudice the acts of a personal representative acting thereunder. The reversal or modification of any decree of an orphans' court in a proceeding in which the court has jurisdiction of the sale, mortgage, exchange or conveyance of real or personal estate shall not divest any estate or interest acquired thereunder by a person not a party to the appeal.

Comment. This is based in part on Section 22(a) of the 1917 act. Cf. Fiduciaries Act of 1949, Sections 520, 547, 950, 967, 1045(c), 1066. See also Section 21(b) of the Register of Wills Act of 1917.

SECTION 773. *Disposition of Cases on Appeal.*—The Supreme and Superior Courts of the Commonwealth shall, in all cases of appeal from a decree of the orphans' court, hear, try and determine the same as to right and justice may belong, and decree according to the equity thereof, and may place or allocate the records costs including printing costs, upon the party in interest who appeals or upon the estate or trust.

Comment. This is based on Section 22(b) of the 1917 act. An article in the Oct. 1945 issue of "*The Shingle*" explains the reasons for providing expressly that the Orphans' Court may place or allocate the costs.

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) Section four of the Act of April 11, 1848, P. L. 506, 17 PS §1745, insofar as it applies to auditors appointed by orphans' courts.

Comment. This is covered by Section 603 of this proposed act.

(2) Act of March 27, 1873, P. L. 49, 20 PS §2371, absolutely.

Comment. This act which provides for the enforcement, by attachment, of a decree of the orphans' court for the payment of money is no longer required. See Section 755 of this act.

(3) Section one of the Act of May 25, 1878, P. L. 156, 12 PS §621, insofar as it applies to monies paid into the orphans' court.

Comment. This is covered by Section 506 of this proposed act.

(4) Section twenty-four of the Fiduciaries Act of 1917, P. L. 447, except insofar as it saves the jurisdiction of other courts in actions which were pending at the time of the approval of the Fiduciaries Act of 1917.

Comment. This was saved from repeal by the Fiduciaries Act of 1949, Section 1401(a) (1) (i). It is covered by Section 301(11) hereof.

(5) Section forty-six (b) of the Act of June 7, 1917, P. L. 447, absolutely.

Comment. This was saved from repeal by the Fiduciaries Act of 1949. It is covered by Section 601 hereof.

(6) Section forty-six (d) of the Act of June 7, 1917, P. L. 447, absolutely.

Comment. This was saved from repeal by the Fiduciaries Act of 1949. It is covered by Section 505 hereof.

(7) Section forty-six (g) of the Act of June 7, 1917, P. L. 447, absolutely.

Comment. This was saved from repeal by the Fiduciaries Act of 1949. It is covered by Sections 301(2) and 301(7) hereof.

(8) Section 46(i) of the Act of June 7, 1917, P. L. 447, absolutely.

Comment. This was saved from repeal by the Fiduciaries Act of 1949. It is covered by Section 505 hereof.

(9) Section 47(a) of the Act of June 7, 1947, P. L. 447, absolutely.

Comment. This was saved from repeal by the Fiduciaries Act of 1949. It is covered by Section 505 hereof.

(10) The Act approved June 7, 1917, P. L. 363, except the last paragraph of section 9.

Comment. It is believed that provisions for the allowance and division of brokers' fees has no part in the Orphans' Court Act, and it should be preserved in this form until such time as the Legislature wishes to take further action thereon. Another portion of Section 9 not included in this act because not considered essential reads: "The right to empower and authorize testamentary trustees to continue to hold real estate charged with a charitable purpose, notwithstanding provisions of the will of the testator, where in the judgment of the court, it will enable the testamentary trustees eventually to accomplish the main intent of the testator."

(11) Section 6 of the Act of April 2, 1868, P. L. 3, 20 PS §2222.

Comment. This is a fee bill.

(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:

Act of June 25, 1947, P. L. 963, 20 PS §2223.

Comment. This is a fee bill.