

REPORT
of the
JOINT STATE GOVERNMENT COMMISSION
OF THE GENERAL ASSEMBLY OF
THE COMMONWEALTH OF PENNSYLVANIA



Relating to the Following
DECEDENTS' ESTATES LAWS OF 1951
Incompetents' Estates Act of 1951
Register of Wills Act of 1951
Orphans' Court Act of 1951
Estate Tax Apportionment Act of 1951

Pursuant to House of Representatives Concurrent
Resolution No. 74 of the General Assembly of 1949

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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F O R E W O R D

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

The Joint State Government Commission, as directed by Senate Resolution Serial No. 46 of the 1945 session of the General Assembly, submitted to the 1947 session drafts of an Intestate Act, a Wills Act, an Estates Act and a Principal and Income Act, all of which were enacted. These, with comments, are contained in the Commission's report, *Decedents' Estates Laws of 1947*. As directed by Senate Resolution Serial No. 34 of the 1947 session of the General Assembly, the Joint State Government Commission submitted to the 1949 session drafts of a Fiduciaries Act and a Fiduciaries Investment Act, both of which were enacted. These, with comments, are contained in the Commission's report, *Decedents' Estates Laws of 1949*.

Continuing the study of Decedents' Estates Laws under the 1949 directive, the Advisory Committee prepared drafts of the Incompetents' Estates Act of 1951, the Register of Wills Act of 1951, the Orphans' Court Act of 1951 and the Estate Tax Apportionment Act of 1951 which the Joint State Government Commission approved and submitted to the 1951 session of the General Assembly.

The Register of Wills Act of 1951 (Act No. 159) and the Estate Tax Apportionment Act of 1951 (Act No. 338) were enacted substantially as introduced. The Incompetents' Estates Act of 1951 (Act No. 158) and the Orphans' Court Act of 1951 (Act No. 263) were amended by the General Assembly to retain for common pleas courts throughout the Commonwealth the jurisdiction of incompetents' estates and

to retain for the common pleas courts of Philadelphia County alone a concurrent jurisdiction over inter vivos trusts. The original bills had provided that orphans' courts throughout the Commonwealth have exclusive jurisdiction of incompetents' estates and of inter vivos trusts.

The four acts represent a complete revision of earlier legislation, with particular emphasis on clarification of procedures and simplification of language. Archaic laws regarding incompetents' estates have been modernized and to a large degree made to conform to provisions of the Fiduciaries Act of 1949 relating to minors' estates. The Estate Tax Apportionment Act of 1951 has clarified and reduced to more understandable wording the difficult rules intended to apportion more fairly the burden of estate taxes.

There are submitted herewith the Incompetents' Estates Act of 1951, the Register of Wills Act of 1951, the Orphans' Court Act of 1951 and the Estate Tax Apportionment Act of 1951, all as finally enacted, together with explanatory comments on each section. The changes to existing law are fully explained in the comments.

BAKER ROYER, *Chairman*

Joint State Government Commission

Capitol Building

Harrisburg, Pennsylvania

1951

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Incompetents' Estates Act
of 1951

HISTORY OF
INCOMPETENTS' ESTATES ACT OF 1951

SENATE BILL No. 6

INTRODUCED BY THE HONORABLE A. EVANS KEPHART

In the Senate

Referred to Committee on Judiciary General, January 15.
Reported as amended, March 29.
Passed first reading, March 29.
Over in order, April 2, 3, 4.
Passed second reading, April 9.
Passed third reading and final passage, April 10 (40-7).

In the House

Referred to Committee on Judiciary, April 16.
Reported as committed, May 22.
Passed first reading, May 23.
Passed second reading, May 24.
Over in order, June 4.
Amended, June 5.
Passed third reading with amendments, June 5.
Passed finally, June 6 (206-0).

In the Senate

Senate concurred in House amendments, June 18 (50-0).

Approved by the Governor, June 28, 1951

Act No. 158

INCOMPETENTS' ESTATES ACT OF 1951

No. 158

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 relating to incompetents' estates.

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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) "Prothonotary" means the prothonotary of the court of common pleas having jurisdiction.

(2) "Court" means the court of common pleas 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. It includes a person heretofore declared to be a lunatic, an habitual drunkard, insane or weak-minded.

Comment. See 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. The definition here employed is believed to be broad enough to supply all such or similar definitions. The last sentence is required because of the retroactive application of the act.

(4) "Guardian" means a fiduciary appointed by a court of competent jurisdiction to have the care and management of the estate of an incompetent. It includes committees and guardians heretofore appointed for incompetents.

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". The last sentence is required because of the retroactive application of the act.

(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 as amended by Act 298 of 1951.

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.

Comment. There being no qualification of the language employed, the act clearly applies to estates of persons heretofore determined to be incompetent as well as those hereafter declared to be incompetent.

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:

* "jursidiction" in original.

(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. For right to jury trial see Section 4 of the Act of 1907, P. L. 292, 50 PS §944, saved from repeal in Section 801(a) (14) hereof.

(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.

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 incompetent'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.

(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, 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. For right of trial by jury see Section 4 of the Act of 1907, P. L. 292, 50 PS §944, saved from repeal by Section 801(a) (14).

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, 28 PS §10, and Section 811 of the 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. Cf. 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 prothonotary, (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 employes 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-Guardians.*—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, **That 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

* "attorney-in-fact" in original.

** "That" omitted in original.

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 safekeeping 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 discretion, 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 suggested by 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 competency of his ward. 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. With court approval, a lease for more than five years could be granted under Section 443. See Sections 962 and 1062 of the Fiduciaries Act of 1949.

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 entirety, 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. Cf. *Biddle Est.*, 1 Fiduc. Rep. 1. 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 had he been 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 anyone 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 the prothonotary 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.

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 of the orphans' court, 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 prothonotary 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. Cf. 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 prothonotary.

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. Notice should be given to the United States Veterans' Administration when required by the Act of 1929, P. L. 647, 20 PS §788.

B. Audits.

SECTION 611. *Confirmation of Accounts.*—The account of a guardian shall be confirmed by the court or by the prothonotary, 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 612. *Recognition of Claims.*—Upon the audit of the account of the guardian of a person who has died during in-

competency, 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 612 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 202 of the Fiduciaries Act of 1949, 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, for ultimate consideration by the orphans' court.

SECTION 613. *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 614. *Decree of 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 prothonotary 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 incompetent 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. *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 643. *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. Cf. 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 as amended. 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 as amended.

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 Commonwealth 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," absolutely.

Comment. Article IX of the Mental Health Act of 1951 entitled "Guardian of the Person" supplies 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 aldermen 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 sixty-five (Pamphlet Laws 31), entitled "An act relating to the committees of the estates of lunatics and habitual drunkards," absolutely.

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 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 (2).

(6) The act, approved the thirteenth day of April, one thousand eight hundred 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 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 right to trial by jury is preserved by Section 4 of the Act of 1907, P. L. 292, which is saved from repeal in clause (14) hereof.

(8) The act, approved the twenty-fifth day of May, one thousand eight hundred seventy-eight (Pamphlet Laws 154), entitled "An act to enable married women whose husbands are lunatics to dispose of their separate estates," absolutely.

Comment. The purposes of this act (50 PS §799) can be accomplished under Section 443 hereof.

(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," absolutely.

Comment. This act (50 PS §796) is no longer necessary. 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," absolutely.

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

(14) 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, except section four thereof which is hereby saved from repeal.

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. Section 4 of the 1907 act has been saved from repeal to preserve the right to trial by jury.

(15) 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

* "the" omitted in original

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.

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 thirteen (Pamphlet Laws 358), entitled "An act relating to the competency as evidence of certain findings in proceedings in lunacy," absolutely.

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 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

* "own" omitted in original.

** "corporation" in original.

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," insofar as they apply to estates of incompetents.

Comment. These clauses are repealed to make it clear that when there is a guardian for the incompetent, procedures provided for by the act should be followed rather than those 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 sixty-six (Pamphlet Laws 780), entitled "An act authorizing persons, whose wives, or husbands, are non com-

pos 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 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.

Approved the 28th day of June, A. D. 1951.

JOHN S. FINE.

Register of Wills Act
of 1951

HISTORY OF REGISTER OF WILLS ACT OF 1951

SENATE BILL No. 17

INTRODUCED BY THE HONORABLE DONALD P. MCPHERSON, JR.

(By Request)

In the Senate

Referred to Committee on Judiciary General, January 15.

Reported as amended, March 29.

Passed first reading, March 29.

Over in order, April 2, 3, 4.

Passed second reading, April 9.

Passed third reading and final passage, April 10 (49-0).

In the House

Referred to Committee on Judiciary, April 16.

Reported as committed, May 22.

Passed first reading, May 23.

Amended, May 24.

Passed second reading with amendments, May 24.

Passed third reading and final passage, June 4 (206-0).

Vote by which bill passed third reading and final passage reconsidered, June 5.

Amended, June 5.

Passed third reading with amendments, June 5.

Passed finally, June 6 (206-0).

In the Senate

Senate concurred in House amendments, June 18 (50-0).

Approved by the Governor, June 28, 1951

Act No. 159

REGISTER OF WILLS ACT OF 1951

No. 159

AN ACT

Relating to the jurisdiction, powers, and duties of registers of wills, and regulating proceedings before them, and the costs thereof, the effects of their acts, and appeals therefrom.

Comment. This is substantially the same as the title to the 1917 act. It omits "qualification" of registers because Section 1 of the 1917 act, relating to the register's oath and bond, has not been re-enacted herein for the reasons stated in the comment to Section 601 (3).

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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 Register of Wills Act of 1951.

Comment. This is similar to Section 25 of the 1917 act.

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) “Register” means the register of wills having jurisdiction.

Comment. This is the same as the definition of “register” in the Fiduciaries Act of 1949, and in the Orphans’ Court Act of 1951, except that the words “to grant letters testamentary or of administration” are omitted.

(2) “Court” means the orphans’ court having jurisdiction.

(3) “Clerk” means the clerk of the orphans’ court having jurisdiction.

Comment. The definitions of “court” and “clerk” are the same as in the Fiduciaries Act of 1949, and in the Orphans’ Court Act of 1951.

(4) “Personal representative” means an executor or administrator of any description.

Comment. This is the same as the definition of “personal representative” in the Fiduciaries Act of 1949.

(5) “Letters” means letters testamentary or letters of administration of any description.

Comment. The Statutory Construction Act of 1937, P. L. 1019, 46 PS 601, includes no definition of letters. Its frequent use throughout the act requires its inclusion here.

(6) "Will" means a written will, codicil or other testamentary writing and a nuncupative will.

Comment. The Statutory Construction Act provides merely that "Will includes codicil".

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

Comment. There being no qualification of the language employed, the act clearly applies in all cases, regardless of the date of death of the decedent.

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 106 of the Fiduciaries Act of 1949, Section 18 of the Estates Act of 1947, and Section 104 of the Orphans' Court Act of 1951.

ARTICLE II.

JURISDICTION AND POWERS.

SECTION 201. *Register's Jurisdiction.*—Within the county for which he has been elected or appointed, the register shall have jurisdiction of the probate of wills, the grant of letters to a personal representative, and any other matter as provided by law.

Comment. This is suggested by Section 3 of the 1917 act.

SECTION 202. *Deputy Register.*—Every register shall appoint a deputy or two deputies who shall have power to perform the duties of the office in his behalf and for whose conduct he and his surety shall be accountable. In case of a vacancy in the office of register, the first deputy shall exercise all the powers of the register until a successor is appointed or elected.

Comment. This is suggested by Section 2 of the 1917 act, as amended in 1945, amplified to indicate more clearly the place of authority in the case of vacancy in the office of register. Before the 1945 amendment, the reference to "deputy" was in the singular. Sections 224 and 233 of the General County Law of 1929, 16 PS 224, 233, applying to all but first-class counties, and providing for a single deputy, are repealed and partially repealed in Section 601(a) hereof to avoid any inconsistency with this section.

SECTION 203. *Witnesses—Testimony.*—The register shall have power to—

(1) *Subpoenas.* Issue a subpoena to any person in any county of the Commonwealth to appear or produce papers or records before him.

Comment. This is suggested by Section 9 of the 1917 act and by Section 741 of the Orphans' Court Act of 1951. It was not considered advisable to list in detail the circumstances when a subpoena may be issued or the procedure to be followed upon failure to obey the subpoena. See Section 205, *infra*, for the procedure to enforce a subpoena.

(2) *Administering Oaths.* Administer oaths and affirmations to parties and witnesses appearing before him and to designate any clerk or clerks in his employ to administer such oaths and affirmations to parties and witnesses appearing before them.

Comment. This should be compared with Section 604 of the Orphans' Court Act of 1951, and Sections 304 and 311 of the Fiduciaries Act of 1949. There is no comparable provision in the 1917 act. The authority to designate clerks to administer oaths is included to give recognition to the practice in Philadelphia County where such delegation of authority is necessary because of the volume of business involved.

(3) *Depositions.* Issue commissions or rules to take the depositions of witnesses in another county or outside of the Commonwealth. The practice relating thereto shall conform to the practice in the local orphans' court.

Comment. This is suggested by Section 10 of the 1917 act. The second sentence is new and should be considered in connection with Section 742 of the Orphans' Court Act of 1951.

SECTION 204. *Witness Fees.*—Witnesses appearing before the register in obedience to the register's subpoena shall be entitled to the same fees and mileage as are allowed by law to witnesses in the orphans' court.

Comment. This is suggested by the last sentence of Section 9 of the 1917 act.

SECTION 205. *Enforcement of Subpoenas, Orders and Costs.*—Should any person refuse to comply with any subpoena or order of the register or to pay all costs, the register shall forthwith certify the record of the proceedings to the court. The court, upon petition of any party in interest, shall compel payment of the costs and shall enforce obedience to the subpoena or order

in the same manner as in cases of subpoenas and orders issued or made by the court.

Comment. This is suggested by the portions of Sections 8 and 9 of the 1917 act which deal with the enforcement of the production of a will or the appearance of witnesses. It was considered advisable to refer enforcement to the orphans' court in all cases. See Orphans' Court Act of 1951, Sections 301(14), 751-756. This section makes unnecessary a special reference to enforcement of payment of the register's costs as provided in Section 23 of the 1917 act.

SECTION 206. *Caveat.*—

(a) *Bond.* When a caveat has been filed, the register shall not delay the probate of a will or the grant of letters for more than ten days after the filing of the petition for probate or for grant of letters, or after the filing of the caveat, whichever shall be later, unless within such ten-day period a party in interest shall file with the register his bond in the name of the Commonwealth with sufficient surety in such amount, not less than five hundred dollars or more than five thousand dollars, as the register considers necessary, conditioned for the payment of any costs which may be decreed against the caveator.

(b) *Failure to Give Bond.* If no bond is filed within the ten-day period, the caveat shall be considered abandoned, except as the register, for cause shown, shall extend the time.

(c) *Costs.* The register, or the court upon appeal, shall determine the amount of costs occasioned by a caveat and direct by whom they shall be paid. If all or part of the costs shall be finally decreed to be paid by the caveator, any party interested in the costs may bring suit on the caveator's bond as provided by law.

Comment. This is suggested by Section 20 of the 1917 act but differs from Section 20 in that it is confined to a caveat alone and does not deal with appeals. Also it more clearly designates the time for the beginning of the ten-day period. Under existing practice it has been difficult to determine whether the ten-day period begins when a letter is filed with the register or only after a more formal caveat is filed. The allowance of a ten-day period after the filing of the petition for probate or for grant of letters will give persons the opportunity to examine the will and then to file a bond if they decide to contest the will.

SECTION 207. *Certification of Records to Court.*—Whenever a caveat shall be filed or a dispute shall arise before the register concerning the probate of a will, the grant of letters or

the performance of any other function by the register, he may certify, or the court upon petition of any party in interest may direct the register at any stage of the proceedings to certify, the entire record to the court, which shall proceed to a determination of the issue in dispute. No letters of administration pendente lite shall be granted by the register after proceedings have been removed to the court except by leave of court.

Comment. This includes the substance of Sections 18 and 19 of the 1917 act, combined into a single abbreviated section as a matter of style. Section 17 of the 1917 act, under which a register may award an issue for jury trial, has not been included. When the register is convinced that an issue should be awarded for jury trial, he should certify the record to the orphans' court. The record so certified may include the testimony taken before the register and the court in its discretion may award an issue thereon without further hearing: Orphans' Court Act of 1951, Section 744.

SECTION 208. Appeals.—

(a) *When Allowed.* Any party in interest who is aggrieved by a decree of the register, or a fiduciary whose estate or trust is so aggrieved, may appeal therefrom to the court within two years of the decree: Provided, That the executor designated in an instrument shall not by virtue of such designation be deemed a party in interest who may appeal from a decree refusing probate of it. The court, upon petition of a party in interest, may limit the time for appeal to six months.

Comment. This is suggested by Section 21(a) of the 1917 act. As in the case of Section 771 of the Orphans' Court Act of 1951, the persons entitled to appeal are more clearly indicated. The prohibition against the executor, as such, appealing from refusal of probate is believed to be declaratory of case law: *Faust Est.*, 364 Pa. 529; *Knecht's Est.*, 341 Pa. 292; *Winters' Est.*, 57 D. & C. 433.

(b) *Bond.* Anyone appealing from a decree of the register shall, within ten days after filing his appeal, file with the register his bond in the name of the Commonwealth with sufficient surety in such amount, not less than five hundred dollars or more than five thousand dollars, as the register considers necessary, conditioned for the payment of any costs that may be decreed against him. If no bond is filed within the ten-day period, the appeal shall be considered abandoned.

Comment. This is suggested by Section 20(a) of the 1917 act and should be compared with Section 206(a) hereof dealing with caveats.

(c) *Effect of Appeal.* No appeal from a decree of the register shall suspend the powers or prejudice the acts of a personal representative to whom letters have been granted.

Comment. This is suggested by Section 21(b) of the 1917 act. It seemed advisable to refer to "a decree" rather than decrees involving the validity of a will or the right to letters as in the 1917 act. Compare Sections 520 and 547 of the Fiduciaries Act of 1949 and Section 772 of the Orphans' Court Act of 1951.

(d) *Excepted Appeals.* This section shall not apply to appeals for inheritance tax purposes, nor to appeals specially regulated by law.

Comment. This subsection is added to avoid any possible conflict with appeals on inheritance tax matters for which special provision is made in the tax laws. See Act of 1919, P. L. 521, Section 13, as amended, 72 PS 2327.

SECTION 209. *Bill of Costs.*—The court may establish a bill of costs to be charged for the services of the register not otherwise provided by law.

Comment. This is suggested by Section 22 of the 1917 act and is similar to Section 503 of the Orphans' Court Act of 1951. It seemed inadvisable to make any distinction between counties with or without separate orphans' courts as was done in the 1917 act. The Act of 1947, P. L. 933, as amended, 20 PS 2045, lists the fees of registers in counties of the fifth, sixth, seventh and eighth classes.

ARTICLE III.

PROBATE.

SECTION 301. *Place of Probate.*—The will of a decedent domiciled in the Commonwealth at the time of his death shall be probated only before the register of the county where the decedent had his last family or principal residence. If the decedent had no domicile in the Commonwealth, his will may be probated before the register of any county where any of his property is located.

Comment. This is suggested by Section 4 of the 1917 act. It is consistent with Section 301 of the Fiduciaries Act of 1949, and Section 305(1) of the Orphans' Court Act of 1951. The second sentence differs from the 1917 act which restricted the right to letters in such circumstances to the county "where the principal part of the goods and estate of such decedent within this Commonwealth shall be".

SECTION 302. *Manner of Probate.*—All wills shall be proved by the oaths or affirmations of two competent witnesses, and

(1) *Will Signed by Testator.* In the case of a will to which the testator signed his name, proof by subscribing witnesses, if there are such, shall be preferred to the extent that they are readily available, and proof of the signature of the testator shall be preferred to proof of the signature of a subscribing witness.

Comment. There is no statutory precedent for this clause, but it conforms with Section 4 of the Wills Act of 1947. It should now be clear that when a subscribing witness is not readily available, the testator's signature may be proved by others without resort to proof of the witnesses' signatures. Compare *Miller v. Carothers*, 6 S. & R. 215.

(2) *Will Signed by Mark or by Another.* In the case of a will signed by mark or by another in behalf of the testator, the proof must be by subscribing witnesses, except to the extent that the register is satisfied that such proof cannot be adduced by the exercise of reasonable diligence. In that event other proof of the execution of the will, including proof of the subscribers' signatures, may be accepted, and proof of the signature of a witness who has subscribed to an attestation clause shall be prima facie proof that the facts recited in the attestation clause are true.

Comment. This is suggested by Section 2(2) and 2(3) of the Wills Act of 1947. The validity of such a will depends on the circumstances under which it was executed including its subscription by two witnesses. Proof of the signatures of subscribing witnesses would not of itself prove a compliance with the requirements of the Wills Act of 1947, unless the attestation clause recited a compliance therewith. Cf. Hunter, *O. C. Commonplace Book*, pp. 437, 440. Non-subscribing witnesses present at the execution of the will, of course, would be competent to prove compliance with the statutory requirements.

(3) *Nuncupative Will.* In the case of a nuncupative will, the witnesses shall have been present when the will was declared, and shall have reduced it to writing or directed it to be reduced to writing.

Comment. This is suggested by Section 3(a) of the Wills Act of 1947.

SECTION 303. *Limit of Time for Probate.*—

(a) *Original Probate.* A will, other than a nuncupative will, may be offered for probate at any time.

Comment. This conforms with the first portion of Section 16(b) of the 1917 act. The reference to nuncupative wills is included to avoid incon-

sistency with Section 3(a) of the Wills Act of 1947, and Section 304, *infra*. "Original probate" means the first probate of any testamentary writing of the decedent in Pennsylvania. It should be compared with "subsequent probate" mentioned in subsection (c) of this section which refers to the probate of a subsequent writing which revokes, in whole or in part, a writing originally probated.

(b) *Conclusiveness of Original Probate.* The probate of a will shall be conclusive as to all property, real or personal, devised or bequeathed by it, unless an appeal shall be taken from the probate as provided in Section 208.

Comment. This is suggested by Section 16(a) of the 1917 act. Regardless of its all-inclusive language, this subsection would not of course be applied strictly where fraud (cf. *Culbertson's Est.*, 301 Pa. 438) or uncertainty of the probate record (cf. *Rockett Will*, 348 Pa. 445) is involved. No special provision is made for refusal of probate as in Section 16(a) of the 1917 act. That is covered by Section 208 hereof.

(c) *Effect Upon Grantee or Mortgagee.* A will offered for original or subsequent probate more than two years after the decedent's death shall be void against a bona fide grantee or mortgagee of real estate of the decedent if the conveyance or mortgage is recorded before the will is offered for probate. This subsection shall not apply to a will of a person dying before the effective date of this act offered for original probate within three years after the decedent's death.

Comment. This is suggested by Section 16(b) of the 1917 act, but reduces the period from three years to two years. The last sentence avoids possible constitutional objections.

SECTION 304. *Nuncupative Wills.*—A nuncupative will shall not be admitted to probate, nor shall letters thereon be issued, unless notice has first been given to those who would be entitled to the estate in case of intestacy.

Comment. This is suggested by Section 6 of the 1917 act. The 1917 act prohibited probate of a nuncupative will within fourteen days of decedent's death. It is not considered advisable to delay the time for probate if provision is made for adequate notice to those who would be entitled to letters of administration. The requirements for nuncupative wills are found in Section 3 of the Wills Act of 1947.

SECTION 305. *Wills in Foreign Language.*—A writing not in English shall not be filed for probate or for any other purpose in the office of the register unless there is attached to it and filed with it a translation into English, sworn to be correct. The

register shall attach the translation to the original and shall file them in his office, and in all cases where a recording is now or hereafter may be required, both the original and the translation shall be recorded. A writing filed in violation of this section shall not constitute notice to any person.

Comment. This is suggested by Section 12 of the 1917 act. It should be compared with Section 504 of the Orphans' Court Act of 1951.

SECTION 306. *Wills Probated Outside the Commonwealth.*—A duly authenticated copy of a will proved outside of the Commonwealth according to the law of the place of probate may be offered for probate before any register having jurisdiction, and letters testamentary or of administration with a will annexed may be granted thereon as though the original will had been offered before such register. If, in addition to such copy, there shall be produced a duly authenticated copy of the record of the probate proceeding of the original instrument, the will shall be entitled to probate in this Commonwealth and appropriate letters shall be issued thereon without the production or examination of the witnesses to prove such will, unless the record shows or it is satisfactorily proved that an essential requirement of Pennsylvania law for a valid will has not been met. In such event, the probate proceedings may be supplemented by the submission of additional evidence to the register.

Comment. This is suggested by Section 7 of the 1917 act. It is intended that probate proceedings in Pennsylvania may be supplemented by the production of additional evidence before the register without the necessity of changing the probate records of the jurisdiction where the will was originally proved. Authentication of wills probated outside of the Commonwealth is governed by Act of Congress, 28 USCA 1738 and 1741.

SECTION 307. *Enforcing Production of Will.*—The register, at the request of any party in interest, shall issue a citation to any person alleged to have possession or control of a will of a decedent requiring him to show cause why it should not be deposited with him. In the absence of good cause shown, the register shall order the will to be deposited with him.

Comment. This is suggested by Section 8 of the 1917 act. Provisions for enforcement are found in Section 205, *supra*. No special procedure is provided for service of the citation or for the hearing before the register. Presumably it will follow the practice in similar cases before the orphans' court.

ARTICLE IV.

LETTERS—ACCOUNTS.

SECTION 401. *Bonds of Personal Representatives.*—If any register shall grant letters without having taken such bond as may be required by law, he and his surety shall be liable to pay all damages which shall accrue to any person by reason thereof. Nothing herein stated shall be deemed to relieve the personal representative from liability which would otherwise be imposed upon him by law.

Comment. This is suggested by Section 8(d) of the Fiduciaries Act of 1917. The statement that letters issued without bond are void is omitted because it is believed that they should not be void insofar as other persons acting upon the faith thereof are concerned.

SECTION 402. *Revocation of Letters.*—

(a) *When No Will.* The register may revoke letters of administration granted by him whenever it appears that the person to whom letters were granted is not entitled thereto.

Comment. This is suggested by Section 5 of the 1917 act.

(b) *When A Will.* The register may amend or revoke letters testamentary or of administration granted by him not in conformity with the provisions of a will admitted to probate.

Comment. This is suggested by Section 5 of the 1917 act. Provision for amendment of letters will make it possible for the register to adjust his records when it is decided that a person improperly appointed should finish his administration in a different capacity. Cf. *Friese's Est.*, 317 Pa. 86, 91.

SECTION 403. *Transmission of Accounts to the Court.*—All accounts filed with the register shall be transmitted to the court for audit and confirmation on dates fixed by the court by general rule or special order and shall be advertised as required by law.

Comment. This is suggested by Section 46(d) of the Fiduciaries Act of 1917 which in addition made provision for the advertisement of accounts. This is now covered by Section 505 of the Orphans' Court Act of 1951.

ARTICLE V.

RECORDS AND CERTIFIED COPIES.

SECTION 501. *Wills.*—All probated wills shall be indexed and recorded by the register, and shall remain in his office, except

for the period required to be in the custody of a higher court. The recording may be accomplished by photographic or other mechanical process.

Comment. This is suggested by Section 11 of the 1917 act. Compare Act No. 432 of 1951 which authorizes the orphans' court, upon petition therefor, to permit a document or documents, in the custody of registers, of persons deceased for more than 50 years, to be delivered to a museum, or organization with similar facilities, for public display.

SECTION 502. *Inventories and Appraisements.*—The register shall index and record all inventories and appraisements filed with him. The recording may be accomplished by photographic or other mechanical process.

Comment. This is suggested by Section 13 of the 1917 act.

SECTION 503. *Certified Copies.*—Every register, upon the request of any person paying the fee therefor, shall make and certify under the seal of his office true copies of his records or of papers filed with him or of proceedings before him. Such certified copies shall be as good evidence as the original in any judicial proceeding in the Commonwealth.

Comment. This is suggested by Section 14 of the 1917 act. The last sentence is suggested by Sections 11 and 13 of the 1917 act.

SECTION 504. *Recording Proceedings in Another County.*—Copies of wills and probate proceedings and records of the grant of letters of administration and proceedings relating thereto, duly certified by the register, may be filed in the office of the register in any county where real estate of the decedent* is located. The register with whom such papers are filed shall forthwith record the same, and the record thereof shall be as valid and effectual in law as the original, or its duly certified copy, or its record would be for all purposes of vesting title, of evidence, and of notice.

Comment. This is suggested by Section 15 of the 1917 act. Permission to file and record the grant of letters of administration has been added because of the administrator's authority under the Fiduciaries Act of 1949 to convey real estate.

* "testator" in original.

ARTICLE VI.

REPEALER.

SECTION 601(a). *Specific Repeals.*—The following acts and parts of acts and all amendments of each are hereby repealed as respectively indicated:

(1) Section 37 of the act, approved the fifteenth day of March, one thousand eight hundred thirty-two (Pamphlet Laws 135), entitled “An Act relating to Registers and Registers’ Courts,” absolutely.

Comment. This section except for this repeal would still apply to Beaver County. It was not supplanted by Section 7 of the Act of 1868, P. L. 3, repealed in clause (2) hereof. A proviso in Section 11 of the Act of 1868, P. L. 3, stipulated that it should not apply inter alia to Beaver County.

(2) Section 7 of the act, approved the second day of April, one thousand eight hundred sixty-eight (Pamphlet Laws 3), entitled “An Act to ascertain and appoint the fees to be received by the several officers of this Commonwealth,” absolutely.

Comment. This section has applied only to Northampton County, the only county of the fourth class, other than Beaver County, not having a separate orphans’ court. The Act of 1947, P. L. 933, as amended, expressly saved from repeal by subsection (c) hereof sets forth the fee bill of registers in counties of the fifth, sixth, seventh and eighth classes. Section 22 of the Register of Wills Act of 1917 provided that in the counties having separate orphans’ courts “the said courts shall establish a bill of costs”. Under Section 209 of this Act, the orphans’ court “may establish a bill of costs to be charged for the services of the register not otherwise provided by law.”

(3) Section 1 of the act, approved the seventh day of June, one thousand nine hundred seventeen (Pamphlet Laws 415), entitled “An Act relating to the qualification, jurisdiction, powers, and duties of registers of wills, and regulating proceedings before said registers, and the costs thereof, the effects of their acts, and appeals therefrom,” except insofar as it applies to counties of the first class; and Sections 2 to 23, both inclusive, of the same act, absolutely.

Comment. While the subject matter of Section 1 of the 1917 act on the oath and bond of the register is included within the scope of the General County Law of 1929, it must nevertheless be preserved because the General County Law of 1929 does not apply to Philadelphia County. When legisla-

tion dealing with Philadelphia County is revised, Section 1 of the Register of Wills Act of 1917 can be repealed absolutely. Section 24 of the 1917 act is preserved from repeal because it provides for fees to be collected for the Commonwealth upon the grant of letters and is not incorporated in the new act.

(4) Section 224 of the act, approved the second day of May, one thousand nine hundred twenty-nine (Pamphlet Laws 1278), entitled "An Act relating to counties of the second, third, fourth, fifth, sixth, seventh and eighth classes; and revising, amending and consolidating the laws relating thereto," insofar as it applies to registers of wills; and Section 233 of the same act, absolutely.

Comment. These sections apply to all but first-class counties and overlap to some extent the provisions of Section 202 of this Act. The partial repeal of Section 224 and the absolute repeal of Section 233 will eliminate any possible conflict of interpretation.

(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 the act, approved the twenty-fifth day of June, one thousand nine hundred forty-seven (Pamphlet Laws 933), entitled "An Act prescribing the fees to be received by registers of wills in counties of the fifth, sixth, seventh and eighth class."

Approved—The 28th day of June, A. D. 1951.

JOHN S. FINE.

Orphans' Court Act
of 1951

HISTORY OF ORPHANS' COURT ACT OF 1951

SENATE BILL No. 25

INTRODUCED BY THE HONORABLE ROWLAND B. MAHANY

In the Senate

Referred to Committee on Judiciary General, January 15.

Reported as amended, March 29.

Passed first reading, March 29.

Over in order, April 2, 3, 4.

Amended, April 9.

Passed second reading with amendments, April 9.

Passed third reading and final passage, April 10 (48-1).

In the House

Referred to Committee on Judiciary, April 16.

Reported as committed, May 22.

Passed first reading, May 23.

Passed second reading, May 24.

Over in order, June 4, 5, 6, 7, 18, 19, 20.

Amended, June 25.

Passed third reading with amendments, June 25.

Passed finally, June 26 (205-0).

In the Senate

Senate nonconcurred in House amendments, July 9 (50-0).

House insisted on its amendments nonconcurred in by the Senate, July 11.

Senate insisted on its nonconcurrence in House amendments and appointed Messrs. Mahany, Kephart and Rosenfeld a Committee of Conference, July 16.

House insisted on its amendments and appointed Messrs. McKinney, Tompkins and Schmidt a Committee of Conference, July 17.

Report of the Committee of Conference, presented to the Senate, July 17.

Report of the Committee of Conference, presented to the House, July 17.

Report of the Committee of Conference adopted by the Senate, July 30 (44-0).

Report of the Committee of Conference adopted by the House, July 31 (207-0).

Approved by the Governor, August 10, 1951

Act No. 263

ORPHANS' COURT ACT OF 1951

No. 263

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, and absentees' estates; providing for the organization of orphans' courts, the procedure therein, the powers and duties of the judges thereof, and appeals therefrom.

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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 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 denitions in clauses (1) to (5) are identical with definitions in the Fiduciaries Act of 1949.

(6) "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:

Comment. The definition of inter vivos trust becomes important because under Section 301(3) hereof the orphans' court is given exclusive jurisdiction thereof, except in Philadelphia County. Heretofore the jurisdiction of the orphans' court over inter vivos trusts has been indefinite, the case law defining inter vivos trusts being found largely in lower court opinions.

(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; 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:

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

Comment. This accords with existing case law: *Shaffer's Est.*, 21 D. & C. 90; *In re Stief*, 32 D. & C. 289. It should not be construed as limiting the jurisdiction of the orphans' court in regard to property of an estate or trust within its jurisdiction: Cf. *Restatement, Trusts* §§45, 55.

(vii) 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.

(viii) 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).

(ix) A temporary trust to hold disputed property;

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

(x) 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.

(xi) A trust primarily for the benefit of business employees, their families 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 Pennsylvania decision dealing with an employees' pension trust, jurisdiction was assumed by the common pleas court: *Luden, Inc., Employees' Trust Fund*, 42 Berks 1, 72 D. & C. 566.

(xii) A trust for bondholders;

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

(xiii) A mortgagee in possession relationship; and

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

(xiv) Similar trusts or fiduciary relationships.

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

Comment. Inasmuch as there are no exceptions, and the Orphans' Court Act of 1917 is repealed in Section 801(a) (5), it is clear that this act applies to the administration of all estates and trusts within the orphans' court, regardless of the date of death or of the creation of the trust.

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 suggested by 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 suggested by Section 1(b) of the 1917 act, altered to include additional counties now having separate orphans' courts, 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 suggested by 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 suggested by 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 suggested by 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 suggested by 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 Section 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. The jurisdiction of the Orphans' Court of Philadelphia County over the administration and distribution of the real and personal property of inter vivos trusts shall be concurrent with the several courts of common pleas as heretofore.

Comment. This is suggested by Section 9(n) and 9(o) of the 1917 act. The definition of inter vivos trusts in Section 102(6) 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) *Absentees' and Presumed Decedents' Estates.* The administration and distribution of the real and personal property of absent persons and of presumed decedents.

Comment. This is suggested in part 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.

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

(7) *Guardian of Persons 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.

(8) *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 suggested by the Act of 1949, P. L. 793, adding Section 9(q) to the Orphans' Court Act of 1917.

(9) *Specific Performance of Contracts*. To enforce specifically the performance by either party of any agreement made by a decedent 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).

(10) *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 (10) is not limited to money legacies, annuities or charges.

(11) *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 the testamentary or statutory power of a fiduciary subject to its jurisdiction to possess, lease, sell, exchange or exercise a similar administrative power in regard to real estate. Clause (11), being restricted to administrative powers, does not apply to dispositive powers such as powers of appointment.

(12) *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 suggested by Section 9(g) of the 1917 act. See also Section 1 of the Revised Price Act of 1917.

(13) *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 nominee, 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. In some cases, a right to trial by jury may exist. See Section 745, *infra*.

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

Comment. This is suggested by Section 9(m) of the 1917 act. Sections 207 and 208 of the Register of Wills Act of 1951 provide for appeals and certification of proceedings to the orphans' court.

(15) *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 15-18 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.

(16) *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.

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

Comment. See 48 PS §§1-19.

(18) *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.

The provisions of clauses (8) and (16), in so far as they relate to adoptions, shall not apply to the Orphans' Court of Philadelphia County. Exclusive jurisdiction in the matter of adoptions shall remain in the Municipal Court of Philadelphia.

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 jurisdiction of the orphans' court 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 whether Pennsylvania courts have jurisdiction of the subject matters enumerated in this act.

Comment. There is no statutory precedent for this section which is intended to make it clear that this act does not attempt to assume jurisdiction in cases where, under the applicable rules of conflict of laws, jurisdiction would be in the courts of another state.

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 suggested by 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 for all purposes shall be as follows:

Comment. The words "for all purposes" are included to make it clear that sales of real estate in all instances are to be authorized by the court of the indicated county rather than the court where the real estate lies.

(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 suggested in part by 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 whose court appointed the guardian. 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 whose court which at the time proceedings are first initiated would have jurisdiction to appoint a guardian of the estate.

Comment. This is suggested by 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 the same 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 for all purposes 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. Contrary to prior law, the venue "for all purposes" is the

county where the trust has its situs. Thus, petitions dealing with trust real estate should be presented to the court of the county where the trust has its situs rather than where the trust real estate is located.

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 was deemed 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 (i) is not domiciled in the Commonwealth at the time when during his lifetime the first application is made to a court concerning the trust, or (ii) was not domiciled in the Commonwealth at his death if the first application to a court concerning the trust was made thereafter, in a county in which any trustee resides, and if there is no such trustee, then in a county where property of the trust is located.

Comment. There is no statutory precedent for this subsection. Confusion should not arise between counties because, under Section 306, juris-

diction after it is once assumed is confined to one county. The Act of 1931 which gave the orphans' court concurrent jurisdiction with the common pleas over inter vivos trusts was silent upon the matter of venue. 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 resided or was located at the commencement of the trust should have jurisdiction of inter vivos trusts. This act has been applied by analogy in the orphans' court. 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-settlor'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 altered circumstances make a change desirable, may be particularly important in trusts of long duration, where the new 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 or the decree discloses that it is not intended as such.

Comment. This is suggested by Section 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 statewide 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 suggested by 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 suggested by 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, un-

der 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. Fees in counties of 5th-8th classes are fixed by law: 20 PS §2223.

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 suggested by 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 to the court for confirmation, stating in the advertisement the names and capacities of the respective accountants.

(b) *Manner of Advertisement.* The notice shall be advertised at least once a week during the four weeks immediately pre-

ceding 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) *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(4). 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 suggested by 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 suggested by 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 suggested by 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. Cf. *Bennett Est.*, 366 Pa. 232.

(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 suggested by 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. See Section 742 of this 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 suggested by Section 17(j) of the 1917 act added by amendment in 1948. 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. Subpoenas.—Masters, auditors and examiners shall have the power to issue subpoenas 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 subpoenaed fails to obey the subpoena, the master, auditor or examiner issuing the subpoena 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 subpoenas 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. The last sentence may be an extension of existing case law. But 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(8), *supra*.

SECTION 704. *Citation.*—Jurisdiction of the person shall be obtained by citation to be awarded by the court upon application of any party in interest. The citation shall direct the party named therein to file a 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 suggested in part by Section 17(a) of the 1917 act.

SECTION 705. *Service of Citation.*—A citation to obtain jurisdiction of a person may be served by any adult person, or by the sheriff of the county wherein the citation issued, or by deputization of the sheriff of the county where the service may be had 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 order awarding the citation shall be void unless the citation is issued within six months.

Comment. This is suggested by Section 17(a), (b), (c), (d), (e), (g) and (h) of the 1917 act, and by Section 602(c) of the Fiduciaries Act of 1949. See Rules of Civil Procedure, Sections 1009 and 1010. When a citation is employed for purpose of notice, including notice to nonresidents of the Commonwealth, it may be served as provided in Section 711.

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 suggested by Section 17(f) of the 1917 act.

B. Notice.

SECTION 711. *Manner of Service; Proof.*—Notice of any proceeding in the court may be given within or outside the Commonwealth by personal service, by registered mail, by publication, or otherwise, as the court shall direct by general rule or special order. Notice may be in the form of a citation served as provided in this section.

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 any citation or notice, the court, upon proof of service thereof, shall have the power to make such order as may be just and necessary.

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 suggested by Section 16 of the 1917 act.

E. Witnesses; Evidence; Hearings; Trials.

SECTION 741. *Subpoenas.*—The court may issue subpoenas 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 suggested by 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 subpoenas 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 subpoenas duces tecum. Under Section 603 of this act, subpoenas can be issued by masters, auditors, and examiners. The fact that there is authorization to issue subpoenas 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 Section 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 4001-4025 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 suggested by Section 20(d) of the 1917 act. See *Hyndman Est.*, 1 Fiduc. Rep. 399, and *Baker v. Weiss*, 43 D. & C. 707, as instances 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 may find, upon the testimony taken before the register, that a substantial dispute of fact exists and require a jury to decide the issue of fact. In all other cases, 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 any event, the court may require witnesses already examined and other witnesses to appear before it.

Comment. This is suggested by Section 20(e)1 and 2 of the 1917 act. It differs in that it expressly approves the Philadelphia practice of permitting the court to award an issue based on testimony taken before the register. The court could not refuse an issue, however, without a hearing unless the parties agree the court may act on the testimony taken before the register.

SECTION 745. *Jury Trial.*—

(a) *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.; *Fleming's Est.*, 265 Pa. 399. 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. The court may award an issue for jury trial based on testimony taken before the register, but may not deny an issue without a hearing. See Section 744, supra.

(b) *Title to Property.* When a substantial dispute of fact shall arise concerning the decedent's title to property, real or personal, any party in interest shall be entitled to a trial of this fact by a jury.

Comment. This subsection is in confirmation of existing case law: *DiPaola Est.*, 350 Pa. 408; *Moyer's Est.*, 341 Pa. 402; *Cross's Est.*, 278 Pa. 170.

(c) *Waiver of Right.* A person entitled to a trial by jury may make demand in writing 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, and is consistent with case law: *Grossman Bros. v. Goldman*, 85 Pa. Superior Ct. 205. The right to dispense with jury trial by agreement is recognized in Art. V, Section 27 of the Pennsylvania Constitution.

(d) *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, and the verdict in such case shall have the same effect as though a trial by jury had been allowed as a matter of right to a party in interest.

Comment. This is suggested by Section 21(a) of the 1917 act, but differs therefrom in that the verdict of the jury, unless a new trial or judgment n. o. v. is granted, would be conclusive, not merely advisory.

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

(a) *Jury.* Jury trials in any case begun before or certified or appealed to the orphans' court shall be tried in the orphans' court. The court shall draw a jury and preside at the trial of the issue and shall have all the powers of a judge in trials by jury in cases at law in the court of common pleas. 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 court 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) *Effect of Verdict.* The verdict of the jury in the orphans' court shall have the same effect as the verdict of a jury in a case at law in a court of common pleas.

Comment. This section is suggested by Section 21(d) of the 1917 act. It is intended that the jury trial shall be conducted in the orphans' court

and have the same effect as a verdict of a jury in the common pleas court. No special provision is made for the certification of the verdict or judgment to the prothonotary. Ample provisions are made in Sections 751-756 for the enforcement of orders and decrees by the orphans' court.

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 suggested by 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 suggested by 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 suggested by Section 18(b)8 of the 1917 act.

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, and shall be 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 seques-

tration shall conform to the practice in the local court of common pleas.

Comment. This is suggested by 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 suggested by 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 suggested by 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 suggested by 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 suggested by 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 suggested in part by 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 and Section 208(c) of the Register of Wills Act of 1951.

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 record costs, including printing costs, upon an appellant or appellee or upon the estate or trust.

Comment. This is suggested by Section 22(b) of the 1917 act.

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, approved the eleventh day of April, one thousand eight hundred forty-eight (Pamphlet Laws 506), entitled "An act to establish a uniform line along the river Delaware, in front of the incorporated districts of the Northern Liberties and Kensington, in reference to county bridges, changing the name of Andrew Jackson Glarfke, to Andrew G. Jackson, to issuing subpoenas for witnesses by auditors, exempting the real estate of the Pennsylvania society for promoting the abolition of slavery, from taxation, in reference to fees of constables in Schuylkill county, in reference to the removal of the barn of Amos George, in the township of Blockley, county of Philadelphia, and to change the name of Dallas township, Lehigh county, to Washington, and relative to the commissioners of Kensington and Richmond, in Philadelphia

county," insofar as it applies to auditors appointed by orphans' courts.

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

(2) Section six of the act, approved the second day of April, one thousand eight hundred sixty-eight (Pamphlet Laws 3), entitled "An act to ascertain and appoint the fees to be received by the several officers of this Commonwealth," absolutely.

Comment. This is a fee bill.

(3) The act, approved the twenty-seventh day of March, one thousand eight hundred seventy-three (Pamphlet Laws 49), entitled "An act to further provide for the enforcement of decrees in the orphans' courts," 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.

(4) The act, approved the twenty-fifth day of May, one thousand eight hundred seventy-eight (Pamphlet Laws 156), entitled "An act to authorize the investment of money paid into court pendente lite," insofar as it applies to monies paid into the orphans' court.

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

(5) The act, approved the seventh day of June, one thousand nine hundred seventeen (Pamphlet Laws 363), entitled "An act relating to the organization, jurisdiction, and procedure of the orphans' courts; the powers and duties of the judges thereof; and appeals therefrom," absolutely, except the part of the last paragraph of section nine thereof, which was added by the act, approved the second day of July, one thousand nine hundred forty-one (Pamphlet Laws 227), entitled "An act to further amend section nine of the act, approved the seventh day of June, one thousand nine hundred and seventeen (Pamphlet Laws, three hundred sixty-three), entitled 'An act relating to the organization, jurisdiction, and procedure of the orphans' courts; the powers and duties of the judges thereof; and appeals therefrom,' by imposing liability on executors, administrators or trustees for real estate broker's commissions in certain cases," which is not repealed hereby.

Comment. Provisions for the allowance and division of brokers' fees are not properly part of the Orphans' Court Act. They should be preserved

in this form until later legislative action thereon. Another portion of Section 9 not included in this act, or saved from repeal, 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."

(6) Section twenty-four of the act, approved the seventh day of June, one thousand nine hundred seventeen (Pamphlet Laws 447), entitled, as amended, "An act relating to the administration and distribution of the estates of decedents and of minors, and of trust estates; including the appointment, bonds, rights, powers, duties, liabilities, accounts, discharge and removal of executors, administrators, guardians, and trustees, herein designated as fiduciaries; the administration and distribution of the estates of presumed decedents; widow's and children's exemptions; debts of decedents, rents of real estate as assets for payment thereof, the lien thereof, sales and mortgages of real estate for the payment thereof, judgments and executions therefor, and the discharge of real estate from the lien thereof; contracts of decedents for the sale or purchase of real estate; legacies, including legacies charged on land; the discharge of residuary estates and of real estate from the lien of legacies and other charges; the appraisal of real estate devised at a valuation; the ascertainment of the curtilage of dwelling houses or other buildings devised; the abatement and survival of actions, and the substitution of executors and administrators therein, the survival of causes of action and suits thereupon by or against fiduciaries; investments by fiduciaries; the organization of corporations to carry on the business of decedents; the audit and review of accounts of fiduciaries; refunding bonds; transcripts to the court of common pleas of balances due by fiduciaries; the rights, powers, and liabilities of nonresident and foreign fiduciaries; the appointment, bonds, rights, powers, duties, and liabilities of trustees *durante absentia*; the recording and registration of decrees, reports and other proceedings, and the fees therefor; appeals in certain cases; and, also, generally dealing with the jurisdiction, powers, and procedure of the orphans' court in all matters relating to fiduciaries concerned with the estates of decedents", except insofar as it saves the jurisdiction of other courts in actions which were pending at the time of the approval of said act,

and subsections (b), (d), (g) and (i) of section forty-six and subsection (a) of section forty-seven thereof, absolutely.

Comment. These sections were saved from repeal by the Fiduciaries Act of 1949, Section 1401(a)(1)(i). Section 24 of the 1917 Fiduciaries Act is covered by Section 301(10) hereof; 46(b) by Section 601 hereof; 46(d) by Section 505 hereof; 46(g) by Section 301(2) and 301(6) hereof; 46(i) by Section 505 hereof; and 47(a) by Section 505 hereof.

(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 act, approved the twenty-fifth day of June, one thousand nine hundred forty-seven (Pamphlet Laws 963), entitled "An act prescribing the fees to be received by the clerks of orphans' courts of counties of the fifth, sixth, seventh and eighth class," or its amendment.

Comment. This is a fee bill.

Approved the 10th day of August, A. D. 1951.

JOHN S. FINE.

Estate Tax Apportionment Act
of 1951

HISTORY OF ESTATE TAX APPORTIONMENT ACT OF 1951

Senate Bill No. 303

INTRODUCED BY THE HONORABLE JOHN M. WALKER (By Request)

In the Senate

Referred to Committee on Judiciary General, March 6.
Reported as committed, April 10.
Passed first reading, April 10.
Passed second reading, April 11.
Recommitted to Committee on Judiciary General, April 16.
Re-reported as committed, May 1.
Passed third reading and final passage, May 2 (49-0).

In the House

Referred to Committee on Ways and Means, May 7.
Returned to House and re-referred to Committee on Judiciary,
June 4.
Re-reported as committed, July 17.
Passed first reading, July 30.
Passed second reading, July 31.
Over in order, August 1, 6, 7.
Passed third reading and final passage, August 13 (205-1).

Approved by the Governor, August 24, 1951

Act No. 338

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ESTATE TAX APPORTIONMENT ACT OF 1951

No. 338

AN ACT

Relating to the apportionment of estate taxes and providing procedure for enforcement of contribution or exoneration.

Comment. The Act of 1937, P. L. 2762, is an amendment to the Fiduciaries Act of 1917 and added Section 48.1 thereto. The title thereto reads:

“An act to add section 48.1 to the act, approved the seventh day of June, one thousand nine hundred and seventeen (Pamphlet Laws 447), entitled [here follows the title of the 1917 act], by providing for the apportionment of estate taxes in certain cases.”

In *Moreland Est.*, 351 Pa. 623, at p. 633, the court relied upon the title of the Fiduciaries Act of 1917 as well as of the amendatory act in concluding that “this is sufficiently broad to include provisions concerning the tribunal, and the ways and means, by which such apportionment is to be made.” See also *Mellon Est.*, 347 Pa. 520, at p. 533, where it was held that the title of the 1937 Act gives adequate notice of proration of interest as well as of the tax.

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

SECTION 1. *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) "Person" includes a corporation, partnership and association, as well as a natural person, whether acting in a separate or in a fiduciary capacity.

Comment. This is suggested by the Statutory Construction Act, §101(84), 46 PS 601.

(2) "Estate Tax" means gross Federal estate tax, including interest and penalty thereon.

Comment. The 1937 Act has been interpreted to apply to interest as well as to the tax: *Mellon Est.*, 347 Pa. 520. So interpreted, it has been held that where there are present and remainder interests, interest on estate tax should be paid from principal: *Widener Est.*, 1 Fiduc. Rep. 126; *Castner's Est.*, 59 D. & C. 370; cf. *Rieck's Est.*, 98 Pitts. L. J. 525. See Section 3(b) and comment thereto. Pennsylvania inheritance and other state death taxes are included in the apportionment to the extent that they are credits, because the tax which is apportionable is the gross Federal tax before any credit for state taxes.

(3) "Persons interested in property includible in gross estate" includes persons liable for payment of estate tax and persons whose property is subject to a lien for the estate tax. It includes personal representatives, guardians and trustees, individual or corporate.

Comment. The words "persons interested in property includible in gross estate" as defined in this clause are intended to embrace anyone who falls within the definition of "executor" found in Section 930 of the Internal Revenue Code, any transferee who may be liable under Section 900 and any person whose property may be taken or is subject to lien for the tax under Sections 826 and 827 of the Code. Cf. *Mellon Est.*, 347 Pa. 520.

(4) "Gross Estate" means all property of every description required to be included in computing the estate tax.

Comment. This is suggested by a similar definition in the New Jersey tax apportionment act. The term as used here is intended to be identical with the term used in Section 811 of the Internal Revenue Code and to include the same items which are contained in that section.

(5) "Fiduciary" includes executors, administrators of any description and trustees.

Comment. A more embracing definition is not required for purposes of this act.

SECTION 2. *Equitable Apportionment.*—Estate tax, except as provided in subsection (a) of section three, shall be apportioned equitably, as near as may be in accordance with the principles hereinafter stated, among all persons interested in property includible in gross estate, whether residents or nonresidents of the Commonwealth, and they shall pay the amounts apportioned against them.

Comment. There is no general provision in the Federal statutes requiring an apportionment, but Section 826(b) of the Internal Revenue Code makes provision for equitable contribution from the decedent's estate when the tax is paid by someone other than the executor; Section 826(c) empowers the executor to secure contribution from insurance beneficiaries; and Section 826(d) empowers the executor to secure contribution from recipients of property over which decedent had power of appointment. It is not contemplated that insurance companies would be "persons interested in property includible in gross estate." Since their relationship to the decedent was contractual their policies, except as they should agree otherwise out of consideration for the beneficiaries, would remain as heretofore: *Moreland Est.*, 351 Pa. 623; cf. *May Est.*, 94 Pitts. L. J. 209. "Whether residents or nonresidents" is suggested by similar provisions in the New York and New Jersey Acts. Cf. *Knight Est.*, 66 D. & C. 267, 72 D. & C. 109; *Beddall Trust*, 1 Fiduc. Rep. 149. The reference to Section 3(a) is included to make it clear that a testator or settlor, within the indicated limits, may provide that there shall be no apportionment. The words "equitably, as near as may be" are intended to indicate that the court is to have some latitude in applying the principles set forth in the act.

While Pennsylvania courts of equity undoubtedly have the right without legislative authority to decree apportionment (*Mellon Est.*, 347 Pa. 520; *Jones' Est.*, 54 D. & C. 364; cf. *Jeffery's Est.*, 333 Pa. 15), it nevertheless seems advisable to give statutory recognition thereto.

SECTION 3. *General Rules.*—

(a) *Powers of Testator or Settlor.* A testator, settlor, or possessor of any appropriate power of appointment may direct how the estate tax shall be apportioned or allocated or grant a discretionary power to another so to direct. Any such direction shall take precedence over the provisions of this act insofar as the direction provides for the payment of the estate tax or any part thereof from property, the disposition of which can be controlled by the instrument containing the direction or delegating the power to another.

Comment. The comparable wording of the 1937 Act is "except in a case where a testator otherwise directs in his will." The right to direct otherwise by will is also recognized in Section 826(c) and 826(d) of the Internal Revenue Code in regard to life insurance and appointed property. Numerous Pennsylvania cases indicate the difficulty in finding the intention

of the testator under the particular wording and circumstances involved: See *The Apportionment of the Federal Estate Tax in Pennsylvania*, 54 Dick. L. R. 432, at p. 446, and cases cited therein.

It is the intention of this clause, for example, that the decedent-donee may by will relieve appointive property of tax by directing its payment from his own estate, but the creator of the power could not relieve it by directing payment from the decedent-donee's estate. Cf. *Schoen Est.*, 1 Fiduc. Rep. 113. However, a general power of appointment would be construed to include a discretionary power of apportionment which would empower the decedent-donee to direct apportionment of all taxes against the appointive property, including those attributable to other interests.

(b) *Present and Remainder Interests.* When estate tax shall be apportioned in a situation involving both a present and future interest, the amount apportioned, including interest and penalties, shall be paid entirely from principal, even though the holder of the present interest also has rights in the principal.

Comment. This subsection is most important and is directed toward the avoidance of complicated apportionments between principal and income: Cf. *Crane's Est.*, 314 Pa. 193; *Mack Est.*, 98 Pitts. L. J. 81; *Wyndham Est.*, 1 Fiduc. Rep. 136. The words "including interest and penalties" are intended to change the method of apportionment thereof introduced by Section 11(4) of the Principal and Income Act of 1947, repealed by Section 8 hereof insofar as it is inconsistent with the provisions of this act.

(c) *Separate Apportionment of Interest and Penalties—Special Circumstances.* When the orphans' court shall find that it is inequitable to apportion interest and penalties in the same manner as the principal of the estate tax by reason of special circumstances, it may direct apportionment of interest and penalties in a manner different from principal.

Comment. This exception is intended to enable the court in special circumstances to place the burden of interest and penalties on the persons who occasioned the delay or benefited most by it. Thus, penalty for a late return might be placed by the court on the testamentary estate if the executor is to be surcharged for his negligence; but if interest on estate tax has accrued because of a contest over the valuation of assets in an inter vivos trust, a greater portion of interest might be charged against the trust. However, it should be borne in mind that all persons against whom tax is apportioned benefit by reduced tax rates when any valuations are reduced or when assets are excluded from the gross estate. In exceptional cases the court might find it equitable to apportion some of the interest and penalties against income.

SECTION 4. *Method of Apportionment.*—

(a) *Basis of Apportionment.* Apportionment of the estate tax, except as provided in section three, shall be made among the

persons interested in property includible in gross estate in the proportion that the value of the interest of each such person bears to the value of the net estate before exemption. The values used in determining the amount of tax liability shall be used for this purpose.

Comment. This establishes a general rule for fair apportionment of the tax. Each interest which is included in the taxable estate must bear its pro rata share of the tax. Uncertainty is reduced by adopting the values used for determining the tax.

(b) *Treatment of Deductions and Credits.* The following principles shall apply with respect to deductions and credits allowable:

(1) *Deductions Allowed by Federal Revenue Laws in Determining the Value of Decedent's Net Estate.* Any interest for which deduction is allowable under Federal revenue laws in determining the value of decedent's net estate, such as property passing to or in trust for a surviving spouse and charitable, public or similar gifts or bequests to the extent of the allowed deduction, shall not be included in the computation provided in subsection (a) of section four hereof, and to that extent no apportionment shall be made against such interest, except that when such an interest is subject to a prior present interest which is not allowable as a deduction, the estate tax apportionable against the present interest shall be paid from principal.

Comment. Clause (1) makes it clear that the surviving spouse or charity would not pay tax on property qualifying for a marital or charitable deduction respectively. See *Harvey Est.*, 350 Pa. 53; *Wilkinson's Est.*, 37 D. & C. 243; *Morris Est.*, 1 Fiduc. Rep. 141; cf. *North's Est.*, 50 D. & C. 703. A deduction would not be allowed for property passing under a post-nuptial agreement except to the extent it might qualify for marital deduction: *Stadtfeld Est.*, 359 Pa. 147.

(2) *Property Previously Taxed and Gift Tax.* Any deduction for property previously taxed and any credit for gift taxes or taxes of a foreign country paid by the decedent or his estate shall inure to the proportionate benefit of all persons liable to apportionment.

Comment. There is no comparable provision in the 1937 Act. A similar provision is included in the New York and New Jersey acts, the former codifying the decision of in re *Blumenthal*, 293 N. Y. 707, 56 N. E. 2d 588. It is the intention of this clause that such deductions and credits should be taken into account only in determining the tax to be apportioned, and should

not inure to the exclusive benefit of the recipients of prior-taxed property or donees of lifetime gifts.

(3) *Credit for State Taxes.* Any credit for inheritance, succession or estate taxes or taxes in the nature thereof in respect to property or interests includible in the gross estate shall inure to the benefit of the persons or interests chargeable with the payment of such taxes to the extent or in proportion that the tax paid or payable reduces the estate tax.

Comment. There is no comparable provision in the 1937 Act. It is consistent with *Mellon Est.*, 347 Pa. 520; *Wyndham Est.*, 1 Fiduc. Rep. 136; and *Rieck's Est.*, 98 Pitts. L. J. 525, and is made to apply to credit for all local taxes. See *Utilization and Apportionment of the Federal Estate Tax Credit*, 98 U. of Pa. L. R. 102. In practical operation this clause would mean that the gross Federal tax is apportioned; and if the total inheritance taxes paid under the Act of 1919 and under the laws of other jurisdictions exceed the total Federal credit, for example by 10%, only 10/11 of the inheritance tax paid by each legatee would be allowed to him as a credit against the amount calculated as his contribution toward the gross Federal tax.

(4) *Inheritance or Death Tax Effect.* To the extent that property passing to or in trust for a surviving spouse or any charitable, public or similar gift or bequest does not constitute an allowable deduction solely by reason of an inheritance tax or other death tax imposed upon and deductible from such property, it shall not be included in the computation provided for in subsection (a) of section four hereof, and to that extent no apportionment shall be made against such property.

Comment. This clause is an innovation having as its purpose the avoidance of the complicated calculations otherwise required. The Federal taxing authorities in giving credit for charitable legacies or marital deduction do not allow a deduction of the portion of such legacies used to pay a Pennsylvania inheritance tax or other death tax: I. R. C. 812(d), 812(e) (1) (E) (i); cf. *Rieck's Est.*, 98 Pitts. L. J. 525. Thus, a Federal estate tax is imposed on the portion of the legacies being used to pay the inheritance tax, which estate tax in turn, except for this clause, might be apportioned against the legacies qualifying for the deduction thereby reducing the deduction, and so on ad infinitum. While the rule here provided places a burden on other taxable shares, the slight additional burden is more than overbalanced by the practical considerations involved.

SECTION 5. *Enforcement of Contribution or Exoneration.*—

(a) *Fiduciary's Duty.* The fiduciary charged with the duty to pay the tax shall be entitled, and it shall be his duty to recover,

from persons liable to apportionment or from whoever is in possession of property includible in the gross estate not in the fiduciary's possession, the amounts of tax apportionable thereto.

Comment. The rights here granted are necessary because of the personal representative's personal liability for payment of the tax levy: 26 U. S. C. A. 822(b). The clauses of the Federal statute permitting proration against insurance proceeds [I. R. C. 826(c)] and property taken by taxable power of appointment [I. R. C. 826(d)] appear to be permissive only. The duty here imposed is undoubtedly consistent with Pa. law. See *Berkowitz Est.*, 36 Luz. 125.

(b) *Suspending Distribution.* Distribution of property includible in the gross estate to any person, other than a fiduciary charged with the duty to pay the tax, shall not be required of any fiduciary until the tax apportionable with respect thereto is paid, or if the tax has not been determined and apportionment made, until adequate security for such payment is furnished to the person making such distribution.

Comment. This subsection is consistent with cases awarding appointed property to the executor of the donee of the power pending determination of its liability for tax: *Curran's Est.*, 312 Pa. 416, cf. *Harris' Est.*, 34 D. & C. 378. See *Hansen's Est.*, 344 Pa. 12, as an instance where distribution was awarded to testamentary trustees upon giving requisite security before tax was determined, and *Cardeza's Est.*, 51 D. & C. 461, as an instance where distribution to a legatee was delayed for several years while the amount of Federal tax was being established. Compare also Sections 617, 618 and 619 of the Fiduciaries Act of 1949.

(c) *Court Decrees.* The orphans' court, upon petition or at an accounting or in any appropriate action or proceeding, shall make such decrees or orders as it shall deem advisable apportioning the tax. It may also direct a fiduciary to collect the apportioned amounts from the property or interest in his possession of any persons against whom such apportionment has been made and direct all other persons against whom the tax has been or may be apportioned or from whom any part of the tax may be recovered to make payment of such apportioned amounts to the fiduciary. When it is ascertained that the fiduciary holds property of the person liable to apportionment insufficient to satisfy the apportioned tax, the court may direct that the balance of the apportioned amount of tax shall be paid to the fiduciary by the person liable. Should an overpayment of the tax be made by any person or on his behalf, the court may direct an appropriate reimbursement for the overpayment. If

the fiduciary cannot recover the tax apportioned against a person benefited, such an unrecovered amount shall be charged in such manner as the orphans' court may determine.

Comment. *Mellon Est.*, 347 Pa. 520, illustrates the advisability of permitting the apportionment to be made upon petition as well as in proceedings already before the court. See also *Elliott's Est.*, 58 Montg. Co. L. R. 114; *Knight Est.*, 66 D. & C. 267. It is clear that a fiduciary who has paid the estate tax could petition the court and be authorized to receive contributions from those against whom the tax is apportioned. Also under *Mellon Est.*, the Commonwealth is not a necessary party entitled to notice, regardless of the fact proration may deprive it of an estate from which to collect the tax. Subsection (c) omits the word "summarily" included in the 1937 Act to avoid any implication that the due process requirement of adequate notice is to be dispensed with: Cf. *Moreland Est.*, 351 Pa. 623. What is adequate notice will depend on the circumstances of each case. The decree could not direct a life insurance company to pay the tax, if to do so would change its obligations under its contract: *Moreland Est.*, supra. Proceedings under this subsection must await the final assessment of tax (*Lucey Est.*, 63 D. & C. 645; *Cardeza's Est.*, 51 D. & C. 461) and should be instituted before the estate is distributed: *Parker Est.*, 348 Pa. 211. The last sentence recognizes the difficulties of enforcement, particularly when the decree must be enforced outside of the Commonwealth. See annotation 16 A. L. R. 2d 1282.

SECTION 6. 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.

SECTION 7. Short Title.—This act shall be known and may be cited as the "Estate Tax Apportionment Act of 1951."

SECTION 8. Repeals.—Section forty-eight point one of the act, approved the seventh day of June, one thousand nine hundred seventeen (Pamphlet Laws 447), entitled, as amended, "An act relating to the administration and distribution of the estates of decedents and of minors, and of trust estates; including the appointment, bonds, rights, powers, duties, liabilities, accounts, discharge and removal of executors, administrators, guardians, and trustees, herein designated as fiduciaries; the administration and distribution of the estates of presumed decedents; widow's and children's exemptions; debts of decedents, rents of real estate as assets for payment thereof, the lien thereof, sales and mortgages of real estate for the payment thereof, judgments

and executions therefor, and the discharge of real estate from the lien thereof; contracts of decedents for the sale or purchase of real estate; legacies, including legacies charged on land; the discharge of residuary estates and of real estate from the lien of legacies and other charges; the appraisement of real estate devised at a valuation; the ascertainment of the curtilage of dwelling houses or other buildings devised; the abatement and survival of actions, and the substitution of executors and administrators therein; the survival of causes of action and suits thereupon by or against fiduciaries; investments by fiduciaries; the organization of corporations to carry on the business of decedents; the audit and review of accounts of fiduciaries; refunding bonds; transcripts to the court of common pleas of balances due by fiduciaries; the rights, powers, and liabilities of nonresident and foreign fiduciaries; the appointment, bonds, rights, powers, duties, and liabilities of trustees *durante absentia*; the recording and registration of decrees, reports and other proceedings, and the fees therefor; appeals in certain cases; and, also, generally dealing with the jurisdiction, powers, and procedure of the orphans' court in all matters relating to fiduciaries concerned with the *estates of decedents," as added by the act, approved the second day of July, one thousand nine hundred thirty-seven (Pamphlet Laws 2762), is hereby repealed.

Subsection four of section eleven of the act, approved the third day of July, one thousand nine hundred forty-seven (Pamphlet Laws 1283), entitled "An act concerning the ascertainment of principal and income; and the apportionment of receipts and expenses among tenants and remaindermen," is hereby repealed insofar as it is inconsistent with the provisions of this act.

All other acts and parts of acts are hereby repealed insofar as they are inconsistent with the provisions of this act.

SECTION 9. *Effective Date.*—The provisions of this act shall become effective immediately upon final enactment; and shall apply to the apportionment of estate taxes with respect to any estate for which the original Federal estate tax return is filed thereafter, regardless of when the decedent died.

Comment. The 1937 Act provided "the provisions of this act shall become effective immediately upon its final enactment." This was interpreted to apply retroactively. As so interpreted, it was determined to be constitutional because it did not disturb vested rights: *Jeffery's Est.*, 32

* "estate" in original.

D. & C. 5, 333 Pa. 15; *Stockler's Est.* (No. 1), 30 Berks 149. The similar act in New York State was determined to be not in violation of the U. S. Constitution: *Riggs Gdn. v. Del Drago*, 317 U. S. 95. The 1937 Act created no new substantive rights; it merely clarified existing rights and implemented their enforcement by giving the orphans' court jurisdiction over persons found liable, including persons who would not otherwise be before the court and who as ordinary debtors would not be subject to its jurisdiction: *Stadifeld Est.*, 359 Pa. 147; *Jones' Est.*, 54 D. & C. 364.

Approved the 24th day of August A. D. 1951.

JOHN S. FINE.