

REPORT
of the
SUBCOMMITTEE ON DECEDENTS'
ESTATES LAWS
of the
JOINT STATE GOVERNMENT COMMISSION



Relating to the following laws:

Intestate Act of 1947
Wills Act of 1947
Estates Act of 1947
Fiduciaries Act of 1949
Act of 1929, May 14, P. L. 1721 (No. 563)
Act of 1935, May 7, P. L. 130
Fiduciaries Investment Act of 1949
Banking Code
Register of Wills Act of 1951
Incompetents' Estates Act of 1951
Orphans' Court Act of 1951
Orphans' Court Partition Act of 1917

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

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INTRODUCTION

The initial directive to the Joint State Government Commission to study and revise the laws relating to decedents' estates was contained in Senate Resolution Serial No. 46, Session of 1945. Pursuant to the directive, the Commission submitted to the General Assembly drafts of an intestate act, a wills act, an estates act, and a principal and income act, all of which were enacted in 1947 and published, with comments, in the Commission's report, *Decedents' Estates Laws of 1947*. In 1949, a fiduciaries act and a fiduciaries investment act, submitted by the Commission in response to the directive contained in Senate Resolution Serial No. 34, Session of 1947, were enacted and published, with comments, in the Commission's report, *Decedents' Estates Laws of 1949*. Finally, as directed by House Concurrent Resolution No. 74, Session of 1949, the Commission submitted to the General Assembly drafts of an incompetents' estates act, a register of wills act, an orphans' court act, and an estate tax apportionment act, all of which were enacted in 1951. These acts, with comments, are contained in the Commission's report, *Decedents' Estates Laws of 1951*.

These acts have been amended from time to time, and suggestions for further amendment have been made by members of the legal profession.

Pursuant to the authority vested in the Commission by the Act of 1937, July 1, P. L. 2460, as amended 1939, June 26, P. L. 1084, the Commission instituted a review of the decedents' estates laws of the Commonwealth and the amendments proposed thereto, with a view to recommending to the General Assembly such amendments as might be deemed desirable for the better working of these laws. To facilitate the study, the Commission, under authority of the Act of 1943, March 8, P. L. 13, Section 1, created a subcommittee on decedents' estates laws and appointed as advisors a group of twenty-eight judges and lawyers, including all those who had served with the Commission's Decedents' Estates Advisory Committee when the acts were drafted.

Suggestions for amendment, submitted by judges, lawyers, and others at the invitation of the Commission, were reviewed by the Commission and the advisors. This report contains the proposals, with comments, of the Decedents' Estates Advisory Committee. Further suggestions and recommendations should be addressed to the secretary of the advisory committee, M. Paul Smith, Esquire, 60 East Penn Street, Norristown, Pennsylvania.

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INTESTATE ACT OF 1947 ✓

Recommendation:

That the Intestate Act of 1947 be amended as follows.

AN ACT

Amending the act of April 24, 1947 (P. L. 80), entitled "An act relating to the descent of the real and personal estates of persons dying intestate and the procedure in reference thereto," and repealing parts thereof, limiting right of a spouse on partial intestacy and in selection of allowance; and revising procedure for setting aside spouse's allowance, establishing title to real estate when spouse claims entire estate, and distribution to the Commonwealth as statutory heir.

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

Section 1. Section 2, act of April 24, 1947 (P. L. 80), known as the "Intestate Act of 1947" is amended to read:

Section 2. Share of Surviving Spouse.—The surviving spouse shall be entitled to the following share or shares:

(1) More Than One Child. One-third if the decedent is survived by more than one child, or by one or more children and the issue of a deceased child or children, or by the issue of more than one deceased child; or

(2) One Child. One-half if the decedent is survived by one child only, or by no child, but by the issue of one deceased child; or

(3) No Issue. The first ten thousand dollars in value and one-half of the balance of the estate, if the decedent is survived by no issue. In case of partial intestacy, any amount received by the surviving spouse under the will shall satisfy pro tanto the ten thousand dollar allowance; or

Comment: This amendment prevents the surviving spouse, provided for in part by the will, from receiving an excessive share in what does not pass by will.

(4) **No Issue or Other Designated Person.** All of the estate if the decedent is survived by no issue, parent, brother, sister, child of a brother or sister, grandparent, uncle or aunt.

Section 2. Sections 10, 11 and 12 of the act are repealed.

Section 3. The act is amended by adding after section 9 three new sections to read:

Section 10. Spouse's Allowance; Procedure.—The ten thousand dollar allowance shall be set aside and awarded in distribution to the surviving spouse, or his successor in interest, in the same manner as other distributive shares of the estate are awarded, without any right in the surviving spouse to choose particular real or personal property in satisfaction thereof. Nothing herein shall be construed as limiting the right of the surviving spouse and other distributees to demand that property not theretofore sold be distributed in kind to them.

Comment: This section takes the place of Section 10 of the 1947 act, which was prepared at a time when real property was not inventoried and included in the accounting. The involved procedure set forth therein was required to set aside the allowance out of real property. As set forth in Section 10 above, the surviving spouse will have no right to choose particular real property. This is consistent with what was done in regard to personal property in 1947. The section, as rewritten, is consistent with Section 12, R. 2 of the Supreme Court Orphans' Court Rules, as amended June 29, 1954, and avoids the confusion illustrated by *Golden Est.*, 99 Pitts. L. J. 467, 1 Fiduc. Rep. 498, 78 D. & C. 599; *Tumolo Est.*, 3 Fiduc. Rep. 57.

Section 11. Procedure to Establish Title to Real Property When Spouse Claims Entire Estate.—A surviving spouse entitled under the provisions of this act to the entire estate of the decedent shall have it awarded to him in the same manner as a lesser share of the estate would be so awarded.

Comment: This takes the place of the more lengthy procedure of the 1947 act. The award of the real property to the surviving spouse in distribution will establish title in him, and nothing further would seem to be required.

Section 12. Property Distributable to the Commonwealth.—
When the estate is distributable to the Commonwealth as statu-
tory heir under the provisions of this act, it shall be reduced to
cash in all cases by the personal representative and awarded by
the court in distribution to the Commonwealth and paid by the
personal representative through the Department of Revenue into
the State Treasury.

Comment: This replaces the more cumbersome language of Section 12 of the 1947 act, which was required until real property was included in the administration of the decedent's estate.

Section 4. This amending act shall take effect January 1, 1956 and shall apply to real and personal estates of all persons dying on or after that day. The provisions of sections 10, 11 and 12 of the "Intestate Act of 1947" repealed hereby shall remain in effect as to the estates of persons dying on or after January 1, 1948, and prior to January 1, 1956.

WILLS ACT OF 1947 ✓ 689

Recommendation:

That the Wills Act of 1947 be amended as follows.

AN ACT

Amending the act of April 24, 1947 (P. L. 89), entitled "An act relating to the form, execution, revocation, operation, and interpretation of wills; to nuncupative wills; to the appointment of testamentary guardians; to elections to take under or against wills and the procedure in reference thereto," revising and changing provisions relating to foreign wills, divorce, inter vivos trusts and insurance affecting right of spouse taking against a will, rights of adopted persons and illegitimates in lapsed and void devises and legacies, and appointment of guardian of property passing to a minor upon testator's death whether or not passing under the will.

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

Section 1. Section 4, clause (2) of section 7, subsection (b) of section 8, subsection (a) of section 12 and clauses (6) and (7) of section 14, act of April 24, 1947 (P. L. 89), known as the "Wills Act of 1947," are amended to read:

Section 4. Witnesses.—

(a) General Rule. Except as provided in subsection (b) hereof, no will shall be valid unless proved by the oaths or affirmations of two competent witnesses.

(b) Foreign Execution. A written will of a testator domiciled outside of Pennsylvania, but within the United States, executed and proved in accordance with the law of his domicile shall be effective as to property within Pennsylvania.

Comment: This subsection covers the case of a will probated in another state and in accordance with the law of that state, even though the method

of proof as set forth in the probate record is not in compliance with the method of proof required for the wills of Pennsylvania decedents. It has been difficult to prove such wills in Pennsylvania, especially after a lapse of many years after the death of the testator. Note the amendment of Section 306 of the Register of Wills Act of 1951 to conform with the addition of this subsection.

Section 7. Modification by Circumstances.—Wills shall be modified upon the occurrence of any of the following circumstances, among others:

* * *

(2) Divorce. If the testator is divorced from the bonds of matrimony after making a will, all provisions in the will in favor of or relating to his spouse so divorced shall [be thereby revoked] thereby become ineffective for all purposes.

* * *

Comment: This amendment eliminates any question concerning the rights of the divorced spouse if the will as probated includes provision for the surviving spouse, thus avoiding possible confusion as to what should be probated.

Section 8. Change by Election of Surviving Spouse.

* * *

(b) Share of Estate. The surviving spouse, upon an election to take against the will, shall be entitled to one-third of the real and personal estate of the testator if the testator is survived by more than one child or by one or more children and the issue of a deceased child or children or by the issue of more than one deceased child, and in all other circumstances the surviving spouse shall be entitled to one-half of the real and personal estate of the testator. In determining the share of a surviving spouse who has elected to take against the will and any one or more conveyances which he has elected to treat as testamentary, there shall be included the value of all interests given to the surviving spouse by the testator either by inter vivos trust or by insurance, even though the surviving spouse cannot or does not treat such conveyances as testamentary.

* * *

Comment: This amendment makes it clear that the surviving spouse who has elected against a conveyance will not be unduly favored. Except for this amendment, the surviving spouse might be able to elect against the will and against an inter vivos conveyance not favorable to him and at the same time enjoy the benefits of a favorable inter vivos transfer. *Bossler Est.*, 44 Schuyl. L. R. 188. See also Section 11(b) of the Estates Act of 1947, as amended.

Section 12. Failure to Make an Election.—

(a) Effect. Except as provided in section 7 (3) hereof, failure to make an election in the manner and within the time limits set forth in section 11 hereof shall be deemed an election to take under the will or an acquiescence in the provisions thereof. No payment or distribution from the estate, except the exemption allowed by law to the [widow] surviving spouse, shall be required to be made to the surviving spouse within one year after the probate of the will unless his election to take under or acquiesce in the will shall have been made and filed as provided in section 10 hereof.

* * *

Comment: The change from “widow” to “surviving spouse” conforms with Section 211 of the Fiduciaries Act of 1949, under which the widower as well as the widow may be entitled to a family exemption.

Section 14. Rules of Interpretation.—In the absence of a contrary intent appearing therein, wills shall be construed as to real and personal estate in accordance with the following rules:

* * *

(6) Adopted Children. In construing clauses (8), (9) and (10) of this section relating to lapsed and void devises and legacies, and in construing a will making a devise or bequest to a person or persons described by relationship to the testator or to another, any person adopted before the death of the testator shall be considered the child of his adopting parent or parents and not the child of his natural parents: Provided, That if a natural parent shall have married the adopting parent before the testator's death, the adopted person shall also be considered the child of such natural parent.

Comment: This amendment to clause 6 and the deletion of clause 11 from subsection 14 make it clear that the adopted child is made a member of his new family and does not remain a member of his natural family. In construing a will before this amendment, it has not been clear that an adopted child was not entitled as issue of his natural parent in the case of lapsed and void devises and legacies. See *Ericsson Est.*, 5 Fiduc. Rep. 225.

(7) Illegitimates. In construing clauses (8), (9) and (10) of this section relating to lapsed and void devises and legacies, and in construing a will making a devise or bequest to a person or persons described by relationship to the testator or to another, an illegitimate person shall be considered the child of his mother and not of his father; Provided, That when the parents of a person born illegitimate shall have married each other, he shall thereafter be considered legitimate.

* * *

Comment: The amendment to this clause is required with the deletion of clause 11.

Section 2. Clause (11) of Section 14 of the act is repealed.

Section 3. Subsection (b) of section 18 of the act, is amended to read:

Section 18. Testamentary Guardian.—

* * *

(b) Guardian of the Estate. Any person may by will appoint a [testamentary] guardian of [the] real or personal [estate which he shall devise, bequeath, or appoint to a minor] property passing to a minor upon his death when such property:

(1) Is devised, bequeathed or appointed to the minor in that person's will;

(2) Is the proceeds of an insurance or annuity contract on the testator's life, unless the owner of the contract has made an inter vivos designation of a guardian therefor;

(3) Arises from an inter vivos transfer the major portion of

which constituted a gift from the testator, unless the testator has made an inter vivos designation of a guardian therefor;

(4) Is a cause of action arising by reason of the testator's death;

(5) Is a pension or death benefit from an employer of the testator or a society or organization of which the testator was a member;

(6) Is a tentative trust of which the testator was the settlor.

Comment: This amendment is suggested to cover the situations not covered by the Act of 1945, April 18, P. L. 253 (No. 113). It is intended to make it possible for a person making a testamentary or inter vivos gift to a minor to provide for the management of such property until the minor attains the age of twenty-one. It was thought advisable to refer specifically to each type of situation to be covered, as there seems to be no general language which could accomplish this purpose.

Section 4. This act shall take effect on January 1, 1956, and shall apply only to the wills of all persons dying on or after that day. As to the wills of persons dying before that day, the existing law shall remain in full force and effect.



ESTATES ACT OF 1947 ✓ (69)

Recommendation:

That the Estates Act of 1947 be amended as follows.

AN ACT

Amending the act of April 24, 1947 (P. L. 100), entitled "An act relating to the incidents of legal and equitable interests in real and personal property, including the validity thereof, the powers, rights, and duties of persons with respect thereto, and the disposition of interests which fail, and containing provisions concerning termination of trusts, releases and disclaimers of powers and interests, perpetuities, accumulations, charitable estates, rights of a surviving spouse in property as to which the decedent has retained certain powers, spendthrift trusts, limited estates in property, rules of interpretation, estates pur auter vie, estates in fee tail, and the Rule in Shelley's Case," revising and changing provisions relating to power of court to terminate trusts heretofore created, release or disclaimer by beneficiary of spendthrift trust, income accumulations, conveyances to defeat marital rights, and inter vivos trusts and insurance affecting right of spouse taking against a will.

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

Section 1. Section 2, and subsection (a) of section 3, act of April 24, 1947 (P. L. 100), known as the "Estates Act of 1947," are amended to read:

Section 2. Termination of Trusts.—

(a) Failure of Original Purpose. The court having jurisdiction of a trust heretofore or hereafter created, regardless of any spendthrift or similar provision therein, in its discretion may terminate such trust in whole or in part, or make an allowance from principal to a conveyer, his spouse, issue, parents, or any of them, who is an income beneficiary, provided the court after hearing is satisfied that the original purpose of the conveyer

cannot be carried out or is impractical of fulfillment and that the termination, partial termination, or allowance more nearly approximates the intention of the conveyer, and notice is given to all parties in interest or to their duly appointed fiduciaries. But, distributions of principal under this section, whether by termination, partial termination, or allowance shall not exceed an aggregate value of twenty-five thousand dollars from all trusts created by the same conveyer.

Comment: This amendment is included to make it possible for the court to terminate a trust under provisions of Section 2, regardless of when the trust was created. A footnote to *Bosler Est.*, 378 Pa. 333, at page 339, indicates that trusts may be terminated retroactively when and if there is a failure of purpose under the circumstances specified in Section 2(a), if there is statutory authorization therefor.

(b) **Distribution of Terminated Trust.** Whenever the court shall decree termination or partial termination of a trust under the provisions of this section, it shall thereupon order such distribution of the principal and undistributed income as it deems proper and as nearly as possible in conformity with the conveyer's intention.

(c) **Other Powers.** Nothing in this section shall limit any power of the court to terminate or reform a trust under existing law.

Section 3. Release or Disclaimer of Powers or Interests.—

(a) **Powers and Interests Releasable.** Any power of appointment, or power of consumption, whether general or special, other than a power in trust which is imperative, and any interest in, to, or over real or personal property held or owned outright, or in trust, or in any other manner which is reserved or given to any person by deed, will or otherwise, and irrespective of any limitation of such power or interest by virtue of any restriction in the nature of a so-called spendthrift trust provision, or similar provision, may be released or disclaimed, either with or without consideration, by written instrument signed by the person possessing the power or the interest and delivered as hereinafter provided, but nothing in this section shall authorize an income beneficiary of a spendthrift trust to release or disclaim his right

to such income, unless as a result of the release or disclaimer the released or disclaimed income will pass to one or more of the beneficiary's descendants.

* * *

Comment: This amendment gives Pennsylvania residents a greater latitude in making their estate plans and avoiding unnecessary federal taxes without losing the protection the conveyor intended to provide for the beneficiaries and their families.

Section 2. Section 6, section 7, and section 8 of the act are repealed.

Section 3. The act is amended by adding after section 5, two new sections to read:

Section 6. Income Accumulations—When Valid.—

(a) General. No direction or authorization to accumulate income shall be void except as herein provided.

(b) Void Accumulations—Exceptions. Upon the expiration of the period allowed by the common law rule against perpetuities as measured by actual rather than possible events, any direction or authorization to accumulate income shall be void.

This subsection shall not apply to:

(1) Directions or authorizations to accumulate income in a trust for any charitable purpose or purposes;

(2) Directions or authorizations to accumulate income in a bona fide trust inter vivos primarily for the benefit of business employes, their families or appointees, under a stock bonus, pension, disability or death benefit, profit-sharing, or other employe benefit plan.

(c) Time for Beginning Period. The period allowed by the common law rule against perpetuities under subsection (b) of this section shall be measured from the expiration of any time during which one person while living has the unrestricted power

to transfer to himself the entire legal and beneficial interest in the property.

Section 7. Income Accumulations; Disposition When Invalidity Occurs.—Income subject to a void direction or authorization to accumulate shall be distributed to the person or proportionately to the persons in whom the right to such income has vested by the terms of the instrument or by operation of law.

Comment: Sections 6 and 7 replace Sections 6, 7, and 8 of the 1947 act. The 1947 act continued in modified form the complicated rules in operation since the original Act of 1853, April 18, P. L. 503. The new provisions are intended to return to the Common Law Rule against Accumulations (cf. Restatement, Property, § 441), except that the period is to be measured by actual, rather than possible, events, consistent with Sections 4 and 5 of the present act. It is hoped that the new rule will reduce litigation and enable Pennsylvania to compete on a more favorable basis with states which have no statute against accumulations. The decision to relax the statutory rule against accumulations in Pennsylvania was reached only after a thorough study, including consideration of the views of leading authorities (who were unanimous in their approval of the suggested change) and of reports indicating that states having no statutes against accumulations have experienced little or no difficulty with unreasonable accumulations.

Section 4. Sections 11 and 21 of the act are amended to read:

Section 11. [Powers of Appointment; Rights of Surviving Spouse] Conveyances to Defeat Marital Rights.—

(a) In General. A conveyance of assets by a person who retains a power of appointment by will, or a power of revocation or consumption over the principal thereof, shall at the election of his surviving spouse, be treated as a testamentary disposition so far as the surviving spouse is concerned to the extent to which the power has been reserved, but the right of the surviving spouse shall be subject to the rights of any income beneficiary whose interest in income becomes vested in enjoyment prior to the death of the conveyor. The provisions of this section shall not apply to any contract of life insurance purchased by a decedent whether payable in trust or otherwise.

Comment: The last sentence is added to eliminate uncertainties as to the application of this section to life insurance. Lower court opinions which have dealt with the subject give no clear indication of the extent to which Section 11, as drafted in 1947, would have been applied to life insurance. See *Auch Est.*, 4 Fiduc. Rep. 113; *Brown Est.*, 5 Fiduc. Rep. 113.

(b) Determination of Share. In determining the share of a surviving spouse who has elected to treat a conveyance as testamentary there shall be included the value of all interests given to the surviving spouse by the conveyor by will, inter vivos trust or insurance, or acquired by the surviving spouse from the conveyor's estate by intestacy. The court having jurisdiction of the decedent's estate shall determine the rights of the surviving spouse in the property included in the conveyance.

Comment: This subsection as amended, together with Section 8(b) of the Wills Act of 1947 as amended, should make it clear that all of the interest passing to the surviving spouse must be taken into consideration, so that the surviving spouse cannot elect against inter vivos transfers which are unfavorable and still enjoy the benefit of inter vivos transfers which are favorable.

(c) Procedure. The election to treat a conveyance as testamentary shall be made in the same manner and within the same time limitations as in the case of an election to take against the will. It can be made only if there has been no forfeiture of the right to make an election and, if there is a will, only if an election is filed also against the will.

Comment: This subsection is intended to provide the procedure needed to carry out the purpose of subsection (a). The need for such clarification was illustrated by Judge Van Roden in his article entitled "Rights of Surviving Spouse to Share in Assets Transferred by Decedent in His Lifetime," 25 Pa. Bar Assn. Qu. 51, 58 Dick. L. R. 70.

Section 21. *Effective Date.*—This act shall take effect on the first day of January, one thousand nine hundred forty-eight and except as set forth in [section] sections 2, 3 and 9 hereof, shall apply only to conveyances effective on or after that day. As to conveyances effective before that day, the existing laws shall remain in full force and effect.

Section 5. This act shall take effect January 1, 1956, and except as set forth in sections 2, 3 and 9 of the act amended hereby, shall apply only to conveyances effective on or after that day. As to conveyances effective before that day, the existing law shall remain in full force and effect.

FIDUCIARIES ACT OF 1949

Recommendation:

That the Fiduciaries Act of 1949 be amended as follows.

AN ACT

Amending the act of April 18, 1949 (P. L. 512), entitled "An act relating to the administration and distribution of decedents' estates, trust estates, minors' estates and absentees' 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 fiduciary in certain cases; the appointment, bond, removal and discharge of fiduciaries of such estates, their powers, duties and liabilities; the rights of persons dealing with such fiduciaries, 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 guardians of the person of minors, the powers, duties and liabilities of sureties and of foreign fiduciaries, the abatement, survival and control of actions and rights of action, and the presumption of death; and also generally dealing with the jurisdiction, powers and procedure of the orphans' court and of the register of wills in all matters relating to fiduciaries," revising and changing provisions relating to first complete advertisement of the grant of letters, payment of accrued pensions without letters, amount of estates distributed on petition, family exemptions, place for grant of letters, inventory and appraisal and objections thereto, claims against decedents, against personal representatives and against decedents' property, awards to nonresident beneficiaries, presumption of release or extinguishment, and amount of minors' estates administered without guardian.

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

Section 1. Section 102, act of April 18, 1949 (P. L. 512),

known as the "Fiduciaries Act of 1949," is amended by adding after clause (7) a new clause to read:

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.

* * *

(8) "First complete advertisement of the grant of letters" in counties having no legal publication means the first of the three times that the grant of letters is advertised in a newspaper and in counties having a legal publication it means when it has been advertised on at least one occasion in both the newspaper and in the legal publication.

Comment: This clause is included to clarify what is meant in Sections 702, 731, and 732, especially for counties where there is no legal publication.

Section 2. Sections 201, 202, 211, 301, the heading of Article IV, sections 401, 402 and 403 of the act are amended to read:

Section 201. Payment of Wages, [or] Salary or Pension to Family.—Any employer of a person dying domiciled in the Commonwealth at any time after the death of the employee, whether or not a personal representative has been appointed, may pay wages, [or] salary or any accrued pension due the deceased in an amount not exceeding two hundred and fifty dollars due to the deceased employee to the spouse, any child, the father or mother, or any sister or brother (preference being given in the order named) of the deceased employee. Any employer making such a payment shall be released to the same extent as if payment had been made to a duly appointed personal representative of the decedent and he shall not be required to see to the application thereof. Any person to whom payment is made shall be answerable therefor to anyone prejudiced by an improper distribution.

Comment: The words "or any accrued pension due the deceased" are added to clarify what was intended when the section was originally drafted.

Section 202. Settlement of Small Estates on Petition.—When any person dies domiciled in the Commonwealth owning property (exclusive of real estate and of wages, [or] salary or any accrued pension payable under section 201, but including personal property claimed as the family exemption) of a gross value not exceeding [one thousand] fifteen hundred dollars, the orphans' court of the county wherein the decedent was domiciled at the time of his death, upon petition of any party in interest, in its discretion, with or without appraisal, and with such notice as the court shall direct, and whether or not letters have been issued or a will probated, may direct distribution of the property (including wages, [or] salary or any accrued pension not paid under section 201) to the parties entitled thereto. The decree of distribution so made shall constitute sufficient authority to all transfer agents, registrars and others dealing with the property of the estate to recognize the persons named therein as entitled to receive the property to be distributed without administration, and shall in all respects have the same effect as a decree of distribution after an accounting by a personal representative. Within one year after such a decree of distribution has been made, any party in interest may file a petition to revoke it because an improper distribution has been ordered. If the court shall find that an improper distribution has been ordered, it shall revoke the decree and shall direct restitution as equity and justice shall require.

Comment: These changes, in addition to conforming to Section 201, increase the scope of this section, which has worked so well. It is believed that the increase in amount is not hazardous because funeral expenses, other bills, and family exemption will, in most instances, exhaust estates of less than \$1,500.

Section 211. When Allowable.—The spouse of any decedent dying domiciled in the Commonwealth, and if there be no spouse, or if he has forfeited his rights, then such children as [form a part of the decedent's] are members of the same household as the decedent, may retain or claim as an exemption [and as a reasonable requirement for support during the settlement of the estate], either real or personal property, or both, not theretofore

sold by the personal representative, to the value of seven hundred and fifty dollars. The surviving husband or wife shall be a competent witness as to all matters pertinent to the issue of forfeiture of the right to the exemption.

Comment: This section is amended to make it clear that a child living in the same household as the decedent is entitled to the exemption, regardless of who may be technically head of the household. The lower courts have been in conflict as to whether an exemption could be claimed by a child when it is determined that the decedent was not the owner or lessee of the property. The clause "and as a reasonable requirement for support during the settlement of the estate" is deleted from this section to make it clear that the "need" of the person claiming the exemption is unimportant. The omitted clause was initially included to secure a federal estate tax advantage which is no longer available. Cf. *Calhoun Est.*, 1 Fiduc. Rep. 162.

Section 301. Proper County.—Letters testamentary or of administration on the estate of a decedent domiciled in the Commonwealth at the time of his death shall be granted only by the register of the county where the decedent had his last family or principal residence. If the decedent had no such domicile in the Commonwealth, letters testamentary or of administration may be granted by the register of any county wherein property of the estate shall be located and, when granted, shall be exclusive throughout the Commonwealth. If the decedent had no such domicile in the Commonwealth, and had no property located therein, and service of process is to be made in the Commonwealth upon his personal representative as authorized by law, then letters testamentary or of administration on his estate may be granted by the register of any county of the Commonwealth and, when granted, shall be exclusive throughout the Commonwealth.

Comment: The last sentence is added in order to provide a personal representative for a nonresident decedent against whom a suit may be brought under the acts relating to nonresident operators of aircraft and motor vehicles.

Article IV.

Inventory [and Appraisement].

Section 401. Duty of Personal Representative.—

(a) **General Assets.** Within three months after his appointment, every personal representative shall file with the register an inventory [and appraisement], verified by his affidavit, of all real and personal estate of the decedent, except real estate outside of the Commonwealth: Provided, That an ancillary personal representative shall include therein only assets for which he is responsible.

(b) **Real Estate Outside of Commonwealth.** The inventory shall include at the end a memorandum of real estate outside of the Commonwealth. The memorandum, at the election of the personal representative, may indicate the value of each item of real estate included therein, but the value so fixed shall not be extended into the total of the inventory or included as real estate in subsequent accountings.

Comment: The words “and appraisement” are deleted from subsection (a) for the reasons stated in comment to Section 402.

Section 402. Valuations [Appraisers].—The personal representative shall determine and state in figures opposite each item of the inventory its fair value as of the date of the decedent’s death [based upon a just appraisement of each item made by two or more appraisers, who shall be sworn well and truly and without prejudice or partiality to appraise the assets of the estate to the best of their skill and judgment].

Comment: This section is revised to eliminate the requirement that there be separate appraisers. With the complexity of present-day society, it is difficult for two persons of their own knowledge to fix values on the different types of property which compose most inventories. Since appraisers must rely on information from other sources, it seems advisable that sole responsibility be placed upon the personal representative for establishing values, which he usually acquires from several sources. With the addition of Section 405, the full rights of all parties will be preserved.

Section 403. Supplemental Inventory.—Whenever any property not included in the inventory [and appraisal] comes to the knowledge of the personal representative, he shall file, within thirty days of its discovery, a supplemental inventory [and appraisal] thereof with the register.

Comment: The words “and appraisal” are deleted from this section in two places, for the reasons stated in comment to Section 402.

Section 3. Article IV of the act is amended by adding after section 404 a new section to read:

Section 405. Objections to Inventory.—Objections to the inventory may be made by any party in interest at any time up to and including the time fixed by rule of court for making objections to the first account of the personal representative. Such objections in the discretion of the court may be heard at the audit of the account. Objections to the inventory also may be made in the form of objections to the account.

Comment: This section, which has no statutory precedent, is intended to clarify the procedure, which has remained confusing, and to change the ruling of *Rogers Est.*, 379 Pa. 494, to the effect that objections to an inventory should be delayed in all cases until audit.

Section 4. Sections 613 and 731 of the act are amended to read:

Section 613. Statutes of Limitations; Claims Not Barred at Death.—The death of a person shall not stop the running of the statute of limitations applicable to any claim against him, but a claim which otherwise would be barred within one year after the death of the decedent shall not be barred until the expiration of one year after his death. Nothing in this section shall be construed to shorten the period which would have been allowed by any applicable statute of limitations if the decedent had continued to live.

Comment: The last sentence is added to eliminate the question raised in some cases as to whether the statute of limitations on a tort claim is reduced to one year after the decedent's death. Cf. *Donahue v. Knaus*, 169 Pa. Superior Ct. 372.

Section 731. Estates Not Exceeding [One Thousand] Fifteen Hundred Dollars.—When the gross real and personal estate of a decedent does not exceed the value of [one thousand] fifteen hundred dollars, the personal representative, after the expiration of one year from the date of the first complete advertisement of the grant of letters may present his petition to the court with an annexed account showing the administration and proper distribution of the estate. Thereupon, the court, upon satisfactory proof of notice to all known parties in interest, may order the discharge of the personal representative and his sureties from future liability, without the expense of proceedings as in a formal account. The court may discharge only the surety from future liability, and may allow the personal representative to continue without surety upon condition that no further assets shall come into the possession of the personal representative until he files another bond, with sufficient surety, as required by the register.

Comment: This change, increasing from \$1,000 to \$1,500 the size of estates which can be administered informally, is consistent with the changes made to Sections 202 and 1001 of this act. The start of the one-year period is changed from the time of the grant of letters to the time of the first complete advertisement of the grant of letters. This is consistent with Section 732 and in conformity with *Goldberg Est.*, 4 Fiduc. Rep. 264, which held that the one-year period must date from the first complete advertisement of the grant of letters.

Section 5. Section 732 of the act, amended August 17, 1951 (P. L. 1258), is amended to read:

Section 732. At Risk of Personal Representative.—

(a) Rights of Claimants Against Personal Representative.—A personal representative, at his own risk and without the filing,

audit or confirmation of his account, may distribute real or personal property [or real estate] and such distribution shall be without liability to any claimant against the decedent who has not given notice of his claim as provided by this act within one year after the first complete advertisement of the grant of letters to [him] such personal representative or thereafter but prior to such distribution. [Except on liens of record existing at the time of death, no claimant who has not given such notice shall have any claim as to the property so distributed.]

(b) Rights of Claimants Against Distributed Property.—

(1) Personal Property. No claimant shall have any claim against personal property distributed by a personal representative at his own risk pursuant to subsection (a) hereof, unless such claimant has given notice of his claim to the personal representative as provided by this act within one year after the first complete advertisement of the grant of letters, or thereafter but prior to such distribution.

(2) Real Property. No claimant shall have any claim against real property conveyed by a personal representative in distribution at his own risk pursuant to subsection (a) hereof, unless such claimant, within one year after the decedent's death, files a written notice of his claim with the clerk. Such claim against real property shall expire at the end of five years after the decedent's death unless within that time the personal representative files an account or the claimant files a petition to compel an accounting.

(3) Liens and Charges Existing at Death. Nothing in this subsection shall be construed as affecting any lien or charge which existed at the time of the decedent's death on his real or personal property.

Comment: This section is redrafted to restore some of the advantages of the one-year lien of debts, which applied under the 1917 act, and at the same time avoid many of the disadvantages thereof. The elimination of the one-year lien of debts in regard to the decedent's real property has

caused difficulty in the passing of title in situations where the personal representative has given a deed in distribution and either has filed no account or has not included real property in his accounting. In such circumstances, future grantees of the real property have been concerned, because there is nothing of record to show whether or not the personal representative had received notice of an unpaid claim before the time of conveyance or within one year of the first complete advertisement of grant of letters.

To eliminate these difficulties and at the same time provide a rule which is not too difficult of application, Section 732 is divided into two subsections. Subsection (a) deals with the rights of claimants against the personal representative and is substantially the same as Section 732 as amended in 1951, except that it omits reference to the rights of claimants against distributed property. The new subsection (b) deals with the rights of claimants against distributed property and makes a distinction between personal property and real property. As to personal property, the rule is substantially the same as it existed under Section 732 as amended and is not changed because, as it relates to personal property, Section 732 has not been a problem. It seems inadvisable to cut off the rights of claimants as to personal property unless the personal representative has duly advertised the grant of letters. In the case of real property, the one-year period must date from a time which clearly appears of record; in addition, the steps to be taken by claimants to establish their positions must also be clearly of record. Since the right established by the notice of the claim will be cut off after five years, these rights will not continue indefinitely. On the other hand, there will be ample opportunity for claimants to protect their interests in real property by taking action within one year of the decedent's death and following it up by taking appropriate proceedings to compel an accounting within five years of the decedent's death. In regard to rights against real property, there would seem to be no violation of any constitutional guarantees, since the grant of letters is notice to claimants. The period of time and the rights of the parties are similar to those under the 1917 act.

The clerk with whom the claim is filed, under Section 102 (1) of the Fiduciaries Act, is "the clerk of the orphans' court having jurisdiction," which is, of course, the clerk in the county in which letters were granted.

Under Section 502 of the Orphans' Court Act, the orphans' court and clerk have ample opportunity to establish the required procedure for indexing the claims filed hereunder.

Section 6. Article VII of the act is amended by adding after section 736 a new section to read:

Section 737. Award to Nonresident Beneficiary.—When the court believes that a beneficiary who is not a resident of the United States, its territories or possessions, would not have the actual use, enjoyment or control of the money or other property distributable to him, the court shall have the power and authority to direct the personal representative (1) to make only such payments to the beneficiary as the court directs, or (2) to convert the distributive share into cash and pay it through the Department of Revenue into the State Treasury without escheat to be held for the benefit of such beneficiary. The court which directed payment to the State Treasury upon petition of the person entitled to such funds, and upon being satisfied that petitioner will have the actual possession, benefit, use, enjoyment or control thereof, shall enter a decree directing the Board of Finance and Revenue to make repayment with interest at two per centum per annum from the date the money was paid into the State Treasury to the date of repayment.

Comment: This is based on the Act of 1953, July 28, P. L. 674. It is deemed advisable to incorporate into the Fiduciaries Act the provisions of the 1953 act relating to distribution.

Section 7. Subsection (a) of section 804, section 983 and the first paragraph of section 1001 of the act are amended to read:

Section 804. Presumption of Payment, Release or Extinguishment.—

(a) Lapse of Twenty Years. When (1) for twenty years after the same or any part thereof becomes due, no payment has been made on account of a dower, recognizance, legacy, annuity instalment, or other charge, created by will, agreement, inter vivos trust or court decree, upon real property; or (2) no proceeding has been brought or no written acknowledgment of the existence thereof or no written promise to pay the same has been made within such period by the owner or owners of the property sub-

ject to the charge, a release or extinguishment thereof shall be presumed, and the charge shall thereafter be irrecoverable.

* * *

Comment: The word "agreement" is added so that the section as amended will clearly cover the situation where the widow and children entitled to a dower or remainder interest convey real estate and agree with the purchaser upon the amount to be paid to the widow and children.

Section 983. Notice, Audits, Reviews and Distribution. The provisions concerning accounts, audits, reviews, distributions and rights of distributees in trust estates shall be the same as those set forth in this act for the administration of a decedent's estate, with regard to the following:

ACCOUNTS.

- (1) Notice to parties in interest, as in section 703;
- (2) Representation of parties in interest, as in section 704.

AUDITS.

- (3) Audits in counties having a separate orphans' court, as in section 711;
- (4) Audits in counties having no separate orphans' court, as in section 712;
- (5) Statement of proposed distribution, as in section 713;
- (6) Confirmation of accounts and approval of proposed distribution, as in section 714.

REVIEWS.

- (7) Rehearing—Relief granted, as in section 721.

DISTRIBUTION.

- (8) Award upon final confirmation of account, as in section 733;
- (9) Distribution in kind, as in section 734;
- (10) Recording and registering decrees awarding real estate, as in section 736;
- (10.1) Award to nonresident beneficiary, as in section 737.

RIGHTS OF DISTRIBUTEES.

- (11) Liability for interest, as in section 754;
- (12) Transcripts of balances due, as in section 755.

Comment: Clause 10.1 is added to incorporate the provisions of the new Section 737.

Section 1001. When Guardian Unnecessary.—When the entire real and personal estate, wherever located, of a resident or non-resident minor has a net value of [one thousand] fifteen hundred dollars or less, all or any part of it may be received and held or disposed of by the minor, or by the parent or other person maintaining the minor, without the appointment of a guardian or the entry of security, in any of the following circumstances:

* * *

Comment: This section, which has worked very well, is changed to increase from \$1,000 to \$1,500 the amount of the estate of a minor which can be disposed of without the appointment of a guardian.

Section 8. Subsection (1) of section 1101 of the act, amended August 17, 1951 (P. L. 1258), is amended to read:

Section 1101. In General. A foreign fiduciary 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 similar local fiduciary, but a foreign personal representative shall have no such power when there is an administration in the Commonwealth. Except in the case of powers with respect to securities, for which special provision is made in section 1102, the maintenance of a proceeding or the exercise of any other power by a foreign fiduciary shall be subject to the following additional conditions and limitations:

(1) Copy of appointment. The foreign fiduciary 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, together with an exemplified copy of the will or other instrument, if any, in pursuance of which he has been appointed or qualified and when he is an executor, administrator c.t.a., testamentary trustee, or testamentary guardian, and wishes to exercise a power [granted by a will] with respect to Pennsylvania real estate, the will must be admitted to probate in Pennsylvania as required by law.

Comment: The words "granted by a will" are deleted so that the clause will cover the situation where the will should be probated in Pennsylvania even though there is no power granted by the will.

Section 9. This act shall take effect January 1, 1956.

ACT OF 1929, MAY 14, P. L. 1721 (No. 563) ✓ 687

Recommendation:

That the Act of 1929, May 14, P. L. 1721 (No. 563), be amended as follows.

AN ACT

Amending the act of May 14, 1929 (P. L. 1721), entitled "An act providing for the service of process in civil suits on nonresident operators, or nonresident owners, of motor vehicles operated within the Commonwealth of Pennsylvania; and making the operation of such a motor vehicle on the public highways of the Commonwealth of Pennsylvania the equivalent of the appointment of the Secretary of Revenue of the Commonwealth of Pennsylvania as the agent of the said nonresident, upon whom civil process may be served; and providing for further notice to the defendant in any such suit," making the consent deemed to have been given by a nonresident operator or owner of a motor vehicle involved in an accident or collision within this Commonwealth for appointment of the Secretary of the Commonwealth as his agent for service of process irrevocable and binding upon his personal representative; providing for service of process when the nonresident operator or owner has died prior to the commencement of an action, and making changes to conform with existing law.

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

Section 1. The title of the act of May 14, 1929 (P. L. 1721), entitled "An act providing for the service of process in civil suits on nonresident operators, or nonresident owners, of motor vehicles operated within the Commonwealth of Pennsylvania; and making the operation of such a motor vehicle on the public highways of the Commonwealth of Pennsylvania the equivalent of the appointment of the Secretary of Revenue of the Commonwealth of Pennsylvania as the agent of the said nonresident, upon

whom civil process may be served; and providing for further notice to the defendant in any such suit," is amended to read:

AN ACT

Providing for the service of process in civil suits on nonresident operators, or nonresident owners, of motor vehicles operated within the Commonwealth of Pennsylvania; and making the operation of such a motor vehicle on the public highways of the Commonwealth of Pennsylvania the equivalent of the appointment of the Secretary of [Revenue] the Commonwealth of the Commonwealth of Pennsylvania as the agent of the said nonresident, upon whom civil process may be served; and providing for further notice to the defendant in any such suit.

Section 2. Section 1 of the act, amended May 23, 1949 (P. L. 1651), is amended to read:

Section 1. Be it enacted, &c., (a) That from and after the passage of this act, any nonresident of this Commonwealth, being the operator or owner of any motor vehicle, who shall accept the privilege extended by the laws of this Commonwealth to nonresident operators and owners of operating a motor vehicle, or of having the same operated, within the Commonwealth of Pennsylvania, or any resident of this Commonwealth, being the licensed operator or owner of any motor vehicle under the laws of this Commonwealth, who shall subsequently become a nonresident or shall conceal his whereabouts, shall, by such acceptance or licensure, as the case may be, and by the operation of such motor vehicle within the Commonwealth of Pennsylvania, make and constitute the Secretary of [Revenue] the Commonwealth of the Commonwealth of Pennsylvania his, her, or their agent for the service of process in any civil suit or proceeding instituted in the courts of the Commonwealth of Pennsylvania or in the United States District Courts of Pennsylvania against such operator or owner of such motor vehicle, arising out of, or by reason of, any accident or collision occurring within the Commonwealth in which such motor vehicle is involved.

(b) A nonresident operator or owner of a motor vehicle which is involved in an accident or collision within this Commonwealth shall be deemed to have consented that the appointment of the Secretary of the Commonwealth as his agent for the service of process pursuant to the provisions of this section shall be irrevocable and binding upon his personal representative, executor or administrator. Where the nonresident motorist has died prior to the commencement of an action brought pursuant to this section, service of process shall be made on the personal representative, executor or administrator of such nonresident motorist in the same manner and on the same notice as is provided in the case of a nonresident motorist. Where an action has been duly commenced under the provisions of this section by service upon a defendant who dies thereafter, if the personal representative, executor or administrator of such defendant does not voluntarily become a party, he may be substituted as a party under the applicable Rules of Civil Procedure and service of process shall be made in the same manner and on the same notice as is provided in the case of a nonresident motorist.

Section 3. Sections 2 and 3 of the act, amended June 25, 1937 (P. L. 2277), are amended to read:

Section 2. Such process shall be served, by the officer to whom the same shall be directed, upon the Secretary of [Revenue] the Commonwealth of the Commonwealth of Pennsylvania, by sending by registered mail, postage prepaid, at least fifteen (15) days before the return day of such process, a true and attested copy thereof, and by sending to the defendant, by registered mail, postage prepaid, a like true and attested copy, with an endorsement thereon of the service upon said Secretary of [Revenue] the Commonwealth, addressed to such defendant at his last known address. The registered mail return receipts of the Secretary of [Revenue] the Commonwealth and of such defendant shall be attached to and made a part of the return of service of such process: Provided, That if the defendant refuses

to accept the notice mailed, or cannot be found at his last known address, the registered mail return receipt or other evidence of such facts shall be attached to and made a part of the return, and shall constitute sufficient service under the provisions of this section.

Section 3. The officer serving such process upon the Secretary of [Revenue] the Commonwealth shall pay to said secretary, at the time of service, a fee of two dollars (\$2.00) for each process served, which fee shall be taxed as costs in the case. The Secretary of [Revenue] the Commonwealth shall keep a record of each such process and the day and hour of the service thereof upon him.

ACT OF 1935, MAY 7, P. L. 130

Recommendation:

That the Act of 1935, May 7, P. L. 130, be amended as follows.

AN ACT

Amending the act of May 7, 1935 (P. L. 130), entitled "An act providing for the service of process in civil suits on non-resident operators or nonresident owners, or a resident who becomes a nonresident and conceals his whereabouts, of aircraft operated within or above the Commonwealth of Pennsylvania; and making the operation of such an aircraft within or above the Commonwealth of Pennsylvania, the equivalent of the appointment of the Secretary of Revenue of the Commonwealth of Pennsylvania as the agent of the said nonresident upon whom civil process may be served; and providing for further notice to the defendant in any such suit," making the consent deemed to have been given by a nonresident operator or owner of an aircraft involved in an accident or collision within this Commonwealth for appointment of the Secretary of the Commonwealth as his agent for service of process irrevocable and binding upon his personal representative; providing for service of process when the nonresident operator or owner has died prior to the commencement of an action, and making changes to conform with existing laws.

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

Section 1. The title and sections 1, 2, and 3, act of May 7, 1935 (P. L. 130), entitled "An act providing for the service of process in civil suits on nonresident operators or nonresident owners, or a resident who becomes a nonresident and conceals his whereabouts, of aircraft operated within or above the Commonwealth of Pennsylvania; and making the operation of such an aircraft within or above the Commonwealth of Pennsylvania, the equivalent of the appointment of the Secretary of Revenue of the Commonwealth of Pennsylvania as the agent of the said non-

resident upon whom civil process may be served; and providing for further notice to the defendant in any such suit," are amended to read:

AN ACT

Providing for the service of process in civil suits on nonresident operators or nonresident owners, or a resident who becomes a nonresident and conceals his whereabouts, of aircraft operated within or above the Commonwealth of Pennsylvania; and making the operation of such an aircraft within or above the Commonwealth of Pennsylvania, the equivalent of the appointment of the Secretary of [Revenue] the Commonwealth of the Commonwealth of Pennsylvania as the agent of the said nonresident upon whom civil process may be served; and providing for further notice to the defendant in any such suit.

Section 1. (a) Be it enacted, &c., That from and after the passage of this act any nonresident of this Commonwealth, being the operator or owner of any aircraft, who shall accept the privilege, extended by the laws of this Commonwealth to nonresident operators and owners, of operating an aircraft, or of having the same operated over or above the lands and waters of the Commonwealth of Pennsylvania, or of using its aviation facilities, or both, or any resident of this Commonwealth, who shall subsequently become a nonresident or shall conceal his whereabouts, shall, by the operation of an aircraft over or above the lands and waters of the Commonwealth of Pennsylvania, make and constitute the Secretary of [Revenue] the Commonwealth of the Commonwealth of Pennsylvania, his, her, or their agent for the service of process in any civil suit or proceeding instituted in the courts of the Commonwealth of Pennsylvania against such operator or owner of such aircraft arising out of, or by reason of, any accident or collision, occurring within or above the Commonwealth, in which such aircraft is involved.

(b) A nonresident operator or owner of an aircraft which is involved in an accident or collision within or above this Commonwealth shall be deemed to have consented that the appointment of the Secretary of the Commonwealth as his agent for the

service of process pursuant to the provisions of this section shall be irrevocable and binding upon his personal representative, executor or administrator. Where the nonresident operator or owner of aircraft has died prior to the commencement of an action brought pursuant to this section, service of process shall be made on the personal representative, executor or administrator of such nonresident operator or owner of aircraft in the same manner and on the same notice as is provided in the case of a nonresident operator or owner of aircraft. Where an action has been duly commenced under the provisions of this section by service upon a defendant who dies thereafter, if the personal representative, executor or administrator of such defendant does not voluntarily become a party, he may be substituted as a party under the applicable Rules of Civil Procedure and service of process shall be made in the same manner and on the same notice as is provided in the case of a nonresident operator or owner of aircraft.

Section 2. Such process shall be served by the officer, to whom the same shall be directed, upon the Secretary of [Revenue] the Commonwealth of the Commonwealth of Pennsylvania by sending by registered mail, postage prepaid, at least fifteen (15) days before the return day of such process, a true and attested copy thereof, and by sending to the defendant by registered mail, postage prepaid, a like true and attested copy with an endorsement thereon of the service upon said Secretary of [Revenue] the Commonwealth addressed to such defendant at his last known address. The registered mail return receipts of the Secretary of [Revenue] the Commonwealth and of such defendant, shall be attached to and made a part of the return of service of such process.

Section 3. The officers, serving such process upon the Secretary of [Revenue] the Commonwealth shall pay to said Secretary at the time of service, a fee of two dollars (\$2.00), which fee shall be taxed as costs in the case. The Secretary of [Revenue] the Commonwealth shall keep a record of each such process, and the day, and hour of the service thereof upon him.

68/8

FIDUCIARIES INVESTMENT ACT OF 1949 ✓

Recommendation:

That the Fiduciaries Investment Act of 1949 be amended as follows.

AN ACT

Amending the act of May 26, 1949 (P. L. 1828), entitled "An act concerning the investment powers and duties of guardians, committees, trustees, and other fiduciaries, except personal representatives, and prescribing the nature and kind of investments which may be made and retained by such fiduciaries," by making further provision respecting the qualification of common stock for investment where there is a predecessor or constituent corporation, and by changing the requirements of an interest bearing deposit by providing that it be fully insured by the Federal Deposit Insurance Corporation.

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

Section 1. Subsection (a) of section 9, act of May 26, 1949 (P. L. 1828), known as the "Fiduciaries Investment Act of 1949," amended June 19, 1953 (P. L. 284), is amended to read:

Section 9. Stocks.—

(a) Preferred and Common Stock. Preferred and common stock of any corporation organized under the laws of the United States or of any commonwealth or state thereof, or of the District of Columbia, shall be an authorized investment if—

(1) purchased in the exercise of that degree of judgment and care, under the circumstances then prevailing, which men of prudence, discretion and intelligence exercise in the management of their own affairs, not in regard to speculation, but in regard to the permanent disposition of their funds, considering the probable income to be derived therefrom as well as the probable safety of their capital;

(2) in the case of preferred stock, the corporation issuing the stock has earned a net profit in eight of the preceding ten fiscal years, as reflected in its statements, and during each of the preceding ten fiscal years has paid dividends in the specified amounts upon all its preferred stock, if any, outstanding during such year;

(3) in the case of common stock, the corporation issuing the stock has earned a net profit in twelve of the preceding sixteen fiscal years, as reflected in its statements, and during each of the preceding sixteen fiscal years has paid dividends in the specified amounts upon all its preferred stock, if any, outstanding during said year and in each of at least twelve of the preceding sixteen fiscal years has paid dividends in some amount upon all its common stock, if any, outstanding during such years; and

(4) in the case of any stock other than stock of a bank or insurance company or of an investment company (as hereinafter defined), the stock is listed or traded (or if unlisted or not entitled to trading privileges, shall be eligible for listing, and application for such listing shall have been made) on the New York Stock Exchange or any other exchange approved by the Secretary of Banking.

No investment in common stock shall be made which, at that time, would cause the market value of the investments in common stocks to exceed one-third of the market value of the estate, not including in such market value the value of any participation in a common trust fund. No sale or other liquidation of any investment shall be required solely because of any change in market values whereby the percentages of stocks hereinabove set forth are exceeded. In determining the market value of an estate, a fiduciary may rely upon published market quotations as to those investments for which such quotations are available and upon such valuations of other property as in his best judgment seem fair and reasonable according to available information.

When a corporation has acquired a substantial part of its property, within sixteen years immediately preceding the investment, by consolidation or merger or by the purchase of a substantial part of the property of any other corporation or corporations, the earnings of the predecessor or constituent corporations shall be consolidated so as to ascertain whether the net profit require-

ments of this section have been satisfied, and the dividend requirements of this section shall be satisfied by payment of the required dividends by any predecessor or constituent corporation.

Comment: This subsection is changed to make it clear that the net profit requirements of the act are satisfied when the earnings of the predecessor or constituent corporations are consolidated. However, in determining the dividend requirements, it is sufficient that they be met by any predecessor or constituent corporation; otherwise the consolidation of a large, profitable corporation and a small corporation which does not meet the dividend requirements would result in making the stock of the new or succeeding corporation an unauthorized investment.

“Corporation” as used in this section shall include a voluntary association, a joint-stock association or company, a business trust, a Massachusetts trust, a common-law trust, and any other organization organized and existing for any lawful purpose and which, like a corporation, continues to exist notwithstanding changes in the personnel of its members or participants, and conducts its affairs through a committee, a board, or some other group acting in a representative capacity.

“Investment Company” as used in this section shall mean a corporation (as defined in this section) which is registered as an investment company under the Federal Investment Company Act of 1940, as from time to time amended, and which has no preferred stock, bonds, loans or any other outstanding securities having preference or priority as to assets or earnings over its common stock and which shall have net assets of not less than ten million dollars (\$10,000,000) at the date of purchase.

“Common Stock” as used in this section shall include the stock certificates, certificates of beneficial interests or trust participation certificates issued by any corporation or unincorporated association included under the definition of “corporation” in the preceding paragraph.

* * *

Section 2. Section 12 of the act is amended to read:

Section 12. Interest-Bearing Deposit.—An interest-bearing deposit in any bank, bank and trust company, savings bank, or

national banking association, located within the Commonwealth, shall be an authorized investment if—

(1) not in the commercial department of a corporate fiduciary of the estate or trust to which the funds belong;

(2) the maturity date or the permissible date of withdrawal does not exceed one year from the date of the deposit or any renewal thereof; and

(3) [the aggregate of such deposits does not exceed one thousand five hundred dollars] it is fully insured by the Federal Deposit Insurance Corporation pursuant to the Act of Congress of June sixteenth, one thousand nine hundred thirty-three (48 Stat. 168), and its supplements and amendments heretofore or hereafter enacted.

Comment: This clause is changed so that investments in interest bearing accounts may be made up to \$10,000 (the amount now fully insured) or up to any amount which hereafter is fully insured. Increased interest rates on savings accounts have made them a more productive investment than heretofore.

Section 3. This act shall take effect January 1, 1956.

BANKING CODE

Recommendation:

That the Banking Code be amended as follows.

AN ACT

Amending the act of May 15, 1933 (P. L. 624), entitled, as amended, "An act relating to the business of banking, and to the exercise of fiduciary powers by corporations; providing for the organization of corporations with fiduciary powers, and of banking corporations, with or without fiduciary powers, including the conversion of National banks into State banks, and for the licensing of private bankers and employes' mutual banking associations; defining the rights, powers, duties, liabilities, and immunities of such corporations, of existent corporations authorized to engage in a banking business, with or without fiduciary powers, of private bankers and employes' mutual banking associations, and of the officers, directors, trustees, shareholders, attorneys, and other employes of all such corporations, employes' mutual banking associations or private bankers, or of affiliated corporations, associations, or persons; restricting the exercise of banking powers by any other corporation, association, or person, and of fiduciary powers by any other corporation; conferring powers and imposing duties upon the courts, prothonotaries, recorders of deeds, and certain State departments, commissions, and officers; imposing penalties; and repealing certain acts and parts of acts," further providing for the power of bank and trust companies and trust companies to establish and maintain mortgage investment funds.

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

Section 1. Sections 1109.2, 1109.3, 1109.4, 1109.5, and 1109.6, act of May 15, 1933 (P. L. 624), known as the "Banking Code" added June 5, 1937 (P. L. 1675) are repealed.

Comment: Because of the needlessly complicated procedure required by Section 1109.2-6 of the Banking Code of 1933, mortgage investment funds, which replaced the mortgage pool system of investment, have not been popular. The following revision thereof preserves necessary safeguards and at the same time eliminates needless and cumbersome requirements.

Section 2. The act is amended by adding after section 1109.1 a new section to read:

Section 1109.2. (a) Creation of Mortgage Fund. A bank and trust company, in its trust department, or a trust company, may establish and maintain one or more mortgage funds as separate entities, for the investment of moneys held by it (1) as fiduciary, (2) as co-fiduciary, (3) as agent for a fiduciary, or (4) as agent for a church or other charity.

Comment: This is substantially broader than existing legislation. Under existing law, investment in mortgage investment funds is confined to instances in which investment is to be made by a trust institution as a fiduciary or co-fiduciary.

(b) Investments of Funds. Assets of the mortgage fund shall be invested only in bonds or obligations secured by mortgages which in addition to meeting the requirements for authorized investments in Pennsylvania shall be amortized within a period not exceeding fifteen years from the date of the acquisition in installments totalling in each year not less than five per centum thereof. No mortgage of the fund shall exceed ten thousand dollars (\$10,000) or five per centum of the fund, whichever is greater: Provided, That in no event shall a mortgage exceed fifty thousand dollars (\$50,000).

Comment: The language is simplified by cross reference to the requirements for legal mortgages. The added limitations make it certain that the fund will not include the type of mortgage which caused difficulty in mortgage pools during depression years.

(c) Temporary Investments. During any period in which appropriate mortgages are not available for investment of moneys in the mortgage fund, investment may be made in obligations of the United States or the United States Treasury, of the Commonwealth or of any political subdivision of the Commonwealth.

Comment: This language is based on Section 506 of the Fiduciaries Act and makes provision for temporary investment, but this is entirely in the discretion of the trust institution operating the fund.

(d) Participating Accounts. The total amount of moneys of any one fiduciary account which may be invested in a mortgage fund shall not exceed five thousand dollars (\$5,000).

Upon the termination of a fiduciary account, or when withdrawal of an investment is required by it, cash of the mortgage fund equal to the amount invested shall be distributed to such fiduciary account. No participating account shall be entitled, after such termination or withdrawal, to participate in any principal accretions of the fund or in its reserve hereinafter mentioned.

Comment: This provision, which limits the size of participations to amounts which cannot be invested readily in separate mortgages, will be of limited value until the Board of Governors of the Federal Reserve System increases the \$1,200 limitation of Section 17 (b) of Regulation F.

(e) Reserve. The bank and trust company or trust company at the close of each earning period shall transfer to a reserve account of the mortgage fund from income of the fund, a sum which in its discretion, shall be at the rate of not less than one-half of one per centum per annum, nor more than one per centum per annum of the total of the outstanding participations in the fund at the close of such earning period. Any gain or loss in the sale or liquidation of an asset of the fund shall be credited or charged to the reserve. The bank and trust company or trust

company, in its discretion, may reduce or discontinue transfers of income to principal when the reserve account equals or exceeds one-tenth of the outstanding participations.

Comment: Requirement of a reserve which can be invested with other assets and thus increase the earnings of the fund is essential for safety and will not unduly reduce the income.

(f) Income. The balance of income remaining after transferring such part thereof to the reserve, as is herein provided, shall be distributed periodically among the outstanding participating accounts in proportion to the amounts of their participations and the period of time owned.

(g) Liquidation of Mortgage Fund. The mortgage fund may be closed to new investments or placed in liquidation by the board of directors of the bank and trust company or trust company, or by the Secretary of Banking, at any time that it or he shall consider that such action is advisable or necessary for the protection of the fiduciary accounts holding participations in the fund. When a mortgage fund has been placed in liquidation as herein provided, the bank and trust company or trust company or any party in interest may apply to the orphans' court of the county in which the principal office of the institution is located, for the approval of a plan of liquidation. Thereupon, the court after such hearing and such notice as it shall direct, shall approve such plan or enter such order as seems fitting and proper under the circumstances, having due regard for the interest of all participating accounts.

Comment: In event of default, liquidation can best be made under supervision of the court under a plan adapted to the circumstances of the particular case.

(h) Application of Amendment. The provisions of this act shall be applicable to mortgage investment funds heretofore or hereafter created.

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REGISTER OF WILLS ACT OF 1951

Recommendation:

That the Register of Wills Act of 1951 be amended as follows.

AN ACT

Amending the act of June 28, 1951 (P. L. 638), entitled "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," changing the procedure on probate of wills probated outside the Commonwealth.

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

Section 1. Section 306, act of June 28, 1951 (P. L. 638), known as the "Register of Wills Act of 1951," is amended to read:

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 will was probated outside of the United States and 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] If the will was probated outside of the United States, the probate proceedings may be supplemented by the submission of additional evidence to the register.

Comment: This is amended to coordinate with Section 4 of the Wills Act of 1947 as amended. It is only when the will has been probated outside of the United States that we need be concerned that the standards of proof of a Pennsylvania will be observed.

Section 2. This act shall take effect January 1, 1956.

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INCOMPETENTS' ESTATES ACT

Recommendation:

That the law providing for the administration of incompetents' estates exclusively by the orphans' court be a new re-enactment of Senate Bill No. 6, Session of 1951, as introduced (See *Proposed Incompetents' Estates Act of 1951*, Report of the Subcommittee on Decedents' Estates Laws of the Joint State Government Commission, Harrisburg, November, 1950), with only the amendment to Section 631 indicated below.

Comment: This act, except as to estates of incompetents which will remain within the jurisdiction of the common pleas court, replaces the Incompetents' Estates Act of 1951. It is occasioned by the 1955 amendment to the Orphans' Court Act of 1951 which gives the orphans' court exclusive, rather than concurrent, jurisdiction over incompetents' estates. A 1953 amendment conferred upon the orphans' court concurrent jurisdiction, with the common pleas court, over incompetents' estates. It was thought that to further amend the 1951 act would cause unnecessary confusion, especially since it would be necessary to have the language remain applicable also to estates remaining within the jurisdiction of the common pleas court.

Section 631. Award Upon Final Confirmation of Account.

(a) Guardian's 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 the same as the present Section 631, but it is set forth as a separate subsection.

(b) Account of Personal Representative of Deceased Incompetent. A guardian shall be relieved of liability with respect to all real and personal estate distributed by him to the personal representative of a deceased incompetent and thereafter distributed by the personal representative in conformity with a decree of court, or in accordance with rule of court upon an accounting of such personal representative and confirmation thereof.

Comment: This subsection is added with the thought that it may be employed frequently to avoid the duplication of accounting when an incompetent dies. In many such instances the incompetent's guardian files an account, the balance of which is awarded to a personal representative, who in turn subsequently files his accounting. Frequently, the guardian and the personal representative are the same person or institution, and the administration of a deceased incompetent's estate can proceed without any formal accounting as guardian, thus saving substantial expense and inconvenience. In instances when the guardian and the personal representative are not the same, the guardian may agree to assume the responsibility of a distribution which remains as a risk distribution until the assets are awarded upon the personal representative's accounting. Should question of surcharge of the guardian arise, he may voluntarily file his account or be forced to do so. No question of the rights of creditors or due process is involved, because adequate notice would be given of grant of letters to the personal representative and of his accounting. The suggested procedure seems to be preferable to that followed in *Tarbotton Est.*, 4 Fiduc. Rep. 328, annot. Fiduciary Review, July, 1954.

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ORPHANS' COURT ACT OF 1951

Recommendation:

That the Orphans' Court Act of 1951 be amended as follows.

AN ACT

Amending the act of August 10, 1951 (P. L. 1163), entitled, as amended, "An act relating to the orphans' court; conferring exclusive jurisdiction on such courts over the administration and distribution of decedents' estates, trust estates, minors' estates, and absentees' estates; conferring concurrent jurisdiction over the administration and distribution of incompetents' estates and the determination of title to real estate in certain cases; providing for the organization of orphans' courts, the procedure therein, the powers and duties of the judges thereof, and appeals therefrom," conferring exclusive jurisdiction on orphans' courts over the administration and distribution of incompetents' estates, and on the orphans' court of Philadelphia County over inter vivos trusts and revising the procedure on and effect of jury trials and the availability of jurors.

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

Section 1. The title, act of August 10, 1951 (P. L. 1163), known as the "Orphans' Court Act of 1951," amended July 28, 1953 (P. L. 690) is amended to read:

AN ACT

Relating to the orphans' [court] courts; conferring exclusive jurisdiction on such courts over the administration and distribution of decedents' estates, trust estates, minors' estates, [and] absentees' estates [; conferring concurrent jurisdiction over the administration and distribution of], and incompetents' estates

and the determination of title to real estate in certain cases; providing for the organization of orphans' courts, the procedure therein, the powers and duties of the judges thereof, and appeals therefrom.

Comment: The title is changed to omit the reference to concurrent jurisdiction over the administration and distribution of incompetents' estates and to include incompetents' estates within the list of estates over which the orphans' court has exclusive jurisdiction. This is consistent with the original recommendation of the Commission and places incompetents' estates in the court which is better fitted to administer such estates.

Section 2. Section 102 of the act is amended by adding at the end a new clause to read:

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:

* * *

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

Comment: Since the orphans' court has exclusive jurisdiction of an incompetent's estate, the definition of "incompetent" is advisable.

Section 3. Section 301 of the act is amended to read:

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.

(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.

(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: By this deletion, the orphans' court of Philadelphia, along with the other orphans' courts of the Commonwealth, will acquire exclusive jurisdiction of inter vivos trusts.

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

(4.1) Incompetents' Estates. The administration and distribution of the real and personal property of the estates of incompetents, except where the jurisdiction thereof already has been acquired by another Pennsylvania court before the effective date of this act. Another court which has acquired jurisdiction of the estate may transfer it to the orphans' court.

Comment: Since the orphans' court is given exclusive jurisdiction of incompetents' estates, clause 2 of Section 302 is omitted and incompetents' estates are here listed among other estates over which the orphans' court has exclusive jurisdiction.

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

(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.

(7) Guardian of Persons of Minors. The appointment, control and removal of the guardian of the person of any minor.

(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.

(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.

(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.

(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.

(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.

(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.

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

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

(16) Adoptions. Adoptions as provided by law.

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

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

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 4. Section 302 of the act, amended July 28, 1953 (P. L. 690) is amended to read:

Section 302. Concurrent Jurisdiction.—Title to Real Estate.—The orphans' court shall have concurrent jurisdiction of

[(1) Title to Real Estate. The] 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.

[(2) Incompetents' Estates. The administration and distribution of the real and personal property of incompetents' estates, except when the jurisdiction thereof has been acquired by another Pennsylvania court. Another court which has acquired jurisdiction of the incompetent's estate may transfer it to the orphans' court.]

Comment: This section is amended to exclude incompetents' estates, of which the orphans' court is given exclusive jurisdiction under Section 301 (4.1).

Section 5. Sections 744, 745 and 746 of the act are amended to read:

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] grant a jury trial. When, upon the testimony taken before the register a jury trial is not granted, 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. The court in its discretion may impanel a jury at any stage of the proceedings.

Comment: The addition of the last sentence to this section, together with Section 746 (a.1), is intended to make it possible for the orphans' court to award a jury trial or impanel a jury at any stage of the proceedings before or after any or all of the testimony is heard, thus avoiding any duplication of hearings. Other changes are for clarification of what was earlier intended.

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, but the verdict of the jury shall be conclusive only if the court is satisfied with the justness of it on the basis of all the evidence. If the court is not so satisfied it may set aside the verdict, grant a new trial or enter such other judgment as satisfies its conscience.

Comment: As amended, this subsection is intended to re-introduce the rule of *Stewart Will*, 354 Pa. 288, 295; *Williams v. McCarroll*, 374 Pa. 281, 297; and *Fleming's Est.*, 265 Pa. 399, and make it clear that the orphans' court has control over the verdict.

(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] the issue by a jury, and the verdict of the jury shall have the same effect as the verdict of a jury in a case at law in a court of common pleas.

Comment: This amendment preserves what was set forth in the original act and is consistent with existing statutes and case law.

(b.1) Determination of Incompetency. Any person against whom proceedings have been instituted to establish his incompetency shall be entitled to a trial of such issue by a jury. The verdict of the jury shall have the same effect as the verdict of a jury in a case at law in a court of common pleas.

Comment: The addition of this subsection is required because the orphans' court is given exclusive jurisdiction of incompetents' estates.

(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] A person desiring a trial by jury shall make demand therefor in writing at least ten days prior to the initial hearing before the court or, if the initial hearing is dispensed with as provided in section 746 (a.1), then at least ten days prior to the trial. The right to trial by jury is waived if such demand is not so made or, after having been made, the person claiming the right fails to appear.

Comment: This subsection is rewritten to make it clear that the party desiring jury trial must make demand in writing in all cases and do so at an early stage; delays of the hearing by demanding a jury trial at the last moment should thus be avoided.

(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] but the verdict shall be conclusive only if the court is satisfied with the justness of it on the basis of all the evidence. If the court is not so satisfied it may set aside the verdict, grant a new trial or enter such other judgment as satisfies its conscience.

Comment: This conforms with the change made to subsection (a) supra.

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] quarter sessions or oyer and terminer and general jail delivery courts 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] courts of common pleas, quarter sessions and oyer and terminer and general jail delivery 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.

Comment: This section is changed to make it clear that the panel of jurors drawn for the criminal courts is also available for the orphans' court.

(a.1) In any case begun before or certified or appealed to the orphans' court, the court may on its own motion or on motion of a party and with reasonable notice to all parties combine the hearing to determine whether a substantial dispute of fact exists with the trial to determine the dispute and may impanel a jury before determining whether or not a substantial dispute of fact exists. In addition, when there are two or more wills and the issues in regard thereto are closely interrelated, the court, on its own motion or on motion of a party, and with such notice as the court shall direct, may combine the hearing or trial in regard to the wills. The court may withdraw the case from the jury whenever the court determines that no substantial dispute of fact exists.

Comment: The addition of this subsection makes it possible for the court to determine whether or not a substantial issue of fact exists and to dispose of the case on its merits in one proceeding, thus avoiding the burden of two trials when one will suffice. It also empowers the court to try, in a single hearing, issues arising from more than one will. See *Simon Will*, 381 Pa. 284.

(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]

Section 6. This act shall take effect January 1, 1956.

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ORPHANS' COURT PARTITION ACT OF 1917 ✓

Recommendation:

That the Orphans' Court Partition Act of 1917 be repealed as follows.

AN ACT

Repealing the act of June 7, 1917 (P. L. 337), entitled "An act relating to the jurisdiction, powers, and procedure of the several orphans' courts in proceedings for the partition and valuation of real estate, and for the sale of real estate for the purpose of distribution; and the fees, costs, and expenses therein," with exceptions.

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

Section 1. The act of June 7, 1917 (P. L. 337), known as the "Orphans' Court Partition Act of 1917" and its amendments are repealed, as to the partition and valuation and sale of real estate of persons who died after December 31, 1949.

Section 2. This act shall take effect January 1, 1956.

Comment: Since the Fiduciaries Act of 1949 has included real estate in the accounting and it can be awarded in distribution or sale thereof can be made for purposes of distribution under authority of Section 734 of the Fiduciaries Act, it appears that there is no need for a separate act covering partition of real estate of a decedent. After real estate has been awarded in distribution, partition thereof can be had under Procedural Rules 1551 *et seq.*

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Effective 11/1/55 see Advance Reports 381 P. -
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