

# **PROBATE, ESTATES AND FIDUCIARIES CODE**

**Proposed Amendments  
and Comments  
1977**



**General Assembly of the Commonwealth of Pennsylvania  
JOINT STATE GOVERNMENT COMMISSION / JUNE 1977**

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The Joint State Government Commission was created by Act of 1937, July 1, P.L. 2460, as amended, 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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**GENERAL ASSEMBLY OF THE COMMONWEALTH OF PENNSYLVANIA  
JOINT STATE GOVERNMENT COMMISSION**

**ROOM 450 - CAPITOL BUILDING**

**HARRISBURG 17120**

June 27, 1977

TO THE MEMBERS OF THE GENERAL ASSEMBLY:

Proposed amendments to the Probate, Estates and Fiduciaries Code (Title 20, Pennsylvania Consolidated Statutes) are presented in this report along with official comments of the Advisory Committee on Decedents' Estates Laws.

This legislation was developed in conjunction with the continuing effort to ensure that Pennsylvania's probate and estates practices are among the most modern and efficient in the nation. The dedicated work of the Task Force and Advisory Committee on Decedents' Estates Laws is recognized with appreciation.

Respectfully submitted,

A handwritten signature in cursive script, reading "Fred J. Shupnik".

Fred J. Shupnik  
Chairman

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## INTRODUCTION

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On June 30, 1972, Title 20 of the Pennsylvania Consolidated Statutes (Decedents, Estates and Fiduciaries) was enacted, becoming the first substantive title incorporated into the consolidated statutes framework. This significant achievement was the product of the Joint State Government Commission Task Force and Advisory Committee on Decedents' Estates Laws.<sup>1</sup>

Subsequent to the codification, the advisory committee, chaired by William H. Eckert, Esquire, has researched many areas of decedents' estates law to determine if statutory changes should be recommended. This research has been prompted by decisions of the United States and Pennsylvania Supreme Courts as well as by innovations found in the laws of other states and in the Uniform Probate Code. As a result of the committee's continuing study, five new chapters of Title 20 have been enacted into law:

- Chapter 83, relating to Inalienable Property (Act of December 10, 1974 P.L. 867, No. 293).
- Chapter 43, relating to Temporary Fiduciaries (Act of December 10, 1974, P.L. 896, No. 294).
- Chapter 56, relating to Powers of Attorney (Act of December 10, 1974 P.L. 899, No. 295).

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1. See Joint State Government Commission, Proposed Probate, Estates and Fiduciaries Code (Harrisburg, 1972).

- Chapter 63, relating to Multiple Party Accounts (Act of July 9, 1976, P.L. 547, No. 134).
- Chapter 62, relating to Disclaimers (Act of July 9, 1976, P.L. 562, No. 136).

Chapters 56 and 63 are derived from provisions of the Uniform Probate Code and Chapter 62 is substantially similar to the Uniform Disclaimer of Property Interests Act. With the incorporation of these three chapters into Title 20, several of the innovative concepts propounded by the National Conference of Commissioners on Uniform State Laws have been enacted to improve Pennsylvania law.<sup>2</sup> Additionally, in 1976 the General Assembly enacted an advisory committee proposal derived from the Uniform Probate Code that authorized estate planning for incompetents (Act of July 9, 1976, P.L. 836, No. 144).

Committee recommendations of a technical or editorial nature were introduced and passed in the 1973-1974 and 1975-1976 legislative sessions in the form of omnibus bills (Act of December 10, 1974, P.L. 867, No. 293; Act of July 9, 1976, P.L. 551, No. 135). Two other proposals of the advisory committee resulted in raising the age of minority from eighteen to twenty-one years under the Uniform Gifts to Minors Act and increasing the family exemption from \$1,500 to \$2,000 (Act of November 2, 1973, P.L. 322, No. 104; Act of June 27, 1974, P.L. 383, No. 130).

Since the codification of Title 20 of the Pennsylvania Consolidated Statutes, nine advisory committee proposals have been enacted into law.

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2. For other advisory committee recommendations derived from the Uniform Probate Code, see Joint State Government Commission, Probate, Estates and Fiduciaries Code, Phase II, 1973 and Probate, Estates and Fiduciaries Code: Proposed Amendments and Comments--1975.

In addition, the task force and advisory committee reviewed all bills introduced to amend the Code to determine their compatibility with policies established for expanding the act. The six enactments during this period that did not originate with the advisory committee were believed to be consistent with such policies.

Two recent advisory committee recommendations have been approved for introduction into the 1977-1978 Session of the General Assembly. One of these bills continues the omnibus bill technique utilized in the past two sessions. The bill contains amendments to eleven sections of Title 20 and would add two new sections, Sections 726 and 727, relating to venue of nonprofit corporations and cemetery companies. The proposed amendments with official comments where appropriate may be found at page 5, infra.

Also approved for introduction was a bill containing comprehensive statutory revision of the rights of the surviving spouse. This legislation, referred to as the spouse's election bill, was originally introduced into the 1973-1974 Session (Senate Bill 1648, Printer's No. 2108) primarily to provide initial exposure of proposed revisions to the members of the General Assembly. It was reintroduced in the 1975-1976 Session as Senate Bill 1142, Printer's No. 1365. These provisions are contained in proposed Chapter 22, Elective Share of Surviving Spouse, and represent an adapted version of the augmented estate concept of the Uniform Probate Code. Proposed Chapter 22 with official comments may be found at page 17, infra.

The principal draftsman of the spouse's election bill, Philip A. Bregy, Esquire, has been a member of the Advisory Committee on Decedents' Estates Laws since 1945 and is the author of Pennsylvania Intestate, Wills and Estates Act of 1947.

The Task Force and Advisory Committee on Decedents' Estates Laws currently are continuing their efforts to ensure that the probate laws of the Commonwealth retain their viability and effectiveness. A sub-committee has been appointed to prepare a comprehensive revision of the Inheritance and Estate Tax Act of 1961 (June 15, P.L. 373) that will attempt to conform the Pennsylvania provisions more closely to those of the Federal Estate Tax Act. Additionally, the advisory committee is reviewing such matters as the necessity of the current requirement for certain fiduciary bonds, the proper allocation between principal and income for income from options, distributions due absentees and the extension of the Uniform Gifts to Minors Act (20 Pa.C.S. §§5301 et seq.) to wills and real estate.

The task force and advisory committee have often recommended introduction into the Legislature of proposals originating from suggestions of interested individuals and organizations. Suggested revisions of the Probate, Estates and Fiduciaries Code should be forwarded to William H. Nast, Jr., Counsel, or D. Barrington Pritchard, Esquire, Joint State Government Commission, Room 450, Main Capitol Building.

AN ACT

Amending Title 20 (Decedents, Estates and Fiduciaries) of the Pennsylvania Consolidated Statutes, expanding nonmandatory jurisdiction of the orphans' court division; providing for venue in certain situations; providing for advertisement of letters in the case of nonresident decedents; authorizing discretionary accountings and records of risk distributions; expanding the power to terminate trusts; making retroactive the rule against perpetuities; and making editorial changes.

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

Section 1. Section 712 of Title 20, act of November 25, 1970 (P.L.707, No.230), known as the Pennsylvania Consolidated Statutes, is amended by adding a paragraph to read:

§ 712. Nonmandatory exercise of jurisdiction through orphans' court division.

The jurisdiction of the court of common pleas over the following may be exercised through either its orphans' court division or other appropriate division:

\* \* \*

(4) Powers of attorney.--All matters pertaining to the exercise of powers by attorneys in fact or agents acting

under powers of attorney as provided in Chapter 56 (relating to powers of attorney) when the principal is or may be deceased, disabled or incapacitated.

Section 2. Title 20 is amended by adding sections to read:

§ 726. Venue of nonprofit corporations.

Except as otherwise specifically provided in Part III of Title 15 (relating to corporations-not-for-profit), in exercising the jurisdiction conferred upon orphans' court divisions by rules of judicial administration over the property or affairs of a nonprofit domestic or foreign corporation, the venue shall be in the county where the registered office of the corporation is located or, in the absence of a registered office within this Commonwealth, in a county where any property held or controlled by the nonprofit corporation is located.

Comment: Jurisdiction of the orphans' court division over nonprofit corporations and cemetery companies is conferred by Section 711(21) and the present Rule of Judicial Administration No. 2156. This section provides venue for nonprofit corporations.

§ 727. Venue of cemetery companies.

Except as otherwise specifically provided in Part III of Title 15 (relating to corporations-not-for-profit), in exercising the jurisdiction conferred upon orphans' court divisions by rules of judicial administration over the property or affairs of a domestic or foreign cemetery company in matters relating to burial grounds or to property held for the burial of the dead or for the care or adornment of burial grounds, the venue shall be in the county where the burial ground, or any part thereof is located or, in the absence of any involved burial grounds within this Commonwealth, in a county where any property held or controlled by the cemetery company is located.

Comment: This section provides venue for cemetery companies (see comment, Section 726).

Section 3. Sections 3162, 5116,, 5161, 5163, 5531, 5533 and 6102(a) of Title 20 are amended to read:

§ 3162. Advertisement of grant of letters.

The personal representative, immediately after the grant of letters, shall cause notice thereof to be given in one newspaper of general circulation published at or near the place where the decedent resided or, in the case of a nonresident decedent, at or near the place where the letters were granted, and in the legal periodical, if any, designated by rule of court for the publication of legal notices, once a week for three successive weeks, together with his name and address; and in every such notice, he shall request all persons having claims against the estate of the decedent to make known the same to him or his attorney, and all persons indebted to the decedent to make payment to him without delay.

Comment: The amendment corrects a prior oversight in the case of a nonresident decedent. Notice will now be required at the place where the letters are granted (see 20 Pa.C.S. §3151).

§ 5116. Orphan beneficiaries, charitable uses or trusts;  
administration, cities of first class.

Whenever any city of the first class of this Commonwealth shall be charged with the administration of any charitable use or trust for both the maintenance and education of orphans, it shall, without application to any court, act as guardian of the person and estate of each of such orphans, through the same agency that administers the charitable use or trust. In case any such orphan child, at or before the time said city is charged

with the administration of such a charitable use or trust, or during the remaining time it acts as guardian of his estate, shall possess or become entitled to any effects or property, the said city shall be entitled, in like manner as other guardians, to demand and receive the same from any person having possession thereof, or owning the same, and to give acquittance therefor; and it shall be the duty of the said city to take care of the same as guardians, and to make the same productive as far as reasonably can be, and to deliver and pay over the same with the increase, less expenditures made in the exercise of a reasonable discretion, to the said orphan, on his attaining the age of [21] 18 years, or to his legal representatives if he shall die before attaining that age.

§ 5161. When accounting filed.

A guardian shall file an account of his administration [promptly] whenever directed to do so by the court or may file an account at the termination of [his] the guardianship, or at [such earlier] any other time or times [as shall be directed or] authorized by the court.

Comment: Elimination of the mandatory filing requirement will make it clear that there can be an informal settlement of accounts between guardian and ward after the latter's majority in cases where a judicial discharge is not desired. It will also conform to the purpose of Section 5163.1.

§ 5163. Notice, audits, reviews and distribution.

The provisions concerning accounts, audits, reviews, distribution and rights of distributees in a minor's estate shall be the same as those set forth in the following provisions of this title for the administration of a decedent's estate[, with regard to the following]:

- [ (1) Notice to parties in interest, as in section 3503 (relating to notice to parties in interest).
- (2) Representation of parties in interest, as in section 3504 (relating to representation of parties in interest).
- (3) Audits in counties having a separate orphans' court division, as in section 3511 (relating to audits in counties having separate orphans' court division).
- (4) Audits in counties having no separate orphans' court division, as in section 3512 (relating to audits in counties having no separate orphans' court division).
- (5) Statement of proposed distribution, as in section 3513 (relating to statement of proposed distribution).
- (6) Confirmation of accounts and approval of proposed distribution, as in section 3514 (relating to confirmation of account and approval of proposed distribution).
- (7) Rehearing; relief granted, as in section 3521 (relating to rehearing; relief granted).
- (8) Award upon final confirmation of account, as in section 3533 (relating to award upon final confirmation of account).
- (9) Distribution in kind, as in section 3534 (relating to distribution in kind).
- (10) Recording and registering decrees awarding real estate, as in section 3536 (relating to recording and registering decrees awarding real estate).
- (11) Liability for interest, as in section 3544 (relating to liability of personal representative for interest).

(12) Transcripts of balances due, as in section 3545  
(relating to transcripts of balances due by personal  
representative). ]

Section 3503 (relating to notice to parties in interest).

Section 3504 (relating to representation of parties in  
interest).

Section 3511 (relating to audits in counties having  
separate orphans' court division).

Section 3512 (relating to audits in counties having no  
separate orphans' court division).

Section 3513 (relating to statement of proposed  
distribution).

Section 3514 (relating to confirmation of account and  
approval of proposed distribution).

Section 3521 (relating to rehearing; relief granted).

Section 3532(c) (relating to record of risk distributions  
of a personal representative).

Section 3533 (relating to award upon final confirmation  
of account).

Section 3534 (relating to distribution in kind).

Section 3536 (relating to recording and registering  
decrees awarding real estate).

Section 3544 (relating to liability of personal  
representative for interest).

Section 3545 (relating to transcripts of balances due by  
personal representative).

Comment: The inclusion of Section 3532(c) authorizes a  
guardian of a minor to file a record of informal adminis-  
tration (see comment to 20 Pa.C.S. §3532(c), Probate,  
Estates and Fiduciaries Code; Proposed Amendments and  
Comments--1975, p. 10).

§ 5531. When accounting filed.

A guardian shall file an account of his administration [promptly] whenever directed to do so by the court or may file an account at the termination of [his] the guardianship, or at [such earlier] any other time or times [as shall be directed or] authorized by the court.

Comment: Elimination of the mandatory filing requirement upon termination of the guardianship will conform to Section 5533.1 which is intended to avoid the necessity for filing an account by a guardian who distributes property to a personal representative who subsequently includes the distributed property in his own account. It will also remove any suggestion that, in cases where a judicial discharge is not desired, the guardian cannot settle his account informally with the parties in interest.

§ 5533. Notice, audits, reviews and distribution.

The provisions concerning accounts, audits, reviews, distribution and rights of distributees in an incompetent's estate shall be the same as those set forth in the following provisions of this title for the administration of a decedent's or minor's estate[, with regard to the following]:

[ (1) Notice to parties in interest, as in section 3503 (relating to notice to parties in interest).

(2) Representation of parties in interest, as in section 3504 (relating to representation of parties in interest).

(3) Audits in counties having a separate orphans' court division, as in section 3511 (relating to audits in counties having separate orphans' court division).

(4) Audits in counties having no separate orphans' court division, as in section 3512 (relating to audits in counties having no separate orphans' court division).

(5) Statement of proposed distribution, as in section 3513 (relating to statement of proposed distribution).

(6) Confirmation of account and approval of proposed distribution, as in section 3514 (relating to confirmation of account and approval of proposed distribution).

(7) Failure to present claim at audit, as in section 5167 (relating to failure to present claim at audit).

(8) Rehearing, relief granted, as in section 3521 (relating to rehearing; relief granted).

(9) Award upon final confirmation of account, as in section 3533 (relating to award upon final confirmation of account).

(10) Distribution in kind, as in section 3534 (relating to distribution in kind).

(11) Recording and registering decrees awarding real estate, as in section 3536 (relating to recording and registering decrees awarding real estate).

(12) Liability for interest, as in section 3544 (relating to liability of personal representative for interest).

(13) Transcripts of balances due, as in section 3545 (relating to transcripts of balances due by personal representative). ]

Section 3503 (relating to notice to parties in interest).

Section 3504 (relating to representation of parties in interest).

Section 3511 (relating to audits in counties having separate orphans' court division).

Section 3512 (relating to audits in counties having no separate orphans' court division).

Section 3513 (relating to statement of proposed distribution).

Section 3514 (relating to confirmation of account and approval of proposed distribution).

Section 3521 (relating to rehearing; relief granted).

Section 3532(c) (relating to record of risk distributions of a personal representative).

Section 3533 (relating to award upon final confirmation of account).

Section 3534 (relating to distribution in kind).

Section 3536 (relating to recording and registering decrees awarding real estate).

Section 3544 (relating to liability of personal representative for interest).

Section 3545 (relating to transcripts of balances due by personal representative).

Section 5167 (relating to failure to present claim at audit).

Comment: See comment, Section 5163.

§ 6102. 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] one or more beneficiaries, 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 \$50,000 [from all trusts created by the same conveyor] at one time.

\* \* \*

Comment: The court's discretion in terminating trusts or making allowances from trusts is expanded from a limited class of income beneficiaries to all beneficiaries. The \$50,000 limit will now operate during a time period, rather than being contingent upon the value of all trusts created by the same conveyor that were distributed under this section.

Section 4. Section 6104 of Title 20 is amended by adding a subsection to read:

§ 6104. Rule against perpetuities.

\* \* \*

(d) Applicability.--The provisions of this section and of section 6105 (relating to rule against perpetuities; disposition when invalidity occurs) shall apply to all interests heretofore or hereafter created.

Comment: Section 4 of the Estates Act of 1947 provided the test of actualities at the end of the perpetuities period in place of the common-law test of possibilities at the beginning of it. Section 5 of the Estates Act also provided a statutory disposition of those interests which violated the rule. However, Sections 4 and 5 did not apply to interests created before January 1, 1948, and the Supreme Court recently noted that the same cut-off date applied to codification of these sections as Sections 6104 and 6105 of the Probate, Estates and Fiduciaries Code: In re Morton's Estate, 454 Pa. 385 (1973).

The statutory test has worked well and has substantially reduced the perpetuities litigation which arose under the common law, where purely theoretical possibilities frequently required an adjudication that the rule had been violated. Moreover, when an interest was invalid, the statutory plan of awarding it to the valid precedent or subsequent estate is clearly preferable to the common-law requirement that distribution be made to those entitled to the residuary estate, or to the next of kin at the time the interest was created, which frequently made it necessary to trace

the property through one or more estates with highly undesirable tax and administration complications.

Whatever may have been the case when the Estates Act of 1947 was drafted, there now appears to be no constitutional bar to making the provisions of Sections 6104 and 6105 of the Probate, Estates and Fiduciaries Code applicable to all interests, whenever created.

Section 5. Sections 7181 and 8109 of Title 20 are amended to read:

§ 7181. When account filed.

A trustee shall file an account of his administration [at the termination of the trust] whenever directed to do so by the court and may file an account at any other time. [The court may direct him to file an account at any time.]

Comment: The mandatory filing requirement at termination of the trust is eliminated to make it clear that, in cases where a judicial discharge is not desired, a trustee can settle his account informally with the parties in interest. It will also conform to the procedures contemplated by Section 7188.

§ 8109. Disposition of natural resources.

Where any part of the principal consists of property in lands from which may be taken timber, minerals, coal, stone, oil, gas or other natural resources and the trustee or tenant is authorized by the terms of the transaction by which the principal was established or by order of court to sell, lease or otherwise develop such natural resources, or where such natural resources have been leased or developed prior to the transaction by which the principal was established, and no provision is made for the disposition of the net proceeds thereof after the payment of expenses and carrying charges on such property, one-third of the net proceeds, if received as rent or payment on a lease, or as royalties, shall be deemed income, and the remaining two-thirds thereof shall be deemed principal to be

invested to produce income: Provided, That if a surviving spouse of the person establishing the principal shall be the sole tenant, he shall be entitled to such proportion of the net proceeds as he would be entitled to under the intestate laws, if the person establishing the principal were to die intestate at the time of the receipt of such proceeds, a resident of [the] this Commonwealth and owning such proceeds, but this shall not include the [\$10,000 allowance] fixed sum allowed to a spouse under Chapter 21 (relating to intestate succession). Such proceeds if received as consideration for the permanent severance of such natural resources from the land, payable otherwise than as rents, or royalties, shall be deemed principal to be invested to produce income. Nothing in this section shall be construed to abrogate or extend any right, which may otherwise have accrued by law to a tenant to develop or work such natural resources for his own use.

Section 6. This act shall take effect in 60 days.

## SPOUSE'S ELECTION BILL

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### AN ACT

Amending Title 20 (Decedents, Estates and Fiduciaries) of the Pennsylvania Consolidated Statutes, further providing for the rights of certain persons in estates of certain decedents and the rules of interpretation of wills and conveyances.

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

Section 1. Sections 2101, 2102, 2103, 2104 and 2105 of Title 20, act of November 25, 1970 (P.L.707, No.230), known as the Pennsylvania Consolidated Statutes, are amended to read:

§ 2101. Intestate [descent] estate.

[The real and personal estate of a decedent, whether male or female, subject to payment of debts and charges, and not disposed of by will or otherwise, shall descend as hereinafter provided.]

All or any part of the estate of a decedent not effectively disposed of by will or otherwise passes to his heirs as prescribed in this chapter.

Comment: This section is rewritten for stylistic purposes. Similar changes are made in Sections 2103 and 2104.

§ 2102. Share of surviving spouse.

Comment: This represents an important expansion of the surviving spouse's intestate share by substituting for present Pennsylvania law the more generous spouse's share provisions of Section 2-102 of the Uniform Probate Code, except that the allowance is kept at \$20,000 rather than increased to \$50,000.

[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 \$20,000 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 \$20,000 allowance; or

(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.]

The intestate share of a decedent's surviving spouse is:

(1) If there is no surviving issue or parent of the decedent, the entire intestate estate.

Comment: The spouse will take the entire estate in the absence of issue or parents, rather than only in the absence of issue, parents, brothers, sisters, nephews, nieces, grandparents, uncles and aunts, as under present law.

(2) If there is no surviving issue of the decedent but he is survived by a parent or parents, the first \$20,000 plus one-half of the balance of the intestate estate.

Comment: The spouse will take the \$20,000 allowance and one-half the balance if a parent survives. This continues present law.

(3) If there are surviving issue of the decedent all of whom are issue of the surviving spouse also, the first \$20,000 plus one-half of the balance of the intestate estate.

Comment: The spouse will take the \$20,000 allowance plus one-half the balance, even when issue survives, so long as the spouse is the parent of the issue. Under present law, the spouse is confined to one-half of the estate if one child survives (with no allowance) or one-third of the estate if more than one child survives.

(4) If there are surviving issue of the decedent one or more of whom are not issue of the surviving spouse, one-half of the intestate estate.

Comment: This covers the stepchild situation where the decedent is survived by issue of a former marriage. As under present law, there is no allowance but the spouse takes one-half in all cases in lieu of one-half or one-third depending on the number of children.

(5) In case of partial intestacy any property received by the surviving spouse under the will shall satisfy pro tanto the \$20,000 allowance under paragraphs (2) and (3).

Comment: This provision for partial intestacy continues present Pennsylvania law.

§ 2103. Shares of others than surviving spouse.

The share of the estate, if any, to which the surviving

spouse is not entitled, and the entire estate if there is no surviving spouse, shall [descend] pass in the following order:

(1) Issue.--To the issue of the decedent.

(2) Parents.--If no issue survives the decedent, then to the parents or parent of the decedent.

(3) Brothers, sisters, or their issue.--If no parent survives the decedent, then to the issue of each of the decedent's parents.

(4) Grandparents.--If no issue of either of the decedent's parents but at least one grandparent survives the decedent, then half to the [parental] paternal grandparents or grandparent, or if both are dead, to the children of each of them and the children of the deceased children of each of them, and half to the maternal grandparents or grandparent, or if both are dead to the children of each of them and the children of the deceased children of each of them. If both of the paternal grandparents or both of the maternal grandparents are dead leaving no child or grandchild to survive the decedent, the half which would have passed to them or to their children and grandchildren shall be added to the half passing to the grandparents or grandparent or to their children and grandchildren on the other side.

(5) Uncles, aunts and their children, and grandchildren.--If no grandparent survives the decedent, then to the uncles and aunts and the children and grandchildren of deceased uncles and aunts of the decedent as provided in section 2104(1) (relating to taking in different degrees).

(6) Commonwealth.--In default of all persons hereinbefore described, then to the Commonwealth of Pennsylvania.

§ 2104. Rules of succession.

The provisions of this chapter shall be applied to both real and personal estate in accordance with the following rules:

(1) Taking in different degrees.--The shares [descending] passing under this chapter to the issue of the decedent, to the issue of his parents or grandparents or to his uncles or aunts or to their children or grandchildren, shall [descend] pass to them as follows: The part of the estate [descending] passing to any such persons shall be divided into as many equal shares as there shall be persons in the nearest degree of consanguinity to the decedent living and taking shares therein and persons in that degree who have died before the decedent and have left issue to survive him who take shares therein. One equal share shall [descend] pass to each such living person in the nearest degree and one equal share shall [descend] pass by representation to the issue of each such deceased person, except that no issue of a child of an uncle or aunt of the decedent shall be entitled to any share of the estate unless there be no relatives as close as a child of an uncle or aunt living and taking a share therein, in which case the grandchildren of uncles and aunts of the decedent shall be entitled to share, but no issue of a grandchild of an uncle or aunt shall be entitled to any share of the estate.

(2) Taking in same degree.--When the persons entitled to take under this chapter other than as a surviving spouse are all in the same degree of consanguinity to the decedent, they shall take in equal shares.

(3) Whole and half blood.--Persons taking under this chapter shall take without distinction between those of the whole and those of the half blood.

(4) After-born persons; time of determining relationships.--Persons begotten before the decedent's death but born thereafter, shall take as if they had been born in his lifetime.

(5) Source of ownership.--Real estate shall [descend] pass under this chapter without regard to the ancestor or other relation from whom it has come.

(6) Quantity of estate.--Any person taking real or personal estate under this chapter shall take such interest as the decedent had therein.

(7) Tenancy in estate.--When real or personal estate or shares therein shall [descend] pass to two or more persons, they shall take it as tenants in common, except that if it shall [descend] pass to a husband and wife they shall take it as tenants by the entirety.

(8) Alienage.--Real and personal estate shall [descend] pass without regard to whether the decedent or any person otherwise entitled to take under this chapter is or has been an alien.

(9) Person related to decedent through two lines.--A person related to the decedent through two lines of relationship shall take one share only which shall be the larger share.

(10) Requirement that heir survive decedent for five days.--Any person who fails to survive the decedent by five days shall be deemed to have predeceased the decedent for purposes of intestate succession and the decedent's heirs

shall be determined accordingly. If the time of death of the decedent or of a person who would otherwise be an heir, or the times of death of both, cannot be determined, and it cannot be established that the person who would otherwise be an heir survived the decedent by five days, that person shall be deemed to have failed to survive for the required period. This section shall not be applied where its application would result in a taking by the Commonwealth under section 2103(6) (relating to shares of others than surviving spouse).

§ 2105. Spouse's rights.

(a) Widow.--The [shares] share of the estate to which [the] a widow is entitled under this title shall be in lieu and full satisfaction of her dower at common law [, so far as relates to real estate of which the husband dies seised; and her share in real estate aliened by the husband in his lifetime, without her joining in the conveyance shall be the same as her share in real estate of which the husband dies seised. The widow shall receive the same share in a future estate owned by the husband as in an estate of which he dies seised, although the particular estate shall not terminate before the death of the husband].

(b) Surviving husband.--The [shares] share of the estate to which [the] a surviving husband is entitled under this title shall be in lieu and full satisfaction of his curtesy at common law [ so far as relates to real estate of which the wife dies seised, and his share in real estate aliened by the wife in her lifetime without his joining in the conveyance shall be the same as his share in real estate of which the wife dies seised. The surviving husband shall receive the same share in a future estate owned by the wife as in an estate of which she dies

seised, although the particular estate shall not terminate before the death of the wife].

Comment: This provides that the share of the estate under this code is in lieu of common law dower or curtesy. A specific statement that a surviving spouse would take no share in real property aliened by the deceased spouse without joinder by the survivor is unnecessary since the right to such a share had no common-law basis other than dower or curtesy and no statutory basis other than the provisions formerly appearing in Section 2105 and its predecessors which are hereby repealed.

Section 2. Section 2111 of Title 20 is repealed.

Section 3. Title 20 is amended by adding a chapter to read:

#### CHAPTER 22

#### ELECTIVE SHARE OF SURVIVING SPOUSE

Sec.

- 2201. Definition of conveyance.
- 2202. Right of election; nonresident decedent.
- 2203. Right of election; resident decedent.
- 2204. Disclaimers, releases and charges against elective share.
- 2205. Transfers for value excluded.
- 2206. Right of election personal to surviving spouse.
- 2207. Waiver of right to elect.
- 2208. Forfeiture of right of election; desertion; nonsupport; slaying.
- 2209. Surviving spouse as witness.
- 2210. Procedure for election; time limit.
- 2211. Determination of effect of election; enforcement.

Comment: This chapter is derived from the sections governing spouse's election in the Uniform Probate Code but does not include the Uniform Code's concept of the augmented estate which unduly complicates the Code's provisions and raises serious questions of valuation. The main changes from Pennsylvania law are (1) a redefinition of (for the most part broadening) the property subject to a surviving spouse's election (see comments

to Section 2203) and (2) broadening provisions for disclaimer by the electing spouse of benefits he has received from decedent (see comments to Section 2204).

§ 2201. Definition of conveyance.

As used in this chapter, unless the context clearly indicates otherwise, "conveyance" means an act by which it is intended to create an interest in real or personal property whether the act is intended to have inter vivos or testamentary operation.

Comment: See "Conveyance," Section 6101.

§ 2202. Right of election; nonresident decedent.

When a married person not domiciled in this Commonwealth dies, the rights, if any, of his surviving spouse to an elective share in property in this Commonwealth are governed by the laws of the decedent's domicile at death, but the rights of the electing spouse shall be subject to the rights of fiduciaries, custodians and obligors within this Commonwealth and transferees for value of and holders of liens for value on real estate or tangible personal property located in this Commonwealth under section 2211 (relating to determination of effect of election; enforcement).

Comment: This is based on subsection (b) of Section 2-201 of the Uniform Probate Code which makes the domicile of the decedent controlling in all cases. It will change present Pennsylvania law only with respect to real estate. Uniformity among the various states in this area is important.

§ 2203. Right of election; resident decedent.

(a) Property subject to election.--When a married person domiciled in this Commonwealth dies, his surviving spouse has a

right to an elective share of one-third of the following property:

(1) Property passing from the decedent by will or intestacy.

(2) Income or use for the remaining life of the spouse of property conveyed by the decedent during the marriage to the extent that the decedent at the time of his death had the use of the property or an interest in or power to withdraw the income thereof.

(3) Property conveyed by the decedent during his lifetime to the extent that the decedent at the time of his death had a power to revoke the conveyance or to consume, invade or dispose of the principal for his own benefit.

(4) Property conveyed by the decedent during the marriage to himself and another or others with right of survivorship to the extent of any interest in the property that the decedent had the power at the time of his death unilaterally to convey absolutely or in fee.

(5) Survivorship rights conveyed to a beneficiary of an annuity contract to the extent it was purchased by the decedent during the marriage and the decedent was receiving annuity payments therefrom at the time of his death.

(6) Property in excess of \$3,000 in value conveyed to any one donee by the decedent during the marriage within one year of his death.

In construing this subsection, a power in the decedent to withdraw income or principal, or a power in any person whose interest is not adverse to the decedent to distribute to or use for the benefit of the decedent any income or principal, shall be deemed to be a power in the decedent to withdraw so much of

the income or principal as is subject to such power, even though such income or principal may be distributed only for support or other particular purpose or only in limited periodic amounts.

(b) Property not subject to election.--The provisions of subsection (a) shall not be construed to include any of the following except to the extent that they pass as part of the decedent's estate to his personal representative, heirs, legatees or devisees:

(1) Any conveyance made with the express consent or joinder of the surviving spouse.

(2) The proceeds of insurance, including accidental death benefits, on the life of the decedent.

(3) Interests under any broad-based nondiscriminatory pension, profit sharing, stock bonus, deferred compensation, disability, death benefit or other such plan established by an employer for the benefit of its employees and their beneficiaries.

(4) Property passing by the decedent's exercise or nonexercise of any power of appointment given by someone other than the decedent.

Comment: Subsection (a) changes present law by following the Uniform Probate Code in making the electing spouse's share one-third in all cases, rather than providing one-third or one-half, depending on whether issue survive. The balance of the subsection redefines the property subject to election and is based to a large extent on the provisions of the Uniform Probate Code.

In one respect, the class of property subject to election is narrower than in present Pennsylvania law. It is intended that the spouse should have a right of election only with respect to assets which the decedent retained the right or power to enjoy during his lifetime. This should not include property which the decedent has given away absolutely and cannot recapture for his own benefit, even though he has retained a power of appointment which cannot be exercised in his favor during his life. For application of the present law in this regard, see Behan Estate, 399 Pa. 314 (1960) (as noted in Fid. Rev., May 1960), where Section 11 of the Estates Act of 1947, P.L. 100, No. 39 (now 20

Pa.C.S. §6111) was applied to permit a spouse to elect against an irrevocable trust to A for life with remainder to "such charitable trust or foundation" as the settlor might establish by will.

In other respects the property subject to the spouse's election is broadened by the proposed provisions, as follows:

(1) Probate property. By including both testamentary and intestate property and requiring their disclaimer, this clause conforms with the decision in Martin Estate, 365 Pa. 280 (1950), where the court denied the spouse the \$10,000 allowance against intestate property in a case of partial intestacy.

(2) Reservation of income. This is one of the main expansions from the class of property presently subject to election. It is based on the Uniform Probate Code but confines the spouse to the income interest rather than the principal of the fund of which decedent has retained the income. Thus, assuming no other powers or interests were reserved, the spouse will take one-third of what the decedent retained--a life income interest.

(3) Revocable transfers. This conforms with present Pennsylvania law.

(4) Joint property. This conforms with present Pennsylvania case law which allows the spouse to take against property held jointly by decedent and another on the theory that the decedent had the power to revoke the conveyance as to his one-half or other fractional share by unilaterally changing it to a tenancy in common.

(5) Annuities. There are no known Pennsylvania cases on this subject. The clause goes beyond the Uniform Probate Code which treats "joint annuities" in the same way as life insurance which is exempt from election. But policy considerations are quite different. An annuity is enjoyed by the decedent and is analogous to retained income, while life insurance is for the most part a burden to the insured rather than a benefit.

(6) Contemplation of death. This is based on the Uniform Probate Code and changes present law by extending the spouse's rights to transfers that are likely to be in contemplation of death.

The final provision in the subsection, equating beneficial powers to beneficial interests, is found neither in the Uniform Code nor present Pennsylvania law. It will make certain transfers subject to the spouse's election which under present law might offer an easy escape from the rights of the surviving spouse, e.g., discretionary trusts where a disinterested trustee has the power to make payments to the decedent or where the decedent had the right to withdraw a certain percentage of the principal each year.

Subsection (b) of Section 2203 conforms to present Pennsylvania law.

§ 2204. Disclaimers, releases and charges against elective share.

(a) Disclaimers.--Except as provided in subsections (b) and (c), an election by a spouse to take his elective share shall be deemed a disclaimer of any beneficial interest of the spouse in the following, to the extent that such interest would otherwise be payable to or enjoyed by the spouse after the decedent's death:

(1) Property subject to the spouse's election not awarded to the spouse as part of his elective share.

(2) Property appointed by the decedent's exercise of a general or special power of appointment, and property passing in default of appointment to the extent that the decedent had power to exclude his spouse from any interest therein.

(3) Property in any trust created by the decedent during his lifetime.

(4) Proceeds of insurance, including accidental death benefits, on the life of the decedent attributable to premiums paid by him, his employer, partner or creditor.

(5) Any annuity contract purchased by the decedent, his employer, partner or creditor.

(6) Any pension, profit sharing, stock bonus, deferred compensation, disability, death benefit or other plan established by an employer for the benefit of its employees and their beneficiaries, exclusive of the Federal social security system and railroad retirement system, by reason of services performed or disabilities incurred by the decedent.

(7) Community property in the proportion that it represents the decedent's earnings or contributions.

(8) All intangible personal property and all real property owned by the decedent and his spouse by the entirety or jointly with right of survivorship, in the proportion that such property represents contributions by the decedent.

(9) All intangible personal property and all real property given to his spouse by the decedent during his lifetime which, or the proceeds of which, are still owned by his spouse at the time of the decedent's death.

(b) Conveyances and releases.--Except as provided in subsection (c), if any of the foregoing beneficial interests has already been accepted or cannot be disclaimed for any other reason, the spouse shall be entitled to an elective share only if the spouse conveys or releases such interest to those who would take it if the spouse had disclaimed it, and such conveyance or release shall be valid regardless of any spendthrift or similar provision.

(c) Charges against elective share.--Notwithstanding the provisions of subsections (a) and (b), the spouse may elect to retain any beneficial interest described in subsection (a) which immediately after the decedent's death consists of property owned by the spouse outright or in fee simple absolute, and have the value thereof at the time of the decedent's death charged against the elective share. The value at the time of the decedent's death of any beneficial interest described in subsection (a), regardless of its form, shall also be so charged against the elective share to the extent that it cannot be disclaimed, conveyed or released.

(d) Definition of "beneficial interest".--The term "beneficial interest" as used in this section shall include any power of appointment or power of consumption and any benefit arising from a direction by the decedent regarding the source of payment of inheritance or estate taxes.

(e) Conditional decree.--Any award to the electing spouse shall be conditioned upon:

(1) the spouse's delivery, in recordable form in the case of real estate, of such disclaimers, releases or conveyances as may be appropriate to insure protection to the person or persons entitled to disclaimed, released or conveyed property; and

(2) the filing with the court of proof of compliance with the condition.

Comment: Subsection (a) changes present Pennsylvania law by broadening the definition of benefits which the electing spouse must disclaim. Except with respect to powers of appointment, present law requires the electing spouse to disclaim only those interests which the spouse could elect against. Hence, if the decedent had put property in joint names with the spouse and had named the spouse beneficiary of life insurance, the spouse can presently accept the rights of survivorship in the joint property, accept the life insurance proceeds and also take the elective share of decedent's remaining property. The present section would eliminate this inequity by requiring disclaimer of most benefits that the spouse received from the decedent.

Under subsection (b) certain interests, such as insurance proceeds the spouse has already collected or a life estate in the spouse which began before decedent's death, might not be subject to disclaimer because they had already been accepted. Such interests could be released or conveyed.

Subsection (c) adopts the Uniform Probate Code approach of letting the spouse keep property and have it charged against the elective share in two narrow areas. In the first place, the spouse is entitled to retain and have charged any property owned outright. This is desirable, bearing in mind that the property in question may be the real estate where the spouse lives. Also, property owned outright does not raise the valuation questions that other beneficial interests might raise.

The subsection also requires charging for any beneficial interest (regardless of form) which cannot be disclaimed, released or

conveyed. It is conceivable, for example, that a spendthrift life estate in a trust governed by the law of another jurisdiction could not be released. In such rare situations the valuation question will have to be addressed.

The main effect of subsection (d) is that it will require the spouse to disclaim powers of appointment given in the will or other instrument. This is contrary to a questionable dictum in Lonegan's Estate, 303 Pa. 142, 149 (1931) and to the decision in Brachman Estate, 11 Fid. Rep. 310 (O.C. Schuyler, 1960).

§ 2205. Transfers for value excluded.

Conveyances and contracts made by the decedent are excluded from the provisions of section 2203 (relating to right of election; resident decedent) and section 2204 (relating to disclaimers, releases and charges against elective share), to the extent that the decedent received adequate consideration therefor in money or money's worth.

Comment: This section is based on the Uniform Probate Code and conforms with present Pennsylvania law.

§ 2206. Right of election personal to surviving spouse.

The right of election of the surviving spouse may be exercised only during his lifetime by him. In the case of a minor or an incompetent spouse, the right of election may be exercised in whole or in part only by the spouse's guardian upon order of the court having jurisdiction of the minor's or the incompetent's estate, after finding that exercise of the right is advisable.

Comment: This section continues present Pennsylvania law. Sections 2207, 2208 and 2209 also conform with present law.

§ 2207. Waiver of right to elect.

The right of election of a surviving spouse may be waived,

wholly or partially, before or after marriage or before or after the death of the decedent.

§ 2208. Forfeiture of right of election; desertion; nonsupport; slaying.

A surviving spouse who under the provisions of section 2106 (relating to forfeiture) would not be entitled to a share of the decedent's estate had he died intestate shall have no right of election.

§ 2209. Surviving spouse as witness.

The surviving spouse shall be a competent witness as to all matters pertinent to his rights under this chapter.

§ 2210. Procedure for election; time limit.

(a) How election made.--A surviving spouse's election to take or not to take his elective share shall be by a writing signed by him and filed with the clerk of the orphans' court division of the county where the decedent died domiciled. Notice of the election shall be given to the decedent's personal representative, if any.

(b) Time limit.--The election must be filed with the clerk before the expiration of six months after the decedent's death or before the expiration of two months after the date of probate, whichever is later. The court may extend the time for election as it sees fit for cause shown by the surviving spouse. Failure to file an election in the manner and within the time limit set forth in this section shall be deemed a waiver of the right of election; provided that if the court determines that gross injustice would result, the court may permit an election to be made subject to any limitations with respect to the property to be subject to the election and to be disclaimed by the spouse that the court deems equitable.

property within each conveyance. After the value of the electing spouse's fractional interest in each conveyance at the time of distribution is determined, items of property within the conveyance may be allocated disproportionately at distribution values between the elective and nonelective shares in order to give maximum effect to the decedent's intention with respect to the disposition of particular items or kinds of property. Property in the nonelective share shall be distributed among the beneficiaries of each conveyance in accordance with the rules of abatement or by analogy thereto.

(2) Disclaimed interests contingent on survival.--If a surviving spouse has disclaimed an interest which would have terminated at the spouse's death or was contingent upon the spouse surviving the decedent, the interests of others shall be as they would have been if the spouse had predeceased the decedent.

(3) Other disclaimed interests.--Except as above provided, disclaimed interests shall pass to other beneficiaries of the conveyance according to section 2514 (relating to rules of interpretation), which may be applied by analogy to inter vivos conveyances or, where those provisions cannot be applied, by way of reversion to the personal representative of the decedent's estate.

(4) Windfalls.--If the election and disclaimers, releases and conveyances by a surviving spouse in connection therewith result in an increase in the value of the interest of a beneficiary, the court may require contributions from such a beneficiary, directly or by sequestering the disclaimed, released or conveyed interests, in relief of other beneficiaries, so that no beneficiary will receive more

value than he would have received in the absence of the election.

(c) Enforcement.--The rights of the electing spouse may be enforced, as the court considers appropriate, by orders, decrees or judgments requiring the performance of specific acts by, or imposing personal liability on:

(1) any fiduciary, custodian or obligor to the extent that he is in possession of property subject to the spouse's election or its proceeds; or

(2) the original beneficial recipient of such property or the donee of that recipient, including successive donees, to the extent that each donee is in possession of such property or its proceeds.

Any such order, decree or judgment of the orphans' court division of the county of the decedent's domicile under this section may be further enforced as necessary by suits in other courts. The liabilities as determined by the court may be enforced against fewer than all persons against whom relief could be sought but no person shall be subject to contribution in any greater amount than he would have been if full relief had been secured against all persons subject to contribution.

(d) Restraining orders.--The court on petition of a surviving spouse may restrain any person from making a payment or transfer of property which may be subject to the spouse's election, either before or after an election is made.

(e) Protection of fiduciaries, custodians and obligors.--Unless restrained by court decree, no fiduciary, custodian or obligor, other than the personal representative of the decedent's estate, shall be liable for making such payments or distributions of property subject to the spouse's election as

would have been required by the terms of the conveyance or contract in the absence of an election.

(f) Transferees and lienholders for value.--No transferee of or holder of a lien against property subject to a spouse's election shall be liable to a surviving spouse if the transferee or lienholder has given a bona fide consideration, unless a certified copy of an order or decree of court providing to the contrary with respect to real property has been recorded in the office for the recording of deeds of the county where the real estate lies prior to the recording of the transfer or the entry of the lien of record. The recording of any such order or decree shall be indexed in the grantor's index under the name of the decedent.

Comment: Subsection (a) is based on the Uniform Probate Code and conforms with present Pennsylvania law.

Subsection (b) sets forth the rules generally followed by the Pennsylvania courts in the ordinary cases but gives the court power to supplement and to depart from them to avoid inequities. For example, clause (1) provides that in most cases the elective share is charged separately against each category of property, but the opening language of the section gives the court the power to depart from this general rule where, for example, an inter vivos conveyance subject to election is more in the nature of a specific legacy, as a gift of a piece of jewelry in contemplation of death.

The latter part of clause (1) is intended to change the result reached in Runyan Estate, 21 D. & C.2d 180, 19 Fid. Rep. 379 (O.C. Fulton 1960), where the electing spouse was given a share of specifically devised real estate without consideration of Section 734 of the Fiduciaries Act of 1949, P.L. 512, No. 121 (now 20 Pa.C.S. §3534).

Clause (4) covers situations where a beneficiary may be actually enriched by the electing spouse's disclaimer. See Lonérgan's Estate, 303 Pa. 142 (1931) and France Estate, 352 Pa. 522 (1945).

The enforcement provisions (subsections (c) and (d)) give the courts wide latitude in requiring specific performance or imposing personal liability in enforcing the spouse's rights which now include broad classes of extratestamentary property, and the spouse is given specific authority to petition the court for restraining orders to prevent transfers of property which may put it beyond the spouse's reach.

On the other hand, subsections (e) and (f) give substantial protection to fiduciaries, custodians, obligors and transferees. The only protection given to third parties in the present law is a very limited protection to grantees of real estate (see Section 2513). The protection given to third parties is expanded because property subject to the spouse's election under Section 2203 might include such things as joint bank accounts, annuity interests and trusts in other jurisdictions. Broad protection of third parties' rights in this area is desirable to avoid delays in the great majority of cases where there is no problem of spouse's election. Thus, fiduciaries (other than the personal representative) may make distribution unless they are subject to a restraining order. Cf. 20 Pa.C.S. §8704 containing a similar provision with respect to employee benefits in another context.

Note that the enforcement and protective provisions apply only to the spouse's rights against others. The rights of beneficiaries are protected by the terms of Section 2204 requiring disclaimers, conveyances, etc., by the spouse as a condition to the election. A specific provision for third party protection of fiduciaries who may make payments to the spouse of property he is required to disclaim is not necessary because any property accepted by the spouse will not be subject to disclaimer and the provisions for releases, conveyances or charges in Section 2204(b) and (c) will then come into play.

Section 4. Sections 2508, 2509, 2510, 2511, 2512 and 2513 of Title 20 are repealed.

Section 5. The definition of the term "conveyance" and the introductory paragraph of section 6101 of Title 20 are amended to read:

§ 6101. Definitions.

The following words and phrases, when used in this chapter, unless the context clearly indicates otherwise, shall have the meanings ascribed to them in this section:

\* \* \*

"Conveyance." [Means an] An act by which it is intended to create an interest in real or personal property whether the act is intended to have inter vivos or testamentary operation. [Except as used in section. 6111 (relating to conveyances to defeat marital rights), it] It shall include an act by which a power of appointment whenever given is exercised.

Section 6. Section 6111 of Title 20 is repealed.

Section 7. Title 20 is amended by adding a section to read:

§ 6111.1. Modification by divorce.

If the conveyer is divorced from the bonds of matrimony after making a conveyance, all provisions in the conveyance which were revocable by him at the time of his death and which were to take effect at or after his death in favor of or relating to his spouse so divorced shall thereby become ineffective for all purposes.

Section 8. This act shall take effect in 60 days.