

**1991 REPORT
of the**

**JOINT STATE GOVERNMENT COMMISSION
TASK FORCE AND ADVISORY COMMITTEE
ON DECEDENTS' ESTATES LAWS**

Containing Recommendations Amending the
PROBATE, ESTATES AND FIDUCIARIES CODE
and the INHERITANCE AND ESTATE TAX ACT
WITH COMMENTS

General Assembly of the Commonwealth of Pennsylvania
June 1991

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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ROOM 108 - FINANCE BUILDING
HARRISBURG 17120

June 1991

TO THE MEMBERS OF THE GENERAL ASSEMBLY:

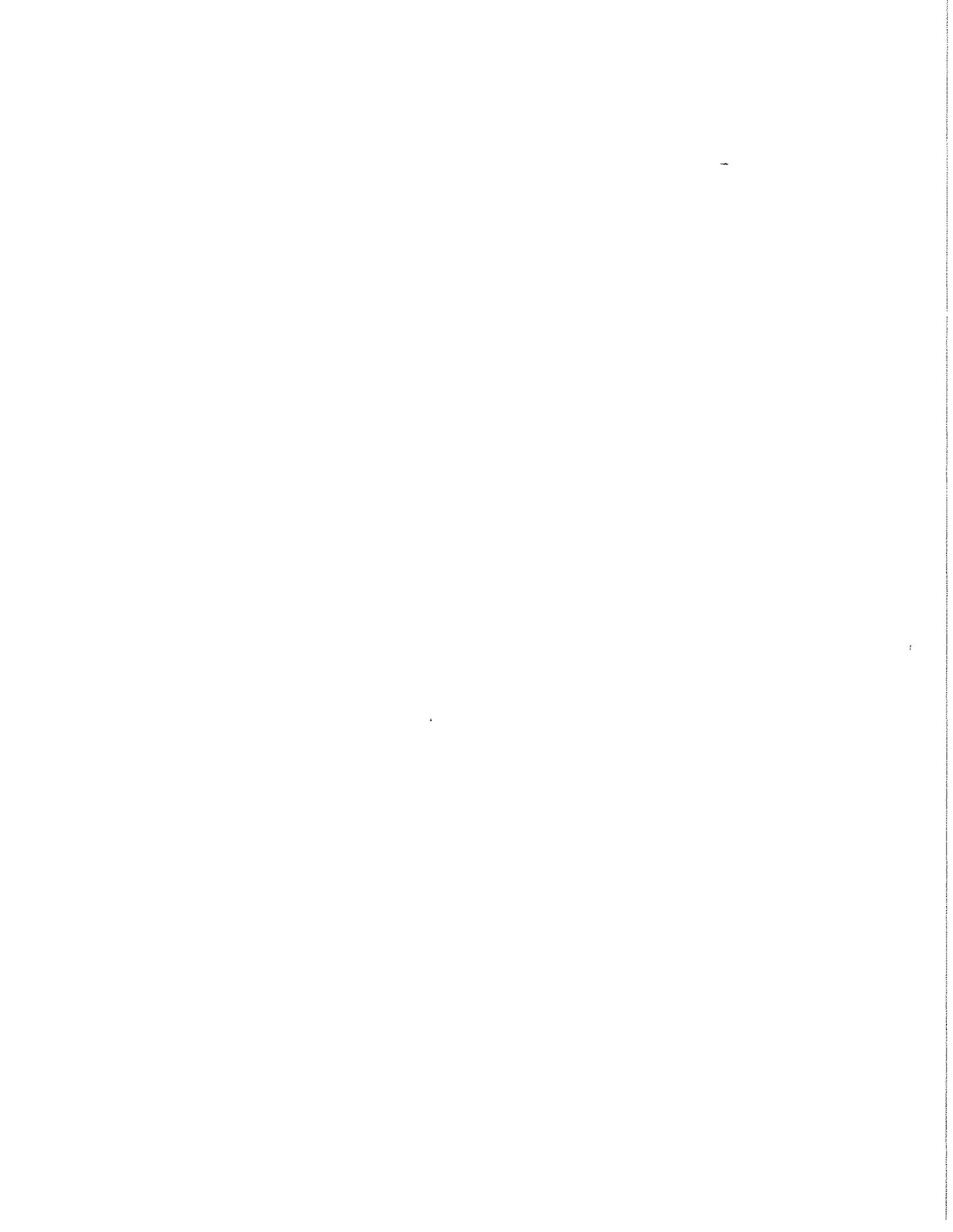
This report summarizes amendments to the Probate, Estates and Fiduciaries Code and the Inheritance and Estate Tax Act recommended by the Task Force and Advisory Committee on Decedents' Estates Laws. Explanatory materials and official comments are included to facilitate review of the legislation introduced by members of the task force.

For over 45 years, the members of the task force and advisory committee have worked to ensure that Pennsylvania can retain its reputation as a national leader in probate law.

Respectfully submitted,

A large, stylized handwritten signature in black ink, appearing to read "Roger A. Madigan".

Roger A. Madigan
Chairman



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I. INTRODUCTION

This is the ninth report of the Joint State Government Commission Task Force and Advisory Committee on Decedents' Estates Laws since the June 30, 1972 codification of the Probate, Estates and Fiduciaries Code as Title 20 of the Pennsylvania Consolidated Statutes. The task force and advisory committee recommend legislation which would make substantive and technical amendments to Title 20 and recommend legislation which would amend the Inheritance and Estate Tax Act codified in 1982 as Chapter 17 of Title 72 of the Pennsylvania Consolidated Statutes to statutorily authorize Pennsylvania to take advantage of the 5 percent State credit for generation-skipping transfers allowable under the Internal Revenue Code.

PROBATE, ESTATES AND FIDUCIARIES CODE

This recommended legislation would:

- Streamline provisions relating to advertisement of accounts (§ 745), the attestation of certain applications and documents (§ 911), notice to absentees (§ 5704), the annexation of certain accounts (§ 7188), and separation of trusts (§ 7191).
- Clarify the court's jurisdiction to reform testamentary trusts (§ 711).
- Broaden the class of property deemed disclaimed when a spouse takes an elective share (§ 2204).

- Make it possible to avoid automatic modification of wills (§ 2507) and conveyances (§ 6111.1) in the cases of subsequent marriage or divorce.
- Provide an additional rule of interpretation for wills (§ 2514) and conveyances (§ 6114) with respect to an affiliate of a corporate fiduciary.
- Confirm existing Pennsylvania law that a gift to any unfunded trust is valid (§ 2515).
- Specify the manner in which contracts concerning succession may be established (Ch. 27).
- Extend to personal representatives the authority to make certain temporary investments (§§ 3316 and 7315.1).
- Allow fiduciaries to hold securities in book-entry form regardless of whether the securities are United States government securities (§ 3321).
- Require a personal representative to notify all beneficiaries and heirs (§ 3330).
- Further provide for notice to parties in interest and for rights and limitation of rights of claimants (§§ 3503 and 3532).
- Make editorial changes relating to apportionment of death taxes (Ch. 37).
- Authorize the guardian of the estate of a minor to distribute certain income without court approval (§ 5164).
- Enact the Uniform Transfers to Minors Act to replace the Pennsylvania Uniform Gifts to Minors Act (Ch. 53).
- Clarify the court's jurisdiction to appoint temporary guardians (§ 5513).
- Authorize the court to further modify the estate plan of an incompetent (§ 5536).
- Amend provisions relating to powers of attorney to:
 - (1) Permit certain powers of attorney to be executed by mark (§ 5601(b)).
 - (2) Expand the statutory powers and their interpretation (§§ 5601(c), 5602 and 5603).

- (3) Permit delegation of powers by an attorney-in-fact (§ 5602(b)(1.1)).
 - (4) Provide a statutory presumption that all powers are durable (§§ 5601.1 and 5604(a)).
 - (5) Authorize the use of springing powers of attorney (§ 5604(a)).
 - (6) Ensure continuing validity of durable powers of attorney (§ 5604(b)).
 - (7) Provide that divorce would serve to revoke the designation of the former spouse as attorney-in-fact (§ 5605).
 - (8) Permit a third party to request an affidavit from the attorney-in-fact concerning the validity of the power (§ 5606).
 - (9) Set forth rules regarding third party liability (§ 5608).
- Provide that as a matter of law divorce revokes any revocable beneficiary designation made in favor of the former spouse (§ 6111.2).
 - Permit banks and trust companies to invest their fiduciary accounts in mutual funds which they also service (§ 7314.1).
 - Further authorize the court to grant declaratory relief with respect to certain interests in real property (§ 8301).

INHERITANCE AND ESTATE TAX ACT

This recommended legislation would:

- Provide the statutory authority for Pennsylvania to take advantage of the 5 percent State credit for generation-skipping transfers allowable under the Internal Revenue Code (§§ 1718, 1753 and 1755).

Explanatory material and official comments of the advisory committee for each amendment summarized above is provided in Parts II and III of this report.

Since the most recent task force and advisory committee proposed legislation was enacted in 1984 (see the table on the following page which lists all of the amendatory acts to the Probate, Estates and Fiduciaries Code since its consolidation into Title 20 in 1972), this proposed legislation incorporates an accumulation of over six years of work. For a history of these proposed amendments, see the 1985 Commission report, Probate, Estates and Fiduciaries Code; Proposed Amendments and Comments--1985, and the 1988 Commission report, Exempting Spousal Transfers and Other Proposed Amendments to the Inheritance and Estate Tax Act; Probate, Estates and Fiduciaries Code, Proposed Amendments and Comments.

The recommended legislation was introduced by task force members in 1985 (Senate Bill 1162, Pr.'s No. 1466), 1987 (Senate Bill 186, Pr.'s No. 2169) and 1989 (Senate Bill 775, Pr.'s No. 845 and House Bill 1015, Pr.'s No. 1157).

Senate Bill 1162, Pr.'s No. 1466, was considered by the Senate Judiciary Committee on December 10, 1985 and amended by deleting the provisions relating to multiple-party bank account forms. Senate Bill 1162, as amended (Pr.'s No. 1688), was unanimously approved by the Senate on January 29, 1986. In the House, the bill was referred to the Judiciary Committee on February 3, 1986 where it remained at the close of the 1985-86 session.

Senate Bill 186, Pr.'s No. 2169, passed in the Senate without a negative vote on June 29, 1988. The bill received first consideration in the House on November 16, 1988 but was re-referred to the

ACTS AMENDING THE
 PROBATE, ESTATES AND FIDUCIARIES CODE
 (1972, P.L. 508, No. 164, effective July 1, 1972)
 THROUGH 1990

<u>Citation</u>	<u>Subject</u>
1972, P.L. 1461, No. 331	Change of age of majority
1973, P.L. 62, No. 25	Bank holding companies
1973, P.L. 322, No. 104	Change of age of majority*
1974, P.L. 282, No. 84	Increase monetary limit, § 3101
1974, P.L. 383, No. 130	Increase monetary limit, § 3121*
1974, P.L. 720, No. 242	Deposit of securities; book-entry securities
1974, P.L. 816, No. 271	Editorial change in title designation
1974, P.L. 867, No. 293	Omnibus*
1974, P.L. 896, No. 294	Temporary fiduciaries*
1974, P.L. 899, No. 295	Powers of attorney*
1975, P.L. 598, No. 168	Increase monetary limit, § 3101
1976, P.L. 434, No. 105	Self-proved wills**
1976, P.L. 547, No. 134	Multiple-party bank accounts*
1976, P.L. 551, No. 135	Omnibus*
1976, P.L. 562, No. 136	Disclaimers*
1976, P.L. 836, No. 144	Estate plan for incompetent*
1978, P.L. 42, No. 23	Spouse's election*
1978, P.L. 77, No. 37	Omnibus*
1978, P.L. 202, No. 53	Judiciary Act Repealer Act
1978, P.L. 909, No. 173	Equal Rights Amendment
1978, P.L. 1269, No. 303	Illegitimates
1979, P.L. 255, No. 86	Conforming amendment
1980, P.L. 565, No. 118	Omnibus*
1980, P.L. 693, No. 142	Repealed § 773
1982, P.L. 45, No. 26	Omnibus*
1982, P.L. 682, No. 194	Anatomical gifts
1984, P.L. 103, No. 21	Forfeiture of parent's share
1984, P.L. 929, No. 182	Omnibus*
1986, P.L.1449, No.141	Anatomical gifts
1988, P.L.553, No.99	Affidavit and oath*; authorized investments
1988, P.L.1444, No.177	Definition of inter vivos trust
1990, P.L.834, No.198	Venue of nonprofit corporations and cemetery companies

*Drafted by the advisory committee and approved and introduced by the Task Force on Decedents' Estates Laws.

**Drafted by the advisory committee without official action of the advisory committee or task force.

Appropriations Committee on November 22, 1988. No further action was taken on SB 186.

Senate Bill 775 passed unanimously in the Senate on June 27, 1989 with an amendment deleting a provision which permitted a parent to appoint by will a guardian of the person of an adult incompetent child (Pr.'s No. 1348). Senate Bill 775 was amended on third consideration in the House on September 24, 1990 to incorporate amendments to the guardianship provisions and amendments to the Inheritance and Estate Tax Act (Title 72) exempting spousal transfers from inheritance taxation. Senate Bill 775, as amended (Pr.'s No. 2485), was unanimously approved by the House on September 24; the Senate concurred in the House amendments on October 2, 1990. Senate Bill 775, Pr.'s No. 2485, was vetoed by the Governor on October 12, 1990. House Bill 1015, Pr.'s No. 1157, the identical bill to Senate Bill 775, Pr.'s No. 845, was introduced on April 5, 1989 and referred to the House Judiciary Committee on the same day. The bill remained in the Judiciary Committee for the remainder of the session.

For a legislative history of the proposed amendments in this session's recommended legislation, see the table on the following pages.

This session's proposed legislation is a replication of SB 775, Pr.'s No. 1348, with the addition of amendments recently recommended by the advisory committee and approved by the task force on May 8, 1991. These proposals amend sections 711, 3330, 3503, 3532(b.1), 5601(c), 5602, 5603, 5604(a), 5605 and 5606 and add sections 5601.1, 5608 and 7314.1.

LEGISLATIVE HISTORY OF PROPOSED AMENDMENTS
CONTAINED IN 1991-92 OMNIBUS BILL

Pa.C.S. Section	1991-92 Omnibus Bill Subject	1989-90 SB 775, PN 845 HB 1015, PN 1157	1987-88 SB 187, PN 2169	1985-86 SB 1162, PN 1466
711	Reformation of testamentary trusts			
745	Advertisements of accounts	X	X	X
911	Attestation of certain applications and documents	X	X	X
2204	Disclaimers of elective share	X	X	
2507	Modification by circumstances	X	X	X
2514	Rules of interpretation (wills)	X	X	X
2515	Validation of gift to an unfunded trust	X	X	
Ch. 27	Contractual arrangements relating to succession	X	X	X
3316	Investment of funds	X	X	X
3321	Book-entry securities	X	X	
3330	Notice to beneficiaries and heirs			
3503	Notice to parties in interest	X		
3532(a) and (b)	At risk distribution	X		
3532(b.1)	Limitation on rights of claimants			
Ch. 37	Apportionment of death taxes	X	X	X
5164	Distribution for support and education of minors	X		
Ch. 53	Pennsylvania Uniform Transfers to Minors Act	X	X	X
5513	Temporary guardian	X	X	
5536	Distribution of income and principal during incompetency	X	X	X
5601(b)	Execution of power of attorney by mark	X		

LEGISLATIVE HISTORY OF PROPOSED AMENDMENTS
CONTAINED IN 1991-92 OMNIBUS BILL

Pa.C.S. Section	1991-92 Omnibus Bill Subject	1989-90 SB 775, PN 845 HB 1015, PN 1157	1987-88 SB 187, PN 2169	1985-86 SB 1162, PN 1466
5601(c)	Rule of interpretation			
5601.1	Powers of attorney presumed durable			
5602(a) (10-24)	Additional enumerated powers			
5602(b) (1.1)	Delegation by attorney-in-fact			
5603(a) (3)	Technical reference change	X	X	X
5603(i) - (x)	Implementation of specifically enumerated powers			
5604(a)	Springing powers of attorney			
5604(b)	Durable powers of attorney, validity	X	X	
5605	Divorce revokes designation of spouse as attorney-in-fact			
5606	Proof of continuance of powers of attorney by affidavit			
5608	Third-party liability			
5704	Notice to absentee	X	X	
6111.1	Modification by divorce (inter vivos conveyances)	X	X	X
6111.2	Effect of divorce on designation of beneficiaries	X	X	
6114	Rules of interpretation (conveyances)	X	X	X
7188	Double piggybacking of accounts	X	X	X
7191	Separate trusts	X	X	
7314.1	Mutual funds			
7315.1	Temporary investments	X	X	X
8301	Powers of court	X		

II. PROBATE, ESTATES AND FIDUCIARIES CODE PROPOSED AMENDMENTS AND COMMENTS

This section provides explanatory material for the proposed legislation amending the Probate, Estates and Fiduciaries Code. The official comments of the advisory committee are included and may be utilized in determining the intent of the General Assembly: 1 Pa.C.S. § 1939; Martin Estate, 365 Pa. 280, 74 A.2d 120 (1950).

Section 711. MANDATORY EXERCISE OF JURISDICTION THROUGH ORPHANS' COURT DIVISION IN GENERAL

Comment: The amendment to paragraph (2) is made to insure that the court has jurisdiction to entertain petitions to reform testamentary trusts just as it has jurisdiction to entertain petitions to reform inter vivos trusts (see paragraph (3)).

Section 745. ADVERTISEMENT OF ACCOUNTS

This section is amended so that accounts are advertised by the clerk of the orphans' court division two times instead of four.

Section 911. ATTESTATION OF CERTAIN APPLICATIONS AND DOCUMENTS

This section is added to provide that documents submitted to the register of wills, except a probate petition, may be attested to by an affidavit or, in the alternative, by a verified statement under penalty of law. See the Crimes Code, 18 Pa.C.S. § 4904.

Section 2204. DISCLAIMERS, RELEASES AND CHARGES AGAINST ELECTIVE SHARE

Comment: The amendments to paragraphs (8) and (9) of subsection (a) recognize that there is no compelling policy consideration which requires different treatment for intangible and tangible personal property. Many times a significant portion of an estate is the tangible personal property collected during the marriage as an investment and held jointly. These amendments rectify the inequity of permitting the electing spouse to attain ownership of the tangible property by operation of law and to also take the elective share of the decedent's remaining property.

Section 2507. MODIFICATION BY CIRCUMSTANCE
Section 6111.1. MODIFICATION BY DIVORCE

The amendments to these sections make it possible to avoid automatic modification of wills that are made in contemplation of a marriage or divorce and of inter vivos conveyances that are made in contemplation of a divorce.

Section 2507.

Comment: The amendments to paragraphs (2) and (3) give a testator who contemplates a particular marriage or divorce the same freedom to adjust his will to this event before it occurs as he has always had to do so afterwards. The spouse's right of election against the will is not affected and would be the same regardless of whether the will was executed before or after the marriage.

Section 6111.1.

Comment: This section parallels the change made in § 2507(2).

Section 2514. RULES OF INTERPRETATION
Section 6114. RULES OF INTERPRETATION

Section 2514 provides rules for interpreting wills and section 6114 provides rules for interpreting conveyances. Many wills contain clauses authorizing or perhaps restricting investments in the securities

or common trust funds of a corporate fiduciary or making special provisions with respect to voting securities of the corporate fiduciary. Paragraph (20) is added to section 2514 to construe these provisions to apply to the securities and common trust funds of any affiliate of the corporate fiduciary. Trust agreements are covered by the same provision added as paragraph (8) of section 6114.

Section 2515. DEVISE OR BEQUEST TO TRUST

This amendment is of a clarifying nature in order to confirm existing law.

Comment: The words "life insurance" and the reference to ownership rights in the policies are deleted so that this provision will apply to any unfunded trust. This amendment is designed to confirm existing Pennsylvania law that a gift to an unfunded trust is valid. Specifically, it is intended to avoid the necessity of the recital of the receipt of a nominal sum and the concomitant accounting problems thereby raised.

Chapter 27. CONTRACTUAL ARRANGEMENTS RELATING TO SUCCESSION

This chapter is added to enumerate the ways in which contracts concerning succession may be established.

Comment: Section 2701 is taken from section 2-701 of the Uniform Probate Code with certain changes intended to eliminate possible ambiguities. The official comment of the National Conference of Commissioners on Uniform State Laws to that section is as follows:

It is the purpose of this section to tighten the methods by which contracts concerning succession may be proved. Oral contracts not to revoke wills have given rise to much litigation in a number of states; and in many states if two persons execute a single document as their joint will, this gives rise to a presumption that the parties had contracted not to revoke the will except by consent of both.

This section requires that either the will must set forth the material provisions of the contract, or the will must make express reference to the contract and extrinsic evidence proving the terms of the contract, or there must be a separate writing signed by the decedent evidencing the contract. Oral testimony regarding the contract is permitted if the will makes reference to the contract, but this provision of the statute is not intended to affect normal rules regarding admissibility of evidence.

Section 3316. INVESTMENT OF FUNDS

Section 7315.1. RETENTION OF CASH; TEMPORARY INVESTMENTS

Section 3316 is amended to extend to personal representatives the provisions of section 7315.1(b).

Section 3316 is amended to allow personal representatives to make the temporary investments authorized for fiduciaries in section 7315.1(b). Since personal representatives are excluded from the definition of "fiduciary" in section 7301, the authority of section 7315.1(b), which permits "sweeping" of otherwise uninvested cash balances and other modern forms of temporary investments, does not extend to personal representatives. Since estates often hold substantial amounts of uninvested cash for limited periods of time, application of the temporary investment provisions of section 7315.1(b) is appropriate. A technical amendment is made to section 7315.1(b) to implement this amendment.

Section 3321. NOMINEE REGISTRATION; CORPORATE FIDUCIARY AS ATTORNEY-IN-FACT; DEPOSIT OF SECURITIES IN A CLEARING CORPORATION; BOOK-ENTRY SECURITIES

Comment: The amendment to subsection (e) is in response to the recent practice of issuers of securities, especially issuers of commercial paper, who are beginning to issue securities in book-entry form. It broadens the scope of coverage of the subsection to permit fiduciaries to hold

securities in book-entry form irrespective of whether the securities are United States government securities.

Section 3330. NOTICE TO BENEFICIARIES AND HEIRS

Comment: New section 3330 expands the duty of the personal representative from notifying charities to notifying all beneficiaries. Since it is good practice to do this, the burden imposed by this requirement will not be great.

Section 3503. NOTICE TO PARTIES IN INTEREST

Section 3532. AT RISK OF PERSONAL REPRESENTATIVE

Comment: The amendment to section 3503 requires the personal representative to give notice of an Orphans' Court audit to claimants who are known to the personal representative, making section 3503 consistent with Supreme Court Orphans' Court Rule 6.3 which requires such notice. The rule provides that an account will not be confirmed by the Orphans' Court unless the accountant gives notice of the audit to every person "known to the accountant to have or claim an interest in the estate as creditor, beneficiary, heir or next of kin." Also see section 3531 which permits small estates to be settled upon court petition with notice to all known parties in interest.

The amendment is recommended in light of Tulsa v. Pope, 108 S. Ct. 1340 (1988) (holding that if there is state action the due process clause of the Fourteenth Amendment requires the personal representative to give notice to creditors who are "reasonably ascertainable" even if the creditor did not notify the personal representative).

The amendments to subsections 3532(a) and (b) make the rights of known claimants of estates informally settled without Orphans' Court audit similar to those of claimants of audited estates.

New subsection (b.1) is designed to avoid, in the case of possible claimants who do not give timely notice of their claim as demanded, the need for an Orphans' Court accounting and the need to give such possible claimants notice of the filing of the account and its call for audit or confirmation.

Chapter 37. APPORTIONMENT OF DEATH TAXES

The amendments to this chapter are all of a technical or editorial nature.

Section 5164. DISTRIBUTIONS FOR SUPPORT AND EDUCATION (MINORS)

The amendment to this section broadens the type of income that a guardian of the estate of a minor may distribute without court approval. It is patterned after the 1982 amendment (act of February 18, 1982 (P.L.45, No.26)) to section 5536(a) (distribution of income and principal during incompetency).

Chapter 53. PENNSYLVANIA UNIFORM TRANSFERS TO MINORS ACT

This chapter, which incorporates the Uniform Transfers to Minors Act, is added and replaces the Pennsylvania Uniform Gifts to Minors Act repealed by this proposed legislation. The uniformity of the act is retained except for a change to reflect Pennsylvania terminology ("guardian" instead of "conservator") and stylistic changes mandated by the Pennsylvania Consolidated Statutes editorial policy. As provided in 1 Pa.C.S. § 1927 (construction of uniform laws), "[s]tatutes uniform with those of other states shall be interpreted and construed to effect their general purpose to make uniform the laws of those states which enact them." Since the provisions of the uniform act are incorporated without substantive change, the comments of the National Conference of Commissioners on Uniform State Laws will be instructive in the application of this chapter.

In order to facilitate the convenient use of the Commissioners' comments the following cross reference table is provided:

<u>UTMA</u>	<u>20 Pa. C. S.</u> <u>(unless otherwise indicated)</u>
*§ 1	§ 5301(b)
2	5302
3	5303
4	5304
5	5305
6	5306
7	5307
8	5308
9	5309
10	5310
11	5311
12	5312
13	5313
14	5314
15	5315
16	5316
17	5317
18	5318
19	5319
20	5320
21	25(a) of proposed legislation
22	25(b) and (c) of proposed legislation
23	See: 1 Pa. C. S. § 1927 (construction of uniform laws)
24	5301(a)
25	See: 1 Pa. C. S. § 1925 (constitutional construction of statutes)
26	27 of proposed legislation
27	10 of proposed legislation
<p>*The following definitions from the uniform act have not been incorporated since they are specifically provided for in either 1 Pa. C. S. § 1991 (definitions) or 20 Pa. C. S. § 102 (definitions) and therefore apply to Chapter 53:</p>	
Adult	1 Pa. C. S. § 1991
Conservator (guardian)	20 Pa. C. S. § 102
Court	20 Pa. C. S. § 102
Person	1 Pa. C. S. § 1991
Personal representative	20 Pa. C. S. § 102
State	1 Pa. C. S. § 1991

Section 5513. TEMPORARY GUARDIAN .

Comment: This amendment is to clarify that the court has jurisdiction to appoint a temporary guardian of the person for an incompetent nonresident who at the time is physically located in Pennsylvania.

Section 5536. DISTRIBUTION OF INCOME AND PRINCIPAL DURING INCOMPETENCY

Subsection (b)(8) is amended to authorize the court to exercise all rights and privileges under certain contracts which provide for payments to an incompetent or others after the incompetent's death. Subsection (b)(11) is added to authorize the court to modify the estate plan of an incompetent to reflect changes in applicable tax laws.

Section 5601. GENERAL PROVISIONS (POWERS OF ATTORNEY)

New subsection (b) authorizes a principal physically incapable of signing his name to execute a power of attorney by mark. This amendment is patterned after section 2502(2) (form and execution of a will) (signature by mark).

Comment: Subsection (c) is added to overrule the decision in Estate of Reifsneider, 386 Pa. Superior Ct. 94, 562 A.2d 370 (1989). In Reifsneider, the court held that general language in a power of attorney does not empower the attorney-in-fact to perform the specific powers enumerated in section 5602(a) (specification of powers). The power in question in Reifsneider was the power to claim an elective share.

Section 5601.1. POWERS OF ATTORNEY PRESUMED DURABLE

Comment: This new section provides a statutory presumption that all powers of attorney are durable unless the power of attorney specifically provides otherwise.

Section 5602. FORM OF POWER OF ATTORNEY

Comment: The addition of the specifically enumerated powers in paragraphs (10) through (24) must be read in concert with paragraphs (i) through (w) of section 5603. See Comment to section 5603. New paragraph (b)(1.1) codifies the common law.

Section 5603. IMPLEMENTATION OF POWER OF ATTORNEY

Comment: These additional statutory powers, which can be delegated to an attorney-in-fact, are designed to permit powers of attorney to be shorter and more understandable to a layman. In addition, extreme brevity may be achieved by use of subsection (w).

The amendment to subsection (a)(3) is a technical amendment to change the reference of the Pennsylvania Uniform Gifts to Minors Act to the Pennsylvania Uniform Transfers to Minors Act.

Section 5604. DURABLE POWERS OF ATTORNEY

Comment: The amendments to subsection (a) are made to conform with new section 5601.1. See comment to section 5601.1. Furthermore, these amendments authorize the use of springing powers of attorney. The amendment to subsection (b) is of a clarifying nature. It ensures the validity of the power of attorney during any lengthy period of disability or incapacity of the principal.

Section 5605. POWER OF ATTORNEY NOT REVOKED UNTIL NOTICE

Comment: New subsection (c) is conceptually modeled after sections 2507(2) (modification by circumstances; divorce; wills), 6111.1 (modification by divorce; conveyances) and 6111.2 (effect of divorce on designation of beneficiaries). New subsection (c) provides that divorce would serve to revoke the designation of the former spouse as attorney-in-fact.

**Section 5606. PROOF OF CONTINUANCE OF POWERS OF ATTORNEY
BY AFFIDAVIT**

Comment: This section is amended to provide that a third party may request an affidavit from an attorney-in-fact concerning the validity of the power of attorney, but it is not necessary for the third party to have such an affidavit in order to act. The section is also amended to conform to the amendments made in sections 5601.1, 5604(a) and 5605(c). See the comments to those sections.

Section 5608. LIABILITY

Comment: This section is new. It is designed to encourage third parties to follow the instructions of an attorney-in-fact and to be relieved of liability for doing so.

Section 5704. NOTICE TO ABSENTEE

Comment: This amendment provides the court with the discretion to require a shorter advertisement period. It is designed to avoid the situation prevalent in many small estates where the cost of advertising is prohibitive.

**Section 6111.2. EFFECT OF DIVORCE ON DESIGNATION OF
BENEFICIARIES**

This section is added to provide that a divorce would serve to revoke any revocable beneficiary designation that had been made in favor of the former spouse of the person who had made the designation.

Comment: This section is new. It is conceptually patterned after sections 2507(2) (modification by circumstances; divorce; wills) and 6111.1 (modification by divorce; conveyances) (see comment to section 2507). It differs from those provisions in permitting a document other than a beneficiary designation, will or trust to express an intention that the spouse's interest survives the divorce because a property settlement agreement often specifies life insurance rights.

Section 7188. ANNEXATION OF ACCOUNT OF DISTRIBUTED ESTATE
OR TRUST

This section is amended to authorize double piggybacking of accounts.

Comment: This change will permit a trustee who has received funds from an estate which in turn has received funds from a terminated inter vivos trust or from an agency to annex the account of the inter vivos trustee or agent as well as the executor's account. A parallel amendment to section 3501.2 seems unnecessary since it is unlikely that an estate would be the ultimate recipient of a similar double pour-over.

Section 7191. SEPARATE TRUSTS

Comment: This amendment gives the court greater discretion in separating trusts by removing the requirement that all beneficiaries consent to the separation. The consent requirement is often impossible to meet since remaindermen may be unascertainable. This amendment is intended to aid in the qualification of trusts as qualified shareholders for Subchapter S corporation purposes as well as for generation skipping tax purposes.

Section 7314.1. MUTUAL FUNDS

Comment: New section 7314.1 permits banks and trust companies to invest their fiduciary accounts in mutual funds to which the bank or trust company provides services. Additionally, it permits the fiduciary to charge a fee provided that appropriate disclosure is made. The addition of this section is in response to the position taken by the Office of the Comptroller of the Currency (OCC). In an interpretive letter of September 21, 1989, the OCC maintained that there would be a conflict of interest if a bank invested fiduciary assets in a mutual fund in which it acted as an investment advisor and received fees for that service. According to the OCC, funds held by a bank as a fiduciary should not be invested in a mutual fund advised by the bank unless lawfully authorized by the terms of the instrument creating the relationship, court order or local law.

Section 8301. POWERS OF COURT TO AUTHORIZE SALE, ETC.
OF REAL PROPERTY

The amendment to this section expedites removing certain title encumbrances which impair the ability of a religious, beneficial or charitable owner to use, mortgage and convey its real property when the grantor or his heirs, successors and assigns retaining a "reversionary-type" interest cannot reasonably be located. It is intended that the amendment apply without regard to whether the encumbrance is classified as a "reversion," "possibility of reverter" or a "right of reentry for condition broken."

III. INHERITANCE AND ESTATE TAX ACT PROPOSED AMENDMENTS AND COMMENTS

In 1981, the task force and advisory committee proposed legislation enacted as Act No. 255 of 1982, to revise and consolidate Pennsylvania's inheritance tax law into Chapter 17 of Title 72 of the Pennsylvania Consolidated Statutes (Inheritance and Estate Tax Act). The 1981 biennial report provides the official comments to Chapter 17. Since the codification, the task force and advisory committee have continued to review inheritance tax law issues and have recommended legislation.

GENERATION-SKIPPING TRANSFER TAX

The task force and advisory committee recommend legislation amending the Inheritance and Estate Tax Act to provide the 5 percent State credit allowed by the Internal Revenue Code for generation-skipping transfers (§§ 1718, 1753 and 1755).

Section 2604 of the Internal Revenue Code provides that a taxpayer is allowed credit against the generation-skipping tax imposed under section 2601 of the Internal Revenue Code in an amount equal to the generation-skipping transfer tax actually paid to any state. Section 2604 further provides that the aggregate amount allowed as a

credit shall not exceed 5 percent of the amount of the tax imposed under section 2601.

Since present Pennsylvania law does not impose a generation-skipping transfer tax, a Pennsylvania taxpayer pays the full amount of the tax to the Federal government. The proposed amendments to the Inheritance and Estate Tax Act impose a generation-skipping tax. This new tax, like the Pennsylvania estate tax (section 1717), is designed solely to "pick up" the Federal tax credit, and therefore its cost to the Pennsylvania taxpayer is designed to be zero.

OTHER TASK FORCE APPROVED LEGISLATION¹

Spousal Exemption

On March 5, 1991, Task Force Chairman Senator Greenleaf introduced **Senate Bill 628, Pr.'s No. 658**, which incorporates a long-standing task force and advisory committee recommendation to amend the Inheritance and Estate Tax Act to exempt inter-spousal transfers from inheritance taxation. Similar legislation has been introduced in each session of the General Assembly since the 1985-86 session.

¹Last session the task force and advisory committee recommended legislation in identical bills (Senate Bill 777, Pr.'s No. 847, and House Bill 922, Pr.'s No. 1040) amending the Inheritance and Estate Tax Act to clarify the exemption from inheritance taxation for retirement plans and employment benefits (§ 1711(r)) and increase from \$3,000 to \$10,000 the exemption for inter vivos transfers made within one year of death of the transferor (§ 1707). As of the date of this report, this legislation has not been reintroduced this session.

Senate Bill 628 phases in the spousal exemption over a five-year period beginning on January 1, 1992 when the rate of tax would be 5 percent; the rate is reduced by 1 percent for each subsequent year until fully implemented on January 1, 1997. Senate Bill 628 is substantially identical to the two task force approved proposals from last session: Senate Bill 776, Pr.'s No. 2281, as amended, and House Bill 921, Pr.'s No. 2817, as amended (a two-year phase-in). Senate Bill 776 was approved by the Senate on June 19, 1990 while HB 921 received first consideration on December 4, 1989, but was re-referred to the House Appropriations Committee on December 6, 1989 where it remained for the remainder of the session. As was detailed earlier in this report, the amendments to exempt inter-spousal transfers from inheritance taxation were amended into SB 775 which was ultimately vetoed by the Governor.

The policy considerations supporting this legislation are set forth at pages 8 and 9 of the 1988 Commission report.

This proposal implements the policy of exempting inter-spousal transfers from inheritance tax. . . . Founded on the premise that inter-spousal transfers are not the occasion for the imposition of a wealth transfer tax, this policy substantially harmonizes Pennsylvania's treatment of taxation of inter-spousal transfers with that of the Federal government and the vast majority of other states and frees married couples from basing property ownership decisions on avoiding inheritance tax.

Under the Economic Recovery Tax Act of 1981, the Federal government exempted inter-spousal transfers from the Federal estate tax through the unlimited marital deduction. By providing a policy consonant with that at the Federal level, Pennsylvanians will be able to plan their estates under Federal and State law which provides substantially similar tax consequences.

Except for its long-standing exemption of entireties property, Pennsylvania is one of only a few states which have not adopted some form of inter-spousal exemption. The other states have implemented this policy by a complete or partial statutory exemption or reliance solely on a slack tax. . . . The slack tax obtains for the state the amount allowed as a credit for state death taxes under section 2011 of the Internal Revenue Code and consequently effectively exempts inter-spousal transfers through the Federal unlimited marital deduction.

Subsequent to the publication of the Commission's 1988 report, two additional concepts have been incorporated into the legislation. These amendments were explained in testimony presented by Commission staff during public hearings held by the House Finance Committee and the Senate Finance Committee on HB 921 and SB 776, respectively.

Spousal Trusts

Because the General Assembly in the revision and codification of Inheritance Tax Act in 1982 determined that all inheritance taxes would thereafter become due and payable nine months after death, bequests to a decedent's spouse left in trust for life with a remainder over to the children or other beneficiary (other than a charity) requires a calculation of a "compromise" tax pursuant to section 1716(e) of the act. Since this result would impose a tax on transfers intended to benefit the surviving spouse, and hence would conflict with the policies detailed above to exempt transfers to a surviving spouse, separate tax treatment is provided for certain such trust arrangements. Sections 1707(d) and 1712 defer the taxable event on trusts and similar arrangements to the date of the surviving spouse's death if the transfer

is for the sole use of the surviving spouse during his or her lifetime. The latter section specifically retains any exemption from tax which would otherwise be applicable at the death of the surviving spouse. There is no change in the present law requiring a compromise tax in the case of a trust which does not meet the conditions of section 1712, e.g., a "sprinkle" trust or one which terminates in the case of remarriage.

Spousal Rights of Withdrawal

Subsequent to the introduction of 1986 Senate Bill 1512, Pr.'s No. 2098 (one of the predecessors of SB 776), a decision of the Philadelphia Orphans' Court, Pemberton Estate, 6 Fid. Rep. 2d 219 (1986), raised concerns within the Department of Revenue with regard to any legislation exempting spousal transfers from inheritance taxation. Pemberton Estate held that since the life income beneficiary (wife) refused to disclaim an unrestricted right to withdraw the principal of a residuary trust, the entire trust principal was taxable at the beneficiary's rate.

Applying Pemberton Estate to the same case after eliminating the 6 percent tax on spousal transfers would result in a testator being able to transfer property to a succeeding generation without incurring any inheritance tax, a result never intended by the advisory committee and task force. After considerable debate, a consensus formed to address the Pemberton Estate problem within the context of the policy to exempt inter-spousal transfers.

The amendment to section 1716(e) modifies the consequences of Pemberton Estate's application to a spousal exemption. The amendment

applies in those instances where a trust does not satisfy the section 1712 requirements (sole use of the surviving spouse during the spouse's lifetime) and the spouse has an unlimited power of withdrawal over principal.

Under this amendment, a right of withdrawal of a surviving spouse not exercised within nine months of the transferor's death is ignored in making the compromise tax calculation and the remainder interests are accelerated and compromised as in other compromise tax situations.

Technical Amendments

On April 2, 1991, the Senate members of the task force introduced **Senate Bill 843, Pr.'s No. 896**. Senate Bill 843 makes the following technical amendments to the Inheritance and Estate Tax Act:

- Provides a credit for estate taxes paid to other states by estates of resident decedents and imposes an estate tax on the estates of nonresident decedents (§ 1717).
- Broadens the definition of "financial institution" to include private safe deposit companies (§§ 1702, 1792(a) and 1796(a)).
- Codifies case law, clarifies certain provisions to ensure an internal consistency and expands death payments not subject to tax (§§ 1702, 1781, 1707(c) and 1711(p)).

The amendments contained in SB 843 were introduced last session as identical bills (1989 SB 778, Pr.'s No. 848 and HB 923, Pr.'s No. 1041). Neither SB 778 nor HB 923 were considered by the committee of original referral. This session's version, though modified to address several technical concerns of the Department of Revenue, is substantively identical to last session's version.

Since most of the amendments contained in SB 843 were also part of the 1987-88 task force approved legislation (1988 SB 1230, Pr.'s No. 1714, and 1987 SB 187, Pr.'s No. 193), the 1988 Commission report provided explanatory material and official comments. For convenience, those notes and comments are replicated on the following pages.

1. Section 1717. Estate tax

As was explained at pages 12 to 14 of the 1988 Commission report:

The amendment to section 1717 addresses the situation where a decedent owns property in more than one state and consequently owes death taxes in both states. This section is amended to:

- (1) provide a Pennsylvania resident with a credit for any slack tax (the tax designed to obtain for the state the amount allowed as a credit for state death taxes under section 2011 of the Internal Revenue Code) paid to other states; and
- (2) impose a slack tax on nonresidents equal to the portion of the credit attributable to Pennsylvania property to the extent this amount exceeds the Pennsylvania inheritance tax.

Present Pennsylvania law provides that if the decedent was a resident of Pennsylvania, then the Commonwealth collects all the slack tax. In ascertaining the amount of slack tax to be collected, Pennsylvania gives credit for inheritance tax paid to the Commonwealth and other states but not for slack taxes paid to other states. In the case of nonresidents, Pennsylvania does not impose any slack tax. This statutory scheme places Pennsylvania residents owning real property in another state at time of death in a position to be taxed twice since many states impose a slack tax on nonresidents. . . .

2. Section 1702. Definition of "financial institution"

This amendment broadens the definition of "financial institution" to include private safe deposit companies and ensures that private companies are subject to the same requirements as other institutions

which house safe deposit boxes. Conforming technical amendments are made to sections 1792(a) and 1796(a).

3. Section 1702. Definitions of "children" and "lineal descendants"

As was explained at pages 27 and 28 of the 1988 Commission report:

The amendments to the definitions of "children" and "lineal descendants" are intended to clarify who pays the lower inheritance tax rate--6 percent instead of 15 percent.

Comment: The broad definitions of "children" and "lineal descendants" include persons who have been adopted out of a decedent's family. This is in accord with Carlson Estate, 479 Pa. 421, 388 A.2d 726 (1978). It is not necessary to repeat the continuing family relationship test of 20 Pa.C.S. §§ 2108, 2514(7) and 6114(4) since such persons will not receive a share of the decedent's estate unless they meet the test and therefore qualify as intestate heirs or are named in a will or other governing instrument which is not likely to occur unless there is, in fact, some continuing relationship with the natural family. The word "stepdescendants" in the definition of "lineal descendants" is intended to include stepchildren and stepchildren of lineal descendants.

4. Section 1781. Refund of tax

The amendment to this section was explained at page 28 of the 1988 Commission report:

The amendment to this section resolves an inconsistency in the law. Section 1108(b) of the Fiscal Code, which applies to all State taxes, was amended by Act No. 78 of 1982 to provide that requests for refunds be made by taxpayers to the Department of Revenue. However, section 1781 provides that application for refunds be made to the Board of Finance and Revenue. This inconsistency causes administrative problems and unnecessary delays in processing refunds.

5. Section 1707(c)(7). Transfers subject to tax

The explanation of the amendments to these sections appeared at pages 14 and 15 of the 1988 Commission report as follows:

The amendment to paragraph (7) clarifies an ambiguity in the last sentence of the paragraph relating to relinquishments of a power to alter, amend or revoke. By a literal reading, such a relinquishment would always be taxable regardless of when it occurred except for relinquishments of the value prescribed in section 1707(c)(3) in the year before the death of the decedent. This amendment eliminates any incongruity between the concepts contained in paragraphs (3) and (7).

6. Section 1711(p). Transfers not subject to tax

The amendment to subsection (p) expands death payments not subject to tax to include payments from the Veterans' Administration, county veteran's death benefits or other similar death benefits.

