

**A HEALTH CARE DECISION-MAKING
PROPOSAL**

A PRUDENT INVESTOR RULE

OTHER PROPOSED AMENDMENTS

RECOMMENDED BY THE
TASK FORCE AND ADVISORY COMMITTEE
ON DECEDENTS-ESTATES LAWS

General Assembly of the Commonwealth of Pennsylvania
JOINT STATE GOVERNMENT COMMISSION
108 Finance Building
Harrisburg, Pennsylvania 17120
March 1998

The release of this report should not be construed as an indication that the members of the Executive Committee of the Joint State Government Commission endorse all of the report's findings, recommendations or conclusions.

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The Joint State Government Commission was created by act of July 1, 1937 (P.L.2460, No.459) 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.

JOINT STATE GOVERNMENT COMMISSION, 1998

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March 1998

TO THE MEMBERS OF THE GENERAL ASSEMBLY:

The Joint State Government Commission is pleased to present the report of the Task Force and Advisory Committee on Decedents' Estates Laws. This report includes a recommended health care power of attorney statute, prudent investor rule and other proposed amendments with official comments. For over 50 years, the members of the task force and advisory committee have worked to ensure that our probate laws are among the most modern and efficient in the nation.

Respectfully submitted,

Roger A. Madigan
Chairman



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INTRODUCTION

This is the twelfth 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. At its February 9, 1998 meeting, the task force authorized the introduction of legislation recommended by the advisory committee. The legislation would make technical and substantive amendments to Titles 20 and 15, including the addition of a chapter statutorily authorizing comprehensive health care powers of attorney and the addition of a chapter incorporating the prudent investor rule. The legislation and the official comments of the advisory committee are set forth on the following pages. The official comments may be utilized in determining the intent of the General Assembly. See 1 Pa.C.S. ' 1939 and In re Martin-s Estate, 365 Pa. 280, 74 A.2d 120 (1950).

HEALTH CARE DECISION-MAKING PROPOSAL

The recommended legislation would:

- Amend and restructure present Chapter 54 of Title 20 in order to incorporate all health care decision-making provisions into Chapter 54.
- Statutorily authorize comprehensive health care powers of attorney and provide a framework for their operation.
- Permit a principal to provide in a health care power of attorney for a health care agent to make all health care decisions for the principal, including those concerning life-sustaining treatment.
- Provide that a family member could serve as a health care representative in order to make health care decisions, including life-sustaining treatment decisions, for an individual who does not have an effective health care power of attorney and for whom no guardian of the person to make health care decisions has been appointed.
- Ensure that any life-sustaining treatment decision made by the health care agent or health care representative is subject to the applicable provisions of the Advance Directive for Health Care Act.
- Permit a principal, irrespective of mental or physical capacity, to countermand individual health care decisions made by a health care agent or health care representative without affecting the authority to make other health care decisions for the principal.
- Repeal the optional declaration form under the Advance Directive for Health Care Act.

PRUDENT INVESTOR RULE

The recommended legislation would:

- Enact, as Chapter 72 of Title 20, the Prudent Investor Rule modeled after the Uniform Prudent Investor Act.

- Retain present Chapter 73 for applicable municipal investments.
- Apply to trustees and guardians.
- Make, by reference, the Prudent Investor Rule applicable to nonprofit corporations.
- Permit fiduciaries (trustees and guardians) to follow any reasonable theory of investing.
- Eliminate all categorical restrictions on types of investments.
- Mandate that fiduciaries reasonably diversify investments.
- Provide that the diversification requirement is not applicable to existing trusts or guardianships.
- Permit a fiduciary to delegate investment and management functions.

OTHER PROPOSED AMENDMENTS

The recommended legislation would:

- Expand the concept of virtual representation to all judicial proceedings before the Orphans= Court and not just accountings (' 751(6)).
- Increase the value of an irrevocable transfer to the custodian of a minor permitted without court approval from \$10,000 to \$25,000 (' 5306(c)).
- Enact a trustees= disabling statute (' 7137).
- Permit the separation of trusts without court approval (' 7191).
- Permit charitable trusts (' 8113) and nonprofit corporations (15 Pa.C.S. ' ' 5548(c), 5549(c) and 5585(a)) to adopt a spending policy on a ~~A~~total return@basis.

HEALTH CARE DECISION-MAKING PROPOSAL

CHAPTER 54

[ADVANCE DIRECTIVE FOR] HEALTH CARE

SUBCHAPTER A

PRELIMINARY PROVISIONS

Sec.

5401. Definitions.

' 5401. Definitions.

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

AAttending physician.@ The physician who has primary responsibility for the treatment and care of a declarant or principal.

Comment: This definition is derived from the definition of **A**attending physician@in former section 5403 (definitions). The only change is that the phrase **A**or principal@is added in order to make the definition applicable to the entire chapter.

ADeclarant. An individual who makes a declaration in accordance with Subchapter B (relating to advance directive for health care).

Comment: This definition is derived from the definition of **Adeclarant** in former section 5403 (definitions). The only changes are technical in nature. The term **Aindividual** replaces **Aperson**, and **ASubchapter B** replaces **Achapter**.

ADeclaration. A written document voluntarily executed by the declarant in accordance with Subchapter B (relating to advance directive for health care).

Comment: This definition is derived from the definition of **Adeclaration** in former section 5403 (definitions). The only change is technical in nature. The phrase **ASubchapter B** replaces **Achapter**.

AHealth care. Any care, treatment, service or procedure to maintain, diagnose, treat or provide for physical or mental health, custodial or personal care, including any medication program, therapeutical and surgical procedure and life-sustaining treatment.

AHealth care agent. An individual designated by a principal in a health care power of attorney.

AHealth care decision. A decision regarding an individual's health care, including, but not limited to:

- (1) Selection and discharge of health care providers and health care institutions.

(2) Approval or disapproval of diagnostic tests, surgical procedures and programs of medication.

(3) Directions to initiate, continue, withhold or withdraw all forms of life-sustaining treatment, including orders not to resuscitate.

AHealth care institution.@ An institution, facility or agency licensed, certified or otherwise authorized or permitted by law to provide health care in the ordinary course of business.

AHealth care power of attorney.@ A writing made by a principal designating an individual to make health care decisions for the principal.

AHealth care provider.@ A person who is licensed, certified or otherwise authorized by the laws of this Commonwealth to administer health care in the ordinary course of business or practice of a profession. The term includes personnel recognized under the act of July 3, 1985 (P.L.164, No.45), known as the Emergency Medical Services Act.

Comment: This definition is derived from the definition of **Ahealth care provider**@in former section 5403 (definitions) and adds the phrase **Aor otherwise authorized.**@

AHealth care representative.@ An individual authorized under section 5428 (relating to decisions by health care representative) to make health care decisions for a principal.

AIncompetent.@ The lack of sufficient capacity for an individual to make or communicate decisions concerning that individual.

Comment: This definition is derived from the definition of incompetent in former section 5403 (definitions). The only changes are technical in nature. The term individual replaces person, and the phrase that individual replaces himself.

Life-sustaining treatment. Any medical procedure or intervention that, when administered to a declarant or principal who has been determined to be in a terminal condition or to be permanently unconscious, will serve only to prolong the process of dying or to maintain the individual in a state of permanent unconsciousness.

Comment: This definition is derived from the definition of life-sustaining treatment in former section 5403 (definitions) and amended as follows:

Life-sustaining treatment. Any medical procedure or intervention that, when administered to [a qualified patient] a declarant or principal, who has been determined to be in a terminal condition or to be permanently unconscious, will serve only to prolong the process of dying or to maintain the [patient] individual in a state of permanent unconsciousness. [Life-sustaining treatment shall include nutrition and hydration administered by gastric tube or intravenously or any other artificial or invasive means if the declaration of the qualified patient so specifically provides.]

The last sentence of the definition is repealed, since it is inconsistent with the holding of In re Fiori, 543 Pa. 592, 673 A.2d 905 (1996). The repealed language imposes a more stringent standard for the exercise of an individual's right to refuse artificial nutrition and hydration by requiring that an advance directive specifically reference that it applies to such care. However, the Supreme Court in Fiori recognized artificial nutrition and hydration as medical treatment. Fiori, 673 A.2d at 908 (note 2). Consequently, the court analyzed an individual's

right to refuse such care using the same standards applicable to other types of medical care. Id. at 909-13.

The reference to **A**principal[@] is added in order to make the definition of **A**life-sustaining treatment[@] applicable to the entire chapter.

In addition, the term **A**qualified patient[@] is deleted from this definition because the definition and use of that term is deleted from the chapter. However, the substance of that term is contained within the definition of **A**life-sustaining treatment.[@]The term **A**qualified patient[@] under former section 5403 had been defined as **A**a person who has executed a declaration and who has been determined to be in a terminal condition or to be permanently unconscious.[@]

AMedical command physician.[@] A licensed physician who is authorized to give medical command under the act of July 3, 1985 (P.L.164, No.45), known as the Emergency Medical Services Act.

Comment: This definition is derived without change from the definition of **A**medical command physician[@] in former section 5403 (definitions).

APermanently unconscious.[@] A medical condition that has been diagnosed in accordance with currently accepted medical standards and with reasonable medical certainty as total and irreversible loss of consciousness and capacity for interaction with the environment. The term includes, without limitation, a permanent vegetative state or irreversible coma.

Comment: This definition is derived from the definition of **A**permanently unconscious[@] in former section 5403 (definitions). The only change is that the term **A**permanent[@] replaces **A**persistent,[@] consistent with current medical terminology. See, e.g., footnote 1 of In re Fiori, 543 Pa. 592, 673 A.2d 905 (1996),

quoting the Multi-Society Task Force on PVS, Medical Aspects of the Persistent Vegetative State (Pts. 1 and 2), 330 New Eng. J. Med. 1499 (1994). In that article published by the New England Journal of Medicine, a distinction was drawn between a ~~A~~persistent~~@~~ and ~~A~~permanent~~@~~ vegetative state. A ~~A~~persistent vegetative state~~@~~ was defined as ~~A~~[a] wakeful unconscious state that lasts longer than a few weeks,~~@~~ whereas a ~~A~~permanent vegetative state~~@~~ was characterized by an ~~A~~irreversible state.~~@~~

~~A~~Person.~~@~~ Any individual, corporation, partnership, association or other similar entity, or any Federal, State or local government or governmental agency.

Comment: This definition is derived from the definition of ~~A~~person~~@~~ in former section 5403 (definitions). The only change is that the phrase ~~A~~or other similar entity~~@~~ is added after the term ~~A~~association.~~@~~

~~A~~Principal.~~@~~ An individual who executes a health care power of attorney, who designates an individual to act or disqualifies an individual from acting as a health care representative, or an individual for whom a health care representative is acting.

~~A~~Terminal condition.~~@~~ An incurable and irreversible medical condition in an advanced state which will, in the opinion of the attending physician, to a reasonable degree of medical certainty, result in death regardless of whether life-sustaining treatment would prolong the individual's life.

Comment: This definition is derived from the definition of ~~A~~terminal condition~~@~~ in former section 5403 (definitions) and amended as follows:

ATerminal condition.@ An incurable and irreversible medical condition in an advanced state [caused by injury, disease or physical illness] which will, in the opinion of the attending physician, to a reasonable degree of medical certainty, result in death regardless of [the continued application of life-sustaining treatment] whether life-sustaining treatment would prolong the individual's life.

These amendments are made for clarification purposes only.

There is no intent to change the substance of this definition.

The language of the deleted last clause suggests that an individual does not have a terminal condition if life-sustaining treatment could keep the individual alive. The added language is intended to clarify that ambiguity.

SUBCHAPTER B

ADVANCE DIRECTIVE FOR HEALTH CARE

' [5401] 5402. Short title of [chapter] subchapter.

This [chapter] subchapter shall be known and may be cited as the Advance Directive for Health Care Act.

' [5402] 5403. Legislative findings and intent.

(a) Findings.--The General Assembly finds that all competent adults have a qualified right to control decisions relating to their own medical care. This right is subject to certain interests of society, such as the maintenance of ethical standards in the medical profession and the preservation and

protection of human life. Modern medical technological procedures make possible the prolongation of human life beyond natural limits. The application of some procedures to an individual suffering a difficult and uncomfortable process of dying may cause loss of patient dignity and secure only continuation of a precarious and burdensome prolongation of life.

(b) Intent.--Nothing in this [chapter] subchapter is intended to condone, authorize or approve mercy killing, euthanasia or aided suicide or to permit any affirmative or deliberate act or omission to end life other than as defined in this [chapter] subchapter. Furthermore, this [chapter] subchapter shall create no presumption concerning the intent of any person who has not executed a declaration to consent to the use or withholding of life-sustaining procedures in the event of a terminal condition or a state of permanent unconsciousness.

[¹ 5403. Definitions.

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

Attending physician.² The physician who has primary responsibility for the treatment and care of the declarant.

Declarant.² A person who makes a declaration in accordance with this chapter.

ADeclaration.@ A written document voluntarily executed by the declarant in accordance with this chapter.

AHealth care provider.@ A person who is licensed or certified by the laws of this Commonwealth to administer health care in the ordinary course of business or practice of a profession. The term includes personnel recognized under the act of July 3, 1985 (P.L.164, No.45), known as the Emergency Medical Services Act.

Ancompetent.@ The lack of sufficient capacity for a person to make or communicate decisions concerning himself.

ALife-sustaining treatment.@ Any medical procedure or intervention that, when administered to a qualified patient, will serve only to prolong the process of dying or to maintain the patient in a state of permanent unconsciousness. Life-sustaining treatment shall include nutrition and hydration administered by gastric tube or intravenously or any other artificial or invasive means if the declaration of the qualified patient so specifically provides.

AMedical command physician.@ A licensed physician who is authorized to give medical command under the act of July 3, 1985 (P.L.164, No.45), known as the Emergency Medical Services Act.

APermanently unconscious.@ A medical condition that has been diagnosed in accordance with currently accepted medical standards and with

reasonable medical certainty as total and irreversible loss of consciousness and capacity for interaction with the environment. The term includes, without limitation, a persistent vegetative state or irreversible coma.

APerson.@ An individual, corporation, partnership, association or Federal, State or local government or governmental agency.

AQualified patient.@ A person who has executed a declaration and who has been determined to be in a terminal condition or to be permanently unconscious.

ATerminal condition.@ An incurable and irreversible medical condition in an advanced state caused by injury, disease or physical illness which will, in the opinion of the attending physician, to a reasonable degree of medical certainty, result in death regardless of the continued application of life-sustaining treatment.]

Comment: These definitions have been incorporated into Subchapter A (section 5401). However, the definition of **Aqualified patient**@ is eliminated, and the substance of that definition is incorporated into the following sections: section 5401 (definition of **Alife-sustaining treatment**@), section 5407(a) (liability; general rule) and section 5410(a) (effect on suicide and life insurance; criminal effect). The deletion of the phrase **Aqualified patient**@ is only editorial in nature and is not intended to alter the substance conveyed by that phrase.

' 5404. Declaration.

(a) Execution.--An individual of sound mind who is 18 years of age or older or who has graduated from high school or has married may execute [at

any time] a declaration governing the initiation, continuation, withholding or withdrawal of life- sustaining treatment. The declaration [must] shall be signed and dated by the declarant by signature or mark, or by another on behalf of and at the direction of the declarant[, and must]. If the declaration is executed by mark or by another individual, then it shall be witnessed by two individuals each of whom is 18 years of age or older. A witness shall not be the [person] individual who signed the declaration on behalf of and at the direction of the declarant. Neither a health care provider nor its agent shall sign a declaration on behalf of and at the direction of the declarant if that health care provider or agent provides health care services to the declarant.

Comment: Subsection (a) is amended in order to make the execution requirements for a declaration the same as those for a health care power of attorney under section 5422(b) (execution of health care power of attorney).

Subsection (a), as amended, provides that the declarant may execute a declaration without any witness requirement. However, witnesses are required when the declaration is executed by mark or by another individual at the direction of the declarant.

Furthermore, subsection (a), as amended, prohibits a health care provider, or anyone acting on its behalf, from signing a declaration for the declarant if the declarant receives health care services from such provider. The intent of this provision is to avoid potential conflicts of interest for a health care provider.

(b) Form.--A declaration may [but need not be in the following form] be in any written form expressing the wishes of the declarant regarding the

initiation, continuation, withholding or withdrawal of life-sustaining treatment
and may include other specific directions, including, but not limited to,
designation of another [person] individual to make the treatment decision for
the declarant if the declarant is incompetent and is determined to be in a
terminal condition or to be permanently unconscious.

[DECLARATION

I, _____, being of sound mind, willfully and voluntarily make this
declaration to be followed if I become incompetent. This declaration reflects
my firm and settled commitment to refuse life-sustaining treatment under the
circumstances indicated below.

I direct my attending physician to withhold or withdraw life-sustaining
treatment that serves only to prolong the process of my dying, if I should be
in a terminal condition or in a state of permanent unconsciousness.

I direct that treatment be limited to measures to keep me comfortable
and to relieve pain, including any pain that might occur by withholding or
withdrawing life-sustaining treatment.

In addition, if I am in the condition described above, I feel especially
strong about the following forms of treatment:

I () do () do not want cardiac resuscitation.

I () do () do not want mechanical respiration.

I () do () do not want tube feeding or any other artificial or invasive form of nutrition (food) or hydration (water).

I () do () do not want blood or blood products.

I () do () do not want any form of surgery or invasive diagnostic tests.

I () do () do not want kidney dialysis.

I () do () do not want antibiotics.

I realize that if I do not specifically indicate my preference regarding any of the forms of treatment listed above, I may receive that form of treatment.

Other instructions:

I () do () do not want to designate another person as my surrogate to make medical treatment decisions for me if I should be incompetent and in a terminal condition or in a state of permanent unconsciousness. Name and address of surrogate (if applicable):

Name and address of substitute surrogate (if surrogate designated above is unable to serve):

I () do () do not want to make an anatomical gift of all or part of my body, subject to the following limitations, if any:

I made this declaration on the day of (month, year).

Declarant's signature:

Declarant's address:

The declarant or the person on behalf of and at the direction of the declarant knowingly and voluntarily signed this writing by signature or mark in my presence.

Witness's signature:

Witness's address:

Witness's signature:

Witness's address:]

Comment: The form set forth in subsection (b), which provides a checklist of treatment options, is repealed as it invites a declarant to engage in self-diagnosis by choosing future treatment options, without fully considering the medical consequences of those choices. Such a declaration may be made long before the onset of a serious illness which would effectuate the declaration, thereby potentially making the declaration counter-productive to the declarant.

Although the repealed form is not mandatory, its inclusion is too often misconstrued as a de facto mandate that the form be used.

The checklist of treatment options contained in the form fails to recognize that medical treatment can be merely life-sustaining in one instance, but beneficial in another. For example, surgery, one of the check-off categories, is sometimes appropriate to make an individual with a terminal condition more comfortable.

However, an individual, who uses the form and checks off surgery as a treatment option, removes surgery as a beneficial treatment option, perhaps without truly understanding the potential consequences of checking off that option. Therefore, there should be no prescribed or preferred form of the declaration because the declaration should be tailored to meet the declarant's individual circumstances, preferably after consultation with a physician.

Although there is no prescribed or preferred form for the declaration, a declarant may include the following directions in a declaration:

(1) To initiate, continue, withhold or withdraw life-sustaining treatment.

(2) To limit treatment to measures that keep the declarant comfortable and relieve pain, including any pain that might occur by withholding or withdrawing life-sustaining treatment.

(3) To provide for specific forms of treatment.

(4) To designate another individual to make life-sustaining treatment decisions if the declarant is incompetent and in a terminal condition or state of permanent unconsciousness.

(5) To provide for the making of an anatomical gift of all or part of the declarant's body.

(c) Invalidity of specific direction.--Should any specific direction in the declaration be held to be invalid, the invalidity shall not [offset] negate other directions of the declaration which can be effected without the invalid direction.

(d) Medical record.--A physician or other health care provider [who is furnished] to whom a copy of the declaration is furnished shall make it a part of the declarant's medical record and, if unwilling to comply with the declaration, promptly so advise the declarant.

' 5405. When declaration becomes operative.

A declaration becomes operative when:

- (1) a copy is provided to the attending physician; and
- (2) the declarant is determined by the attending physician to be incompetent and in a terminal condition or in a state of permanent unconsciousness.

When the declaration becomes operative, the attending physician and other health care providers shall act in accordance with its provisions or comply with the transfer provisions of section 5409 (relating to unwillingness to comply[;] and transfer of declarant).

' 5406. Revocation.

(a) General rule.--A declaration may be revoked at any time and in any manner by the declarant without regard to the declarant's mental or physical condition. A revocation is effective upon communication to the attending physician or other health care provider by the declarant or a witness to the revocation.

(b) Medical record.--The attending physician or other health care provider shall make the revocation a part of the declarant's medical record.

' 5407. Liability.

(a) General rule.--No physician or other health care provider who, consistent with this [chapter] subchapter, causes or participates in the initiating, continuing, withholding or withdrawal of life-sustaining treatment from a [qualified patient] declarant who has been determined to be in a

terminal condition or to be permanently unconscious and who is incompetent shall, as a result thereof, be subject to criminal or civil liability or be found to have committed an act of unprofessional conduct if the attending physician has followed the declarant's wishes as expressed earlier by the declarant in the form of a declaration executed pursuant to this [chapter] subchapter.

(b) Absence of declaration.--The absence of a declaration by a patient shall not give rise to any presumption as to the intent of the patient to consent to or to refuse the initiation, continuation [or termination], withholding or withdrawal of life-sustaining treatment.

Comment: The amendment to subsection (a) is technical in nature as it incorporates the substance of the repealed definition of Aqualified patient.@

' 5408. Duty of physician to confirm terminal condition.

For purposes of section 5405 (relating to when declaration becomes operative), an attending physician shall, without delay after the diagnosis that the declarant is in a terminal condition or in a state of permanent unconsciousness, certify in writing that the declarant is in a terminal condition or in a state of permanent unconsciousness and arrange for the physical examination and confirmation of the terminal condition or state of permanent unconsciousness of the declarant by a second physician.

' 5409. Unwillingness to comply[;] and transfer of declarant.

(a) Attending physician or health care provider.--If an attending physician or other health care provider cannot in good conscience comply with a declaration or if the policies of the health care provider preclude compliance with a declaration, the attending physician or health care provider shall so inform the declarant, or, if the declarant is incompetent, shall so inform the [declarant's surrogate] individual designated in the declaration to make life-sustaining treatment decisions for the declarant, or, if [a surrogate] such an individual is not named in the declaration, shall so inform the family, guardian or other representative of the declarant. The attending physician or health care provider shall make every reasonable effort to assist in the transfer of the declarant to another physician or health care provider who will comply with the declaration.

(b) Employee or staff member of health care provider.--An employee or staff member of a health care provider shall not be required to participate in the withholding or withdrawal of life-sustaining treatment. It shall be unlawful for an employer to discharge or in any other manner to discriminate against an employee or staff member who informs the employer [that he does not] of a wish not to participate in the withholding or withdrawal of life-sustaining treatment. The employer may require the employee or staff member to express [his] such wishes in writing.

(c) Liability.--If transfer under subsection (a) is not possible, the provision of life-sustaining treatment to a declarant shall not subject a health care provider to criminal or civil liability or administrative sanction for failure to carry out the provisions of a declaration.

Comment: The amendment to subsection (a) is technical in nature and only removes the term Asurrogate.[@] It is consistent with section 5404(b).

' 5410. Effect on suicide and life insurance.

(a) Criminal effect.--The withholding or withdrawal of life-sustaining treatment from a [qualified patient] declarant who has been determined to be in a terminal condition or to be permanently unconscious in accordance with the provisions of this [chapter] subchapter shall not, for any purpose, constitute suicide or homicide.

(b) Life insurance.--The making of or failure to make a declaration in accordance with this [chapter] subchapter shall not affect in any manner the sale, procurement or issuance of any policy of life insurance nor shall it be deemed to modify the terms of an existing policy of life insurance. No policy of life insurance shall be legally impaired or invalidated in any manner by the withholding or withdrawal of life-sustaining treatment from an insured patient, notwithstanding any term of the policy to the contrary.

Comment: The amendment to subsection (a) is technical in nature as it incorporates the substance of the repealed definition of Aqualified patient.[@]

' 5411. Declaration optional.

No physician or other health care provider and no health care service plan, health maintenance organization, insurer issuing disability insurance, self-insured employee welfare benefit plan, nonprofit hospital plan or Federal, State or local government sponsored or operated program shall:

- (1) require any [person] individual to execute a declaration as a condition for being insured for or receiving health care services; or
- (2) charge any [person] individual a different rate or fee whether or not the [person] individual executes or has executed a declaration.

' 5412. Preservation of existing rights.

The provisions of this [chapter] subchapter shall not impair or supersede any existing rights or responsibilities not addressed in this [chapter] subchapter.

' 5413. Emergency medical services.

(a) Care given prior to declaration taking effect.--Nothing in this [chapter] subchapter shall be construed to make the provisions of a declaration apply to care given to a patient by emergency medical services personnel prior to the declaration's becoming operative under sections 5405 (relating to when declaration becomes operative) and 5408 (relating to duty of physician to confirm terminal condition).

(b) Care given after declaration takes effect.--The provisions of a declaration shall apply to care given to a patient by emergency medical services personnel after the declaration becomes operative under sections 5405 and 5408 only if:

(1) an original declaration, signed by the declarant or other authorized person, is presented to the emergency medical services personnel. The emergency medical services personnel must immediately notify the medical command physician of the presence of the declaration; or

(2) the medical command physician, based on prior notification by the attending physician or other health care provider that a valid and operative declaration exists, directs the emergency medical service personnel according to the provisions of the declaration.

(c) Uncertainty regarding validity of declaration.--Emergency medical services personnel confronted with any conflicting information regarding the patient's wishes for life-sustaining treatment shall act according to the accepted treatment protocols and standards appropriate to their level of certification.

' 5414. Pregnancy.

(a) General rule.--Notwithstanding the existence of a declaration or direction to the contrary, life-sustaining treatment, nutrition and hydration must be provided to a pregnant woman who is incompetent and has a

terminal condition or who is permanently unconscious unless, to a reasonable degree of medical certainty as certified on the patient's medical record by the attending physician and an obstetrician who has examined the patient, life-sustaining treatment, nutrition and hydration:

(1) will not maintain the pregnant woman in such a way as to permit the continuing development and live birth of the unborn child;

(2) will be physically harmful to the pregnant woman; or

(3) would cause pain to the pregnant woman which cannot be alleviated by medication.

(b) Pregnancy test.--Nothing in this section shall require a physician to perform a pregnancy test unless the physician has reason to believe that the woman may be pregnant.

(c) Payment of expenses by Commonwealth.--

(1) In the event that treatment, nutrition and hydration are provided to a pregnant woman who is incompetent and has a terminal condition or who is permanently unconscious, notwithstanding the existence of a declaration or direction to the contrary, the Commonwealth shall pay all usual, customary and reasonable expenses directly and indirectly incurred by the pregnant woman to whom such treatment, nutrition and hydration are provided.

(2) The Commonwealth shall have the right of subrogation against all moneys paid by any third-party health insurer on behalf of the pregnant woman.

(3) The expenditures incurred on behalf of the pregnant woman shall constitute a grant and no lien shall be placed upon the property of the pregnant woman, her estate or her heirs.

' 5415. Penalties.

Any person who willfully conceals, cancels, alters, defaces, obliterates or damages the declaration of another without the consent of the declarant commits a felony of the third degree. Any person who falsifies or forges the declaration of another, or willfully conceals or withholds personal knowledge of a revocation as provided in section 5406 (relating to revocation), with the intent to cause a withholding or withdrawal of life-sustaining treatment contrary to the wishes of the declarant and, because of such an act, directly causes life-sustaining treatment to be withheld or withdrawn and death to be hastened shall be subject to prosecution for criminal homicide as provided in 18 Pa.C.S. Ch. 25 (relating to criminal homicide). Any person who willfully, by undue influence, fraud or duress, causes a person to execute a declaration pursuant to this [chapter] subchapter commits a felony of the third degree.

[* 5416. Severability.

The provisions of this chapter are severable, and, if any word, phrase, clause, sentence, section or provision of the chapter is for any reason held to be unconstitutional, the decision of the court shall not affect or impair any of the remaining provisions of this chapter. It is hereby declared as the legislative intent that this chapter would have been adopted had such unconstitutional word, phrase, clause, sentence, section or provision thereof not been included herein.]

Comment: This section is deleted because its substance is contained in 1 Pa.C.S. ' 1925 (relating to constitutional construction of statutes).

SUBCHAPTER C

HEALTH CARE AGENTS AND REPRESENTATIVES

Sec.

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' 5421. Short title of subchapter.

This subchapter shall be known and may be cited as the Health Care Agents and Representatives Act.

' 5422. General provisions.

(a) Who may execute a health care power of attorney.--An individual of sound mind who is 18 years of age or older or has graduated from high school or has married may execute a health care power of attorney.

(b) Execution.--A health care power of attorney shall be signed and dated by the principal by signature or mark, or by another on behalf of and at the direction of the principal. If the health care power of attorney is executed by mark or by another individual, then it shall be witnessed by two individuals, each of whom is 18 years of age or older. A witness shall not be the

individual who signed the health care power of attorney on behalf of and at the direction of the principal. Neither a health care provider nor its agent shall sign a health care power of attorney on behalf of and at the direction of the principal if that health care provider or agent provides health care services to the principal.

Comment: Subsection (a) describes those individuals who may execute a health care power of attorney. The execution requirements for a health care power of attorney are the same as those for a declaration under section 5404(a) (execution of declaration). There is a presumption of sound mind to execute a health care power of attorney, absent clear evidence to the contrary. A health care provider, in good faith, can rely on the presumption of a principal's sound mind.

Subsection (b) provides that the principal may execute a health care power of attorney without any witness requirement, consistent with Chapter 56 (Powers of attorney), which does not require witnesses for a general power of attorney executed by the principal. However, witnesses are required when the health care power of attorney is executed by mark or by another individual on behalf of and at the direction of the principal.

Subsection (b) prohibits a health care provider, or anyone acting on its behalf, from signing a health care power of attorney for the principal if the principal receives health care services from such provider. The intent of this provision is to avoid potential conflicts of interest for a health care provider.

Finally, it should be noted that this section does not require notarization for a health care power of attorney to be effective.

' 5423. Form of health care power of attorney.

(a) Requirements.--A health care power of attorney shall:

(1) Identify the principal and appoint the health care agent.

(2) Declare that the principal authorizes the health care agent to have authority to make health care decisions on behalf of the principal.

(b) Optional provisions.--A health care power of attorney may, but need not:

(1) Describe the limitations, if any, that the principal imposes upon the authority of the health care agent.

(2) Indicate the intent of the principal regarding the initiation, continuation, withholding or withdrawal of life-sustaining treatment.

(3) Disqualify an individual from acting as a health care representative, prohibit the appointment of a health care representative or provide for an order of priority of appointment of a health care representative pursuant to section 5428(c) (relating to decisions by health care representative).

(4) Nominate a guardian of the person of the principal as provided in section 5427(b) (relating to relation of health care agent to court-appointed guardian and other agents).

(5) Contain other provisions as the principal may specify regarding the implementation of health care decisions and related actions by the health care agent.

(c) Invalidity of specific direction.--Should any specific direction in the health care power of attorney be held to be invalid, the invalidity shall not

negate other directions of the health care power of attorney which can be effected without the invalid direction.

Comment: Since the execution requirements for a health care power of attorney are consistent with those for an advance directive for health care, these intentions could be expressed in a single document. There is no prescribed or preferred health care power of attorney form because the health care power of attorney should be tailored to meet the principal's individual circumstances. A health care power of attorney can be adapted to embody the choices offered by this subchapter: (1) successor health care agents can be named; (2) multiple health care agents can act together; (3) the health care power of attorney can be effective immediately; (4) the power of attorney can state that it terminates at a certain time; and (5) most important, particular choices about health care, including life-sustaining treatment, can be made. Subsection (c) is patterned after section 5404(c) (relating to declaration; invalidity of specific direction).

' 5424. Countermand, amendment and revocation.

(a) Countermand of health care decision.--A principal may countermand a health care decision made by the principal's health care agent at any time and in any manner without regard to the principal's mental or physical capacity by personally informing the attending physician or health care provider. The attending physician or health care provider shall make reasonable efforts to inform promptly the health care agent of the countermand. A countermand shall not affect the authority of the health care agent to make other health care decisions in accordance with the health care power of attorney.

(b) Amendment.--A principal while of sound mind may amend a health care power of attorney by a writing executed in accordance with the provisions of section 5422(b) (relating to general provisions). An amendment may include the revocation in part of the health care power of attorney or the designation of new or additional health care agents.

(c) Divorce.--If the principal's spouse is designated as the principal's health care agent and thereafter either spouse files an action in divorce, the designation of the spouse as health care agent shall be deemed revoked as of the time the action is filed, unless it clearly appears from the health care power of attorney that the designation was intended to continue to be effective notwithstanding the filing of an action in divorce by either spouse.

(d) Revocation.--A principal while of sound mind may revoke a health care power of attorney by a writing executed in accordance with the provisions of section 5422(b) or by personally informing the attending physician, health care provider or health care agent that the health care power of attorney is revoked.

(e) Effect of revocation.--A physician or other health care provider may rely on the effectiveness of a health care power of attorney unless notified of its revocation. A health care agent, knowing of the revocation, shall not make or attempt to make health care decisions for the principal.

Comment: Subsection (a) permits the principal, irrespective of mental or physical capacity, to countermand individual health care decisions made by a health care agent without affecting the authority of the agent to make other health care decisions for the principal. This subsection recognizes the underlying policy consideration of individual autonomy.

Subsection (c) provides that the filing of a divorce action revokes the designation of a spouse as a health care agent, unless it clearly appears that the designation was intended to continue notwithstanding such filing.

Subsection (d) provides two methods of revocation. A principal may revoke a health care power of attorney either (1) by a writing or (2) orally by personally informing the attending physician, health care provider or health care agent of the revocation.

Subsection (e) incorporates three important concepts. First, it provides a degree of certainty for physicians or other health care providers by permitting them to rely on a health care power of attorney until notified of its revocation. Second, it does not foreclose the ability of physicians or other health care providers to challenge the validity of a health care power of attorney, if, for example, they have reason to believe that the health care power of attorney was forged. Finally, subsection (e) prohibits a health care agent from acting under a health care power of attorney if that agent knows of its revocation.

' 5425. Operation of health care power of attorney.

(a) When operative.--Unless specifically provided otherwise in the health care power of attorney, a health care power of attorney becomes operative when a copy of the health care power of attorney is provided to the attending physician and the attending physician determines that the principal is unable to make or communicate health care decisions and becomes inoperative

during such time as, in the determination of the attending physician, the principal is able to make and communicate health care decisions.

(b) Duration.--Unless the health care power of attorney states a time of termination, it is valid until revoked by the principal or the principal's guardian of the person, notwithstanding the lapse of time since its execution.

Unless specifically provided otherwise in the health care power of attorney, a health care power of attorney becomes inoperative during such time as, in the determination of the attending physician, the principal has the ability to make and communicate health care decisions.

(c) Extent of authority of agent.--Except as expressly provided otherwise in a health care power of attorney, and subject to subsection (d), a health care agent shall have the authority to make any and all health care decisions and to exercise any and all rights and powers concerning the principal's care, custody and health care treatment that the principal could have made and exercised.

(d) Life-sustaining treatment decisions.--All life-sustaining treatment decisions made by a health care agent shall be subject to sections 5405 (relating to when declaration becomes operative), 5408 (relating to duty of physician to confirm terminal condition) and 5414 (relating to pregnancy).

(e) Health care decisions.--After consultation with health care providers, and after consideration of the prognosis and acceptable medical alternatives

regarding diagnosis, treatments and side effects, the health care agent shall make health care decisions in accordance with the health care agent's understanding and interpretation of any instructions given by the principal at a time when the principal had the capacity to make and communicate health care decisions. Instructions shall include any declaration made by the principal and any clear written or oral directions which cover the situation presented. In the absence of instructions, the health care agent shall make health care decisions in conformity with the health care agent's assessment of the principal's preferences and values, including religious and moral beliefs. If the health care agent does not know enough about the principal's instructions, preferences and values to make a decision, the health care agent shall act in accordance with the health care agent's assessment of the principal's best interests.

(f) Health care information.--Unless specifically provided otherwise in the health care power of attorney, a health care agent has the same rights and limitations as the principal to request, examine, copy and consent or refuse to consent to the disclosure of medical or other health care information. Disclosure of medical or other health care information to a health care agent does not constitute a waiver of any evidentiary privilege or of a right to assert confidentiality. Any health care provider that discloses such information to a health care agent in good faith shall not be liable for that

disclosure. A health care agent shall not disclose health care information regarding the principal except as is reasonably necessary to perform the agent's obligations to the principal or as otherwise required by law.

(g) Court approval unnecessary.--A health care decision made by a health care agent for a principal is effective without court approval.

Comment: The introductory clause of subsection (a) permits the principal, by specific provisions contained in the health care power of attorney, to authorize the agent to act on behalf of the principal even though the principal is able to make or communicate health care decisions. Otherwise, the health care power of attorney becomes operative when provided to the attending physician and the attending physician determines that the principal is unable to make and communicate health care decisions.

Subsection (b) provides statutory assurance to third parties that a health care power of attorney is valid until revoked by the principal or guardian or terminated as provided in the health care power of attorney. This subsection is conceptually modeled after section 5604(b) (durable power of attorney not affected by disability or lapse of time).

Subsection (d) is designed to ensure that health care decisions regarding the initiation, continuation, withholding or withdrawal of life-sustaining treatment under a health care power of attorney are treated the same as such decisions under an advance directive for health care pursuant to Subchapter B. Subsection (d) also applies to health care representatives. See section 5428(b) (extent of authority of health care representative). Specifically, the attending physician must make a determination that the principal is in a terminal condition or in a state of permanent unconsciousness (section 5405 (when declaration becomes operative)) and arrange to have that diagnosis confirmed by a second physician (section 5408 (duty of physician to confirm terminal condition)). Furthermore, the provisions of section 5414 (pregnancy) also apply to a life-

sustaining treatment decision made by a health care agent for a principal who is pregnant.

Subsection (e) is consistent with the principles regarding substituted judgment enunciated by the court in In re Fiori, 543 Pa. 592, 673 A.2d (905) (1996). However, the last sentence of subsection (e) is an extension of the Fiori holding to account for a situation not present in Fiori, namely where the agent does not know enough about the principal's instructions, preferences and values to make a decision. In that case, the health care agent shall act in accordance with the health care agent's assessment of the principal's best interests.

The court in Fiori explained that in exercising substituted judgment, a surrogate decision maker . . . considers the patient's personal value system for guidance. The surrogate considers the patient's prior statements about and reactions to medical issues, all the facets of the patient's personality that the surrogate is familiar with--with, of course, particular reference to his or her relevant philosophical, theological, and ethical values--in order to extrapolate what course of medical treatment the patient would choose.

Subsection (f) recognizes that health care agents may be provided otherwise confidential medical information necessary for them to make health care decisions for the principal. Section 5435(f) (effect on other State law; disclosure) makes it clear that this subsection supersedes other State laws that impose stringent patient consent requirements. Section 5428(b) (decisions by health care representative; extent of authority of health care representative) provides the same access to such confidential medical information for health care representatives as this subsection provides for health care agents. The confidentiality of the information is protected by the re-disclosure limitation on health care agents and representatives.

' 5426. Appointment of health care agents.

(a) Multiple and successor health care agents.--A principal may in a health care power of attorney provide for:

(1) The appointment of more than one health care agent, who shall act jointly unless the health care power of attorney provides otherwise.

(2) The appointment of one or more successor agents who shall serve in the order named in the health care power of attorney, unless the principal expressly directs to the contrary.

(b) Limitation on appointment of agent.--Unless related by blood, marriage or adoption, a health care agent may not be the principal's attending physician or other health care provider, nor an owner, operator or employee of a health care institution in which the principal is receiving care.

Comment: Subsection (a) is patterned after section 5602(b)(1) and (2) (appointment of attorney-in-fact and successor attorney).

' 5427. Relation of health care agent to court-appointed guardian and other agents.

(a) Accountability of health care agent.--If a principal who has executed a health care power of attorney is later adjudicated an incapacitated person and a guardian of the person to make health care decisions is appointed, the health care agent is accountable to the guardian as well as to the principal.

The guardian shall have the same power to revoke or amend the health care power of attorney that the principal would have if the principal were not incapacitated.

(b) Nomination of guardian of person.--A principal may in a health care power of attorney nominate the guardian of the person for that principal for consideration by the court if incapacity proceedings for the principal's person are thereafter commenced. If the court determines that the appointment of a guardian is necessary, the court shall make its appointment in accordance with the principal's most recent nomination except for good cause or disqualification.

(c) Reasonable expenses.--A health care agent may incur reasonable expenses, including the purchase of health care insurance, in fulfilling the health care needs for the principal to the extent the expenses are not otherwise covered by insurance or other similar benefits. Any guardian of the estate of the principal or agent acting on behalf of the principal under a power of attorney if that agent has the power to disburse the principal's funds shall pay for the expenses or reimburse the health care agent for the expenses from the principal's funds.

Comment: Subsections (a) and (b) are patterned after section 5604(c) (relation of attorney-in-fact to court-appointed guardian).

Since a health care agent might not have access to the principal's funds, subsection (c) provides a means of payment for health care provided to the principal.

' 5428. Decisions by health care representative.

(a) General rule.--A health care representative may make a health care decision for an individual whose attending physician has determined that the individual lacks the ability to make or communicate health care decisions if:

(1) the individual is 18 years of age or older or has graduated from high school or has married;

(2) the individual does not have a health care power of attorney, or the individual's health care agent is not reasonably available or has indicated an unwillingness to act and no alternate health care agent is reasonably available; and

(3) a guardian of the person to make health care decisions has not been appointed for the individual.

(b) Extent of authority of health care representative.--The authority of a health care representative shall be the same as provided for a health care agent in sections 5425(c), (d), (e), (f) and (g) (relating to operation of health care power of attorney) and 5427 (c) (relating to relation of health care agent to court-appointed guardian and other agents).

(c) Who may act as health care representative.--An individual of sound mind may, by a signed writing or by personally informing the attending physician or the health care provider, designate one or more individuals to act as health care representative. In the absence of a designation or if no

designee is reasonably available, any member of the following classes who is reasonably available, in descending order of priority, may act as health care representative:

- (1) the spouse unless an action for divorce is pending;
- (2) an adult child;
- (3) a parent;
- (4) an adult brother or sister;
- (5) an adult grandchild; or
- (6) an adult who has exhibited special care and concern for the principal and who is familiar with the principal's personal values.

An individual may by a signed writing, including a health care power of attorney, provide for a different order of priority. An individual with a higher priority who is willing to act as a health care representative may assume the authority to act notwithstanding the fact that another individual has previously assumed the authority.

(d) Disqualification.--An individual of sound mind may disqualify one or more individuals from acting as health care representative in the same manner as subsection (c) provides for the designation of a health care representative. An individual may also disqualify one or more individuals from acting as health care representative by a health care power of attorney. Upon the petition of any member of the classes set forth in subsection (c),

the court may for cause shown disqualify an individual otherwise eligible to serve as a health care representative.

(e) Limitation on designation of health care representative.--Unless related by blood, marriage or adoption, a health care representative may not be the principal's attending physician or other health care provider, nor an owner, operator or employee of a health care institution in which the principal is receiving care.

(f) Decision of health care representative.--If more than one member of a class assumes authority to act as a health care representative, and they do not agree on a health care decision and the attending physician or health care provider is so informed, the attending physician or health care provider may rely on the decision of a majority of the members of that class who have communicated their views to the attending physician or health care provider.

If the class of health care representatives is evenly divided concerning the health care decision and the attending physician or health care provider is so informed, an individual having a lower priority may not act as a health care representative. So long as the class remains evenly divided, no decision shall be deemed made until such time as the parties resolve their disagreement. Notwithstanding such disagreement, nothing in this subsection shall preclude the administration of health care treatment in accordance with accepted standards of medical practice.

(g) Duty of health care representative.--Immediately upon assuming authority to act, a health care representative shall communicate the assumption of authority to the members of the principal's family specified in subsection (c) who can be readily contacted.

(h) Countermand of health care decision.--A principal may countermand a health care decision made by the health care representative at any time and in any manner without regard to the principal's mental or physical capacity by personally informing the attending physician or health care provider. The attending physician or health care provider shall make reasonable efforts to inform promptly the health care representative of the countermand. A countermand shall not affect the authority of the health care representative to make other health care decisions.

(i) Court approval unnecessary.--A health care decision made by a health care representative for a principal is effective without court approval.

(j) Written declaration of health care representative.--An attending physician or health care provider may require a person claiming the right to act as health care representative for a principal to provide a written declaration made under penalty of perjury stating facts and circumstances reasonably sufficient to establish the claimed authority.

Comment: This section is conceptually derived from section 5 of the Uniform Health-Care Decisions Act which was approved

by the National Conference of Commissioners on Uniform State Laws in 1993.

This section authorizes a health care representative to make health care decisions for certain individuals.

Subsection (c) sets forth who may act as a health care representative in descending order of priority and provides that an individual by a signed writing including a health care power of attorney may provide for a different order of priority.

Subsection (d) provides that an individual may prohibit anyone from acting as that individual's health care representative. Furthermore, any member of the classes set forth in subsection (c) may petition the court to disqualify another individual otherwise eligible to serve as a health care representative. This provision recognizes an inherent concern with a statutorily prioritized list of potential health care representatives. It is conceivable that a member having a lower priority might be better suited to serve as a health care representative because of that member's continuing relationship with the principal.

Subsection (e) provides the same limitations on the designation of a health care representative as section 5426(b) (limitation on appointment of agent) provides with regard to the appointment of a health care agent.

Subsection (f) addresses the situation where more than one member of a class has assumed authority to act as a health care representative and agreement is not reached. In that event, the attending physician or health care provider may rely on the decision of the majority of the members of that class who have communicated their views to the attending physician or health care provider. If the class is evenly divided, no decision is deemed made until the class resolves the disagreement, and importantly, an individual having a lower priority may not act. For example, if the adult children are evenly divided, neither a parent nor an adult brother or sister may act as health care representative to make that decision. This subsection recognizes that the decision-making process is an evolving one.

Subsection (h) permits the principal to countermand individual health care decisions made by the health care representative.

This parallels the right of countermand under a health care power of attorney. See section 5424(a) (countermand of health care decision).

Subsection (j) permits a health care provider to require a written declaration from the person asserting the authority to act as a health care representative stating facts and circumstances reasonably sufficient to establish the claimed authority. Significantly, this subsection is not intended to impose a duty on a physician or health care provider to investigate the qualifications of the health care representative or to search for a health care representative.

' 5429. Duties of attending physician and health care provider.

(a) Communication of health care decision.--Before implementing a health care decision made by a health care agent or by a health care representative, an attending physician or health care provider, whenever possible, shall promptly communicate to the principal the decision made and the identity of the person making the decision.

(b) Compliance with decisions of health care agent or health care representative.--An attending physician or health care provider shall comply with health care decisions made by a health care agent, subject to any specific limitations contained in the health care power of attorney, or by a health care representative to the same extent as if the decisions had been made by the principal.

(c) Medical record.--Any attending physician or health care provider who is given a health care power of attorney shall arrange for the health care power of attorney or a copy to be placed in the principal's medical record.

(d) Medical record entry.--Any attending physician or health care provider to whom an amendment or revocation of a health care power of attorney is communicated or to whom the designation or disqualification of a health care representative is communicated shall promptly enter the information in the principal's medical record and maintain a copy if one is furnished.

(e) Record of determination.--Any attending physician who makes a determination that a principal is unable or has regained the ability to make and communicate health care decisions or makes a determination which affects the authority of a health care agent or health care representative shall enter the determination in the principal's medical record and, if possible, shall inform promptly the principal and any health care agent or health care representative of the determination.

Comment: This section sets forth the various duties imposed on an attending physician and health care provider.

Subsection (a) regarding communication of a health care decision is crucial to the operation of sections 5424(a) (countermand of health care decision made by health care agent) and 5428(h) (countermand of health care decision made by health care representative) and is designed to preserve patient autonomy.

Subsection (b), which requires compliance with a health care decision made by a health care agent or a health care representative, provides statutory assurance to the principal, health care agent and health care representative that a decision made by an agent or health care representative will be treated as if the decision had been made by the principal.

Subsections (c) and (d) require that a health care power of attorney be made part of the principal's medical record and that any amendment or revocation of that power of attorney or any designation or disqualification of a health care representative be entered in the principal's medical record.

Subsection (e) serves the dual purpose of requiring that a determination that the principal is unable or has regained the ability to make and communicate health care decisions be entered in the principal's medical record and that the principal, health care agent or health care representative be informed of the determination.

' 5430. Limitations on liability.

(a) Attending physician, health care provider and health care institution.--

Any attending physician, health care provider, health care institution and other person who acts in good faith shall not be subject to civil or criminal liability, discipline for unprofessional conduct or administrative sanctions for:

(1) complying with any direction or decision of an individual who the health care provider believes in good faith has authority to act as the principal's health care agent or health care representative so long as, in the case of a health care agent, the direction or decision is not clearly contrary to the terms of the health care power of attorney;

(2) declining to comply with a direction or decision of an individual based on a good faith belief that the individual lacks authority to act as the principal's health care agent or health care representative;

(3) complying with a health care power of attorney under the assumption that it was valid when made and has not been amended or revoked; or

(4) disclosing health care information to another person based upon a good faith belief that the disclosure would be authorized, permitted or required by this subchapter.

Any attending physician, health care provider, health care institution and other person so acting is protected and released to the same extent as if dealing directly with a competent principal.

(b) Health care agent.--No health care agent who in good faith acts for the principal and in accordance with the terms of a health care power of attorney, or who fails to act, shall be subject to civil or criminal liability for the action or inaction.

(c) Health care representative.--No health care representative who in good faith acts for the principal, or who fails to act, shall be subject to civil or criminal liability for the action or inaction.

(d) Death not suicide or homicide.--Death resulting from the withholding or withdrawal of life-sustaining treatment in accordance with the provisions of this subchapter shall not for

any purpose constitute suicide or homicide.

Comment: Subsection (a) is designed to encourage third parties, including an attending physician, a health care provider and health care institution to follow the instructions of a health care agent or health care representative and to be relieved of liability for doing so.

Subsections (b) and (c) are designed to provide immunity for the good faith efforts of health care agents and health care representatives.

Subsection (d) is patterned after section 5410(a) (effect on suicide) regarding advance directives for health care.

' 5431. Unwillingness to comply and transfer of principal.

(a) Attending physician or health care provider.--If an attending physician or health care provider cannot in good conscience comply with a health care decision of a health care agent or health care representative or if the policies of the health care institution preclude compliance with the health care decision, the attending physician or health care provider shall so inform the health care agent or health care representative. The attending physician or health care provider shall make every reasonable effort to assist in the transfer of the principal to another physician or health care provider who will comply with the health care decision of the health care agent or health care representative.

(b) Employee or staff member of health care provider.--An employee or staff member of a health care provider shall not be required to comply with a health care decision of a health care agent or health care representative,

if the employee=s or staff member=s good conscience dictates otherwise. It shall be unlawful for an employer to discharge or in any other manner to discriminate against the employee or staff member who informs the employer of an unwillingness to comply based upon good conscience. The employer may require the employee or staff member to express the unwillingness in writing.

(c) Liability.--If transfer under subsection (a) is not possible, the provision of life-sustaining treatment to a principal shall not subject an attending physician, health care provider or health care institution to criminal or civil liability or administrative sanctions for failure to carry out the health care decision.

Comment: This section is patterned after section 5409 (unwillingness to comply; transfer of declarant).

' 5432. Effect on life insurance.

The making of or failure to make a health care power of attorney or a designation of a health care representative in accordance with this subchapter shall not affect in any manner the sale, procurement or issuance of any policy of life insurance nor shall it be deemed to modify the terms of an existing policy of life insurance. No policy of life insurance shall be legally impaired or invalidated in any manner by the withholding or

withdrawal of life-sustaining treatment from an insured principal, notwithstanding any term of the policy to the contrary.

Comment: This section is patterned after section 5410(b) (effect on life insurance).

' 5433. Conditioning services or action.

No person may require or prevent the execution of a health care power of attorney or the designation of a health care representative as a condition of insuring or providing any type of health care service.

' 5434. Criminal penalties.

(a) Tampering with a health care power of attorney.--Any person who, without the consent of the principal, willfully conceals, cancels, alters, defaces, obliterates or damages a health care power of attorney or any amendment or revocation or who falsifies or forges a health care power of attorney, its amendment or revocation, and, as a result of that act, directly changes the health care provided to the principal commits a felony of the third degree.

(b) Tampering resulting in death.--A person who falsifies or forges a health care power of attorney or willfully conceals or withholds personal knowledge of an amendment or revocation of a health care power of attorney with the intent to cause a withholding or withdrawal of life-sustaining treatment contrary to the intent of the principal and, as a result of that act

directly causes life-sustaining treatment to be withheld or withdrawn and death to the principal to be hastened shall be subject to prosecution for criminal homicide as provided in 18 Pa.C.S. Ch. 25 (relating to criminal homicide).

Comment: This section is conceptually patterned after section 5415 (penalties).

' 5435. Effect on other State law.

(a) Mental health.--This subchapter shall not affect the requirements of any other laws of this Commonwealth concerning consent to observation, diagnosis, treatment or hospitalization for a mental illness.

(b) Prohibited care.--This subchapter shall not authorize a health care agent or health care representative to consent to any health care prohibited by the laws of this Commonwealth.

(c) Consent.--This subchapter shall not affect the laws of this Commonwealth concerning:

- (1) the standard of care of a health care provider required in the administration of health care;
- (2) when consent is required for health care;
- (3) informed consent for health care; or
- (4) consent to health care in an emergency.

(d) Preservation of religious rights.--This subchapter shall not prevent a health care agent or health care representative from consenting to health care administered in good faith pursuant to religious tenets of the principal or from withholding consent to health care which is contrary to religious tenets of the principal.

(e) Individual's rights.--This subchapter shall not affect the right of an individual to make health care decisions.

(f) Disclosure.--The disclosure requirements of section 5425(f) (relating to operation of health care power of attorney) shall supersede any provision in any other State statute or regulation which requires the principal to consent to disclosure or which otherwise conflicts with section 5425(f), including, but not limited to:

(1) Section 8 of the act of April 14, 1972 (P.L.221, No.63), known as the Pennsylvania Drug and Alcohol Abuse Control Act.

(2) Section 111 of the act of July 9, 1976 (P.L.817, No.143), known as the Mental Health Procedures Act.

(3) Section 15 of the act of October 5, 1978 (P.L.1109, No.261), known as the Osteopathic Medical Practice Act.

(4) Section 41 of the act of December 20, 1985 (P.L.457, No.112), known as the Medical Practice Act of 1985.

(5) Section 7 of the act of November 29, 1990 (P.L.585, No.148), known as the Confidentiality of HIV-Related Information Act.

The disclosure requirements under section 5425(f) shall not apply to the extent that the disclosure would be prohibited by Federal laws and implementing regulations.

Comment: Subsection (a) provides that this subchapter does not affect the requirements of any other laws of this Commonwealth concerning consent to observation, diagnosis, treatment or hospitalization for a mental illness, including, but not limited to, the following list of statutory and regulatory provisions:

1. The act of July 9, 1976 (P.L.817, No.143), known as the Mental Health Procedures Act, specifically--
 - a. Section 201 (relating to persons who may authorize voluntary treatment).
 - b. Section 207 (relating to transfer of person in voluntary treatment).
 - c. Section 301 (relating to persons who may be subject to involuntary emergency examination and treatment).
 - d. Section 302 (relating to involuntary emergency examination and treatment authorized by a physician--not to exceed one hundred twenty hours).
 - e. Section 303 (relating to extended involuntary emergency treatment certified by a judge or mental health review officer--not to exceed twenty days).
 - f. Section 304 (relating to court-ordered involuntary treatment not to exceed ninety days).

- g. Section 305 (relating to additional periods of court-ordered involuntary treatment).
2. The relevant sections of the act of October 20, 1966, Special Sess. No. 3 (P.L.96, No. 6), known as the Mental Health and Mental Retardation Act of 1966.
3. The relevant provisions of Part VII of 55 Pa. Code, sections 5100-5100.93, known as the Public Welfare Code--Mental Health Manual.

The intent of subsection (f) is to remove any uncertainty as to whether the disclosure requirements of section 5425(f) control in the event of a conflict with present State law or regulations. The list of State statutes in subsection (f) is not meant to be exclusive.

' 5436. Conflicting health care powers of attorney.

If a provision of a health care power of attorney conflicts with another provision of a health care power of attorney or with a provision of a declaration under Subchapter B (relating to advance directive for health care), the provision of the instrument latest in date of execution shall prevail to the extent of the conflict.

Comment: This section follows the long-standing rule that in the event of a conflict between provisions of multiple instruments, the provision of the instrument latest in date of execution prevails to the extent of the conflict.

' 5437. Validity.

This subchapter shall not limit the validity of a health care power of attorney executed prior to the effective date of this subchapter. A health care power of attorney executed in another state or jurisdiction and in

conformity with the laws of that state or jurisdiction shall be considered valid in this Commonwealth, except to the extent that the health care power of attorney executed in another state or jurisdiction would allow a health care agent to make a health care decision inconsistent with the laws of this Commonwealth.

Repealers

The implementing legislation will repeal 20 Pa.C.S. §§ 5602(a)(8) and (9) and 5603(h).

Validity of Declaration

The repeal of the form of declaration in section 5404(b) shall not affect the validity of any declaration executed, pursuant to that form, before, on or after the effective date of this act.

Effective Date

This act shall take effect in 60 days.

PRUDENT INVESTOR RULE

CHAPTER 72

PRUDENT INVESTOR RULE

' 7201. Definitions.

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

Fiduciary. Includes guardians and trustees, whether domiciliary or ancillary, individual or corporate, subject to the jurisdiction of the orphans' court. The term shall not include a custodian under Chapter 53 (relating to Pennsylvania uniform transfers to minors act), an agent acting under a power of attorney, a personal representative, an administrator of a municipal pension or retirement plan or a person whose fiduciary duties are, by statute, governed by the principles of Chapter 73 (relating to municipalities investments).

Mutual fund. The securities of an open-end or closed-end management investment company or investment trust registered under the Investment Company Act of 1940 (54 Stat. 789, 15 U.S.C. ' 80a-1 et seq.).

Trust. Includes guardianships and trusts subject to the jurisdiction of the orphans' court and having property owned or managed by a fiduciary. The term shall not include custodianships, agencies created by a power of attorney, decedents' estates or municipal pension or retirement plans.

' 7202. Default rule.

(a) General rule.--Except as otherwise provided by the governing instrument, a fiduciary shall invest and manage property held in a trust in accordance with the provisions of this chapter.

(b) Exception.--Where the instrument establishing a trust contains a restriction on the fiduciary's power of investment and the court having jurisdiction over the trust finds that adherence to the restriction is impractical or that the existing or reasonably foreseeable economic conditions are so far different from those prevailing at the creation of the trust that adherence to the restriction might deprive the respective beneficiaries of income and principal of the full benefits the testator or settlor intended them to enjoy, the court may release the fiduciary from the restriction to the extent and on the conditions, if any, as the court may deem appropriate.

(c) Court direction.--A fiduciary appointed by the court and not acting under a trust instrument, in addition to or in place of the investments authorized by this chapter, may make and retain without liability for resulting loss, investments as the court, upon petition of the fiduciary or of any party in interest, after notice as it shall direct, aided by the report of a master if necessary, shall authorize or direct, subject only to the conditions and limitations as shall be fixed by the court in the decree authorizing or directing the investment.

' 7203. Prudent investor rule.

(a) General rule.--A fiduciary shall invest and manage property held in a trust as a prudent investor would, by considering the purposes, terms and other circumstances of the trust, and by pursuing an overall investment strategy reasonably suited to the trust.

(b) Permissible investments.--A fiduciary may invest in every kind of property and type of investment, including, but not limited to, mutual funds and similar investments, consistent with this chapter.

(c) Considerations in making investments and management decisions.-- In making investment and management decisions a fiduciary shall consider, among other things, to the extent relevant to the decision or action:

- (1) the size of the trust;
- (2) the nature and estimated duration of the fiduciary relationship;

- (3) the liquidity and distribution requirements of the trust;
- (4) the expected tax consequences of investment decisions or strategies and of distributions of income and principal;
- (5) the role that each investment or course of action plays in the overall investment strategy;
- (6) an asset's special relationship or special value, if any, to the purposes of the trust or to one or more of the beneficiaries;
- (7) to the extent reasonably known to the fiduciary, the needs of the beneficiaries for present and future distributions authorized or required by the governing instrument; and
- (8) to the extent reasonably known to the fiduciary, the income and resources of the beneficiaries and related trusts.

' 7204. Diversification.

Except as provided in section 7205 (relating to retention of inception assets), a fiduciary shall reasonably diversify investments, unless the fiduciary reasonably determines that it is in the interests of the beneficiaries not to diversify, taking into account the purposes, terms and other circumstances of the trust and the requirements of this chapter.

' 7205. Retention of inception assets.

A fiduciary, in the exercise of reasonable care, skill and caution, may retain any asset received in kind, even though the asset constitutes a disproportionately large share of the portfolio.

' 7206. Delegation.

(a) Permissible delegation.--A fiduciary may delegate investment and management functions that a prudent investor of comparable skills might delegate under the circumstances.

(b) Duties of fiduciary.--A fiduciary shall not be responsible for the investment decisions or actions of the investment agent to which the investment functions are delegated if the fiduciary exercises reasonable care, skill and caution in selecting the investment agent, in establishing the scope and specific terms of the delegation and in reviewing periodically the investment agent's actions in order to monitor the investment agent's performance and compliance with the scope and specific terms of the delegation.

(c) Duties of investment agent.--The investment agent shall comply with the scope and terms of the delegation and shall exercise the delegated function with reasonable care, skill and caution, and shall be liable to the trust for failure to do so. An investment agent who represents that he has special investment skills shall exercise those skills.

(d) Jurisdiction.--An investment agent who accepts the delegation of a fiduciary's function from a fiduciary who is subject to the jurisdiction of a court of this Commonwealth shall be deemed to have submitted to the jurisdiction of that court even if the delegation agreement provides for a different jurisdiction or venue.

(e) When co-fiduciary may delegate to another co-fiduciary.--A co-fiduciary may delegate investment and management functions to another co-fiduciary if the delegating co-fiduciary reasonably believes that the other co-fiduciary has greater investment skills than the delegating co-fiduciary with respect to those functions. The delegating co-fiduciary shall not be responsible for the investment decisions or actions of the other co-fiduciary to which the investment functions are delegated if the delegating co-fiduciary exercises reasonable care, skill and caution in establishing the scope and specific terms of the delegation and in reviewing periodically the other co-fiduciary's actions in order to monitor the co-fiduciary's performance and compliance with the scope and specific terms of the delegation.

(f) Mutual funds.--Investment in a mutual fund is not a delegation of investment function, and neither the mutual fund nor its advisor is an investment agent.

' 7207. Retention of cash; temporary investments.

(a) Uninvested cash.--A fiduciary may hold cash uninvested:

(1) which the fiduciary reasonably expects to:

(i) distribute to beneficiaries as income on a quarterly or more frequent basis;

(ii) use for payment of debts, taxes, expenses of administration or reinvestment within the next 90 days; or

(2) when the amount available for investment does not justify the administrative burden of making the investment determined in the light of the facilities available to the fiduciary.

A corporate fiduciary may deposit uninvested funds in its own or an affiliate's commercial department.

(b) Temporary investments.--A fiduciary may make temporary investment of funds which the fiduciary is entitled to hold uninvested or which the fiduciary wishes to hold in liquid form in short-term interest-bearing obligations or deposits, or other short-term liquid investments, selected in each case in compliance with the standards of section 7203 (relating to prudent investor rule), but without regard to any investment restrictions imposed by the governing instrument and may make a reasonable charge, in addition to all other compensation to which the fiduciary is entitled, for services rendered in making the temporary investment.

' 7208. Life insurance.

A trustee may acquire or retain a contract of life insurance upon the life of the settlor or the settlor's spouse, or both without liability for a loss arising from the trustee's failure to:

- (1) determine whether the contract is or remains a proper investment;
- (2) investigate the financial strength of the life insurance company;
- (3) exercise nonforfeiture provisions available under the contract; or
- (4) diversify the contract.

' 7209. Mutual funds.

Notwithstanding that a bank or trust company or an affiliate provides services to the investment company or investment trust, including that of an investment advisor, custodian, transfer agent, registrar, sponsor, distributor or manager, and receives reasonable compensation for those services and notwithstanding any other provision of law, a bank or trust company acting as a fiduciary, agent or otherwise may invest and reinvest in a mutual fund if the portfolio of the mutual fund consists substantially of investments not prohibited by the governing instrument. With respect to any funds invested, the basis upon which compensation is calculated, expressed as a percentage of asset value or otherwise, shall be disclosed by prospectus, account statement or otherwise to all persons to whom statements of the account are rendered.

' 7210. Common trust fund and mortgage investment fund.

Any corporate fiduciary and its co-fiduciary, if any, may invest in:

(1) A common trust fund or collective trust fund containing only investments authorized for fiduciaries, established and maintained by the corporate fiduciary or by any affiliate of the corporate fiduciary within the meaning of section 1504 of the Internal Revenue Code of 1986 (Public Law 99-514, 26 U.S.C. ' 1504) and otherwise in conformity with the laws of the Commonwealth and of the United States.

(2) A mortgage investment fund containing only mortgages and other investments authorized for fiduciaries, established and maintained by the corporate fiduciary in conformity with the laws of the Commonwealth and of the United States.

' 7211. Further investment authority.

Unless a contrary intent is clearly expressed in the instrument, the authority to invest in specified types of investments includes authorization to invest in a mutual fund, or in any common or collective trust fund established and maintained by a corporate fiduciary, or by any affiliate of a corporate fiduciary within the meaning of section 1504 of the Internal Revenue Code of 1986 (Public Law 99-514, 26 U.S.C. ' 1504), or any successor provision, if the portfolio of the mutual fund or of the common or collective trust fund consists of the specified types of investments and is

otherwise in conformity with the laws of this Commonwealth and of the United States.

' 7212. Degree of care.

A fiduciary shall exercise reasonable care, skill and caution in making and implementing investment and management decisions. A fiduciary who represents that he has special investment skills shall exercise those skills.

' 7213. Judgment of fiduciary's decisions.

The rules of this chapter are standards of conduct and not of outcome or performance. Compliance with the rules of this chapter shall be determined in light of the facts and circumstances prevailing at the time of the fiduciary's decision or action and not by hindsight. A fiduciary is not liable to the extent the fiduciary acted in substantial compliance with the rules of this chapter or in reasonable reliance on the terms and provisions of the governing instrument. A fiduciary's investment and management decisions respecting individual assets shall be considered in the context of the trust portfolio as a whole and as part of an overall investment strategy, and not in isolation. No specific investment or course of action, taken alone, shall be considered inherently prudent or imprudent.

' 7214. Language invoking chapter.

The following terms or words or words of similar import in the provisions of a trust, unless otherwise limited or modified, shall authorize any

investment or investment strategy permitted under this chapter:
Investments permissible by law for investment of trust funds,
legal investments,
authorized investments,
Using the judgment and care under the circumstances then prevailing that persons of prudence, discretion and intelligence exercise in the management of their own affairs, not in regard to speculation but in regard to the permanent disposition of their own funds, considering the probable income as well as the probable safety of their capital,
prudent man rule,
prudent trustee rule,
prudent person rule and
prudent investor rule.

Applicability and Effective Date

The implementing legislation will contain the following applicability and effective date provisions:

Section 6. (a) This act shall apply to all actions of fiduciaries occurring on or after the effective date of this subsection, regardless of whether the guardianship or trust was created before, on or after that effective date, except as provided in subsection (b).

(b) (1) The addition of 20 Pa.C.S. ' 7204 shall not apply to guardianships created prior to the effective date of section 7204, even if the action of the guardian occurs after that date.

(2) The addition of 20 Pa.C.S. ' 7204 shall not apply to trusts becoming irrevocable prior to the effective date of section 7204, even if

the action of the trustee occurs after that date; nor shall section 7204 apply to trusts created by revocable instruments executed prior to the effective date of section 7204 if such instruments are not amended on or after that date, even if the action of the trustee occurs after that date.

(3) The addition of 20 Pa.C.S. ' 7206 shall apply to actions of guardians and trustees on or after the date of enactment of this act.

(4) The addition of 20 Pa.C.S. ' 7208 shall apply to actions of trustees before, on or after the date of enactment of this act.

Section 7. This act shall take effect as follows:

(1) The addition of 20 Pa.C.S. '' 7206 and 7208 shall take effect immediately.

(2) Section 6(b) and this section shall take effect immediately.

(3) The remainder of this act shall take effect in six months.

Comment: New Chapter 72 is modeled on the Uniform Prudent Investor Act. It makes several important changes from that act, and in addition retains several particular provisions of existing Pennsylvania law.

Section 7201 applies the prudent investor rule to trustees and guardians. As under present law, personal representatives are subject to a duty to liquidate rather than to invest (see section 3316). Investments by custodians are specified in section 5312(b). Investments by agents may create special problems best left to individual cases. Investments by Pennsylvania municipalities are covered by present Chapter 73 which remains unchanged.

Section 7202 is taken from present sections 7318 and 7319. The word **shall** in subsection (a) and elsewhere is intended to create a duty. The word **manage** in subsection (a) is intended to encompass the delegation permitted by section 7206.

Section 7203 is taken from section 2 of the Uniform Prudent Investor Act. It is the heart of the prudent investor rule.

Subsection (a) omits the words **risk and return** found in the uniform act. This significant change from the uniform act is made so that the fiduciary is not restricted to modern portfolio theory but instead can follow any reasonable theory of investing.

Subsection (b) follows section 2(e) of the uniform act. Every type of investment includes investments previously considered speculative if appropriate in the circumstances. The reference to mutual funds is declaratory of existing law and is included for clarity.

Subsection (c) follows section 2(a) of the uniform act but omits references to general economic conditions, the possible effect of inflation or deflation, and the expected total return because these are too imprecise. The list in subsection (c) includes the size of the trust and the nature and estimated duration of the fiduciary relationship to make it clear, for example, that fiduciaries of small funds may make more simplified choices and engage in a less sophisticated analysis than fiduciaries of larger and longer lasting funds. In addition, consideration of the resources of the beneficiaries is only relevant to the extent known by the fiduciary.

Section 7204 mandating diversification is based on section 3 of the uniform act. The phrase **reasonably diversify** is designed not to require the extreme diversification which might be required by modern portfolio theory. This section is not made applicable to existing trusts because Pennsylvania has not required diversification, and because the modern notion of diversification includes the duty to diversify types of investments as well as individual investments. Retroactivity

would have required drafters of old trusts to have been clairvoyant to have negated a non-existent duty to diversify.

Section 7205 is based on present section 7315 which authorizes retention of assets received in kind.

Section 7206 generally follows section 9 of the uniform act. Subsection (d) would not prohibit an arbitration clause in the agreement between the fiduciary and the investment agent in appropriate circumstances, such as if the beneficiaries were obligated to arbitrate any dispute they had with the fiduciary.

Subsection (f) has been added for clarity.

Section 7207 is based on present section 7315.1.

Section 7208 is present section 7316 and is modernized to protect trustees of irrevocable life insurance trusts in accordance with the typical intent of settlors. The language is adapted from a recent South Carolina statute (South Carolina Code ' 62-7-302).

Section 7209 is based on present section 7314.1.

Section 7210 is based on present section 7314.

Section 7211 is based on present section 7310.1. The definition of ~~A~~investment company@in present section 7310 is incorporated in this section, but changed to delete the requirements that the investment company not have securities with a preference over its common stock and have assets over \$10 million.

Section 7212 is taken from section 2(a) and 2(f) of the uniform act. It codifies Pennsylvania law.

Section 7213 incorporates provisions from section 1(b), 2(b), and 8 of the uniform act and also follows the New York version. Collecting all such provisions in one section seems desirable.

Section 7214 is taken from section 10 of the uniform act.

Sections 4, 5, 6, 7 and 12 of the Uniform Prudent Investor Act have not been adopted.

Section 4 of the uniform act requires a trustee to bring the initial portfolio into compliance with the act. This is omitted because it is thought to be simply declaratory of existing law, and at the same time somewhat inconsistent with section 7205.

Section 5 of the uniform act requires a trustee to invest solely in the interest of the beneficiaries. This simply codifies the general duty of loyalty which pervades trust law. It seems inappropriate to single out by statute the investment duty as being subject to the duty of loyalty.

Section 6 of the uniform act requires a trustee to be impartial between the beneficiaries in investing the trust assets. The general duty of impartiality applies throughout the trust area, so again it seems inappropriate to codify that duty only as to investing. In addition, section 6 of the uniform act is inconsistent with Mayhew's Estate, 307 Pa. 84 (1932) and other cases in which the courts take the position that a typical testator favors those closest to him rather than those more remote; as a result, a modest tilt in investing toward favoring the life tenant has not been improper.

Section 7 of the uniform act requires the trustee only to incur reasonable costs in investment matters. This again is a general principle of law pervading trusts, and there seems no reason to codify it only with respect to investment costs.

Section 12 of the uniform act states that the act should be construed to achieve uniformity among the states. In view of the substantial changes made in the Pennsylvania version, particularly the omission of the words *Arisk* and *return* in section 7203, it seems best not to call this a uniform act.

Conforming Amendments of Title 20 to the Prudent Investor Rule

' 3316. Investment of funds.

Subject to his duty to liquidate the estate for prompt distribution and to the provisions of the will, if any, the personal representative may invest the funds of the estate but shall have no duty to do so. Any such investment, except as the court or the will may otherwise authorize or direct, shall be restricted to:

(1) obligations of the United States or the United States Treasury, of the Commonwealth, or of any political subdivision of the Commonwealth [, and to interest-bearing deposits authorized by section 7313 (relating to interest-bearing deposit) and to];

(2) an interest bearing deposit in any bank, bank and trust company, savings bank or national banking association, located within the Commonwealth if:

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

(ii) the deposits do not exceed the amount which is fully insured by the Federal Deposit Insurance Corporation, pursuant to the

Federal Deposit Insurance Act (64 Stat. 873, 12 U.S.C. ' ' 1728(b) and 1811 et seq.; 18 U.S.C. ' ' 215 and 709);

(3) savings accounts [in savings associations authorized in section 7310(b) (relating to savings accounts insured by Federal Savings and Loan Insurance Corporation).] of any savings association incorporated under the laws of this Commonwealth, or of any Federal savings and loan association incorporated under the laws of the United States, if the withdrawal or repurchase value thereof is insured by the Federal Deposit Insurance Corporation pursuant to the Federal Deposit Insurance Act;
and

(4) a money market mutual fund affiliated with a corporate personal representative.

The personal representative may also make temporary investments as authorized by section [7315.1(b)] 7207 (relating to retention of cash; temporary investments) without regard to any investment restrictions imposed by the will.

Comment: Although the references to section 7313 (interest-bearing deposit) and section 7310(b) (stocks; saving accounts insured by Federal savings and loan insurance corporation) are deleted, the substance of those statutory provisions is contained in paragraphs (2) and (3), respectively. The only change of substance is the addition of section 3316(4) authorizing a corporate personal representative to make investments in its own money market funds. This is an appropriate change in light of the existing authorization of

corporate trustees to do so (see section 7314.1 and section 7209).

' 5145. Investments.

Subject only to the provisions of a governing instrument, if any, a guardian may accept, hold, invest in and retain investments as provided by Chapter [73 (relating to fiduciaries investments)] 72 (relating to prudent investor rule).

' 7134. Investments.

Subject only to the provisions of a governing instrument, if any, a trustee may accept, hold, invest in and retain investments as provided by Chapter [73 (relating to fiduciaries investments)] 72 (relating to prudent investor rule).

Comment: Present Chapter 73 is referenced to in several places in Title 20. These changes update the cross references to the new prudent investor rule in Chapter 72.

Chapter 73
[Fiduciaries Investments]
Municipalities Investments

' 7301. Definition of fiduciary.

The term ~~Fiduciary~~ as used in this chapter shall include [guardians, trustees, and other fiduciaries, whether domiciliary or ancillary, subject to the jurisdiction of the common pleas court but shall not include a personal representative] an administrator of a municipal pension or retirement plan or any other person whose fiduciary duties are, by statute, governed by the principles of this chapter. The provisions of this chapter shall apply only to such fiduciaries.

Comment: The municipal codes reference Chapter 73 in order to make any investment authorized by Chapter 73 an authorized investment for an administrator of any municipal pension or retirement fund. This amendment keeps unchanged the investment requirements of municipalities. The balance of the present Chapter 73 remains unchanged.

Proposed Amendment to 15 Pa.C.S. ' 5548(a)

' 5548. Investment of trust funds.

(a) General rule.--Unless otherwise specifically directed in the trust instrument, the board of directors or other body of a nonprofit corporation incorporated for charitable purposes shall have power to invest any assets vested in the corporation by such instrument or the proceeds thereof separately or together with other assets of the corporation, in the manner authorized for fiduciaries by [the Fiduciaries Investment Act of 1949] Chapter 72 (relating to prudent investor rule), and to retain any investments heretofore so made. Any such nonprofit corporation may, by appropriate action of its board of directors or other body, keep any investments or fractional interests in any investments, held by it or made by it, in the name of the corporation or in the name of a nominee of the corporation.

* * *

Comment: This amendment makes the prudent investor rule applicable to nonprofit corporations.

OTHER RECOMMENDATIONS

Proposed Amendments to Title 20

Section 751. Appointment; purpose.

The orphans= court division may appoint:

* * *

(6) Representation of parties in interest.--Persons interested in an estate or trust as beneficiary or heir, if minors or otherwise legally incapacitated, and possible unborn or unascertained persons, may be represented in a judicial proceeding by a guardian or trustee ad litem, if the court deems necessary. The court may dispense with the appointment of a guardian or trustee ad litem for a person who is a minor or otherwise legally incapacitated, unborn or unascertained, if there is a living person sui juris having a similar interest or if such person is or would be issue of a living ancestor sui juris and interested in the estate or trust whose interest is not adverse to his. If the whereabouts of any beneficiary or heir is unknown, or if there is doubt as to his existence, the

court shall provide for service of notice and representation in the judicial proceeding as it deems proper.

Comment: This amendment moves the substance of section 3504 out of the portion of Title 20 having to do with accountings filed in court into general provisions governing proceedings before the Orphans= Court, so that the provision applies to all judicial proceedings including those not involving accountings. Section 3504 is repealed.

' 5306. Other transfer by fiduciary.

(a) Irrevocable transfer by personal representative or trustee.--Subject to subsection (c), a personal representative or trustee may make an irrevocable transfer to another adult or trust company as custodian for the benefit of a minor pursuant to section 5309 (relating to manner of creating custodial property and effecting transfer) in the absence of a will or under a will or trust that does not contain an authorization to do so.

(b) Irrevocable transfer by guardian.--Subject to subsection (c), a guardian may make an irrevocable transfer to another adult or trust company as custodian for the benefit of the minor pursuant to section 5309.

(c) Additional requirements for transfer.--A transfer under subsection (a) or (b) may be made only if:

(1) the personal representative, trustee or guardian considers the transfer to be in the best interest of the minor;

(2) the transfer is not prohibited by or inconsistent with provisions of the applicable will, trust agreement or other governing instrument; and

(3) the transfer is authorized by the court if it exceeds [\$10,000] \$25,000 in value.

Comment: The dollar amount contained in subsection (c)(3) is increased from \$10,000 to \$25,000 in line with 1994 amendments (1994 Act No. 102) to sections 3102 (settlement of small estates on petition), 3531 (estates not exceeding \$25,000) and 5101 (when guardian necessary).

' 7137. Limitations on powers.

(a) In general.--Unless the terms of a trust refer specifically to this section and expressly provide to the contrary, any of the following powers conferred upon an individual trustee cannot be exercised by that individual trustee:

(1) The power to make discretionary distributions of either principal or income to or for the benefit of the individual trustee in his individual capacity, except the individual trustee may exercise the power to make discretionary distributions for the individual trustee's health, education, support or maintenance. This exception shall not broaden the power to make discretionary distributions in the governing instrument.

(2) The power to make discretionary allocations of receipts or expenses between principal and income favorable to such individual trustee in his individual capacity.

(3) The power to make discretionary distributions of either principal or income to satisfy any support or other legal obligation of such individual trustee in his individual capacity.

(4) The power to remove without cause and replace any disinterested trustee with a trustee who is related or subordinate to the individual trustee, if the disinterested trustee has a power which, if held by the individual trustee, would be subject to paragraph (1), (2) or (3) above.

Any of the foregoing proscribed powers that are conferred upon two or more trustees may be exercised by the trustees who are not so disqualified. If there is no trustee qualified to exercise a power under this subsection, any party in interest may apply to the court to appoint an independent trustee and that power may be exercised by the independent trustee appointed by the court.

(b) Definition.--As used in subsection (a)(4) the term **related or subordinate** means any of the following:

- (1) The individual trustee's spouse if living with the individual trustee.
- (2) The individual trustee's father, mother, issue, brother or sister.
- (3) An employee of the individual trustee.

(4) A corporation or any employee of a corporation in which the stockholdings of the individual trustee and the trust are significant from the viewpoint of voting control.

(5) A subordinate employee of a corporation in which the individual trustee is an executive.

(c) When section not applicable.--This section shall not apply to:

(1) The settlor of a trust which is revocable or amendable by the settlor.

(2) The spouse of the creator of a testamentary or inter vivos trust for which a Federal gift tax marital deduction or Federal estate tax marital deduction is allowed.

(3) A trustee who possesses in his individual capacity an unlimited right to withdraw the entire principal of the trust or a general testamentary power of appointment over the entire principal of the trust.

(d) Trust reference.--This section may be referred to in a trust as the trustee's disabling statute.

Comment: This section is designed to overcome unintended Federal tax consequences. It is modeled on a Florida statute (F.S.A. ' 737.402(4)) approved by the Internal Revenue Service.

The reference in subsection (a)(1) to health, education, support or maintenance is intended to be identical to the ascertainable standards set out in section 2041(b)(1)(A) and section 2514(c)(1) of the Internal Revenue Code of 1986, and

therefore to include the ascertainable standard language permitted by Treasury Regulations section 20.2041-1(c)(2) and section 25.2514-1(c)(2).

Under subsection (a)(1), a power to distribute for the trustee-beneficiary-s welfare, for example, is cut down to permit distributions only for health, education, support or maintenance. A power to distribute for the trustee-beneficiary-s welfare but not education is cut down to permit distributions only for health, support or maintenance.

The **implementing legislation** contains the following applicability provision:

The provisions of this section apply to wills and inter vivos trusts becoming irrevocable after the date of enactment of this act, even if the will or trust was executed prior to the date of enactment.

' 7191. Separate trusts.

(a) Without court approval.--A trustee may without court approval divide a trust into separate trusts, allocating to each separate trust either a fractional share of each asset and each liability held by the original trust or assets having an appropriate aggregate fair market value and fairly representing the appreciation or depreciation in the assets of the original trust as a whole. If the division reflects disclaimers or different tax elections, the division shall relate back to the date to which the disclaimer or tax election relates.

(b) With court approval.-- The court, for cause shown, may authorize the division of a trust into two or more separate trusts upon such terms and conditions and with such notice as the court shall direct.

(c) Separate fund.--A trustee may without court approval set aside property in a separate fund prior to actual distribution, after which income earned on the separate fund, and appreciation or depreciation of the property set aside, shall belong to the separate fund.

Comment: Division of a trust into separate trusts is becoming relatively routine in light of changes in the Federal tax laws. Accordingly, the amendment dispenses with the earlier requirement of court approval. A 1992 amendment (1992 Act No. 152) dispensed with the requirement of approval of all parties in interest. The parties' interests are safeguarded because a division does not affect their beneficial interests.

The set aside provisions are designed to ease compliance with the Federal generation-skipping transfer tax.

' 3316.1 Set aside.

A personal representative may without court approval set aside property in a separate fund prior to actual distribution, after which income earned on the separate fund, and appreciation or depreciation of the property set aside, shall belong to the separate fund.

Comment: See Comment to section 7191 (separate trusts).

' 8113. Charitable trusts

(a) Election.--Notwithstanding the foregoing provisions of this chapter, the trustee of a trust held exclusively for charitable purposes may elect to be governed by this section unless the governing instrument expressly provides to the contrary.

(b) Eligibility for election.--To make an election under this section, the trustee shall adopt and follow an investment policy seeking a total return for the investments held by the trust, whether the return is to be derived from appreciation of capital or earnings and distributions with respect to capital, or both. The policy constituting the election shall be in writing, shall be maintained as part of the permanent records of the trust and shall recite that it constitutes an election to be governed by this section.

(c) Effect of election.--If an election is made to be governed by this section, the term *Income* shall mean a percentage of the value of the trust. The trustee shall in a writing maintained as part of the permanent records of the trust annually select the percentage and determine that it is consistent with the long-term preservation of the real value of the principal of the trust, but in no event shall the percentage be less than 2% nor more than 7% per year. The term *Principal* shall mean all other assets held by the trustee with respect to the trust.

(d) Revocation of election.--The trustee may revoke an election to be governed by this section if the revocation is made as part of an alternative

investment policy seeking the long-term preservation of the real value of the principal of the trust. The revocation and alternative investment policy shall be in writing and maintained as part of the permanent records of the trust.

(e) Value determination.--For purposes of applying this section, the value of the trust shall be the fair market value of the cash and other assets held by the trustee with respect to the trust, whether such assets would be considered ~~Aincome@~~ or ~~Aprincipal@~~ under the other provisions of this chapter, determined at least annually and averaged over a period of three or more preceding years. However, if the trust has been in existence less than three years, the average shall be determined over the period during which the trust has been in existence.

Comment: The law governing charitable trusts does not currently permit the trustees to adopt a ~~Apending policy@~~ in connection with the management of endowment or other trust funds on a ~~Atotal return@~~ basis. In any situation where the trust is required to spend ~~Aincome,@~~ all dividends and interest must be expended--none can be added to principal even in years in which the income is extraordinarily high.

On the other hand, realized capital gains must all be allocated to principal, even in years in which the ordinary dividend and interest yield is low.

The best way to resolve this problem is to amend the Principal and Income Act to provide a new definition of the terms ~~Aprincipal@~~ and ~~Aincome@~~ in appropriate circumstances. By couching the language in terms of defining income, issues regarding retroactivity may be avoided, as indicated by the holding of the Pennsylvania Supreme Court in Arrott's Estate, 421 Pa. 275, 217 A.2d 741 (1966).

The percentages stated reflect a judgment as to the range of yields within which a spending policy may be appropriate. The upper limit is actually more than would be considered prudent in long-term management of a trust. Nevertheless, some flexibility should be allowed so the trustees can adjust to the specific needs of a charity from time to time. A limit at the low end is proposed to ensure that, in cases where the trust requires the current expenditure of income, the trustee cannot subvert this requirement by defining income to be zero.

The above rules are necessary only in connection with trusts which state that only the income can be expended currently. Trusts which allow the application of both principal and income can be managed on a total return basis in any event. In addition, charitable trusts that are private foundations for Federal income tax purposes already have the ability to expend principal to the extent provided in section 1 of the act of June 17, 1971 (P.L.181, No.23 (10 P.S. ' 201)). Accordingly, this provision will provide needed flexibility primarily to those charitable trusts that are not private foundations.

A trustee's exercise of the authority granted by this section would be subject in all cases to the standards of prudence otherwise applicable to investments by fiduciaries.

Proposed Amendments to Title 15

' 5548. Investment of trust funds.

* * *

(b) Use and management.--Except as otherwise permitted under [the Estates Act of 1947] 20 Pa.C.S. Chapter 61 (relating to estates), the board of directors or other body shall apply all assets thus received to the purposes specified in the trust instrument. The directors or other body shall keep accurate accounts of all trust funds, separate and apart from the accounts of other assets of the corporation.

(c) Determination of income.--

[(1) With respect to any assets thus received (including any participation in any common trust fund) so much of the net realized capital gains as of the end of any fiscal year of the corporation as the directors or other body shall, within four months after the end of such year, in their sole discretion, allocate to income for such fiscal year shall be deemed income.

(2) The amount allocated under paragraph (1) of this subsection, when added to all other income derived by the corporation from the same assets or participation in a common trust fund for such fiscal year, shall not exceed 9% of the market value (as of the end of such fiscal year) of

the principal remaining with respect to such assets or participation after allocation of such gain to income.

(3) Allocation to income of realized capital gains in a common trust fund may be made in accordance with the provisions of paragraphs (1) and (2) of this subsection without regard to whether the capital gains in question were realized before or after any particular trust or fund became a part of such common trust fund and without regard to whether the separate records maintained with respect to such particular trust or fund reflect the existence of a capital gain in such trust or fund.]

(1) Unless otherwise specifically directed in the trust instrument, the board of directors or other body may elect to be governed by this subsection with respect to assets thus received including any participation in any common trust fund.

(2) To make an election under this subsection, the board of directors or other body shall adopt and follow an investment policy seeking a total return for the assets held by the corporation or in the name of a nominee of the corporation, or by an institutional trustee pursuant to section 5549 (relating to transfer of trust or other assets to institutional trustee), whether the return is to be derived from capital appreciation, earnings or distributions with respect to the capital, or both. The policy constituting the election shall be in writing, shall be maintained as part of the

permanent records of the corporation and shall recite that it constitutes an election to be governed by this subsection.

(3) If an election is made to be governed by this subsection, the term ~~Income~~ shall mean a percentage of the value of the assets so held by or for the corporation. The board of directors or other body shall in a writing maintained as part of the permanent records of the corporation annually select a percentage and determine that it is consistent with the long-term preservation of the real value of the assets, but in no event shall the percentage be less than 2% nor more than 7% per year.

(4) The board of directors or other body may revoke an election to be governed by this subsection if the revocation is made as part of an alternative investment policy seeking the long-term preservation of the real value of the assets thus received. The revocation and alternative investment policy shall be in writing and maintained as part of the permanent records of the corporation.

(5) For purposes of applying this subsection, the value of the assets of the corporation shall be the fair market value of the assets so held by or for the corporation, determined at least annually and averaged over a period of three or more preceding years. However, if the assets have been held for less than three years, the average shall be determined over the period during which the assets have been held.

(d) Scope of section.--This section shall apply to assets hereafter received pursuant to section 5547 (relating to authority to take and hold trust property), to assets heretofore so received and held at the time when this article takes effect and to reinvestment of all such assets.

[(e) Definition.--As used in subsection (c) of this section ~~Net~~ realized capital gains as of the end of any fiscal year[@] means the balance accumulated as of such date, since the inception of the trust or fund or common trust fund, as the case may be, of all realized gains less realized losses, computed in the manner provided in section 1001 et seq. of the Internal Revenue Code of 1954 on the basis of actual cost, or in the case of property transferred to the fund or trust, on the basis of fair market value on the date of transfer.]

' 5549. Transfer of trust or other assets to institutional trustee.

* * *

(c) Amount and frequency of payment.--Such corporate trustee shall pay, at least semi-annually or at more frequent intervals if so agreed, the net income from such assets, which income may [include so much of the realized appreciation of principal as the board of directors or other body of the corporation may deem prudent] be determined under section 5548(c) (relating to investment of trust funds) if such election is properly made by the board of directors or other body of the corporation, to the corporation for use

and application to the purpose or purposes for which the assets were received by the corporation.

' 5585. Establishment or use of common trust funds authorized.

(a) General rule.--Every nonprofit corporation may establish and maintain one or more common trust funds, the assets of which shall be held, invested and reinvested by the corporation itself or by a corporate trustee to which the assets have been transferred pursuant to section 5549 (relating to transfer of trust or other assets to institutional trustee). Upon the payment by the corporate trustee to the nonprofit corporation of the net income from such assets, which income may be determined under section 5548(c) (relating to investment of trust funds) if such election is properly made by the board of directors or other body of the corporation, for use and application to the several participating interests in such common trust fund, the proportionate participation of each interest in such net income shall be designated by the corporate trustee. The nonprofit corporation may, at any time, withdraw the whole or part of any participating interest in such common trust fund for distribution by it as provided in this subchapter.

* * *

Comment: The percentages stated reflect a judgment as to the range of yields within which a spending policy may be appropriate. The upper limit is actually more than would be considered prudent in long term management of a trust. Nevertheless, some flexibility should be allowed so the

nonprofit corporation can adjust to the specific needs of the charity from time to time. A limit at the low end is proposed to ensure that, in cases where the trust requires the current expenditure of income, the nonprofit corporation cannot subvert this requirement by defining income to be zero.

The above rules are necessary only in connection with trusts which state that only the income can be expended currently. Trusts which allow the application of both principal and income can be managed on a total return basis in any event.

A nonprofit corporation's exercise of the authority granted by section 5548(c) (investment of trust funds) would be subject in all cases to the standards of prudence otherwise applicable to investments by fiduciaries.