

**THE PROBATE, ESTATES and  
FIDUCIARIES CODE:  
PROPOSED AMENDMENTS to TITLE 20 of the  
PENNSYLVANIA CONSOLIDATED STATUTES**

**REPORT of the ADVISORY COMMITTEE on  
DECEDENTS' ESTATES LAWS**

**JUNE 2010**



General Assembly of the Commonwealth of Pennsylvania  
JOINT STATE GOVERNMENT COMMISSION  
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Harrisburg, PA 17120

The release of this report should not be interpreted as an endorsement by the members of the Executive Committee of the Joint State Government Commission of all the findings, recommendations or conclusions contained in this report.

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# INTRODUCTION

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## *The Advisory Committee and Task Force Process*

The Joint State Government Commission Advisory Committee on Decedents' Estates Laws is a standing group of attorneys and judges from across the Commonwealth who assist the General Assembly by recommending improvements to Pennsylvania's Probate, Estates and Fiduciaries Code<sup>1</sup> and related statutes. Since 1945, the Advisory Committee has provided expertise and advice to formulate legislation aimed at modernizing Pennsylvania law.

After reaching consensus on its legislative recommendations, the Advisory Committee presents its recommendations to the Task Force on Decedents' Estates Laws, which is a bicameral and bipartisan panel of legislators. The Task Force then considers the recommendations and decides whether to authorize the Joint State Government Commission to publish a report containing the recommendations, which serve as a basis for legislation.

On June 7, 2010, the Task Force authorized both the publication of a report containing the recommendations of the Advisory Committee and the introduction of the legislation contained in this report. However, the inclusion of any recommendation in this report does not necessarily reflect the endorsement of the Task Force.

## *Proposed Recommendations*

This report contains the most recent recommendations of the Advisory Committee, in the form of proposed legislation with official comments, which may be used in determining the intent of the General Assembly.<sup>2</sup> These recommendations include proposed amendments to 20 Pa.C.S. regarding the following:

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<sup>1</sup> Title 20 of the Pennsylvania Consolidated Statutes (20 Pa.C.S.).

<sup>2</sup> 1 Pa.C.S. § 1939 ("The comments or report of the commission . . . which drafted a statute may be consulted in the construction or application of the original provisions of the statute if such comments or report were published or otherwise generally available prior to the consideration of the statute by the General Assembly"). Notes or source notes may also follow a proposed statutory provision, to provide additional information regarding the recommendation.

1. The Uniform Trust Act, specifically nonjudicial settlement agreements, representation of parties in interest, the division of trusts, claims and distribution after the settlor's death and a trustee's duty to advertise, the resignation of a trustee, the duty to inform and report, and a trustee's powers, duties and liabilities.<sup>3</sup>
2. Charitable instruments.<sup>4</sup>
3. The determination of title to a decedent's interest in real estate.<sup>5</sup>
4. Dispositions independent of letters.<sup>6</sup>
5. Submission to Orphans' Court jurisdiction.<sup>7</sup>
6. Businesses of the estate.<sup>8</sup>
7. The release of powers and interests and the disclaimers of powers.<sup>9</sup>
8. Powers of appointment.<sup>10</sup>
9. Formula clauses for federal tax purposes.<sup>11</sup>

This report also contains the Charitable Instruments Act of 1971<sup>12</sup> and a list of the members of the Advisory Committee since its inception in 1945.<sup>13</sup>

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<sup>3</sup> Proposed amendments to §§ 7710.1(c), 7722, 7740.7(b), 7755(c), 7765, 7780.3 and 7792. *Infra* pp. 21-28.

<sup>4</sup> Proposed new Chapter 79. *Infra* pp. 29-32.

<sup>5</sup> Proposed amendment of § 3546. *Infra* pp. 33-36.

<sup>6</sup> Proposed amendments to §§ 3101 and 3102. *Infra* pp. 37-39.

<sup>7</sup> Proposed new § 3163. *Infra* p. 41.

<sup>8</sup> Proposed amendments to §§ 3314 and 3315. *Infra* pp. 43-44.

<sup>9</sup> Proposed repeal of § 6103 and new § 6103.1. *Infra* pp. 45-49.

<sup>10</sup> Proposed new Chapter 76. *Infra* pp. 51-59.

<sup>11</sup> Proposed new Chapter 28. *Infra* pp. 61-65.

<sup>12</sup> Appendix 1, *infra* pp. 73-74.

<sup>13</sup> Appendix 2, *infra* pp. 75-79.

The necessary conforming amendments and transitional language follow the proposed legislation, notes and comments.<sup>14</sup>

The following discusses in more detail the proposed recommendations contained in this report.

## **Uniform Trust Act**

### ***Nonjudicial Settlement Agreements***

Section 7710.1(c) currently provides that “[a] nonjudicial settlement agreement is valid only to the extent it does not violate a material purpose of the trust and includes terms and conditions that could be properly approved by the court under this chapter or other applicable law.”

The Advisory Committee recommends that the phrase “does not violate” be replaced by “is not inconsistent with,” to be consistent with the language in § 7740.1(b), which addresses judicial modification of an irrevocable trust with the beneficiaries’ consent.

The Advisory Committee recommends that the amendment of § 7710.1(c) take effect in 60 days.

### ***Representation of Parties in Interest***

Section 7722 currently provides the following regarding the representation of parties in interest:

(a) Judicial proceeding.--In a judicial proceeding involving a trust matter, an order or decree of the court that binds the representative or representatives is binding upon a person, class of persons or both represented in accordance with section 7723 (relating to representatives and persons represented) if the trustee notifies the representatives in writing whom they represent, they do not decline the representation as provided in section 7725 (relating to notice of representation) and they act in good faith.

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<sup>14</sup> Conforming amendments are set forth *infra* pp. 67-69. Transitional language includes applicability, repeal and effective date provisions and is set forth *infra* pp. 71-72.

(b) Nonjudicial resolution.--In a nonjudicial resolution of a trust matter, notice to, the consent or approval of or the waiver or release by the representative or representatives is binding upon a person, class of persons or both represented in accordance with section 7723 if the trustee notifies the representatives in writing whom they represent, they do not decline the representation as provided in section 7725 and they act in good faith.

(c) Permissible consideration.--In making decisions, a representative may consider general benefit accruing to the living members of the family of the person represented.

The Advisory Committee recommends the amendment of subsection (a) and (b) to include additional alternatives<sup>15</sup> and the addition of a new subsection (d) regarding a written acceptance of representation:

(a) Judicial proceeding.--In a judicial proceeding involving a trust matter, an order or decree of the court that binds the representative [or representatives] is binding upon a person, class of persons or both represented in accordance with section 7723 (relating to representatives and persons represented) if:

(1) the trustee notifies the [representatives] representative in writing whom [they represent, they do] he represents, the representative does not decline the representation as provided in section 7725 (relating to notice of representation) and [they act] the representative acts in good faith;

(2) the petitioner avers the representation in the petition, the representative is the petitioner or a respondent over whom the court has jurisdiction and, if a respondent, the representative does not decline the representation in a responsive pleading filed and served as required by law; or

(3) the representative has signed a certification of representation described in subsection (d) and has not rescinded the certification on the court's records by the time the court acts upon the petition.

(b) Nonjudicial resolution.--In a nonjudicial resolution of a trust matter, notice to, the consent or approval of or the waiver or release by the representative [or representatives] is binding upon a person, class of persons or both represented in accordance with section 7723 if:

(1) the trustee notifies the [representatives] representative in writing whom [they represent, they do] he represents, the representative does not decline the representation as provided in section 7725 and [they act] the representative acts in good faith; or

(2) the representative has signed a certification of representation described in subsection (d) and has not rescinded the certification in a writing received by the trustee by the time of the nonjudicial settlement.

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<sup>15</sup> A technical amendment is also made to subsection (c).

(c) Permissible consideration.--In making decisions, a representative may consider the general benefit accruing to the living members of the family of the person represented.

(d) Certification of representation.--

(1) A certification signed by the representative describing his representation of another person, class of persons or both in accordance with section 7723 may be filed with:

(i) the court, in the case of a judicial proceeding; or

(ii) the trustee, in the case of a nonjudicial resolution of a trust matter.

(2) A certification of representation may be rescinded in a writing signed by the representative and filed with:

(i) the court at any time before the court acts in reliance upon the certification, in the case of a judicial proceeding; or

(ii) the trustee before a trust matter is resolved without application to the court.

The Advisory Committee recommends these statutory amendments because uncertainty exists as to whether a trust matter requiring representation can be resolved before the expiration of the waiting period described in § 7725.<sup>16</sup> The Advisory Committee notes that the certification of representation described in proposed subsection (d) will expedite both judicial and nonjudicial resolutions of trust matters by eliminating the waiting period described in § 7725 where the proposed representative has accepted that role in writing and not rescinded the acceptance by the time the court or the parties to a nonjudicial settlement agreement rely upon it.

The Advisory Committee recommends that the amendment of § 7222 take effect in 60 days.

### ***Division of Trusts***

Without court approval, a trustee may “divide a trust into separate trusts” under certain conditions.<sup>17</sup> For cause shown, the court “may authorize the division of a trust into two separate trusts upon such terms and conditions and with notice as the court shall direct.”<sup>18</sup>

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<sup>16</sup> Section 7725 provides the following: “A person representing another must be given written notice by the trustee that the person is representing the other person. The person to whom the notice is given may decline the representation by a writing that is given to the trustee no later than 60 days after receipt of the trustee’s notice.”

<sup>17</sup> 20 Pa.C.S. § 7740.7(a).

<sup>18</sup> *Id.* § 7740.7(b).

The Advisory Committee recommends that these two provisions be parallel, thereby permitting the court to divide the trust into two or more separate trusts. Accordingly, the Advisory Committee proposes the following statutory amendment to § 7740.7(b): “The court, for cause shown, may authorize the division of a trust into [two] separate trusts upon such terms and conditions and with notice as the court shall direct.”

The Advisory Committee recommends that the amendment of § 7740.7(b) take effect in 60 days.

### ***Advertisements***

Section 7755(c) currently provides that “[i]f no personal representative is appointed within 90 days after the settlor’s death, the trustee shall advertise the trust’s existence and the name and address of the trustee in the manner set forth in section 3162 (relating to advertisement of grant of letters).”

Senate Bill No. 53 of 2009 and House Bill No. 120 of 2009, based on the Advisory Committee’s recommendations set forth in the October 2007 Joint State Government Commission report,<sup>19</sup> amend § 7755(c) as follows:

(c) [No personal representative. If no personal representative is appointed within 90 days after the settlor’s death, the trustee shall advertise the trust’s existence and the name and address of the trustee in the manner set forth in section 3162 (relating to advertisement of grant of letters)] Trustee’s duty to advertise.--

(1) A trustee of a revocable trust:

(i) May advertise at any time after the settlor’s death.

(ii) Shall advertise if the first advertisement of the grant of letters by the settlor’s personal representative does not occur within 90 days after the settlor’s death.

(2) Advertisements by the trustee under this subsection shall be in the manner set forth in section 3162 (relating to advertisement of grant of letters) and shall include:

(i) The fact of the trust’s existence.

(ii) The trustee’s name and address.

(3) The personal representative of the settlor of a revocable trust shall send to the trustee copies of the proof of publication of the advertisement of the grant of letters.

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<sup>19</sup> *The Probate, Estates and Fiduciaries Code: Proposed Amendments to Title 20 of the Pennsylvania Consolidated Statutes* (Oct. 2007).

Based on subsequent discussions, the Advisory Committee recommends an additional amendment to § 7755(c)(2) specifically to provide that the advertisement shall be done in the jurisdiction of the deceased settlor's domicile.

Senate Bill No. 53 and House Bill No. 120 also amend § 3162 to add a new subsection (b):

(b) Proofs of advertisement to trustee.--A personal representative who has advertised the grant of letters and received the notice required by section 7780.3(c) (relating to duty to inform and report) shall promptly send copies of the proofs of that advertisement to the trustee.

The Advisory Committee does not recommend further amendment of § 3162.<sup>20</sup>

Because neither Senate Bill No. 53 nor House Bill No. 120 was enacted into law at the time of publication of this report, the amendments to §§ 3162 and 7755(c) that are contained in these bills are reproduced in their entirety in this report, along with the comments from the October 2007 report. The additional amendment of § 7755(c) is incorporated into this proposed statutory language.

The Advisory Committee continues to recommend that the amendment of §§ 3162 and 7755(c) take effect in 60 days.

### ***Resignation of Trustee***

Section 7765(a), (b) and (c) currently provides for the resignation of a trustee:

- (a) Court approval.--A trustee may resign with court approval.
- (b) Without court approval if authorized by trust instrument.--A trustee may resign without court approval if authorized to resign by the trust instrument.
- (c) Without court approval and without authorization in trust instrument.--
  - (1) Unless expressly provided to the contrary in the trust instrument, an individual trustee may resign without court approval and without authorization in the trust instrument if:
    - (i) there is at least one cotrustee and all cotrustees consent in writing to the resignation; and
    - (ii) all the qualified beneficiaries consent in writing to the resignation.

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<sup>20</sup> The amendment of § 3162 is proposed as a conforming amendment in this report, in light of the amendment of § 7755(c).

(2) This subsection shall not authorize the sole trustee of a trust to resign unless the trust instrument names a successor trustee or provides a method for appointing a successor trustee, and in either case the resignation shall not be effective until the successor trustee accepts the appointment in writing.

The Advisory Committee recommends the repeal of these three subsections and the adoption of a new subsection (a.1):

(a.1) General rule.--A trustee may resign:

(1) with court approval;

(2) without court approval if authorized to resign by the trust instrument; or

(3) pursuant to a nonjudicial settlement agreement described in section 7710.1 (relating to nonjudicial settlement agreements - UTC 111).

The resignation of a trustee is one of the subjects that all beneficiaries and trustees may resolve by a nonjudicial settlement agreement. New subsection (a.1) eliminates the distinction between corporate and individual trustees regarding resignation.

The Advisory Committee recommends that the amendment of § 7765 take effect in 60 days.

### ***Duty to Inform and Report***

A settlor of a trust may nominate one or more persons to receive the required notices on behalf of a current beneficiary of the trust.<sup>21</sup> However, the Uniform Trust Act does not contain the authority for a current beneficiary, who has capacity but is disabled or institutionalized, to nominate someone to receive the required notices on his or her behalf.<sup>22</sup> Therefore, the Advisory Committee recommends that § 7780.3 be further amended to add a new subsection (k.1):

(k.1) Nomination by current beneficiary.--A current beneficiary of a trust who has capacity may nominate another person to receive, on behalf of the current beneficiary, the notice required by this section. The current beneficiary shall notify the trustee of the nomination. The trustee giving the notice required by this section to that nominee satisfies the trustee's

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<sup>21</sup> 20 Pa.C.S. § 7780.3(k).

<sup>22</sup> Although the Advisory Committee acknowledged that the beneficiary could make this nomination through a power of attorney, the members agreed that the statute should provide the authority directly, without necessitating the current beneficiary to have a power of attorney drafted and executed for this limited purpose.

duty to give to the named current beneficiary the notice required by this section if:

(1) the trustee notifies the nominee that the notice is being given to the nominee as representing the named current beneficiary; and

(2) the nominee does not decline to receive the notice in a writing that is given to the trustee no later than 60 days after receipt of the trustee's notice.

The Advisory Committee recommends that the amendment of § 7780.3 take effect in 60 days.

### ***Powers, Duties and Liabilities***

The Advisory Committee recommends that § 7792 (powers, duties and liabilities identical with personal representatives) be amended to include a reference to § 3532(c), which concerns receipts, releases and refunding agreements: “The provisions concerning the powers, duties and liabilities of a trustee shall be the same as those set forth in the following provisions of this title for the administration of a decedent’s or a minor’s estate: ... Section 3532(c) (relating to at risk of personal representative).”

The Advisory Committee recommends that the amendment of § 7792 take effect in 60 days.

### **Charitable Instruments**

The Advisory Committee recommends the codification of the Charitable Instruments Act of 1971<sup>23</sup> as new 20 Pa.C.S. Chapter 79 (Charitable Instruments). The proposed chapter is organized into six sections: short title, definitions, deemed provisions of governing instrument, power to amend governing instrument, court authority and applicability.

In light of the addition of Chapter 79, the Advisory Committee proposes a conforming amendment to § 8113(f) (charitable instruments) to change the reference from the 1971 act to Chapter 79.

The Advisory Committee recommends that the addition of Chapter 79 and the amendment of § 8113(f) take effect immediately.

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<sup>23</sup> Act of June 17, 1971 (P.L. 181, No. 23); 10 P.S. §§ 201-206.

### **Determination of Title to Decedent's Interest in Real Estate**

The Advisory Committee recommends that a nonprofit corporation organized for community development purposes or a municipality in which a decedent's real estate is located be permitted to petition to establish title to the decedent's real estate, in a manner that the court prescribes and upon a showing by clear and convincing evidence that no heirs or devisees exist or have taken action regarding the real estate for at least five years since the decedent's death. The Advisory Committee also recommends that if letters testamentary or letters of administration have been granted on the estate of the decedent, notice of the petition must be given to the personal representative of the decedent. Accordingly, the Advisory Committee recommends that § 3546 (determination of title to decedent's interest in real estate) be amended to incorporate these provisions and be restructured for clarity. The proposed new subsections of § 3546 separately set forth provisions regarding applicability, who may petition, where to petition, the notice of petition and the decree.

The Advisory Committee recommends that the amendment of § 3546 take effect in 60 days.

### **Dispositions Independent of Letters**

The Advisory Committee recommends increasing the dollar amounts set forth in § 3101(a), (b) and (c) (payments to family and funeral directors) and § 3102 (settlement of small estates on petition). Under § 3101(a), an employer may pay wages, salary or benefits due the deceased in an amount not exceeding \$10,000 (increased from \$5,000). Under § 3101(b), a financial institution may pay the amount that a decedent has on deposit or represented by the certificate up to \$10,000 (increased from \$3,500). Under § 3101(c), a facility where the decedent was a patient may disburse funds remaining in the decedent's patient care account for the decedent's burial expenses in an amount not exceeding \$10,000 (increased from \$3,500), and after the payment of the burial expenses, the facility may disburse the balance of the account if the payment, including that for burial expenses, does not exceed \$11,000 (increased from \$4,000). Under § 3102, a small estate petition may be filed when an individual dies domiciled in Pennsylvania owning property of a gross value not exceeding \$50,000 (increased from \$25,000).

The Advisory Committee recommends that the amendment of § 3101 take effect in 60 days.

## *Jurisdiction*

The Advisory Committee recommends that a new section be added to 20 Pa.C.S. regarding a person's submission to the jurisdiction of the orphans' court:

### § 3163. Submission to jurisdiction.

A person granted letters testamentary or letters of administration shall be deemed to submit to the jurisdiction of the orphans' court division of the county in which the register granted the letters.

The Advisory Committee recommends that the addition of § 3163 take effect immediately.

## *Businesses of the Estate*

The Advisory Committee recommends that §§ 3314 (continuation of business) and 3315 (incorporation of estate's business) be amended to include the recognition of certain business entities other than corporations, such as partnerships and limited liability companies.<sup>24</sup>

Under § 3314 as proposed to be amended, "[t]he order may provide: (1) for the conduct of business, by the personal representative alone or jointly with others, or, unless restricted by the terms of the governing instrument, as a corporation, partnership, limited liability company or other entity to be formed." Under § 3315 as proposed to be amended, the court

may authorize the personal representative alone or jointly with others, to organize a corporation or form a partnership, limited liability company or other entity to carry on the business of the estate, whether the business was owned solely or with others, and may contribute for stock of the corporation, as capital, or for an interest in a partnership, limited liability company or other entity, all or part of the property of the estate which was invested in the business.

The Advisory Committee also recommends that the order under § 3314 "may provide: . . . (4.1) for the compensation of a personal representative actively managing, supervising or engaging in the operation of an entity or business, from the estate's assets or from the entity or business, as appropriate, provided the compensation is reasonably based upon the actual responsibilities assumed and performed."

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<sup>24</sup> The title of § 3315 is proposed to be amended accordingly: "Incorporation of or formation of entity to operate estate's business."

In addition, the Advisory Committee recommends the amendment of §§ 3314 and 3315 to specify that the court must give due regard to the provisions of the governing instrument and any other relevant factor. The first sentence of § 3314 would be amended as follows:

[The court,] Giving due regard to the provisions of the governing instrument and any other factor that the court deems relevant, and aided by the report of a master if necessary, the court may authorize the personal representative to continue any business of the estate for the benefit of the estate [and in doing so the court, for cause shown, may disregard the provisions of the governing instrument, if any.]

Similarly, § 3315 would be amended as follows:

After notice to all parties in interest, aided by the report of a master if necessary, and giving due regard to the provisions of the governing instrument and any other factor that the court deems relevant, the court[, unless restricted by the terms of the governing instrument,] may authorize the personal representative . . .

The Advisory Committee recommends that the amendment of §§ 3314 and 3315 take effect in 60 days.

### **Release of Powers and Interests and Disclaimer of Powers**

Section 6103, concerning the release or disclaimer of powers or interests, provides the following:

(a) Powers and interests releasable.--Any power of appointment, or power of consumption, whether general or special, other than a power in trust which is imperative, and any interest in, to, or over real or personal property held or owned outright, or in trust, or in any other manner which is reserved or given to any person by deed, will or otherwise, and irrespective of any limitation of such power or interest by virtue of any restriction in the nature of a so-called spendthrift trust provision, or similar provision, may be released or disclaimed, either with or without consideration by written instrument signed by the person possessing the power or the interest and delivered as hereinafter provided, but nothing in this section shall authorize an income beneficiary of a spendthrift trust to release or disclaim his right to such income, unless as a result of the release or disclaimer the released or disclaimed income will pass to one or more of the beneficiary's descendants. This section shall not apply to an interest that may be disclaimed under Chapter 62 (relating to disclaimers).

(b) Form of release or disclaimer.--A power or interest which is releasable or disclaimable may be released or disclaimed either absolutely or conditionally, and may also be released or disclaimed with respect to the whole or any part of the property subject to such power or interest, and may also be released or disclaimed in such manner as to reduce or limit the persons or objects or classes of persons or objects in whose favor such power or interest would otherwise be exercisable. No release or disclaimer of a power or of an interest shall be deemed to make imperative a power or interest which was not imperative prior to such release or disclaimer unless the instrument of release or disclaimer expressly so provides.

(c) Delivery of release or disclaimer.--Such release or disclaimer may be delivered to any one of the following:

(1) Any person specified for such purpose in the instrument creating the power or interest.

(2) Any trustee of the property to which the power or interest relates.

(3) The clerk of the court having jurisdiction of the trust for filing in said court.

(4) The recorder of deeds for recording in the county in which the person possessing the power or interest resides, or in which the deed, will, or other instrument creating the power or interest is recorded or filed.

(d) Grantee or lienholder.--A release or disclaimer shall be void as against a bona fide grantee of or holder of a lien on real estate in any county unless the release or disclaimer or a duplicate original or certified copy thereof is recorded in the county where the real estate lies before the recording or entering of the instrument or lien under which such grantee or lienholder claims.

Chapter 62, which contains detailed provisions regarding the disclaimer of interests, was enacted in 1976<sup>25</sup> and subject to only minor amendments over the years. Consequently, Pennsylvania has a comprehensive, modern and settled statutory framework for the disclaimer of interests.

The provisions concerning releases were originally enacted in the early 1940s in response to Federal tax law. Section 6103 was subsequently enacted to clarify that certain releases were valid under state law and amended a decade later to allow releases of income interests in spendthrift trusts if the released interest passed to the releasor's descendants. Since then, the statute has not been updated in any significant manner, and case law has created uncertainty in its application.

For example, wealthy individuals who want to release their income interest in a spendthrift trust so that income is paid to their children (and taxed to their children) may disclaim the interest income before accepting it or release it after they accept it. Section

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<sup>25</sup> Act of July 9, 1976 (P.L.562, No. 136), effective immediately.

6103 allows such a release, even though the trust contains a spendthrift provision, if the released income passes to their descendants. However, some cases hold that upon a release of an income interest, the succeeding life estate or remainder is accelerated into possession, as would occur with a disclaimer; other cases hold that a remainder is not accelerated and instead the released income interest is sequestered until the releasor dies.

The Advisory Committee recommends that § 6103 be repealed and replaced by a new statutory framework for the release of powers and interests and the disclaimer of powers:

§ 6103.1. Release of powers and interests and disclaimer of powers.

(a) Interests releasable.--

(1) Subject to paragraph (2), an interest in property that has been accepted may be released.

(2) An income interest in a spendthrift trust may be released only if the released income passes to one or more of the releasor's descendants.

(b) Effect of release of interest.--A releasor of an interest in property shall be treated as having died at the time of the release for purposes of determining and accelerating the interests of other parties in the property.

(c) Nonfiduciary powers disclaimable or releasable.--A power of appointment, power of withdrawal or other power held in a nonfiduciary capacity may be disclaimed prior to its acceptance or released after its acceptance.

(d) Fiduciary powers disclaimable or releasable.--

(1) Except as otherwise provided in the instrument creating the power, a power held in a fiduciary capacity that is not imperative may be disclaimed prior to its acceptance or released after its acceptance.

(2) A disclaimer or release under this subsection is effective as to a successor fiduciary if the disclaimer or release so provides.

(e) Terms of disclaimer or release.--

(1) A release of a power or interest or a disclaimer of a power under this section may:

(i) Be absolute or conditional.

(ii) Be made with respect to the whole or any part of the property subject to the power or interest.

(iii) Reduce or limit the persons or objects or classes of persons or objects in whose favor the power or interest would otherwise be exercisable.

(2) Unless the disclaimer or release so provides, a disclaimer or release under this section shall not make imperative a power or interest that was not imperative prior to the disclaimer or release.

(f) Date of effect.--

(1) A disclaimer of a power held in a fiduciary capacity that is not imperative takes effect as of the time the instrument creating the power becomes irrevocable.

(2) A release of a power held in a fiduciary capacity that is not imperative takes effect immediately after the last exercise of the power.

(g) Procedural requirements.--A release and a disclaimer under this section shall be in writing and filed, delivered and recorded in a similar manner as a disclaimer under section 6204 (relating to filing, delivery and recording).

Proposed subsections (a), (c), (d) and (e) are based on current law. Proposed subsection (b) specifies that the remainder would be accelerated, as would occur with a disclaimer, which most likely would be the desired result of a releasor. Proposed subsection (f) is new, and proposed subsection (g) makes the procedure similar for all releases and disclaimers, to avoid unnecessary complexity.

In addition, new § 6103.1 simplifies and modernizes the language of repealed § 6103 and clarifies that Chapter 62 relates to disclaimers of interests, while this section relates to disclaimers of powers.

In light of the repeal of § 6103 and the enactment of § 6103.1, the Advisory Committee proposes a conforming amendment to § 5603(e) to change the reference from § 6103 to § 6103.1.

The Advisory Committee further recommends that the repeal of § 6103, the addition of § 6103.1 and the amendment of § 5603(e) take effect in 60 days.

### **Powers of Appointment**

The Advisory Committee recommends the addition of a new 20 Pa.C.S. Chapter 76 regarding powers of appointment. The proposed chapter is organized into seven sections: definitions, exercise of powers of appointment, contract to exercise power, manner of appointment, anti-lapse provision, partially effective exercise and creditors' rights.

In light of the addition of Chapter 76, the Advisory Committee proposes a conforming amendment to § 2514 (rules of interpretation) to repeal paragraph (13) (power of appointment), since the substance of that paragraph will be recodified as § 7602 (exercise of powers of appointment).

The Advisory Committee recommends that the amendment of § 2514 and the addition of Chapter 76 take effect immediately and that the addition of Chapter 76 apply to all powers of appointment created before, on or after the effective date of the chapter.

## *Formula Clauses for Federal Tax Purposes*

Wills, trusts and other documents, such as a beneficiary designation for a life insurance policy, which direct the distribution of assets of a decedent, often contain provisions designed to minimize the payment of federal estate tax and/or the federal generation-skipping transfer tax (the “GST tax”). In many instances, these provisions are not stated in fixed-dollar amounts, but in terms of a formula intended to produce the optimal result under the tax laws in effect at the decedent’s date of death. Often, these formula provisions provide the primary direction necessary to fulfill the decedent’s intent regarding the distribution of assets among his or her family, friends and charitable beneficiaries.

On December 31, 2009, the federal estate tax and the GST tax were repealed for one year. This repeal was unexpected. Due to the repeal, there is the potential to disrupt the intent of a multitude of decedents who prepared estate plans that are based on formula clauses which rely upon the federal estate tax and the GST tax that were in effect on December 31, 2009.

Therefore, the Advisory Committee recommends the addition of a new 20 Pa.C.S. Chapter 28 regarding formula clauses for federal tax purposes, to preclude the disruption that could be caused by the unanticipated repeal of the federal estate tax and the GST tax. The proposed chapter is organized into three sections: definitions, interpretation of formula clauses and judicial proceeding. It creates a rebuttable presumption that a decedent, who dies after December 31, 2009 and prior to the reinstatement of the federal estate tax and the GST tax, intended that the provisions of his or her will, trust or other dispositive document be interpreted as if the federal estate tax and the GST tax in effect on December 31, 2009, are still applicable, unless the will, trust or other document provides otherwise. The proposed chapter allows the personal representative, trustee or beneficiary of a decedent to rebut this presumption by presenting other evidence of the decedent’s intent, to the appropriate court for consideration. The proposed chapter is not intended to eliminate the use of any post-mortem mechanisms, such as disclaimers, that may preserve any potential benefits that may result from the repeal of the federal estate tax and the GST tax.

The Advisory Committee recommends that the addition of 20 Pa.C.S. Chapter 28 apply to any decedent dying after December 31, 2009 and take effect immediately.

## SUMMARY OF RECOMMENDATIONS

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This report contains amendments to the following sections of Title 20 of the Pennsylvania Consolidated Statutes (the Probate, Estates and Fiduciaries Code):

**§ 2514.** Paragraph (13) (power of appointment) is repealed and recodified as new § 7602 (exercise of powers of appointment).<sup>26</sup>

**§§ 2801 - 2803.** These new sections, which comprise new Chapter 28, create a statutory framework for formula clauses for federal tax purposes.<sup>27</sup>

**§ 3101.** Subsections (a), (b) and (c) are amended to increase the dollar amounts. The dollar amount in subsection (a) regarding wages, salary or employee benefits is increased from \$5,000 to \$10,000. The dollar amount in subsection (b) regarding a deposit account is increased from \$3,500 to \$10,000. In subsection (c), the dollar amount for burial expenses is increased from \$3,500 to \$10,000, and the reference to the maximum payment from a patient's care account, including the payment for burial expenses, is increased from \$4,000 to \$11,000.<sup>28</sup>

**§ 3102.** This section is amended to increase the dollar amount regarding the gross value of the small estate from \$25,000 to \$50,000.<sup>29</sup>

**§ 3162.** Subsection (b) is new and provides that a personal representative who has advertised the grant of letters and received the required notice under § 7780.3(c) shall promptly send copies of the proofs of that advertisement to the trustee.<sup>30</sup>

**§ 3163.** This new section provides that a person granted letters testamentary or letters of administration is deemed to submit to the jurisdiction of the orphans' court division of the county in which the register granted the letters.<sup>31</sup>

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<sup>26</sup> *Infra* pp. 67-68.

<sup>27</sup> *Infra* pp. 61-65.

<sup>28</sup> *Infra* pp. 37-38.

<sup>29</sup> *Infra* p. 39.

<sup>30</sup> *Infra* pp. 68-69.

<sup>31</sup> *Infra* p. 41.

- § 3314. This section is amended to specify that the court must give due regard to the provisions of the governing instrument and any other factor that the court deems relevant before authorizing the personal representative to continue any business of the estate for the benefit of the estate. Paragraph (1) is amended to include “partnership, limited liability company or other entity.” New paragraph (4.1) is added to specify that the order may provide “for the compensation of a personal representative actively managing, supervising or engaging in the operation of an entity or business, from the estate’s assets or from the entity or business, as appropriate, provided the compensation is reasonably based upon the actual responsibilities assumed and performed.”<sup>32</sup>
- § 3315. This section is amended to specify that the court must give due regard to the provisions of the governing instrument and any other factor that the court deems relevant before authorizing the personal representative to organize or form a business entity. This section is also amended to include references to “a partnership, limited liability company or other entity.”<sup>33</sup>
- § 3546. This section is rewritten for organizational purposes and contains a new provision authorizing a nonprofit corporation organized for community development purposes or a municipality in which the real estate is located to petition to establish title to the decedent’s real estate. New subsection (b)(2) specifies that this petition must be in the manner that the court prescribes and is permitted only upon a showing by clear and convincing evidence that no heirs or devisees exist or have taken action with respect to the real estate for at least five years since the decedent’s death. New subsection (d) requires notice of the petition to be given to the personal representative of the decedent if letters testamentary or letters of administration have been granted on the estate of the decedent.<sup>34</sup>
- § 5603. Subsection (e) is amended to change the reference from § 6103 to § 6103.1.<sup>35</sup>
- § 6103. This section, concerning the release or disclaimer of powers or interests, is repealed and replaced by new § 6103.1.<sup>36</sup>

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<sup>32</sup> *Infra* pp. 43-44.

<sup>33</sup> *Infra* p. 44.

<sup>34</sup> *Infra* pp. 33-36.

<sup>35</sup> *Infra* p. 69.

<sup>36</sup> *Infra* pp. 45-46.

- § 6103.1.** This new section, which replaces repealed § 6103, provides a new statutory framework regarding the release of powers and interests and the disclaimer of powers. Subsections (a) through (g) concern interests that are releasable, the effect of a release of an interest, non-fiduciary powers that are disclaimable or releasable, fiduciary powers that are disclaimable or releasable, the terms of a disclaimer or release, the date of effect of a disclaimer or release, and procedural requirements.<sup>37</sup>
- §§ 7601 - 7607.** These new sections, which comprise new Chapter 76, create a statutory framework for powers of appointment.<sup>38</sup>
- § 7710.1.** Subsection (c) is amended to replace the phrase “does not violate” with “is not inconsistent with,” regarding a material purpose of the trust, to be consistent with the language in § 7740.1(b), which addresses judicial modification of an irrevocable trust with the beneficiaries’ consent.<sup>39</sup>
- § 7722.** Subsection (a) is amended to add the following two alternatives regarding a judicial proceeding: (1) the petitioner avers the representation in the petition, the representative is the petitioner or a respondent over whom the court has jurisdiction and, if a respondent, the representative does not decline the representation in a responsive pleading filed and served as required by law and (2) the representative has signed a certification of representation and not rescinded the certification on the court’s records by the time the court acts upon the petition. Subsection (b) is amended to add the following alternative regarding a nonjudicial resolution: the representative has signed a certification of representation and not rescinded the certification in a writing received by the trustee by the time of the nonjudicial settlement. Subsection (d) is new and provides for the filing and rescission of a certification of representation.<sup>40</sup>
- § 7740.7.** Subsection (b) is amended to permit a trust to be divided into two or more separate trusts.<sup>41</sup>
- § 7755.** Subsection (c) is rewritten and concerns a trustee’s duty to advertise. New paragraph (1) provides that a trustee may advertise at any time after the settlor’s death and shall advertise if the first advertisement of the grant of letters by the settlor’s personal representative does not occur within 90 days after the settlor’s death. New paragraph (2) provides that an advertisement by

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<sup>37</sup> *Infra* pp. 47-49.

<sup>38</sup> *Infra* pp. 51-59.

<sup>39</sup> *Infra* p. 21.

<sup>40</sup> *Infra* pp. 21-23.

<sup>41</sup> *Infra* p. 24.

a trustee shall be done in the same manner as an advertisement of a grant of letters and in the jurisdiction of the deceased settlor's domicile. The advertisement shall include the fact of the trust's existence and the trustee's name and address. New paragraph (3) provides that the personal representative of the settlor of a revocable trust shall send the trustee copies of the proof of publication of the advertisement of the grant of letters.<sup>42</sup>

- § 7765.** Subsections (a), (b) and (c) are repealed in favor of a new subsection (a.1), which provides that a trustee may resign with court approval, without court approval if authorized to resign by the trust instrument, or pursuant to a nonjudicial settlement agreement. New subsection (a.1) eliminates the distinction between corporate and individual trustees regarding resignation.<sup>43</sup>
- § 7780.3.** Subsection (k.1) is new and permits a current beneficiary of a trust who has capacity to nominate another person to receive, on behalf of the current beneficiary, the required notice. This subsection specifies the conditions by which the trustee satisfies his or her duty to give the required notice.<sup>44</sup>
- § 7792.** This section is amended to provide that § 3532(c), which concerns receipts, releases and refunding agreements, applies to a trustee.<sup>45</sup>
- §§ 7901 - 7906.** These new sections, which comprise new Chapter 79, codify the Charitable Instruments Act of 1971 (10 P.S. §§ 201-206).<sup>46</sup>
- § 8113.** Subsection (f) is amended to change the reference from the Charitable Instruments Act of 1971 to 20 Pa.C.S. Chapter 79.<sup>47</sup>

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<sup>42</sup> *Infra* pp. 24-25.

<sup>43</sup> *Infra* pp. 25-26.

<sup>44</sup> *Infra* pp. 26-27.

<sup>45</sup> *Infra* pp. 27-28.

<sup>46</sup> *Infra* pp. 29-32.

<sup>47</sup> *Infra* p. 69.

## UNIFORM TRUST ACT

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**Sections 7710.1(c), 7722, 7740.7(b) and 7755(c) of Title 20 of the Pennsylvania Consolidated Statutes are amended to read:**

§ 7710.1. Nonjudicial settlement agreements - UTC 111.

\* \* \*

(c) Exception.--A nonjudicial settlement agreement is valid only to the extent it [does not violate] is not inconsistent with a material purpose of the trust and includes terms and conditions that could be properly approved by the court under this chapter or other applicable law.

\* \* \*

### **Pennsylvania Comment**

**In subsection (c), the phrase “is not inconsistent with a material purpose of the trust” has been substituted for the phrase “does not violate a material purpose of the trust” to be consistent with the language in § 7740.1(b), which addresses judicial modification of an irrevocable trust with the beneficiaries’ consent.**

§ 7722. Representation of parties in interest in general.

(a) Judicial proceeding.--In a judicial proceeding involving a trust matter, an order or decree of the court that binds the representative [or representatives] is binding upon a person, class of persons or both represented in accordance with section 7723 (relating to representatives and persons represented) if:

(1) the trustee notifies the [representatives] representative in writing whom [they represent, they do] he represents, the representative does not decline the

representation as provided in section 7725 (relating to notice of representation) and [they act] the representative acts in good faith;

(2) the petitioner avers the representation in the petition, the representative is the petitioner or a respondent over whom the court has jurisdiction and, if a respondent, the representative does not decline the representation in a responsive pleading filed and served as required by law; or

(3) the representative has signed a certification of representation described in subsection (d) and has not rescinded the certification on the court's records by the time the court acts upon the petition.

(b) Nonjudicial resolution.--In a nonjudicial resolution of a trust matter, notice to, the consent or approval of or the waiver or release by the representative [or representatives] is binding upon a person, class of persons or both represented in accordance with section 7723 if:

(1) the trustee notifies the [representatives] representative in writing whom [they represent, they do] he represents, the representative does not decline the representation as provided in section 7725 and [they act] the representative acts in good faith; or

(2) the representative has signed a certification of representation described in subsection (d) and has not rescinded the certification in a writing received by the trustee by the time of the nonjudicial settlement.

(c) Permissible consideration.--In making decisions, a representative may consider the general benefit accruing to the living members of the family of the person represented.

(d) Certification of representation.--

(1) A certification signed by the representative describing his representation of another person, class of persons or both in accordance with section 7723 may be filed with:

(i) the court, in the case of a judicial proceeding; or

(ii) the trustee, in the case of a nonjudicial resolution of a trust matter.

(2) A certification of representation may be rescinded in a writing signed by the representative and filed with:

(i) the court at any time before the court acts in reliance upon the certification, in the case of a judicial proceeding; or

(ii) the trustee before a trust matter is resolved without application to the court.

**Pennsylvania Comment**

**The trustee initiated representation of a person, a class of persons or both under prior law. There was uncertainty whether a trust matter facilitated by representation under this subchapter could be resolved before the expiration of the waiting period set forth in § 7725. Subsection (a)(2) allows the petitioner to initiate representation in a court proceeding and gives the respondent, if he or she is the proposed representative, the right to decline the representation in a responsive pleading. The certification of representation described in subsection (d) expedites both judicial and nonjudicial resolutions of trust matters by eliminating the waiting period described in § 7725 where the proposed representative has accepted that role in writing and not rescinded the acceptance by the time the court or the parties to a nonjudicial settlement agreement rely upon it.**

§ 7740.7. Division of trusts.

\* \* \*

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

\* \* \*

**Note**

**The amendment of subsection (b) is to make the statutory language parallel to that of subsection (a) (“a trustee may, without court approval, divide a trust into separate trusts”).**

**Pennsylvania Comment**

**Subsection (b), like subsection (a), permits a trust to be divided into two or more separate trusts.**

§ 7755. Claims and distribution after settlor’s death.

\* \* \*

(c) [No personal representative.--If no personal representative is appointed within 90 days after the settlor’s death, the trustee shall advertise the trust’s existence and the name and address of the trustee in the manner set forth in section 3162 (relating to advertisement of grant of letters)] Trustee’s duty to advertise.--

(1) A trustee of a revocable trust:

(i) May advertise at any time after the settlor’s death.

(ii) Shall advertise if the first advertisement of the grant of letters by the settlor’s personal representative does not occur within 90 days after the settlor’s death.

(2) Advertisements by the trustee under this subsection shall be in the manner set forth in section 3162 (relating to advertisement of grant of letters), shall be done in the jurisdiction of the deceased settlor's domicile and shall include:

(i) The fact of the trust's existence.

(ii) The trustee's name and address.

(3) The personal representative of the settlor of a revocable trust shall send to the trustee copies of the proof of publication of the advertisement of the grant of letters.

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### **Pennsylvania Comment**

**The purpose of advertisement by a trustee of a (formerly) revocable trust is to clear creditors' claims against trust property.**

**Section 7765(a), (b) and (c) of Title 20 of the Pennsylvania Consolidated Statutes is amended and the section is amended by adding a subsection to read:**

§ 7765. Resignation of trustee; filing resignation.

[(a) Court approval--A trustee may resign with court approval.

(b) Without court approval if authorized by trust instrument.--A trustee may resign without court approval if authorized to resign by the trust instrument.

(c) Without court approval and without authorization in trust instrument.--

(1) Unless expressly provided to the contrary in the trust instrument, an individual trustee may resign without court approval and without authorization in the trust instrument if:

(i) there is at least one cotrustee and all cotrustees consent in writing to the resignation; and

(ii) all the qualified beneficiaries consent in writing to the resignation.

(2) This subsection shall not authorize the sole trustee of a trust to resign unless the trust instrument names a successor trustee or provides a method for appointing a successor trustee, and in either case the resignation shall not be effective until the successor trustee accepts the appointment in writing.]

(a.1) General rule.--A trustee may resign:

(1) with court approval;

(2) without court approval if authorized to resign by the trust instrument; or

(3) pursuant to a nonjudicial settlement agreement described in section 7710.1

(relating to nonjudicial settlement agreements - UTC 111).

\* \* \*

### **Pennsylvania Comment**

**Among the matters that all beneficiaries and trustees of a trust may resolve by a nonjudicial settlement agreement described in section 7710.1 is the resignation of a trustee. Former § 7765(a) allowed individual trustees to resign on conditions that are routinely addressed in a nonjudicial, or “family,” settlement agreement but did not allow corporate trustees to resign without permission in the trust instrument or approval by the court. That distinction has been removed.**

**Section 7780.3 of Title 20 of the Pennsylvania Consolidated Statutes is amended by adding a subsection to read:**

§ 7780.3. Duty to inform and report.

\* \* \*

(k.1) Nomination by current beneficiary.--A current beneficiary of a trust who has capacity may nominate another person to receive, on behalf of the current beneficiary, the

notice required by this section. The current beneficiary shall notify the trustee of the nomination. The trustee giving the notice required by this section to that nominee satisfies the trustee's duty to give to the named current beneficiary the notice required by this section if:

(1) the trustee notifies the nominee that the notice is being given to the nominee as representing the named current beneficiary; and

(2) the nominee does not decline to receive the notice in a writing that is given to the trustee no later than 60 days after receipt of the trustee's notice.

\* \* \*

**Section 7792 of Title 20 of the Pennsylvania Consolidated Statutes is amended to read:**

§ 7792. Powers, duties and liabilities identical with personal representatives.

The provisions concerning the powers, duties and liabilities of a trustee shall be the same as those set forth in the following provisions of this title for the administration of a decedent's or a minor's estate:

Section 3184 (relating to discharge of personal representative and surety).

Section 3321(d) and (e) (relating to nominee registration; corporate fiduciary as agent; deposit of securities in a clearing corporation; book-entry securities).

Section 3323 (relating to compromise of controversies).

Section 3324 (relating to death or incapacity of fiduciary).

Section 3332 (relating to inherent powers and duties).

Section 3353 (relating to order of court).

Section 3354 (relating to power given in governing instrument).

Section 3355 (relating to restraint of sale).

Section 3356 (relating to purchase by personal representative).

Section 3358 (relating to collateral attack).

Section 3359 (relating to record of proceedings; county where real estate lies).

Section 3532(c) (relating to at risk of personal representative).

### **Note**

**Section 3532(c) provides the following:**

**(c) Record of risk distributions.--The personal representative may file with the clerk receipts, releases and refunding agreements which he may have received from persons to whom he has made a risk distribution, or from other parties in interest. Receipts, releases and refunding agreements so filed shall be indexed under the name of the estate. Their acceptance shall not be construed as court approval of any act of administration or distribution therein reflected.**

# CHARITABLE INSTRUMENTS

**Title 20 of the Pennsylvania Consolidated Statutes is amended by adding a chapter to read:**

## CHAPTER 79

### CHARITABLE INSTRUMENTS

Sec.

7901. Short title.

7902. Definitions.

7903. Deemed provisions of governing instrument.

7904. Power to amend governing instrument.

7905. Court authority.

7906. Applicability.

§ 7901. Short title.

This chapter shall be known and may be cited as the Charitable Instruments Act.

§ 7902. 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:

“Charitable organization.” A corporation, trust or other instrumentality governed by Pennsylvania law, including:

(1) A trust described in section 4947(a)(1) or (2) of the Internal Revenue Code of 1986 (Public Law 99-514, 26 U.S.C. § 4947(a)(1) or (2)), which is or is

treated as a private foundation under section 509 of the Internal Revenue Code of 1986 (26 U.S.C. § 509).

(2) A trust governed by Pennsylvania law that is or is treated as a pooled income fund under section 642(c)(5) of the Internal Revenue Code of 1986 (26 U.S.C. § 642(c)(5)).

§ 7903. Deemed provisions of governing instrument.

(a) Effect of deemed provisions.--The governing instrument of a charitable organization is deemed to include provisions, the effects of which are to:

(1) Require distributions for each taxable year in such amounts and at such times and in such manner as not to subject the organization to tax under section 4942 of the Internal Revenue Code of 1986 (Public Law 99-514, 26 U.S.C. § 4942).

(2) Prohibit the organization from:

(i) Engaging in an act of self-dealing, as defined in section 4941(d) of the Internal Revenue Code of 1986 (26 U.S.C. § 4941(d)).

(ii) Retaining excess business holdings, as defined in section 4943(c) of the Internal Revenue Code of 1986 (26 U.S.C. § 4943(c)).

(iii) Making an investment in such manner as to subject the organization to tax under section 4944 of the Internal Revenue Code of 1986 (26 U.S.C. § 4944).

(iv) Making a taxable expenditure, as defined in section 4945(d) of the Internal Revenue Code of 1986 (26 U.S.C. § 4945(d)).

(b) Effect of contrary provision.--The deemed provisions under subsection (a) supersede any contrary provision of the governing instrument.

(c) Applicability.--This section applies only to the extent that the charitable organization is subject to one or more of the sections of the Internal Revenue Code of 1986 set forth in subsection (a).

§ 7904. Power to amend governing instrument.

The trustees or directors of every charitable organization have the power, acting alone, without the approval of a member, court, donor or beneficiary, to amend the instrument governing the charitable organization in any manner required for the sole purpose of ensuring that:

(1) Gifts and bequests to the charitable organization qualify for charitable deductions available for Federal income, gift and estate tax purposes.

(2) The charitable organization qualifies for tax exemptions available for Federal income tax purposes.

§ 7905. Court authority.

Nothing in this chapter precludes a court of competent jurisdiction from authorizing a deviation from the express terms of an instrument governing a charitable organization.

§ 7906. Applicability.

This chapter shall apply to:

(1) A charitable organization created after December 31, 1969.

(2) A charitable organization created before January 1, 1970, unless a court of competent jurisdiction in a proceeding instituted before January 1, 1972, explicitly decided that the operation of this chapter would substantially impair the accomplishment of the purposes of the charitable organization involved in that proceeding.

**Source Note**

**This section is based on the act of June 17, 1971 (P.L. 181, No. 23), known as the Charitable Instruments Act of 1971 (10 P.S. §§ 201-206). The following chart lists the provision in new Chapter 79, its basis in the Charitable Instruments Act of 1971 and the corresponding section in 10 P.S. Chapter 6 (Charitable Instruments).**

<b>20 Pa.C.S. Chapter 79 Provision</b>	<b>Section in the Charitable Instruments Act of 1971</b>	<b>10 P.S. Section</b>
7901	6	206
7902	2	202
7903	1	201
7904	4(a)	204(a)
7905	4(b)	204(b)
7906	5	205

**Note**

**Section 3 of the Charitable Instruments Act of 1971 (10 P.S. § 203) (“References herein to the Internal Revenue Code of 1986 shall be deemed to extend to corresponding provisions of any subsequent Federal tax laws.”) is not codified in 20 Pa.C.S. Chapter 79 because its inclusion is unnecessary. In general, if a statute in Pennsylvania refers to another statute, the reference to the referred statute includes amendments to the referred statute in force at the time of application of the referring statute. 1 Pa.C.S. § 1937.**

## **DETERMINATION OF TITLE TO DECEDENT'S INTEREST IN REAL ESTATE**

**Section 3546 of Title 20 of the Pennsylvania Consolidated Statutes is amended to read:**

§ 3546. Determination of title to decedent's interest in real estate.

[When a person shall die leaving an interest in real estate within the Commonwealth and no letters testamentary or of administration have been granted on the estate of the decedent in the Commonwealth, and one year has expired since the decedent's death, or if a personal representative has been appointed and has not filed his account within six years of the death of the decedent, any person claiming an interest in the real estate as or through an heir or devisee of the decedent may present a petition to establish title thereto in the orphans' court division of the county where the letters testamentary or of administration have been granted, or should no letters have been granted, then in the orphans' court division of the county within which was the family or principal residence of the decedent. If the decedent was a nonresident of the Commonwealth, the petition may be presented in the orphans' court division of any county wherein any of the real estate shall lie. The court, aided if necessary by the report of a master, may enter its decree nisi adjudging that the title to the decedent's interest in the real estate is in such person or persons as the court shall determine. Notice of the decree nisi shall be given to creditors and other parties in interest, by advertisement and otherwise, as the court shall direct. If no exception to the decree is filed within three months, it shall be confirmed absolutely, free of all decedent's debts not then liens of record, and regardless of the

provisions of any testamentary writing of the decedent thereafter probated. A certified copy of the decree shall be recorded in the office of the recorder of deeds of each county where real estate included in the decree shall lie, shall be indexed by the recorder in the grantor's index under the name of the decedent and in the grantee's index under the name of each distributee, and shall be registered in the survey bureau or with the proper authorities empowered to keep a register of real estate in the county.]

(a) Applicability.--This section shall apply if:

(1) A person dies leaving an interest in real estate within this Commonwealth.

(2) Either of the following:

(i) No letters testamentary or letters of administration have been granted on the estate of the decedent in this Commonwealth and one year has expired since the decedent's death.

(ii) A personal representative has been appointed but has not filed an account within six years of the death of the decedent.

(b) Who may petition.--The following may petition to establish title to the decedent's real estate:

(1) A person claiming an interest in the real estate:

(i) as an heir or devisee of the decedent; or

(ii) through the decedent or an heir or devisee of the decedent.

(2) A nonprofit corporation organized for community development purposes or a municipality in which the real estate is located:

(i) In a manner that the court prescribes.

(ii) Upon a showing by clear and convincing evidence to the court that no heirs or devisees exist or have taken action with respect to the real estate for at least five years since the decedent's death.

(c) Where to petition.--A petition under this section shall be filed in the orphans' court division of the county where:

(1) the letters testamentary or letters of administration have been granted;

(2) the principal residence of the decedent was located, if no letters testamentary or letters of administration have been granted; or

(3) any of the real estate is located, if the decedent was a nonresident of this Commonwealth.

(d) Notice of petition.--If letters testamentary or letters of administration have been granted on the estate of the decedent, notice of the petition under this section shall be given to the personal representative of the decedent.

(e) Decree.--

(1) Aided if necessary by the report of a master, the court may enter a decree nisi adjudging that the title to the decedent's interest in the real estate is in the petitioner as the court determines.

(2) Notice of the decree nisi shall be given to creditors and other parties in interest, by advertisement and otherwise, as the court shall direct.

(3) If no exception to the decree is filed within three months, it shall be confirmed absolutely, free of all decedent's debts not then liens of record, and regardless of the provisions of any testamentary writing of the decedent thereafter probated.

(4) A certified copy of the decree shall be:

(i) Recorded in the office of the recorder of deeds of each county where real estate included in the decree shall lie.

(ii) Indexed by the recorder in the grantor's index under the name of the decedent and in the grantee's index under the name of each distributee.

(iii) Registered in the survey bureau or with the proper authorities empowered to keep a register of real estate in the county.

**Note**

**This section as amended provides an easier process than that set forth in Act 171 of 2006, which amends § 3155 and concerns the granting of letters testamentary to redevelopment authorities.**

**Comment**

**An adjoining property owner does not have standing under the amendment to § 3546 because he or she could receive a windfall if granted standing.**

## **DISPOSITIONS INDEPENDENT OF LETTERS**

**Sections 3101(a), (b) and (c) and 3102 of Title 20 of the Pennsylvania Consolidated Statutes are amended to read:**

§ 3101. Payments to family and funeral directors.

(a) Wages, salary or employee benefits.--Any employer of a person dying domiciled in this Commonwealth at any time after the death of the employee, whether or not a personal representative has been appointed, may pay wages, salary or any employee benefits due the deceased in an amount not exceeding [\$5,000] \$10,000 to the spouse, any child, the father or mother, or any sister or brother (preference being given in the order named) of the deceased employee. Any employer making such a payment shall be released to the same extent as if payment had been made to a duly appointed personal representative of the decedent and he shall not be required to see to the application thereof. Any person to whom payment is made shall be answerable therefor to anyone prejudiced by an improper distribution.

(b) Deposit account.--Any bank, savings association, savings and loan association, building and loan association, credit union or other savings organization, at any time after the death of a depositor, member or certificate holder, may pay the amount on deposit or represented by the certificate, when the total standing to the credit of the decedent in that institution does not exceed [\$3,500] \$10,000, to the spouse, any child, the father or mother or any sister or brother (preference being given in the order named) of the deceased depositor, member or certificate holder, provided that a receipted funeral bill or

an affidavit, executed by a licensed funeral director which sets forth that satisfactory arrangements for payment of funeral services have been made, is presented. Any bank, association, union or other savings organization making such a payment shall be released to the same extent as if payment had been made to a duly appointed personal representative of the decedent and it shall not be required to see to the application thereof. Any person to whom payment is made shall be answerable therefor to anyone prejudiced by an improper distribution.

(c) Patient's care account.--When the decedent was a qualified recipient of medical assistance from the Department of Public Welfare, the facility in which he was a patient may make payment of funds, if any, remaining in the patient's care account, for the decedent's burial expenses to a licensed funeral director in an amount not exceeding [\$3,500] \$10,000 whether or not a personal representative has been appointed. After the payment of decedent's burial expenses, the facility may pay the balance of decedent's patient's care account, as long as the payments including the payment for burial expenses does not exceed [\$4,000] \$11,000, to the spouse, any child, the father or mother or any sister or brother (preference being given in the order named) of the deceased patient. Any facility making such a payment shall be released to the same extent as if payment had been made to a duly appointed personal representative of the decedent and it shall not be required to see to the application thereof. Any licensed funeral director or other person to whom payment is made shall be answerable therefor to anyone prejudiced by an improper distribution.

\* \* \*

§ 3102. Settlement of small estates on petition.

When any person dies domiciled in the Commonwealth owning property (exclusive of real estate and of property payable under section 3101 (relating to payments to family and funeral directors), but including personal property claimed as the family exemption) of a gross value not exceeding [~~\$25,000~~] \$50,000, the orphans' court division of the county wherein the decedent was domiciled at the time of his death, upon petition of any party in interest, in its discretion, with or without appraisal, and with such notice as the court shall direct, and whether or not letters have been issued or a will probated, may direct distribution of the property (including property not paid under section 3101) to the parties entitled thereto. The authority of the court to award distribution of personal property under this section shall not be restricted because of the decedent's ownership of real estate, regardless of its value. The decree of distribution so made shall constitute sufficient authority to all transfer agents, registrars and others dealing with the property of the estate to recognize the persons named therein as entitled to receive the property to be distributed without administration, and shall in all respects have the same effect as a decree of distribution after an accounting by a personal representative. Within one year after such a decree of distribution has been made, any party in interest may file a petition to revoke it because an improper distribution has been ordered. If the court shall find that an improper distribution has been ordered, it shall revoke the decree and shall direct restitution as equity and justice shall require.



## **JURISDICTION**

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**Title 20 of the Pennsylvania Consolidated Statutes is amended by adding a section to read:**

§ 3163. Submission to jurisdiction.

A person granted letters testamentary or letters of administration shall be deemed to submit to the jurisdiction of the orphans' court division of the county in which the register granted the letters.



## **BUSINESSES OF THE ESTATE**

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**Sections 3314 and 3315 of Title 20 of the Pennsylvania Consolidated Statutes are amended to read:**

§ 3314. Continuation of business.

[The court,] Giving due regard to the provisions of the governing instrument and any other factor that the court deems relevant, and aided by the report of a master if necessary, the court may authorize the personal representative to continue any business of the estate for the benefit of the estate [and in doing so the court, for cause shown, may disregard the provisions of the governing instrument, if any]. The order may be with or without notice. If prior notice is not given to all parties in interest, it shall be given within five days after the order or within such extended time as the court, for cause shown, shall allow. Any party in interest may, at any time, petition the court to revoke or modify the order. The order may provide:

(1) for the conduct of business, by the personal representative alone or jointly with others, or, unless restricted by the terms of the governing instrument, as a corporation, partnership, limited liability company or other entity to be formed;

(2) the extent of the liability of the estate or any part thereof, or of the personal representative, for obligations incurred in the continuation of the business;

(3) whether liabilities incurred in the conduct of the business are to be chargeable solely to the part of the estate set aside for use in the business or to the estate as a whole;

(4) the period of time the business may be conducted; [and]

(4.1) for the compensation of a personal representative actively managing, supervising or engaging in the operation of an entity or business, from the estate's assets or from the entity or business, as appropriate, provided the compensation is reasonably based upon the actual responsibilities assumed and performed; and

(5) such other regulations, including accountings, as the court shall deem advisable.

§ 3315. Incorporation of or formation of entity to operate estate's business.

After notice to all parties in interest, aided by the report of a master if necessary, and giving due regard to the provisions of the governing instrument and any other factor that the court deems relevant, the court[, unless restricted by the terms of the governing instrument,] may authorize the personal representative alone or jointly with others, to organize a corporation or form a partnership, limited liability company or other entity to carry on the business of the estate, whether the business was owned solely or with others, and may contribute for stock of the corporation, as capital, or for an interest in a partnership, limited liability company or other entity, all or part of the property of the estate which was invested in the business.

## **RELEASE OF POWERS AND INTERESTS AND DISCLAIMER OF POWERS**

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**Section 6103 of Title 20 of the Pennsylvania Consolidated Statutes is repealed:**

[§ 6103. Release or disclaimer of powers or interests.

(a) Powers and interests releasable.--Any power of appointment, or power of consumption, whether general or special, other than a power in trust which is imperative, and any interest in, to, or over real or personal property held or owned outright, or in trust, or in any other manner which is reserved or given to any person by deed, will or otherwise, and irrespective of any limitation of such power or interest by virtue of any restriction in the nature of a so-called spendthrift trust provision, or similar provision, may be released or disclaimed, either with or without consideration by written instrument signed by the person possessing the power or the interest and delivered as hereinafter provided, but nothing in this section shall authorize an income beneficiary of a spendthrift trust to release or disclaim his right to such income, unless as a result of the release or disclaimer the released or disclaimed income will pass to one or more of the beneficiary's descendants. This section shall not apply to an interest that may be disclaimed under Chapter 62 (relating to disclaimers).

(b) Form of release or disclaimer.--A power or interest which is releasable or disclaimable may be released or disclaimed either absolutely or conditionally, and may also be released or disclaimed with respect to the whole or any part of the property subject to such power or interest, and may also be released or disclaimed in such manner

as to reduce or limit the persons or objects or classes of persons or objects in whose favor such power or interest would otherwise be exercisable. No release or disclaimer of a power or of an interest shall be deemed to make imperative a power or interest which was not imperative prior to such release or disclaimer unless the instrument of release or disclaimer expressly so provides.

(c) Delivery of release or disclaimer.--Such release or disclaimer may be delivered to any one of the following:

(1) Any person specified for such purpose in the instrument creating the power or interest.

(2) Any trustee of the property to which the power or interest relates.

(3) The clerk of the court having jurisdiction of the trust for filing in said court.

(4) The recorder of deeds for recording in the county in which the person possessing the power or interest resides, or in which the deed, will, or other instrument creating the power or interest is recorded or filed.

(d) Grantee or lienholder.--A release or disclaimer shall be void as against a bona fide grantee of or holder of a lien on real estate in any county unless the release or disclaimer or a duplicate original or certified copy thereof is recorded in the county where the real estate lies before the recording or entering of the instrument or lien under which such grantee or lienholder claims.]

**Title 20 of the Pennsylvania Consolidated Statutes is amended by adding a section to read:**

§ 6103.1. Release of powers and interests and disclaimer of powers.

(a) Interests releasable.--

(1) Subject to paragraph (2), an interest in property that has been accepted may be released.

(2) An income interest in a spendthrift trust may be released only if the released income passes to one or more of the releasor's descendants.

(b) Effect of release of interest.--A releasor of an interest in property shall be treated as having died at the time of the release for purposes of determining and accelerating the interests of other parties in the property.

(c) Nonfiduciary powers disclaimable or releasable.--A power of appointment, power of withdrawal or other power held in a nonfiduciary capacity may be disclaimed prior to its acceptance or released after its acceptance.

(d) Fiduciary powers disclaimable or releasable.--

(1) Except as otherwise provided in the instrument creating the power, a power held in a fiduciary capacity that is not imperative may be disclaimed prior to its acceptance or released after its acceptance.

(2) A disclaimer or release under this subsection is effective as to a successor fiduciary if the disclaimer or release so provides.

(e) Terms of disclaimer or release.--

(1) A release of a power or interest or a disclaimer of a power under this section may:

(i) Be absolute or conditional.

(ii) Be made with respect to the whole or any part of the property subject to the power or interest.

(iii) Reduce or limit the persons or objects or classes of persons or objects in whose favor the power or interest would otherwise be exercisable.

(2) Unless the disclaimer or release so provides, a disclaimer or release under this section shall not make imperative a power or interest that was not imperative prior to the disclaimer or release.

(f) Date of effect.--

(1) A disclaimer of a power held in a fiduciary capacity that is not imperative takes effect as of the time the instrument creating the power becomes irrevocable.

(2) A release of a power held in a fiduciary capacity that is not imperative takes effect immediately after the last exercise of the power.

(g) Procedural requirements.--A release and a disclaimer under this section shall be in writing and filed, delivered and recorded in a similar manner as a disclaimer under section 6204 (relating to filing, delivery and recording).

### Comment

**This section, which replaces former § 6103, (1) simplifies and modernizes the language of § 6103; (2) adds a new provision concerning the effect of a release of an interest, the lack of which has impeded the practical usefulness of releases; (3) clarifies that Chapter 62 relates to disclaimers of interests and this section relates to disclaimers of powers and (4) makes similar the procedural requirements for releases and disclaimers.**

**Subsections (a) (which protects spendthrift clauses), (c), (d) and (e) continue current law. Subsection (b) is new and follows the same principle used in ascertaining the effect of a disclaimer. It rejects the different rule of older cases that released income may be sequestered**

**and remainders may not be accelerated. Subsection (d) does not follow § 5 of the Uniform Disclaimer of Property Interests Act, which permits disclaimers of imperative powers, because the result would be inappropriate and unnecessary in light of Chapter 75 and the fact that a nominated trustee can decline to serve. Subsection (f) is new and modeled on § 11 of the Uniform Disclaimer of Property Interests Act. Subsection (g) makes the procedure similar for all releases and disclaimers, to avoid unnecessary complexity.**



# POWERS OF APPOINTMENT

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**Title 20 of the Pennsylvania Consolidated Statutes is amended by adding a chapter to read:**

## CHAPTER 76

### POWERS OF APPOINTMENT

Sec.

7601. Definitions.

7602. Exercise of powers of appointment.

7603. Contract to exercise power.

7604. Manner of appointment.

7605. Anti-lapse provision.

7606. Partially effective exercise.

7607. Creditors' rights.

§ 7601. 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:

“Broad power of appointment.” A power of appointment that the donee may exercise in favor of any one or more of the following:

- (1) One or more persons selected by the donee.
- (2) The donee.
- (3) The donee's estate.

(4) Every person other than the donee, the donee's creditors, the donee's estate or the creditors of the donee's estate.

"Limited power of appointment." A power of appointment that is not a broad power of appointment. The term includes a power to appoint to the donee's creditors or the creditors of the donee's estate.

### Comment

**This section divides powers of appointment into two categories based on the probable intention of the donor rather than on Federal tax law. A broad power of appointment is essentially one where the donor intended to give the donee complete discretion. Therefore, a broad power of appointment includes in paragraph (4) a commonly used power by which donors give donees virtually unfettered discretion without attracting Federal estate tax. This is similar to § 7723(7) regarding whom a donee of a power of appointment represents. A limited power of appointment includes a power to appoint to the donee's creditors or the creditors of the donee's estate because donors who grant such powers typically intend to grant only limited power to the donee and include creditors only to avoid Federal generation-skipping transfer tax.**

§ 7602. Exercise of powers of appointment.

(a) Broad power of appointment.--Subject to subsection (c), in the absence of a contrary intent appearing in the instrument creating a broad power of appointment or in the donee's instrument exercising the power, a broad power of appointment may be exercised only by the donee's instrument making:

- (1) specific reference to the power;
- (2) general reference to any or all powers of appointment held by the donee;
- (3) a testamentary or inter vivos gift specifically describing the appointive property;

(4) an insufficiently funded testamentary pecuniary legacy, to the extent to satisfy the legacy;

(5) a general testamentary gift; or

(6) a testamentary residuary gift.

(b) Limited power of appointment.--

(1) Subject to paragraph (2) and subsection (c), in the absence of a contrary intent appearing in the instrument creating a limited power of appointment or in the donee's instrument exercising the power, a limited power of appointment may be exercised only by the donee's instrument making:

(i) specific reference to the power;

(ii) a testamentary or inter vivos gift specifically describing the appointive property;

(iii) a general testamentary gift to all, and only to all, the objects of the power; or

(iv) a testamentary residuary gift to all, and only to all, the objects of the power.

(2) The objects of the power described in paragraph (1)(iii) and (iv) who have a common ancestor shall be only those descendants of the common ancestor determined on a per stirpes basis.

(c) Necessity of donee's specific reference to power.--A power of appointment may be exercised only by specific reference to the power if the instrument creating the power so requires.

(d) Exercise before testamentary power granted.--In the absence of a contrary intent appearing in the instrument creating a power of appointment exercisable at the donee's death or in the donee's instrument exercising the power, the donee's instrument may exercise a power of appointment existing at the donee's death even though the power was granted after the date of the donee's instrument.

(e) Testamentary powers.--

(1) Notwithstanding any contrary provision in an instrument creating a power of appointment, a testamentary power of appointment shall not be exercisable in favor of the donee or the donee's creditors.

(2) A grant of a testamentary power to appoint to the donee's creditors shall be construed as a power to appoint to the creditors of the donee's estate.

(3) An attempted exercise of a testamentary power of appointment in favor of the donee's creditors shall be construed as an exercise in favor of those creditors of the donee's estate who were also creditors of the donee at the time of the donee's death.

(4) If the donee is an issue of the donor, a testamentary power of appointment to appoint to the donor's issue shall not be exercisable in favor of the donee or the donee's estate.

### Comment

**This section codifies present case law and recodifies former § 2514(13). Subsection (c) codifies the longstanding expectations of drafters of donor's trusts and is consistent with the New York and California statutes and with Pennsylvania case law regarding special (limited) powers. The Pennsylvania case law on the validity of a specific reference requirement to exercise a general (broad) power of appointment is less clear. Subsection (e) prohibits what is logically impossible and codifies what is believed to be existing law that a testamentary power to appoint to the donor's issue does not permit**

**the donee to appoint to the donee or the donee's estate if the donee is an issue of the donor.**

§ 7603. Contract to exercise power.

(a) Contract prohibited.--Unless the donor and donee are the same person, the donee of a power of appointment that is not presently exercisable may not contract to exercise the power.

(b) Actions for recovery.--A prohibited contract under subsection (a), if made, may not be the basis of an action for specific performance or damages, but the promisee can obtain restitution from the donee of the value given for the promise, unless the donee has exercised the power pursuant to the contract.

(c) No limitation on disclaimer or release.--This section does not limit the power of a donee to disclaim or release a power of appointment in whole or in part.

**Comment**

**This section follows Restatement of the Law Second, Property (Donative Transfers) § 16.2 and the New York and California statutes. It is believed to be declaratory of existing law, although there is no case law on point.**

§ 7604. Manner of appointment.

(a) Outright or in trust.--Subject to section 7602(e) (relating to exercise of powers of appointment), unless expressly prohibited by the instrument creating a power of appointment, a donee may exercise a power by appointing in any manner, including, but not limited to:

(1) Appointing outright to one or more objects of the power.

(2) Appointing to one or more trustees to hold the appointive property in trust for the benefit of one or more objects of the power and specifying the terms and

administrative provisions of the trust and the powers and duties of the trustees, even if the trustees themselves are not objects of the power.

(3) Creating a broad or limited power of appointment exercisable by any one or more objects of the original power to whom the donee could have appointed outright, even if some of the objects of the new power are not among the objects of the original power, provided that if the original power is a limited power, other than a power to appoint to the donee's creditors or the creditors of the donee's estate:

(i) All the objects of the original power are among the objects of the new power.

(ii) All the takers in default of exercise of the new power are among the objects of the original power.

(b) Exclusive and nonexclusive powers.--Unless the instrument creating a power of appointment expressly specifies a minimum share of, a minimum pecuniary amount of or a particular item of appointive property to be appointed to an object of the power, the donee may exclude any object of the power as the donee deems appropriate.

### Comment

**This section follows present law with one exception: subsection (a)(3) differs from case law and Restatement of the Law Second, Property (Donative Transfers) § 19.4, which require the objects of the new power to be objects of the original power. This exception is warranted because it seems illogical to forbid doing directly in one step what could be done indirectly in two steps, especially when there may be tax and other advantages to the one-step procedure. To illustrate, a donee possessing a limited power to appoint to donee's issue could appoint outright to a child of the donee, in which case the child could later transfer the appointed property to anyone. Under subsection (a)(3), the donee could appoint in trust for that child and give that child a broad testamentary power to appoint the property to anyone except the donee's estate and the creditors of the donee's estate. However, the donee of a power to appoint among the donee's**

**issue could not give a child a power to appoint only to charity (a non-object of the original power), because the donee of the original power should not be able to prevent the donee from appointing to the objects of the original power. The donee could give a child a power to appoint among issue and charity.**

§ 7605. Anti-lapse provision.

(a) General rule.--

(1) Subject to paragraphs (2) and (3), in the absence of a contrary intent appearing in the instrument creating a power of appointment or in the donee's instrument exercising the power, an exercise of the power of appointment in favor of any of the following, whether designated by name or as one of a class, shall not fail if the appointee is not living at the time the appointment becomes effective:

(i) A child or other issue of the donee.

(ii) A brother or sister of the donee.

(iii) A child of a brother or sister of the donee.

(2) Paragraph (1) applies if:

(i) One or more issue of the appointee are living at the time the appointment becomes effective.

(ii) The issue under subparagraph (i), per stirpes, are objects of the power.

(3) The property appointed to the deceased appointee shall pass per stirpes to the appointee's issue living at the time the appointment becomes effective, but the appointment to a brother or sister or child of a brother or sister of the donee shall fail to the extent the property would pass to the spouse or issue of the donee if the appointment were to lapse.

(b) Lapsed share of residue.--In the absence of a contrary intent appearing in the donee's instrument exercising a power of appointment, if an appointment of an amount or share of the residue of the property subject to the power fails, the amount or share shall pass to the other appointees of the residue of the property subject to the power, if any, in proportion to their shares in the residue of the property subject to the power.

### Comment

**Subsection (a) overrules a few lower court cases to accord Pennsylvania law with the Restatement of the Law Second, Property (Donative Transfers) §§ 18.5 and 18.6 and with the notion that since the anti-lapse statute applies to gifts made by wills, there is no reason not to extend it to gifts made by the exercise of powers of appointment. Subsection (b) parallels existing law regarding wills (§ 2514(11)).**

§ 7606. Partially effective exercise.

In the absence of a contrary intent appearing in the instrument creating a power of appointment or in the donee's instrument exercising the power, a partially ineffective exercise of a power of appointment shall not make ineffective any otherwise effective portion of the exercise, unless the appointment regarded as a whole constitutes such an integrated plan that the parts cannot be separated without defeating the plan.

### Comment

**This section codifies existing case law.**

§ 7607. Creditors' rights.

Property subject to a presently exercisable inter vivos broad power of appointment that does not exceed the greater of \$5,000 or 5% of the assets subject to the power is not, by virtue of the power, available to the creditors of the donee of the power.

### Comment

**A presently exercisable 5 + 5 broad power is not available to creditors of the donee for the practical reason that such a power is common for non-creditor avoidance reasons and creditors do not rely on it.**



# FORMULA CLAUSES FOR FEDERAL TAX PURPOSES

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**Title 20 of the Pennsylvania Consolidated Statutes is amended by adding a chapter to read:**

## CHAPTER 28

### FORMULA CLAUSES FOR FEDERAL TAX PURPOSES

Sec.

2801. Definitions.

2802. Interpretation of formula clauses.

2803. Judicial proceeding.

§ 2801. 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:

“Formula clause.” A clause that has any of the following characteristics:

(1) Refers to the unified credit, estate tax exemption, applicable exemption amount, applicable credit amount, applicable exclusion amount, generation-skipping transfer tax exemption, GST exemption, marital deduction, maximum marital deduction, unlimited marital deduction or charitable deduction, or other words relating to Federal tax exemptions, exclusions, deductions or credits where the meaning of the words is dependent on the current state of the Federal tax laws.

(2) Measures a share of an estate or trust based on the amount that can pass free of Federal estate taxes or affects the inclusion ratio for generation-skipping transfer tax purposes.

(3) Is based on a similar provision of Federal estate tax or generation-skipping transfer tax law.

“Other dispositive instrument.” Includes the following:

(1) A beneficiary designation pertaining to insurance or retirement assets.

(2) An instrument that exercises a power of appointment held by the decedent at death.

(3) A similar instrument that:

(i) expresses a decedent’s intent regarding assets over which the decedent had dispositive authority at death; or

(ii) otherwise disposes of assets as a result of the decedent’s death.

§ 2802. Interpretation of formula clauses.

(a) General rule.--Except as provided in subsection (b), and subject to section 2803 (relating to judicial proceeding), a will, trust or other dispositive instrument of a decedent who dies after December 31, 2009, and before January 1, 2011, that contains a formula clause shall be rebuttably presumed to be interpreted pursuant to the Federal estate tax and generation-skipping transfer tax laws applicable to estates of decedents dying on December 31, 2009.

(b) Exception.--

(1) Subsection (a) shall not apply with respect to a will, trust or other dispositive instrument that:

(i) is executed or amended after December 31, 2009; or

(ii) manifests an intent that a contrary rule shall apply if the decedent dies on a date on which there is no applicable Federal estate tax or generation-skipping transfer tax in effect.

(2) If the Federal estate tax or generation-skipping transfer tax applies to an estate of a decedent dying or generation-skipping transfer occurring before January 1, 2011, then with respect to each such Federal tax, the initial reference to January 1, 2011, in this section shall refer instead to the first date after December 31, 2009, on which such tax applies to decedents' estates or generation-skipping transfers.

§ 2803. Judicial proceeding.

(a) Standing.--The decedent's personal representative, trustee or any affected beneficiary under the will, trust or other dispositive instrument may bring a proceeding to interpret a formula clause.

(b) Commencement.--A proceeding under this section must be commenced within 12 months following the death of the decedent.

(c) Considerations.--In a proceeding under this section, the court shall consider all of the following:

(1) The provisions and purposes of the will, trust or other dispositive instrument.

(2) The facts surrounding the creation of the will, trust or other dispositive instrument.

(3) The decedent's known or probable intent, based on all the facts and circumstances surrounding the creation of the will, trust or other dispositive

instrument. In determining this intent, the court may consider evidence that contradicts the plain meaning of the will, trust or other dispositive instrument.

(4) The identity and interests of beneficiaries of different shares resulting from the application of the formula clause.

(d) Modifications.--The court shall have the power to modify a provision of a will, trust or other dispositive instrument in a manner that is not contrary to the decedent's probable intention in order to achieve the decedent's tax and other objectives.

(e) Effective date of interpretation or modification.--The court may provide that an interpretation or modification pursuant to this chapter shall be effective as of the decedent's date of death.

### Comment

**Wills, trusts and other documents, such as a beneficiary designation for a life insurance policy, which direct the distribution of assets of a decedent, often contain provisions designed to minimize the payment of federal estate tax and/or the federal generation-skipping transfer tax (the "GST tax"). In many instances, these provisions are not stated in fixed-dollar amounts, but in terms of a formula intended to produce the optimal result under the tax laws in effect at the decedent's date of death. Often, these formula provisions provide the primary direction necessary to fulfill the decedent's intent regarding the distribution of assets among his or her family, friends and charitable beneficiaries.**

**On December 31, 2009, the federal estate tax and the GST tax were repealed for one year. This repeal was unexpected. Due to the repeal, there is the potential to disrupt the intent of a multitude of decedents who prepared estate plans that are based on formula clauses which rely upon the federal estate tax and the GST tax that were in effect on December 31, 2009.**

**The purpose of this chapter is to preclude the disruption that could be caused by the unanticipated repeal of the federal estate tax and the GST tax. This chapter creates a rebuttable presumption that a decedent, who dies after December 31, 2009 and prior to the reinstatement of the federal estate tax and the GST tax, intended that**

**the provisions of his or her will, trust or other dispositive document be interpreted as if the federal estate tax and the GST tax in effect on December 31, 2009, are still applicable, unless the will, trust or other document provides otherwise. This chapter allows the personal representative, trustee or beneficiary of a decedent to rebut this presumption by presenting other evidence of the decedent's intent, to the appropriate court for consideration. This chapter is not intended to eliminate the use of any post-mortem mechanisms, such as disclaimers, that may preserve any potential benefits that may result from the repeal of the federal estate tax and the GST tax.**

**Section 2803(d), regarding modifications, is directly based on § 7740.6 and for purposes of this situation confirms the court's power of modification related to documents in addition to a trust instrument.**



## CONFORMING AMENDMENTS

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**Sections 2514(13), 3162, 5603(e) and 8113(f) of Title 20 of the Pennsylvania Consolidated Statutes are amended to read:**

§ 2514. Rules of interpretation.

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

\* \* \*

[(13) Power of appointment.--A general devise of the real estate of the testator, or of the real estate of the testator in any place, or in the occupation of any person mentioned in his will, or otherwise described in a general manner, shall be construed to include any real estate, or any real estate to which such description shall extend, as the case may be, which he shall have power to appoint in any manner he shall think proper, and shall operate as an execution of such power. In like manner, a bequest of the personal estate of the testator, or any bequest of personal property described in a general manner, shall be construed to include any personal estate, or any personal estate to which such description shall extend, as the case may be, which he shall have power to appoint in any manner he shall think proper, and shall operate as an execution of such power. In like manner, a general pecuniary legacy, when the assets of the individual estate of the testator are not sufficient for its payment, shall, to the extent necessary to make possible the payment of the legacy, be construed to include

any estate which the testator shall have power to appoint in any manner he shall think proper, and shall to such extent operate as an execution of such power.]

\* \* \*

### Comment

**Paragraph (13) is repealed and recodified as § 7602.**

§ 3162. Advertisement of grant of letters.

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

(b) Proofs of advertisement to trustee.--A personal representative who has advertised the grant of letters and received the notice required by section 7780.3(c) (relating to duty to inform and report) shall promptly send copies of the proofs of that advertisement to the trustee.

### Comment

**Because § 7755 (claims and distribution after settlor's death) allows the trustee to piggyback on the protection advertisement affords a personal representative and encourages the trustee to advertise when there is no personal representative or when the**

**personal representative does not advertise, it is important that a personal representative who has advertised the grant of letters share proof of that fact with the trustee.**

§ 5603. Implementation of power of attorney.

\* \* \*

(e) Power to disclaim any interest in property.--A power “to disclaim any interest in property” shall mean that the agent may release or disclaim any interest in property on behalf of the principal in accordance with Chapter 62 (relating to disclaimers) or section [6103 (relating to release or disclaimer of powers or interests)] 6103.1 (relating to release of powers and interests and disclaimer of powers), provided that any disclaimer under Chapter 62 shall be in accordance with the provisions of section 6202 (relating to disclaimers by fiduciaries or agents) in the case of a principal who shall have been adjudicated an incapacitated person at the time of the execution of the disclaimer.

\* \* \*

§ 8113. Charitable trusts.

\* \* \*

(f) Charitable organizations.--For a charitable organization defined under [the act of June 17, 1971 (P.L.181, No.23), known as the Charitable Instruments Act of 1971,] Chapter 79 (relating to charitable instruments) the provisions of [that act] Chapter 79 shall supersede subsection (c) if necessary to comply with the minimum investment return requirements.



## **TRANSITIONAL LANGUAGE**

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### **APPLICABILITY**

This act shall apply as follows:

(1) The addition of 20 Pa.C.S. Ch. 76 shall apply to all powers of appointment created before, on or after the effective date of that chapter.

(2) The addition of 20 Pa.C.S. Ch. 79 is a continuation of the act of June 17, 1971 (P.L.181, No.23), known as the Charitable Instruments Act of 1971. The following apply:

(i) All activities initiated under the Charitable Instruments Act of 1971 shall continue and remain in full force and effect and may be completed under 20 Pa.C.S. Ch. 79. Resolutions, orders, regulations, rules and decisions which were made under the Charitable Instruments Act of 1971 and which are in effect on the effective date of this section shall remain in full force and effect until revoked, vacated or modified under 20 Pa.C.S. Ch. 79. Contracts, obligations and agreements entered into under the Charitable Instruments Act of 1971 are not affected nor impaired by the repeal of the Charitable Instruments Act of 1971.

(ii) Any difference in language between 20 Pa.C.S. Ch. 79 and the Charitable Instruments Act of 1971 is intended only to conform to the style of the Pennsylvania Consolidated Statutes and is not intended to change or affect the legislative intent, judicial construction or administrative interpretation and implementation of the Charitable Instruments Act of 1971.

(3) The addition of 20 Pa.C.S. Ch. 28 shall apply to any decedent dying after December 31, 2009.

### **Comment**

**Since Chapter 76 largely codifies and clarifies existing law, no retroactivity issue is involved. The new provision in § 7604(a)(3) can be retroactive because it does not expand what the donee and the object can do with the appointive property.**

### **REPEALS**

Repeals are as follows:

(1) The General Assembly declares that the repeal under paragraph (2) is necessary to effectuate the addition of 20 Pa.C.S. Ch. 79.

(2) The act of June 17, 1971 (P.L.181, No.23), known as the Charitable Instruments Act of 1971, is repealed.

### **EFFECTIVE DATES**

This act shall take effect as follows:

(1) The amendment, addition or repeal of 20 Pa.C.S. §§ 3101(a), (b) and (c), 3102, 3162, 3314, 3315, 3546, 5603(e), 6103, 6103.1, 7710.1(c), 7722, 7740.7(b), 7755(c), 7765(a), (a.1), (b) and (c), 7780.3(k.1) and 7792 shall take effect in 60 days.

(2) The remainder of this act shall take effect immediately.

### **Note**

**The provisions of this act taking effect immediately are the amendment of 20 Pa.C.S. §§ 2514(13) and 8113(f); the addition of 20 Pa.C.S. Ch. 28, § 3163, Ch. 76 and Ch. 79; and the repeal of the act of June 17, 1971 (P.L.181, No.23), known as the Charitable Instruments Act of 1971.**

**CHARITABLE INSTRUMENTS ACT OF 1971  
Act of Jun. 17, 1971, P.L. 181, No. 23**

AN ACT

Respecting governing instruments of certain charitable organizations.

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

Section 1. The governing instrument of any charitable organization shall be deemed to include provisions, the effects of which are:

(1) To require distributions for each taxable year in such amounts and at such times and in such manner as not to subject the organization to tax under section 4942 of the Internal Revenue Code of 1986; and

(2) To prohibit the organization from engaging in any act of self-dealing (as defined in section 4941(d) of the Internal Revenue Code of 1986) and from retaining any excess business holdings (as defined in section 4943(c) of that code) and from making any investment in such manner as to subject the organization to tax under section 4944 of that code and from making any taxable expenditure as defined in section 4945(d) of that code, and such provisions shall supersede any contrary provision of the governing instrument. This section shall be applicable only to the extent that the charitable organization is subject to one or more of the cited sections of the Internal Revenue Code of 1986.

(1 amended Nov. 27, 1996, P.L.797, No.136)

Section 2. For purposes of this act, the term “charitable organization” means any corporation, trust, or other instrumentality governed by Pennsylvania law, including:

(1) any trust described in section 4947(a)(1) or (2) of the Internal Revenue Code of 1986, which is or is treated as a private foundation under section 509 of that code; or

(2) any trust governed by Pennsylvania law that is or is treated as a pooled income fund under section 642(c)(5) of that code.

(2 amended Nov. 27, 1996, P.L.797, No.136)

Section 3. References herein to the Internal Revenue Code of 1986 shall be deemed to extend to corresponding provisions of any subsequent Federal tax laws.

(3 amended Nov. 27, 1996, P.L.797, No.136)

Section 4. (a) The trustees or directors of every charitable organization shall have the power, acting alone, without the approval of any member, any court, any donor or any

beneficiary, to amend the instrument governing the charitable organization in any manner required for the sole purpose of ensuring that:

(1) gifts and bequests to the charitable organization qualify for charitable deductions available for Federal income, gift and estate tax purposes; and

(2) the charitable organization qualifies for tax exemptions available for Federal income tax purposes.

(b) Nothing in this act shall preclude a court of competent jurisdiction from authorizing a deviation from the express terms of an instrument governing a charitable organization.

(4 amended Nov. 27, 1996, P.L.797, No.136)

Section 5. This act shall take effect immediately and shall apply:

(1) Forthwith to every charitable organization created after December 31, 1969; and

(2) After December 31, 1971, to every charitable organization created before January 1, 1970, unless a court of competent jurisdiction in a proceeding instituted before January 1, 1972, should explicitly decide that the operation of section 1 of this act would substantially impair the accomplishment of the purposes of the charitable organization involved in that proceeding.

Section 6. This act shall be known and may be cited as the “Charitable Instruments Act of 1971.”

**Joint State Government Commission**  
**Advisory Committee on Decedents' Estates Laws**  
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