

JOINT STATE GOVERNMENT COMMISSION

General Assembly of the Commonwealth of Pennsylvania

PROBATE, ESTATES AND FIDUCIARIES: Proposed Amendments to Title 20 of the Pennsylvania Consolidated Statutes

*Report of the Advisory Committee on
Decedents' Estates Laws*

February 2018



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REPORT

*Probate, Estates and Fiduciaries:
Proposed Amendments to Title 20 of the Pennsylvania Consolidated Statutes*

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The Joint State Government Commission was created in 1937 as the primary and central non-partisan, bicameral research and policy development agency for the General Assembly of Pennsylvania.¹

A fourteen-member Executive Committee comprised of the leadership of both the House of Representatives and the Senate oversees the Commission. The seven Executive Committee members from the House of Representatives are the Speaker, the Majority and Minority Leaders, the Majority and Minority Whips, and the Majority and Minority Caucus Chairs. The seven Executive Committee members from the Senate are the President Pro Tempore, the Majority and Minority Leaders, the Majority and Minority Whips, and the Majority and Minority Caucus Chairs. By statute, the Executive Committee selects a chairman of the Commission from among the members of the General Assembly. Historically, the Executive Committee has also selected a Vice-Chair or Treasurer, or both, for the Commission. There was also a Secretary during some years.

The studies conducted by the Commission are authorized by statute or by a simple or joint resolution. In general, the Commission has the power to conduct investigations, study issues, and gather information as directed by the General Assembly. The Commission provides in-depth research on a variety of topics, crafts recommendations to improve public policy and statutory law, and works closely with legislators and their staff.

A Commission study may involve the appointment of a legislative task force, composed of a specified number of legislators from the House of Representatives or the Senate, or both, as set forth in the enabling statute or resolution. In addition to following the progress of a particular study, the principal role of a task force is to determine whether to authorize the publication of any report resulting from the study and the introduction of any proposed legislation contained in the report. However, task force authorization does not necessarily reflect endorsement of all the findings and recommendations contained in a report.

Some studies involve an appointed advisory committee of professionals or interested parties from across the Commonwealth with expertise in a particular topic; others are managed exclusively by Commission staff with the informal involvement of representatives of those entities that can provide insight and information regarding the particular topic. When a study involves an advisory committee, the Commission seeks consensus among the members.² Although an advisory committee member may represent a particular department, agency, association, or group, such representation does not necessarily reflect the endorsement of the department, agency, association, or group of all the findings and recommendations published in a report.

¹ Act of July 1, 1937 (P.L.2460, No.459); (46 P.S. §§ 65 – 69).

² Consensus does not necessarily reflect unanimity among the advisory committee members on each individual policy or legislative recommendation. At a minimum, it reflects the views of a substantial majority of the advisory committee, gained after lengthy review and discussion.

Over the years, nearly one thousand individuals from across the Commonwealth have served as members of the Commission's numerous advisory committees or have assisted the Commission with its studies. Members of advisory committees bring a wide range of knowledge and experience to deliberations involving a particular study. Individuals from countless backgrounds have contributed to the work of the Commission, such as attorneys, judges, professors and other educators, state and local officials, physicians and other health care professionals, business and community leaders, service providers, administrators and other professionals, law enforcement personnel, and concerned citizens. In addition, members of advisory committees donate their time to serve the public good; they are not compensated for their service as members. Consequently, the Commonwealth of Pennsylvania receives the financial benefit of such volunteerism, along with the expertise in developing statutory language and public policy recommendations to improve the law in Pennsylvania.

The Commission periodically reports its findings and recommendations, along with any proposed legislation, to the General Assembly. Certain studies have specific timelines for the publication of a report, as in the case of a discrete or timely topic; other studies, given their complex or considerable nature, are ongoing and involve the publication of periodic reports. Completion of a study, or a particular aspect of an ongoing study, generally results in the publication of a report setting forth background material, policy recommendations, and proposed legislation. However, the release of a report by the Commission does not necessarily reflect the endorsement by the members of the Executive Committee, or the Chair or Vice-Chair of the Commission, of all the findings, recommendations, or conclusions contained in the report. A report containing proposed legislation may also contain official comments, which may be consulted to construe or apply "the original provisions of the statute".³

Since its inception, the Commission has published more than 350 reports on a sweeping range of topics, including administrative law and procedure; agriculture; athletics and sports; banks and banking; commerce and trade; the commercial code; crimes and offenses; decedents, estates, and fiduciaries; detectives and private police; domestic relations; education; elections; eminent domain; environmental resources; escheats; fish; forests, waters, and state parks; game; health and safety; historical sites and museums; insolvency and assignments; insurance; the judiciary and judicial procedure; labor; law and justice; the legislature; liquor; mechanics' liens; mental health; military affairs; mines and mining; municipalities; prisons and parole; procurement; state-licensed professions and occupations; public utilities; public welfare; real and personal property; state government; taxation and fiscal affairs; transportation; vehicles; and workers' compensation.

Following the completion of a report, subsequent action on the part of the Commission may be required, and, as necessary, the Commission will draft legislation and statutory amendments, update research, track legislation through the legislative process, attend hearings, and answer questions from legislators, legislative staff, interest groups, and constituents.

³ 1 Pa.C.S. § 1939.

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To the Members of the General Assembly of Pennsylvania:

The Joint State Government Commission is pleased to announce the release of the report, *Probate, Estates and Fiduciaries: Proposed Amendments to Title 20 of the Pennsylvania Consolidated Statutes*.

The report includes legislation proposed by the Advisory Committee on Decedents' Estates Laws. The recommendations address such diverse topics as powers of attorney, powers of appointment, administration and personal representatives, trusts, incapacitated persons, and limitations on exercise of trustee powers and powers of beneficiaries to appoint trustees.

On behalf of the Commission, I would like to thank the members of the Advisory Committee for the longstanding contributions of knowledge, expertise, and wisdom they have given to the Decedents' Estates Laws of Pennsylvania.

Respectfully submitted,

Glenn J. Pasewicz
Executive Director

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INTRODUCTION

The Advisory Committee on Decedents' Estates Laws convened in October 2017 and recommended amendments to current law and pending legislation. This report contains these proposals to amend 20 Pa.C.S. chapters 33 (relating to administration and personal representatives), 56 (relating to powers of attorney), 75 (relating to limitations on exercise of trustee powers and powers of beneficiaries to appoint trustees), 76 (relating to powers of appointment), and 77 (relating to trusts), as well as Senate Bill No. 884.⁴

The proposed amendments to chapter 56 would add references to Adult Protective Services Act, which is a more recent enactment that supplements the earlier Older Adults Protective Services Act.⁵ The other proposed amendment to this chapter would enact statutory standing for judicial relief.⁶

The proposed amendment to chapter 76 would add a section relating to creditors' rights so that this chapter more completely codifies existent case law.⁷ The proposed amendments to chapters 33 and 77 would authorize a settlor and testator to split the responsibilities of co-fiduciaries so that some could have powers the others do not.⁸ Those co-fiduciaries who do not have those powers would be exonerated from liability for the exercise or nonexercise of those powers by the co-fiduciaries who are assigned those powers. As such, these amendments would apply to personal representatives and trustees.

The proposed amendment to Senate Bill No. 884 would require approval of compromises and settlements of claims by or against an estate *via* a guardian to be approved by the orphans' court division that has jurisdiction of the guardianship.⁹ Similarly, counsel fees and other expenses of the compromise or settlement would require the same approval. This approval would be mandated regardless whether litigation is pending and is believed to reflect current practice (at least for personal injury claims and settlements).

The proposed amendment to chapter 75 would correct a glitch in the effective date provision in § 7504(c)(2) (relating to certain trustee powers not exercisable).¹⁰ A literal reading of that provision would make the statute inapplicable to the current trustee/beneficiaries of trusts in existence before March 21, 1999, if the current trustees became successor trustees after that date. This was never the intention, but the provision could be interpreted that way.

⁴ (Sess. of 2017).

⁵ *Infra* pp. 5-7.

⁶ *Infra* pp. 7-8.

⁷ *Infra* pp. 9-11.

⁸ *Infra* pp. 16-23.

⁹ *Infra* pp. 26-27.

¹⁰ *Infra* p. 30.

PROPOSED AMENDMENTS TO 20 Pa.C.S. Ch. 56

Financial abuse and exploitation can occur when powers of attorney are misused. Both Older Adults Protective Services Act¹¹ and Adult Protective Services Act¹² established programs to provide protective services to adults and older adults who need them as well as to detect, prevent, reduce and eliminate abuse, neglect, exploitation and abandonment.¹³ These acts authorize reporting information relating to the need for protective services to agencies providing those services but do not authorize private causes of actions against agents acting under powers of attorney.¹⁴

Other jurisdictions statutorily specify a list of persons who may petition for judicial review of an agent's conduct with the expectation that financial abuse and exploitation might be reduced or prevented because those authorized petitioners could effectively alert the judiciary to possible misdeeds. The Commonwealth's enactment of a similar provision would eliminate inconsistent, case-by-case application of common law principles of standing. The judiciary may direct an agent to "file an account of his administration",¹⁵ but a petitioner requesting this accounting would have to rely on common law standing to do so.

The advisory committee previously considered but rejected recommending Uniform Power of Attorney Act (2006), § 116 (relating to judicial relief) for enactment, and instead favored enactment of a section relating to investigation of financial abuse and mismanagement.¹⁶ Subsequently, this alternative originally preferred by the advisory committee was not enacted and Pennsylvania Supreme Court's Elder Law Task Force recommended for enactment the uniform § 116 instead of the advisory committee's originally preferred alternative.¹⁷ The Elder Law Task Force's Elder Abuse and Neglect Committee reported these reasons for this recommendation:¹⁸

¹¹ Act of Nov. 6, 1987 (P.L.381, No.79); 35 P.S. §§ 10225.101-10225.5102.

¹² Act of Oct. 7, 2010 (P.L.484, No.70); 35 P.S. §§ 10210.101-10210.704.

¹³ Act of Nov. 6, 1987 (P.L.381, No.79), § 102; 35 P.S. § 10225.102. Act of Oct. 7, 2010 (P.L.484, No.70), § 102(5); 35 P.S. § 10210.102(5).

¹⁴ *Id.* § 302; 35 P.S. § 10225.302. Act of Oct. 7, 2010 (P.L.484, No.70), § 302; 35 P.S. § 10210.302.

¹⁵ 20 Pa.C.S. § 5610.

¹⁶ Advisory Comm. on Decedents' Estates Laws, Pa. J. State Gov't Comm'n, *Powers of Att'y: Proposed Amends. to the Probate, Estates & Fiduciaries Code* 39-41,

<http://jsg.legis.state.pa.us/resources/documents/ftp/publications/2010-14-POWERS%20OF%20ATTORNEY%20March%2023%202010.pdf> (2010).

¹⁷ Elder Law Task Force, Pa. Sup. Ct., *Rep. & Recommendations* (Recommendation 100) 242, <http://www.pacourts.us/assets/files/page-543/file-4025.pdf?cb=1512764122788> (2014).

¹⁸ *Id.* (Elder Abuse & Neglect Comm. Rep.) 190-91, <http://www.pacourts.us/assets/files/page-543/file-4023.pdf?cb=1512855234939>.

- 1) Studies note epidemic financial exploitation nationally.
- 2) Approximately half the states similarly expanded standing to challenge agents' actions to prevent financial abuse.
- 3) The proposal might be the only way to detect and prevent an agent's financial abuse.
- 4) The Commonwealth previously enacted a corollary uniform provision but not this one.

The previously enacted, corollary uniform provision¹⁹ codifies the agent's common law duty to account to a principal.²⁰ Rather than create an affirmative duty of periodic accounting, it states that the agent is not required to disclose receipts, disbursements or transactions unless ordered by a court or requested by the principal, a fiduciary acting for the principal, or a governmental agency with authority to protect the welfare of the principal. The narrow categories of persons that may request an agent to account are consistent with the premise that a principal with capacity should control to whom the details of financial transactions are disclosed. As an additional protective counter-measure to the narrow categories of persons who may request an agent to account, the uniform act contains a broad standing provision for seeking judicial review of an agent's conduct, which this proposal would enact.

To preserve a principal's financial privacy, current law narrowly limits the persons who can request an agent to account for transactions conducted on the principal's behalf. The proposed amendment²¹ would operate as a check-and-balance on the narrow scope of current law²² and provide what, in many circumstances, may be the only means to detect and stop agent abuse of an incapacitated principal.

The other proposed amendments²³ would update current law to add references to a law enacted in 2010 to extend protective services to adults who weren't covered by the preexistent Older Adults Protective Services Act.

¹⁹ Unif. Power of Att'y Act, § 114(h), http://www.uniformlaws.org/shared/docs/power%20of%20attorney/UPOAA_2011_Final%20Act_2017jan30.pdf (2006).

²⁰ 20 Pa.C.S. § 5601.3(d).

²¹ § 5615, *infra* pp. 7-8.

²² 20 Pa.C.S. § 5601.3(d).

²³ *Id.* § 5604 & 5608.1(b), *infra* pp. 5-7.

*Proposed Statutory Amendments*²⁴

AN ACT

Amending Title 20 (Decedents, Estates and Fiduciaries) of the Pennsylvania Consolidated Statutes, in powers of attorney, adding references to Adult Protective Services and providing for judicial relief.

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

Section 1. Section 5604(d) and (e) of Title 20 of the Pennsylvania Consolidated Statutes is amended to read:

§ 5604. Durable powers of attorney.

* * *

(d) Discovery of information and records regarding actions of agent.—

(1) If the agency acting pursuant to the act of November 6, 1987 (P.L.381, No.79), known as the Older Adults Protective Services Act, or October 7, 2010 (P.L.484, No.70), known as the Adult Protective Services Act, is denied access to records necessary for the completion of a proper investigation of a report or a client assessment and service plan or the delivery of needed services in order to prevent further abuse, neglect, exploitation or abandonment of the adult principal or older adult principal reported to be in need of protective services, the agency may petition the court of common pleas for an order requiring the appropriate access when either of the following conditions applies:

(i) the adult principal or older adult principal has provided written consent for confidential records to be disclosed and the agent denies access; or

(ii) the agency can demonstrate that the adult principal or older adult principal has denied or directed the agent to deny access to the records because of incompetence, coercion, extortion or justifiable fear of future abuse, neglect, exploitation or abandonment.

(2) This petition may be filed in the county wherein the agent resides or has his principal place of business or, if a nonresident, in the county wherein the adult principal or older adult principal resides. The court, after reasonable notice to the agent and to the adult principal or older adult principal, may conduct a hearing on the petition.

(3) Upon the failure of the agent to provide the requested information, the court may make and enforce such further orders.

²⁴ “Language intended to be taken out of an existing provision is enclosed in brackets and new language to be added is underscored.” 101 Pa. Code § 15.222.

(4) A determination to grant or deny an order, whether in whole or in part, shall not be considered a finding regarding the competence, capacity or impairment of the adult principal or older adult principal, nor shall the granting or denial of an order preclude the availability of other remedies involving protection of the person or estate of the adult principal or older adult principal or the rights and duties of the agent.

(e) Definitions.--As used in this section, the following words and phrases shall have the meanings given to them in this subsection:

"Abandonment." As that term is defined in the act of November 6, 1987 (P.L.381, No.79), known as the Older Adults Protective Services Act, or October 7, 2010 (P.L.484, No.70), known as the Adult Protective Services Act.

"Abuse." As that term is defined in the act of November 6, 1987 (P.L.381, No.79), known as the Older Adults Protective Services Act, or October 7, 2010 (P.L.484, No.70), known as the Adult Protective Services Act.

"Adult principal." A principal who is 18 years of age or older but less than 60 years of age.

"Agency." As that term is defined in the act of November 6, 1987 (P.L.381, No.79), known as the Older Adults Protective Services Act, except that in cities of the first class the term shall mean the Department of Aging, or October 7, 2010 (P.L.484, No.70), known as the Adult Protective Services Act.

"Exploitation." As that term is defined in the act of November 6, 1987 (P.L.381, No.79), known as the Older Adults Protective Services Act, or October 7, 2010 (P.L.484, No.70), known as the Adult Protective Services Act.

"Neglect." As that term is defined in the act of November 6, 1987 (P.L.381, No.79), known as the Older Adults Protective Services Act, or October 7, 2010 (P.L.484, No.70), known as the Adult Protective Services Act.

"Older adult principal." A principal who is 60 years of age or older.

Section 2. Section 5608.1(b) of Title 20 is amended to read:

§ 5608.1. Liability for refusal to accept power of attorney.

* * *

(b) Acceptance not required.--A person may not be required to accept a power of attorney if any of the following applies:

* * *

(7) The person makes a report to the local protective services agency under section 302 of the act of November 6, 1987 (P.L.381, No.79), known as the Older Adults Protective Services Act, or October 7, 2010 (P.L.484, No.70), known as the Adult Protective Services Act, stating a good faith belief that the principal may be subject to physical or financial abuse, neglect, exploitation or abandonment by the agent or someone acting for or with the agent.

(8) The person has actual knowledge that another person has made a report to the local protective services agency under section 302 of the Older Adults Protective Services Act or Adult Protective Services Act stating a good faith belief that the principal may be subject to physical or financial abuse, neglect, exploitation or abandonment by the agent or someone acting for or with the agent.

* * *

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

§ 5615. Judicial relief.

(a) Petitioner.--The following persons may petition a court to construe a power of attorney or review the agent's conduct, and grant appropriate relief:

(1) the principal or the agent;

(2) a guardian, conservator, or other fiduciary acting for the principal;

(3) a person authorized to make health-care decisions for the principal;

(4) the principal's spouse, parent, or descendant;

(5) an individual who could qualify as an intestate successor of the principal;

(6) a person named as a beneficiary:

(i) to receive any property, benefit, or contractual right on the principal's death;

or

(ii) of a trust created by or for the principal;

(7) a governmental agency having regulatory authority to protect the welfare of the principal;

(8) the principal's caregiver or another person that demonstrates sufficient interest in the principal's welfare; and

(9) a person asked to accept the power of attorney.

(b) Principal.--Upon motion by the principal, the court shall dismiss a petition filed under this section, unless the court finds that the principal lacks capacity to revoke the agent's authority or the power of attorney.

Comment

This section is from Uniform Power of Attorney Act, § 116 (2006), so that the uniform law comment applies under 1 Pa.C.S. §§ 1927 & 1939. The uniform law comment refers to § 114(h), which is § 5601.3(d). While Adult and Older Adult Protective Services agencies are specifically authorized to petition a court under § 5604(d), subsection (a)(7) applies to governmental agencies.

The primary purpose of this section is to protect vulnerable or incapacitated principals against financial abuse. Subsection (a) sets forth broad categories of persons who have standing to petition the court for construction of the power of attorney or review of the agent's conduct, including in the list a "person that demonstrates sufficient interest in the principal's welfare" (subsection (a)(8)). Allowing any person with sufficient interest to petition the court is the approach taken by the majority of states that have statutory standing provisions.

In addition to providing a means for detecting and redressing financial abuse by agents, this section protects the self-determination rights of principals. Subsection (b) mandates dismissal of a petition upon the principal's motion unless the court finds that the principal lacks the capacity to revoke the agent's authority or the power of attorney.

Contrasted with this section's breadth is § 5601.3(d), which narrowly limits the persons who can request an agent to account for transactions conducted on the principal's behalf. The rationale for narrowly restricting who may request an agent to account is the preservation of the principal's financial privacy. This section operates as a check-and-balance on the narrow scope of § 5601.3(d) and provides what, in many circumstances, may be the only means to detect and stop agent abuse of an incapacitated principal.

PROPOSED AMENDMENT TO 20 Pa.C.S. Ch. 76

This proposed amendment reflects existent Pennsylvania law stating the four ways a creditor can reach property subject to a power of appointment. It is offered to make the current statutory chapter on this topic a more complete codification of case law.

Proposed Statutory Amendment²⁵

AN ACT

Amending Title 20 (Decedents, Estates and Fiduciaries) of the Pennsylvania Consolidated Statutes, in powers of appointment, codifying creditors' rights in property.

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

Section 1. Chapter 76 of Title 20 of the Pennsylvania Consolidated Statutes is amended by adding a section to read:

§ 7607. Creditors' rights.

Property subject to a power of appointment shall not, by virtue of the power, be available to the creditors of the donee of the power, except to the extent:

(1) the donee expressly exercises a broad power of appointment in favor of his creditors or his estate's creditors;

(2) the creation of the power was connected with a fraudulent conveyance on those creditors;

(3) the power of appointment is broad and the donee is also the donor of the power;

or

(4) the power is broad and is presently exercisable by the donee; however, an unrestricted power to withdraw the greater of the amount specified in sections 2041(b)(2), 2503(b) or 2514(e) of the Internal Revenue Code of 1986 (Public Law 99-514, 26 U.S.C. §§ 2041(b)(2), 2503(b) or 2514(e)) or any lesser amount determined by reference to one or more of these provisions may not be treated as a presently exercisable broad power of appointment for purposes of this section.

²⁵ "Language intended to be taken out of an existing provision is enclosed in brackets and new language to be added is underscored." 101 Pa. Code § 15.222.

Comment

This section follows the long-standing and consistent Pennsylvania case law that property subject to a broad testamentary power of appointment (created by someone other than the donee) is exempt from claims of the donee's creditors. About half the states agree with Pennsylvania. The Restatement (Third) of Property, Wills and other Donative Transfers and the Uniform Powers of Appointment Act differ from Pennsylvania on this point.

Paragraph (1) states the obvious.

Paragraph (2) is consistent with the Restatement (Third) of Property, Wills and other Donative Transfers, § 22.1, comment b, and § 22.3 (2010), and the Uniform Powers of Appointment Act, §§ 501, 504 (2013), and codifies existing Pennsylvania law. *See, e.g., McCreary's Estate v. Pitts*, 47 A.2d 235, 238 (Pa. 1946).

Paragraph (3) is consistent with the Restatement and Uniform Act and codifies longstanding Pennsylvania case law. *See, e.g., Mackason's Appeal*, 42 Pa. 330, 338 (1862); *Nolan v. Nolan*, 67 A. 52 (Pa. 1907).

Paragraph (4) follows the Restatement (Third) of Property, Wills and other Donative Transfers, § 22.3(a) (2010), and the Uniform Powers of Appointment Act, § 502(a)(1) (2013), which give creditors access to property subject to an *inter vivos* broad power. Paragraph (4) differs from those provisions in not limiting the creditors' rights in appointive property to any shortfall in the donee's own property. The proviso exempting 5 and 5 powers and Crummey powers is consistent with Pennsylvania's definition of a power of withdrawal, *see* 20 Pa.C.S. §§ 7703 and 7748, and with the Uniform Powers of Appointment Act, § 503.

Since this section codifies and clarifies existing law, no retroactivity issue is involved.

Illustrations

- (1) The donee of a broad power of appointment directs in her will that all her debts be paid. She makes no mention of her power. The power is not expressly exercised in favor of her creditors.**

- (2) Donor creates a trust to benefit donee and gives the donee a power to withdraw the entire trust principal exercisable after attaining age 30. The entire principal is available to the donee's creditors after the donee attains age 30.**

Section 2. This act shall take effect immediately upon enactment and apply to all powers of appointment created before, on or after the effective date.

PROPOSED AMENDMENTS TO 20 Pa.C.S. Chs. 33 & 77

These proposed amendments would authorize a settlor and testator to split the responsibilities of co-fiduciaries so that some could have powers the others do not. Those co-fiduciaries who do not have those powers would be exonerated from liability for the exercise or nonexercise of those powers by the co-fiduciaries who are assigned those powers. As such, these amendments would apply to personal representatives and trustees.

Many states, including Delaware, have adopted statutes that enable “directed trusts.” The following four situations illustrate how the concept most often arises in practice:

John and Mary have successfully relied upon Brother’s investment advice. Nearing retirement, Brother is not willing to serve as a trustee for their children after both John and Mary have died. However, Brother is willing to serve as the investment manager for trusts of which the children will be current beneficiaries. John and Mary are prepared to appoint Bank as trustee and to empower Brother to make all investment decisions for the trusts.

Bank is prepared to act as trustee of a trust that will hold a closely-held business interest for which Aunt Mary has particular expertise and the family’s confidence. Family is prepared to appoint Bank as trustee and to give authority to Aunt Mary with respect to the business interest. Bank wants to understand its liability in this relationship.

Henry and Agnes have a Troubled Child. Troubled Child has always been close to Uncle John, who has a knack for encouraging Troubled Child to pursue wholesome conduct. Uncle John is not prepared to be a co-trustee and be bothered with the bookkeeping, tax reporting and investment management responsibilities associated with a trust for Troubled Child. He is willing to participate in decisions as to when Troubled Child should receive money from the trust. Henry and Agnes would like to appoint Bank as trustee and to empower Uncle John to veto Bank’s proposals to distribute trust assets to or for Troubled Child.

Mercurial Entrepreneur blisters at the notion that she may not change an irrevocable trust she has just established for the purpose of acquiring substantial insurance on her life and would like to empower Sister, with whom she has always been close, to change governance, dispositive and administrative provisions. She is describing the role of a “trust protector.”

The issues raised by these fact patterns are:

- 1) Can trustees without express authority given by the trust instrument delegate certain duties, such as investment responsibility, among themselves or hire third parties, such as investment advisors, to perform certain of the trustees' duties?
- 2) Can a trust instrument prescribe different duties for different trustees and confine liability for violating a particular duty to the trustee charged with that duty?
- 3) How secure is an excluded trustee in his freedom from liability for actions taken by the other trustees?
- 4) Can a trust instrument appoint a person who is not a trustee to have responsibility for certain trustee functions, and can the trust instrument divide liability between the trustees and that person?

Pennsylvania law currently addresses these issues in 20 Pa.C.S. §§ 7763, 7777 and 7778. The key section, § 7778, is not sufficiently detailed, particularly regarding the liability implications of splitting a trustee's traditional duties into pieces, to be especially helpful to practitioners or trust companies. For that reason, it is unsatisfactory.

A subcommittee presented a proposal to the Advisory Committee in 2016 that would replace § 7778 with a full set of provisions describing directed trusts. The full committee postponed a decision pending a review of the anticipated Uniform Directed Trust Act, which was approved and recommended for enactment in all the states in 2017. The principal difference between the Uniform Act's approach and the subcommittee's approach taken in 2016 is that the Uniform Act is conceptual, which requires a thorough understanding of trust law to be sure what the Uniform Act means, whereas this proposal elaborates upon the roles of a trust director for investments and a trust protector and offers practitioners and trustees detailed default provisions, making it more user-friendly. From a trustee's standpoint, mentioning in a statute detailed rules regarding the issues that most often arise in a directed trust relationship gives comfort the Uniform Act would not.

Using other words and a different level of organization, these proposed amendments address all of the concepts of the Uniform Act.

Expanded § 7778 (relating to powers to direct) is the key provision. It would provide:

- in subsection (e), a general statement of the trust direction concept;
- in subsection (f), what a trust director for investments may do absent contrary provisions in the trust instrument;

- in subsection (g), for the role of a trust director for distributions. In the Advisory Committee's judgment, having a trust director for distributions is rare and the situations are unique. For that reason, we have not included default provisions and have placed the burden upon the scrivener to define that function; and
- in subsection (h), default provisions for a trust protector that the trust instrument may eliminate or modify.

Subsection (i) incorporates the same disabling provisions, most of them tax-sensitive, that apply to trustees. This subject is not broadly addressed in the Uniform Act.

Subsections (j) and (k) describe the liability implications of trust direction upon the trust director and the trustee, respectively. These are more elaborate than the corresponding provisions of the Uniform Act. However, the Advisory Committee liked the Uniform Act's concept that if a trust director or trustee goes beyond his role on one occasion, such as by engaging in a discussion with the other about subjects that are not part of the trust director's role, neither party assumes the duty to do so on later occasions.

The remaining subsections of amended § 7778 specifically address concepts the Uniform Act would resolve by reference to the corresponding provisions of the Uniform Trust Code, Pennsylvania's Uniform Trust Act. These concepts would become self-standing by describing in subsection (l) how a trustee director accepts or rejects the role; in subsection (m), how multiple trust directors make a decision; in subsection (n), whether and how a trust director may resign; in subsection (o), how a trust director may be removed; and in subsection (p), the entitlement of a trust director to reasonable compensation and reimbursement of expenses.

Like the Uniform Act, this proposal, in subsection (q), subjects a trust director of a trust having its *situs* in Pennsylvania to the jurisdiction of the Pennsylvania courts and goes beyond the Uniform Act by doing so "notwithstanding any contrary provision in the trust instrument or in any agreement apart from the trust instrument," such as a boilerplate third party agreement that would otherwise send the parties to a different jurisdiction or to binding arbitration.

We address in subsection (r) a subject the Uniform Act does not, by prohibiting delegation between co-trustees of a role the settlor has given to a trust director.

The notice required by § 7780.3 would include the names, addresses and telephone numbers of all trust directors so that a trust's beneficiaries are aware of the directed relationship.

*Proposed Statutory Amendments*²⁶

AN ACT

Amending Title 20 (Decedents, Estates and Fiduciaries) of the Pennsylvania Consolidated Statutes, in administration and personal representations and in trusts, providing that wills and trusts may assign different duties and liabilities to different fiduciaries, and providing default rules.

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

Section 1. Chapter 33 of Title 20 of the Pennsylvania Consolidated Statutes is amended by adding a section to read:

§ 3327.1. Different duties and liabilities of personal representatives.

A will may assign different duties and different standards of care to different personal representatives, and may limit the liability of a personal representative who acts upon the direction of another personal representative to whom a duty is exclusively given by the will or who complies with the veto of another personal representative to whom a power to veto is exclusively given by the will. In such a situation, the rules of section 7763(i) (relating to cotrustees — UTC 703) shall apply.

Section 2. Section 7763(g) of Title 20 is amended and the section is amended by adding a subsection to read:

§ 7763. Cotrustees – UTC 703.

* * *

(g) Reasonable care.—Except as provided in subsection (i), each [Each] trustee shall exercise reasonable care to:

- (1) prevent a cotrustee from committing a breach of trust involving fraud or self-dealing; and
- (2) compel a cotrustee to redress a breach of trust involving fraud or self-dealing.

* * *

(i) Different duties and standards of care among cotrustees.--A trust instrument may assign different duties and standards of care to different trustees, and may limit the liability of a trustee who acts upon the direction of another trustee to whom a duty is exclusively given by the trust instrument or who complies with the veto of another trustee to whom a power to veto is exclusively

²⁶ “Language intended to be taken out of an existing provision is enclosed in brackets and new language to be added is underscored.” 101 Pa. Code § 15.222.

given by the trust instrument. The duties and powers assigned may be those of a trust director described in section 7778 (relating to powers to direct). Where a trust instrument confers upon a cotrustee the power to direct or to veto certain actions of the trustees and excludes another trustee from participating in the exercise of such power, the following rules apply in respect of such actions unless the trust instrument provides otherwise:

(1) The excluded trustee shall act in accordance with the cotrustee's written direction or written veto and is not liable, individually or as a fiduciary, for any loss resulting directly or indirectly from compliance with that direction or veto or from the cotrustee's failure to respond to a recommendation by the excluded trustee that the cotrustee has the power to veto.

(2) The excluded trustee has no duty, beyond seeking the cotrustee's direction or veto, to monitor the conduct of the cotrustee, to provide advice to or consult with the cotrustee, or to inquire, investigate, or evaluate the cotrustee's decisions or lack of decisions. If the excluded trustee takes any such action beyond his duty, he is not liable for failure to do so in the future.

(3) The excluded trustee is not required to give notice to any beneficiary of any action taken or not taken by the cotrustee, whether or not the excluded trustee agrees with the action. If the excluded trustee gives such notice, he is not liable for failure to do so in the future. An excluded trustee is not liable for taking administrative actions to implement the cotrustee's actions or for confirming that those actions have been taken.

(4) The cotrustee who holds the power to direct or to veto certain actions with respect to the trust is liable to the beneficiaries with respect to the exercise of or failure to exercise the power to the same extent as if the excluded trustee were not in office, and has the exclusive obligation to account to the beneficiaries and defend any action brought by the beneficiaries with respect to the exercise of or failure to exercise the power.

Section 3. Section 7778(b), (c) and (d) of Title 20 is amended and the section is amended by adding subsections to read:

§ 7778. Powers to direct [- UTC 808].

(a) Direction of settlor.—While a trust is revocable, the trustee may follow a written direction of the settlor that is contrary to the trust instrument.

[(b) Compliance with power.—If a trust instrument confers upon a person other than the settlor of a revocable trust power to direct certain actions of the trustee, the trustee shall act in accordance with a written exercise of the power unless the attempted exercise is manifestly contrary to the trust instrument or the trustee knows the attempted exercise would constitute a serious breach of a fiduciary duty that the person holding the power owes to the beneficiaries of the trust.

(c) Modification or termination of trust.—A trust instrument may confer upon a trustee or other person a power to modify or terminate the trust.

(d) Fiduciary relationship.—A person other than a beneficiary who holds a power to direct certain actions of a trustee is presumptively a fiduciary who, as such, is required to act in good faith with regard to the purposes of the trust and the interests of the beneficiaries. The holder of a power to direct is liable for any loss that results from breach of the holder's fiduciary duty.]

(e) Trust director, in general.—A trust instrument may appoint a trust director to make or veto investment, distribution or other decisions affecting the trust or to serve as a trust protector. A trust director may but need not be a trustee of the trust. The trust instrument may appoint more than one person in any such capacity. Trust directors are fiduciaries within the scope of their appointment.

(f) Trust director for investments.—Unless the trust instrument provides otherwise:

(1) A trust director for investments shall have the power to:

(i) direct the trustee, or to veto the trustee's recommendations, as to the investment of the trust assets;

(ii) direct the trustee, or to veto the trustee's recommendations, as to the voting of proxies and the exercise of other voting powers associated with the trust's assets;

(iii) select, and to determine reasonable compensation of, one or more investment advisors or managers, even if a trustee, and to authorize or engage them to perform any of the investment powers of the trust director;

(iv) determine the frequency and methodology for valuing trust assets; and

(v) exercise, or to veto the trustee's exercise of, any other investment power the trustee has or might have.

(2) The provisions of Chapter 72 (relating to prudent investor rule) shall apply to a trust director for investments to the same extent they would apply to the trustee.

(g) Trust director for distributions.—A trust instrument may appoint a trust director for distributions to direct the trustee, or to veto the trustee's recommendations, regarding whether, how and to whom to make discretionary distributions from the trust and the amount of such distributions. If the trust instrument does not specify the powers of the trust director for distributions, the office of trust director for distributions shall be deemed vacant.

(h) Trust protector.—

(1) Subject to paragraph (2), a trust instrument may appoint a trust director as trust protector to exercise such powers as the trust instrument may specify, which may include, among others, the powers to:

(i) amend the trust instrument to achieve favorable tax status or to respond to changes in tax laws, apply changes in the rule against perpetuities to the trust, or improve the trust's administration;

(ii) change the trust's situs, the trust's governing law, or both;

(iii) remove, appoint or replace an investment advisor or manager, or a member of an investment or distribution committee, and prescribe a plan of succession for future holders of any such office;

(iv) remove, appoint or replace a trustee, appoint one or more successor trustees, and prescribe a plan of succession for future trustees;

(v) remove, appoint or replace a trust director and specify his powers (which appointment and specification shall be deemed made by the trust instrument);

(vi) appoint one or more successor trust protectors, and prescribe a plan of succession for future trust protectors;

(vii) modify or eliminate the interests of any beneficiaries of the trust; however the trust protector may not thereby increase the trust protector's beneficial interest, if any, in the trust;

(viii) grant a power of appointment to one or more beneficiaries of the trust on such terms as the trust protector may specify, or modify the terms of or terminate a power of appointment granted to a beneficiary by the trust instrument; however by doing so, the trust protector may not establish as an object of the power:

(A) any individual or class of individuals who were not beneficiaries of the trust; or

(B) the trust protector, his estate, his creditors, or the creditors of his estate;

and

(ix) terminate the trust and direct the trustee how to distribute the trust property; however the trust protector may not thereby increase his beneficial interest, if any, in the trust.

(2) If the trust instrument grants the same power to both a trust protector and a trust director who is not a trust protector, the trust protector shall control the exercise of the power. The trust protector shall notify Office of Attorney General of the exercise of any

of the foregoing powers if the trustee would be required to give such notice if the trustee exercised the same power.

(i) Trustee disabling provisions applicable to trust director.—Unless the trust instrument provides otherwise, the restrictions set forth in Chapter 75 (relating to limitations on exercise of trustee powers and powers of beneficiaries to appoint trustees) shall apply to a trust director as if the trust director were a trustee.

(j) Duty and liability of trust director.—

(1) In exercising or not exercising the authority granted in this section or by the trust instrument, a trust director is subject to the same fiduciary duties and liabilities that apply to a trustee, unless the trust instrument provides otherwise; however the trust instrument may not exonerate a trust director from liability to an extent greater than the trust instrument might exonerate a trustee. A donee of a power of appointment is not a fiduciary with respect to his exercise or non-exercise of the power of appointment, even if the donee is also a trust director. A trust director has no duty to:

(i) monitor the trustee’s conduct;

(ii) provide advice to or consult with the trustee on matters outside the trust director’s role; or

(iii) give notice to any beneficiary of any action taken or not taken by a trustee, whether or not the trust director agrees with the action.

(2) If a trust director takes any such action beyond his duty, he is not liable for failure to do so in the future.

(k) Duty and liability of trustee.—When a trust instrument confers upon a trust director the power to make or to veto certain decisions regarding the trust, the following rules apply in relation to the matters the trust director may decide or veto unless the trust instrument provides otherwise:

(1) The trustee shall act in accordance with the trust director’s written direction or written veto and is not liable, individually or as a fiduciary, for any loss resulting directly or indirectly from compliance with that direction or veto or from the trust director’s failure to respond to a recommendation by the trustee that the trust director has the power to veto.

(2) If the trust instrument provides that a trustee shall act only with the consent of a trust director, then the trustee is not liable, individually or as a fiduciary, for any loss resulting directly or indirectly from any action taken or not taken as a result of the trust director’s failure to provide such consent.

(3) The trustee has no duty, beyond seeking the trust director’s direction or veto, to monitor the conduct of the trust director, to provide advice to or consult with the trust

director, or to inquire, investigate, or evaluate the trust director's decisions or lack of decisions. If a trust director takes any such action beyond his duty, he is not liable for failure to do so in the future.

(4) The trustee is not required to give notice to any beneficiary of any action taken or not taken by a trust director, whether or not the trustee agrees with the action. If a trust director gives such notice, he is not liable for failure to do so in the future. The trustee is not liable for taking administrative actions to implement the trust director's actions or for confirming that those actions have been taken.

(l) Acceptance and rejection of trust director's role.—

(1) A person designated as a trust director accepts the appointment to serve in that capacity:

(i) by substantially complying with a method of acceptance specified in the trust instrument; or

(ii) if the trust instrument does not specify a method for acceptance, or the method provided in the trust instrument is not expressly exclusive, by exercising powers or performing duties as a trust director or otherwise indicating acceptance of the appointment to serve as a trust director.

(2) A person designated as a trust director may reject the appointment to serve in that capacity. A trustee may request in writing that a person designated as a trust director accept that role in writing. If requested to accept that role in writing, the person designated as a trust director who does not accept in writing an appointment within 60 days after receipt of the trustee's written request shall be considered to have rejected the appointment to serve as a trust director. If the trust director does not accept his appointment or there is a vacancy in the position, the powers, duties and responsibilities of the trustee shall be determined as if the office of the trust director had not been created, unless the trust instrument provides otherwise.

(m) Action by multiple trust directors who share a role.—When more than one trust director is authorized to act on a matter entrusted to them and they are unable to reach a unanimous decision on the matter, they may act by majority vote, unless the trust instrument provides otherwise.

(n) Resignation by trust director.—A trust director may resign:

(1) if allowed to do so by the trust instrument;

(2) upon at least 30 days' advance notice in writing to the qualified beneficiaries of the trust, the settlor if sui juris, and all trustees, unless the trust instrument provides otherwise; or

(3) with court approval.

(o) Removal of trust director.—The settlor, a trustee or a beneficiary of an irrevocable trust may petition the court to remove a trust director, or a trust director may be removed by the court on its own initiative, for any of the reasons for which the court may remove a trustee. Pending a final decision whether to remove a trust director, or in lieu of or in addition to removing a trust director, the court may order appropriate relief to protect the trust or the interests of the beneficiaries.

(p) Compensation and reimbursement of trust director.—A trust director is entitled to reasonable compensation and reimbursement of expenses on the terms provided in the trust instrument or, in the absence of such terms, as the law provides for trustees.

(q) Jurisdiction over trust director.—By accepting an appointment to serve as a trust director of a trust having its situs in this Commonwealth, the trust director submits to the jurisdiction of the courts of this Commonwealth to the same extent as the trustee, notwithstanding any contrary provision in the trust instrument or in any agreement apart from the trust instrument. The trust director may be made a party to any action or proceeding involving issues relating to a decision and action or inaction by the trust director within the scope of the trust director’s authority.

(r) Trustee may not delegate trust director’s role.—A trustee may not delegate a duty or power under section 7777 (relating to delegation by a trustee) that the trust instrument gives to a trust director.

Comment

Subsection (e) is the core concept of § 6 of the Uniform Directed Trust Act, approved and recommended for enactment in all the states by the National Conference of Commissioners on Uniform State Laws in 2017. Subsection (e) recognizes that a trust director’s role might be to direct an action or to veto a proposal by the trustee or another trust director with which the trust director disagrees.

Differing from the approach of the Uniform Directed Trust Act, subsections (f), (g) and (h) list and elaborate upon the three applications of the directed trust concept most frequently encountered in practice.

Subsections (j) and (k) blend the concepts expressed in §§ 8, 9 and 11 of the Uniform Act.

Section 16 of the Uniform Directed Trust Act would address each of the concepts in subsections (l) through (p) by referring to the corresponding provision of the Uniform Trust

Code, known in Pennsylvania as the Uniform Trust Act. The approach here eliminates the need to do so and elaborates upon how a trust director's role may be accepted or rejected.

Subsection (q) addresses and elaborates upon the concepts set forth in § 15 of the Uniform Directed Trust Act.

Subsection (r) precludes the delegation between co-trustees of a function assigned to a trust director.

Section 4. Section 7780.3(i) of Title 20 is amended to read:

§ 7780.3. Duty to inform and report.

* * *

(i) Contents of notice.—Except as provided in subsection (g), any notice under this section shall be written and convey the following information:

- (1) The fact of the trust's existence.
- (2) The identity of the settlor.
- (3) The [trustee's] name, address and telephone number of each trustee.
- (4) The recipient's right to receive [upon request] a copy of the trust instrument.
- (5) Each current beneficiary's right to receive, at least annually, upon request, periodic written financial reports concerning the trust.
- (6) The name, address and telephone number of each trust director.

* * *

SENATE BILL No. 884 (Sess. of 2017)

The advisory committee published reports in 2011²⁷ and 2012,²⁸ upon which legislation²⁹ that has been introduced to amend 20 Pa.C.S. ch. 55 (relating to incapacitated persons) is based. Relevant to this proposal, the advisory committee proposed repealing part of current law to replace it with a new statutory framework that eliminates cross-references to other provisions in 20 Pa.C.S. (relating to decedents, estates and fiduciaries), clarifies and modernizes the statutory language, specifies which guardianship duties require further court approval and which do not, and relocates several provisions that do not actually concern guardianship duties.³⁰ This is because several cross-referenced sections in current law³¹ are inappropriate, confusing or difficult to understand in the context of the powers, duties and liabilities of a guardian of the estate of an incapacitated person.³²

Based on a cross-referenced section in current law,³³ the proposed legislation originally would enable a guardian of the estate to compromise or settle any claim by or against the estate, through litigation or otherwise, without court approval. However, the guardian could seek court approval of the compromise or settlement, subject to specified conditions and provisions regarding when the court could enter a decree authorizing the compromise or settlement, the payment of counsel fees and other expenses, the filing of the court order, and when the guardian could receive the proceeds of the compromise or settlement.

In 2016, Advisory Council on Elder Justice in the Courts recommended amending this particular provision in Senate Bill No. 568 (Sess. of 2015). At its full advisory committee conferences in 2016 and 2017, the advisory committee supported this recommendation from Advisory Council on Elder Justice in the Courts. Specifically, this amendment would require approval of compromises and settlements of claims by or against an estate *via* a guardian to be

²⁷ Pa. J. State Gov't Comm'n, Powers of Att'y & Health Care Decision-Making: Proposed Amends. to the Probate, Estates & Fiduciaries Code, <http://jsg.legis.state.pa.us/resources/documents/ftp/publications/2011-201-DEL%20-%20Report%206-13-11.pdf> (2011).

²⁸ *Id.*, Guardianship Law: Proposed Amends. to the Probate, Estates & Fiduciaries Code, <http://jsg.legis.state.pa.us/resources/documents/ftp/publications/2012-284-guardianship%20report%2010.4.12.pdf> (2012).

²⁹ Pa. Senate Bills No.: 1614 (Sess. of 2012), 117 (Sess. of 2013), 568 (Sess. of 2015) & 884 (Sess. of 2017). Senate Bill No. 1614 was referred to the Senate comm. on the judiciary, where it remained. After 1st consideration by the Senate, Senate Bill No. 117 was re-referred to the Senate comm. on appropriations, where it remained. By a vote of 47-0, the Senate passed Senate Bill No. 568, after which, it was referred to the House comm. on the judiciary, where it remained. Senate Bill No. 884 was referred to the Senate comm. on the judiciary and remains there at the time of this publication.

³⁰ Pa. J. State Gov't Comm'n, *supra* note 28, at 8.

³¹ 20 Pa.C.S. § 5521(b).

³² Pa. J. State Gov't Comm'n, *supra* note 28, at 62.

³³ 20 Pa.C.S. §§ 5521(b), 3323.

approved by the orphans' court division that has jurisdiction of the guardianship. Similarly, counsel fees and other expenses of the compromise or settlement would require the same approval. This approval would be mandated regardless whether litigation is pending and is believed to reflect current practice (at least for personal injury claims and settlements). Civil litigation involving guardians largely involves litigation with a long-term care facility over its fees, which should be subject to orphans' court approval if there were to be some compromise or settlement. In certain cases this might impose an undue cost on the incapacitated person's estate for small amounts, but it is probably better to draw the line requiring approval in all cases rather than whether a suit is pending and it harder to draw a line to carve out small claims.

As such, the advisory committee supports an amendment to Senate Bill No. 884 (Sess. of 2017) to delete proposed § 5521(b.13)³⁴ that would authorize but not require judicial approval of compromises and settlements by or against an estate *via* a guardian while moving this same provision (albeit slightly reworded) to proposed § 5521(b.2)³⁵ to authorize these compromises and settlements only with judicial approval from the orphans' court division having jurisdiction of the guardianship.

***Proposed amendment for Senate Bill No. 884 (Sess. of 2017)³⁶
moving proposed § 5521(b.13) to subsection § (b.2)
& rewording it as paragraph (4) reading:³⁷***

§ 5521. Provisions concerning powers, duties and liabilities.

* * *

(b.2) Powers of guardian of the estate with further court approval.--A guardian of the estate of an incapacitated person may have the following powers only with further court authorization or confirmation:

* * *

(4) A guardian of the estate may compromise or settle any claim by or against the estate, through litigation or otherwise. The guardian shall seek approval of the orphans' court division having jurisdiction of the guardianship of any such compromise or settlement, subject to the following:

(i) The court may enter a decree authorizing the compromise or settlement to be made:

³⁴ If done on Printer's No. 1147, this would strike lines 23-30 on p. 35 & lines 1-29 on p. 36.

³⁵ If done on Printer's No. 1147, this would insert a new paragraph (4) between lines between lines 7 & 8 on p. 31.

³⁶ Printer's No. 1147.

³⁷ "Language intended to be taken out of an existing provision is enclosed in brackets and new language to be added is underscored" 101 Pa. Code § 15.222.

(A) On petition by the guardian of the estate or any party in interest setting forth all the facts and circumstances.

(B) After notice as the court directs.

(C) Aided if necessary by the report of a master.

(ii) For a compromise or settlement of an action in which damages are sought on behalf of the estate, the court that has jurisdiction and in which the action is pending may approve the compromise or settlement, including an agreement for the payment of counsel fees and other proper expenses incident to the action, upon:

(A) oral motion by plaintiff's counsel of record in the action; or

(B) petition by the guardian of the estate.

(iii) The order of the court approving the compromise or settlement or the agreement for the payment of counsel fees and other expenses shall be subject to approval of the orphans' court division having jurisdiction of the guardianship.

(iv) The guardian of the estate shall file a copy of the order of the court approving the compromise or settlement with the clerk of the court having jurisdiction of the estate. When the guardian of the estate has been required to give bond, the guardian may not receive the proceeds of the compromise or settlement until:

(A) the court of the county having jurisdiction of the estate has made an order excusing the guardian from entering additional security; or

(B) the guardian has entered the additional security that is required by the court of the county having jurisdiction of the estate.

PROPOSED AMENDMENTS TO 20 Pa.C.S. § 7504(c)(2)

There is a rather large glitch in the effective date provision in 20 Pa.C.S. § 7504(c)(2) (relating to certain trustee powers not exercisable).³⁸ A literal reading of that provision would make the statute inapplicable to the current trustee/beneficiaries of trusts in existence before March 21, 1999, if the current trustees became successor trustees after that date. This was never the intention, but the provision could be interpreted that way.

Section 7504's general rule operates to preclude a trustee from exercising powers conferred by a governing instrument upon the trustee in his or her capacity as such where the powers would otherwise confer a general power of appointment. An exception is carved out in § 7504(c)(2) if no estate inclusion issue would have existed "if the trustee had died on March 21, 1999". This reference to "the trustee" should mean the trustee in office from time to time and when a question arises (rather than being limited to an individual who happened to hold the position of trustee on March 21, 1999). It is not clear how a current trustee who succeeded to the position of trustee after March 21, 1999, and who has a current estate inclusion issue would not be excepted out of the protection of the statute. A literal reading of § 7504(c)(2) would appear to prevent the statute from disabling precisely the type of beneficiary-held power in a pre-March 21, 1999-trust that was intended to be disabled by the statute because it requires that the estate inclusion issue would have existed "if the trustee had died on March 21, 1999".

It would seem to make more sense to read the qualification of trusts within the protection of the statute as those for whom there would have been an estate inclusion issue "if the trustee had died without the benefit of the statute having been enacted" or some similar language rather than the current wording of the statute. It is hard to imagine why the statute should not benefit current successor trustees under older documents who simply were not the individuals who occupied the office of trustee on the date of enactment. Unfortunately, there is no legislative history to aid in the interpretation of the statute, and the literal reading is problematic.³⁹

³⁸ This provision was formerly 20 Pa.C.S. § 7503(b)(5) (relating to application of ch.) and was relocated by the act of July 7, 2006 (P.L.625, No.98), §§ 6, 7. This paragraph was moved to another section because it doesn't apply to the entire ch.. 20 Pa.C.S. § 7504, Pa. J. State Gov't Comm'n Comment (2005).

³⁹ This provision was originally enacted (along w/the rest of ch. 75) by the act of Dec. 21, 1998 (P.L.1067, No.141), § 2. This original legislation was not reviewed by the advisory committee prior to its enactment.

*Proposed Statutory Amendments*⁴⁰

AN ACT

Amending Title 20 (Decedents, Estates and Fiduciaries) of the Pennsylvania Consolidated Statutes further providing for an exception to certain trustee powers not exercisable.

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

Section 1. Section 7504(c)(c) of Title 20 of the Pennsylvania Consolidated Statutes is amended to read:

§ 7504. Certain trustee powers not exercisable.

* * *

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

* * *

(2) A trust created under a governing instrument executed on or before March 21, 1999, if no part of the principal of the trust would have been included in the gross estate of the trustee for Federal estate tax purposes if the trustee had died [on March 21, 1999,] without the benefit of this section having been enacted, without having exercised the power under the governing instrument to make discretionary distributions of principal or income to or for the benefit of the trustee, the trustee's estate or the creditors of either.

⁴⁰ "Language intended to be taken out of an existing provision is enclosed in brackets and new language to be added is underscored." 101 Pa. Code § 15.222.