

***PRACTICE
AND PROCEDURE
BEFORE THE
ORPHANS' COURT
DIVISION
OF THE COURT
OF COMMON PLEAS
OF
PHILADELPHIA COUNTY***

PREFACE

The Rules and Practice Committee of the Probate and Trust Law Section of the Philadelphia Bar Association offers this revised and expanded edition of “Practice and Procedure in the Orphans’ Court Division in Philadelphia County,” first prepared as a pamphlet in 1950 by John Blessing who had served for 23 years as a law clerk to Judges of the Philadelphia Orphans’ Court. Mr. Blessing later worked as a Trust Officer for First Pennsylvania Bank, one of the predecessors to Wachovia Wealth Management which has acted as the sponsor of the *Philadelphia Estate Practitioner Handbook* in both its print edition and on the internet at peph.com. While in short supply, having last been published in 1981, this volume is affectionately known by probate lawyers as “The Red Book,” the last component of the trilogy which comprises the *Philadelphia Estate Practitioner Handbook*.

As was the intent of the original publication, the goal of this volume is to acquaint the newly admitted lawyer or a seasoned practitioner with limited Orphans’ Court experience to the unique procedures followed in the handling of estate, trust and guardianship matters. Material involving practice in the Office of the Register of Wills was earlier published as the Register of Wills Manual or “The Blue Book” and therefore no longer appears as part of this treatise. The role of the Orphans’ Court has broadened to include a more direct role in charitable and non-profit corporation matters so the volume has been expanded to cover these topics.

The Red Book was revised and expanded by the following members of the Section to whom great appreciation is owed: Joan Agran, Gregory G. Alexander, Lawrence Barth, Thomas A. Bell, Wendy Fein Cooper, Kim D. Fetrow, George S. Forde, Jr., Daniel L. Glennon, Daphne Goldman, Adam T. Gusdorff, Leanna Johannes, Steven R. Klammer, Bernice J. Koplin, Sue D. Lomas, Marie K. Parrott, Sanford L. Pfeffer, Arthur R. G. Solmssen, Jr., Nina Booz Stryker and Gordon M. Wase.

We are deeply grateful to Eugene H. Gillin, who has acted as Editor-in-Chief of the entire *Philadelphia Estate Practitioner Handbook* and edited this volume along with the undersigned. Gene also spearheaded the effort to introduce PEPH to distribution via the internet where it has enjoyed overwhelming success.

We again acknowledge with sincere thanks our sponsor, Wachovia Wealth Management, without whose support this project would not have been possible.

Margaret Gallagher Thompson, Chair
Rules and Practice Committee
Probate and Trust Law Section
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ABBREVIATION AND CITATION FORMS

| <i>Abbreviation / Citation</i> | <i>Full Title</i> |
|--------------------------------|--|
| PEF Code | Probate, Estates and Fiduciaries Code, 20 Pa. C.S.A. §101 <i>et. seq.</i> |
| Remick | Pennsylvania Orphans' Court Practice, Volumes 1-6 |
| Hunter | Pennsylvania Orphans' Court Commonplace Book (2nd ed.), Volumes 1-6A |
| Orphans' Court | Orphans' Court Division of the Court of Common Pleas of Philadelphia |
| Pa.O.C. Rule | Pennsylvania Supreme Court Orphans' Court Rule |
| Phila.O.C. Rule | Philadelphia Orphans' Court Division Rule |
| Pa.R.C.P. | Pennsylvania Rules of Civil Procedure |
| PEPH | <i>Philadelphia Estate Practitioner Handbook</i> , Philadelphia Bar Association, Probate and Trust Law Section in hard copy or online at www.peph.com |

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CHAPTER 1

JURISDICTION OF THE COURT

A. Status Before 1969 Constitutional Amendment

The 1874 Pennsylvania Constitution required every county with a population of over 150,000 to have a separate Orphans' Court. Other counties could establish a separate Orphans' Court at their discretion. In counties without a separate Orphans' Court, judges of the Court of Common Pleas heard Orphans' Court matters.

B. The Effect of the 1969 Amendment to the Pennsylvania Constitution

A Constitutional amendment, effective January 1, 1969, abolished separate Orphans' Courts throughout the Commonwealth. In judicial districts with separate Orphans' Courts, the Orphans' Court became a Division of the Court of Common Pleas. In judicial districts without separate Orphans' Courts, an Orphans' Court Division composed of the judge or judges of the Court of Common Pleas of the judicial district exercised Orphans' Court jurisdiction.

C. General Powers

The Orphans' Court Division of the Court of Common Pleas is a court of limited jurisdiction, exercising only those powers expressly granted to the Court by statute or by necessary implication. *See Main's Estate*, 322 Pa. 243 (1936). Further, the Orphans' Court is a court of equity with all legal and equitable powers required for, or incidental to, the exercise of its jurisdiction, including the power to grant relief and enforce its decrees. *See* PEF Code §701, *McDavitt Estate*, 379 Pa. Super. 610, 550 A.2d 1015 (1988).

A party in interest is entitled to a jury trial in the Orphans' Court when a substantial factual dispute arises concerning a decedent's title to property. Further, any person against whom guardianship proceedings have been instituted is entitled to a jury trial on the issue of capacity. A jury verdict in such cases has the same effect as a jury verdict in an action at law. In all other matters, including will contests, the Orphans' Court may grant a jury trial demand in its discretion. A jury verdict in such cases is advisory only. The right to a jury trial is waived if not timely filed. *See* PEF Code §777.

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D. Mandatory and Exclusive Jurisdiction

PEF Code §711 sets forth those matters over which the Orphans' Court has mandatory and exclusive jurisdiction. These matters are:

1. Administration and distribution of decedents' estates, and control of the decedent's burial;
2. Administration and distribution of testamentary trusts;
3. Administration and distribution of *inter vivos* trusts;
4. Administration and distribution of minors' estates;
5. Custodianships of the property of minors;
6. Guardians of persons of minors;
7. Administration and distribution of incapacitated persons' estates;
8. Absentees' and presumed decedents' estates;
9. Appointment, control, and discharge of fiduciaries of estates and trusts (other than the appointment of the personal representative of a decedent's estate);
10. Specific performance of contracts made by a decedent to purchase or sell real property;
11. Proceedings for the enforcement of legacies, annuities, and charges placed on real or personal property by will, *inter vivos* trust, or Orphans' Court decree;
12. Interpretation of fiduciary administrative powers pertaining to real estate;
13. Disposition of title to real estate acquired by descent or will when the property is held in an estate or trust;
14. Adjudication of title to personal property held by a personal representative, or registered in the name of the decedent or the decedent's nominee, or alleged to have been in the decedent's possession at the time of death;
15. Appeals from and proceedings removed from the Register of Wills;
16. Marriage licenses;
17. Inheritance and estate taxes;
18. Nonprofit corporations; and
19. Matters pertaining to the powers of an agent under a power of attorney.

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In Philadelphia, the Family Court Division of the Court of Common Pleas hears matters involving adoption, custody of minors, and birth records.

The Register of Wills has original jurisdiction of the probate of wills and the grant of letters to a personal representative. *See* PEF Code §901. The Orphans' Court has jurisdiction over appeals from a decree of the Register of Wills. *See* PEF Code §908. *See also* Pa. and Phila.O.C. Rule 10; PEPH, Blue Book.

E. Concurrent (Non-Mandatory) Jurisdiction

PEF Code §712 provides that the Orphans' Court has concurrent jurisdiction with the Trial Division of the Court of Common Pleas in the following areas:

1. The determination of the person to whom real estate passes by will or trust;
2. Appointment, control and removal of the guardian of the person of an incapacitated person; and
3. The disposition of any case involving a substantial question appropriate for Orphans' Court determination.

Further, a number of cases have held that claims by creditors against a decedent's estate may be brought in either the Trial Division or the Orphans' Court. *See, e.g., Perkasie Vulcanizing Co. v. Mundorf*, 24 Bucks 352, 62 D & C 2d 769 (1973). The Orphans' Court has jurisdiction to enforce such claims. *See Randall Estate*, 385 Pa. 252 (1956); Remick §44.03.

The Orphans' Court will not assume jurisdiction over a matter in which it has concurrent jurisdiction if the Trial Division previously assumed jurisdiction except upon written order of the President Judge of the Court of Common Pleas. *See* Phila.O.C. Rule 1.2N.

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F. No Jurisdiction

The Orphans' Court does not have jurisdiction to decide the following matters:

1. Determination of the right to possession of property when the property was not in the possession of the decedent or the decedent's personal representative. *See Patterson's Estate*, 341 Pa. 177 (1941). The Orphans' Court does have jurisdiction, however, with respect to property formerly in the decedent's estate, but presently in the hands of the attorney or agent of the personal representative. *See Webb Estate*, 391 Pa. 584 (1958).
2. Claims against alleged debtors of the decedent. *See Colison Estate*, 356 Pa. 531 (1947).
3. Claims alleging tortious acts by the decedent. *See Gilbert Estate*, 350 Pa. 13, 492 A.2d 401 (1944).
4. Actions alleging libel by the decedent. *See Nagles' Estate*, 305 Pa. (1931).

Because the Orphans' Court has jurisdiction only where conferred by statute, jurisdiction cannot be obtained by mutual consent of the parties. *See Crisswell's Estate*, 334 Pa. 266 (1939).

G. Survival and Wrongful Death Actions

1. *Survival Actions*

A survival action may be brought by the personal representative either in the Trial Division of the Court of Common Pleas or the United States District Court. A recovery in a survival action becomes part of the decedent's estate and is subject to claims of creditors and to death taxes. The Orphans' Court is the proper forum to hear questions concerning distribution of any recovery under the survival statute. *See Frazier v. Oil Chemical Co., Inc.*, 407 Pa. 78 (1962); *Fiduciary Review*, March 1962, February 1972, July 1994 and November 1997. *See also* Chapter 4 for further discussion of survival actions.

2. *Wrongful Death Actions*

A wrongful death action may be brought either in the Trial Division or the United States District Court. A recovery in a wrongful death action passes to the spouse,

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children or parents according to their intestate shares, free of claims of creditors and death taxes. Because the proceeds are not assets of a decedent's estate, the Orphans' Court has no jurisdiction over distribution of wrongful death proceeds. *See Pozzuolo Estate*, 433 Pa. 185 (1969); *Fiduciary Review*, June 1968. Notwithstanding the foregoing, the Orphans' Court has jurisdiction over the settlement of a wrongful death action when a minor is a litigant. *See* PEF Code §2206(a); *Fiduciary Review*, April 1985. *See* Chapter 4 for further discussion of wrongful death actions.

CHAPTER 2

PETITIONS, NOTICE AND OTHER BUSINESS OF THE COURT

A. In General

The practitioner typically appears before the Orphans' Court for: (i) audits of accounts of executors, administrators, trustees and guardians; (ii) petitions, motions and applications attendant to the administration and distribution of estates of decedents, testamentary and *inter vivos* trusts, estates of incapacitated persons, and minors; (iii) exceptions to adjudications or decrees of the Court; (iv) appeals from the Register of Wills involving probate matters; and (v) inheritance tax appeals. This chapter will address proceedings by petition, motion or application in the Orphans' Court. *See* Chapter 3 for an in-depth discussion of the audit procedure.

B. Proceeding by Petition

1. *Generally* - A petition should contain the following:

- a. A decree page attached to the front of the petition (except for petitions filed with the Register of Wills);
- b. The petition itself, which should contain:
 1. A caption;
 2. A heading stating the purpose of the petition;
 3. A concise statement of the facts, in numbered paragraphs, conforming to the requirements of any applicable rule;
 4. A request for the relief desired; and
 5. The signature of the petitioner with the name typed below.
- c. An affidavit or verification;
- d. Any required exhibits, consents or approvals;
- e. A certification of counsel that: (i) no notice is required, (ii) consents of all parties in interest are attached, or (iii) notice has been given, listing the persons notified and stating the date and manner of service, together with a copy of the notice; and

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- f. A cover page in the format provided by the Clerk's office.

The petition is prepared on 8 1/2" x 11" paper and should be typewritten (double spaced) or printed, and endorsed with the name of counsel appearing in court. *See* Phila. O.C. Rule 1.2.A; Pa.O.C. Rule 3.4, Phila.O.C. Rule 3.4.A. Appeals from the Register of Wills are governed by Phila.O.C. Rule 10.2.C; and inheritance tax appeals are governed by Phila.O.C. Rule 10.2.E. *See* PEPH, Green Book, for sample forms.

There are two methods of proceeding by petition in the Orphans' Court. As explained in Paragraph B.2, a party proceeds by petition and notice when seeking Court approval of a proposed act. As explained in Paragraph B.3, a party proceeds by petition and citation when seeking to compel another party to act.

2. *Petition and Notice*

Petitions may be handled in one of two ways when the party seeks the approval of the Court for a proposed act, depending on whether the matter requires notice. *See* Phila.O.C. Rule 1.2.A. Notice may not be required if all parties in interest have joined in, or consented to the petition.

If no notice is required by statute or rule of court, or where the consents of all parties in interest are attached, the petition, motion or application is filed with the Clerk's office and the filing fee is paid. The Clerk will then transmit the matter to the Motion Judge or other appropriate Judge of the Orphans' Court for disposition.

When notice is required, counsel must proceed as follows:

a. Preliminary Procedures:

Counsel for the moving party prepares the petition or other document in accordance with the rules. A separate notice to parties in interest is then prepared and sent with a copy of the document to be filed. The notice must state that unless written objections are filed with the Clerk within twenty (20) days of the date of the notice (or any longer period required by statute or rule of court), the Court will assume that the matter is uncontested. The "date of the notice" is the date of mailing, publication or service of the notice.

Except where specifically provided otherwise, notice may be sent by ordinary mail to the party in interest or to his or her attorney of record.

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Notice to a person who is not *sui juris* must be given to the person's guardian, trustee, agent, or other fiduciary. If there is no such fiduciary, notice must be given to the person under disability (if over fourteen (14) years of age) and to such person's next of kin, spouse, the person with whom he or she resides or by whom the person is maintained, the superintendent or other official of the institution having custody of such person, or as the Court may by special order direct. *See* Pa.O.C. Rule 5.2 and Phila.O.C. Rule 5.2.A.

In addition to the notice requirements in connection with accounts (set forth in Chapter 3), the rules set forth specific notice requirements for other proceedings, such as petitions for allowance to surviving spouse of an intestate decedent (Phila.O.C. Rules 12.1.C and 12.2.A), family exemption (Phila.O.C. Rule 12.1.A), public and private sales of real estate (Phila.O.C. Rules 5.1.B and 12.9.A), settlement of small estates (Phila.O.C. Rule 6.11.B), and determination of title to real estate (Phila.O.C. Rule 12.1.E; PEF Code §3546).

b. Certification of Service

A separate exhibit must be attached to the petition, motion or other application, listing the names of the persons notified and stating the date and manner of service and must be certified by counsel and include a copy of the notice.

c. Filing

On the same day as the date of the notice, or the next business day, counsel for the moving party files the document with the Clerk's office and pays the required filing fee. The Clerk holds the document until the expiration of the notice period.

d. Responses

If a party objects to the action proposed by the moving party, the objecting party (or their counsel) must file a written response with the Clerk on or before the last day of the notice period and the objecting party must also send a copy of the response to the moving party (or their counsel) on the same day that the response is filed with the Clerk.

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e. Disposition

After the expiration of the notice period, the Clerk transmits the petition, motion or other application, together with any response, to the Motion Judge or other appropriate judge of the Orphans' Court. The judge sets a time and place for a hearing or a conference, or makes such other disposition as is deemed proper.

3. Petition and Citation

a. General Requirements and Procedure

A party seeking to compel a person to act must proceed by petition and citation if the Court has not previously obtained jurisdiction over the person. *See* Pa.O.C. Rule 3.5. "Jurisdiction of the person shall be obtained by citation to be awarded by the orphans' court division upon application of any party in interest. The citation shall direct the party named therein to file a complete answer under oath to the averments of the petition on or before a day certain, which shall not be less than ten (10) days after the service thereof, and to show cause as the decree of the division shall provide." *See* PEF Code §764; Pa. O.C. Rule 5.3.

It is not always clear whether counsel should proceed by petition and citation or by petition and notice. Generally, jurisdiction of the person is required in two types of situations: (i) where the petitioner requests the Court to order the respondent to perform a specific act or to refrain from a specific act; and (ii) where the relief requested will have a direct impact on property in which the respondent has an interest. For example, if a personal representative of a decedent's estate seeks to recover the proceeds of a bank account titled jointly between the decedent and his son, the citation to show cause will be directed to the son to compel the delivery of funds to the estate and to the bank where the funds are on deposit. The bank has a direct interest in the property involved by virtue of its contract of deposit. Another typical situation where an action is commenced by petition and citation is an action to compel a personal representative to file an account.

The petition and citation procedure in Philadelphia is as follows:

1. The petitioner files a petition with the Clerk, for example, "for a citation to show cause why John Jones, executor, should not be compelled to file an account." The prayer for relief requests only that a citation be issued.

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2. No notice of the presentation of a petition for citation is required. Therefore, the Clerk transmits the petition to the assigned Judge as soon as it is filed. If the petition is properly brought, the Court will enter a decree ordering the issuance of a citation. On occasion, the Court will require additional information, revisions of the petition, or a brief supporting the authority for obtaining the ultimate relief desired by the petitioner before a citation will issue.
3. After the decree is entered, the Clerk prepares the citation. Counsel obtains the citation and necessary service copies from the Clerk. The citation is in the form of an order directing each respondent named in the petition to show cause on or before a day certain why the relief sought by the petitioner should not be granted.
4. The respondent shows cause by filing a response to the petition on or before the return date. One noteworthy exception is a petition for adjudication of incapacity. In that case, the citation directs the incapacitated person to appear in Court on the return date pursuant to the preliminary decree. *See* Chapter 6. When a response is filed, the matter is referred to the assigned judge for appropriate disposition. If no response is filed, the petitioner must file a second petition requesting the specific relief sought, namely, a motion for a default order in accordance with Phila.O.C. Rules 3.5.B(3) and 1.2.A(1).

b. Method of Service

Counsel must obtain the citation and copies from the Clerk and arrange for service of the copies of the citation and the petition. The citation shall be served in the same manner as original process in a civil action under Pa.R.C.P. 402. *See also* Phila.O.C. Rule 3.5.B. The citation must be served at least twenty (20) days prior to the return date. For service of a citation in proceedings for an adjudication of incapacity, *see* Chapter 6; Phila.O.C. Rule 14.2.B(4). A copy of the petition must be served with the copy of the citation.

c. Proof of Service

Proof of service of a citation is by affidavit of the person mailing, publishing, or personally serving the citation, by return of the sheriff, or by written acceptance of service by or on behalf of the person to be served. The affidavit

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of proof of service must be completed on the reverse side of the original citation, which is then filed with the Clerk.

In the case of service of a citation on an alleged incapacitated person, the affidavit of service must state that the petition and citation were read to the alleged incapacitated person and explained in terms the alleged incapacitated person would be most likely to understand. *See* Phila.O.C. Rule 14.2.B(4)(a). Proof of service on an incapacitated person is handed to the Court at the time of the hearing.

The Rules require service of a *copy* of the petition and a *copy* of the citation on the person served. The *original* citation must be retained and submitted to the Court as part of the proof of service.

4. Cost of Filing

The fee for filing the petition, motion or other pleading is payable at the time of filing with the Clerk. An itemized list of fees fixed by the Court may be found in the Philadelphia Bar Association *Legal Directory* and on the Philadelphia Orphans' Court website: www.courts.phila.gov.

C. Court *En Banc*

1. Generally

There is no regularly scheduled argument list or session of the Court *en banc* in Philadelphia County. The Court will hear a matter *en banc* only as ordered by the Administrative Judge of the Orphans' Court Division at the request of the Hearing or Auditing Judge. *See* Phila.O.C. Rules 1.2.B and 7.1.A(3).

2. Scheduling Arguments

If the Administrative Judge determines that an argument before the Court *en banc* is warranted, the Administrative Judge will issue an order setting forth dates for filing briefs and for oral argument before the Court *en banc*. *See* Phila.O.C. Rule 1.2.B(3).

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3. *Service*

As soon as a brief is filed, copies must be delivered promptly to counsel of record for opposing parties.

4. *Argument*

Upon call by the Court, the exceptant proceeds with argument before the court *en banc* followed by the other party or parties. Arguments of all parties are presented orally.

D. Discovery

PEF Code §774 states that to the extent not provided by general rule or special order of the local Orphans' Court, the practice relating to depositions, discovery and the production of documents shall conform to the practice in the division of the court having jurisdiction over actions at law. Phila.O.C. Rule 3.6.A states that leave to take depositions or to obtain discovery or the production of documents may be granted only on petition upon cause shown, and that the procedure relating to depositions, discovery and the production of documents shall be governed by special order of the Court in every case.

E. Jury Trial

Jury trials in the Orphans' Court are available as a matter of right only in cases involving a substantial dispute concerning decedent's title to property or determination of incapacity. *See* PEF Code §§777(a) and (b). The Court, in its discretion, may grant a jury trial in will contests and other matters. Verdicts in such matters, however, are advisory only. *See* PEF Code §777(c); Phila.O.C. Rule 10.2.D; *see also* Chapter 1.

F. Declaratory Judgment

An action for declaratory judgment is commenced by petition and citation. *See* Phila. O.C. Rule 1.2.P for the contents of the petition.

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For declaratory judgment practice in general *see* Hunter, Judgments. *See* Remick, §44.03(f) for the types of matters in which the Court will grant a declaratory judgment. *See* PEPH, Green Book, 2.6 for a sample petition.

On occasion it may be useful to seek a declaratory judgment as to property rights in order to determine tax liabilities. *See* Remick, §18.08; *see also* Declaratory Judgments Act, 42 Pa. C.S. §7531 *et. seq.*

ACCOUNTS, AUDITS AND DISTRIBUTION

A. Accounts

1. Preparation

An account is a statement that lists all the assets received by a fiduciary, the disbursements, distributions, investments and capital changes during the accounting period, and sets forth the composition of the net balance remaining in the fiduciary's hands. Counsel fees and fiduciaries' commissions should always be shown in an account. An account may be prepared, preferably in a form suitable for filing if ever necessary, even if settlement will be made on the basis of an agreement commonly called "receipt and release." *See* PEPH, Green Book, 6.18.

An account may be a final account (one that covers the entire course of an administration) or a partial account (one that is filed before the administration has been completed). The trustees of a continuing trust may file several accounts during the term of the trust. Each such account should begin where the last account (or schedule of distribution filed pursuant to the audit and decree) ended. A trustee's account often does not include a full income accounting. Instead, waivers of an income accounting, signed by each beneficiary entitled to income, are attached to the account or submitted at the audit.

Accounts should be prepared in accordance with the Uniform Fiduciary Accounting Principles. *See* Phila.O.C. Rule 6.1.A. The Pennsylvania Supreme Court has approved forms for use in any Pennsylvania county in accordance with Pa.O.C. Rule 6. The forms can be found in the compendium of Orphans' Court Rules for Pennsylvania and ten local counties published by *American Lawyer Media*; in the Philadelphia County Court Rules published by *American Lawyer Media*; and in PEPH, Green Book, Executor's Account, 6.3.1, and Trustee's Account, 6.3.2.

These sources do not yet contain forms for unitrust accounts. PEF Code §8105 now permits a trustee of a traditional non-charitable trust to convert to a unitrust, sometimes referred to as a "total return" trust. Trustees of charitable trusts have a similar conversion power under PEF Code §8113, and many modern charitable trusts have been unitrusts from their inception.

Accounts for unitrusts should contain all the information customarily included in traditional trust accounts as to both principal and income. This permits tracking of gains and losses, dividend receipts, etc.

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Unitrust distributions are based on a percentage of the market value of all trust assets (whether traditionally considered principal or income) as of a set valuation date, averaged with the market value of all trust assets as of the two preceding valuation dates. Therefore, a unitrust account should contain market valuations for all the relevant valuation dates, possibly including market values for valuation dates preceding the accounting period if these figure into the averages. A schedule showing the calculation of the distributable amount for each unitrust year, and the distribution of that amount to the beneficiaries, should be attached to the account.

2. *Filing*

Accounts of personal representatives and other fiduciaries (“accountants”) are filed with the Clerk of the Orphans’ Court. The following documents must be filed with the account: (i) Orphans’ Court Cover Sheet; (ii) Account Checklist; and (iii) Petition for Adjudication and Statement of Proposed Distribution and required attachments. A personal representative may file an account any time after four (4) months following the first complete advertisement of the grant of letters, and may be cited by any creditor or party in interest to do so after six (6) months following the first complete advertisement of the grant of letters. In addition, a personal representative may be directed by the Court to file an account at any time. Filing fees for the Clerk of the Orphans’ Court Division are published annually in the Philadelphia Bar Association *Legal Directory*.

The account of a fiduciary may be filed as an exhibit to another account. Such an account is referred to as a “piggyback” account. *See* Chapter 7. Use of a piggyback account may avoid duplication of effort and expense (including filing fees), and may contribute to a better understanding of both accounts.

Upon filing, the account will be placed on an Orphans’ Court audit list. The Orphans’ Court calendar in the *Legal Directory* and on the Court’s website lists audit dates, last filing dates, and audit lists. *The Legal Intelligencer* and other newspapers of general circulation publish the audit list approximately three (3) weeks prior to the audit date, together with the name of the judge to whom the account has been assigned, the time and courtroom where the audit list will be called.

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B. Audits

1. Notice

The accountant must give written notice of the filing of the account and of the place, time and date of audit by regular, first class mail at least fifteen (15) days prior to the audit date to every unpaid claimant who has given written notice of a claim to the accountant and to every other person known to the accountant to have or claim an interest in the estate as creditor, beneficiary, heir or next of kin. *See* Phila.O.C. Rule 6.3.A. *See* PEPH, Green Book 6.8 for a sample form of the notice letter. Notice must also be given to:

- a. The Attorney General of the Commonwealth of Pennsylvania must receive notice if there are any charitable beneficiaries (except in the case of a charitable pecuniary legacy of \$25,000 or less which has been or will be paid in full). The notice, in the special form of Notice of Charitable Gift, is available from the Clerk of the Orphans' Court and in PEPH, Green Book 6.7. The completed form should be sent to the Deputy Attorney General, whose office is in Philadelphia, rather than to the Office of the Attorney General in Harrisburg. *See* Chapter 8.
- b. The Department of Revenue must receive notice and a copy of the account in the case of a decedent who died in a state-owned institution in the Commonwealth. *See* Pa.O.C. Rule 6.7.
- c. The United States Veterans Administration must receive notice and a copy of the account of the estate of a deceased veteran or of the minor child of a veteran who was entitled to veteran's benefits. *See* Pa.O.C. Rule 6.8.

The audit notice must state that a copy of the account and a copy of the will or trust instrument will be sent upon request, unless these documents are enclosed with the notice, or have been furnished previously. The notice must: describe the nature of any claim, interest or objection of the recipient; state whether the claim is admitted or contested; include an interpretation of any dispute or question to be presented at the audit; and state that the recipient of the notice must file written objections and appear at audit in person or by counsel under penalty that, in the absence of such appearance, the Court may adopt the accountant's position. *See* Phila.O.C. 6.3.A.(5).

Questions may arise as to whether it is sufficient to send notice to a fiduciary who represents possible parties in interest and not also to the parties themselves (*e.g.*,

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notice sent to trustee of the trust to which decedent's estate will be distributed, rather than to the beneficiaries of the trust). In some cases, the Court has continued the audit until notice has been given to all known parties in interest. Where a doubt exists, the safest course is to provide notice to the parties in addition to the fiduciary.

2. Forms

The forms used in connection with an account filing and audit may be obtained free of charge in the Orphans' Court Clerk's office, on the Court's website, or in PEPH, Green Book, 6.10.

There are specific forms of petition for adjudication for each type of account: decedent's estate, trust, guardian of a minor or incapacitated person, and agent under a power of attorney. The instructions on each form should be followed carefully. Several attachments are required with the petition for adjudication. Certain original documents may not be required if they have been submitted at the audit of a prior account in the same matter.

The petition for adjudication ends with a proposed distribution. The petition must be signed by all accountants and verified by the affidavit of at least one accountant. When principal will be distributed in kind, an accountant may include in the petition a request that the Court order the filing of a schedule of distribution. When the assets are all in cash or will be distributed to a single distributee, counsel may request that the Court not require a schedule of distribution. *See* Chapter 9 if real property is to be distributed.

3. Procedure at Audit

If the audit of a matter is continued, the accountant must give notice of the rescheduled audit to the parties in interest or others, as the Court may direct. *See* Phila.O.C. Rule 6.3.B. Counsel for the accountant and each attorney representing a party in interest at the audit must present an appearance slip on a form supplied by the Court, signed by the attorney actually present at the audit, with the attorney's name, attorney identification number, address and telephone number and identifying the client by name and by the nature of the party's interest. For example, if the attorney represents an unpaid creditor, the attorney's appearance slip must list the client's name, identify the client as an unpaid creditor and show the dollar amount of the claim. Counsel for the accountant may note additional items of receipts and disbursements on the appearance slip, but should not list major items of disbursement, such as accountant's commissions or counsel fees, unless such items were included in the notice to the parties in interest.

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Written objections to an account must be filed with the Clerk of the Orphans' Court no later than the date and time of the call of the audit, unless the Court orders otherwise. *See* Phila.O.C. Rule 6.10.A. The objectant generally hands a copy of the objections to the Court and parties in interest (or their counsel) when the matter is called. In a contested matter, the Court may fix a date for the audit or continue the matter to a later date.

If the petition includes a question for adjudication by the Court and there is no contest, on the first call of the list counsel should request that the matter be placed on the second call. On the second call, counsel will be given an opportunity to present the question and a proposed solution. The same procedure is followed when counsel wishes to make a statement about an item not appearing in the account or in the petition for adjudication that should be included in the Court's adjudication.

In an uncontested matter with no questions, on the first call of the audit list counsel for the accountant usually says "Ready, your Honor, no questions" and hands up counsel's appearance slip and any other documents not previously filed.

C. Adjudications

Subsequent to the audit, the Auditing Judge files an adjudication, which is sent to counsel who have filed appearances. The adjudication is a decree of distribution and is filed in all cases where there has been a formal accounting. The Court returns the original documents (*e.g.*, letters testamentary, trust agreement and official inheritance tax receipts) submitted with the petition for adjudication, together with a copy of the adjudication.

1. *Form of Adjudication*

Generally, the adjudication in a decedent's estate recites: the date of death of the decedent; whether the decedent died leaving a will or intestate; the terms of the will, or the names of heirs and next of kin if the decedent died intestate; that letters were granted and the date thereof; and that proofs of publication of the grant of letters were submitted and are annexed to the adjudication. If credit for inheritance tax has been taken in the account and the receipt is produced, the adjudication recites that payment of the tax was vouched. If the petition included a question for the Court, a decision is rendered. In such cases there will be a definite finding of fact or a definite conclusion of law to which an aggrieved party may file exceptions (*see* Phila.O.C. Rule 7.1.A), an appeal, or both.

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2. *Awards*

The adjudication sets forth the balance for distribution shown in the account, directs payment of all claims admitted or allowed, and makes awards to the parties entitled. The accountant is authorized to make all transfers and assignments necessary to carry the awards into effect. If there is more than one beneficiary and distribution is to be made in kind, the Court may order a schedule of distribution to be filed. *See* Section D. If there is an award in trust to an individual trustee, even when there is a corporate co-trustee, the Court may order a certificate of the official court examiner to be filed. Finally, the account is confirmed *nisi* and the adjudication is dated and signed by the Auditing Judge. If no exceptions are filed within twenty (20) days, or if no appeal is filed within thirty (30) days, the adjudication automatically becomes absolute.

3. *Distribution In Cash or In Kind*

Immediately following the recitation of the balance for distribution shown by the account, there may be a phrase reading: “composed as set forth in the account” or “composed of cash as noted in the account.” These words or words of similar import signify the type of distribution the Court has sanctioned. If the balance shown by the recapitulation in the account is composed entirely of cash, the adjudication will read, “composed of cash as noted in the account” and the distributee is then entitled to receive cash and the fiduciary may be ordered to distribute cash. If, on the other hand, the balance shown by the recapitulation in the account is composed of securities as well as cash and there is no indication to the contrary, the Court may assume that the parties in interest desire or at least agree to accept distribution in kind and the adjudication will award the balance shown “composed as set forth in the account.” This signifies a distribution in kind and indicates that the Court has exercised its discretion to make awards in kind. The parties may not then demand that the executor distribute cash. In other words, unless the parties in interest appear at the audit and demand a cash distribution, the Court may assume that they agree to distribution in kind and make awards accordingly.

4. *Awards “subject to distribution already made”*

Sometimes the phrase, “subject to any payment or payments heretofore properly made on account of distribution as shown in the account,” is used. In the account, a distribution at risk, *i.e.*, a distribution made prior to audit, is shown in the account in the distribution section. The balance shown in the adjudication does not reflect distributions already made. Therefore, in the adjudication, it is necessary to make the

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awards “subject to any distribution heretofore properly made as shown in the account.” A legatee is entitled to have the Court confirm the full amount of the legacy regardless of risk distributions previously made. The credit for distributions previously made will be reflected in the schedule of distribution. A satisfaction of award may be obtained from a legatee at the time of payment and may be filed as proof of payment of the confirmed amount.

5. *“Leave” to Transfer Securities*

Toward the end of the adjudication there may appear the words: “Leave is granted the accountant to make all necessary transfers and assignments.” This is a general authorization for the accountant to distribute the estate. When the accountant is the executor, the Court usually authorizes the executor to make distribution. In such case the adjudication would be more specific: “Leave is hereby granted the accountant, as executor of the will of X, deceased, to make all necessary transfers and assignments.” This enables the executor to make the transfers necessary to carry awards into effect.

6. *Award Subject to Unpaid Inheritance Tax*

Immediately following the clause in the adjudication which recites the balances shown by the account, the so-called awarding paragraph may include the phrase, “subject to payment of inheritance tax as claimed in such amount as may be found to be due.” At the audit a representative of the Inheritance Tax Division routinely enters an appearance. When the accountant has not obtained the final inheritance tax notice of assessment and receipts for balances due, the representative will request that the award be made subject to such additional inheritance tax. Even if a final receipt has been obtained, this request may be made because of administrative and communication problems within the Department of Revenue. The Court may delay the audit until after an inheritance tax return has been filed with the Register. Frequently the Court awards the balance shown in the account although the tax has not been paid in full. In such case, the award is made subject to the payment of such taxes as may be due. The accountant must pay the inheritance tax after the adjudication has been filed. The payment of additional tax should be reflected in the schedule of distribution. If a schedule of distribution is not ordered, the original receipt for the payment of the tax will evidence the payment of the tax.

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7. Reserve for Unpaid Federal Estate Tax

Where, as is often the case, federal estate tax has not yet been finally settled at the time of the audit, the accountant should make a generous estimate of any additional tax due and request the Court to reserve that amount from distribution, with leave to distribute without further accounting any of that reserve not required for tax payment. If the request is reasonable, the adjudication will authorize the accountant to withhold the fund, pay the tax when duly assessed, and distribute the excess to the parties entitled thereto.

8. Exceptions and Appeals

Exceptions are governed by Pa.O.C. Rule 7 and Phila.O.C. Rule 7.1.A.

A party aggrieved by an adjudication or by a non-interlocutory order or decree may file exceptions within twenty (20) days, or may instead take an appeal to the Superior Court within thirty (30) days. *See* Pa.R.A.P. 903. Filing exceptions is no longer a prerequisite to preserving issues for appeal. If exceptions are filed, they must be in writing and set forth specifically the alleged errors of the Auditing Judge.

A single aggrieved party who files exceptions may not thereafter take an appeal until disposition of the exceptions. If there are multiple aggrieved parties, any of them may take an appeal within thirty (30) days, even if another party has already filed exceptions. In such case, the already-filed exceptions become a nullity, no further exceptions may be filed, and the disputed issues are effectively removed to the appropriate appellate court.

If one party files exceptions, the other parties have ten (10) days thereafter to file cross-exceptions, even if the normal twenty (20) day period has otherwise expired.

Proposed Pa.R.A.P. 311(a)(9) would permit an appeal as of right from an order determining the validity of a will or trust, effectively overruling *Estate of Schmitt*, 846 A.2d 127 (Pa. Super. 2004). Proposed revisions to Pa.R.A.P. 342 would clarify that an order of the Orphans' Court Division determining an interest in realty, personalty, the status of individuals or entities, or an order of distribution, determined by that Division to be final, can be immediately appealed, effectively overruling *Estate of Sorber*, 803 A.2d 767 (Pa. Super. 2002).

Philadelphia Rules now provide for the Auditing Judge alone to dispose of exceptions. In most cases, exceptions are listed for argument before the Court *en*

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banc only if the Administrative Judge so orders. Only the Auditing Judge can request that the Administrative Judge refer the exceptions to the Court *en banc*. The Court will not entertain motions or petitions by a party for an *en banc* hearing.

9. *Review of Adjudication*

Even after an adjudication has been confirmed absolutely, it may be opened for the purpose of review if proper cause is shown. PEF Code §3521 provides that review is available only (i) within five (5) years of final decree, and (ii) before distribution in accordance with the adjudication is actually made. However, a failure to notify potential heirs entitled to notice of an audit is a jurisdictional defect and renders any decree of the Orphans' Court void and the time-bar under PEF Code §3521 inapplicable. *See Alexander Estate*, 758 A.2d 182 (Pa. Super. 2000).

If the Orphans' Court decree is affirmed on appeal, the Orphans' Court may nonetheless grant a petition for review, but only as to questions not raised or passed upon on appeal. *See Bell Estate*, 463 Pa. 109 (1975).

The party seeking review must file a petition for a citation to all parties in interest to show cause why the adjudication should not be opened to review the particular matter in controversy. If an answer is filed, the matter is referred to a Hearing Judge who will allow or deny the petition in an opinion. If the petition is allowed the record will be referred to the Auditing Judge who will dispose of the controversy by supplemental adjudication.

D. Distribution

1. *Schedule of Distribution*

The adjudication may direct the filing of a schedule of distribution. In addition, the accountant may elect to file a schedule.

The schedule of distribution specifies the nature and value of assets to be distributed to the various distributees. It is a supplement to the account and must begin with the amount awarded by the adjudication. It may contain a current valuation of assets as of the approximate date of distribution and should contain such a valuation where non *pro rata* distributions are contemplated. *See* paragraph 3 below. The schedule should also include any corrections to the account and additional items of receipt or

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disbursement. It is not appropriate to charge or include counsel fees and fiduciaries' commissions on the schedule unless listed in the account or submitted to the Court at the audit.

Counsel for the accountant must certify that the schedule is correct and in conformity with the adjudication. If the schedule does not conform to the adjudication, counsel must point out the differences. The schedule must be submitted to the Auditing Judge within the period of time specified in adjudication, usually ninety (90) days. *See* Phila.O.C. Rule 6.11.

2. *Notice and Consents*

Consents to the schedule of distribution may be attached. In such case counsel must certify whether the schedule contains the consents of all the parties in interest affected by the filing and all other parties ordered by the Court to receive notice. Written notice of the filing must be given to all parties whose consents are not attached. The notice must state that a copy of the schedule is enclosed or will be sent upon request, and that any objections must be filed within twenty (20) days of the filing of the schedule. The notice must be mailed no later than the day the schedule is filed. Return of notice is by certification of counsel attached to the schedule that notice of the filing was given as required by the Phila.O.C. Rule 6.11.A. A copy of the notice letter and a list of the recipients must be attached to the schedule.

3. *Re-appraisal of Securities*

An equitable division of the estate assets almost always necessitates the re-appraisal of securities as of the date of actual distribution. The schedule may contain such a re-appraisal, and it should reflect any gain or loss in value since the filing of the account. The schedule should include only those assets included in the account or received as a result of any conversion of such assets subsequent to the accounting period.

4. *Unconverted Real Estate*

When unconverted real estate is awarded by adjudication and included in a schedule of distribution, the property must be described in the schedule in the same manner as is commonly required in a deed. This enables the Clerk to certify an excerpt from the schedule for recording purposes. *See* Chapter 9.A.

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E. Review of Schedule of Distribution

1. Objections

Objections must be filed in duplicate with the Clerk and must include a statement of the bases of the objections. No objection that was or could have been presented at the audit may be raised as an objection to the schedule.

2. Disposition of Schedule

If the consents of all necessary parties are attached, the Court may approve the schedule of distribution immediately upon filing, and the approval will be absolute. Where notice has been given, the Court may approve the schedule twenty (20) days after filing. If no objections have been filed, the schedule will become absolute on the day of approval. If objections have been filed, the Court in its discretion may hold a hearing or require argument. Any party has twenty (20) days after the Court's disposition of the objections in which to file exceptions.

F. Auditors, Masters and Official Examiners

An auditor may be appointed by the Court to state an account where the fiduciary has failed to do so. An auditor also may be appointed to review an account but only with the consent of all parties in interest or their counsel. *See* Phila.O.C. Rule 8.1.A (1) and (2).

The Court also has the power to appoint a Master, either on its own motion, or upon the petition of the accountant or any party in interest. The Master will hear the testimony or arguments of the parties in interest and furnish the Court with a report as required by Phila.O.C. Rule 8.1.A.(3).

At the end of the adjudication the Court may direct the filing of a certificate by its official examiner. An official examiner is assigned to each of the Judges of the Orphans' Court. Where there is an award in trust, particularly where the executor and the trustee are the same person, the Court may direct a physical examination of the securities comprising the fund to verify that the securities are intact, safely kept, and properly registered as property of the trust. Where the trust continues and an individual trustee is involved, even with a corporate co-trustee, the Court may direct an examination of the trust assets by its official examiner. Where a trust continues following an examination, and the trustee wishes to make a final distribution without a formal accounting, the trustee must comply with Phila.O.C.

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Rule 9.1.B. The Rule requires the trustee to deliver to the examiner a receipt and waiver of accounting signed by the distributees, under which the trustee is held personally liable for the compensation of the examiner unless a reserve has been provided for that purpose.

G. Record of Risk Distributions

In the event a fiduciary chooses not to file an account for formal court adjudication, such fiduciary may nonetheless desire a formal record of the proofs of distribution. Receipts, releases and refunding agreements may be filed with the Orphans' Court Clerk. Acceptance of the documents by the Clerk does not constitute Court approval of any act of administration or distribution. *See* PEF Code §3532(c).

CHAPTER 4

CLAIMS BY AND AGAINST THE ESTATE

A. Claims by the Estate

1. *In General*

All causes of actions or proceedings survive the death of a party or the death of one or more joint parties, whether plaintiff or defendant. *See* PEF Code §3371; 42 Pa. C.S. §8302. An action or proceeding to enforce any right that survives the decedent may be brought by the personal representative alone or with any parties as though the decedent were alive. *See* PEF Code §3373.

Generally, any actions which survive the decedent are subject to the usual statutes of limitations. Any statute of limitations, however, which would bar any debt or liability owed to the estate within one (1) year after the decedent's death is automatically extended until the end of one (1) year following the date of death, whether or not there is a failure or delay in opening the estate. *See* PEF Code §3376.

The personal representative may be substituted for the decedent in an action or proceeding which is pending on the date of the decedent's death. If the plaintiff in a pending action dies, a suggestion of death should be filed and a personal representative appointed within one (1) year thereafter. If this is not done, any defendant or respondent may petition the Court to abate the decedent's cause of action. Copies of the petition are served upon the executor named in the will, if known to the defendant, otherwise upon all next of kin entitled to letters of administration. The Court shall abate the action as to decedent's cause of action if the delay in taking out letters is not reasonably explained. *See* PEF Code §3375.

Any action or proceeding to which a fiduciary is a party is not abated by the fiduciary's death or resignation or by the termination of the fiduciary's authority. The successor of the fiduciary may be substituted in the action or proceeding in the manner provided by law. *See* PEF Code §3374.

The funds recovered under any action (other than a wrongful death action) on behalf of the decedent's estate are includible on death tax returns and are subject to claims of creditors against the estate and are available for distribution to beneficiaries of the decedent's probate estate.

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2. *Survival Actions*

Survival actions are brought by the personal representative on behalf of the estate. While any cause of action or proceeding survives decedent's death, PEF Code §3371, a "survival action" is that which the decedent could have brought if the decedent had survived. In personal injury circles, it is most commonly thought of as arising from a negligent act, usually one that caused decedent's death. It must be commenced within two (2) years from the date of the negligent act. *See* 42 Pa. C.S. §5524.

B. Wrongful Death Actions

1. *Generally*

A wrongful death action (or "death action") is based on the Act of July 9, 1976, P.L. 586, 42 Pa. C.S. §8301 *et seq.* It is a separate cause of action, but not mutually exclusive, from the "survival" claim prosecuted by the personal representative on behalf of the estate. Damages, however, may not overlap.

During the first six (6) months following the death of the decedent, an action can be instituted only by the personal representative for the benefit of those persons entitled by law to recover damages for such wrongful death. After six (6) months, an action may be brought by the personal representative or by any person entitled by law to recover damages in such action as trustee *ad litem* on behalf of all persons entitled to share in the damages, which group encompasses spouse, child and parents. *See* Pa.R.C.P. 2202.

If there are no dependents, the personal representative can bring suit to recover hospitalization, funeral and administration expenses. *See* 42 Pa. C.S. §8301(d).

2. *Proceeds of Recovery*

The damages recovered in a wrongful death action are not part of a decedent's estate. Further, they are not subject to either Pennsylvania inheritance or estate tax, or federal estate tax, nor are they subject to any claims of creditors. *See* 42 Pa. C.S. §8301; *Chapman Estate*, 16 Fiduc. Rep. 459 (O.C. Berks, 1966); Rev. Rul. 54-19, 1954-1 C.B. 179 (under New Jersey's "Death by Wrongful Act" statute). The proceeds are divided among the dependents in the proportion they would take the decedent's personal estate in case of intestacy. Case law has narrowed the class of

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beneficiaries from intestate heirs to the subset of intestate heirs who have suffered a pecuniary loss as a result of decedent's death. *See* Hunter, Volume 2 - Executors and Administrators, §35(c). For example, emancipated children have no "pecuniary loss" and are not entitled to wrongful death proceeds.

3. *Purpose*

The purpose of a wrongful death action is to enable the designated dependents of the decedent to recover compensatory damages for the pecuniary loss which they suffer by deprivation of that part of the earnings of the decedent which they would have enjoyed if the decedent had lived.

4. *Statute of Limitations*

The action must be brought within two (2) years following the date of death. *See* 42 Pa. C.S. §5524.

C. Claims Against the Estate

1. *Creditors' Rights in Securing Letters*

PEF Code §3155(b) establishes the order of preference of those who may qualify as administrator under a grant of letters of administration. The creditors of the decedent at the time of death are fourth in priority after: (i) those who are entitled to the residuary estate under the will; (ii) the surviving spouse; and (iii) those who are entitled under the intestate law as the Register determines will best administer the estate while giving preference to share size. Unless the prior classes have consented, there is a waiting period of seven (7) days from the date of death before letters can be issued in favor of creditors. *See* PEF Code §3155(c).

2. *Creditors' Claim*

The personal representative gives notice of the grant of letters for the decedent's estate by advertising the grant of letters once each week for three (3) successive weeks. *See* PEF Code §3162. The personal representative is required, within three (3) months after the grant of letters, to give notice of the grant to the Department of Revenue or the proper officer of the political subdivision, as the case may be, with respect to claims due the Commonwealth or any political subdivision thereof for

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maintenance in an institution of a person who has died therein. *See* PEF Code §3393. The Commonwealth is entitled to recover from the estate payments for medical assistance for nursing facility services, home and community based services, related hospital and prescription drug services and other services to a person age fifty-five (55) or older. *See* 62 P.S. §1412. The personal representative of a decedent who was at least that old when any such payment was made and who received such assistance during five (5) years prior to death, must notify the Pennsylvania Department of Public Welfare to obtain a statement of the Department's claim. The Commonwealth pursues recoupment based on its Medical Assistance Estate Recovery Regulations, §§258.1 *et seq.*, 55 Pa. Code Ch. 258, (www.pacode.com/secure/data/055/chapter258/chap258toc.html) which became effective on February 1, 2002. The Department forfeits its right to any claim if it does not submit its claim within forty-five (45) days of receipt of such notice from the personal representative. *See* 62 P.S. §1412(b). The title company insuring the transfer of decedent's Pennsylvania real estate will typically ask for the Commonwealth's written confirmation about such a claim.

With respect to claims for federal tax liability, IRC Reg. §301.6903-1 requires notice be given to the Internal Revenue Service by filing Internal Revenue Service Form 56. *See* Section E, Claims by Internal Revenue Service, below.

If any creditor's claim remain unpaid when an account has been filed and called for audit, written notice of the audit must be given to such creditor and to every other person known to the accountant to have an interest in the estate as beneficiary, heir or next of kin. *See* PEF Code §3503. A personal representative who makes distribution of the estate in conformity with a decree of Court after confirmation of an account is relieved of all liability. *See* PEF Code §3533.

If a creditor has not filed written notice of a claim with the personal representative within one (1) year from the first complete advertisement of letters, and the personal representative is not aware of the claim, the personal representative may distribute personal and real property without the necessity of an accounting and without liability to such claimant. *See* PEF Code §3532. This does not affect a lien or charge existing at death on decedent's real or personal property. *See* PEF Code §3532(b)(3).

3. Statute of Limitations

Local statutes of limitations are no bar to an action by the United States.

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The death of a party does not stop the running of the statute of limitations applicable to any claim against the decedent, but any claim that would otherwise be barred within one (1) year after the decedent's death is not barred until the expiration of one (1) year after the date of his death. In no event is an applicable statute of limitations shortened because of the death of the party involved. *See* PEF Code §3383.

Starting an action against the estate is not the only way to toll the statute. In accordance with PEF Code §3384, this can be accomplished by:

- a. Giving written notice to the personal representative or his attorney;
- b. Instituting proceedings to compel the filing of an account;
- c. Starting an action against and serving the personal representative;
- d. Substituting the personal representative as a defendant in an action pending against the decedent; or
- e. Receiving a written acknowledgment by the personal representative or the representative's attorney of record of the claim's existence.

4. *Payment of Claims*

If the estate is solvent and the personal representative is satisfied as to the validity of any claim, the personal representative may pay the claim without Court order.

If the estate may be insolvent, great caution should be exercised in payment of any claims. PEF Code §3392 sets forth certain preferences for charges and claims when the estate is insolvent. The order of preference is as follows, without priority as between claims of the same class:

- a. The costs of administration;
- b. The family exemption;
- c. The costs of funeral and burial, as well as the costs for those medicines, medical or nursing services, hospital services (including maintenance) and services performed by any employee of decedent which were provided within six (6) months of decedent's death;

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- d. Rents for occupancy of the decedent's residence for six (6) months immediately prior to death;
- e. All other claims, including those by the Commonwealth.

In addition, PEF Code §3392 recognizes possible priorities given to claims due as of the date of death to the United States. Compare *Weiss Estate*, 24 Fiduc. Rep. 138 (O.C. Div. Alleg., 1974) with *Hackney Estate*, 24 Fiduc. Rep. 639 (O.C. Div. Phila., 1974); see generally Hunter, *Debts of Decedent*, §8(d).

PEF Code §§3381, 3382 and 3532(b)(3) recognize the priority of liens existing at the date of death.

Unpaid claimants may file a petition for citation in the Orphans' Court to compel the personal representative of the estate to file an account.

5. *Judgment Creditors*

A judgment which is a lien on real estate owned by a decedent at the time of the decedent's death or on real estate the decedent conveyed by unrecorded deed during the decedent's lifetime continues to bind the real estate for the longer of five (5) years from its inception or last revival, or for one (1) year following the decedent's death, even though not revived after the decedent's death, and during such period the priority maintains its rank as of the time of death. See PEF Code §3382.

6. *Execution on Judgments*

No levy or execution is permitted upon any real or personal property of a decedent's estate by virtue of a judgment against the decedent or the decedent's personal representative unless (i) agreed to by the personal representative in a writing filed in the proceeding giving rise to the judgment or (ii) approved by the Orphans' Court. In the latter case, the Court may require or waive the giving of notice to the personal representative or other parties in interest. See PEF Code §3377.

The foregoing restrictions do not apply to actions to enforce mortgages, ground rents, pledges or conditional sales of real or personal property. See PEF Code §3377(b).

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7. *Claims Not Reduced to Judgment*

A personal representative, at his or her own risk and without the filing, audit or confirmation of an account, may distribute real or personal property without liability to any claimant who has not given notice of his claim within one (1) year after the first complete advertisement of the grant of letters or prior to such distribution. *See* PEF Code §3532(a).

No claimant shall have any claim against distributed personal property unless such claimant's claim is known to the personal representative within one (1) year after the first complete advertisement or prior to distribution. *See* PEF Code §3532(b)(1).

No claimant shall have any claim against distributed real property unless such claimant has, within one (1) year after the decedent's death, filed a written notice of claim with the Clerk of Court. Such claim against real property shall expire at the end of five (5) years after the decedent's death unless, within that time, the personal representative files an account or the claimant files a petition to compel an accounting. *See* PEF Code §3532(b)(2).

Under PEF Code §3532(b.1), a personal representative may, by mail or delivery, make written demand of a person who may have a claim against the estate but has never before provided written notice of it. If the personal representative asks such a person to give written notice of such claim within sixty (60) days from the mailing or delivery of the demand, or within one (1) year from the first complete advertisement of the grant of letters if later, the failure to do so precludes such person from bringing a claim under PEF Code §§3532(a) or 3532(b)(1) and the person has no right to receive notice of the filing of the personal representative's account and its call for audit or confirmation. The personal representative is not required to make or not make such a demand under this provision.

A personal representative may file with the Clerk of Court receipts, releases and refunding agreements. Acceptance by the Court shall not be construed as Court approval of any distribution. *See* PEF Code §3532(c).

8. *Specific Performance of Contracts*

If an individual makes a legally binding contract to purchase or sell real or personal property and dies before its consummation, the decedent's representative has the power to consummate it. If the personal representative does not do so, the Court, on the application of the other party, may order specific performance of the agreement

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if the contract would have been enforced specifically had the decedent not died. *See* PEF Code §3390.

9. *Election Against Will*

See Chapter 10.

D. Claims by Department of Revenue

The Pennsylvania Department of Revenue, Personal Income Tax Bureau, has adopted Regulation 119.27 Fiduciary Request (pursuant to §338 of the Tax Reform Code of 1971), which sets forth the procedure by which a personal representative can secure a discharge from personal liability for any income tax deficiency found to be due after such discharge is granted. After the filing of all returns due from the decedent and his or her estate, a request is made to the Department of Revenue, in duplicate, using the format in the Regulation, for the prompt assessment and final determination of the income taxes of the decedent and his or her estate.

E. Claims by Internal Revenue Service

1. *Notice of Fiduciary Relationship*

Under IRC Reg. §301.6903-1, as soon as all necessary information is available, notice is required to be given of the existence of a fiduciary relationship by filing IRS Form 56 with the IRS office at which the decedent filed his or her returns.

If notice is not filed, the fiduciary is charged with notice of debt for further taxes even though such notice may be sent to the taxpayer's last address and not to the fiduciary.

When the fiduciary capacity has terminated, the fiduciary should file a written notice (IRS Form 56) of such termination with the IRS office where notice of appointment was originally filed.

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2. Request for Prompt Assessment

Under IRC §6501(d), a personal representative may reduce the period for assessment of certain taxes from three (3) years to eighteen (18) months by filing IRS Form 4810 with the appropriate office. Under IRC §2204(a), the personal representative may request a determination of and discharge from personal liability for federal estate tax, to be made within nine (9) months after the filing of the Federal Estate Tax Return (IRS Form 706) or the date of the request, whichever is later. The personal representative may also request a determination and discharge from personal liability for decedent's federal income and gift taxes to be made within nine (9) months after the filing of the applicable return or the date of the request, whichever is later. *See* IRC §6905.

3. Priority of Claim

PEF Code §3392 provides that, in the event of an insolvent estate, the personal representative shall pay claims in the order listed "subject to any preference given by law to claims due the United States." *See Weiss Estate* and *Hackney Estate*, *supra*, with respect to federal tax claims.

F. Compromise of Claims

Unless a decedent's will provides otherwise, the personal representative has the authority to compromise claims by or against the estate. Where Court approval is necessary or desirable, the Court, on petition setting forth all the facts and circumstances, may enter a decree authorizing that the compromise or settlement be made. *See* PEF Code §3323.

Whenever it is desired to compromise or settle an action in which damages are sought to be recovered on behalf of the estate, the Court in which such action is pending and which has jurisdiction thereof may make an order approving such compromise or settlement. Such order may approve an agreement for the payment of counsel fees and other proper expenses incident to such action. The Court order approving such compromise shall not be subject to collateral attack in the Orphans' Court in the settlement of the estate. *See* PEF Code §3323(b).

The personal representative shall file a copy of the Court order approving such compromise in the Office of the Register or Clerk of the Orphans' Court having jurisdiction of the estate. When required to give bond, the personal representative shall not receive the

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proceeds of any such compromise or settlement until the Court has issued an order excusing the personal representative from entering additional security or requiring additional security, and, in the latter event, only after the additional security has been entered. *See* PEF Code §3323(b).

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A. Introduction

Procedures for the appointment of a guardian of the person or estate of a minor and the administration and distribution of minors' estates by Court-appointed guardians are covered in this chapter. PEF Code §102 defines "minor" as an individual under the age of eighteen (18) years. This definition is subject to specific statutory exceptions. For example, PEF Code §5301(b) (dealing with Uniform Transfers to Minors) defines a "minor" as an individual who has not yet attained twenty-one (21) years of age.

B. Procedure for Appointment

1. *Jurisdiction and Venue*

The Orphans' Court has mandatory jurisdiction over the administration and distribution of real and personal property of minors' estates and the appointment, control and removal of guardians of the person of minors. *See* PEF Code §§711(4) and (6). A guardian of the person or of the estate of a minor may be appointed by the Court of the county in which the minor resides, or if the minor is a non-resident, in the county having jurisdiction of a decedent's estate or of a trust from which the minor's estate is derived. If the derivative source is other than a decedent's estate or trust, proceedings may be instituted in any county where an asset of the minor's estate is located. *See* PEF Code §§5111 (a) and (b).

2. *Petition*

- a. **In General:** A guardian of the estate or person of a minor is appointed by petition to the Orphans' Court. Pa.O.C. Rule 12.5 sets forth requirements applicable to both types of petitions. When the petitioner seeks to appoint the same guardian to act in both capacities, it is appropriate to file a single petition. Generally, a petition for the guardian of a minor's person is required when the minor is an orphan and the deceased parents made no provision for the appointment of a guardian by will. *See* PEF Code §2519(a).

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- b. Parties:** When the same guardian is sought for more than one (1) minor with the same parents, a single petition is filed. *See* Pa.O.C. Rule 12.5(d).

A minor over the age of fourteen (14) years may present his or her own petition for the appointment of a guardian. In other cases, the minor's parents or the party (either individual or institutional) having custody of his or her person will usually act as the petitioner. However, anyone with an interest in the minor's welfare may petition for the appointment of a guardian. *See* Pa.O.C. Rule 12.5(a).

- c. The Guardian:** The Court has no authority to appoint a parent as guardian of a minor's estate, except as a co-guardian. *See* PEF Code §5112(3). The Court is generally reluctant to appoint any individual with whom the minor resides as guardian of the minor's estate. *But see* Phila.O.C. Rule 12.5.B(2)(c). Preference will be given to the nominee of a minor over the age of fourteen (14) years. *See* PEF Code §5113.
- d. Allowances:** Requests for allowances to pay for the support or education of the minor or for counsel costs and fees may not be included in a petition to appoint guardian. These must be presented to the Court in a separate petition after the guardian is appointed. This will be treated in greater depth below.
- e. Consents of Interested Parties:** Phila.O.C. Rule 12.5.B(1) requires the written consents of the parents (or surviving parent) of the minor to the presentation of the petition. If the minor is an orphan, consent must be obtained from an adult person with whom he or she resides or the person in charge of an institution having his or her custody. The rule also requires a spouse's consent in the case of a minor who is married.
- f. Other Exhibits:** The required consents must be annexed to the petition as exhibits. Other required exhibits are: (i) consent of an individual guardian (Phila.O.C. Rule 12.5.B(2)); (ii) copies of Court decrees approving distribution to minors who are parties to litigation or were parties to litigation (Phila.O.C. Rule 12.5.B(3)); and (iii) a copy of notice to United States Veterans Administration if the minor is the child of a veteran and funds of the Veterans Administration are payable to him or her.
- g. Security:** A Court-appointed guardian must enter security. The amount of the security must be adequate to cover the personal estate "which will come into

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the control of the guardian.” *See* PEF Code §5121. This amount is initially determined by reference to the allegation in the petition as to the contents of the estate, and is subject to adjustment by the Court. *See* PEF Code §5123. The bond requirements (as well as other administrative aspects) may be avoided by depositing the funds in a restricted bank account. This procedure is covered in depth below in section F.

- h. Notice and Decree:** An appropriate decree must be annexed to the front of the petition. If all requirements are satisfied, the Court will enter a decree appointing a guardian without the necessity of a hearing. If an interested party will not consent or cannot be located, notice must be given and a hearing may be necessary. There is no prescribed form of notice in this type of proceeding. The Court in each case will determine which type of notice is adequate. In some cases this will involve a citation on the non-consenting party to show cause why the proposed guardian should not be appointed. In other instances, counsel may be permitted to proceed by petition and notice. *See* Chapter 2.

C. Administration of Minors’ Estates

In many respects the guardian of a minor’s estate has powers, duties, and liabilities identical to the personal representative of a decedent’s estate. *See* PEF Code §§5144 and 5153. The guardian has all rights of possession and maintenance of all of the real and personal assets belonging to the minor (PEF Code §5141), may sell personal property without Court approval (PEF Code §5151), and may lease real or personal property not to extend beyond the date of majority without Court approval (PEF Code §5152). Permission of the Court must be secured to convey or encumber real estate in which the minor has an interest. *See* PEF Code §5155. The appropriate procedure is detailed in Chapter 9. A guardian must file an inventory with the Clerk of the Orphans’ Court within three months “after real or personal estate of his ward comes into his possession.” *See* PEF Code §5142.

D. Allowances

The guardian may expend income for maintenance and support of the minor without Court approval. With the exception of the payment of nominal counsel fees, Court approval

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must be obtained to invade principal for the maintenance, support, and education of the minor or to pay attorney's fees. The requirements for these petitions are set forth in Phila.O.C. Rules 12.5.E(1)-(3).

E. Accounts and Distribution

1. Necessity to Account

The guardian has a duty to account to the former minor at the termination of his guardianship when the minor attains the age of eighteen (18) years. It may be that the minor remains incapacitated and requires a guardian even after attaining majority. *See* Chapter 6. In order to obtain a discharge, the account must be filed with the Court. While this is the recommended procedure for concluding a minor's estate, it is not required by law. *See* PEF Code §5161. Frequently, the former minor cannot afford the expense of an Orphans' Court audit and prefers an informal settlement of the estate. Counsel for guardians who choose to proceed in this fashion must take extreme care in providing an accurate accounting and obtaining a full acknowledgment and release of liability from the former minor.

2. Audit of a Guardian's Account

The basic audit procedure is covered in depth in Chapter 3. A guardian's account is filed with the Clerk of the Orphans' Court and is placed on the audit list in the identical manner as an account of a personal representative. The notice requirements are also the same. At the time the account is filed documents required by Phila.O.C. Rule 6.9.D(1) and (4) must be filed with the Clerk. Counsel must appear at audit and enter an appearance as explained in Chapter 3.

F. Restricted Accounts

Under the procedure set forth in Phila.O.C. Rule 12.5.C, a guardian may avoid the entry of security by depositing the assets of the estate into a restricted bank account. This alternative is utilized extensively by counsel in Philadelphia because of its simplicity and cost savings to the estate.

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The procedure can be summarized as follows: It is initiated by a petition requesting the appointment of a guardian and authorization for the guardian to deposit the funds in a restricted account or accounts in lieu of the entry of security. Special care should be taken in preparing the decree so that the banking institution can release the funds when the minor attains the age of eighteen (18) years. The maturity date of any savings certificate should be selected so as not to extend beyond attainment of the age of majority.

After the decree is entered, the bank accounts authorized by the decree are established and the appropriate restrictions are typed on the passbook or certificate. The guardian need not file an inventory since no assets are “in his possession.” However, there is a duty to report all bank deposits to the Court. In Philadelphia, this is done by filing an affidavit of compliance which includes a copy of the Court order and a copy of the restricted account’s title page including the Court ordered restrictive language.

On the minor’s 18th birthday the account may be closed upon the joint order of the guardian and the former minor. There is no need for an accounting if no withdrawals are made during the guardian’s term.

If it becomes necessary to obtain an allowance, the Court must be petitioned accordingly, as set forth in paragraph D above. However, withdrawals from restricted accounts can be made without Court approval in order to pay federal and state income taxes. *See* Phila.O.C. Rule 12.5.6(5). Once withdrawals have been made, the guardian must petition the Court if a discharge is desired. A statement containing the same basic information as an account must be annexed as an exhibit to the petition for discharge. *See* Phila.O.C. Rule 12.5.C(3)(b).

G. Distribution to or on Behalf of a Minor without the Appointment of a Guardian

1. Small Estates

The Court has the authority to order the maintenance, conveyance, or distribution of a minor’s assets without the appointment of a guardian where the entire real and personal estate has a net value of \$25,000 or less. *See* PEF Code §§5101 and 5102. The procedure for obtaining Court approval of such disposition of a minor’s estate is set forth in Phila.O.C. Rule 12.5.D. In practice, the Orphans’ Court will not favorably entertain a petition brought under this Rule where the relief requested is for distribution of cash to the minor or his parents, unless a nominal amount is involved. It is recommended that the standard guardian procedure be employed in this situation.

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However, it may be appropriate to utilize this procedure in certain situations, such as where a minor owns an insignificant fractional interest in a parcel of real estate which has been sold, and the sale is subject to approval by the Court.

2. *Minor as Civil Suit Plaintiff - Blocked Accounts*

No compromise, settlement or discontinuance may be made in a lawsuit to which a minor is a party without Court approval. The procedure for obtaining Court approval is by petition in the Civil Trial Division of the Court of Common Pleas. This procedure is governed by Pa.R.C.P. 2039(b) which authorizes the Court to order payments of \$25,000 and less to the minor's natural guardian, the guardian of his or her person, the person maintaining the minor, or the minor. In Philadelphia, the procedural requirements which must be followed in each case are set forth in Philadelphia Civil Rule 165. This rule also authorizes unlimited payments to blocked accounts (the amount in each account not to exceed the F.D.I.C. insurance limits) which prohibit withdrawal prior to majority in the absence of Court order. *See* PEF Code §5103. Reference to the definition of "guardian" set forth in Pa.R.C.P. 2026 is recommended before attempting to proceed under Pa.R.C.P. 2039.

The foregoing procedure has the advantages of simplicity and cost savings. It is also appropriate for short term situations and those where the amounts involved are small. However, it is imperative in each case that trial counsel consider the alternative of proceeding in the Orphans' Court to have a guardian appointed to receive the litigation proceeds. This is particularly true where the award is large, of significant duration, or allowances are likely to be necessary. The procedure under Pa.R.C.P. 2039(b)(1) and (2) is discretionary with the Court. In many instances the Trial Division Judge will require a Court-appointed guardian before entering an order for payment. It is best to consult with the Judge before deciding which procedure to adopt.

H. Avoidance of Guardianship Proceedings

The cost, inconvenience, and lack of flexibility in arrangements involving Court-appointed guardians often can be avoided by proper estate planning. Generally speaking, assets should not be titled in a fashion which may vest absolute ownership in a minor. Common examples to be avoided are Totten trusts with minor beneficiaries, real estate deeded to a minor, and life insurance designating minors as beneficiaries of the policy proceeds.

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Minimum estate planning techniques include: (i) a will with trust provisions for property devised or bequeathed to a minor and appointing guardians of the person for minor children; (ii) designating trustees as beneficiaries of the proceeds of life insurance and employee benefit plans where they are to be paid for the benefit of a minor; and (iii) utilizing trusts or custodial arrangements (*See* PEF Code §5301 *et seq.*). A detailed analysis of the foregoing techniques and their alternatives exceeds the scope of this chapter.

CHAPTER 6

PROCEEDINGS INVOLVING INCAPACITATED PERSONS

A. Introduction

A capsule review of the administration of the estates of incapacitated persons, discussed in greater detail below, is as follows:

1. *Petition* alleging incapacity is filed with the Clerk of the Orphans' Court.
2. *Preliminary decree* is entered, awarding a citation directing the alleged incapacitated person to show cause why he should not be adjudged an incapacitated person, and scheduling a hearing usually within thirty (30) days.
3. *Service of notice* is made upon an alleged incapacitated person and others at least twenty (20) days before the hearing date.
4. *Hearing* takes place and evidence introduced.
5. *Final decree* is entered, containing adjudication of incapacity, appointing guardian (if required), and fixing amount of security.
6. *Inventory* is filed, usually within ninety (90) days, and a copy of the incapacitated person's will (if applicable) is submitted to Hearing Judge.
7. *Petition for special allowances* (if required) is filed, generally to obtain approval for principal distributions.
8. *Distributions of incapacitated person's estate at his death* is made to his personal representative.

The basic statutory provisions are set forth in PEF Code §5501 *et seq.*

B. Definition of Incapacitated Person

An "incapacitated person" means "an adult whose ability to receive and evaluate information effectively and communicate decisions in any way is impaired to such a

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significant extent that he is partially or totally unable to manage his financial resources or to meet essential requirements for his physical health and safety.” See PEF Code §5501.

A minor cannot be adjudged an incapacitated person. The proper procedure is to have a guardian appointed for the minor’s estate. See *Williams Estate*, 40 D. & C. 2d 718 (O.C. Phila. 1966). See generally Chapter 5.

C. Jurisdiction and Venue

Exclusive jurisdiction over the incapacitated person’s estate, and concurrent jurisdiction over his person, is vested in the Orphans’ Court. See PEF Code §711(10) and §712 (2).

In the case of a resident incapacitated person, the guardian of the person or estate may be appointed by the Court of the county in which the incapacitated person is domiciled, is a resident, or is residing in a long-term care facility. In the case of a non-resident incapacitated person a guardian of the estate may be appointed by the Court of the county which has jurisdiction of a decedent’s estate or trust in which the incapacitated person has an interest, or if the non-resident incapacitated person’s estate is derived otherwise, the Court of any county where an asset of the incapacitated person is located. See PEF Code §§5512(a) and (b), and §721(2); *Rodriguez Estate*, 6 D.&C. 2d 521 (O.C. Phila. 1956).

The appointment of a guardian for a non-resident incapacitated person may be made in accordance with the same procedure for a resident incapacitated person, or it may be made upon the submission of an exemplified copy of a decree establishing his incapacity in another jurisdiction. See PEF Code §5511(b).

D. Types of Guardians

1. *Emergency Guardian*

Pending an adjudication of incapacity, an emergency guardian may be appointed to avoid irreparable harm to the incapacitated person’s estate or person. Notice of the petition and the hearing to appoint an emergency guardian is required only to the extent it appears feasible under the circumstances. An emergency order appointing a guardian of the person may be in effect for up to seventy-two (72) hours. If the

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emergency continues, the Court may extend the emergency order for no more than twenty (20) days from the original order's expiration after which a full guardianship proceeding must be initiated. *See* PEF Code §5513. *But see* Phila.O.C. Rule 14.2.B(7)(c)(ii) (an emergency guardian of the estate shall not exceed thirty (30) days). The emergency guardian may be the same person who will eventually serve as permanent guardian.

2. *Guardian of the Person or Estate*

A guardian may be appointed for either a resident incapacitated person's estate or his person. The same individual can be appointed guardian of both the person and estate. A guardian of the estate is responsible for managing the property of the incapacitated person, receiving all income and exercising reasonable discretion in making expenditures for the care and maintenance of the incapacitated person. *See* PEF Code §5536(a). A guardian of the person makes decisions for an individual who is unable to make or communicate responsible decisions regarding his person. For instance, if consent to a medical procedure is needed, or if no one is caring for the incapacitated person and it is necessary to obtain medical service or admit him to a care facility, it would be appropriate to request a guardian for the incapacitated person's person. *See Null Estate*, 25 Fiduc. Rep. 1 (O.C. Div. Wash. 1974).

E. Procedure for Appointment of Guardian of Incapacitated Person's Person and/or Estate

1. *Petition*

- a. The procedure is initiated by the filing of a petition with the Clerk of the Orphans' Court. A fee is paid and the petition is then assigned to a Hearing Judge. The petitioner may be any person interested in the alleged incapacitated person's welfare. *See* PEF Code 5511(a).
- b. The required contents of the petition are set forth in Pa.O.C. Rule 14.2. and Phila.O.C. Rule 14.2.A. *See* PEPH, Green Book, 8.1.
- c. The following must be attached to the petition:

- (1) A *Preliminary Decree* for signature by the Court, awarding a citation directed to the alleged incapacitated person to show cause why he should

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not be adjudged an incapacitated person and a guardian appointed and provide for a hearing scheduled for a date, hour and place to be filled in by the Court. Generally, the Court sets a hearing date within thirty (30) days from the date of the decree to allow sufficient time to obtain service.

- (2) A *Final Decree* for signature by the Court, which sets forth an adjudication of incapacity, appoints a guardian, directs the guardian to file an inventory and fixes the amount of security, if any. The Philadelphia Court usually requires security in the amount of 150% of the estate's liquid asset value.
- (3) The guardian's written consent to serve should be attached as an exhibit to the petition, and if the guardian is an individual, a statement as to his domicile and that he is a citizen of the United States and is able to speak, read and write the English language. A family relationship shall not by itself be considered an interest adverse to the alleged incapacitated person.

2. *Hearing Judge*

The judge to whom the petition is assigned is designated the Hearing Judge. Generally, all matters pertaining to the incapacitated person's estate should be referred to the Hearing Judge. *See* Phila.O.C. Rule 14.5.B(2).

3. *Notice*

At least twenty (20) days before the hearing, notice must be given as follows:

- a. The alleged incapacitated person must be personally served with the citation with notice with a copy of the petition attached. At the time of service, the citation and petition must be explained to the maximum extent possible in language the incapacitated person is most likely to understand. *See* PEF Code §5511(a). The affidavit of service is presented to the Court at the hearing and should verify service in this manner. *See* Phila.O.C. Rule 14.2.B(4). If the citation cannot be served on the alleged incapacitated person within twenty (20) days before a hearing date, an *alias* or *pluries* citation must be obtained and served.
- b. A letter of notice of the filing of a petition and of the hearing must be served personally or by certified mail on the incapacitated person's intestate heirs who are residing in the Commonwealth and who are *sui juris*, and to such other persons as the Court may direct. *See* PEF Code §5511. Many attorneys attach a copy of the petition and citation to the letter of notice. *See* Phila.O.C. Rule

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14.2.B(4)(b). If there are no intestate heirs, the practice in Philadelphia County is to give notice to the Deputy Attorney General in Philadelphia, and to such person or institution providing residential services to the alleged incapacitated person.

- c. If counsel has not been retained by or on behalf of the alleged incapacitated person, petitioner must notify the Court at least seven days prior to the hearing. *See* PEF Code §5511(a). In this notice, Petitioner should include information to assist the Court in ascertaining the need for Court-appointed counsel.

4. *Hearing*

- a. The alleged incapacitated person must be present at the hearing unless the Court finds that his physical or mental condition would be harmed by his presence or because of his absence from the Commonwealth. *See* PEF Code §5511.
- b. Evidence is usually submitted as follows:
 - (1) The affidavit of service.
 - (2) Testimony of physician or psychiatrist. Petitioner must present, in person or by deposition, the testimony of a physician or licensed psychiatrist qualified by training and experience in evaluating individuals with the incapacities of the type alleged by the petitioner. *See* PEF Code §5518; Phila.O.C. Rule 14.2.B(8)(a). If the alleged incapacitated person is not present at the hearing, the deposition or testimony of or sworn statement by a physician or psychiatrist, should be introduced to show that the physical or mental condition of the alleged incapacitated person would be harmed by his or her presence. *See* Phila.O.C. Rule 14.2.B(6)(a).
 - (3) Testimony of petitioners and other persons as to how the alleged incapacitated person's care needs and financial needs are currently being met.
 - (4) Testimony as to the nature and size of the estate, and the qualifications of the proposed guardian.
- c. Mental capacity is presumed, and before a person will be deprived of the right to handle his own property, there must be clear and convincing proof of mental incapacity and such proof must be preponderant. *See Myers Estate*, 395 Pa. 459 (1959).

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- d. The hearing may be closed to the public and without a jury unless the alleged incapacitated person or his or her counsel objects. The Court may dismiss any proceeding which it finds was not brought to benefit the alleged incapacitated person. *See* PEF Code 5511(a).
- e. The Hearing Judge, upon petition or *sua sponte*, may order a physician to examine the alleged incapacitated person. The physician's report will be submitted in writing to the Court and to all parties in interest before the hearing. *See* PEF Code §5511(d).
- f. A non-resident of Pennsylvania will generally not be appointed guardian of the estate.
- g. If the evidence at the hearing indicates that the entire estate does not exceed \$25,000, it may be awarded directly to the person or institution maintaining the incapacitated person without the appointment of a guardian or may be placed in a restricted bank account. *See* PEF Code §5505; *cf.* §§5101-5103; Phila.O.C. Rule 14.2.C.
- h. When the Court has appointed a guardian, no other Court shall appoint a similar guardian for the alleged incapacitated person within the Commonwealth. *See* PEF Code §5512(c).

F. Effect of Determination of Incapacity

Legal title to all property remains in the incapacitated person, subject, however, to all powers granted to the guardian by law and by Court decree. *See* PEF Code §302. The incapacitated person is legally incapable of making a contract, gift, or any instrument in writing in those specific areas in which the person has been found to be incapacitated. *See* PEF Code §5524. The incapacitated person may make a will, but the burden of proof is on the proponent of the will to show its validity. *See Lanning Will*, 414 Pa. 313 (1964).

CHAPTER 6

PROCEEDINGS INVOLVING INCAPACITATED PERSONS

G. Powers and Duties of Guardian

1. Filing Bond

Every guardian must file a surety bond as the Court may direct, subject to certain exceptions, most notably, corporate fiduciaries. *See* PEF Code §5515 *cf.* §§5121-5122. In lieu of entering security, the guardian may be allowed to deposit the funds of a minor's estate in a restricted bank account. *See* Phila.O.C. Rule 14.2.B(2) *cf.* 12.5.C.

In addition, the Court may require a separate bond to protect the assets of an estate of which the incapacitated person is a fiduciary. *See* PEF Code §5516.

2. Right of Possession and Sale

The guardian has the right to possess every real and personal asset of the incapacitated person to which his appointment extends and may sell any personal property of the incapacitated person. Permission of the Court must be secured to convey or encumber real estate in which the incapacitated person has an interest. *See* PEF Code §5521 *cf.* §§3353 and 3355. The appropriate procedure is detailed in Chapter 9. The guardian need not petition the Court to approve sales of personal property or for sale or retention of securities except in unusual circumstances, such as when the incapacitated person regains his capacity. *See* Phila.O.C. Rule 14.2.E(1) and (2).

3. Inventory and Production of Will

Within ninety (90) days after the adjudication of incapacity, the guardian must file an inventory on Court approved forms of the assets that have come into his possession and assets anticipated to be received. *See* PEF Code §5521(b); Phila.O.C. Rule 14.2.B(9). The Court may order an additional security bond based upon the inventory. Except in cases of extreme emergency, requests for allowance will not be approved prior to the filing of the inventory. *See* Phila.O.C. Rule 14.2.D(1)(d)(i). A supplemental inventory must be filed within ninety (90) days following receipt of additional assets not revealed in the initial inventory.

The incapacitated person's will, if found, must be submitted to the Hearing Judge, with a copy for retention in the Judge's private file. In *Widener Estate*, 437 Pa. 294 (1970), the Court approved the practice of impounding and inspecting the incapacitated person's will, but disapproved the disclosure of its contents as a violation of the incapacitated person's right of privacy.

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PROCEEDINGS INVOLVING INCAPACITATED PERSONS

4. *Notice to Commonwealth*

If the incapacitated person has been maintained in a state-owned institution, the guardian must give notice of appointment within ninety (90) days to the proper state official. *See* PEF Code §5525.

5. *Expenditures from Estate*

The guardian may expend all of the income for the incapacitated person's care and maintenance without Court approval. The guardian may also, with Court approval, expend income or principal for (i) the care, maintenance or education of the incapacitated person, his spouse, children or those for whom the incapacitated person was making such provision before incapacity, or (ii) the reasonable funeral expenses of the incapacitated person's spouse, child or indigent parent. *See* PEF Code §5536. Generally, the Court will authorize principal expenditures of a recurring nature for a period of one (1) to three (3) years, at the end of which period another petition must be filed. Payment of counsel fees from principal, except in a nominal amount, requires Court approval. *See* Phila.O.C. Rule 14.2.D(1)(a) *cf.* 12.5.E(1)(a). Also, the Court may authorize the guardian to retain such assets as are deemed appropriate for the anticipated expenses of the incapacitated person's funeral and burial lot, which assets shall be exempt from all claims including claims of the Commonwealth. *See* PEF Code §5537.

To obtain Court approval, the guardian should file a petition for allowance with the Clerk for submission to the Hearing Judge. The petition should include all of the information and averments set forth in Phila.O.C. Rule 14.2.D(1). *See* PEPH, Green Book, 8.5.

6. *Estate Planning*

The Court, upon petition and with notice to all parties in interest and for good cause shown, shall have the power to substitute its own judgment in authorizing estate planning on behalf of the incapacitated person by such techniques as making gifts, creating trusts, purchasing securities, changing insurance beneficiaries, claiming an elective share of a deceased spouse's estate and changing the incapacitated person's residence and domicile. *See* PEF Code §5536(b); PEPH, Green Book, 8.8.

CHAPTER 6

PROCEEDINGS INVOLVING INCAPACITATED PERSONS

H. Adjudication of Capacity

The Court, upon petition and a hearing, may find that a person previously adjudged incapacitated has regained capacity. *See* PEF Code §5517; Pa.O.C. Rule 14.3; *Nagle Estate*, 418 Pa. 170 (1965); PEPH, Green Book, 8.6.

I. Death of Incapacitated Person

Within sixty (60) days of the death of an incapacitated person, the guardian shall file a final report of the guardianship. The filing of an account is not required unless the Court so directs.

J. Audits and Distribution

After the incapacitated person's death, all claims against the incapacitated person should be presented to the personal representative of the incapacitated person's estate. In making final distribution, the guardian may be discharged from responsibility by either:

1. ***"Piggyback" Account***

The guardian may distribute the deceased's estate to the personal representative of the incapacitated person's estate who will thereafter, file an account, attaching the guardian's account as an exhibit. The guardian will be relieved of all liability when the property is distributed by the personal representative pursuant to the adjudication upon his account. *See* PEF Code §5533; *cf.* §3544.

2. ***Separate Account***

The guardian may file an account with the Court. *See* PEF Code §5531. The Auditing Judge shall only permit the payment of necessary administration expenses, including fees of the guardian and his attorney. *See* PEF Code §5534. The procedure with regard to his account is largely the same as that for decedent's or minor's estates. *See* PEF Code §5533; *cf.* §3533.

If the deceased is a veteran, a copy of the account filed with the Court (and, probably, notice of audit) should be sent to the Veterans Administration.

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PROCEEDINGS INVOLVING INCAPACITATED PERSONS

K. Avoidance of Incapacity Proceedings

In some cases, the need for a guardian may be avoided by proper planning. A person concerned about future capacity may execute a general power of attorney which, by statute, will survive the donor's incapacity unless otherwise specifically provided. *See* PEF Code §5601.1. In addition, a person may transfer property to a trust with power in the trustee to manage the trust estate on the person's behalf. Also, a testator or settlor should not transfer property to an incapacitated person. In such circumstances, property should be transferred into a trust with the trustee empowered to apply the income or principal for the incapacitated person's benefit, rather than paying it to the incapacitated person.

CHAPTER 7

APPOINTMENT AND DISCHARGE OF FIDUCIARIES OTHER THAN GUARDIANS

A. In General

PEF Code §102 and Phila.O.C. Rule 2.3.A(7) define “fiduciary” to include personal representatives, trustees and guardians of the estates of minors and incapacitated persons. Other “fiduciaries” include guardians and trustees *ad litem* and custodians under the Uniform Transfers to Minors Act (UTMA).

B. Personal Representatives

A personal representative is an executor or administrator appointed by the Register of Wills. The power to remove a personal representative is vested exclusively in the Orphans’ Court. Grounds and procedure for removal are set forth in PEF Code §§3182 and 3183.

After an accounting and audit in the Orphans’ Court, the Court will, upon petition, discharge the personal representative and his surety, if any, or the surety alone. Such petitions are seldom filed because the personal representative is adequately protected from further liability in most cases by the adjudication itself. In large or disputed estates, the surety may insist on an express discharge, but is usually satisfied by other evidence that the estate has been properly distributed. *See* PEF Code §3184; Pa.O.C. Rule 12.7 and Phila.O.C. Rule 12.7.A.

Where letters have been granted in an estate not exceeding \$25,000, PEF Code §3531 permits a personal representative, after the expiration of one (1) year from the first complete advertisement of the grant of letters, to petition the Court for discharge without the expense and delay of a formal accounting. However, an account and suggested distribution of the estate must be annexed to the petition.

C. Trustees

Trustees are generally appointed by or pursuant to the deed or will under which the trust arises. In the case of testamentary trusts, the Court makes an award to the trustee in its

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APPOINTMENT AND DISCHARGE OF FIDUCIARIES OTHER THAN GUARDIANS

adjudication of the personal representative's account, if any. In the event the personal representative chooses not to file an account for audit, or if the need arises to have a trustee's appointment confirmed at an earlier date, a petition may be filed in accordance with the provisions of Pa.O.C. Rule 12.14.

When a vacancy occurs for any reason - most commonly because of death, inability or renunciation - and the trust instrument does not designate a substitute or successor, an interested party must petition the Court to fill the vacancy. The requirements and procedures are set forth in PEF Code §7101 *et seq.*, Pa.O.C. Rule 12.6, and Phila.O.C. Rule 12.6.A. The provisions for removal and discharge of trustees are similar to those relating to personal representatives and their surety. *See* PEF Code §7121; PEPH, Green Book 9.1.

D. Guardians and Trustees *Ad Litem*

Due process ordinarily requires the joinder or notification of every person whose interest may be affected by the particular judicial proceeding. Except as discussed below, if a beneficiary is under a disability, such as incapacity or minority, and has no guardian, or if persons unborn or unascertained are potential beneficiaries, the Court will appoint a guardian or trustee *ad litem* to represent unborn or unascertained persons. As the title indicates, an *ad litem* is appointed to represent such interests only for the duration of the particular proceeding, most commonly the audit of a fiduciary's account. In most cases, counsel for the accountant requests the Court to make such an appointment in order to bar, insofar as possible, subsequent objections. Requirements relating to the appointment of a guardian *ad litem* for an incompetent who is a party in a civil action are set forth in Pa.R.C.P. 2051 *et seq.*

Pursuant to PEF Code §751(6), the appointment of an *ad litem* is unnecessary where there are other parties who have similar interests or if the minor, unborn or unascertained beneficiary is the issue of a *sui juris* living ancestor who is interested in the estate or trust and whose interest is not adverse to that of such beneficiary (the principle of "virtual representation"). In addition, the appointment of an *ad litem* is sometimes waived where the trust is uncomplicated and of modest value, where there has been a recent accounting or where the interests of the unborn and unascertained beneficiaries are not likely to vest. In such cases, counsel should file a request for waiver of the appointment (an unofficial form is often used). Where the request for waiver is based upon PEF Code §751(6), counsel should furnish the Court with details concerning the interests in the estate or trust of those upon whom virtual representation is based and their relationship to the minor, unborn or unascertained beneficiary.

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APPOINTMENT AND DISCHARGE OF FIDUCIARIES OTHER THAN GUARDIANS

The appointment of guardians and trustees *ad litem* in connection with the audit of a personal representative's account is exceptional. The rule in Philadelphia is that an *ad litem* will be appointed in every case when the discharge of a trustee or his estate is sought or a particular distribution of corpus is to be made. *See* Phila.O.C. Rule 12.4.A. Whenever a trustee's account is filed, counsel should carefully review the facts to determine if an *ad litem* is required. If so, a petition conforming to Phila.O.C. Rule 12.4.A should be prepared and presented to the Auditing Judge at least two (2) weeks prior to the audit date.

It is common practice in Philadelphia to appoint an attorney as guardian or trustee *ad litem*. Although nothing precludes the *ad litem* from obtaining legal assistance, the *ad litem* normally acts as his or her own counsel. Usually the audit is continued to permit the appointee time to review the case and to prepare a written report to the Court. The contents of such a report are set forth in Phila.O.C. Rule 12.4(5).

1. The *ad litem* is entitled to compensation and to reimbursement for reasonable costs, such as for transcripts of notes of testimony, and should request an allowance for such costs in his report. Compensation is usually charged against that portion of the funds in which the *ad litem's* ward has an interest, which most commonly is principal.
2. In appropriate circumstances, an *ad litem* will be authorized - even directed - to appeal the findings of the Auditing Judge. Otherwise, the *ad litem* is not expected to appeal an adjudication or decree adverse to the interests of those whom he was appointed to represent.

E. Custodians Under Uniform Transfers to Minors Act

The practice with respect to custodians under the Pennsylvania Uniform Transfers to Minors Act (PEF Code §§5301-5310) is virtually the same as for trustees. A custodian is appointed by the donor of the gift, is subject to removal by the Court, and, in the event of death or legal incapacity with no successor otherwise designated, will be succeeded by a person designated in accordance with PEF Code.

CHAPTER 8

CHARITABLE GIFTS

A. Definition

PEF Code §6101 defines “charity” or “charitable purposes” as including, but not limited to, the relief of poverty, the advancement of education, the advancement of religion, the promotion of health, governmental or municipal purposes and other purposes, the accomplishment of which is beneficial to the community.

Charitable gifts have long enjoyed a special position in the law. They are not subject to the rule against perpetuities, PEF Code §6104(b)(1), nor are directions to accumulate income in a trust for charitable purposes subject to the rule against accumulations, PEF Code §6106(b)(1). However, the Internal Revenue Code does impose certain distribution requirements on private foundations.

B. The Attorney General as *Parens Patriae*

The Commonwealth, or the Attorney General on its behalf, acting in the capacity of *parens patriae*, represents the public’s interest in charities, and is, therefore, an indispensable party in every proceeding which affects a charitable trust. *See Pruner Estate*, 390 Pa. 529 (1957). Thus, Pa.O.C. Rule 5.5 requires that in every proceeding involving or affecting a charitable interest (except where there are pecuniary legacies of \$25,000 or less which have been or will be paid in full) notice must be given to the Attorney General. This notice requirement also applies in matters which are settled informally. *See Little Estate*, 403 Pa. 534 (1961). It is easy to comply with the requirement and the printed form entitled “Notice of Charitable Gift,” obtainable from the Clerk, may be used. *See* PEPH, Green Book, 6.7. Whether or not the form is used, counsel is required to submit a copy of the instrument creating the gift, a copy of the account (in proper fiduciary form), any other supporting documents or other relevant information to the Deputy Attorney General for charities no less than fifteen (15) days prior to audit, and it is recommended that it be done at least a month in advance. One set of documents is sufficient and should be sent to the designated local Deputy Attorney General, the Regional Chief of the Charitable Trusts and Organizations Section, whose office is in the Attorney General’s Eastern Regional Office located in Philadelphia.

The Attorney General’s Deputies will then review the notice, the account, and any accompanying documents and, if there are no questions or objections, will issue a “Clearance Certificate” approving the account if the account is being submitted for audit by the Court. If the account has been presented for informal settlement and there are no objections, the

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Attorney General will issue a letter so stating. Accounts in normal fiduciary form may be submitted in matters being settled informally regardless of size. If requested and provided with all the required information, the Deputy Attorney General may, on occasion, waive the notice requirement. Note that the Attorney General pays particular attention to the trustee or personal representative commissions and counsel fees where charities are concerned but to a lesser extent where the charitable interest is remote. It is, therefore, suggested that a family tree showing the lives in being who would inherit ahead of the charitable interest be provided in such cases. It is important to remember that in all matters relating to charitable interests the Attorney General is a necessary party and it would be well to consult the Attorney General in advance concerning any novel problem. A charitable trust is initially and continuously subject to the *parens patriae* power of the Commonwealth and to the supervisory jurisdiction of the Court, which has broad visitatorial and supervisory powers.

C. *Cy Pres* Doctrine

The doctrine of *cy pres* is one of approximation. It is set forth in PEF Code §6110 and is used whenever the particular charitable purpose for which property is given in trust is or becomes impossible, illegal or impractical of fulfillment and the settlor or testator has manifested a general charitable intent. In such case, the Orphans' Court, upon petition, may direct the application of the property to a charitable purpose which falls within the general charitable intent of the settlor.

No individual charity, unless it is a beneficiary named in the instrument, has any special right to notice of *cy pres* proceedings. This is because the Attorney General, rather than various individuals or organizations or agencies, acts for the public in the supervision of charitable trusts. *See Nevil Estate*, 414 Pa. 122 (1964).

D. Charitable Corporations

Jurisdiction over non-profit corporations handling funds for charitable purposes is vested in the Orphans' Court. *See* Chapter 2, paragraph E. This covers their internal operations as well as the manner in which control is exercised over trusts funds designated for charitable uses. *See Fiduciary Review*, June 1975. Any fundamental change involving a non-profit charitable corporation should be reported to the Attorney General and, upon occasion, to the Orphans' Court. *See* Chapter 11.

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CHARITABLE GIFTS

E. General

For further reference to the large body of law dealing with charities and trusts for charitable purposes, see Hunter, *Charities; Restatement (Third) of Trusts*, Section 28 (2003); and Scott, *The Law of Trusts*, Volume IVA, Sections 348-403 (4th ed. 1989).

CHAPTER 9

PROCEEDINGS INVOLVING REAL ESTATE

The Orphans' Court has jurisdiction over real estate of decedents, minors, incapacitated persons and that in trusts subject to its authority. *See* PEF Code §711.

Legal title to all real estate of a decedent passes at death to the heirs or devisees, subject, however, to all the powers granted to the personal representative by the PEF Code and by the will, and to all orders of the Court. *See* PEF Code §301(b).

Legal title to the real estate of an incapacitated person or a minor remains in the ward subject to all powers granted to the guardian by the PEF Code or by a governing instrument, and to all orders of the Court. *See* PEF Code §§302 and 303.

PEF Code §3311 sets forth the rights and duties of the personal representative of a decedent as to possession of real and personal property. PEF Code §3312 describes how the personal representative may renounce the right to administer real property. The personal representative has the right and duty to possess and manage real estate, unless an heir or devisee of the decedent occupies it at the decedent's death. Such occupancy does not defeat the personal representative's right to sell the property, although a specific devisee must join in any deed.

PEF Code §5141 sets forth the rights and duties of the guardian of the estate of a minor as to possession of real and personal property. PEF Code §5521(b) incorporates the provisions of §5141 as to the guardian of the estate of an incapacitated person. *See* PEF Code §7141 as to a trustee's rights and duties.

To avoid serious title problems, the practitioner must follow precisely all applicable statutes and rules. Those governing trustees and guardians in real property matters by and large parallel those for personal representatives but are not necessarily identical.¹

¹ Compare the relevant sections of Chapters 33 (decedents), 51 (minors), 55 (incapacitated persons), and 71 (trustees). This text is oriented mainly to decedent's estates; the practitioner should anticipate possible differences in similar sections on other matters.

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PROCEEDINGS INVOLVING REAL ESTATE

A. Distribution

A probated will is usually a sufficient public record of the passing of legal title to the decedent's real estate, whether the realty passes by specific devise or under a residuary clause. In many instances, however, as for example, if the real estate is located in a county other than where the will was probated, or if for some reason the real estate did not, in fact, pass to the beneficiary named in the will, an executor (or administrator, *c. t. a.*) should execute and record a deed, preferably with appropriate recitals, to the transferee.

Where real property passes by intestacy, most often where a decedent leaves no will, the administrator should always prepare and record a deed for the purpose of transferring title to the heirs. Consider also the Divorce Code of 1990, especially 23 Pa. C.S. §3323 and Chapter 35 in determining when spouses of the parties in interest must join in the deed.

Distribution by a personal representative's deed to heirs or devisees is a risk distribution. *See* PEF Code §3532. In order to be effective against creditors, distribution must be made more than one (1) year after the first complete advertisement of the grant of letters. It is safer, however, to file an account and to have the Court award the real estate by adjudication. *See* Phila.O.C. Rule 6.11.A. The adjudication usually directs the filing of a schedule of distribution. Indeed, the best practice is to request such a direction. After such a schedule of distribution containing a full legal description and a recital of title is filed and approved, an excerpt from the schedule, certified by the Clerk of the Orphans' Court, should be obtained by counsel and recorded in the public office for the recording of deeds in the county where the property is located. *See* Phila.O.C. Rule 6.11.A(6)(c). The Clerk's office has printed forms available for this purpose. *See* PEHP, Green Book, 6.15. After the excerpt is recorded, it should be given to the heir or devisee concerned since this recorded excerpt is tangible evidence of an interest in the real estate tantamount to a deed. In some counties, the legal description is submitted at audit with the statement of proposed distribution and an excerpt from the adjudication is then recorded. In Philadelphia, counsel is required to certify personal examination of the description in the last deed of record of the subject property and that the description submitted is an exact copy thereof on the schedule of distribution. *See* Phila.O.C. Rule 6.11.A(6)(b).

When a decedent dies intestate leaving only homestead real estate that the heirs, or some of them, intend to occupy, it may be that no personal representative is appointed.

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PROCEEDINGS INVOLVING REAL ESTATE

In this case, the title change can and ought to be reflected of record with a deed given by all of the intestate heirs to themselves or the intended owner[s].²

B. Sale by or to a Personal Representative

PEF Code §§3351 and 3353 set forth the powers of the personal representative to sell or lease the real property of a decedent. Under §3351, unless prohibited by the will, an executor can sell a decedent's real estate without securing approval of the Court. PEF Code §3352 relates to leasing such property. Under §3356, a personal representative, subject to Court approval, may also purchase real property of a decedent.

A personal representative who has been required to give bond may not receive the proceeds of the sale or involuntary conversion of the decedent's real property unless either the Court has excused entry of additional security or such additional security has been posted. Accordingly, a bonded personal representative's listing agreement with a real estate broker should specify that no commission is payable until the Court has approved the petition to fix additional security. The agreement of sale should contain a similar contingency with respect to closing.

Sales have been voided for the personal representative's failure to secure a Court order. *See Stewart Estate*, 22 Fiduc. Rep. 257 (1972). Phila.O.C. Rule 12.10.B sets forth the requirements of the petition to fix or waive additional security for sales made under §3351. *See* PEPH, Green Book, 4.8.

Special attention should be paid to the requirement that the petition list the terms of the proposed sale, itemize the settlement costs and net proceeds payable to the petitioner, and state the names of all parties in interest and whether or not they join in the petition or consent to the sale. The same bonding company that posted the original security should post the additional security. In addition, the certification required by rule must be annexed as an exhibit to the petition. Otherwise, the Court may require one or more appraisals prior to acting on the petition.

PEF Code §3353 provides for a public or private sale of real estate by a fiduciary where the PEF Code or the terms of the governing instrument do not authorize a sale or

² If record title is held or shared in proportions not exactly equivalent to the inheritance, there may be realty transfer tax to pay but much future difficulty will be avoided.

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where it is desirable that the sale have the effect of a judicial sale, with the resultant discharge of liens. Specifically devised property may be sold under this section, even without the devisee's joinder. Phila.O.C. Rule 12.9.A sets forth the requirements of the petition for public sale of realty under §3353, while Phila.O.C. Rule 12.10.A states the requirements with respect to private sales. These two (2) rules also apply to sales by guardians of minors or incapacitated persons. *See* Phila.O.C. Rule 12.10.B, Comments (2) and (3), and Pa.O. C. Rule 14.4.

C. Determination of Title

PEF Code §3546 permits a person claiming real estate as an heir or devisee to establish title thereto by means of a petition to the Orphans' Court. This procedure is available if no letters have been granted on the estate of the decedent in the Commonwealth and over a year has passed since the death, or if a personal representative has been appointed but has not filed an account within six (6) years of the decedent's death. Three (3) months after the Court's decree *nisi*, if no exceptions have been filed, the decree determining title shall be confirmed absolutely. Notice to creditors and other parties in interest of the decree *nisi* shall be as the Court directs. The final decree frees claimant's interest of all decedent's debts not then liens of record and without regard to the terms of any will of the decedent that may be thereafter probated. Phila.O.C. Rule 12.1.E sets forth the requirements of the petition. *See also* Remick, §15.03(f)(4), which suggests that this procedure is intended to apply to the rare case of a decedent who leaves no estate for administration except a partial interest in real estate.

D. Partition

The Orphans' Court Partition Act of 1917 was repealed as to interests created after 1950 by the Act of April 18, 1949, P.L. 512 (now §3534 of PEF Code), which provides:

“The court, for cause shown, may order the estate to be distributed in kind to the parties in interest, including fiduciaries. In such case, when there are two or more distributees, distribution may be made of undivided interests in real or personal estate or the personal representative or a distributee may request the court to divide, partition and allot the property, or to direct the sale of the property. If such a

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PROCEEDINGS INVOLVING REAL ESTATE

request is made, the court, after such notice as it shall direct, shall fairly divide, partition and allot the property among the distributees in proportion to their respective interests, or the court may direct the personal representative to sell at a sale confined to the distributees, or at a private or public sale not so confined, any property which cannot be so divided, partitioned or allotted.”

Phila.O.C. Rule 12.8.A covers these proceedings. It has been suggested that the proceedings under Phila.O.C. Rule 6.9.F be used whenever possible. In practice, questions of partition may thus be handled more easily at the audit than by use of more formal proceedings. *See* Remick, Chapter 49 and §15.03(f)(3).

E. Inalienable Interests

Chapter 83 of the PEF Code (successor to the Revised Price Act of 1917 repealed in 1974³) covers the problem of disposing of inalienable real estate. Chapter 83 provides a procedure to authorize the sale, mortgage, lease, or exchange of real estate encumbered by certain itemized limitations or where the legal title is otherwise inalienable. It provides that the Court of Common Pleas, operating through its appropriate division, may authorize such action on the petition of any party in interest, upon such terms and upon such security and after such notice as the Court shall direct by general rule or special order. PEF Code §§711 and 712 must be read together with Chapter 83 to determine when the Orphans’ Court is the appropriate Division.

Phila.O.C. Rules 12.12.A through 12.12.H cover these proceedings.

F. Real Estate of a Presumed Decedent

1. Less Than Seven (7) Years

When a person domiciled or having property in the Commonwealth disappears and is absent from his or her last known place of residence for a period of one (1) year

³ A detailed explanation of the Revised Price Act may be found in Remick, Chapter 50.

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without explanation being heard, the Court of the county where the property is located may, upon petition and after published notice, appoint a trustee to take care of the estate. Such a trustee must give bond and must protect and maintain the property, although, with the approval of the Court, the income from the property and, if needed, the property itself may be used for the support of anyone whom the absentee would be under a legal duty to support. *See* PEF Code §§5701-5705.

2. *After Seven (7) Years*

If a person is absent for seven (7) years without explanation, upon the petition of any party in interest and after published notice, the Court may make a finding and decree that the absentee is dead. After the entry of such a decree, the property of the absentee is administered by a personal representative the same as in the case of any other decedent. However, the personal representative shall make no distribution of such property to the persons entitled thereto by will or by intestacy, nor shall such persons acquire indefeasible title thereto, except under decree of Court. In such cases the Court will require a refunding bond executed by each distributee and filed with the Clerk. *See* PEF Code §5703. *See also* Remick, Chapter 9 for forms of various petitions.

MISCELLANEOUS PROCEEDINGS

A. Family Exemption

1. *When Allowed*

The family exemption is a right to retain or to claim real or personal property of a decedent in a certain amount, presently \$3,500. It accrues to the spouse of a decedent, and, if there is no spouse or if the surviving spouse has forfeited his or her rights, then to the children who are members of the same household as the decedent, and, if there are no such children, then to the parent or parents of decedent who are members of the same household as the decedent. *See* PEF Code §3121. The family exemption is in the nature of a property right and was originally based on the principle that in no event should the family be wholly deprived of support. It is preferred to all claims against the estate other than administration expenses, *see* PEF Code §3392, and may be a deductible expense for the purpose of Pennsylvania Inheritance Tax, 72 P.S. §9127(3).

2. *When Claimed*

The exemption should be claimed as soon as possible after the death of the decedent. It is a personal right and it can be lost if not claimed within a reasonable time. *See* Remick, §29.02, for other ways the exemption may be lost, waived or forfeited.

3. *Procedure*

The procedure for claiming the exemption depends on the circumstances. Any interested party may petition the Court to control the disposition of personal property claimed under PEF Code §3122. If there is a dispute or a question as to the rights of the claimant or the sufficiency of the net assets of the estate to pay the claim, or if the claim is made from real estate, then the procedure is initiated by petition to the Court, in accordance with the requirements prescribed by Phila.O.C. Rule 12.1.A-C. In addition to the procedure set forth in PEF Code §3123, a claim from real estate may be made by petition at the audit of the account. However, PEF Code §3126(b) limits the validity of an unrecorded decree setting apart a family exemption in the case of a subsequent *bona fide* grantee or lien holder.

Typically, the exemption is claimed from personal property of the decedent and the procedure is quite informal. The claimant simply notifies the executor or administrator of the claim by letter. If the claimant is the executor or administrator,

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he gives the letter to the estate's attorney. If the claim is for specific property, it is set aside at the values fixed by the inventory, and, if the claim is for cash, it is paid to the claimant as soon as available after the administration of the estate is begun. If the claimant has possession of tangible property, he or she can retain it. In all events, the payment of the exemption is shown as a disbursement in the account and listed on the Pennsylvania Inheritance Tax return as a deduction. The family exemption can only be claimed against probate property and will be disallowed as a Pennsylvania Inheritance Tax deduction if there is no probate estate. However, it may not be claimed as a deduction on the Federal Estate Tax return as it is considered a terminable interest.

B. Spouse's Election

1. When Available

In addition to the family exemption, a surviving spouse may elect against the provisions of the will and take a one-third (1/3) share of: (i) property passing from the decedent by will or intestacy; (ii) income from or use of, for the remaining life of the spouse, property conveyed by the decedent during the marriage to the extent that the decedent at the time of death had the use of property or an interest in or power to withdraw the income therefrom; (iii) property conveyed by the decedent during lifetime to the extent that the decedent at the time of death had a power to revoke the conveyance or to consume, invade or dispose of the principal for his or her own benefit; (iv) property conveyed by the decedent during the marriage to the decedent and another with right of survivorship to the extent of any interest in the property that the decedent had the power at the time of death to convey unilaterally absolutely or in fee; (v) survivorship rights conveyed to a beneficiary of an annuity contract to the extent it was purchased by the decedent during the marriage and the decedent was receiving annuity payments therefrom at the time of death; and (vi) property conveyed by the decedent during the marriage and within one (1) year of death to the extent that the aggregate amount so conveyed to each donee exceeds \$3,000, valued at the time of conveyance. *See* PEF Code §2203(a). The classes of property not subject to election are set forth in PEF Code §2203(b). A surviving spouse's election to take an elective share is deemed to be a disclaimer of the classes of property set forth in PEF Code §2204.

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The right to elect is a personal right and cannot be exercised by the personal representative of a deceased spouse. *See* PEF Code §2206. It is forfeited under certain circumstances set forth in PEF Code §2208.

The amount that a surviving spouse is entitled to take by election under PEF Code Chapter 22 should not be confused with what is sometimes call the “spouse’s allowance,” which is the dollar amount to which a surviving spouse is entitled under the intestate laws, PEF Code Chapter 21.

2. *When Made*

The surviving spouse’s election must be made within six (6) months after the decedent’s death or six (6) months after the date of probate, whichever is later. *See* PEF Code §2210(b). The Court may, however, grant an extension of time under certain conditions. A surviving spouse desiring an extension of time must file a petition complying with Phila.O.C. Rule 12.3.C with the Clerk of the Orphans’ Court within the foregoing time limit.

In some circumstances, the election should be made as promptly as possible. For example, where the decedent had an interest in an *inter vivos* trust, the electing spouse should consider immediately petitioning the Court to restrain the payment or transfer of property. *See* PEF Code §2211(c). Absent such an order, the trustee is free to make trust distributions notwithstanding the spouse’s claim. *See* PEF Code §2211(e).

3. *How Made*

The surviving spouse files a signed written election with the Clerk of the Orphans’ Court of the county in which the decedent was domiciled at death. *See* PEF Code §2210(a). Notice of the election must be given to the decedent’s personal representative, if any. Except as provided in PEF Code §2507(3), failure to make a proper election is deemed to be a waiver of the right of election. *See* PEF Code §2210(b).

Attorneys differ as to whether the personal representative or his or her counsel is under a duty to inform the surviving spouse of possible rights of election. *See Wilson Estate*, 25 Fiduc. Rep. 278 (O.C. Div. Allegh. 1975) and *Amon Estate*, 27 Fiduc. Rep. 1 (O.C. Div. Mont. 1976), which hold that counsel for the estate has no such duty. The advisable course for the personal representative is to establish a record that the surviving spouse has been advised of his or her elective rights. Until case law

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develops more exact guidelines, counsel must be vigilant in assembling all relevant information about property subject to elective rights, the consequences of disclaimers and post-death planning. The personal representative should consider whether the surviving spouse should be advised to seek separate counsel to protect his or her elective share rights. *See Fiduciary Review*, March 1967 and November 1969.

C. Settling Small Estates

Where the gross estate of a decedent is less than \$25,000 (excluding real estate and payments under PEF Code §3101), two (2) alternative settlement procedures are available. PEF Code §3102 gives any party in interest the right to petition for a decree of distribution, whether or not letters have been granted and advertised. The requirements for such a petition are set forth in Phila.O.C. Rule 6.11.B. The Court in its discretion may immediately issue a decree of distribution, either with or without appraisal and with such notice as it may direct. However, this decree does not become final until one (1) year has elapsed from the date of decedent's death. Before the expiration of the one (1) year period, an objecting party may petition the Court for revocation of its order. If the order is revoked, restitution will be required as to any property distribution improperly decreed. A decree under this procedure is not effective as to real estate. *See Chapter 9.*

A second method of settlement for a small estate is under PEF Code §3531. After one (1) year from the date of the first complete advertisement of letters, the personal representative may present a petition to the Court for discharge, attaching an exhibit in the form of an account and a statement of proposed distribution. After due notice, the Court may enter a decree approving the distribution and discharging the personal representative and sureties from future liability without the expense of proceeding through the formal account process. This procedure differs from that under §3102 in that it is a final decree, which applies to real as well as personal property and is only available where letters have been duly granted.

The above procedures are not frequently utilized by counsel. Practitioners find that the savings in probate fees, advertising expenses and filing costs do not justify the extra time and effort involved. They can have practical significance, however, where a timely court order is desirable or necessary.

For a fuller treatment of this subject, *see Remick*, §§19.01 and 32.02.

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D. Conversion to Total Return Unitrust

Unless specifically prohibited by the governing instrument, PEF Code §8105 authorizes the trustee to convert a conventional “income” trust to a unitrust. In order to convert to a unitrust, the trustee must determine that the conversion will enable the trustee to better carry out the intent of the settlor or testator and the purposes of the trust. The trustee must give written notice of the intention to convert to all *sui juris* beneficiaries who are currently entitled to receive income and who would receive principal if the trust terminated immediately before notice was given. *See* PEF Code §8105(a). There must be at least one (1) adult and competent beneficiary in both categories. If no beneficiary receiving notice objects to the conversion within sixty (60) days of the notice, the trustee may make the conversion. If a beneficiary does object or if there is not a representative in each of the categories listed above, the trustee may seek Court approval of the conversion. In addition, if after a beneficiary requests a conversion a trustee refuses to make the conversion, the beneficiary may request the Court to direct that the conversion be made if the Court determines that it is consistent with the intent of the settler or testator. *See* PEF Code §8105(b). Once a trust is converted to a unitrust, it cannot convert back without Court approval.

In deciding whether to exercise the power to convert to a unitrust, the trustee may consider the factors under PEF Code §8105(c), including the size of the trust, how long the trust is expected to last, the liquidity requirements of the trust, the need for regular distributions and for the preservation and growth of principal, expected tax consequences of an adjustment, the source and type of assets held by the trustee, the needs of the beneficiaries to the extent reasonably known, whether the governing instrument permits the trustee to invade principal or to accumulate income, and the effect of inflation and deflation and other economic conditions, actual and anticipated. Once the trustee decides to convert to a unitrust, the trustee has the discretion to determine, among other things, the effective date of the conversion, the provisions for prorating the unitrust distribution in a short year, the frequency of unitrust distributions throughout the year, whether to value the trust’s assets annually or more frequently, and what valuation dates to use. *See* PEF Code §8105(e).

Upon conversion, the trustee must follow an investment policy seeking a total return for the investments held by the trust. The word “income” as used in the trust will thereafter be defined as a specified percent of the annual value of the trust, which the statute sets at four (4%) percent, valued on a three (3) year rolling average. *See* PEF Code §8105(d). The trustee can petition the Court to approve a percentage payout of more or less than four (4%) percent or to average the valuation over a period of other than three (3) years. *See* PEF Code §8105(g). Expenses which would be deducted from income if the trust were not a unitrust

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may not be deducted from the unitrust distribution. Unless otherwise provided by the governing instrument, the unitrust distributions are ordered, first from net income, then if necessary short term capital gains, then long term capital gains and finally principal. *See* PEF Code §8105(f).

The trustee is prohibited from converting the trust to a unitrust where: (i) the adjustment would diminish the income interest in a trust that requires that all of the income be distributed annually to a spouse that qualifies for the marital deduction; (ii) the trust is a unitrust or annuity trust; (iii) the trust is a split interest trust with a charitable income or remainder beneficiary; (iv) the power to adjust would make the trust a grantor trust as to the trustee; (v) the power to adjust would result in the trustee holding a general power of appointment; or (vi) the trustee is a beneficiary. However, if there is more than one trustee, a co-trustee to whom these provisions do not apply, may convert the trust unless prohibited by the governing instrument. *See* PEF Code §8105(i).

The federal income tax consequences of conversion to a total return unitrust are set forth in IRC Reg. §1.643(b) and related regulations effective for taxable years that began on or after January 2, 2004.

E. Attachment Process

If a party fails to comply with an order or decree of the Orphans' Court, the order or decree may be enforced by: (i) attachment of the person, sequestration of real or personal property, execution on personal property; or (ii) execution on real estate. *See* PEF Code §§781-786.

The attachment process is cumbersome and should be undertaken only if more direct remedies fail or are unavailable. It will generally make more sense, for example, to petition the Court to remove a noncompliant fiduciary, *see* PEF Code §§3181-3184, 7121, or to appoint an auditor to state an account, *see* PEF Code §751, than pursue attachment. Nevertheless, the most frequent use of the attachment process involves forcing fiduciaries to file an account.

If all else fails a party may pursue attachment by filing the following four (4) petitions. The steps to compel an account are illustrated below while similar steps would be required for other relief.

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1. Petition for Citation to Show Cause Why an Account Should Not be Filed

If the respondent fails to answer the petition, the Court may enter a decree granting the prayer of the petition. *See* Phila.O.C. Rule 3.2.B.

If the respondent files an answer, or if the account is filed, there is no need to pursue the following steps. If an answer is filed which raises an issue of fact, a conference or hearing will be scheduled. *See* Phila.O.C. Rule 3.2.B.

2. Petition for Order to Compel

If the respondent does not comply with the Court's decree, the citation may be enforced by filing a petition for order to compel the filing of an account.

3. Petition for Citation for Writ of Attachment

If the respondent does not file an account or answer, the next step is to file a petition for citation for writ of attachment.

4. Petition for Writ of Attachment

If the respondent does not answer, the last step is to file a petition for writ of attachment.

All four (4) petitions are filed with the Clerk of the Orphans' Court pursuant to Phila.O.C. Rule 3.5.B. Service of the writ of attachment is made by the Sheriff. *See* PEPH, Green Book, 2.7. *See also* Chapter 2 for an in-depth discussion of the petition process.

CHAPTER 11

PROCEEDINGS INVOLVING NON-PROFIT CORPORATIONS

A. Jurisdiction and Venue

The Orphans' Court has mandatory jurisdiction over many matters involving non-profit corporations, based on PEF Code §711(21), Pennsylvania Rule of Judicial Administration 2156, and, in Philadelphia County Court of Common Pleas Joint General Court Regulation No. 2000-03.¹

The comment to the Philadelphia County Court Regulation distills the matters over which the Orphans' Court will exercise its jurisdiction:

“Comment: The assignment of matters under this rule will depend on the nature of the underlying action. For example, an action involving one or more nonprofit corporations concerning an ordinary tort or contract claim will be assigned to the Trial Division. An action involving one or more nonprofit corporations concerning the proper application of property committed to charitable purposes, or the rights and obligations of members, directors or officers of such nonprofit corporations, will be assigned to the Orphans' Court. The mere possibility that an ordinary tort or contract claim could result in a judgment for or against a nonprofit corporation will not cause a matter to be assigned to the Orphans' Court.”

In practice, matters related to the administration of charitable assets owned by a non-profit corporation (either directly or as trustee for itself) and matters relating to the rights and obligations of the members, directors and officers of the corporations can be brought to the Orphans' Court.

Venue is generally proper in the county in which the corporation has its registered office, or, if there is no such office, where its property is located. *See* PEF Code §726.

¹ A history of the development of this jurisdiction can be found in Judge Klein's *Adjudication in Pennsylvania Home Teaching Society and Free Circulating Library for the Blind*, 25 Fid. Rep. 556 (O.C. Div. Phila. 1975).

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B. Method of Proceeding in the Orphans' Court; Standing

The proper method of proceeding is by petition pursuant to Pa.O.C. Rule 3.5. Notice must be given to the Attorney General pursuant to Pa.O.C. Rule 5.5 and *Pruner Estate*, 390 Pa. 529 (1957). The question whether a party has standing to bring an action has received extensive attention. In all cases, it is clear that the Attorney General has standing, and in some cases other parties may have standing depending on their relationship to the corporation or the charitable property in question. *See, e.g., Valley Forge Historical Society v. Washington Memorial Chapel*, 493 Pa. 491 (1981); *Wiegand v. Barnes Foundation*, 374 Pa. 149 (1953); *In re The Barnes Foundation*, 443 Pa. Super. 369 (1995); *In re Milton Hershey School Trust*, 807 A.2d 324 (Pa. Commw. 2002). However, a “person whose only interest in compelling a charitable organization to perform a duty owed by that organization to the public is that interest held in common with other members of the public, cannot compel the performance of a duty owed by the organization to the public.” *Valley Forge Historical Society, supra* at 498 (citing *Wiegand, supra* at 153).

C. Accounts

The preparation of accounts for funds controlled by non-profit corporations can be a time-consuming and expensive process, primarily because many non-profit corporations either do not keep the necessary records to do so, or they do not have them in the form suitable to prepare a standard fiduciary account. As an alternative, Pa.O.C. Rule 12.15 sanctions the much simpler method of submitting the corporation's financial statements in lieu of an account. In addition, the Court and the Office of the Attorney General may agree instead to the submission of already existing documentation, such as IRS Forms 990 or 990-PF, which usually contain adequate information for most purposes.

D. Types of Property Owned by Non-Profit Corporations

In any proceeding involving the property of a non-profit corporation, it may become necessary to distinguish among various categories of ownership. Since non-profit corporations can act pursuant to 15 Pa.C.S. §5547(a) as trustees for themselves, some non-profit corporations have express trust funds held for their own benefit. More commonly, non-profit corporations hold funds that are subject to a variety of donor-imposed restrictions. These restrictions are usually related to the use of the property for a particular purpose, or the

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use of only the income² from the property. Categories of such funds (which may or may not be subject to specific use restrictions) include: (i) those funds given by donors for the “endowment” of the corporation; (ii) board restricted funds; (iii) and the other general assets of the corporation. The rights and obligations of the corporation and the donors with respect to these funds often depend on the specific facts of the funds involved. Special care must be used when relying on a corporation’s financial statements for information regarding charitable funds. The generally accepted accounting principles imposed by the Financial Accounting Standards Board on accountants require the classification of a non-profit corporation’s funds as either “unrestricted,” “temporarily restricted” or “permanently restricted.” These classifications may not always clearly reflect the different categories set forth above.³

E. Nondiversion of Charitable Property and Fundamental Changes

15 Pa.C.S. §5547(b) prohibits a non-profit corporation from diverting charitable property from the purposes for which it was given. The Orphans’ Court will rule on a petition from a non-profit corporation seeking confirmation that a proposed action does not constitute such a diversion. In addition, the Orphans’ Court may be asked to rule on a question under 15 Pa.C.S. §5550 concerning the effect of certain fundamental changes in the corporation on a gift to the corporation. The general rule concerning property rights of non-profit corporations after a merger are found at 15 Pa.C.S. §5929(b).

Additionally, in the case of health care non-profits, the Office of the Attorney General has promulgated a “Review Protocol For Fundamental Change Transactions Affecting Health Care Nonprofits,” which requires that certain information be provided to enable it to review fundamental corporate change transactions involving a transfer of ownership or control of charitable assets and determine how the public interest would be affected.

² The income may be either traditional accounting income or are a percentage of the total amount if the corporation has made an election under 15 Pa.C.S. §5548.

³ See Bullitt, “When FAS 116, FAS 117 and FAS 124 Meet State Law,” 68 *PA CPA Journal* 1 (Spring 1997).

