

State of New Jersey

New Jersey Law Revision Commission

ANNUAL REPORT

2008



Report to the Legislature of the State of New Jersey
As provided by 1:12A-9.

(LRC 87-2008)

TABLE OF CONTENTS

I. [MEMBERS AND STAFF](#)3

II. [IN MEMORY OF WILLIAM E. GARLAND](#)4

III. [HISTORY AND PURPOSE](#)5

IV. [LEGISLATIVE SUMMARY](#)7

V. FINAL REPORTS AND RECOMMENDATIONS

A. [Adverse Possession](#)9

B. [Pejorative Terms](#)10

C. [Uniform Child Abduction Prevention Act](#)11

D. [Uniform Prudent Management Investment Funds Act](#)12

E. [Uniform Trade Secrets](#)13

F. [Uniform Trust Code](#)14

G. [Title 1](#)16

VI. TENTATIVE REPORTS

A. [Construction Lien Law](#)17

B. [Title 22A](#)18

C. [Title 39](#)20

D. [Title 44 – Poor Law](#)21

VII. WORK IN PROGRESS

A. [Title 9-Children](#)23

B. [Uniformed Environmental Covenants Act](#)23

VIII. FINAL REPORTS PUBLISHED IN 2008

[Adverse Possession](#) **Appendix A**

[Pejorative Terms](#) **Appendix B**

[Uniform Child Abduction Prevention Act](#) **Appendix C**

[Uniform Prudent Management Investment Funds Act](#) **Appendix D**

[Uniform Trade Secrets](#) **Appendix E**

[Uniform Trust Code](#) **Appendix F**

[Title 1](#) **Appendix G**

VIII. TENTATIVE REPORTS PUBLISHED IN 2008

[Construction Lien Law](#) **Appendix H**

[Title 22A](#) **Appendix I**

[Title 44 – Poor Law](#) **Appendix J**

I. MEMBERS AND STAFF OF THE COMMISSION IN 2008

The members of the Commission are:

Vito A. Gagliardi, Jr., Chairman, Attorney-at-Law

Albert Burstein, Attorney-at-Law

Andrew O. Bunn, Attorney-at-Law

Hon. Sylvia Pressler, P.J.A.D., Retired

John Adler, Chairman, Senate Judiciary Committee, Ex officio

Linda R. Greenstein, Chairman, Assembly Judiciary Committee, Ex officio

Patrick Hobbs, Dean, Seton Hall Law School, Ex officio

Represented by **William E. Garland**, Professor of Law

Stuart Deutsch, Dean, Rutgers Law School – Newark, Ex officio

Represented by Associate Dean **Bernard Bell**

Rayman Solomon, Dean, Rutgers Law School - Camden, Ex officio,

Represented by **Grace Bertone**, Attorney-at-Law

The staff of the Commission is:

John M. Cannel, Executive Director

Laura C. Tharney, Deputy Director

Marna L. Brown, Counsel

John J. A. Burke, Of Counsel

Jenene J. Hatchard, Administrative Assistant

***Ksenia Takhistova**, Law Student Intern

The New Jersey Uniform Law Commissioners are:

Barry Evenchick, Esq.

Joseph Donegan, Esq.

Daniel O'Hern, New Jersey Supreme Court, Retired

*Resigned October 2008

In Memory Of



Professor William E. Garland

1944 - 2009

The New Jersey Law Revision Commission was saddened by the loss of Professor William E. Garland, of Seton Hall Law School, in early January 2009.

Professor Garland served on the New Jersey Law Revision Commission beginning in 1997 representing the Dean of the Seton Hall Law School. For more than a decade, Professor Garland rendered invaluable service, providing insights and commentary on numerous projects; helping to refine and improve the Commission's reports.

Professor Garland, a faculty member at Seton Hall Law School for more than 30 years, was generous with his time and willing to undertake detailed reviews of complicated and lengthy projects. His contributions to the Commission will be missed.

III. HISTORY AND PURPOSE OF THE COMMISSION

New Jersey has a tradition of law revision. The first Law Revision Commission was established in 1925 and produced the Revised Statutes of 1937. The Legislature intended that the work of revision and codification continue after the enactment of the Revised Statutes, so the Law Revision Commission continued in operation until 1939. After that time, the functions of the Commission were transferred to a number of successor agencies, including the Legislative Counsel.¹

In 1985, the Legislature enacted section 1:12A-1 *et seq.*, the effective date of which was January 21, 1986. The new sections of the statute transferred the functions of statutory revision and codification to a newly created New Jersey Law Revision Commission.² The Commission began work in 1987 and, since that time, has filed 68 Reports with the Legislature, 36 of which have been enacted into law.

The statutory mandate of the Commission is to simplify, clarify and modernize New Jersey statutes. Pursuant to its obligations, the Commission

¹ N.J.S. 52:11-61.

² The Law Revision Commission was created by L.1985, c.498, and charged with the duty to:

a. Conduct a continuous examination of the general and permanent statutory law of this State and the judicial decisions construing it for the purpose of discovering defects and anachronisms therein, and to prepare and submit to the Legislature, from time to time, legislative bills designed to

- (1) Remedy the defects,
- (2) Reconcile conflicting provisions found in the law, and
- (3) Clarify confusing and excise redundant provisions found in the law.

b. Carry on a continuous revision of the general and permanent statute law of the State, in a manner so as to maintain the general and permanent statute law in revised, consolidated and simplified form under the general plan and classification of the Revised Statutes and the New Jersey Statutes;

c. Receive and consider suggestions and recommendations from the American Law Institute, the National Conference of Commissioners on Uniform State Laws, and other learned bodies and from judges, public officials, bar associations, members of the bar and from the public generally, for the improvement and modification of the general and permanent statutory law of the State, and to bring the law of this State, civil and criminal, and the administration thereof, into harmony with modern conceptions and conditions; and

d. Act in cooperation with the Legislative Counsel in the Office of Legislative Services, to effect improvements and modifications in the general and permanent statutory law pursuant to its duties set forth in this section, and submit to the Legislative Counsel and the Division for their examination such drafts of legislative bills as the commission shall deem necessary to effectuate the purposes of this section.

conducts an ongoing review of the statutes to identify areas of the law that require revision. The scope of the revision performed by the Commission varies by project, and includes both modest changes such as the correction or removal of inconsistent, obsolete or redundant language, and more comprehensive modifications to select areas of the law.

Before choosing an area of the law for revision, the Commission considers recommendations from the American Law Institute, the National Conference of Commissioners on Uniform State Laws, and other learned bodies and public officers. Once a project begins, the Commission extensively examines local law and practice, and the law of other jurisdictions. The Commission also consults, throughout the drafting process, with experts in the field, and seeks input from individuals and organizations familiar with the practical operation of the law and the impact of the existing statutes.

When the preliminary research and drafting is finished, the Commission issues a Tentative Report and makes it available to the public for comments. The Commission then reviews all the comments received, and incorporates them into the Tentative Report as necessary. When a revision is completed, a Final Report is prepared and submitted to the New Jersey Legislature for consideration.

The Commission's work has been published in law journals, cited by the New Jersey Courts, and used by law revision commissions in other jurisdictions.

The meetings of the Commission are open to the public and the Commission actively solicits public comment on its Tentative Reports, which are widely distributed to interested persons and groups. Since 1996, the Commission has maintained a website for the purpose of making its projects and Reports readily available to the public, now at <http://www.njlrc.org>.

IV. LEGISLATIVE SUMMARY

Since it began work in 1987, the New Jersey Legislature has enacted 36 bills³ based upon the Final Reports and Recommendations of the New Jersey Law Revision Commission:

- Anatomical Gift Act (L.2001, c.87)
- Cemeteries (L.2003, c.261)
- Civil Actions – Service of Process (L.1999, c.319)
- Civil Penalty Enforcement Act (L.1999, c.274)
- Court Names (L.1991, c.119)
- Court Organization (L.1991, c.119)
- Criminal Law, Titles 2A and 24 (L.1999, c.90)
- Evidence (L.1999 c.319)
- Intestate Succession (L.2001, c.109)
- Juries (L.1995 c.44)
- Lost or Abandoned Property (L.1999, c.331)
- Material Witness (L.1994, c.126)
- Municipal Courts (L.1993, c.293)
- Parentage Act (L.1991, c.22)
- Recordation of Title Documents (L.1991, c.308)
- Repealers (L.1991, c.59, 93, 121, 148)
- Replevin (L.1995, c.263)
- School Background Checks (L.2007, c.82)
- Service of Process (L.1999 c.319)
- Statute of Frauds (L.1995, c.36)
- Surrogates (L.1999, c.70)
- Tax Court (L.1993, c.403)
- Title 45 –Professions (L.1999, c.403)
- Uniform Child Custody Jurisdiction and Enforcement Act (L.2004 c.147)

³ A total of 36 bills were enacted, implementing 33 reports. The Repealers project was divided into three reports.

- Uniform Commercial Code 2A –Leases (L.1994, c.114)
- Uniform Commercial Code 3 – Negotiable Instruments (L.1995, c.28)
- Uniform Commercial Code 4 – Bank Deposits (L.1995, c.28)
- Uniform Commercial Code 4A – Funds Transfers (L.1994, c.114)
- Uniform Commercial Code 5 – Letters of Credit (L.1997, c.114)
- Uniform Commercial Code 8 – Investment Securities (L.1997, c.252)
- Uniform Commercial Code 9 – Secured Transactions (L.2001, c.117)
- Uniform Electronic Transactions Act (L.2001, c.116)
- Uniform Mediation Act (L.2004 c.157)

V. FINAL REPORTS AND RECOMMENDATIONS

A Final Report contains the decision of the Commission on a particular area of the law. The Report contains an analysis of the subject, proposed statutory language and commentary. A Final Report is approved and adopted after the public has had an opportunity to comment on tentative drafts of the Report, and is then filed with the Legislature. After filing, the Commission and its staff work with the Legislature to draft the Report in bill form and to facilitate its enactment.

In 2008, the New Jersey Law Revision Commission published five Final Reports and Recommendations to the Legislature.

A. Adverse Possession

This Report recommends a new statute to clarify the law concerning adverse possession and to promote the stability of land titles in light of the New Jersey Supreme Court's decision in *J & M Land Co. v. First Union Bank*, 166 N.J. 493 (2001). That case held that under the current statutes governing adverse possession (2A:14-30 and 2A:14-31) a possessor is vested with title to real estate after 30 years' actual possession of the real estate, or, if the property consists of woodlands or uncultivated tracts, 60 years' possession. Two other statutes seem to conflict with sections 2A:14-30 and 2A:14-31. Section 2A:14-6 provides that every person with any right or title of entry into real estate must make such entry within 20 years after the right or title accrues. Under 2A:14-7, every action for real estate must be commenced within 20 years after the cause of action accrues. The Supreme Court in *J & M Land Co.* noted that the Legislature might choose to clarify the matter by enacting appropriate legislation.

The Commission addressed the issues by recommending the repeal of sections 2A:14-30, 2A:14-31, 2A:14-6, 2A:14-7 and 2A:14-8 and the enactment of a statute that provides that title to land may be acquired by an adverse possessor after 20 years in most cases. Under the proposed statute, once the

applicable time period has expired, the record owner is not merely barred from attempting to recover possession; title then vests in the adverse possessor. Adoption of this provision would bring New Jersey's statutory scheme in line with that of most other states, in which the relevant time period for adverse possession is 20 years or less.

The Commission proposal also addressed the use of adverse possession against governmental entities. First, the statute codifies the holding of *Devins v. Borough of Bogota*, 124 N.J. 570 (1991) which held that municipal property not dedicated to a public purpose was subject to adverse possession.

In general, the Commission proposal also follows the common law rule exempting State property from the effect of adverse possession. However, one exception is made for riparian lands. That proposed provision allows persons who meet the requirements for adverse possession for 40 years and, in addition, have record title to their property and have paid taxes on that property to establish good title. These requirements are more onerous than those ordinarily imposed for adverse possession, but they allow property owners who acquired property relying on a chain of title and who have paid taxes in the same way as other owners to establish ownership free of the State's tidelands claims.

B. Pejorative Terms Regarding Mental Capacity

This Report resulted from the Amendment to Article 2 of the New Jersey Constitution, which eliminated the use of the terms "idiot" and "insane" in relation to the denial of suffrage to certain persons lacking the capacity to understand the act of voting. That Amendment prompted the Commission to undertake an effort to identify and replace all current language deemed pejorative, consistent with the intent of the constitutional amendment. As a result, changes were made to more than 100 statutory sections, crossing a variety of subject matters.

Before releasing this is project as a Final Report, the Commission consulted with and received comment from individuals and attorneys associated

with the various departments and agencies responsible for administering the affected statutes. Anachronistic language was updated, agency titles made current and language made gender-neutral as appropriate. In other cases, certain statutes no longer relevant were recommended for repeal.

C. Uniform Child Abduction Prevention Act

This Report resulted from the promulgation of the Uniform Child Abduction Prevention Act (“UCAPA”) by the National Conference of Commissioners on Uniform State Laws (“NCCUSL”). NCCUSL promulgated this Act to provide a mechanism for a court to impose child abduction prevention measures at any time, thereby deterring and preventing domestic and international abductions. UCAPA was created to complement and enhance existing law, including the Uniform Child Custody Jurisdiction and Enforcement Act, the Parental Kidnapping Prevention Act, and the Hague Convention on the Civil Aspects of International Child Abduction. As noted in the preface to the Original Text, the UCAPA is “premised on the general principle that preventing abduction is in a child’s best interests.”

At the time of release of the Commission’s Final Report, the UCAPA had been enacted in seven states although bills incorporating some or all of the UCAPA were pending in at least ten more jurisdictions.⁴ The Commission reviewed and considered the Act but does not recommend adoption. The Commission did not address deficiencies or suggest possible modifications to the UCAPA, concluding that the Act is not necessary in light of the broad powers of the New Jersey chancery courts provided by the State constitution and statutes. Invoking such constitutional and statutory provisions, New Jersey courts have adopted the “best interests” standard in determining the needs and welfare of children, exercising broad powers in order to do so.

⁴ See NCCUSL at http://www.nccusl.org/Update/uniformact_factsheets/uniformacts-fs-ucapa.asp.

D. Uniform Prudent Management of Institutional Funds Act

This Report resulted from the promulgation, by NCCUSL, of the Uniform Prudent Management of Institutional Funds Act (“UPMIFA”), which was recommended for adoption in all states. UPMIFA replaces and updates the 1972 Uniform Management of Institutional Funds Act (“UMIFA”) that was adopted in 47 states, including the State of New Jersey, effective 1975, and codified at section 15:18 *et seq.*

At the time of the release of the Commission’s Tentative Report, in 2007, 13 states had adopted UPMIFA and bills were pending in eight additional legislatures.⁵ The Commission reviewed and considered the Act and recommends that the Legislature enact the official text of the Act, without adopting the optional provision contained in section 4, subsection (d).⁶

Adoption of UPMIFA does not produce an adverse effect on New Jersey law. Case law in this area is sparse and the available cases reveal that adoption of the Act would provide greater clarity for the judiciary in this area of the law. New Jersey courts have considered three decisions related to UMIFA: *Midatlantic Nat. Bank v. Frank G. Thompson Foundation*, 170 N.J. Super. 128 (Ch. Div. 1979), *Johnson v. Johnson*, 212 N.J. Super. 368 (Ch. Div. 1986), and *In re Dickerson*, 193 N.J. Super. 353 (Ch. Div. 1983). These cases do not contradict, nor are they inconsistent with, any principle contained in UPMIFA. Consequently, adoption of the UPMIFA in New Jersey would not unsettle established law.

The Final Report of the New Jersey Law Revision Commission recommended that the New Jersey Legislature repeal the Uniform Management of Institutional Funds Act and adopt the Official Text of the Uniform Prudent

⁵ See NCCUSL at http://www.nccusl.org/Update/uniformact_factsheets/uniformacts-fs-upmifa.asp.

⁶ Appendix I of the Tentative Report contains the Official Text of the UPMIFA, with the deleted subsection marked by a strikethrough. Appendix II contains a NCCUSL developed comparison table of the two Acts.

Management of Institutional Funds Act, without adopting the optional subsection (d) provision of section 4 and with select language amendments set forth in the draft submission.

E. Uniform Trade Secrets Act

This Report resulted from NCCUSL's Uniform Trade Secrets Act ("UTSA"), which was promulgated in 1979 and amended in 1985 to further clarify the intent of the Official Text. The purpose of the Act is to codify the basic principles of common law trade secret protection while preserving the essential distinctions from patent law and the remedies for trade secret misappropriation as developed in case law. The UTSA provides a cause of action for actual or threatened misappropriation of trade secrets. It permits the imposition of injunctive relief, to eliminate the commercial advantage that otherwise would be derived from the misappropriation, as well as damages including actual loss and unjust enrichment for misappropriation.

At the time of the release of the Commission's Final Report, the UTSA had been adopted in 47 jurisdictions, including the District of Columbia, and every state except for New Jersey, New York, Massachusetts and Texas.⁷ The Commission reviewed and considered the amended UTSA and recommends that the Legislature enact the Official Text of the Act with significant modifications that reflect the nuances of New Jersey trade secret practice.⁸

In reviewing the UTSA, the Commission considered New Jersey's rich common law trade secret and related jurisprudence, including the common law definition of "improper means" not fully reflected in the Uniform Act definition. The Commission also examined the manner in which other jurisdictions had modified the UTSA, particularly the definition of "trade secret" and the provision for attorney's fees, in the context of New Jersey's well-established jurisprudence.

⁷ See NCCUSL at http://www.nccusl.org/Update/uniformact_factsheets/uniformacts-fs-utsa.asp.

⁸ The Final Report contains the Official Text of the UTSA, with deletions marked with strikethroughs and additions marked with underscores.

As a result, the Commission adds definitions not in the Official Text and includes in the modification the award of costs and fees for the service of expert witnesses. Reference to R. 4:10-3(g) of the Rules Governing the Courts of the State of New Jersey is also added and section 7 made consistent with other New Jersey statutory language. Because the modifications made are very specific to New Jersey common law trade secret practice, the Commission recommends entitling the Act the New Jersey Trade Secrets Act and placing the Act at the end of Title 56 of the New Jersey Statutes, which pertains to Trade Names, Trade-Marks and Unfair Trade Practices.

F. Uniform Trust Code

The 2000 version of the Uniform Trust Code (“UTC 2000”) was the product of several years of drafting and was motivated by the objective of providing a comprehensive Trust Code for all states. It was the view of several prominent bodies that the law of trusts was sparse in some states, non-uniform in certain matters, and scattered throughout statutory law. The UTC 2000 was largely modeled on the California Trust Code and was enacted by 21 states. New Jersey has not adopted the Act. Since 2000, the UTC has undergone several revisions and amendments and the current version is the amended and revised UTC 2005.

The primary reasons for the UTC and its amendments include the growing use of trusts, the development of commercial trusts, and the recognition that state law taken as a whole is insufficient to support the structure of trusts. While the primary source of trust law in most states is the *Restatement (3rd) of Trusts*, there are gaps in state law and a failure to provide guidance on several practical issues. The UTC 2000 does not displace the common law of trusts but supplements it.

Some of the key features of the UTC 2000 include the fact that: it applies only to express trusts and does not apply to constructive trusts or other judicially crafted trusts that are not express trusts; with limited exceptions, it consists of

default statutory provisions that may be overridden by the Trust instrument; it encourages out-of-court settlement of contests; it permits the designation of the principal place of administration of the trust; it provides that a trust may be terminated without a court order if the value of the trust property is insufficient to justify the cost of administration; it reverses the common law assumption that trusts are irrevocable; it treats transactions between trusts and third parties in the same manner as any other commercial transaction; and it allows for spendthrift provisions provided those provisions restrain the voluntary and involuntary transfer of the beneficiary's interest (although it permits creditors of the settlor to reach assets of the trust when the settlor is designated a beneficiary of the trust an approach consistent with current New Jersey law).

The Commission's Final Report consists of two parts. The first contains a general description based on a reading of the Official Text and secondary literature and highlights the main features of UTC 2005 that the drafters, the reporter and expert commentary deemed significant changes from the predecessor statute. The UTC Official Text and its commentary run 179 pages. The second part of the Final Report summarizes the work of the New Jersey *ad hoc* Committee on the Uniform Trust Code. The Committee is comprised of New Jersey's leading experts in the field of Trusts and Probates. During a several year period, the Committee studied the official text, modified official text language, deleted non-conforming sections, repealed New Jersey law rendered obsolete by the Uniform Trust Code, and prepared a summary of their changes. The Committee also worked with the Office of Legislative Services, and the New Jersey version is prepared in bill form to the satisfaction of the Committee.

The New Jersey Law Revision Commission was informed of the activities of the *ad hoc* Committee, reviewed the Draft Final Bill and endorsed without reservation or qualification the work product of the *ad hoc* Committee and recommended that the New Jersey Legislature enact the New Jersey Uniform Trust Code.

G. Title 1 – Acts, Laws and Statutes

Since its inception, the Commission has periodically considered whether it would be desirable to recompile all of New Jersey's statutory law. The Commission has never approved such a project since the most important pressing statutory issues tend to have substantive aspects that rearrangement in a new compilation would not reach. There are still many subject areas in which the statutes are anachronistic, contradictory or substantively deficient. None of these problems can be addressed by technical recompilation. Notwithstanding that judgment, the Commission has always recognized that there are areas of the statutes that would benefit from rearrangement or renumbering. As a result, the Commission began this project to determine whether there was a way that could be created to allow statutes to be rearranged and renumbered administratively.

This project has expanded since it began. Examination of Title 1 of the statutes revealed problems unknown at the commencement of the project. Much of the material needed modernization. The current law is focused on the printing of the annual volume of laws. While that publication remains important, the legislative public internet site has become equally important in the publication of the law. Some revision is needed to reflect that change.

This Report gives the Office of Legislative Services the authority to recompile statutes. The concept is new, although, there are instances when statutes have been assigned new compilation numbers. The Report requires concurrence by the Attorney General (as in statutory corrections) and provides for a system of recording that a statute has been recompiled. The Report also continues the authority of OLS to correct statutes, but provides for a system to record any such corrections; that provision is new. Finally, the Report creates a simplified system for citing statutes. The current system requires three different forms of citation depending on when and in what form the statute was enacted. No policy considerations support the current system; its complications are merely a matter of history.

VI. TENTATIVE REPORTS

A Tentative Report represents the first settled attempt of the Commission to revise an area of law. It is the product of lengthy deliberations, but it is not final. A Tentative Report is distributed to the general public for comment. The Commission considers these comments and amends its Report.

In 2007, the Commission published four Tentative Reports.

A. Construction Lien Law

This project was begun in response to concerns from construction industry attorneys that the Construction Lien Law, *N.J.S. 2A:44-1 to 38*, was ambiguous and had led to inconsistent appellate decisions. The Commission learned that contractors and subcontractors attempting to invoke the law, as well as judges and arbitrators responsible for implementing it, found the law confusing and unclear. More than a year after commencing revision of the statute, the Tentative Report on Construction Lien Law was released in December of 2008 with a public comment period through March 1, 2009.

The Construction Lien Law became effective in 1994, replacing the old Mechanic's Lien Law, which, up until that time, had applied to non-public construction projects. The purpose of the statute is twofold: to enable private project contractors, subcontractors and suppliers to secure payment for their labor and materials by a straightforward lien filing process, and to protect property owners from exposure to double payment for work or materials for which they have already paid. Application of the law has been problematic, however, because key terms in the current law are not precisely defined and some provisions are difficult to understand or nonexistent. The Commission also learned soon after commencing the project that the initial drafters of the law had anticipated at the time of the statute's enactment that revision would ultimately be necessary.

The Commission was fortunate to receive considerable informal

comments during the pendency of the project from a wide source of commenters, including attorneys and organizations representing various participants in the construction process. With increased feedback from a number of sources, the project grew in scope, soon addressing ambiguities and unclear provisions in the existing law as well as the need for new sections to rectify practical concerns.

The revision focuses on clarification of existing definitions; the addition of new defined terms necessary for better application of the statute; the modification of existing provisions found to be ineffective in practice; the incorporation of recent court decisions; clarification of the arbitrator's role; and the addition of new provisions that enhance the effectiveness of the statute. Where necessary, language has been updated or reworded to make the statute clearer and easier to use. Although the statute has been substantially revised, the Commission strove to make all modifications consistent with the stated legislative intent and expressed purpose of the initial drafters as elucidated by case law.

B. Title 22A - Costs and Fees

Title 22A contains the general fees pertaining to civil actions, probate actions and criminal actions. The Title also includes other provisions regarding various fees and the disposition of fees.

The updating of this Title has been inconsistent. Certain sections of the Title, including filing fees for the Courts and County Clerks, have remained reasonably current. Other sections, including those pertaining to the service of subpoenas and the costs awarded in various courts, have not been updated and may be appropriate candidates for removal from the statute. One example is the mileage reimbursement rate, which, in New Jersey, is still \$0.04/mile. If the sections that have not been updated since their enactment 1953 are to remain a part of the statute, then it is appropriate to update them to include realistic fees and current terminology.

Of the modifications proposed by this draft, the largest single substantive change is the inclusion of a flat-fee mileage listing for the counties that is proposed to replace the hundreds of different mileage fees assigned to individual municipalities throughout the State. Another substantive change is the adjustments of the filing fees for an initial paper in an action to make that fee nearly uniform across the courts. Other fees were modestly adjusted to round them to the nearest dollar and to make all dollar figures multiples of either \$5 or \$10.

Another substantive change about which commenters have expressed concerns is the copying charges presently imposed by the Title. The question of whether to adjust the costs for the copying of documents in the draft, to more closely align the current charges with the charges permitted by the Open Public Records Act (47:1A-5), was an outstanding question before the end of 2008. OPRA provides for charges on a sliding scale, ranging from \$0.75/per page to \$0.25/per page. Since all other fees in this section were rounded to the nearest dollar, the copying fees in prior drafts were reduced to \$1 in this Title. There are difficulties associated with making that change as a result of the manner in which budgeting is handled in the Surrogate's Offices and the County Clerk's Offices. Revising the costs for copying would result in a significant and negative impact on the budget. It is of concern, however, that in lieu of paying the statutorily mandated copy fees, in certain instances a party could simply make an OPRA request and pay a substantially lower fee for copies.

Throughout the Title, various sections were proposed for removal as anachronistic or inconsistent with other sections of the Title. Other sections have been consolidated and reorganized in an effort to develop a more orderly presentation of the information contained in the Title.

A Tentative Report was released in September 2008. In response to the number of comments that were received from interested parties, a Revised Tentative Report was released in November 2008 with a comment period scheduled to conclude in January 2009. It is anticipated that additional detailed

comments will be received within the comment period that will enable Staff to prepare a Final Report for release in the spring of 2009.

C. Title 39 - Motor Vehicles and Traffic Regulation

This substantial project that the Commission worked on for several years was released as a Tentative Report at the end of 2007. After initially considering sections of Title 39 in response to requests, the Commission determined that the more than 500 pages of statute that comprise Title 39 was an appropriate candidate for a comprehensive revision.

The basic statutory provisions concerning motor vehicles were drafted in the 1920's and there are statutory sections currently in effect that were enacted in every decade beginning in the 1920's. Periodic modifications and accretions over time have resulted in a collection of layered statutes containing overlapping, contradictory and obsolete provisions.

The scope of Title 39 is very broad. It includes registration and licensing requirements, motor vehicle equipment requirements, and numerous provisions regarding the regulation of traffic, including requirements pertaining to bicycles, roller skates, horses and horse-drawn vehicles, snowmobiles, all terrain vehicles, machinery and equipment of unusual size or weight, pedestrians, the law of the road and right-of-way, traffic signals, accidents and reports, parking, highway and traffic signs, and the powers of municipal, county and state officials. Title 39 also includes provisions regarding automobile insurance, vehicle inspections, the purchase, sale and transfer of vehicles, abandoned and unclaimed vehicles, junk yards, driving schools and auto body repair facilities.

As a result of its scope, Title 39 has a significant impact on a large number of residents of the State of New Jersey, and on those who drive on the many roadways in this State. The Commission focused its efforts on improving the language, the structure and the accessibility of Title 39 so that those who are impacted by various provisions of the law can more readily locate and

understand the requirements, responsibilities and restrictions imposed upon them.

The general goal of this revision was not to modify the substance of the law significantly, but to consolidate and, where appropriate, restructure the law, so that it is consistent, organized and accessible. There were, however, sections of the law where the substance was revised, including outdated and inconsistent penalty provisions. The modifications to the substance in that area, and in some others, were the result of input from the Motor Vehicle Commission, municipal court judges, attorneys who regularly practice in municipal court, police officers, and others whose work with Title 39 has afforded them the opportunity to identify the instances in which the current law does not adequately address the problems posed by its day-to-day application.

The project was released at the end of 2007 with a lengthy public comment period. The Commission was fortunate to receive informal comments during the pendency of the project and substantial additional commentary was received during the comment period and, significantly, attorneys with the Motor Vehicle Commission conducted a line-by-line review of the project in preparation for the submission of detailed MVC comments on the project. As a result of competing demands for attorney time and resources, the MVC was able to submit some, but not all, of its comments to Staff before the end of 2008. It is anticipated that those comments will be provided to the Commission in early 2009, enabling Staff to update the project to reflect those comments and other comments received as appropriate.

D. Title 44 – Poor Law

Two main laws with confusingly similar names govern assistance to the needy in New Jersey. One, the “Work First New Jersey” Act, 44:10-55 *et seq.*, resulted from the federal “Personal Responsibility and Work Opportunity Reconciliation Act of 1996,” 42 U.S.C. section 601 *et seq.*, which established a federal block grant for temporary assistance for needy families and enabled the

states to design their own welfare programs. This Act replaced earlier programs including: aid to families with dependent children, general public assistance, emergency assistance for recipients, and the Family Development Initiative. The two main relief programs established by this Act are Temporary Aid for Needy Families (“TANF”) and General Assistance (“GA”). TANF is the successor to the federally funded categorical programs; GA is the continuation of municipal general public assistance for those people who do not fit within the categorical programs.

The Work First New Jersey General Public Assistance Act, 44:8-107 *et seq.*, the second main law, replaced the State’s General Public Assistance Law of 1947. The existing statutory language obfuscates the relationship between the two “Work First” laws. The Work First New Jersey General Public Assistance Act seems to establish a general assistance program to “needy, single adults and couples without dependent children.” In fact, the Act serves only to provide for municipal governance of the General Assistance program established by the other “Work First” Act. A municipality may choose either to run the program itself or to cede authority to the county. In current practice, administration of the program is equally divided between municipal and county governance. The TANF program is administered by the county.

Much of the difficulty with the current statutory scheme results from the fact that many of the statutes in the earlier chapters of the Title were enacted in the 19th century. Others date from the 1920’s and before. Archaic in substance and in style, they do not reflect current reality and practice. It appears that as times and welfare programs changed, very little of the old law was repealed.

Commission staff has spent many days in consultation with welfare professionals to produce a draft of a modern, comprehensive, clear welfare law. The Commission drafted provisions that clearly establish the programs operating in New Jersey and remove the ambiguities and anachronisms of the current statutes. A Tentative Report was completed in May of 2008, and it is anticipated that a Final Report will be published early in 2009.

VII. WORK IN PROGRESS

A. Title 9

In response to a suggestion from a Legislator, the Commission began a project to revise Title 9 – Children. The first chapter addressed is chapter 6, on child abuse and neglect. Thus far, a first rough draft has been prepared and consultations have begun with interested parties.

B. Uniform Environmental Covenants Act

This project considers the adoption in New Jersey of the Uniform Environmental Covenants Act (“UECA”) as recommended for adoption in all states by NCCUSL. The UECA is intended to develop a system of recording environmental covenants for Brownfields properties. Brownfields are abandoned and environmentally contaminated properties, formerly used for commercial and industrial purposes, which communities try to develop and reintroduce into the stream of commerce. The UECA seeks to ensure that land use restrictions, environmental monitoring requirements and engineering controls for potential environmental risks of residual contamination are reflected on the land records and effectively enforced over time.



STATE OF NEW JERSEY

N J L R C

NEW JERSEY LAW REVISION COMMISSION

Final Report
Relating to

Adverse Possession

February 21, 2008

Current as of December 5, 2008

John M. Cannel, Esq., Executive Director
NEW JERSEY LAW REVISION COMMISSION
153 Halsey Street, 7th Fl., Box 47016
Newark, New Jersey 07101
973-648-4575
(fax) 973-648-3123
email: njlrc@njlrc.org
web site: <http://www.njlrc.org>

Adverse Possession

Introduction

This report recommends a new statute to clarify the law concerning adverse possession and promote the stability of land titles in light of the New Jersey Supreme Court's decision in *J & M Land Co. v. First Union Bank*, 166 N.J. 493 (2001). That case held that under the current statutes governing adverse possession, 2A:14-30 and 2A:14-31, a possessor is vested with title to real estate after 30 years' actual possession of the real estate, unless the property consists of woodlands or uncultivated tracts. Title vests to the possessor of woodlands or uncultivated tracts after 60 years' possession. Two other statutes seem to conflict with 2A:14-30 and 2A:14-31. Section 2A:14-6 provides that every person with any right or title of entry into real estate must make such entry within 20 years after the right or title accrues; under 2A:14-7, every action for real estate must be commenced within 20 years after the cause of action accrues. The Supreme Court noted that the Legislature might choose to clarify the matter by enacting appropriate legislation. 166 N.J. at 521.

Another statute, 2A:14-8, appears to establish a 20-year statute of limitation for State's claims to real estate. This statute can be read to make adverse possession easier to establish against the State than against a private party. This reading conflicts with the common law principle that, in general, adverse possession is not available against the State. See *Devins v. Borough of Bogota*, 124 N.J. 570, 575-579 (1991)

The Commission addresses these problems by recommending the repeal of 2A:14-30, 2A:14-31, 2A:14-6, 2A:14-7 and 2A:14-8 and enacting a statute that provides that title may be acquired by an adverse possessor after 20 years in most cases. Under this statute, once the applicable time period has expired, the record owner is not merely barred from attempting to recover possession; his title is extinguished and title is vested in the adverse possessor. This provision would bring New Jersey's statutory scheme in line with that of most other states, in which the relevant time period for adverse possession is 20 years or less.

The Commission proposal also deals with the problem of the use of adverse possession against governmental entities. First, the statute codifies the holding of *Devins v. Borough of Bogota*, 124 N.J. 570 (1991) as to local government property. In that case, the Court held that municipal property not dedicated to a public purpose was subject to adverse possession. The case involved a lot that the municipality had taken for non-payment of taxes. Nothing in the holding suggests that property that the municipality is using or intends to use for a public purpose is not exempt from adverse possession. The provision

proposed by the Commission adopts that distinction and protects public property held for any public purpose.

In general, the Commission proposal also follows the common law rule exempting State property from the effect of adverse possession. However, one exception is made for riparian lands. The provision allows persons who meet the requirements for adverse possession for forty years and, in addition, have record title to their property and have paid taxes on that property to establish good title to the property. These requirements are more onerous than those ordinarily imposed for adverse possession, but they allow property owners who acquired property relying on a chain of title and who have paid taxes in the same way as other owners to establish ownership free of the State's tidelands claims.

Proposed Adverse Possession Provision

a. If a person, for 20 years, has possessed real estate, all claims that may be made by any person for the recovery of the real estate shall be barred from any claim of right and that person shall have good title in the real estate, except as otherwise set forth in subsections (b) or (c), provided that during that period the possession has been:

(1) actual, open and notorious, of a kind that would notify others of the claim to the property;

(2) inconsistent with ownership of the property by others; and

(3) continued uninterruptedly for the requisite period by the person and the person's predecessors by occupancy, descent, conveyance or otherwise.

b. This section shall not limit the right or title of, or bar any claim or action by:

(1) the State or any agency or authority of the State except as provided by subsection (c); or

(2) a county or municipality or any agency or authority of a county or municipality in regard to lands held for, or dedicated to, a public use.

c. If a person, for 40 years, has possessed real estate that was tidal-flowed prior to that period and not tidal flowed at any time thereafter, the State shall be barred from any claim of riparian rights and the person shall have good title in the real estate, provided that the possession:

(1) meets the conditions of subsections (a)(1), (2) and (3);

(2) has been based on an instrument or instruments recorded as provided by law that describe the property, and

(3) has been accompanied by payment of all real estate taxes and other assessments on the property.

d. The required period of possession of any shall include possession by the person and all others with whom the person is in privity.

COMMENT

Subsection (a) states the general rule for adverse possession. It establishes the period for adverse possession at 20 years and applies that period both as a basis for good title in the possessor and a statute of limitations for actions by others claiming the land. Subsections (a)(1), (2) and (3) restate the rules (now partly statutory and partly common-law) for the kind of possession that establishes adverse possession. The wording of subsections (a)(1) and (a)(2) is derived from case law. See, *Baker v. Normanoch Ass'n* 25 N.J. 407, 420 (1957). Subsection (a)(3) continues the statutory requirement that the possession be continuous and subsection (d) adds the common law principle that periods of adverse possession by successive owners may be aggregated.

Subsection (b)(2) exempts local governmental property dedicated to public use from adverse possession. See, *Devins v. Borough of Bogota*, 124 N.J. 570 (1991). Subsection (b)(1) provides a general exemption for State property, but that exemption is subject to the exception in subsection (c). That provision allows a person to establish title free of riparian land claims by the State on land that has been free of tidal-flow for 40 years if he not only meets the requirements for adverse possession (for a period of 40 years, rather than 20) but also shows that his title has been recorded and he has paid taxes on the property.



STATE OF NEW JERSEY

N J L R C

NEW JERSEY LAW REVISION COMMISSION

FINAL REPORT

Relating to

PEJORATIVE TERMS REGARDING MENTAL CAPACITY

December 2008

John M. Cannel, Esq., Executive Director
NEW JERSEY LAW REVISION COMMISSION
153 Halsey Street, 7th Fl., Box 47016
Newark, New Jersey 07101
973-648-4575
(Fax) 973-648-3123
Email: njlrc@njlrc.org
Web site: <http://www.njlrc.org>

PEJORATIVE TERMS REGARDING MENTAL CAPACITY

Introduction

The following amendment to the New Jersey Constitution was approved at the last election:

Amend Article II, Section I, paragraph 6 to read as follows:

6. No [idiot or insane] person who has been adjudicated by a court of competent jurisdiction to lack the capacity to understand the act of voting shall enjoy the right of suffrage.

The change in the Constitution reflects the realization that the words “idiot” and “insane” are inappropriate in our statutes. These words no longer convey clear enough meaning to permit application of the statutes in which they are found.

In keeping with the spirit and intent of the constitutional amendment, the Commission undertook this project to eliminate all pejorative language relating to mental capacity found in the New Jersey statutes. Language in the affected statutes that is anachronistic, gender specific and unclear, or that references nonexistent entities and institutions, has also been modified accordingly.

The project evolved in the following manner. First, references to “idiot” and “insane”, derivations thereof, and other related terms initially deemed pejorative,¹ were culled from the New Jersey statutes. Once identified, however, not all culled terms were treated equally.

Terms obviously pejorative were replaced with appropriate language to reflect the meaning intended by the statutory reference. Other terms as used in a criminal context, such as the term “insane” and its derivations, were determined not to be pejorative.² Additional terms, such as “unsound mind” and “sound mind”, though often not used pejoratively, were sometimes defined unclearly.³

¹ Words culled included “idiot” (and variations such as “idiocy” and “idiotic”), “insane” (and variations such as “insanity”), “lunatic” (and variations such as “lunacy”), and “feeble-minded” (and variations such as “feeble-mindedness.”) These words, when found, were replaced as discussed later in the text of this report. For purposes of thoroughness, other pejorative terms referring to mental capacity (e.g., “imbecile”, and the like), were searched for but not found in the statutes. The words “unsound mind” and “sound mind”, and “competency” and “incompetency”, and their variations, were also made part of the search and are addressed later in the text of this report.

² The use of “insane” or “insanity” in the criminal law context, for example, appeared correct and not pejorative. Therefore, these terms appearing in the criminal statutes (Title 2C) and statutes that reference criminal standards (interspersed throughout Titles 30, 40 52, 53 and 2A) were not replaced and are not included in this final report.

³ For example, N.J.S.3B:14-21 (e) provides that a court may remove a fiduciary from office when he is of “unsound mind or mentally incapacitated for the transaction of business”. Since “unsound mind” is not

Where the words “unsound mind” appeared to add nothing to the meaning of the statutory reference, they were eliminated. References to “of sound mind” in statutes with a specific probate purpose, such as those found in N.J.S. 3B:3-1, pertaining to testamentary capacity, and in N.J.S. 3B:3-4, pertaining to making a will self-proved, were viewed not to be pejorative and therefore not included in this report.⁴ All other references to “unsound mind” and “sound mind” were replaced with words more appropriate in the statutory context (see, e.g., section 30:6B-1). Similarly, the words “sane mind”, “sanity” or simply the word, “sane”, as it relates to mental capacity, also were replaced for purposes of consistency.

To determine replacements for the pejorative terms, the Commission first looked at the definition of “incapacitated individual” as used in Title 3B, the revised Administration of Estates – Decedents and Others (the New Jersey Probate Code).

Section 3B:1-2 defines “incapacitated individual” as:

an individual who is impaired by reason of mental illness or mental deficiency to the extent that he lacks sufficient capacity to govern himself and manage his affairs.

but further states that:

The term incapacitated individual is also used to designate an individual who is impaired by reason of physical illness or disability, chronic use of drugs, chronic alcoholism or other cause (except minority) to the extent that he lacks sufficient capacity to govern himself and manage his affairs.

The terms incapacity and incapacitated individual refer to the state or condition of an incapacitated individual as hereinbefore defined.

Because the Probate Code definition is intended to have a broader meaning and also include the physically disabled or ill, the Commission does not use the terms “incapacitated individual” as a replacement for the pejorative terms. Instead, the words “mentally incapacitated”, or their variation, are used, as they present a neutral alternative consistent with the amended constitutional language. For purposes of this report, and consistent with the Probate Code, “mentally incapacitated” is defined as *impaired by reason of mental illness or mental deficiency to the extent that the person lacks sufficient capacity to govern the person’s own body and manage personal affairs.*

otherwise defined in the statute, its meaning is unclear. Further examples of undefined uses of “sound mind” appear in other non-probate contexts (e.g. N.J.S. 40:11A-22.2).

⁴ The statutes not altered are N.J.S. 3B:3-1 (Individuals competent to make a will and appoint a testamentary guardian); 3B:3-4 (Making will self-proved at time of execution); and 3B:3-5 (Making will self-proved subsequent to time of execution).

References to “incompetent” “incompetency”, “competent”, “competency”, “mental incompetent”, “mentally incompetent”, or “mental incompetency”, where found, are also changed to “mentally incapacitated”, or its appropriate variation, for purposes of consistency.⁵

In those provisions otherwise altered to eliminate pejorative language, the Commission made the following additional modifications:

- a. the provisions are made gender neutral;
- b. references to “under the age of 21” or “under the age of 18” or “infancy”, or their variations, are replaced with the word “minor”, or corresponding language, and all references to reaching the ages of 21 or 18 with the words “reaching majority”, or corresponding language;
- c. other unclear or anachronistic language is eliminated or refined; and
- d. institution and agency names are made current.

In a few instances, the Commission also recommends repeal of those statutory provisions that are now entirely anachronistic or irrelevant.

Certain statutes that use pejorative terms are also not included in this report because the statutes are addressed in other Commission projects. Thus, provisions of the Married Women’s Property Acts containing references to “lunatic” and “lunacy”, and pejorative terms appearing in Title 22A – Fees and Costs; Title 44 – Poor Law; and Title 9 – Children, are not part of this report.

In addition, as a result of this project, other problematic areas requiring revision have been identified. For example, references to the words “mental retardation” and its derivatives are also pejorative and appear throughout the statutes. The Commission purposely did not diverge in this project from its singular goal of addressing the concerns raised by the constitutional amendment. However, other pejorative terms identified as a result of this project will be considered in one or more separate Commission projects at a later time.

Finally, the Commission also soon realized that as a result of revision of an outdated and anachronistic portion of a current statutory section, the remaining unrevised sections of the same Title became more cumbersome and less comprehensible. Titles 2A and 30, for example, contain lengthy paragraphs, grammatical errors and awkward language. The contrast of the new language, as proposed in this report, alongside the existing language within the same Titles, underscores the need for revision of these Titles as well as other Titles similarly affected.

⁵ References in a criminal context, or in a context unrelated to mental capacity such as the use of the word “incompetent” to describe careless or negligent conduct, have not been altered and are not included in this report. A very few references to “incompetent” that pertain to general “disabilities” also are not included. See, *e.g.*, N.J.S. 2A:62-8 and 2A:62-10. In addition, N.J.S. 3A:25-42, though specifically referencing mental incompetency, is not included in this report as the section is part of a block of sections that were neither repealed nor saved from repeal by section 3B:29-1.

The references to pejorative terms with recommended replacement language and revision are set out below in separate sections chronologically ordered by Title number.

Title 2A:

2A:4A-39. Right to counsel

a. A juvenile shall have the right, as provided by the Rules of Court, to be represented by counsel at every critical stage in the proceeding which, in the opinion of the court may result in the institutional commitment of the juvenile.

b. During every court proceeding in a delinquency case, the waiving of any right afforded to a juvenile shall be ~~done~~ accomplished in the following manner:

(1) A juvenile who is found not to be competent mentally incapacitated may not waive any rights except in the presence of and after consultation with counsel, and unless a parent has first been afforded a reasonable opportunity to consult with the juvenile and the juvenile's counsel regarding this decision. The parent or guardian may not waive the rights of a ~~competent~~ juvenile found not to be mentally incapacitated.

(2) Any such waiver shall be executed in writing or recorded. Before the court may accept a waiver, the court shall question the juvenile and ~~his~~ the juvenile's counsel to determine if the juvenile is knowingly, willingly and voluntarily waiving ~~his~~ any right. If the court finds after questioning the juvenile that the waiver is not being made voluntarily and intelligently, the waiver shall be denied.

(3) An ~~incompetent~~ mentally incapacitated juvenile may not waive any right. A guardian ad litem shall be appointed for the juvenile who may waive rights after consultation with the juvenile and the juvenile's counsel ~~for the juvenile, and the juvenile.~~

(4) Waivers shall be executed in the language regularly spoken by the juvenile.

2A:14-21. Disabilities affecting limitations; prescribed by articles 1 and 2

If ~~any a~~ person entitled to ~~any of the~~ commence an actions or proceedings specified in N.J.S. 2A:14-1 to 2A:14-8 or N.J.S. 2A:14-16 to 2A:14-20 or to a right or title of entry under N.J.S. 2A:14-6, ~~is or shall be,~~ is a minor or mentally incapacitated at the time ~~of any~~ such cause of action or right or title ~~accruing accrues,~~ under the age of 21 years, or insane, such person may commence ~~such the~~ action or make ~~such the~~ entry, within ~~such the~~ time as limited by those statutes, after ~~his coming to or being of full age~~ reaching majority or ~~of sane mind returning to mental capacity.~~ Notwithstanding the provisions of this section to the contrary, an action by or on behalf of a minor that has accrued for medical malpractice for injuries sustained at birth shall be commenced prior to the minor's 13th birthday, as provided in N.J.S.2A:14-2.

2A:14-32. Disabilities affecting right to enforce right or title to real estate

If any person having a right or title to real estate is a minor or has been adjudicated mentally incapacitated or is outside the United States for purposes other than a military tour of duty shall, at the time ~~such the~~ right or title first accrued or descended, ~~be either not of sound mind or under the age of 21 years, or without the United States,~~ he, and his heirs ~~may,~~ that person may, notwithstanding the fact that the periods of time ~~mentioned specified~~ in sections N.J.S. 2A:14-30 and N.J.S. 2A:14-31 of this title have expired, bring ~~his or their~~ an action to enforce ~~the his or their~~ right or title, if ~~such provided the~~ action shall ~~be is~~ commenced within 5 years after ~~his the~~ disability is removed or ~~he the~~ person ~~comes is~~ physically present within the United States, ~~but not thereafter.~~

2A:15-1. Actions in person or by attorney

Every person ~~of full age and sound mind~~ who has reached majority and is not mentally incapacitated may prosecute or defend any action in any court, in person or through another duly admitted to the practice of law in this sState.

2A:16-7. Judgment for conveyance of land; effect

When a judgment of the sSuperior eCourt ~~shall be is~~ entered for a conveyance, release or acquittance of real estate or an interest therein, and the party against whom the judgment ~~shall be is~~ entered ~~shall not~~ has failed to comply therewith by the time ~~appointed specified~~ in the judgment, or within 15 days after entry of the judgment if no time ~~be appointed is~~ specified therein, the judgment shall ~~be considered and taken, in all courts of the state to have the same operation and effect in all courts, and to be available as if the conveyance, release or acquittance had been executed conformably to in conformance with the judgment, and this notwithstanding any disability of such the party by infancy because of minority, lunacy mental incapacity coverture or otherwise.~~

2A:16-55. Declaration of rights or legal relations of interested parties in relation to estates, wills and other writings

A person interested as or through an executor, administrator, trustee, guardian, receiver, assignee for the benefit of creditors or other fiduciary, creditor, devisee, legatee, heir, next of kin, or cestui que trust, in the administration of a trust or the estate of a decedent, ~~an infant~~ a minor, ~~lunatic~~ mentally incapacitated person, insolvent or other person may have a declaration of rights or legal relations in respect thereto, to:

- a. Ascertain any class of creditors, devisees, legatees, heirs, next of kin or others; or
- b. Direct the executor, administrator, trustee, guardian, receiver, assignee for the benefit of creditors or other fiduciary to do or abstain from doing any particular act in ~~his~~ a fiduciary capacity; or
- c. Determine any question arising in the administration of the estate, trust or guardianship, including the construction of wills and other writings.

2A:41-1. Arrest or imprisonment in civil action prohibited; discharge on habeas corpus

~~No idiot or lunatic, during the time of his lunacy~~ mentally incapacitated person shall, ~~during the period of incapacity,~~ be committed or detained in prison for want of bail, or ~~his body~~ taken in execution of a writ in ~~any~~ a civil action or in any action for a penalty. ~~In case any~~ A mentally incapacitated person ~~idiot or lunatic shall be~~ who is arrested and detained in custody in ~~any~~ a civil action, contrary to this section, ~~he~~ shall be discharged, on motion, by the court out of which the process ~~on which he is so held~~ issued, or upon a writ of habeas corpus.

2A:48-2. Limitation of action against municipality or county

No action under this article shall be instituted unless commenced within 3 months after the loss of or injury to the property. If any person entitled to such an action is at the time of ~~any such cause of~~ the action ~~accruing~~ accrues, ~~under the age of 21 years or insane,~~ a minor or mentally incapacitated, ~~he~~ the person may commence ~~such~~ the action within 3 years after ~~his coming to or being of full age reaching majority or of sane mind~~ returning to mental capacity.

2A:67-13. Who may prosecute writ

Except as provided in section 2A:67-14 ~~of this title,~~ any ~~the following~~ persons ~~hereinafter specified~~ may prosecute a writ of habeas corpus, ~~according to the provisions of~~ in accordance with this chapter, to inquire into the cause of ~~his~~ the person's imprisonment or restraint:

a. ~~Any~~ A person committed, detained, confined or restrained of ~~his~~ liberty, within this ~~s~~State, for ~~any~~ a criminal or supposed criminal matter;

b. ~~Any~~ A person in custody by virtue of civil process issued out of ~~any~~ a court in this ~~s~~State;

c. ~~Any~~ A person committed, detained, confined or restrained of ~~his~~ liberty, within this ~~s~~State, under any pretense whatsoever;

d. ~~Any~~ A person in confinement on a charge of a criminal offense, which is of a bailable nature, for the purpose of ~~putting in such~~ posting bail;

e. ~~Any~~ A person confined in ~~any~~ a State hospital ~~for the insane, within this state, for the purpose of determining his sanity or insanity~~ whether the person is mentally incapacitated;

f. ~~Any~~ A person lawfully committed to ~~any~~ a State institution ~~of this state, pursuant to law,~~ but not for a fixed period of time, for the purpose of determining whether the refusal of the chief executive officer thereof to discharge ~~him~~ the person ~~therefrom~~ is justified;

g. ~~Any~~ A person who has left ~~any~~ a State charitable institution ~~of this state~~ without having been finally and lawfully discharged ~~therefrom pursuant to law~~ and who was lawfully committed or admitted to such institution, ~~pursuant to law,~~ for a permanent or determinable period of time, for the purpose of determining whether such person should be released from the commitment;

h. A superintendent or chief executive officer of ~~any~~ a State charitable institution ~~of this state,~~ for the purpose of obtaining the release from custody or restraint of a person specified in subsection g. of this section and ~~his~~ that person's return to the custody of ~~such~~ the institution.

If sufficient cause appears, the complaint may be filed and the writ may be prosecuted by another on behalf of the person entitled to prosecute the writ.

2A:67-27. Time of hearing; notice

When the writ is returned, the court may hold the hearing immediately unless the validity of a detention on any civil process, or the ~~sanity or insanity~~ mental capacity of the party is to be determined, and may, in any case, set a date for the hearing which shall be not more than 5 days after the return of the writ unless for good cause additional time is allowed.

Notice of the time and place set for a later hearing shall be served at least 2 days ~~prior thereto~~ before the hearing or ~~at such earlier, time~~ as the court may order, by the applicant upon the defendant, and (a) if the party is in custody on any criminal matter, upon the county prosecutor of the county ~~wherein in which~~ the alleged offense was committed, or (b) if the party is in custody on any civil process, upon each person having an interest in continuing the confinement or restraint or upon ~~his~~ the party's attorney, or (c) if the party is in custody of any psychiatric hospital ~~for the insane~~ or other institution, ~~service shall be made upon~~

the person or persons upon whose application he was the basis for committed commitment to the hospital or institution, and upon the medical director or other head officer of the hospital or institution.

2A:67-28. Hearing; jury

In all cases in which the ~~sanity or insanity~~ mental capacity of the party is to be determined, the testimony shall be taken orally and the judge may hear the matter without a jury or may direct that the action be tried by a jury called from the general panel or, if ~~such a jury is~~ not available, by a jury specially summoned as in other actions.

In all other cases, the judge may hear the matter summarily on the complaint, return and answer to the return, ~~if any,~~ or may require that testimony be offered orally ~~as in other actions~~ and, on its own motion, may summon witnesses and require any person to produce any documents, records or other writings.

In any a proceeding under subsection d. of section 2A:67-13 ~~of this title~~, the judge may take testimony concerning the truth of ~~the affidavit or affidavits and proofs upon which the order for process, under which the defendant therein is held,~~ was made and said the process issued.

2A:67-29. Judgment

In any proceeding under subsections a., b. or c. of section 2A:67-13 ~~of this title~~, if no cause is shown for the imprisonment or restraint or for the continuation thereof, the judge shall discharge the party from the confinement or restraint ~~under which he is held~~. If the party is not entitled to a discharge and is not bailed, the party shall be remanded by the judge shall remand him to the custody or placed him under the restraint from which ~~he was taken~~, so long as such custody or restraint is lawful. ~~if the person under whose custody he was is legally entitled thereto, and if not so entitled, such custody or restraint is not lawful, such party shall be committed by the judge shall commit the party to the custody of such other the officer or person who by law is lawfully entitled thereto.~~

In any proceedings under subsections a., b., c. or d. of section 2A:67-13 ~~of this title~~, if it appears that the ~~prisoner~~ person is entitled to be bailed, the judge shall ~~forthwith~~ discharge the ~~prisoner~~ person immediately from his imprisonment, upon taking his a secured or bonded recognizance in ~~such sum and with such surety or sureties~~ an amount as the judge may determine ~~approve for his appearance, as the circumstances may require,~~ and the judge shall then certify the writ with the return and the recognizance to the court where the appearance is to be made.

In any proceeding under subsection d. of section 2A:67-13 ~~of this title~~, the judge shall discharge the party in custody if the process was improperly or improvidently mistakenly issued, ~~or should not have been issued against such party.~~

In any proceeding under subsection e. of section 2A:67-13 ~~of this title~~, the ~~inmate person~~ shall not be discharged unless ~~he is~~ found not to be mentally incapacitated, ~~to be sane~~ either by the judge, if the hearing is held without a jury, or by ~~the~~ unanimous verdict of the jury.

In any proceeding under subsection f. of section 2A:67-13 ~~of this title~~, the ~~inmate person~~ shall not be discharged from the commitment unless the judge finds ~~he is~~ the person not afflicted as stated in the order of commitment.

In any proceeding under subsection g. or subsection h. of section 2A:67-13 ~~of this title~~, the judge, ~~in his~~ shall have the discretion, ~~may~~ to discharge the person ~~committed~~ from the commitment, or if such person is under confinement or restraint, to release ~~him therefrom~~ the person and order ~~his~~ the person's return to the institution ~~to which he was~~ where previously committed or admitted, depending upon the best interests of such person and ~~his~~ the person's parents, guardians or custodians.

No person shall be entitled to a discharge because of any informality or insufficiency in the original arrest or commitment.

2A:81-2. Transactions with ~~lunatic~~ mentally incapacitated person or decedent; proof required

When 4 a mentally incapacitated party to ~~any~~ a civil action is ~~a lunatic~~ suing or defending sues or defends by guardian or ~~when 4 party~~ sues or is sued in a representative capacity, any other party who asserts a claim or an affirmative defense against ~~such~~ the lunatic mentally incapacitated person or representative, that is supported by oral testimony of a promise, statement or act (i) of the ~~lunatic~~ mentally incapacitated person while of sound mind before the onset of mental incapacity, or (ii) of the decedent, shall be required to establish the same by clear and convincing proof.

COMMENT

The Commission recommends the change to the section's descriptor as underlined.

2A:84A-20. Lawyer-client privilege

Rule 26. [N.J.R.E. 504]

(1) General rule. Subject to Rule 37 [N.J.R.E. 530] and except as otherwise provided by paragraph 2 of this rule communications between lawyer and ~~his~~ client in the course of that relationship and in professional confidence, are privileged, and a client has a privilege (a) to refuse to disclose any such communication, and (b) to prevent ~~his~~ the lawyer from disclosing it, and (c) to prevent any other witness from disclosing such communication if it came to the knowledge of such witness (i) in the course of its transmittal between the client and the lawyer, or (ii) in a manner not reasonably to be anticipated, or (iii) as a result of a breach of the lawyer-client relationship, or (iv) in the course of a

recognized confidential or privileged communication between the client and such witness. The privilege shall be claimed by the lawyer unless otherwise instructed by the client or ~~his~~ the client's representative; the privilege may be claimed by the client in person, or if ~~incompetent~~ mentally incapacitated or deceased, by ~~his~~ the client's guardian or personal representative. Where a corporation or association is the client having the privilege and it has been dissolved, the privilege may be claimed by its successors, assigns or trustees in dissolution.

(2) Exceptions. Such privilege shall not extend (a) to a communication in the course of legal service sought or obtained in aid of the commission of a crime or a fraud, or (b) to a communication relevant to an issue between parties all of whom claim through the client, regardless of whether the respective claims are by testate or intestate succession or by inter vivos transaction, or (c) to a communication relevant to an issue of breach of duty by the lawyer to ~~his~~ the client, or by the client to ~~his~~ the lawyer. Where 2 or more persons have employed a lawyer to act for them in common, none of them can assert such privilege as against the others as to communications with respect to that matter.

(3) Definitions. As used in this rule (a) "client" means a person or corporation or other association that, directly or through an authorized representative, consults a lawyer or the lawyer's representative for the purpose of retaining the lawyer or securing legal service or advice from ~~him~~ the lawyer in ~~his~~ a professional capacity; and includes an ~~incompetent~~ mentally incapacitated person whose guardian so consults the lawyer or the lawyer's representative in behalf of the ~~incompetent~~ mentally incapacitated person, (b) "lawyer" means a person authorized, or reasonably believed by the client to be authorized to practice law in any State or nation the law of which recognizes a privilege against disclosure of confidential communications between client and lawyer. A communication made in the course of relationship between lawyer and client shall be presumed to have been made in professional confidence unless knowingly made within the hearing of some person whose presence nullified the privilege.

2A:84A-22. Marital privilege - Confidential communications

Rule 28. [N.J.R.E. 509]

No person shall disclose any communication made in confidence between such person and ~~his or her~~ that person's spouse unless both shall consent to the disclosure or unless the communication is relevant to an issue in an action between them or in a criminal action or proceeding in which either spouse consents to the disclosure, or in a criminal action or proceeding coming within ~~Rule 23(2)~~ section 2A:84A-17. When a spouse is ~~incompetent~~ mentally incapacitated or deceased, consent to the disclosure may be given for such spouse by the guardian, executor or administrator. The requirement for consent shall not terminate with divorce or separation. A communication between spouses while living separate and apart under a divorce from bed and board shall not be a privileged communication.

2A:84A-22.1. Definitions; patient-physician privilege

As used in this act, (a) "patient" means a person who, for the sole purpose of securing preventive, palliative, or curative treatment, or a diagnosis preliminary to such treatment, of his physical or mental condition, consults a physician, or submits to an examination by a physician; (b) "physician" means a person authorized or reasonably believed by the patient to be authorized, to practice medicine in the State or jurisdiction in which the consultation or examination takes place; (c) "holder of the privilege" means the patient while alive and not under the guardianship or the guardian of the person of an ~~incompetent~~ mentally incapacitated patient, or the personal representative of a deceased patient; (d) "confidential communication between physician and patient" means such information transmitted between physician and patient, including information obtained by an examination of the patient, as is transmitted in confidence and by a means which, so far as the patient is aware, discloses the information to no third persons other than those reasonably necessary for the transmission of the information or the accomplishment of the purpose for which it is transmitted.

2A:84A-22.15. Victim counselor's privilege

Subject to Rule 37 ~~of the Rules of Evidence [N.J.R.E. 530]~~, a victim counselor has a privilege not to be examined as a witness in any civil or criminal proceeding with regard to any confidential communication. The privilege shall be claimed by the counselor unless otherwise instructed by prior written consent of the victim. When a victim is ~~incompetent~~ mentally incapacitated or deceased consent to disclosure may be given by the guardian, executor or administrator except when the guardian, executor or administrator is the defendant or has a relationship with the victim ~~such that he has an~~ results in an interest in the outcome of the proceeding. The privilege may be knowingly waived by a juvenile. In any instance where the juvenile is, in the opinion of the judge, incapable of knowing consent, the parent or guardian of the juvenile may waive the privilege on behalf of the juvenile, provided that the parent or guardian is not the defendant and does not have a relationship with the defendant ~~such that he has an interest~~ results in an interest in the outcome of the proceeding. A victim counselor or a victim cannot be compelled to provide testimony in any civil or criminal proceeding that would identify the name, address, location, or telephone number of a domestic violence shelter or any other facility that provided temporary emergency shelter to the victim of the offense or transaction that is the subject of the proceeding unless the facility is a party to the proceeding.

Title 3B:**3B:11-5. Trustee's death or failure to act; appointment of new trustee by court; powers**

When a trustee appointed by a will probated in the surrogate's court of any county or a trustee appointed under a trust inter vivos as to real or personal

property situate in any county fails or refuses to act or dies before the execution or completion of the trust ~~committed to him~~ or absconds or removes from this State, is adjudicated a mentally incompetent incapacitated, or becomes in any manner legally incapable of executing the trust, the Superior Court may remove the trustee, ~~if he be alive~~, and appoint a suitable person or persons to execute the trust, and the trustee or trustees so appointed shall be entitled to the trust estate as fully and in the same manner as the original trustee was and shall have all the power and discretion of the original trustee.

3B:11-21. Purposes and policies; liberal construction

This act shall be liberally construed and applied to promote its underlying purposes and policies, which are among others to:

a. encourage the orderly establishment of community trusts for the benefit of persons with severe chronic disabilities;

b. ensure that community trusts are administered properly and that the managing boards of the trusts are free from conflicts of interest, except that an unpaid member of the managing board of a nonprofit corporation provider shall not be deemed to be in conflict as a member of the managing board of a trust;

c. facilitate sound administration of trust funds for persons with severe chronic disabilities by allowing family members and others to pool resources in order to make professional management investment more efficient;

d. provide parents of persons with severe chronic disabilities peace of mind in knowing that a means exists to ensure that the interests of their children who have severe chronic disabilities are properly looked after and managed after the parents die or become incapacitated;

e. help make guardians available for persons with severe chronic disabilities who are incompetent mentally incapacitated when no other family member is available for this purpose;

f. encourage the availability of private resources to purchase for persons with severe chronic disabilities goods and services that are not available through any governmental or charitable program and to conserve these resources by limiting purchases to those which are not available from other sources;

g. encourage the inclusion, as beneficiaries of community trusts, of persons who lack resources and whose families are indigent, in a way that does not diminish the resources available to other beneficiaries whose families have contributed to the trust; and

h. remove the disincentives which discourage parents and others from setting aside funds for the future protection of persons with severe chronic disabilities by ensuring that the interests of beneficiaries in community trusts are not considered assets or income which would disqualify them from any governmental or charitable entitlement program with an economic means test.

3B:11-22. Definitions

As used in this act:

a. "Beneficiary" means any person with a severe chronic disability who has qualified as a member of the community trust program and who has the right to receive those services and benefits of the community trust program as provided in this act.

b. "Board" means the board of trustees or the group of persons vested with the management of the business and affairs of a corporation, formed for the purpose of managing a community trust, irrespective of the name by which the group is designated.

c. "Community trust" means a nonprofit organization which offers the following services:

(1) administration of special trust funds for persons with severe chronic disabilities;

(2) follow-along services;

(3) guardianship for persons with severe chronic disabilities who are ~~incompetent~~ mentally incapacitated, when no other immediate family member or friend is available for this purpose; and

(4) advice and counsel to persons who have been appointed as individual guardians of the persons or estates of persons with severe chronic disabilities.

d. "Follow-along services" means those services offered by community trusts which are designed to insure that the needs of each beneficiary are being met for as long as may be required and may include periodic visits to the beneficiary and to the places where the beneficiary receives services, participation in the development of individualized plans being made by service providers for the beneficiary, and other similar services consistent with the purposes of this act.

e. "Severe chronic disability" means a physical or mental impairment which is expected to give rise to a long-term need for specialized health, social, and other services, and which makes the person with such a disability dependent upon others for assistance to secure these services.

f. "Trustee" means any member of the board of a corporation, formed for the purpose of managing a community trust, whether that member is designated as a trustee, director, manager, governor, or by any other title.

g. "Surplus trust funds" means funds accumulated in the trust from contributions made on behalf of an individual beneficiary, which, after the death of the beneficiary, are determined by the board to be in excess of the actual cost of providing services during the beneficiary's lifetime, including the beneficiary's share of administrative costs, and of any amounts provided to a remainderman.

3B:13-2. Definitions

As used in this chapter:

a. "Federal agency" means any bureau, office, board or officer of the United States by whatever name known, now or hereafter charged by Congress:

(1) With payment of pensions, bounties and allowances to veterans of the military service of the United States, their widows, widowers, children, mothers and fathers, or

(2) With the administration of the affairs of any of the aforesaid persons who may be minors or mentally ~~incompetent~~ incapacitated or to manage pensions, bounties and allowances payable to them;

b. "Military" has reference to the army, navy, marine, air and coast guard services;

c. "Estate" and "income" include only moneys received by the guardian from a Federal agency and earnings, interest and profits derived therefrom;

d. "Benefits" means moneys payable by the United States to the aforesaid persons or their guardians through a Federal agency;

e. "Chief officer" means an officer of a Federal agency, charged by the laws of the United States with the particular duty in connection with which the term is used;

f. "Ward" means a beneficiary of a Federal agency;

g. "Guardian" means a person acting as fiduciary for a ward.

3B:13-6. Determination of ~~incompetency~~ mental incapacity by Superior Court

For the purpose of appointing a guardian pursuant to this chapter, the mental ~~incompetency~~ incapacity of a beneficiary of a Federal agency shall be determined by the Superior Court.

COMMENT

The Commission recommends the change to the section's descriptor as underlined.

3B:13-7. Guardians; when and how appointed

When, pursuant to any law of the United States or regulation of a Federal agency, the chief officer of the agency requires, prior to payment of benefits, that a guardian be appointed for a ward, the appointment for a mentally incapacitated person shall be made in the Superior Court ~~in the case of a mental incompetent,~~ and in the appointment for a minor shall be made in the Superior Court or in the surrogate's court or in the Superior Court in the case of a minor.

3B:13-8. Guardian to have no more than five wards; exceptions

Except as provided in this section, no person shall accept appointment as guardian of a ward if ~~he be~~ acting as guardian for five wards.

In an action brought by an attorney of a Federal agency, establishing that a guardian is acting in a fiduciary capacity for more than five wards, the Superior Court shall require a final accounting forthwith from the guardian and shall discharge ~~him~~ the guardian.

The limitation of this section shall not apply where the guardian is a bank or trust company or a public guardian of ~~incompetent~~ mentally incapacitated veterans, and an individual may be guardian of more than five wards if they are all members of the same family.

3B:13-18. Authorization for guardian of ~~incompetent~~ mentally incapacitated ward to receive additional personal property not exceeding \$10,000.00

When an ~~incompetent~~ mentally incapacitated ward for whom a guardian has been appointed becomes entitled to personal property amounting to not more than \$10,000.00 from any source other than the United States Government, the court may authorize ~~him~~ the guardian to receive the personal property for conservation and administrative care. On payment of any money or delivery of property to the guardian, a release executed by ~~him~~ the guardian to the person or persons paying the money or delivering the property shall be valid and effective.

COMMENT

The Commission recommends the change to the section's descriptor as underlined.

3B:13-21. Appointment of public guardian for veterans

There may be appointed in each county a person to be known as "public guardian of ~~incompetent~~ mentally incapacitated veterans for the county of (naming county)" , who shall be appointed by the Assignment Judge of the Superior Court in the county. ~~He~~ The person appointed shall hold office for the term of 5 years from the date of ~~his~~ appointment and until ~~his~~ a successor is appointed and qualified.

3B:13-22. Guardian's bond

Before entering upon the duties of ~~his~~ office, a public guardian of ~~incompetent~~ mentally incapacitated veterans shall execute a bond to the Superior Court in an amount and with sureties as shall be approved by the Superior Court, conditioned for the faithful discharge of all duties imposed by law upon ~~him~~ the person appointed public guardian.

The bond shall be renewed annually and shall, from time to time, be increased or reduced as the court may direct.

The expense of procuring the bond shall be paid by the county treasurer upon presentation of a proper voucher approved by the Assignment Judge of the Superior Court in the county.

3B:13-23. Salary of public guardian

A public guardian of ~~incompetent~~ mentally incapacitated veterans shall receive an annual salary to be fixed by the Assignment Judge of the Superior Court of the county for which the guardian is appointed, with the approval of the board of freeholders or governing body of the county.

The salary shall be paid by the county treasurer in semimonthly payments and shall be in lieu of all other charges, compensation and commissions. A guardian shall not accept any other money whatsoever by way of fee, compensation, gratuity or present for any ~~of his~~ services.

3B:13-24. Duties of public guardian as adviser of other guardians

The public guardian of ~~incompetent~~ mentally incapacitated veterans shall, in each county, assist, supervise, advise and otherwise aid the duly appointed guardians of ~~incompetent~~ these veterans and give help as may be necessary in preparing and drawing papers and documents, and also help them to work in conjunction with the United States Department of Veterans' Administration Affairs, so that their wards may be fully protected.

COMMENT

The Veterans Administration has changed its name to the Department of Veterans Affairs.

3B:13-25. Discharge and removal of public guardian

The public guardian of ~~incompetent~~ mentally incapacitated veterans shall be subject to discharge or removal, by the court, on the grounds and in the manner in which other guardians of mental ~~incompetents~~ incapacitated persons are discharged or removed.

3B:13-26. Public guardian may be appointed general guardian for veteran

Where an action is brought in the Superior Court for the appointment of a guardian for a person who, while in the military, naval, marine, air or coast guard service of the United States, or after discharge therefrom, is ~~or shall have been~~ determined to be mentally ~~incompetent~~ incapacitated, whether or not ~~he is or shall have been~~ committed or confined to an institution for the care of mentally ~~incompetent~~ incapacitated persons, and the heirs of the person are unwilling, unable or unqualified for the appointment, ~~or in case it shall appear that or if~~ the

best interests of the person require it, the Superior Court may appoint the public guardian of the county in which the person resides as ~~his~~ guardian of the person.

3B:13-27. Powers of public guardian as guardian of veterans' estates

The public guardian of ~~incompetent~~ mentally incapacitated veterans shall have, in respect of any veteran and the estate of any veteran for whom ~~he has been~~ the appointed guardian, the same power and authority as any other duly appointed guardian of a ~~mentally incompetent~~ mentally incapacitated person.

3B:13-28. Settlement of accounts

The public guardian shall settle ~~his~~ accounts in each estate in which ~~he has been~~ the guardian is appointed guardian at the times and in the same manner as other guardians of ~~mentally incompetents~~ mentally incapacitated persons.

3B:13-29. Termination of guardianship; settlement of account

Upon the termination of a guardianship, by death of ~~his~~ the ward or otherwise, the public guardian shall settle ~~his~~ the account as ~~guardian~~ in the same manner as other guardians of ~~mentally incompetents~~ mentally incapacitated persons.

3B:13-31. Counsel to represent public guardian; compensation

The public guardian of ~~incompetent~~ mentally incapacitated veterans may, when authorized by the Superior Court, employ counsel to represent ~~him~~ the public guardian. The compensation of counsel shall be fixed by the court and paid from moneys in the guardian's ~~hands~~ control belonging to the estate involved in litigation.

3B:13A-1. Definitions

As used in this chapter:

a. "Conservatee" means a person who has not been ~~judicially declared incompetent~~ adjudicated mentally incapacitated but who by reason of advanced age, illness or physical infirmity, is unable to care for or manage ~~his~~ property or has become unable to provide support for ~~himself~~ the conservatee or others who dependent upon him for such support;

b. "Conservator" means a person appointed by the court to manage the estate of a conservatee.

3B:13A-16. Limitations on appointment of conservator

The appointment of a conservator shall not:

- a. Be evidence of the ~~competency~~ mental capacity or ~~incompetency~~ incapacity of a conservatee; or
- b. Transfer title of the conservatee's real and personal property to the conservator; or
- c. Deprive or modify any civil right of the conservatee, including but not limited to civil service status and appointment or rights relating to the granting, forfeiture or denial of a license, permit, privilege or benefit pursuant to any law.

3B:13A-34. Termination of conservatorship upon death or incompetency mental incapacity of conservatee

A conservatorship shall terminate upon the death of the conservatee or upon ~~his having been adjudicated to be~~ adjudication of the conservatee incompetent as mentally incapacitated as provided by law, but the termination shall not affect the conservator's liability for prior acts nor ~~his~~ obligation to account funds and property of the conservatee.

COMMENT

The Commission recommends the change to the section's descriptor as underlined.

3B:13A-36. Conservator's compensation

A conservator shall be compensated for ~~his~~ services in the same manner as a guardian for a minor or ~~mentally incompetent~~ incapacitated person.

3B:14-21. Removal for cause

The court may remove a fiduciary from office when the fiduciary:

- a. After due notice of an order or judgment of the court so directing, ~~he~~ neglects or refuses, within the time fixed by the court, to file an inventory, render an account or give security or additional security;
- b. After due notice of any other order or judgment of the court made under its proper authority, ~~he~~ neglects or refuses to perform or obey the order or judgment within the time fixed by the court; or
- c. ~~He has embezzleds, wasteds or misapplieds any part of the estate committed to his custody for which the fiduciary is responsible, or has abuseds the trust and confidence reposed in him~~ the fiduciary; or
- d. ~~He has removed from~~ No longer resides nor has an office in the sState or ~~does not reside therein~~ and neglects or refuses to proceed with the administration of the estate and perform the duties required and ~~trust devolving upon him~~; or
- e. ~~He is of unsound mind or~~ Becomes mentally incapacitated for the transaction of business; or

f. ~~One of two or more fiduciaries has neglected or refused, as one of two or more fiduciaries, to perform his the required duties or to join with the other fiduciary or fiduciaries in the administration of the estate committed to their care for which they are responsible~~ whereby the proper administration and settlement of the estate is or may be hindered or prevented.

3B:14-23. Powers.

In the absence of contrary or limiting provisions in the judgment or order appointing a fiduciary, in the will, deed or other instrument or in a subsequent court judgment or order, every fiduciary shall, in the exercise of good faith and reasonable discretion, have the power:

a. To accept additions to any estate or trust from sources other than the estate of the decedent, minor, ~~mentally incompetent~~ incapacitated person or the settlor of a trust;

b. To acquire the remaining undivided interest in an estate or trust asset in which the fiduciary, in ~~his~~ a fiduciary capacity, holds an undivided interest;

c. To invest and reinvest assets of the estate or trust under the provisions of the will, deed or other instrument or as otherwise provided by law and to exchange assets for investments and other property upon terms as may seem advisable to the fiduciary;

d. To effect and keep in force fire, rent, title, liability, casualty or other insurance to protect the property of the estate or trust and to protect the fiduciary;

e. With respect to any property or any interest therein owned by an estate or trust, including any real property belonging to the fiduciary's decedent at death, except where the property or any interest therein is specifically disposed of:

(1) To take possession of and manage the property and to collect the rents therefrom, and pay taxes, mortgage interest and other charges against the property;

(2) To sell the property at public or private sale, and on terms as in the opinion of the fiduciary shall be most advantageous to those interested therein;

(3) With respect to fiduciaries other than a trustee, to lease the property for a term not exceeding three years, and in the case of a trustee to lease the property for a term not exceeding 10 years, even though the term extends beyond the duration of the trust, and in either case including the right to explore for and remove mineral or other natural resources, and in connection with mineral leases to enter into pooling and unitization agreements;

(4) To mortgage the property;

(5) To grant easements to adjoining owners and utilities;

(6) A fiduciary acting under a will may exercise any of the powers granted by this subsection e. notwithstanding the effects upon the will of the birth of a child after its execution;

f. To make repairs to the property of the estate or trust for the purpose of preserving the property or rendering it rentable or saleable;

g. To grant options for the sale of any property of the estate or trust for a period not exceeding six months;

h. With respect to any mortgage held by the estate or trust to continue it upon and after maturity, with or without renewal or extension, upon terms as may seem advisable to the fiduciary and to foreclose, as an incident to collection of any bond or note, any mortgage and purchase the mortgaged property or acquire the property by deed from the mortgagor in lieu of foreclosure;

i. In the case of the survivor or survivors of two or more fiduciaries to administer the estate or trust without the appointment of a successor to the fiduciary or fiduciaries who have ceased to act and to exercise or perform all of the powers given unless contrary to the express provision of the will, deed or other instrument;

j. As a new, alternate, successor, substitute or additional fiduciary or fiduciaries, to have or succeed to all of the powers, duties and discretion of the original fiduciary or fiduciaries, with respect to the estate or trust, as were given to the original fiduciary or fiduciaries named in or appointed by a will, deed or other instrument, unless the exercise of the powers, duties or discretion of the original fiduciary or fiduciaries is expressly prohibited by the will, deed or other instrument to any successor or substitute fiduciary or fiduciaries;

k. Where there are three or more fiduciaries qualified to act, to take any action with respect to the estate or trust which a majority of the fiduciaries shall determine; a fiduciary who fails to act through absence or disability, or a dissenting fiduciary who joins in carrying out the decision of a majority of the fiduciaries if ~~his~~ the dissent is expressed promptly in writing to ~~his~~ the cofiduciaries, shall not be liable for the consequences of any majority decision, provided that liability for failure to join in administering the trust or to prevent a breach of trust may not thus be avoided;

l. To employ and compensate attorneys for services rendered to the estate or trust or to a fiduciary in the performance of ~~his~~ duties;

m. To compromise, contest or otherwise settle any claim in favor of the estate, trust or fiduciary or in favor of third persons and against the estate, trust or fiduciary, including transfer inheritance, estate, income and other taxes;

n. To vote in person or by proxy, discretionary or otherwise, shares of stock or other securities held by the estate or trust;

o. To pay calls, assessments and any other sums chargeable or accruing against or o account of shares of stock, bonds, debentures or other corporate securities in the ~~hands~~ control of a fiduciary, whenever the payments may be

legally enforceable against the fiduciary or any property of the estate or trust or the fiduciary deems payment expedient and for the best interests of the estate or trust;

p. To sell or exercise stock subscription or conversion rights, participate in foreclosures, reorganizations, consolidations, mergers or liquidations, and to consent to corporate sales or leases and encumbrances, and, in the exercise of those powers, the fiduciary is authorized to deposit stocks, bonds or other securities with any custodian, agent, protective or other similar committee, or trustee under a voting trust agreement, under terms and conditions respecting the deposit thereof as the fiduciary may approve;

q. To execute and deliver agreements, assignments, bills of sale, contracts, deeds, notes, receipts and any other instrument necessary or appropriate for the administration of the estate or trust;

r. In the case of a trustee:

(1) To hold two or more trusts or parts of trusts created by the same instrument, as an undivided whole, without separation as between the trusts or parts of the trusts, provided that separate trusts or parts of trusts shall have undivided interests and provided further that no holding shall defer the vesting of any estate in possession or otherwise;

(2) To divide a trust, before or after its initial funding, into two or more separate trusts, provided that such division will not materially impair the accomplishment of the trust purposes or the interests of any beneficiary. Distributions provided for by the governing instrument may be made from one or more of the separate trusts;

s. To distribute in kind any property of the estate or trust as provided in article 1 of chapter 23 of this title;

t. To join with the surviving spouse, the executor of ~~his or her~~ the spouse's will or the administrator of ~~his or her~~ the spouse's estate in the execution and filing of a joint income tax return for any period prior to the death of a decedent for which ~~he has not filed a~~ no return or a gift tax return on gifts made by the decedent's surviving spouse was filed, and to consent to treat the gifts as being made one-half by the decedent, for any period prior to a decedent's death, and to pay taxes thereon as are chargeable to the decedent;

u. To acquire or dispose of an asset, including real or personal property in this or another state, for cash or on credit, at public or private sale, and to manage, develop, improve, exchange, partition, change the character of, or abandon an estate asset;

v. To continue any business constituting the whole or any part of the estate for so long a period of time as the fiduciary may deem advisable and advantageous for the estate and persons interested therein;

w. In the case of a qualified bank as defined in section 1 of P.L.1948, c.67 (C.17:9A-1), and an out-of-State bank as defined in section 1 of P.L.1948, c.67

(C.17:9A-1), which has established a trust office in this State to purchase, sell and maintain for any fiduciary account, securities issued by an investment company which is operated and maintained in accordance with the "Investment Company Act of 1940," 15 U.S.C.s.80a-1 et seq., and for which the qualified bank or out-of-State bank is providing services as an investment advisor, investment manager, custodian or otherwise, including those for which it receives compensation, if:

(1) The investment is otherwise in accordance with applicable fiduciary standards; and

(2) The investment is authorized by the agreement or instrument creating the fiduciary account that gives the qualified bank or out-of-State bank investment authority, or by court order; or

(3) The qualified bank or out-of-State bank provides written notice not less than annually by prospectus, account statement or otherwise, disclosing to any current income beneficiaries of the trust the services provided by the qualified bank or its affiliate or out-of-State bank to the investment company, and the rate, formula, or other method by which compensation paid to the qualified bank or its affiliate or out-of-State bank is determined and the qualified bank or out-of-State bank does not receive a written objection from any current income beneficiary within 30 days after receipt of this notice. If a written objection is received from any current income beneficiary pursuant to this paragraph (3), no such investment of the trust assets of that fiduciary account shall be made or maintained.

Such investment shall not be deemed self-dealing or a fiduciary conflict; nor shall the fact that other beneficiaries of fiduciary accounts of the qualified bank or out-of-State bank have similar investments be deemed to be an improper commingling of assets by the qualified bank or out-of-State bank.

For purposes of this subsection, "fiduciary account" shall include a trust, estate, agency or other account in which funds, property, or both, are held by a qualified bank pursuant to section 28 of P.L.1948, c.67 (C.17:9A-28), or an account for which a qualified bank or out-of-State bank acts as investment advisor or manager or an account held by an out-of-State bank as defined in section 1 of P.L.1948, c. 67 (C.17:9A-1);

x. To employ and compensate accountants from the fiduciary fund for services rendered to the estate or trust or to a fiduciary in the performance of the fiduciary's duties, including the duty of a corporate or other fiduciary with respect to the preparation of accountings, without reduction in commissions due to the fiduciary, so long as such accountings are not the usual, customary or routine services provided by the fiduciary in light of the nature and skill of the fiduciary. In evaluating the actions of the fiduciary under this subsection, the court shall consider the size and complexity of the fiduciary fund, the length of time for which the accounting is rendered, and the increased risk and responsibilities imposed on fiduciaries as a result of revisions to laws affecting fiduciaries including, but

not limited to, the "Uniform Principal and Income Act," P.L.2001, c.212 (C.3B:19B-1 et seq.) and the "Prudent Investor Act," P.L.1997, c.26 (C.3B:20-11.1 et seq.) provided that such revisions of the laws affecting fiduciaries were enacted after the fiduciary responsibilities under the corresponding will, deed or other instrument, or court judgment or order, were imposed on, and assumed by, the fiduciary. For purposes of this subsection, "Accountant" means a person who is registered as a certified public accountant pursuant to the provisions of P.L.1997, c.259 (C.45:2B-42 et seq.), or an accounting firm which is organized for the practice of public accounting pursuant to the provisions of P.L.1997, c.259 (C.45:2B-42 et seq.) and P.L.1969, c.232 (C.14A:17-1 et seq.); and

y. The powers set forth in this section are in addition to any other powers granted by law, and by a will, deed or other instrument.

3B:15-1. Bonds of fiduciaries

The court or surrogate appointing a fiduciary in any of the instances enumerated below shall secure faithful performance of the duties of ~~his~~ the office by requiring the fiduciary thereby authorized to act to furnish bond to the Superior Court in a sum and with proper conditions and sureties, having due regard to the value of the estate ~~in his charge~~ and the extent of ~~his~~ the fiduciary's authority, as the court shall approve:

a. When an appointment is made upon failure of the will, or other instrument creating or continuing a fiduciary relationship, to name a fiduciary;

b. When a person is appointed in the place of the person named as fiduciary in the will, or other instrument creating or continuing the fiduciary relationship;

c. When the office to which the person is appointed is any form of administration, except (1) administration ad litem which may be granted with or without bond; or (2) administration granted to a surviving spouse where the decedent's entire estate is payable to the surviving spouse;

d. When the office to which the person is appointed is any form of guardianship of a minor or mentally ~~incompetent~~ incapacitated person, except as otherwise provided in N.J.S. 3B:12-16 or N.J.S. 3B:12-33 with respect to a guardian appointed by will;

e. When letters are granted to a nonresident executor, except in cases where the will provides that no security shall be required of the person named as executor therein;

f. When an additional or substituted fiduciary is appointed;

g. When an appointment is made under chapter 26 of this title, of a fiduciary for the estate or property, or any part thereof, of an absentee; or

h. When a fiduciary moves from the State, the court may require ~~him to~~ the fiduciary give such security as it may determine.

Nothing contained in this section shall be construed to require a bond in any case where it is specifically provided by law that a bond need not be required.

3B:15-7. Conditions of bonds of guardians of minors and mentally incompetents incapacitated persons

The bond required of a guardian of a minor or mentally incompetent incapacitated person shall be conditioned substantially as follows:

a. To well and truly administer the ward's estate, and to take proper care of the ward if the guardian is the guardian of the ward's person;

b. To make a just and true account of ~~his~~ the administration of the guardianship, and, if required by the court, to settle ~~his~~ accounts therein within the time so required.

COMMENT

The Commission recommends the change to the section's descriptor as underlined.

3B:15-17.1. Estate of minor consisting of judgment proceeds; payment

Where the estate of a minor consists of the proceeds of a judgment recovered in favor of the minor in any court of this State and the funds recovered are placed under the control of the county surrogate, the funds shall be paid over to the person when the person reaches ~~the age of 18 years~~ majority, unless the court finds the person ~~incompetent~~ mentally incapacitated.

3B:16-8. Inventory of guardian of the estate of a minor or mentally incompetent incapacitated person

Every guardian of the estate of a minor or mentally incompetent incapacitated person may, and if required by the court shall, file with the surrogate of the proper county or the clerk of the Superior Court, ~~as the case may be,~~ an inventory, under oath, of all the real and personal property which ~~has come to his hands,~~ is in the control, possession or knowledge of the guardian or ~~into the hands of any other person for him~~ on the guardian's behalf. The court shall not require an inventory and appraisal to be filed until 3 months have elapsed after the grant of letters.

COMMENT

The Commission recommends the change to the section's descriptor as underlined.

3B:17-1. Fiduciary filing release by ward or cestui que trust

A fiduciary need not render or settle ~~his~~ an account if ~~he~~ the fiduciary files with the court a release or discharge from the beneficiary, ward or cestui que

trust who ~~is of full age~~ has reached majority and is not mentally ~~competent~~ incapacitated.

The release or discharge shall be executed and acknowledged as provided for deeds of real estate to be recorded.

3B:23-21. Unclaimed estate assets

When a fiduciary states his a final account and there remains in his ~~hands~~ the fiduciary's control a balance, devise, distributive share, dividend or sum of money to be paid to a person and the person, or his that person's guardian, if ~~he~~ be an infant a minor or mentally ~~incompetent~~ incapacitated person, fails to claim the balance, devise, distributive share, dividend or sum of money within the period of time set forth in R.S.46:30B-37.1, then the property shall be disposed of as provided in N.J.S.3B:23-19 if it is part of an intestate estate or otherwise presumed abandoned and handled in accordance with the "Uniform Unclaimed Property Act (1981)," R.S.46:30B-1 et seq.

3B:23-34. Conditions precedent to suit for devise

An action to recover a devise may not be maintained until:

- a. The devise becomes due and payable;
- b. Reasonable demand for payment is made upon the personal representative; and
- c. A refunding bond in substantially the form prescribed in N.J.S. 3B:23-26 is (i) tendered to the personal representative by the devisee, or the guardian of his the devisee's estate if the devisee is ~~an infant a minor~~ or a mentally ~~incompetent~~ incapacitated, and, if ~~he refuses to~~ (ii) if not accepted by the personal representative, ~~the refunding bond~~, is filed with the clerk of the court, prior to the commencement of the action.

3B:23-39. Deposit with court; effect

When a devise charged by will upon real estate is wholly or in part limited over:

- a. To ~~infants~~ minors, the mentally ~~incompetents~~ incapacitated or persons not in esse; or
- b. To persons who cannot be ascertained until the happening of an event named in the will; or
- c. In a manner that the vesting of the devise may be contingent ~~--~~ then ~~the~~ Superior Court may, in a summary or other action by the executor, or a person interested in the real estate, direct the devise paid into court together with any additional sums as the court may deem reasonable to cover the expense of investing and taking charge of the devise. Upon payment into court, the real estate shall be wholly clear and discharged from the lien created by the will.

Title 10:

10:4-12. Meetings open to public; exclusion of public; subject matter of discussion

a. Except as provided by subsection b. of this section all meetings of public bodies shall be open to the public at all times. Nothing in this act shall be construed to limit the discretion of a public body to permit, prohibit or regulate the active participation of the public at any meeting, except that a municipal governing body and a board of education shall be required to set aside a portion of every meeting of the municipal governing body or board of education, the length of the portion to be determined by the municipal governing body or board of education, for public comment on any governmental or school district issue that a member of the public feels may be of concern to the residents of the municipality or school district.

b. A public body may exclude the public only from that portion of a meeting at which the public body discusses:

(1) Any matter which, by express provision of federal law or State statute or rule of court shall be rendered confidential or excluded from the provisions of subsection a. of this section.

(2) Any matter in which the release of information would impair a right to receive funds from the Government of the United States.

(3) Any material the disclosure of which constitutes an unwarranted invasion of individual privacy such as any records, data, reports, recommendations, or other personal material of any educational, training, social service, medical, health, custodial, child protection, rehabilitation, legal defense, welfare, housing, relocation, insurance and similar program or institution operated by a public body pertaining to any specific individual admitted to or served by such institution or program, including but not limited to information relative to the individual's personal and family circumstances, and any material pertaining to admission, discharge, treatment, progress or condition of any individual, unless the individual concerned (or, in the case of a minor or ~~incompetent~~ mentally incapacitated person, ~~his~~ the guardian) shall request in writing that the same be disclosed publicly.

(4) Any collective bargaining agreement, or the terms and conditions which are proposed for inclusion in any collective bargaining agreement, including the negotiation of the terms and conditions thereof with employees or representatives of employees of the public body.

(5) Any matter involving the purchase, lease or acquisition of real property with public funds, the setting of banking rates or investment of public funds, where it could adversely affect the public interest if discussion of such matters were disclosed.

(6) Any tactics and techniques utilized in protecting the safety and property of the public, provided that their disclosure could impair such protection. Any investigations of violations or possible violations of the law.

(7) Any pending or anticipated litigation or contract negotiation other than in subsection b. (4) herein in which the public body is, or may become a party. Any matters falling within the attorney-client privilege, to the extent that confidentiality is required in order for the attorney to exercise his ethical duties as a lawyer.

(8) Any matter involving the employment, appointment, termination of employment, terms and conditions of employment, evaluation of the performance of, promotion or disciplining of any specific prospective public officer or employee or current public officer or employee employed or appointed by the public body, unless all the individual employees or appointees whose rights could be adversely affected request in writing that such matter or matters be discussed at a public meeting.

(9) Any deliberations of a public body occurring after a public hearing that may result in the imposition of a specific civil penalty upon the responding party or the suspension or loss of a license or permit belonging to the responding party as a result of an act or omission for which the responding party bears responsibility.

Title 12A:

12A:3-308. Proof of signatures and status as holder in due course

a. In an action with respect to an instrument, the authenticity of, and authority to make, each signature on the instrument is admitted unless specifically denied in the pleadings. If the validity of a signature is denied in the pleadings, the burden of establishing validity is on the person claiming validity, but the signature is presumed to be authentic and authorized unless the action is to enforce the liability of the purported signer and the signer is dead or ~~incompetent~~ mentally incapacitated at the time of trial of the issue of validity of the signature. If an action to enforce the instrument is brought against a person as the undisclosed principal of a person who signed the instrument as a party to the instrument, the plaintiff has the burden of establishing that the defendant is liable on the instrument as a represented person under subsection a. of 12A:3-402.

b. If the validity of signatures is admitted or proved and there is compliance with subsection a. of this section, a plaintiff producing the instrument is entitled to payment if the plaintiff proves entitlement to enforce the instrument under 12A:3-301, unless the defendant proves a defense or claim in recoupment. If a defense or claim in recoupment is proved, the right to payment of the plaintiff is subject to the defense or claim, except to the extent the plaintiff proves that the plaintiff has rights of a holder in due course which are not subject to the defense or claim.

Title 17:

17:4-9.1. Substitution of "successor" company for "liquidating" company as fiduciary; account; bond

a. For purposes of this section, the term "successor company" includes "successor bank" or "successor savings bank"; and the term "predecessor company" includes "liquidating company" or "predecessor bank" or "predecessor savings bank".

b. ~~Whenever a "successor company" has been or may hereafter be a successor company formed under and by virtue of the provisions of section 17:4-9, repealed and replaced by section 17:9A-16, and has qualified to act as a fiduciary as provided for in by section 17:4-41, repealed and now replaced by section 17:9A-30, subject to the exception hereinafter made, in order to facilitate and hasten the orderly liquidation and the winding up of the affairs of the "liquidating company" predecessor company, it shall and may be lawful for such the "successor company" shall be permitted from time to time, to take over and become to be substituted as fiduciary in any or all those matters in which said "liquidating company" the predecessor company has qualified;~~

c. ~~in any and all matters wWhere in the sound judgment of the "liquidating company" predecessor company and the "successor company" successor company, such substitution of fiduciary is deemed advisable, in the best interests of the trust or relation, and in aid of the winding up of the affairs of the "liquidating company," liquidation, the "liquidating company", predecessor company may file its account to date with the court having the jurisdiction thereof, and upon approval of such account thereof and upon the discharge of the "liquidating company" from such the trust or relation the said "successor company" shall succeed to all such the rights, relations and trusts and the associated duties connected therewith, and shall execute and perform each and every such the trust or relation in the same manner as if such the "successor company" had itself originally assumed the trust or relation; provided, however, that the "successor company" shall not assume no the liabilities which may have been incurred by the "liquidating company" predecessor company incident to its administration of such the trust or relation.~~

d. Subject to subsection c., tThe "successor company" shall as to such matters succeed to all the rights and duties of the "liquidating company" predecessor company and to all fiduciary capacities, whether as administrator, coadministrator, executor, coexecutor, trustee or cotrustee, guardian, coguardian, assignee, coassignee, receiver, coreceiver, committee or committeeman of estates of lunatics or in any other fiduciary capacity of or in respect to any estate or trust or other matter being administered under the laws of New Jersey, or as transfer agent or registrar of stocks and bonds;

e. such relations as well as any other or similar fiduciary relations and all rights, privileges and duties connected therewith shall remain unimpaired, subject as aforesaid Subject to subsections c. and d., all fiduciary rights, privileges and

~~duties shall remain unimpaired and shall continue into and in the said "successor company" from and as of the date of discharge by the court of the "liquidating company" predecessor company from such the trust or relation, by the court, irrespective regardless of the date when (i) such the relationship may have been was created or established; and irrespective of the date of said (ii) the trust agreement was created; relating thereto or the date of death of any or (iii) the trustor or decedent or lunatic mentally incapacitated person or minor died, whose estate is being so administered or managed, and it shall not be necessary for said "successor company" without the need for the successor company to seek appointment in said the person's estates, by any court of this State; provided, further, that in all cases where the instrument under which the "liquidating company" predecessor company qualified to act did not require the "liquidating company" to furnishing of a bond, no such bond shall be required of the "successor company" as provided for in section 17:4-41, or otherwise. The terms "successor company" and "liquidating company" as used herein shall apply to and be construed to have the same meaning as is placed on said terms by section 17:4-9.~~

COMMENT

Section 17:4-9 has since been repealed and replaced by section 17:9A-16. Section 17:4-41 has since been repealed and replaced by section 17:9A-30. Subsections have been added for clarity.

Title 17B:

17B:30B-9. Information required before entering into viatical settlement contracts; right of rescission; contract changes; consideration; inquiries concerning health status of insured

a. (1) A viatical settlement provider entering into a viatical settlement contract shall first obtain:

(a) If the viator is the insured, a written statement from a licensed attending physician that the viator ~~is of sound mind~~ has the mental capacity and is under no constraint or undue influence to enter into a viatical settlement contract; and

(b) A document in which the insured consents to the release of his medical records to a viatical settlement provider, life insurance producer and, if the policy was issued less than two years from the date of application for a viatical settlement contract, to the insurance company that issued the policy covering the life of the insured.

(2) The insurer shall respond to a request for verification of coverage submitted by a viatical settlement provider not later than 30 calendar days after the date the request is received. The request for verification of coverage shall be made on a form approved by the commissioner. The insurer shall complete and issue the verification of coverage or indicate in which respects it is unable to respond. In its response, the insurer shall indicate whether, based on the

medical evidence and documents provided, the insurer intends to pursue an investigation at that time regarding the validity of the insurance contract.

(3) Prior to or at the time of execution of the viatical settlement contract, the viatical settlement provider shall obtain a witnessed document in which the viator consents to the viatical settlement contract, represents that the viator has a full and complete understanding of the viatical settlement contract, that the viator has a full and complete understanding of the benefits of the life insurance policy, acknowledges that the viator is entering into the viatical settlement contract freely and voluntarily and, for persons with a terminal or chronic illness or condition, acknowledges that the insured has a terminal or chronic illness and that the terminal or chronic illness was diagnosed after the life insurance policy was issued.

(4) If a life insurance producer performs any of the activities required of the viatical settlement provider, the viatical settlement provider is deemed to have fulfilled the requirements of this section.

b. All medical information solicited or obtained by any licensee shall be subject to the applicable provisions of State law relating to confidentiality of medical information.

c. All viatical settlement contracts entered into in this State shall provide the viator with an unconditional right to rescind the contract before the earlier of 30 calendar days after the date upon which the settlement contract is executed by all parties or 15 calendar days after the receipt of the viatical settlement proceeds by the viator. If exercised by the viator, rescission is effective only if both notice of the rescission is given and a full repayment of all proceeds and any premiums, loans and loan interest to the settlement provider is made within the rescission period. If the insured dies during the rescission period, the viatical settlement contract shall be deemed to have been rescinded, subject to repayment to the viatical settlement provider or purchaser of (i) all viatical settlement proceeds, and (ii) any premiums, loans and loan interest that have been paid by the settlement provider.

d. The viatical settlement provider shall instruct the viator to send the executed documents required to effect the change in ownership, assignment or change in beneficiary directly to the independent escrow agent. Within three business days after the date the escrow agent receives the documents (or from the date the viatical settlement provider receives the documents, if the viator erroneously provides the documents directly to the provider), the provider shall pay or transfer the proceeds of the viatical settlement into an escrow or trust account maintained in a State or federally-chartered financial institution whose deposits are insured by the Federal Deposit Insurance Corporation (FDIC). Upon payment of the settlement proceeds into the escrow account, the escrow agent shall deliver the original change in ownership, assignment or change in beneficiary forms to the viatical settlement provider or related provider trust. Upon the escrow agent's receipt of the acknowledgment of the properly completed transfer of ownership or designation of beneficiary from the insurance

company, the escrow agent shall pay the viatical settlement proceeds to the viator.

e. Failure to tender consideration to the viator for the viatical settlement contract within the time disclosed pursuant to paragraph (6) of subsection a. of section 17B:30B-8 of this act renders the viatical settlement contract voidable by the viator for lack of consideration until the time consideration is tendered to and accepted by the viator.

f. Contacts with the insured for the purpose of determining the health status of the insured by the viatical settlement provider after the viatical settlement has occurred shall only be made by the settlement provider licensed in this State or its authorized representatives and shall be limited to once every three months for insureds with a life expectancy of more than one year, and to no more than once per month for insureds with a life expectancy of one year or less. The provider shall explain to the insured the procedure for these contacts at the time the viatical settlement contract is entered into. The limitations set forth in this subsection shall not apply to any contacts with an insured for reasons other than determining the insured's health status. Viatical settlement providers shall be responsible for the actions of their authorized representatives.

g. If the insured is not terminally or chronically ill, viatical settlement providers shall pay an amount greater than the cash surrender value or accelerated death benefit then available.

Title 18A:

18A:66-184. Disability benefits; payment; total disability; exceptions

a. The disability benefits provided under such group policy or policies for all eligible participants in the alternate benefit programs shall provide a monthly income if the participant becomes totally disabled from occupational or nonoccupational causes for a period of at least 6 consecutive months following the effective date of the coverage. The monthly disability benefit may be paid by the insurance company so long as the participant remains disabled up to ~~his~~ the person's seventieth 70th birthday, provided the disability commenced prior to ~~his~~ the person's sixtieth 60th birthday. The benefit will terminate when the participant is no longer considered totally disabled or begins to receive retirement benefits.

b. The participant will be considered totally disabled if ~~he is~~ unable to perform each duty of ~~his~~ the person's occupation and is under the regular care of a physician. After the 12 months following the commencement of such disability benefit payments, ~~he~~ the person must be unable to engage in any gainful occupation for which ~~he is~~ reasonably fitted by education, training or experience. Total disability is not considered to exist if ~~he~~ the person is gainfully employed. However, following an agreement with the insurance company and the policyholder, the participant can continue to receive disability benefits for a limited time while performing some type of work. During the period of

rehabilitation the monthly benefit will be the regular payment less 80% of the participant's earnings from such rehabilitative position.

c. For purposes of this section a participant shall be deemed to be in service and covered by the disability benefit insurance provisions for a period of no more than 6 months while on official leave of absence without pay if satisfactory evidence is presented to the Division of Pensions and Benefits that such leave of absence without pay is due to illness and that the member was not actively engaged in any gainful occupation during such period of leave of absence without pay.

d. Disability benefit insurance provisions of the group policy or policies shall not cover disability resulting from or contributed to by pregnancy, act of war, intentionally self-inflicted injury, or attempted suicide ~~whether or not sane~~ regardless of mental capacity. For purposes of such disability insurance the participant will not be considered to be disabled while ~~he is~~ imprisoned or while outside the United States, its territories or possessions, or Canada.

e. If the participant has recovered from the disability for which ~~he had~~ benefits were received ~~benefits~~ and again becomes totally disabled while insured, the later disability will be regarded as a continuation of the prior one unless the participant has returned to full-time covered employment for at least 6 months. However, if the later absence is due to an unrelated cause and the participant had returned to full-time work, it will be considered a new disability. The disability benefit insurance cannot be converted to an individual policy.

f. No person shall be covered by the disability benefit provision of the group policy or policies except upon the completion of one year of full-time continuous employment in a position eligible for participation in the alternate benefit program.

COMMENT

Subsections have been added for clarity. The Division of Pensions is now called the Division of Pensions and Benefits.

Title 19:

19:4-1. Constitutional qualifications; persons not having right of suffrage; right to register

~~Except as provided in sections 19:4-2 and 19:4-3 of this Title, E~~every person possessing the qualifications required by Article II, paragraph 3, of the Constitution of the State of New Jersey and having none of the disqualifications ~~hereinafter~~ hereafter stated and being duly registered as required by this Title, shall have the right of suffrage and shall be entitled to vote in the polling place assigned to the election district in which ~~he~~ the person actually resides, and not elsewhere.

No person shall have the right of suffrage—

(1) ~~Who is an idiot or is insane~~ has been adjudicated by a court of competent jurisdiction to lack the capacity to understand the act of voting; or

(2) (Deleted by amendment.)

(3) (Deleted by amendment.)

(4) (Deleted by amendment.)

(5) (Deleted by amendment.)

(6) Who has been convicted of a violation of any of the provisions of this Title, for which criminal penalties were imposed, if such person was deprived of such right as part of the punishment therefor according to law unless pardoned or restored by law to the right of suffrage; or

(7) Who shall be convicted of the violation of any of the provisions of this Title, or which criminal penalties are imposed, if such person shall be deprived of such right as part of the punishment therefor according to law, unless pardoned or restored by law to the right of suffrage; or

(8) Who is serving a sentence or is on parole or probation as the result of a conviction of any indictable offense under the laws of this or another state or of the United States or a territory thereof.

A person who will have on the day of the next general election the qualifications ~~to entitle him~~ to vote shall have the right to be registered for and vote at such general election and register for and vote at any election, intervening between such date of registration and such general election, if ~~he shall be~~ a citizen of the United States and ~~shall meet~~ having met the age and residence requirements prescribed by the Constitution of this State and the laws of the United States, when such intervening election is held, as though such qualifications were met before registration.

COMMENT

Sections 19:4-2 and 19:4-3 have since been repealed.

Title 26:

26:2H-54. Legislative findings

The Legislature finds and declares that:

a. ~~Competent~~ Adults who are not mentally incapacitated have the fundamental right, in collaboration with their health care providers, to control decisions about their own health-care. This State recognizes, in its law and public policy, the personal right of the individual patient to make voluntary, informed choices to accept, to reject, or to choose among alternative courses of medical and surgical treatment.

b. Modern advances in science and medicine have made possible the prolongation of the lives of many seriously ill individuals, without always offering realistic prospects for improvement or cure. For some individuals the possibility

of extended life is experienced as meaningful and of benefit. For others, artificial prolongation of life may seem to provide nothing medically necessary or beneficial, serving only to extend suffering and prolong the dying process. This State recognizes the inherent dignity and value of human life and within this context recognizes the fundamental right of individuals to make health care decisions to have life-prolonging medical or surgical means or procedures provided, withheld, or withdrawn.

c. In order that the right to control decisions about one's own health care should not be lost in the event a patient loses decision making capacity and is no longer able to participate actively in making ~~his own~~ such health care decisions, this State recognizes the right of ~~competent~~ adults who are not mentally incapacitated to plan ahead for health care decisions through the execution of advance directives, such as living wills and durable powers of attorney, and to have the wishes expressed therein respected, subject to certain limitations.

d. The right of individuals to forego life-sustaining measures is not absolute and is subject to certain interests of society. The most significant of these societal interests is the preservation of life, understood to embrace both an interest in preserving the life of the particular patient and a related but distinct interest in preserving the sanctity of all human life as an enduring social value. A second, closely related societal interest is the protection of individuals from direct and purposeful self-destruction, motivated by a specific intent to die. A third interest is the protection of innocent third parties who may be harmed by the patient's decision to forego therapy; this interest may be asserted to prevent the emotional and financial abandonment of the patient's minor children or to protect the paramount concerns of public health or safety. A fourth interest encompasses safeguarding the ethical integrity of the health care professions, individual professionals, and health care institutions, and maintaining public confidence and trust in the integrity and caring role of health care professionals and institutions. Finally, society has an interest in ensuring the soundness of health care decision making, including both protecting vulnerable patients from potential abuse or neglect and facilitating the exercise of informed and voluntary patient choice.

e. In accordance with these State interests, this State expressly rejects on both legal and moral grounds the practice of active euthanasia. No individual shall have the right to, nor shall any physician or other health care professional be authorized to engage in, the practice of active euthanasia.

f. In order to assure respect for patients' previously expressed wishes when the capacity to participate actively in decision making has been lost or impaired; to facilitate and encourage a sound decision making process in which patients, health care representatives, families, physicians, and other health care professionals are active participants; to properly consider patients' interests both in self-determination and in well-being; and to provide necessary and appropriate safeguards concerning the termination of life-sustaining treatment for ~~incompetent~~ mentally incapacitated patients as the law and public policy of this

State, the Legislature hereby enacts the New Jersey Advance Directives for Health Care Act.

26:2H-55. Definitions

As used in this act:

"Adult" means an individual ~~18 years of age or older~~ who has reached the age of majority.

"Advance directive for health care" or "advance directive" means a writing executed in accordance with the requirements of this act. An "advance directive" may include a proxy directive or an instruction directive, or both.

"Attending physician" means the physician selected by, or assigned to, the patient who has primary responsibility for the treatment and care of the patient.

"Decision making capacity" means a patient's ability to understand and appreciate the nature and consequences of health care decisions, including the benefits and risks of each, and alternatives to any proposed health care, and to reach an informed decision. A patient's decision making capacity is evaluated relative to the demands of a particular health care decision.

"Declarant" means ~~an competent~~ adult who is not mentally incapacitated and who executes an advance directive.

"Do not resuscitate order" means a physician's written order not to attempt cardiopulmonary resuscitation in the event the patient suffers a cardiac or respiratory arrest.

"Emergency care" means immediate treatment provided in response to a sudden, acute and unanticipated medical crisis in order to avoid injury, impairment or death.

"Health care decision" means a decision to accept or to refuse any treatment, service or procedure used to diagnose, treat or care for a patient's physical or mental condition, including life-sustaining treatment. "Health care decision" also means a decision to accept or to refuse the services of a particular physician, nurse, other health care professional or health care institution, including a decision to accept or to refuse a transfer of care.

"Health care institution" means all institutions, facilities, and agencies licensed, certified, or otherwise authorized by State law to administer health care in the ordinary course of business, including hospitals, nursing homes, residential health care facilities, home health care agencies, hospice programs operating in this State, mental health institutions, facilities or agencies, or institutions, facilities and agencies for the developmentally disabled. The term "health care institution" shall not be construed to include "health care professionals" as defined in this act.

"Health care professional" means an individual licensed by this State to administer health care in the ordinary course of business or practice of a profession.

"Health care representative" means the individual designated by a declarant pursuant to the proxy directive part of an advance directive for the purpose of making health care decisions on the declarant's behalf, and includes an individual designated as an alternate health care representative who is acting as the declarant's health care representative in accordance with the terms and order of priority stated in an advance directive.

"Instruction directive" means a writing which provides instructions and direction regarding the declarant's wishes for health care in the event that the declarant subsequently lacks decision making capacity.

"Life-sustaining treatment" means the use of any medical device or procedure, artificially provided fluids and nutrition, drugs, surgery or therapy that uses mechanical or other artificial means to sustain, restore or supplant a vital bodily function, and thereby increase the expected life span of a patient.

"Other health care professionals" means health care professionals other than physicians and nurses.

"Patient" means an individual who is under the care of a physician, nurse or other health care professional.

"Permanently unconscious" means a medical condition that has been diagnosed in accordance with currently accepted medical standards and with reasonable medical certainty as total and irreversible loss of consciousness and capacity for interaction with the environment. The term "permanently unconscious" includes without limitation a persistent vegetative state or irreversible coma.

"Physician" means an individual licensed to practice medicine and surgery in this State.

"Proxy directive" means a writing which designates a health care representative in the event the declarant subsequently lacks decision making capacity.

"State" means a state, territory, or possession of the United States, the District of Columbia, or the Commonwealth of Puerto Rico.

"Terminal condition" means the terminal stage of an irreversibly fatal illness, disease or condition. A determination of a specific life expectancy is not required as a precondition for a diagnosis of a "terminal condition," but a prognosis of a life expectancy of six months or less, with or without the provision of life-sustaining treatment, based upon reasonable medical certainty, shall be deemed to constitute a terminal condition.

26:2H-56. Executing an advance directive

A declarant may execute an advance directive for health care at any time. The advance directive shall be signed and dated by, or at the direction of, the declarant in the presence of two subscribing adult witnesses, who shall attest that the declarant ~~is of sound mind~~ has the mental capacity to make the advance directive and is free of duress and undue influence. A designated health care representative shall not act as a witness to the execution of an advance directive. Alternatively, the advance directive shall be signed and dated by, or at the direction of, the declarant and ~~be~~ acknowledged by the declarant before a notary public, attorney at law, or other person authorized to administer oaths. An advance directive may be supplemented by a video or audio tape recording. A female declarant may include in an advance directive executed by her, information as to what effect the advance directive shall have if she is pregnant.

26:2H-57. Reaffirming, modifying and revoking an advance directive

a. A declarant may reaffirm or modify either a proxy directive, or an instruction directive, or both. The reaffirmation or modification shall be made in accordance with the requirements for execution of an advance directive pursuant to section 4 ~~of this act~~ 26:2H-56.

b. A declarant may revoke an advance directive, including a proxy directive, or an instruction directive, or both, by the following means:

(1) Notification, orally or in writing, to the health care representative, physician, nurse or other health care professional, or other reliable witness, or by any other act evidencing an intent to revoke the document; or

(2) Execution of a subsequent proxy directive or instruction directive, or both, in accordance with section 4 ~~of this act~~ 26:2H-56.

c. Designation of the declarant's spouse as health care representative shall be revoked upon divorce or legal separation, and designation of the declarant's domestic partner as defined in section 3 of P.L.2003, c.246 (C.26:8A-3) as health care representative shall be revoked upon termination of the declarant's domestic partnership, unless otherwise specified in the advance directive.

d. An ~~incompetent~~ mentally incapacitated patient may suspend an advance directive, including a proxy directive, an instruction directive, or both, by any of the means stated in paragraph (1) of subsection b. of this section. An ~~incompetent~~ mentally incapacitated patient who has suspended an advance directive may reinstate that advance directive by oral or written notification to the health care representative, physician, nurse or other health care professional of an intent to reinstate the advance directive.

e. Reaffirmation, modification, revocation or suspension of an advance directive is effective upon communication to any person capable of transmitting

the information including the health care representative, the attending physician, nurse or other health care professional responsible for the patient's care.

26:2H-58. Advance directives for health care

a. A declarant may execute a proxy directive, pursuant to the requirements of section 26:2H-56 ~~4 of this act~~, designating an competent adult who is not mentally incapacitated to act as his the declarant's health care representative.

(1) An competent adult who is not mentally incapacitated, including, but not limited to, a declarant's spouse, domestic partner as defined in section 3 of P.L.2003, c.246 (C.26:8A-3), adult child, parent or other family member, friend, religious or spiritual advisor, or other person of the declarant's choosing, may be designated as a health care representative.

(2) An operator, administrator or employee of a health care institution in which the declarant is a patient or resident shall not serve as the declarant's health care representative unless the operator, administrator or employee is related to the declarant by blood, marriage, domestic partnership or adoption.

This restriction does not apply to a physician, if the physician does not serve as the patient's attending physician and the patient's health care representative at the same time.

(3) A declarant may designate one or more alternate health care representatives, listed in order of priority. In the event the primary designee is unavailable, unable or unwilling to serve as health care representative, or is disqualified from such service pursuant to this section or any other law, the next designated alternate shall serve as health care representative. In the event the primary designee subsequently becomes available and able to serve as health care representative, the primary designee may, insofar as then practicable, serve as health care representative.

(4) A declarant may direct the health care representative to consult with specified individuals, including alternate designees, family members and friends, in the course of the decision making process.

(5) A declarant shall state the limitations, if any, to be placed upon the authority of the health care representative including the limitations, if any, which may be applicable if the declarant is pregnant.

b. A declarant may execute an instruction directive, pursuant to the requirements of section ~~4~~ 26:2H-56 ~~of this act~~, stating the declarant's general treatment philosophy and objectives; or the declarant's specific wishes regarding the provision, withholding or withdrawal of any form of health care, including life-sustaining treatment; or both. An instruction directive may, but need not, be executed contemporaneously with, or be attached to, a proxy directive.

26:2H-105. Advance directive; execution, reaffirmation, modification, revocation or suspension; requirements; witnesses

a. A declarant may execute, reaffirm, modify, revoke or suspend an advance directive for mental health care at any time, except as provided in subsection f. of section 5 26:2H- ~~of this act.~~

(1) The advance directive shall be signed and dated by, or at the direction of, the declarant in the presence of at least one subscribing adult witness, who shall attest that the declarant ~~is of sound mind~~ has the mental capacity to do that act specified in subsection a. and is free of duress and undue influence.

(2) The advance directive may be supplemented by a video or audio tape recording.

b. The following persons shall not act as a witness to the execution of an advance directive for mental health care:

(1) a designated mental health care representative; and

(2) the responsible mental health care professional responsible for, or directly involved with, the patient's care at the time that the advance directive is executed.

c. A person shall not act as a sole witness to the execution of an advance directive for mental health care if that person is:

(1) related to the declarant by blood, marriage or adoption, or is the declarant's domestic partner or otherwise shares the same home with the declarant;

(2) entitled to any part of the declarant's estate by will or by operation of law at the time that the advance directive is executed; or

(3) an operator, administrator or employee of a rooming or boarding house or a residential health care facility in which the declarant resides.

Title 30:

30:1-18. Jurisdiction of Superior Court over ~~incompetent or mentally ill~~ or incapacitated not affected

No provisions of this Title shall restrain or abridge the power and authority of the Superior Court over the persons and property of the ~~incompetent or mentally ill~~ or incapacitated.

COMMENT

The Commission recommends the change to the section's descriptor as underlined.

[30:3-5(2). Use of moneys provided for by this act; order of precedence as to institutions

The moneys raised by this act shall be devoted exclusively to the acquisition of sites for and the constructing, reconstructing, development, extending and equipping of state charitable, hospital, relief, training, correctional, reformatory and penal institutions and appurtenances thereto, in the order of precedence set forth in this section.

Third State Hospital for Mental Diseases—	
Third unit, including patient housing, employees' housing, psychopathic building, administration building and service lines	\$1,250,000.00
Woodbine Colony for Feeble-Minded Males—	
Housing for inmates	85,000.00
Reconstruction and repairs to service lines	21,000.00
Laundry building	44,000.00
State Institution for Feeble-Minded, Vineland—	
Building for defective delinquents	120,000.00
State Hospital, Trenton—	
Completion of building for housing tubercular insane	150,000.00
Housing for employees	50,000.00
State Hospital, Greystone Park—	
Fireproofing buildings for patients	150,000.00
Fire protection, water lines, etc.....	145,000.00
Completion of attendants' housing	90,000.00
New Jersey Reformatory, Annandale—	
Housing for inmates	215,000.00
Completion of administration unit, assembly hall, chapel and hospital	160,000.00
Housing for guards and employees	100,000.00
New Jersey Reformatory, Rahway—	
Industrial building	30,000.00
Completion of new wing for housing prisoners	150,000.00
Housing for officers and employees	45,000.00

New Lisbon Colony for Feeble-Minded Males—	
Assembly and recreation building	45,000.00
New Jersey Reformatory for Women, Clinton—	
Detention building and hospital	85,000.00
State Home for Boys, Jamesburg—	
New dormitory, housing for inmates	65,000.00
State Prison—	
Housing for prisoners (industrial colonies)	250,000.00
Village for Epileptics, Skillman—	
Continuation of repairs, to buildings	12,000.00
Ground lighting, conduits, etc.....	75,000.00
North Jersey Training School, Totowa—	
Water supply, including water tank and tower	20,000.00
Roads, walks and grading	7,500.00
Detention building	50,000.00
State Home for Girls, Trenton—	
Repairs and reconstruction of buildings	50,000.00
Sanatorium for Tuberculous Diseases, Glen Gardner—	
Replacing steam line	9,000.00]

COMMENT

This appropriations statute is now moot and therefore recommended for repeal.

30:4-1. Boards of trustees; appointment; terms; vacancies; removal; compensation; organization

a. The State board, with the approval of the Governor, shall appoint a board of trustees for each State institution or agency ~~within the department~~ or for each group or class thereof as it may determine, from residents of the State without respect to political affiliation or belief.

b. The State board, with the approval of the Governor, may appoint a board of trustees or authorize or designate an existing board of trustees ~~Whenever the establishment or assumption of jurisdiction over an additional institution, or the acquisition of a an institutional site therefor, is authorized by the Legislature, , the State board, with the approval of the Governor, may appoint a board of trustees therefor or may authorize or designate any existing board of trustees to assume jurisdiction thereof.~~

c. Each board of trustees of an institution shall be known as "the board of trustees" naming the institution or group or class for which the board is appointed. The State board, with the approval of the Governor, shall ~~determine the names of the boards of noninstitutional agencies.~~

d. Except as otherwise specifically provided by statute, the boards of trustees shall consist of not less than five nor more than seven members, ~~appointed with the approval of the Governor from residents of the State at large without respect to political affiliation or belief.~~ At least two women shall be members of each board in charge of ~~the Training School for Boys, Jamesburg, the Veterans Memorial Homes for Disabled Soldiers, Sailors, Marines and their Wives and Widows, and the institutions or agencies for the blind, feebleminded, the epileptic and the insane~~ mentally incapacitated and developmentally disabled, and at least two members of the Commission for the Blind and Visually Impaired shall themselves be legally blind but ~~they shall not be employees, or related to an employee related by blood, marriage or adoption, to any employee, of said commission.~~ At least a majority of the members of each board in charge of ~~the Training School for Girls, Trenton, and the women's reformatory shall be women.~~

e. The term of each board member shall be ~~3~~ three years commencing on July 1 and ending on June 30, of the third year thereafter. A vacancy shall be filled by the State board, with the approval of the Governor, for the unexpired term only.

f. The members of new or additional boards of trustees shall at the time of their appointment be divided into groups so that the terms of two members shall expire on June 30 of the year next succeeding appointment; the terms of two others on June 30 of the second year succeeding appointment; the term of the fifth member and in case of larger boards the term of the sixth member, on June 30 of the third year succeeding appointment; the term of the seventh member of a board having seven members, on June 30 of the fourth year succeeding appointment. Their successors shall be appointed for ~~3~~ three-year terms.

g. The members of ~~such boards~~ of trustees' shall receive no compensation for services but shall be reimbursed for actual expenditures incurred in the performance of duty. They shall be subject to removal by the State board, with the approval of the Governor, at any time for good and sufficient cause.

h. Annually, ~~On~~ or before July 1, ~~of each year~~ each ~~such~~ board of trustees shall ~~reorganize by the election~~ elect from among its members of a chairman and vice chairman and shall appoint a secretary, with the approval of the chief executive officer of the institution, who shall be an employee of the ~~department~~ institution or agency and shall serve at the pleasure of the board without additional compensation. The term of office of the chairman and vice chairman shall be until June 30 of the following year or until ~~their~~ successors are elected and qualified.

COMMENT

State board is defined by section 30:1-1 as the State Board of Human Services. The Training School for Boys, Jamesburg, is now known as the New Jersey Training School for Boys and, since 1976, when the Juvenile Justice Commission of the Department of Law & Public Safety (JJC) was formed, has been under JJC jurisdiction. The New Jersey Training School for Boys, however, has not been governed by a Board of Trustees as referred to in this statute since the JJC assumed control. The statutory authority for and responsibilities of the JJC are found in N.J.S. 52:17B-170 through 180. The Training School for Girls, Trenton, and the women's reformatory no longer exist. The Veterans Memorial Homes have no gender requirements for their Boards. Changes to the names of other institutions are appropriately noted. Subsections have been added for clarity.

30:4-7.1. ~~Incompetent~~ mentally incapacitated patients; medical, psychiatric, surgical and dental treatment

It is hereby declared to be the public policy of this State to make maximum provision for the health, safety and welfare of ~~incompetent~~ mentally incapacitated patients and residents in State and county institutions for the mentally ill and developmentally disabled, for developmentally disabled residents in community-based alternate living arrangements in the State or in private facilities both in and outside the State, and for minor inmates ~~under age 18~~ in State and county penal and correctional institutions, by permitting the chief executive officer of such institution or the regional administrator of a Division of Developmental Disabilities community services region to consent to the utilization of appropriate medical, psychiatric, surgical and dental treatment for such patients, inmates and residents where prescribed by a licensed physician or dentist as provided for herein.

COMMENT

The Commission recommends the change to the section's descriptor as underlined.

30:4-7.2. Consent for treatment for certain patients, inmates, residents, or juveniles

The chief executive officer of a State or county institution for the mentally ill or developmentally disabled, ~~of~~ or a State or county penal or correctional institution, ~~of~~ or a juvenile facility or detention center, or the regional administrator of a Division of Developmental Disabilities community services region is hereby authorized to give consent for medical, psychiatric, surgical or dental treatment to ~~incompetent~~ mentally incapacitated patients, inmates or minor juveniles ~~under age 18~~, or residents, hospitalized, confined or placed by the Division of Developmental Disabilities in community-based alternate living arrangements in the State or in private facilities both in and outside the State, under circumstances where it appears that

(a) Such patients, inmates, juveniles or residents, because of ~~incompetency~~ mental incapacity or nonage, are legally prevented from giving consent to such treatment, and

(b) Either: (i) there is no parent or guardian known to such officer or administrator, after reasonable inquiry, who ~~is competent~~ has the mental capacity to give consent for the treatment of patients, minor inmates ~~under the age of 18~~ or residents, or (ii) where a parent or guardian, after reasonable notice of the proposed treatment and a request for consent, and prior to the date fixed in such notice for the rendering of said treatment, refuses or neglects to execute and submit to such officer or administrator a writing expressing either the grant or denial of such consent, and

(c) Where a licensed physician, psychiatrist, surgeon or dentist certifies that the treatment to be performed is essential and beneficial to the general health and welfare of such patient, inmate or resident, or will improve ~~his~~ the opportunity for recovery or prolong or save ~~his~~ the person's life.

30:4-24.2. Rights of patients

a. Subject to any other provisions of law and the Constitutions of New Jersey and the United States, no patient shall be deprived of ~~any~~ civil rights solely ~~by reason of his~~ because of receiving treatment under the provisions of this Title nor shall such treatment modify or vary any legal or civil right of any ~~such~~ patient including but not limited to the right to register for and to vote at elections, or rights relating to the granting, forfeiture, or denial of a license, permit, privilege, or benefit pursuant to ~~any~~ law.

b. Every patient in treatment shall be entitled to all rights set forth in this act and shall retain all rights not specifically denied him under this Title. A notice of the rights set forth in this act shall be given to every patient within 5 days of his admission to treatment. Such notice shall be ~~in writing and~~ written in simple understandable plain language. ~~It shall be in a language the patient understands and if the patient cannot read the notice, it shall be read to the patient him. In the case of an~~ If a patient is adjudicated ~~incompetent~~ mentally incapacitated patient, ~~the notice shall be given to the patient's guardian. such procedure shall be followed for the patient's guardian.~~ Receipt of this notice shall be acknowledged in writing with a copy placed in the patient's file. If the patient or guardian refuses to acknowledge receipt of the notice, the person delivering the notice shall state this in writing with a copy placed in the patient's file.

c. No patient may be presumed ~~to be incompetent~~ incapacitated because ~~he has been examined or treated of an examination or treatment~~ for mental illness, regardless of whether ~~such~~ the evaluation or treatment was voluntarily or involuntarily received. ~~Any~~ A patient who leaves a mental health program following evaluation or treatment for mental illness, regardless of whether that evaluation or treatment was voluntarily or involuntarily received, shall be given a written statement of the substance of this act.

d. Each patient in treatment shall have the following rights, a list of which shall be prominently posted in all facilities providing such services and otherwise brought to ~~his~~ the patient's attention by ~~such~~ additional means as the department may designate:

(1) To be free from unnecessary or excessive medication. No medication shall be administered unless at the written order of a physician. Notation of each patient's medication shall be kept in ~~his~~ the treatment records. At least weekly, the attending physician shall review the drug regimen of each patient under ~~his~~ the physician's care. All physician's orders or prescriptions shall be written with a termination date, which shall not exceed 30 days. Medication shall not be used as punishment, for the convenience of staff, as a substitute for a treatment program, or in quantities that interfere with the patient's treatment program. Voluntarily committed patients shall have the right to refuse medication.

(2) Not to be subjected to experimental research, shock treatment, psychosurgery or sterilization, without the express and informed consent of the patient after consultation with counsel or interested party of the patient's choice. Such consent shall be ~~made~~ in writing, a copy of which shall be placed in the patient's treatment record. If the patient has been adjudicated ~~incompetent~~ mentally incapacitated, a court of ~~competent jurisdiction~~ shall ~~hold a hearing to~~ determine the necessity of such procedure at a hearing at which ~~where~~ the client is physically present, represented by counsel, and provided the right and opportunity to be confronted with and to cross-examine ~~all~~ witnesses alleging the necessity of ~~such~~ the procedures. In such proceedings, the burden of proof shall be on the party alleging the necessity of ~~such~~ the procedures. ~~In the event that~~ If a patient cannot afford counsel, the court shall appoint an attorney not less than 10 days before the hearing. An attorney so appointed shall be entitled to a reasonable fee to be determined by the court and paid by the county from which the patient was admitted. Under no circumstances may a patient in treatment be subjected to experimental research ~~which is~~ not directly related to the specific goals of ~~his~~ the patient's treatment program.

(3) To be free from physical restraint and isolation. Except for emergency situations, in which a patient has caused substantial property damage or ~~has~~ attempted to cause self-harm himself or harm to others and in which less restrictive means of restraint are not feasible, a patient may be physically restrained or placed in isolation, only on a medical director's written order or that of ~~his~~ the director's physician designee ~~which explains~~ with the rationale for such action. The written order may be entered only after the medical director or ~~his~~ physician designee has personally seen the patient ~~concerned~~, and evaluated ~~whatever~~ the episode or situation is said to require causing the need for restraint or isolation. Emergency use of restraints or isolation shall be for no more than 4 an hour, by which time the medical director or ~~his~~ physician designee shall have been consulted and shall have entered an appropriate written order, ~~in writing~~. ~~Such~~ The written order shall be effective for no more than 24 hours and shall be renewed if restraint and isolation are continued. While in restraint or isolation, the patient must be bathed every 12 hours and checked by an attendant every 2

hours, ~~with a notation in writing of such checks placed~~ which must be noted in the patient's treatment record along with the order for restraint or isolation.

(4) To be free from corporal punishment.

e. Each patient receiving treatment pursuant to this Title, shall have the following rights, a list of which shall be prominently posted in all facilities providing such services and otherwise brought to his the patient's attention by ~~such~~ additional means as the commissioner may designate:

(1) To privacy and dignity.

(2) To the least restrictive conditions necessary to achieve the purposes of treatment.

(3) To wear his the patient's own clothes; to keep and use his personal possessions including his toilet articles; and to keep and be allowed to spend a reasonable sum of his ~~own~~ money for canteen expenses and small purchases.

(4) To have access to individual storage space for his private use.

(5) To see visitors each day.

(6) To have reasonable access to and use of telephones, both to make and receive confidential calls.

(7) To have ready access to letter writing materials, including stamps, and to mail and receive unopened correspondence.

(8) To regular physical exercise several times a week, the facilities and equipment for which the hospital has a duty to provide. ~~It shall be the duty of the hospital to provide facilities and equipment for such exercise.~~

(9) To be outdoors at regular and frequent intervals, in the absence of medical considerations.

(10) To suitable opportunities for social interaction with members of the opposite or same gender ~~opposite sex~~, with adequately supervised ~~ion~~.

(11) To practice the religion of his choice or abstain from religious practices. Provisions for ~~such~~ worship shall be made available to each person on a nondiscriminatory basis.

(12) To receive prompt and adequate medical treatment for any physical ailment.

f. Rights designated under subsection d. ~~of this section~~ may not be denied under any circumstances.

g. (1) A patient's rights designated under subsection e. ~~of this section~~ may be denied for good cause ~~in any instance in which the~~ when the director of the patient's treatment program ~~in which the patient is receiving treatment~~ feels it is imperative to do so ~~deny any of these rights~~; provided, however, under no circumstances shall a patient's right to communicate with his an attorney, physician or the courts be restricted. Any such denial of a patient's rights shall

take effect only after a written notice of the denial has been filed in the patient's treatment record ~~and shall include~~ including an explanation of the reason for the denial.

(2) A denial of rights shall be effective for a period not to exceed 30 days and shall be renewed for additional 30-day periods only by a written statement entered by the director of the program in the patient's treatment record ~~which indicates~~ indicating the detailed reason for ~~such~~ renewal of the denial.

(3) In each instance of a denial or a renewal, the patient, ~~his~~ the patient's attorney, and ~~his~~ guardian, if the patient has been adjudicated ~~incompetent~~ mentally incapacitated, the patient's guardian, and the department shall be given written notice of the denial or renewal and the reason ~~therefor~~.

h. ~~Any individual~~ A patient subject to this Title shall be entitled to a writ of habeas corpus upon proper petition by ~~himself~~ the patient, by a relative, or a friend to any court of ~~competent jurisdiction~~ in the county in which ~~he~~ the patient is detained and shall further be entitled to enforce any of the rights herein stated by civil action or other remedies otherwise available by common law or statute.

30:4-27.11a. Legislative findings and declaration

The Legislature finds and declares that:

a. It is of paramount public interest to ensure the rights of all patients in inpatient psychiatric facilities, including those persons being assessed or receiving treatment on an involuntary basis in screening services and short-term care facilities as defined in section 2 of P.L.1987, c.116 (C.30:4-27.2);

b. The rights set forth in section 10 of P.L.1965, c.59 (C.30:4-24.2) apply to any person who has been involuntarily committed to a State or county psychiatric hospital, a psychiatric unit of a county hospital or a special psychiatric hospital in accordance with the laws of this State;

c. Because involuntary assessment and treatment in a screening service and involuntary commitment to a short-term care facility involve the deprivation of a patient's liberty, it is necessary to specify and guarantee by statute the rights to which that patient is entitled, in a manner similar to that provided for a patient who is involuntarily committed to a State or county psychiatric hospital, a psychiatric unit of a county hospital or a special psychiatric hospital, while recognizing the administrative, structural and staffing features of screening services and short-term care facilities which are different from State or county psychiatric hospitals, psychiatric units of county hospitals or special psychiatric hospitals, as well as recognizing differences between the administrative, structural and staffing features of screening services and short-term care facilities by providing a separate guarantee of rights for patients in each of these settings; and

d. All patients who are receiving assessment or treatment on an involuntary basis in screening services and short-term care facilities as defined in

section 2 of P.L.1987,–c.116 (C.30:4-27.2) are entitled to receive professional treatment of the highest standard and, unless ~~incompetent~~ mentally incapacitated to participate in their treatment and discharge planning to the fullest extent possible.

30:4-27.11c. Legal and civil rights of psychiatric patients in inpatient facilities protected; no presumption of incompetence mental incapacity; patients entitled to writ of habeas corpus upon proper petition

a. Subject to any other provisions of law and the Constitutions of New Jersey and the ~~Constitution of the~~ United States, a patient shall not be deprived of a civil right solely by reason of his receiving assessment or treatment under the provisions of P.L.1987, c.116 (C. section 30:4-27.1 et seq.), nor shall the assessment or treatment modify or vary a legal or civil right of that patient, including, but not limited to, the right to register for and to vote at elections, or rights relating to the granting, forfeiture, or denial of a license, permit, privilege, or benefit pursuant to any law.

b. A patient shall be entitled to all rights set forth in this act and shall retain all rights not specifically denied ~~him~~ under P.L.1987, c.116 (C.30:4-27.1 et seq.) and P.L.1989, c.170 (C.26:2H-12.7 et seq.).

c. A patient shall not be presumed to be ~~incompetent~~ mentally incapacitated solely because ~~he has been~~ of an examination or treatment for mental illness.

d. A patient shall be entitled to a writ of habeas corpus upon proper petition by ~~himself~~ the patient, a relative, or a friend to a court of ~~competent jurisdiction~~ in the county in which ~~he~~ the patient is detained and shall further be entitled to enforce, by civil action or other remedies otherwise available by common law or statute, any of the rights provided in this act.

COMMENT

The Commission recommends the change to the section's descriptor as underlined.

30:4-27.11d. Rights of psychiatric patients in short-term care facilities; list of rights to be posted conspicuously; denial of rights for good cause only; written notice of denial required

a. A patient in a short-term care facility shall have the following rights, which shall not be denied under any circumstances. A list of these rights shall be posted in a conspicuous place in each room designated for use by a patient and otherwise brought to the patient's attention pursuant to subsection d. of this section:

(1) To be free from unnecessary or excessive medication. Medication shall not be administered unless at the written or verbal order of a physician. A verbal

order shall be valid only for a period of 24 hours, after which a written order for the medication shall be completed. At least weekly, the attending physician shall review the drug regimen of each patient under ~~his~~ the physician's care. Medication shall be administered in accordance with generally accepted medical standards as part of a treatment program. Medication shall not be used as punishment, for the convenience of staff, as a substitute for a treatment program, or in quantities that interfere with the patient's treatment program.

(A) In an emergency in which less restrictive or appropriate alternatives acceptable to the patient are not available to prevent imminent danger to the patient or others, medication may be administered over a patient's objection at the written order of a physician, which shall be valid for a period of up to 72 hours, in order to lessen the danger.

(B) A patient's right to refuse medication when imminent danger to the patient or others is not present may be overridden by a written policy which has been adopted by the short-term care facility to protect the patient's right to exercise informed consent to the administration of medication. The written policy shall, at a minimum, provide for appropriate procedures that ensure notice to the patient of the decision by the attending physician or other designated physician to administer medication, the right to question the physician about ~~his~~ the physician's decision to administer medication and to provide information to the physician regarding that decision. The written policy shall also provide for review of the patient's decision to object to the administration of medication by a psychiatrist who is not directly involved in the patient's treatment. The psychiatrist shall not override the patient's decision to object to the administration of medication unless the psychiatrist determines that: the patient is incapable, without medication, of participating in a treatment plan that will provide a realistic opportunity of improving ~~his~~ the patient's condition; or, although it is possible to devise a treatment plan that will provide a realistic opportunity of improving the patient's condition without medication, a treatment plan which includes medication would probably improve the patient's condition within a significantly shorter time period, or there is a significant possibility that, without medication, the patient will cause self-harm himself or harm others before improvement of ~~his~~ the condition is realized.

(C) An adult who has been voluntarily committed to a short-term care facility shall have the right to refuse medication.

(2) Not to be subjected to psychosurgery or sterilization, without the express and informed, written consent of the patient after consultation with counsel or interested party of the patient's choice. A copy of the patient's consent shall be placed in the patient's treatment record. If the patient has been adjudicated ~~incompetent~~ mentally incapacitated, a court of ~~competent jurisdiction~~ shall hold a hearing to determine the necessity of the procedure. The patient shall be physically present at the hearing, represented by counsel, and provided the right and opportunity to be confronted with and to cross-examine all witnesses alleging the necessity of the procedure. In these proceedings, the

burden of proof shall be on the party alleging the necessity of the procedure. In the event that a patient cannot afford counsel, the court shall appoint an attorney not less than 10 days before the hearing. An attorney so appointed shall be entitled to a reasonable fee to be determined by the court and paid by the State.

(3) To be free from unnecessary physical restraint and seclusion. Except for an emergency in which a patient has caused substantial property damage or has attempted to cause self-harm himself or harm to others, or in which his the patient's behavior threatens to cause self-harm himself or harm to others, and in which less restrictive means of restraint are not feasible, a patient may be physically restrained or placed in seclusion only on an attending physician's written order or that of another designated physician which explains the rationale for that action. The written order may be given only after the attending physician or other designated physician has personally seen the patient, and evaluated the episode or situation that is said to require restraint or seclusion.

(A) In an emergency, the use of restraints or seclusion may be initiated by a registered professional nurse and shall be for no more than one hour. Within that hour, the nurse shall consult with the attending physician or other designated physician and, if continued restraint or seclusion is determined to be necessary, shall obtain an order from the attending physician or other designated physician to continue the use of restraints or seclusion. If an order is given, the patient shall be reevaluated by the nurse or the attending physician or other designated physician as to the patient's physical and psychiatric condition and the need for continuing the restraints or seclusion at least every two hours until the use of restraints or seclusion has ended.

(B) The patient's attending physician or other designated physician shall enter a written order approving the continued use of restraints or seclusion no later than 24 hours after the time that physical restraint or seclusion began, and only after the physician has personally seen the patient. A written order by the physician for the continued use of restraints or seclusion shall be effective for no more than 24 hours and shall be renewed if restraint and seclusion are continued. A medical examination of the patient shall be conducted every 12 hours by a physician.

(C) While a patient is in restraints or seclusion, nursing personnel shall check the patient's hygienic, toileting, food-related and other needs every 15 minutes. A notation of these checks shall be placed in the patient's medical record along with the order for restraints or seclusion. A patient in restraints shall be permitted to ambulate every four hours, except when the patient's psychiatric condition would make a release from restraints dangerous to the patient himself or others, and shall be permitted to ambulate at least once every 12 hours regardless of the patient's psychiatric condition.

(4) To be free from any form of punishment.

(5) Not to receive electroconvulsive treatment or participate in experimental research without the express and informed, written consent of the

patient. The patient shall have the right to consult with counsel or interested party of the patient's choice. A copy of the patient's consent shall be placed in the patient's treatment record. If the patient has been adjudicated ~~incompetent~~ mentally incapacitated, a court of ~~competent jurisdiction~~ shall hold a hearing to determine the necessity of the procedure. The patient shall be physically present at the hearing, represented by counsel, and provided the right and opportunity to be confronted with and to cross-examine all witnesses alleging the necessity of the procedure. In these proceedings, the burden of proof shall be on the party alleging the necessity of the procedure. In the event that a patient cannot afford counsel, the court shall appoint an attorney not less than 10 days before the hearing. An attorney so appointed shall be entitled to a reasonable fee to be determined by the court and paid by the State.

b. A patient receiving treatment in a short-term care facility shall have the following rights, which may only be denied pursuant to subsection c. ~~of this section~~. A list of these rights shall be posted in a conspicuous place in each room designated for use by a patient and otherwise brought to the patient's attention pursuant to subsection d. ~~of this section~~:

- (1) To privacy and dignity.
- (2) To the least restrictive conditions necessary to achieve the purposes of treatment.
- (3) To wear ~~his~~ the patient's own clothes; to have access to and use ~~his~~ nondangerous personal possessions including ~~his~~ toilet articles; and to have access to and be allowed to spend a reasonable sum of ~~his own~~ money for expenses and small purchases.
- (4) To have access to individual storage space for ~~his~~ private use.
- (5) To see visitors each day.
- (6) To have reasonable access to and use of telephones, both to make and receive confidential calls.
- (7) To have ready access to letter writing materials, including stamps, and to mail and receive unopened correspondence.
- (8) To regular physical exercise or organized physical activities several times a week.
- (9) To be outdoors at regular and frequent intervals, in the absence of medical considerations, commencing two weeks after admission, except where the physical location of the short-term care facility precludes outdoor exercise or would render the supervision of outdoor exercise too onerous for the facility.
- (10) To suitable opportunities for social interaction with members of the opposite or same gender ~~sex~~, with adequately supervised ~~ion~~.
- (11) To practice the religion of ~~his~~ choice or abstain from religious practices. Provisions for worship shall be made available to each patient on a nondiscriminatory basis.

(12) To receive prompt and adequate medical treatment for any physical ailment.

(13) To be provided with a reasonable explanation, in terms and language appropriate to the patient's condition and ability to understand, of:

(a) the patient's general mental and physical condition;

(b) the objectives of the patient's treatment;

(c) the nature and significant possible adverse effects of recommended treatments;

(d) the reasons why a particular treatment is considered appropriate; and

(e) the reasons for the denial of any of the patient's rights pursuant to subsection c. ~~of this section.~~

c. (1) A patient's rights designated under subsection b. ~~of this section~~ may be denied only for good cause when the attending physician feels it is imperative to deny any of these rights; except that, under no circumstances shall a patient's right to communicate with his an attorney, physician or the courts be restricted. The denial of a patient's rights shall take effect only after a copy of the written notice of the denial has been filed in the patient's treatment record and shall include an explanation of the reason for the denial.

(2) A denial of rights shall be effective for a period not to exceed 10 days and shall be renewed for additional 10-day periods only by a written statement entered by the attending physician or other designated physician in the patient's treatment record ~~which indicates~~ indicating the detailed reason for the renewal of the denial.

(3) In each instance of a denial or a renewal, the patient, ~~his~~ the patient's attorney, and ~~his~~ the patient's guardian, if the patient has been adjudicated ~~incompetent~~ mentally incapacitated, shall be given written notice of the denial or renewal and the reason ~~therefor~~.

d. A notice of the rights set forth in this section shall be given to a patient in a short-term care facility upon admission. The notice shall be ~~in writing and written~~ in simple understandable plain language. ~~It shall be in a language the patient understands and if the patient cannot read the notice, it shall be read to the patient him. In the case of an~~ If a patient is adjudicated incompetent mentally incapacitated patient, the notice shall be given to the patient's guardian. this procedure shall be followed for the patient's guardian. Receipt of this notice shall be acknowledged in writing with a copy placed in the patient's file. If the patient or guardian refuses to acknowledge receipt of the notice, the person delivering the notice shall state this in writing with a copy placed in the patient's file.

30:4-27.11e. Rights of psychiatric patients during first 24 hours of involuntary assessment provided at a screening service; list of rights to be provided to patient; denial of rights for good cause only; written notice of denial required

a. A patient in a screening service shall have the following rights, which shall apply during the first 24 hours of involuntary assessment and care provided at a screening service and which shall not be denied under any circumstances. A list of these rights shall be posted in a conspicuous place in the screening service and otherwise brought to the patient's attention pursuant to subsection d. of this section:

(1) To be free from unnecessary or excessive medication. Medication shall not be administered unless at the order of a physician. Medication shall be administered in accordance with generally accepted medical standards as part of a treatment program. Medication shall not be used as punishment, for the convenience of staff, as a substitute for a treatment program, or in quantities that interfere with the patient's treatment program.

(A) In an emergency in which less restrictive or appropriate alternatives acceptable to the patient are not available to prevent imminent danger to the patient or others, medication may be administered over a patient's objection at the written order of a physician, which shall be valid for a period of up to 24 hours, in order to lessen the danger.

(2) Not to be subjected to experimental research, psychosurgery or sterilization, without the express and informed, written consent of the patient. The patient shall have the right to consult with counsel or interested party of the patient's choice. A copy of the patient's consent shall be placed in the patient's treatment record.

(3) To be free from unnecessary physical restraint and seclusion. Except for an emergency, in which a patient has caused substantial property damage or has attempted to cause self-harm himself or harm to others, or in which ~~his~~ the patient's behavior threatens to cause self-harm himself or harm to others, and in which less restrictive means of restraint are not feasible, a patient may be physically restrained or placed in seclusion only on an attending physician's written order or that of another designated physician which explains the rationale for that action. The written order may be given only after the attending physician or other designated physician has personally seen the patient, and evaluated the episode or situation that is said to require restraint or seclusion.

In an emergency, the use of restraints or seclusion may be initiated by a registered professional nurse and shall be for no more than one hour. Within that hour, the nurse shall consult with the attending physician or other designated physician and, if continued restraint or seclusion is determined to be necessary, shall obtain an order from the physician to continue the use of restraints or seclusion. If an order is given, the patient shall be reevaluated by the nurse or the attending physician or other designated physician as to the patient's physical

and psychiatric condition and the need for continuing the restraints or seclusion at least every two hours until the use of restraints or seclusion has ended.

The patient's attending physician or other designated physician shall enter a written order approving the continued use of restraints or seclusion no later than 12 hours after the time that physical restraint or seclusion began, after the physician has personally seen the patient. A written order by the physician for the continued use of restraints or seclusion shall be effective for no more than 24 hours and shall be renewed if restraint and seclusion are continued. A medical examination of the patient shall be conducted every 12 hours by a physician.

While a patient is in restraints or seclusion, nursing personnel shall check the patient's hygienic, toileting, food-related and other needs every 15 minutes. A notation of these checks shall be placed in the patient's medical record along with the order for restraints or seclusion. A patient in restraints shall be permitted to ambulate every four hours, except when the patient's psychiatric condition would make a release from restraints dangerous to ~~himself~~ the patient or others, and shall be permitted to ambulate at least once every 12 hours regardless of the patient's psychiatric condition.

(4) To be free from any form of punishment.

b. A patient receiving treatment in a screening service shall have the following rights, which may only be denied pursuant to subsection c. ~~of this section~~. A list of these rights shall be posted in a conspicuous place in the screening service and otherwise brought to the patient's attention pursuant to subsection d. ~~of this section~~:

(1) To privacy and dignity.

(2) To the least restrictive conditions necessary to achieve the purposes of treatment.

(3) To wear ~~his~~ the patient's own clothes, except as necessary for medical examination.

(4) To see visitors.

(5) To have reasonable access to and use of telephones, both to make and receive confidential calls.

(6) To practice the religion of ~~his~~ choice or abstain from religious practices.

(7) To receive prompt and adequate medical treatment for any physical ailment.

(8) To be provided with a reasonable explanation, in terms and language appropriate to the patient's condition and ability to understand, of:

(a) the patient's general mental condition, and ~~his~~ physical condition if the screening service has conducted a physical examination of the patient;

(b) the objectives of the patient's treatment;

(c) the nature and significant possible adverse effects of recommended treatments;

(d) the reasons why a particular treatment is considered appropriate; and

(e) the reasons for the denial of any of the patient's rights pursuant to subsection c. ~~of this section.~~

(9) To have a discharge plan prepared ~~for him~~ and to participate in the preparation of that plan.

c. (1) A patient's rights designated under subsection b. ~~of this section~~ may be denied only for good cause when the attending physician feels it is imperative to deny any of these rights; except that, under no circumstances shall a patient's right to communicate with ~~his~~ the patient's attorney, physician or the courts be restricted. The denial of a patient's rights shall take effect only after a copy of the written notice of the denial has been filed in the patient's treatment record and shall include an explanation of the reason for the denial.

(2) A denial of rights shall be effective only for the period of time that the patient is in the screening service.

d. A notice of the rights set forth in this section shall be given to a patient as soon as possible upon admission to the screening service. The notice shall be ~~in writing and written~~ in simple understandable plain language. ~~It shall be in a language the patient understands and if the patient cannot read the notice, it shall be read to the patient him. In the case of an~~ If the patient is adjudicated incompetent mentally incapacitated patient, this procedure shall be followed for the notice shall be given to the patient's guardian. Receipt of this notice shall be acknowledged in writing with a copy placed in the patient's file. If the patient or guardian refuses to acknowledge receipt of the notice, the person delivering the notice shall state this in writing with a copy placed in the patient's file.

30:4-101. Married couples not to be separated; exceptions

Married or civil union couples who are inmates of ~~in~~ a public institution maintained in whole or in part by the ~~s~~State, or a county, municipality or subdivision thereof, ~~married couples and inmates of the same institution,~~ shall not be ~~separated or~~ maintained in separate quarters. This provision shall not apply to psychiatric hospitals or institutions for the ~~insane or feeble-minded~~ mentally incapacitated or developmentally disabled, or to correctional institutions, or ~~to cases~~ where the health or mental condition of the persons concerned warrants separation.

[30:4-127. Visitation of certain institutions; application to Superior Court judge

An assignment judge of the Superior Court may grant, on a written application to him of a majority of the board of managers of the State Charities Aid Association of New Jersey, to such person as may be named in such

application an order enabling such person to visit, inspect and examine, in behalf of such association, any of the county, town, township or city poorhouses, prisons, jails, penitentiaries, reformatories, and lunatic or orphan asylums, located within any of the counties of which he is the assignment judge. Every such order shall specify the institutions to be visited, inspected and examined, and the name of the person by whom the visitation, inspection and examination are to be made, and shall be in force for one year from the date on which it shall have been granted, unless sooner revoked.]

COMMENT

This statute is anachronistic and therefore recommended for repeal.

30:4A-7. Admission of unconfined person; hearing

If the person for whom the diagnosis is sought by any court or agency of the State, ~~or of a county,~~ or municipal government, desiring to utilize the services of the diagnostic center, ~~is not under confinement or process of any nature whatsoever,~~ then admission to the diagnostic center shall be secured upon application to the Superior Court upon forms to be provided by the Department of Human Services. The county adjuster shall be the official ~~in the county~~ charged with the responsibility of assisting with processing of such applications and shall perform functions similar to those set forth in Title 30, Revised Statutes. In connection with each such application, the court shall order a hearing to be held, which may be in camera at the discretion of the court. At least ten days' notice of the time, date and place of such hearing shall be served upon the person, and if ~~he be a minor or incompetent~~ mentally incapacitated person, upon the parent, guardian, person standing in loco parentis or person having custody and control of such minor or ~~incompetent~~ mentally incapacitated person. At such hearing, the court shall determine whether the services of the diagnostic center shall be made available to the ~~said~~ person and may order the person's confinement ~~of such person~~ in the center for a period not to exceed ninety days, which order shall be provided and shall cause a copy of said order of confinement to accompany the ~~said person~~ to the center.

30:6B-1. Commitment by court or judicial officer to Department of Veterans Affairs Administration or other agency of United States

~~Whenever, a. If it is determined in any a court proceeding in any court of competent jurisdiction or before a judicial officer, having jurisdiction thereof, under the laws of this State for the commitment of a person alleged to be of unsound mind~~ mentally incapacitated or otherwise in need of confinement in a psychiatric hospital or other institution for the person's his proper care, treatment or safekeeping, ~~it is determined after such adjudication of the status of such person as may be required by law that commitment to a hospital for mental disease or other institution that commitment is necessary for safekeeping or treatment and it appears that such and that~~ the person is eligible for care or treatment by the Department of Veterans Administration Affairs or other agency

of the United States Government, ~~the said court or judicial officer, the court may commit the person to the Department of Veterans Affairs or other agency instead of to a State institution,~~ upon receipt of a certificate from the Department of Veterans Administration Affairs or such other agency showing that facilities are available and that ~~such~~ the person is eligible for care or treatment therein, ~~may, subject to the provisions of this act, commit such person to said Veterans Administration or other agency instead of to an institution of this State.~~

b. Upon any such commitment, ~~such person, and~~ when admitted to any a facility operated by any such agency ~~within or without this State, the person~~ shall be subject to the rules and regulations of the Department of Veterans Administration Affairs or other agency. The chief officer of any a facility of the Department of Veterans Administration Affairs or institution operated by any the other agency of the United States to which the person is so committed shall, ~~with respect to such person, with respect to the retention of the person's custody, transfer, parole or discharge,~~ be vested with the same powers as that of the chief officer of a State institution ~~would have if such person had been committed to a State institution, , with respect to the retention of custody, transfer, parole or discharge of such person.~~

COMMENT

The Veterans Administration has changed its name to the Department of Veterans Affairs. Given the change in name, the Commission recommends the change to the section's descriptor as underlined. Subsections are also added for clarity.

30:6B-4. Transfer of eligible persons to Department of Veterans Administration Affairs or other agency of United States

Upon receipt of a certificate of the Department of Veterans Administration Affairs or ~~such~~ other agency of the United States that facilities are available for the care or treatment of any a person ~~heretofore committed to any hospital for the an institution for care and treatment of insane the mentally incapacitated or other institution for the care or treatment of persons similarly afflicted~~ and that such person is eligible for care or treatment, the chief officer of the institution may, subject to the approval of the Commissioner of Institutions and Agencies Human Services or of the court or judicial officer having jurisdiction of over such the person, cause the transfer of such transfer the person to the Department of Veterans Administration Affairs or other agency of the United States for care or treatment.

Any A person transferred as provided in this section shall be deemed to ~~be~~ committed to the Department of Veterans Administration Affairs or other agency of the United States, pursuant to the original commitment, ~~but may be subject to a change of venue to the Department of Veterans Affairs site where the commitment hearings take place.~~

COMMENT

The Veterans Administration has changed its name to the Department of Veterans Affairs. Given the change in name, the Commission recommends the change to the section's descriptor as underlined.

30:6D-4. Admission to or residence at facility or receipt of service; prohibition of presumption of mental incapacity incompetence, discrimination against or deprivation of constitutional, civil or legal rights

No developmentally disabled person shall be presumed ~~to be incompetent~~ mentally incapacitated or shall be discriminated against or shall be deprived of any constitutional, civil or legal right solely by reason of admission to or residence at a facility or solely by reason of receipt of any service for developmentally disabled persons. No such admission, residence or receipt of services shall modify or vary any constitutional, civil or legal right of such person, including, but not necessarily limited to;

- a. Register and vote at elections;
- b. Free exercise of religion;
- c. Receive and send unopened correspondence and, upon request, to obtain assistance in the writing and reading of such correspondence;
- d. Private visitations and private telephone conversations without prior notice to the facility during such reasonable hours as may be established by the facility with parents, guardians, representatives of guardian services, relatives, friends, physicians, attorneys, government officials, and any other persons;
- e. Reasonable opportunities for social interaction with members of the same or opposite gender sex;
- f. Confidential handling of personal and medical records.

COMMENT

The Commission recommends the change to the section's descriptor as underlined.

30:6D-5. Rights of person receiving services for developmentally disabled at facility

a. No person receiving services for the developmentally disabled at any facility shall:

- (1) be subjected to any corporal punishment;
- (2) be administered any medication or chemical restraint, except upon the written authorization of a physician when necessary and appropriate as an element of the service being received or as a treatment of any medical or physical condition in conformity with accepted standards for such treatment. The

nature, amount of, and reasons for the administration of any medication or chemical restraint shall be promptly recorded in such person's medical record;

(3) be physically or chemically restrained or isolated in any manner, except in emergency situations for the control of violent, disturbed or depressed behavior which may immediately result in or has resulted in harm to such person or other person or in substantial property damage.

The chief administrator of the facility, or his chief administrator's designee, shall be notified immediately upon the application of any such restraint or isolation, and thereafter such restraint or isolation shall be continued only upon the written order of the administrator or designee. Such order shall be effective for not more than 24 hours, and may be renewed for additional periods of not more than 24 hours each if the administrator or designee shall determine that such continued restraint or isolation is necessary. While in restraint or isolation, such person shall be checked by an attendant every 15 minutes, and bathed every 24 hours. Such restraint or isolation shall be terminated at any time if an attending physician shall find such restraint or isolation to be medically contraindicated. The nature, duration of, reasons for and notation of attendant checks shall be promptly recorded in such person's medical record;

(4) be subjected to shock treatment, psychosurgery, sterilization or medical behavioral or pharmacological research without the express and informed consent of such person, if an an competent adult not mentally incapacitated, or of such person's guardian ad litem specifically appointed by a court for the matter of consent to these proceedings, if a minor or an incompetent mentally incapacitated adult or a person administratively determined to be mentally deficient. Such consent shall be made in writing and shall be placed in such person's record.

Either the party alleging the necessity of such procedure or such person or such person's guardian ad litem may petition a court of competent jurisdiction to hold a hearing to determine the necessity of such procedure at which the client is physically present, represented by counsel, and provided the right and opportunity to be confronted with and to cross-examine all witnesses alleging the necessity of such procedure. In such proceedings, the burden of proof shall be on the party alleging the necessity of such procedure. In the event that a person cannot afford counsel, the court shall appoint an attorney not less than 10 days before the hearing. An attorney so appointed shall be entitled to a reasonable fee to be determined by the court and paid by the county from which the person was admitted. Under no circumstances may a person in treatment be subjected to hazardous or intrusive experimental research which is not directly related to the specific goals of his treatment program.

b. Every developmentally disabled person in residence at any facility shall be provided with a nutritionally adequate and sufficient diet and shall receive appropriate and sufficient medical and dental care on a regular basis and whenever otherwise necessary.

c. Every developmentally disabled person between the ages of 5 and 21, inclusive, in residence or full-time attendance at any facility shall be provided a thorough and efficient education suited to such person's age and abilities.

30:9-1. Superintendents and physicians of county hospitals in counties of first class; appointment; terms of office

~~The boards of chosen freeholders in counties of the first class shall appoint a superintendent for each county hospital and the physicians for the several county hospitals. The term of office of such appointees the physicians shall be two years, except that of the superintendents of the county hospitals for the insane whose terms of office shall be~~ The term of office of the superintendents of the county hospitals shall be as provided by section 30:9-12, of this title, shall be two years.

[30:9-1.1. Bonds for erection of county lunatic asylum

The board of chosen freeholders of a county by resolution adopted by a vote of not less than three-fourths of all its members may issue bonds in the corporate name of the county in an amount not exceeding two hundred thousand dollars for the purpose of erecting a suitable county lunatic asylum.]

COMMENT

This statute is anachronistic and therefore recommended for repeal.

[30:9-2. Architect appointed by Superior Court; duties

The erection of a county lunatic asylum shall be under the direct supervision of a competent architect who shall be appointed by the assignment judge of the Superior Court of the county. He shall prepare or approve the plans, specifications and contracts; certify to the correctness of all payments or approve them in writing before they shall be made; report in writing to the said judge and board of chosen freeholders from time to time the progress of the work; report in writing whenever the judge or board may require it, the condition of the work or any portion thereof. The board may direct the attention of the judge to any part of the work of which complaint may be made.

The architect's compensation shall be fixed by the judge and paid by the board from time to time as the judge shall direct. He may be removed and a successor appointed at the pleasure of such assignment judge.]

COMMENT

This statute is anachronistic and therefore recommended for repeal.

30:9-3.1. Commissary or store; establishment; cost; profits

~~Boards of chosen freeholders~~ Counties are empowered to maintain a commissary or store for the sale of commodities to patients, patients' visitors and employees of any county psychiatric hospital ~~for the insane~~ under rules to be

adopted by the ~~board~~ county. The cost of establishing the commissary or store may be defrayed out of ~~any~~ funds appropriated for current maintenance. Any profit ~~accruing~~ may be used by ~~the board~~ for recreational entertainment of the patients or ~~any~~ another like purpose.

30:9-4. Enlargement of or additions to asylum psychiatric facilities

~~Wherever in any county in this State~~ If a lunatic asylum psychiatric facility is owned and maintained by the county, and it becomes necessary ~~from time to time~~ either to enlarge ~~such asylum~~ the facility by the building of additions or extensions ~~thereto~~, or to erect additional buildings ~~or pavilions~~ for the accommodation of ~~the insane patients~~, the board of chosen freeholders or governing body ~~of any such~~ of the county may, ~~from time to time~~, upon resolution to be adopted by the affirmative votes of two-thirds of ~~the~~ its members ~~of such board~~, build such additions, extensions, additional building or buildings, ~~pavilion or pavilions~~, and properly fit, furnish and equip ~~the same~~ them.

COMMENT

Adding the terms “governing body” as well as “board of chosen freeholders” reflects the fact that now not all counties are governed by boards of freeholders. The use of the terms “governing body” is also consistent with other parts of Title 30, e.g., sections 30:8-42 (wages for prisoners) and 30:9-3 (adoption of bylaws, rules and regulations for management of county psychiatric facilities). The Commission also recommends the change to the section’s descriptor as underlined.

30:9-5. Bonds for additions, repairs, or furnishing county lunatic asylum psychiatric facility

The county may issue bonds in the corporate name of the county ~~To meet~~ the expense of erecting new buildings, additions or accommodations at a county ~~lunatic asylum psychiatric facility~~, and making repairs to or otherwise properly fitting, furnishing and equipping such buildings, ~~providing proper furniture or apparatus for lighting, heating or otherwise fitting up the same~~, ~~the board of chosen freeholders may issue bonds in the corporate name of the county.~~

COMMENT

The Commission recommends the change to the section’s descriptor as underlined.

30:9-6. Consolidation of county insane psychiatric hospitals

The board of chosen freeholders or governing body of a county by resolution adopted by the affirmative vote of two-thirds of its members may consolidate its county psychiatric hospitals ~~for the insane~~ in one place on suitable lands owned by the county and erect, furnish and maintain suitable hospital buildings thereon. County bonds for such purpose may be issued to an amount not exceeding six-tenths of one per cent of the ratables of the county.

COMMENT

Adding the terms “governing body” as well as “board of chosen freeholders” reflects the fact that now not all counties are governed by boards of freeholders. The use of the terms “governing body” is also consistent with other parts of Title 30, e.g., sections 30:8-42 (wages for prisoners) and 30:9-3 (adoption of bylaws, rules and regulations for management of county psychiatric facilities). The Commission also recommends the change to the section’s descriptor as underlined.

30:9-7. Sale of unnecessary lands and buildings on consolidation; disposition of proceeds

~~Whenever if county psychiatric hospitals for the insane shall be are consolidated as authorized provided by section 30:9-6 of this title, the board of chosen freeholders of such the county may sell any its lands and buildings owned by such county and used for the purposes of used for a psychiatric hospital for the insane which are located in a part of the county remote from the site of the hospital buildings so consolidated, and which that are rendered unnecessary to be used for such hospital purposes, and the sale and conveyance of such the lands by such board shall vest in the purchaser title in fee to the premises so sold. The proceeds of such sale shall be applied by such board to the sinking funds of such the county or to the redemption of county bonds, and not otherwise.~~

30:9-8. Change of location of county insane psychiatric hospital within county

~~Whenever in any if the county of this state the board of chosen freeholders or the governing body of the county thereof shall determine, by a resolution which shall receive adopted by the affirmative votes of at least two-thirds of all its members, that any a county psychiatric hospital for the insane under its management and control is unsuitably located, and that it is expedient and desirable that the location thereof should be changed to some other place in its county, such the board county may make such change.~~

COMMENT

Adding the terms “governing body” as well as “board of chosen freeholders” reflects the fact that now not all counties are governed by boards of freeholders. The use of the terms “governing body” is also consistent with other parts of Title 30, e.g., sections 30:8-42 (wages for prisoners) and 30:9-3 (adoption of bylaws, rules and regulations for management of county psychiatric facilities). The Commission also recommends the change to the section’s descriptor as underlined.

30:9-9. Relocation of county insane psychiatric hospital in another county; agreement with other county; powers and duties of boards of chosen freeholders or other governing body; eminent domain; bond issues

a. If the county, ~~in the judgment of a board of chosen freeholders~~ desiring to change the location of a county psychiatric hospital for the insane under authority of section 30:9-8 of this title, determines there is no suitable location ~~within its county~~ at which ~~such the~~ hospital might be relocated, and ~~such board~~ desires to locate in ~~some other~~ another county of this ~~s~~State, it may do so by entering into an agreement with the ~~board of chosen freeholders of such other county~~, either to ~~jointly~~ build and maintain such hospital jointly, or ~~that the board of one county may to~~ build and maintain the same by one county with the right in the other ~~board~~ county to commit its patients therein, at a sum per week per patient to be agreed upon.

b. If ~~both of such boards~~ counties agree to ~~jointly~~ build and maintain ~~such the hospital jointly~~, they shall ~~jointly agree~~ concur upon the site thereof, appoint an architect, and approve of plans and specifications, and do and perform everything ~~other necessary act and thing~~ for the completion of the work ~~herein authorized~~ and the maintenance of ~~the same after completion thereafter~~, including the employment of physicians and other necessary employees, ~~in and about the institution.~~

c. If by their ~~agreement between such boards~~, ~~one board is to~~ one county builds and maintains ~~such the~~ hospital, that ~~board~~ county shall select the site ~~therefor~~, appoint the architect, and approve of the plans and specifications, and do and perform everything ~~other necessary act and thing~~ for the completion of the work ~~herein authorized~~, and the maintenance thereafter ~~of the same after completion~~, including the employment of physicians and other necessary employees, ~~in and about the institution.~~

d. If ~~any board concludes~~ a county decides to change the location of its hospital, ~~as aforesaid~~, the ~~joint boards if they agree to undertake the work, or the single board, if it is to do the work alone, either within or without its county,~~ one or more counties depending upon their agreement shall have full power and authority to acquire lands within or without the county by gift, devise, purchase or condemnation, ~~and to erect suitable buildings thereon, and to fit, furnish and equip the same~~ buildings, lay out the grounds, make provision for ~~a water supply utilities and railroad~~ mass transit connections, and do and perform ~~such other things as may be~~ whatever is necessary or ~~proper to be done in order~~ appropriate to establish a modern psychiatric hospital for the insane.

e. The ~~moneys wherewith~~ funds to acquire ~~such the~~ lands, erect ~~such the~~ buildings, and ~~to do and perform all~~ perform the work and things, including the purchase of materials and fittings, furnishings and equipment ~~herein authorized~~, except ~~that which might consist in maintenance only,~~ for maintenance only, shall be raised and obtained by the ~~board of chosen freeholders of the county if one only undertakes the doing of the work, or the boards of chosen freeholders of the~~

~~two counties undertaking the doing of the work, by one or more counties doing the work, each to the extent of its share, by the issue and sale of bonds therefor and in the manner and by the methods prescribed by chapter 1 of the title Municipalities and Counties (s. 40:1-1 et seq.), and shall be paid out by the county treasurer or treasurers, in accordance with the counties' agreement, as the case may be on the order of the board of chosen freeholders, as the case may be.~~

COMMENT

The Commission recommends the change to the section's descriptor as underlined. Section 40:1-1 *et seq.* has been repealed. Subsections also have been added for clarity.

30:9-11. Contracts for county ~~insane asylums~~ psychiatric facilities

~~If the cost of Where any work is to be done work performed and materials to be furnished in the erection and construction, furnishing and equipping of such buildings county psychiatric hospitals, or in the fitting, furnishing and equipping of the same, or in and about the grounds, as provided by section 30:9-9, of this title, where the cost thereof shall exceed the sum of ~~exceeds one thousand dollars~~ \$1,000.00, the same ~~work~~ shall be ~~done~~ performed and materials furnished on contract to be awarded to the lowest responsible bidder who shall furnish satisfactory security to the board or boards county or counties undertaking such the work, on bids duly advertised for in the county or counties, ~~engaged in the work, and also where the~~ If buildings are to be erected, the advertisement shall be published for at least two weeks, once in each week; and if joint counties undertake the work ~~be undertaken by joint boards~~, they shall appoint a committee to advertise for and receive such bids, ~~which committee shall~~ and to report the bids to their governing bodies such boards at their next meetings.~~

COMMENT

The Commission recommends the change to the section's descriptor as underlined.

30:9-12. Superintendents of psychiatric hospitals ~~for insane~~ in counties of first class; terms of office

~~The board of chosen freeholders in e~~Counties of the first class, in appointing superintendents for the county psychiatric hospitals ~~for the insane~~, may designate and prescribe the terms of office of such superintendents, which shall not be for a longer time than five years.

COMMENT

The Commission recommends the change to the section's descriptor as underlined.

[30:9-29. County aid to hospitals caring for communicable diseases

The board of chosen freeholders of a county which has no county hospital permanently maintaining a building or pavilion for communicable diseases other than the sick ward of the county poor home or the county institutions for the insane, may appropriate not more than \$50,000.00 in any 1 year, to any one hospital which permanently maintains and operates a building or pavilion for communicable diseases, or, for the purpose of contracting with any such hospital for payment for care and treatment of residents of such county who are afflicted with communicable diseases.]

COMMENT

This statute is anachronistic and moot and therefore recommended for repeal.

30:13-6. Discharge or transfer of resident

Any nursing home resident may arrange for the resident's own discharge himself from a nursing home upon presentation of a written release and if the resident is ~~an~~ adjudicated mentally ~~incompetent~~ incapacitated, upon the written consent of ~~his~~ the person's guardian. In such case, the nursing home is free from any responsibility for the resident upon ~~his~~ release. When a nursing home wishes to transfer or discharge on a nonemergency basis a ~~competent or an adjudicated mental incompetent~~ resident who is either not mentally incapacitated or is adjudicated mentally incapacitated ~~on a nonemergency basis~~, it may do so for medical reasons or for ~~his~~ the person's welfare or that of other residents upon receiving a written order from the attending physician, or for nonpayment of ~~his stay~~, except as prohibited by Title XVIII or Title XIX of the Social Security Act, as amended, and such action shall be recorded in the resident's medical record. When a transfer or discharge on a nonemergency basis of a resident is requested by a nursing home, the resident or, in the case of ~~an~~ a resident adjudicated mentally ~~incompetent~~ incapacitated resident, the guardian, shall be given at least 30 days advance notice of such transfer or discharge.

Title 34:**34:15-27. Modification of agreement; review of award, determination, ~~rule~~ for judgment or order approving settlement**

An agreement for compensation may be modified at any time by a subsequent agreement. Upon the application of any party, ~~a~~ A formal award, determination, ~~and rule for judgment or order approving settlement~~ may be reviewed within 2 years from the date when the injured person last received a payment ~~upon the application of either party~~ on the ground that the incapacity of the injured employee has subsequently increased. If ~~any~~ a party entitled to a review under this section shall become ~~insane~~ mentally incapacitated within the aforesaid 2-year period, ~~his insanity~~ the incapacity shall constitute grounds for

tolling the unexpired balance of the 2-year period, which shall only begin to run again after ~~his coming to or being of same mind~~ the party returns to mental capacity. An award, determination ~~and rule for or~~ judgment or order approving settlement may be reviewed at any time on the ground that the ~~disability incapacity~~ has diminished. In such case the provisions of section 34:15-19 of ~~this Title~~ with reference to medical examination shall apply.

COMMENT

The Commission recommends the change to the section's descriptor as noted.

Title 37:

37:1-6. Consent of parents or guardian of minor; when required

a. A marriage or civil union license shall not be issued to a minor ~~under the age of 18 years~~, unless the parents or guardian of the minor, if ~~there be~~ any, first certify ~~under their hands and seals~~, in the presence of two reputable witnesses, ~~their~~ consent thereto, which ~~consent~~ shall be delivered to the licensing officer issuing the license. ~~If the parents, or either of them, or guardian of any such minor shall be of unsound mind~~ Consent to the proposed marriage or civil union by a parent or guardian that is mentally incapacitated, ~~the consent of such parent or guardian to the proposed marriage or civil union~~ shall not be required.

b. When a minor is under the age of 16 years, the consent required by this section must be approved in writing by ~~any~~ judge of the Superior Court, Chancery Division, Family Part. ~~Said approval shall be~~ and filed with the licensing officer.

c. The licensing officer shall transmit ~~to the State Bureau of Vital Statistics~~ all such consents, orders, and approvals to the State Bureau of Vital Statistics and Registration ~~so received by him in the same manner~~ and subject to the same penalty as in the case of marriage or civil union certificates ~~of marriage or civil union and marriage or civil union~~ or licenses.

COMMENT

Subsections have been added for clarity. The name of the State Bureau of Vital Statistics has been changed to the State Bureau of Vital Statistics and Registration.

37:1-9. When issuance of license prohibited

No marriage license shall be issued when, at the time of making an application ~~therefor~~, either applicant is infected with a venereal disease in a communicable stage, or is a person currently adjudicated mentally ~~incompetent~~ incapacitated.

Title 40:

40:11A-22.2. Qualifications

No person may be appointed as a parking enforcement officer unless the person:

- a. is a resident of this State during the term of appointment;
- b. is able to read, write and speak the English language ~~well and intelligently~~;
- c. ~~is of sound mind~~ is not mentally incapacitated and ~~in good health~~ is physically able to perform the tasks of parking enforcement officer;
- d. ~~is of good moral character~~;
- e.d. has not been convicted of any offense involving dishonesty or which would make ~~him~~ the person unfit to perform the duties of ~~his~~ the office.

Title 40A:

40A:9-154.9. Minimum qualifications

No person may be appointed as a parking enforcement officer unless, at a minimum, the person:

- a. Is a resident of this State during the term of appointment;
- b. Is able to read, write and speak the English language ~~well and intelligently~~;
- c. ~~Is of sound mind~~ Is not mentally incapacitated and ~~in good health~~ is physically able to perform the tasks of parking enforcement officer; and
- d. ~~Is of good moral character~~; and
- e.d. Has not been convicted of any offense involving dishonesty or which would make the person unfit to perform the duties of ~~his~~ the office.

Title 42:

42:2A-8.2. Resignation of registered agent

Resignation of registered agent. a. The registered agent of a domestic limited partnership or a foreign limited partnership authorized to transact business in this State may resign by complying with the provisions of this section.

b. The registered agent, or, in the case of a registered agent who is deceased or has been declared ~~incompetent~~ mentally incapacitated by a court of ~~competent jurisdiction~~, his the agent's legal representative, shall serve a notice of resignation by certified mail, return receipt requested, upon a general partner or general partners of the limited partnership at the address last known to the agent, and shall make an affidavit of such service. If service cannot be made, the

affidavit shall so state, and shall state briefly why service cannot be made. The affidavit, together with a copy of notice of resignation, shall be filed in the Office of the Secretary of State.

c. The resignation shall become effective 30 days after the filing in the office of the Secretary of State of the affidavit of service or upon the designation by the limited partnership of a new registered agent pursuant to this act, whichever is earlier. If the limited partnership fails to designate a new registered agent within the 30 day period, the limited partnership shall thereafter be deemed to have no registered agent or registered office in this State, until the limited partnership files a certificate of change of address of registered office and registered agent indicating the new registered office and registered agent.

d. If any certificate of change replacing a resigned agent is not filed, the limited partnership shall, after written demand therefor by the Secretary of State, forfeit to the State a penalty of \$200.00 for each year or part thereof until an agent is appointed. The Secretary of State may issue a certificate to the Clerk of the Superior Court that the limited partnership is indebted for the payment of this penalty. This certificate shall be entered by the Clerk as a judgment docketed in the Superior Court, and shall have the same form as a docketed judgment.

42:2A-31. Events of withdrawal of a general partner

Except as approved by the specific written consent of all partners at the time, a person ceases to be a general partner of a limited partnership upon the happening of any of the following events:

a. The general partner withdraws from the limited partnership as provided in section 39 of P.L.1983, c. 489(C. 42:2A-40);

b. The general partner ceases to be a member of the limited partnership as provided in section 46 of P.L.1983, c. 489 (C. 42:2A-47);

c. The general partner is removed as a general partner in accordance with the partnership agreement;

d. Unless otherwise provided in the certificate of limited partnership, the general partner: (1) makes an assignment for the benefit of creditors; (2) files a voluntary petition in bankruptcy; (3) is adjudicated a bankrupt or insolvent; (4) files a petition or answer seeking for himself any reorganization, arrangement, composition, readjustment, liquidation, dissolution or similar relief under any statute, law, or regulation; (5) files an answer or other pleading admitting or failing to contest the material allegations of a petition filed against him in any proceeding set forth in (4) above; or (6) seeks, consents to, or acquiesces in the appointment of a trustee, receiver, or liquidator of the general partner or of all or any substantial part of his properties;

e. Unless otherwise provided in the certificate of limited partnership, 120 days after the commencement of any proceeding against the general partner seeking reorganization, arrangement, composition, readjustment, liquidation,

dissolution or similar relief under any statute, law, or regulation, the proceeding has not been dismissed, or if within 90 days after the appointment without his consent or acquiescence of a trustee, receiver, or liquidator of the general partner or of all or any substantial part of his properties, the appointment is not vacated or stayed, or within 90 days after the expiration of any such stay, the appointment is not vacated;

f. In the case of a general partner who is a natural person, ~~his death or the entry by a court of competent jurisdiction of a judgment adjudicating him~~ the partner incompetent lacking mental capacity to manage his person or estate;

g. In the case of a general partner who is acting as a general partner by virtue of being a trustee of a trust, the termination of the trust (but not merely the substitution of new trustee);

h. In the case of a general partner that is a separate partnership, the dissolution and commencement of winding up of the separate partnership;

i. In the case of a general partner that is a corporation, the filing of a certificate of dissolution, or its equivalent, for the corporation or the revocation of its charter; or

j. In the case of an estate, the distribution by the fiduciary of the estate's entire interest in the partnership.

42:2A-50. Power of personal representative of deceased or incompetent mentally incapacitated person; representative or successor of corporation, trust or other entity

If a partner who is an individual dies or a court of ~~competent jurisdiction~~ adjudges ~~him to be the partner incompetent~~ lacking the mental capacity to manage his person or his property, the partner's executor, administrator, guardian, conservator, or other legal representative may exercise all the partner's rights for the purpose of settling his the partner's estate or administering his the partner's property, including any power the partner had to give an assignee the right to become a limited partner. If a partner is a corporation, trust, or other entity and is dissolved or terminated, the powers of that partner may be exercised by its legal representative or successor.

COMMENT

The Commission recommends the change to the section's descriptor as underlined.

42:2B-7. Resignation of a registered agent; procedures

a. The registered agent of a domestic limited liability company or a foreign limited liability company authorized to transact business in this State may resign by complying with the provisions of this section.

b. The registered agent of a foreign or domestic limited liability company may resign and appoint a successor registered agent by filing a certificate in the

office of the Secretary of State, stating that it resigns and the name and address of the successor registered agent. There shall be attached to such certificate a statement executed by the affected limited liability company ratifying and approving such change of registered agent. Upon such filing, the successor registered agent shall become the registered agent of each limited liability company which has ratified and approved the substitution and the successor registered agent's address, as stated in such certificate, shall become the address of each limited liability company's registered office in this State. The Secretary of State shall furnish to the successor registered agent upon request a certified copy of the certificate of resignation. Filing of the certificate of resignation shall be deemed to be an amendment of the certificate of formation of the limited liability company affected thereby and the limited liability company shall not be required to take any further action with respect thereto, to amend its certificate of formation under this act.

c. The registered agent of a limited liability company may resign without appointing a successor registered agent by complying with the following provisions:

(1) The registered agent, or, in the case of a registered agent who is deceased or has been declared ~~incompetent~~ mentally incapacitated by a court of ~~competent jurisdiction~~, ~~his~~ the agent's legal representative, shall serve a notice of resignation by certified mail, return receipt requested, upon the limited liability company at the address last known to the agent, and shall make an affidavit of such service. If service cannot be made, the affidavit shall so state, and shall state briefly why service cannot be made. The affidavit, together with a copy of notice of resignation, shall be filed in the office of the Secretary of State.

(2) The resignation shall become effective 30 days after filing the affidavit of service in the office of the Secretary of State or upon the designation by the limited liability company of a new registered agent pursuant to this act, whichever is earlier. If the limited liability company fails to designate a new registered agent within the 30-day period, the limited liability company shall thereafter be deemed to have no registered agent or registered office in this State, until the limited liability company files a certificate of change of address of registered office and registered agent indicating the new registered office and registered agent.

42:2B-47. Exercise of a member's rights upon death or ~~incompetence~~ mental incapacity

If a member who is an individual dies or a court of ~~competent jurisdiction~~ adjudges ~~him~~ the member ~~to be incompetent~~ lacking the mental capacity to manage ~~his~~ person or ~~his~~ property, the member's executor, administrator, guardian, conservator or other legal representative may exercise all of the member's rights for the purpose of settling ~~his~~ the member's estate or administering ~~his~~ the member's property, including any power under an operating agreement of an assignee to become a member and the power given to an assignee under subsection d. of section 46 of P.L.1993, c.210 (C.42:2B-46). If a

member is a corporation, trust or other entity and is dissolved or terminated, the powers of that member may, in addition to the powers given to an assignee under subsection d. of section 46 of P.L.1993, c.210 (C.42:2B-46), be exercised by its legal representative or successor.

COMMENT

The Commission recommends the change to the section's descriptor as underlined.

42:4-13. Dissolution authorized; application; order of dissolution

~~When~~ If a member of a partnership ~~has been or shall be adjudged a lunatic~~ is adjudicated mentally incapacitated, the court may ~~in an action and on application of any of the other~~ another partners or ~~such~~ other person as the court shall determine to be entitled to make the application, dissolve the partnership. The court may proceed in the action in a summary manner or otherwise.

42:4-14. Powers and duties of guardian in general

When a partnership is dissolved as provided by section 42:4-13 ~~of this Title, or is otherwise lawfully dissolved by due course of law, and a member thereof partner~~ has been or shall be adjudged a lunatic, adjudicated mentally incapacitated, the guardian of ~~such lunatic, the mentally incapacitated person~~ in the name and on behalf of his ward that partner, may ~~join and concur with the other members of the partnership partners~~ or other persons interested in disposing of all the partnership property, in such manner and upon such terms as the court may direct as directed by the court.

42:4-15. Conveyances by guardian; disposition of mental incompetent's share of partnership

The guardian mentioned in section 42:4-14 ~~of this Title~~ may make and execute all such conveyances and do all things necessary to effectuate the provisions of this article ~~as the court may direct. He shall and shall~~ also dispose of all money or property by him received for, from or on account of the lunatic's mentally incapacitated person's share or interest in the partnership as the court may direct.

Title 43:

43:15C-13. Disability benefit coverage payments; conditions upon payment; payments during rehabilitation; exclusions

a. The disability benefit coverage provided under a group policy or policies shall provide a monthly income if the participant becomes totally disabled from occupational or nonoccupational causes for a period of at least six consecutive months following the effective date of the coverage. The monthly disability benefit may be paid by the insurance company so long as the participant remains

disabled up to the ~~seventieth~~ 70th birthday, provided the disability commenced prior to the ~~sixtieth~~ 60th birthday. The benefit shall terminate when the participant is no longer considered totally disabled or begins to receive retirement benefits.

b. The participant shall be considered totally disabled if the participant is unable to perform each duty of the participant's occupation and is under the regular care of a physician. After the 24 months following the commencement of such disability benefit payments, the participant shall be unable to engage in any gainful occupation for which the participant is reasonably fitted by education, training or experience. Total disability shall not be considered to exist if the participant is gainfully employed. Following an agreement with the insurance company and the policyholder, the participant may continue to receive disability benefits for a limited time while performing some type of work. During the period of rehabilitation, the monthly benefit shall be the regular payment less 80% of the participant's earnings from such rehabilitative position.

c. A participant shall be deemed to be in service and covered by the disability benefit insurance provisions for a period of no more than six months while on official leave of absence without pay if satisfactory evidence is presented to the Division of Pensions and Benefits that such leave of absence without pay is due to illness and that the participant was not actively engaged in any gainful occupation during such period of leave of absence without pay.

d. Disability benefit insurance provisions of the group policy or policies shall not cover disability resulting from or contributed to by pregnancy, act of war, intentionally self-inflicted injury, or attempted suicide ~~whether or not sane~~ regardless of mental-capacity. For purposes of such disability benefit coverage, the participant shall not be considered to be disabled while the participant is imprisoned or while outside the United States, its territories or possessions, or Canada.

e. If the participant has recovered from the disability for which the member had received benefits and again becomes totally disabled while insured, the later disability shall be regarded as a continuation of the prior one unless the participant has returned to full-time covered employment for at least six months. If the later absence is due to an unrelated cause and the participant had returned to full-time work, it shall be considered a new disability. The disability benefit insurance cannot be converted to an individual policy.

f. No participant shall be covered by the disability benefit provision of the group policy or policies except upon the completion of one year of full-time continuous employment in a position eligible for participation in the Defined Contribution Retirement Program. For a member who is a participant pursuant to paragraph (5) of subsection a. of section 2 of P.L.2007, c.92 (C.43:15C-2) as amended by section 12 of P.L.2007, c.103, completion of one year of full-time continuous employment in a position eligible for membership in the Teachers' Pension and Annuity Fund or the Public Employees' Retirement System shall also be considered in determining if the participant met the requirements of this paragraph.

COMMENT

Subsections have been added for clarity.

Title 45:

45:14B-36. Disclosure authorization; contents

A valid authorization for the purpose of this act shall:

a. Be in writing;

b. Specify the nature of the information to be disclosed, the person authorized to disclose the information, to whom the information may be disclosed, the specific purposes for which the information may be used, both at the time of disclosure and at any time in the future;

c. Specify that the patient is aware of the statutory privilege accorded by section 28 of P.L. 1966, c. 282 (C. 45:14B-28) to confidential communications between a patient and a licensed psychologist;

d. State that the consent is subject to revocation at any time;

e. Be signed by the patient or the person authorizing the disclosure. If the patient is adjudicated ~~incompetent~~ mentally incapacitated or is deceased, the authorization shall be signed by the patient's legally authorized representative. When the patient is more than 14 years of age but has not yet reached the age of majority, the authorization shall be signed by the patient and by the patient's parent or legal guardian. When the patient is less than 14 years of age, the authorization shall be signed only by the patient's parent or legal guardian; and

f. Contain the date upon which the authorization was signed.

Title 47:

47:3-9. Removal and destruction of certain papers and records on file in offices of county clerks and registers of deeds and mortgages

Whenever papers of the character hereinafter as described herein have been on file in the office of any county clerk or register of deeds and mortgages for more than the number of years specified, the county clerk or register of deeds and mortgages, ~~as the case may be,~~ having charge thereof, may direct such the papers to be removed and destroyed ~~or the records therein otherwise effectively obliterated~~, subject, however, to the limitations imposed herein, ~~in respect to said papers.~~ The following ~~are the papers which~~ may be removed and destroyed ~~or the records therein effectively obliterated~~ pursuant to the provisions of this act:

(a) Admissions to the bar, notices of intention to apply for such admissions, after one year;

(b) Appeals, notices of from local criminal courts, and other papers incidental thereto, where such appeals were not heard and disposed of by specific court action, after five years;

(c) Bills of sale upon condition and other papers in the nature of conditional bills of sale, after six years; provided their expiration dates occurred prior to said six years; and further provided, if their expiration dates shall have been extended by the acts of the parties and notice of such acts shall have been given to the county recording officer, then after six years from their expiration dates as so extended; and further provided, that bills of sale under seal, after twenty-two years instead of after six years;

(d) Bonds given as bail and recognizances in connection with or in lieu of bail, and discharges of the same, after six years; provided notations thereof have been entered on the dockets;

(e) Bonds under orders of filiation, after twenty years;

(f) Certificates of authority filed by insurance and bonding companies, after six years;

(g) Chattel mortgages, after six years; provided their expiration dates occurred prior to said six years; and further provided, if their expiration dates shall have been extended by the acts of the parties and notice of such acts shall have been given to the county recording officer, then after six years from their expiration dates as so extended; and further provided, that chattel mortgages under seal, after twenty-two years instead of after six years;

(h) Contracts, plans and specifications for the construction of buildings and other structures except for public buildings, after ten years;

(i) Convictions of disorderly persons, after five years;

(j) Costs, bills of costs taxed by the clerk, both civil and criminal, after twenty years; provided notations thereof have been entered on the dockets;

(k) Depositions, which are not within the scope of any applicable court rule and which do not pertain to any pending court action or proceeding, after ten years;

(l) Delinquent municipal tax returns for real and personal property and discharges therefor, after twenty years;

(m) Elections returns, certificates of, and all other papers relating to elections, including primary petitions, returns for primary and general elections and statements of candidates' campaign managers and treasurers, after five years;

(n) Executions returned by the sheriff, both satisfied and unsatisfied, after twenty years; provided notations thereof have been entered on the dockets;

(o) Extradition papers including applications for writs of habeas corpus, except judgments thereon, after five years;

(p) Indictments, accusations, informations and complaints in the nature thereof, if nolle prossed, or if the defendant charged thereby has been convicted or acquitted, or if the court has otherwise disposed of the same, after five years;

(q) Inquests conducted by the coroners, and their reports, and other papers relating to sudden deaths, after ten years;

(r) Insolvency proceedings, assignments for the benefit of creditors, inventories in such proceedings, discharges of insolvents, and other papers relating or incidental to insolvency proceedings, after twenty years;

(s) Institutions and agencies, commitments other than in criminal or ~~lunacy~~ mental incapacity cases, reports and other papers relating to institutions and agencies, after thirty years;

(t) Judgment transcripts for docketing, after twenty years; provided notations thereof have been entered on the dockets;

(u) Judgments, satisfactions and discharges and releases of judgments, after twenty years; provided notations thereof have been entered on the dockets;

(v) Juries, lists of Grand and petit juries, and other papers relating to summoning, impaneling and the charging of such juries, after five years;

(w) Justices of the peace bonds, dockets, files and papers, after twenty years;

(x) Licenses for hunting, including applications, after two years;

(y) Lien notices and claims other than mechanics' lien claims, and other than lien notices or notices in the nature of lien notices filed by any State, county or municipal agency, after six years;

(z) Lists of causes for trial calendars, including notices of trial, after one year;

(aa) ~~Lunacy~~ Proceedings for commitments to psychiatric institutions including medical and other reports relating thereto, after thirty years;

(bb) Mechanics' lien and construction lien claims, notices of intention, notices of unpaid balance and right to file lien, stop notices and all papers relating to mechanics' lien and construction lien claims, other than proceedings and actions in the courts brought to enforce such lien claims, after six years;

(cc) Notary public certificates and qualifying papers, after five years;

(dd) Notices and other papers, authorized or required by law to be filed but not recorded and not involving title to real or personal property or to proceedings or actions in any court, after ten years;

(ee) Oaths of office of persons whose incumbency in office has ceased, after five years; provided the term of office of such person expired prior to said five years;

(ff) Permits to carry firearms, which have expired, including the applications therefor, after two years;

(gg) Prison records and reports and papers relating thereto, after five years;

(hh) Probation reports and papers relating thereto, after five years;

(ii) Referees' reports, not forming a part of the record of a proceeding or action in court, after six years;

The ~~said~~ several periods of time shall be computed from the date of the filing of ~~said~~ the papers.

The county clerk and the register of deeds and mortgages, ~~respectively, in his discretion,~~ may retain on file ~~in his office~~ any of ~~said~~ the papers as a part of the permanent records of such office.

Title 52:

[52:14-13. Insanity of state officer to vacate office

Whenever an officer of this state or a member of a state board or commission appears to be insane and is committed to an institution for the insane pursuant to law, the commission or appointment of such officer or member shall become vacated and void, and a vacancy shall thereupon exist in such office, the same as though the officer or member had resigned or died.]

COMMENT

This statute is anachronistic and therefore recommended for repeal.

52:4B-7. Hearings on appeals; procedural requirements

Hearings on appeals from decisions of the Victims of Crime Compensation Agency involving issues of victim compensation shall be conducted by the Victims of Crime Compensation Review Board in the following manner:

a. Upon an application made to the board under the provisions of P.L.1971, c.317, the board shall fix a time and place for a hearing on such application and shall cause notice thereof to be given to the applicant.

b. For the purpose of carrying out the provisions of P.L.1971, c.317, the board, or any member thereof, may hold such hearings, sit and act at such times and places, and take such testimony as the board or such member may deem advisable. Any member of the board may administer oaths or affirmations to witnesses. The board shall have full powers of subpoena and compulsion of attendance of witnesses and production of documents, except that no subpoena shall be issued except under the signature of a member of the board, and application to any court for aid in enforcing such subpoena may be made in the name of the board by any member thereof. Subpoenas shall be served by any person designated by the board.

c. In any case in which the person entitled to make an application is a child, the application may be made ~~on his behalf~~ by ~~his~~ the child's parent, guardian, or advocate. on the child's behalf. In any case in which the person entitled to make an application is mentally ~~incompetent~~ incapacitated, the application may be made on his the person's behalf by ~~his~~ guardian, advocate, or such other individual authorized to administer his the person's estate.

d. Any person having a substantial interest in a proceeding may appear, produce evidence and cross-examine witnesses in person or by ~~his~~ attorney.

e. The board may receive in evidence any statement, document, information, or matter that may in the opinion of the board contribute to its functions under P.L.1971, c.317, but the board shall not be bound by the rules of evidence.

f. If any person has been convicted of any offense with respect to an act or omission on which a claim under P.L.1971, c.317 is based, proof of that conviction shall be taken as conclusive evidence that the offense has been committed, unless an appeal or any proceeding with regard thereto is pending.

52:27G-21. Legislative findings and declarations

The Legislature finds and declares that private guardianship for an ~~incompetent-mentally incapacitated~~ elderly adult may not be feasible where there are no willing and responsible family members or friends to serve as guardian, that this act establishes a public guardianship program for elderly adults for the purpose of furnishing guardianship services to elderly persons at reduced or no cost when appropriate, and that this act intends to promote the general welfare by establishing a public guardianship system that permits elderly persons to determinatively participate as fully as possible in all decisions that affect them.

Title 54:

54:4-3.6. Exemption of property of nonprofit organizations

a. The following property shall be exempt from taxation under this chapter:

(1) All buildings actually used for colleges, schools, academies or seminaries, provided that if any portion of such buildings are leased to profit-making organizations or otherwise used for purposes which are not themselves exempt from taxation, said portion shall be subject to taxation and the remaining portion only shall be-exempt;

(2) aAll buildings actually used for historical societies, associations or exhibitions, when owned by the State, county or ~~any~~ political subdivision thereof or when located on land owned by an educational institution which derives its primary support from State revenue;

(3) aAll buildings actually and exclusively used for public libraries;

(4) All buildings actually and exclusively used for asylum hospitals, institutions or schools for feebleminded or idiotic mentally incapacitated persons and children;

(5) ~~a~~All buildings used exclusively by any association or corporation formed for the purpose and actually engaged in the work of preventing cruelty to animals;

(6) ~~a~~All buildings actually and exclusively used and owned by volunteer first-aid squads, ~~which squads are or shall be~~ incorporated as associations not for pecuniary profit;

(7) ~~a~~All buildings (i) actually used in the work of associations and corporations organized exclusively for the moral and mental improvement of men, women and children provided that if any portion of a building used for that purpose is leased to profit-making organizations or is otherwise used for purposes which are not themselves exempt from taxation, that portion shall be subject to taxation and the remaining portion only shall be exempt; and all buildings (ii) owned or held by an association or corporation created for the purpose of holding the title to such buildings as are actually and exclusively used in the work of two or more associations or corporations organized exclusively for the moral and mental improvement of men, women and children.

(8) ~~a~~All buildings (i) actually used in the work of associations and corporations organized exclusively for religious purposes, including religious worship, or charitable purposes, provided that if any portion of a building used for that purpose is leased to a profit-making organization or is otherwise used for purposes which are not themselves exempt from taxation, that portion shall be subject to taxation and the remaining portion shall be exempt from taxation, and provided further that if any portion of a building is used for a different exempt use by an exempt entity, that portion shall also be exempt from taxation; and all buildings (ii) owned by a corporation created under or otherwise subject to the provisions of Title 15 of the Revised Statutes or Title 15A of the New Jersey Statutes and actually and exclusively used in the work of one or more associations or corporations organized exclusively for charitable or religious purposes, which associations or corporations may or may not pay rent for the use of the premises or the portions of the premises used by them;

(9) ~~a~~All buildings actually used in the work of associations and corporations organized exclusively for hospital purposes, provided that if any portion of a building used for hospital purposes is leased to profit-making organizations or otherwise used for purposes which are not themselves exempt from taxation, that portion shall be subject to taxation and the remaining portion only shall be exempt; As used in this section, "hospital purposes" includes health care facilities for the elderly, such as nursing homes; residential health care facilities; assisted living residences; facilities with a Class C license pursuant to P.L. 1979, c. 496 (C.55:13B-1 et al.) the "Rooming and Boarding House Act of 1979", similar facilities that provide medical, nursing or personal care services to their residents; and that portion of the central administrative or

service facility of a continuing care retirement community that is reasonably allocable as a health care facility for the elderly;

~~all buildings owned or held by an association or corporation created for the purpose of holding the title to such buildings as are actually and exclusively used in the work of two or more associations or corporations organized exclusively for the moral and mental improvement of men, women and children.~~

~~all buildings owned by a corporation created under or otherwise subject to the provisions of Title 15 of the Revised Statutes or Title 15A of the New Jersey Statutes and actually and exclusively used in the work of one or more associations or corporations organized exclusively for charitable or religious purposes, which associations or corporations may or may not pay rent for the use of the premises or the portions of the premises used by them;~~

~~(10) the buildings, not exceeding No more than two buildings, actually occupied as a parsonage by the officiating clergymen of any religious corporation of this State, together with the accessory buildings located on the same premises;~~

b. With regard to the buildings specified in subsection a., the following shall be exempt from taxation:

~~(i)†The land, not to exceed five acres, upon which any of the buildings necessary for fair enjoyment thereof of the land are erected so long as the land is devoted to the purposes specified in subsection a. only; whereon any of the buildings hereinbefore mentioned are erected, and which may be necessary for the fair enjoyment thereof, and which is devoted to the purposes above mentioned and to no other purpose and does not exceed five acres in extent;~~

~~(ii)†The furniture and personal property in said such buildings if used in and devoted to for the purposes above mentioned in subsection a.;~~

c. a~~All property owned and used by any nonprofit corporation in connection with its curriculum, work, care, treatment and study of feebleminded, mentally retarded, developmentally disabled or idiotic or mentally incapacitated men, women, or children shall also be exempt from taxation, provided that such corporation conducts and maintains research or professional training facilities for the care and training of feebleminded, mentally retarded, or idiotic these men, women, or children;:-~~

d. The foregoing buildings, lands on which they stand, and the associations, corporations or institutions using and occupying them are exempt from taxation provided, in case of all the foregoing, that the buildings, or the lands on which they stand, or the associations, corporations or institutions using and occupying them as aforesaid, they are not used or conducted for profit, except that the exemption of the buildings and lands used for charitable, benevolent or religious purposes shall extend to cases where the charitable, benevolent or religious work therein carried on is supported partly by fees and charges received from or on behalf of beneficiaries using or occupying the buildings; provided so long as the building is wholly controlled by and the entire

income therefrom is used for ~~said~~ the charitable, benevolent or religious purposes.

e. ~~The foregoing exemption set forth in subsection d.~~ shall apply only where the association, corporation or institution claiming the exemption owns the property in question and is incorporated or organized under the laws of this State and authorized to carry out the purposes ~~on account of~~ for which the exemption is claimed or where an educational institution, as provided ~~herein~~ in this statute, has leased ~~said~~ the property to an historical society, or association, or to a corporation organized for such purposes and created under or otherwise subject to the provisions of Title 15 of the Revised Statutes or Title 15A of the New Jersey Statutes.

~~As used in this section "hospital purposes" includes health care facilities for the elderly, such as nursing homes; residential health care facilities; assisted living residences; facilities with a Class C license pursuant to P.L. 1979, c. 496 (C.55:13B-1 et al.), the "Rooming and Boarding House Act of 1979"; similar facilities that provide medical, nursing or personal care services to their residents; and that portion of the central administrative or service facility of a continuing care retirement community that is reasonably allocable as a health care facility for the elderly.~~

COMMENT

Subsections have been added for clarity.

54:5-84. Infants Minors and mental incompetents mentally incapacitated

If a delinquent owner or lienor ~~shall be,~~ is a minor or has been adjudicated mentally incapacitated ~~at the time of the~~ upon expiration of the time limited for the redemption of the real estate in which he ~~is interested~~ that person has an interest, an infant under the age of twenty-one years, or an idiot, or then shall have been ~~judicially adjudged a person of unsound mind,~~ the right to redeem shall not be barred by service of notice as provided in this article so long as ~~such impediment shall~~ the incapacity continues, but shall be barred only by an action to foreclose brought in the Superior Court.

COMMENT

The Commission recommends the change to the section's descriptor as underlined.

Title 59:

59:8-8. Time for presentation of claims

A claim relating to a cause of action for death or for injury or damage to person or to property shall be presented as provided in this chapter not later than the ~~ninetieth~~ 90th day after accrual of the cause of action. After the expiration of six months from the date notice of claim is received, the claimant may file suit in

an appropriate court of law. The claimant shall be forever barred from recovering against a public entity or public employee if:

a. ~~He~~ The claimant failed to file ~~his~~ the claim with the public entity within 90 days of accrual of ~~his~~ the claim except as otherwise provided in section 59:8-9; or

b. Two years have elapsed since the accrual of the claim; or

c. The claimant or ~~his~~ claimant's authorized representative entered into a settlement agreement with respect to the claim.

Nothing in this section shall prohibit ~~an infant or incompetent~~ a minor or mentally incapacitated person from commencing an action under this act within the time limitations contained herein, after ~~his coming to or being of full age reaching majority or sane mind~~ returning to mental capacity.



STATE OF NEW JERSEY

N J L R C

NEW JERSEY LAW REVISION COMMISSION

FINAL REPORT

Relating to

UNIFORM CHILD ABDUCTION PREVENTION ACT

December 2008

John M. Cannel, Esq., Executive Director
NEW JERSEY LAW REVISION COMMISSION
153 Halsey Street, 7th Fl., Box 47016
Newark, New Jersey 07101
973-648-4575
(Fax) 973-648-3123
Email: njlrc@njlrc.org
Web site: <http://www.njlrc.org>

UNIFORM CHILD ABDUCTION PREVENTION ACT

Introduction

In July of 2006, the National Conference of Commissioners on Uniform State Laws (NCCUSL) approved and recommended for enactment, the Uniform Child Abduction Prevention Act (UCAPA). Since then, the UCAPA has been enacted in only seven states: Nebraska, Utah, Kansas, South Dakota, Nevada, Colorado, and Louisiana, although bills incorporating some or all of the UCAPA are pending in at least ten more jurisdictions.¹

The UCAPA's stated purpose is to provide a mechanism for a court to impose child abduction prevention measures at any time, thereby deterring and preventing domestic and international abductions. Child abduction is defined as "wrongful removal" or "wrongful retention" of an unemancipated minor. The UCAPA was created to complement and enhance existing law, such as the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), the Parental Kidnapping Prevention Act (PKPA), and, with regard to international abduction, the Hague Convention on the Civil Aspects of International Child Abduction. As noted in the preface to the Original Text, the UCAPA is "premised on the general principle that preventing abduction is in a child's best interests."

Summary of Provisions of the UCAPA

The "Definitions" section of the UCAPA tracks as much as possible that of the UCCJEA. The UCAPA permits a court, on its own motion, to order abduction prevention measures if the court finds the evidence establishes a credible risk of abduction of the child. It also permits a party or anyone with the rights to seek a child-custody determination, to file a verified petition, in the court having jurisdiction to make a child custodial determination with respect to that child, for an order protecting the child from abduction. Provision exists for temporary emergency jurisdiction, in accordance with the UCCJEA, if the court finds a credible risk of abduction and for the prosecutor, or public authority with the power under the relevant state law, to seek a warrant to take physical custody of a child or other appropriate prevention measures.

In determining whether there is a credible risk of abduction of a child, the court may consider *any one or more* risk factors, including whether the petitioner or respondent has threatened to abduct the child, engaged in activities that may

¹Louisiana's version of the Uniform Law, though modeled on the UCAPA, is also restricted to international abductions. A few states such as Arkansas, California, Oregon and Texas address child abduction prevention in legislation pre-dating the completion of the UCAPA, although Texas is now considering adoption of the UCAPA. Other federal legislation also addresses other aspects of the problems encountered with missing and abducted children.

indicate a planned abduction (such as selling the primary residence, terminating a lease, abandoning employment), or engaged in domestic violence, stalking or child abuse. Petitioners may offer evidence of conduct not expressly mentioned in the UCAPA and courts are required to consider evidence regarding *both* the petitioner and the respondent when making determinations of the risks of abduction. However, the UCAPA does not discuss the weight the evidence is to be given.

The remainder of the UCAPA addresses the mechanics of the procedures to be implemented (duration of court orders, etc.), and the actual provisions required to be included in the court order. The measures and conditions a court may impose to prevent child abduction are within the discretion of the court so long as due consideration is given to custody and visitation rights of the parties, and the court considers the age of the child; potential harm to the child from the abduction; legal and practical difficulties of returning the child to the jurisdiction; and reasons for the potential abduction, including evidence of domestic violence, stalking, child abuse or neglect.

Concerns Regarding Adoption of the UCAPA

Criticism of the UCAPA has been expressed during the legislative hearings in states that considered its enactment. As a result, the versions of UCAPA enacted have been modified in significant respects. Some of the concerns raised in those legislative hearings as well as other concerns raised by careful review of the proposed Uniform Law are discussed briefly below.

One concern is that the initial draft, which sought to prevent the huge problem of international child abductions to those countries either not signatories of the Hague Treaty or non-complying signatories, should not have been expanded to include domestic abductions. Louisiana adopted a version of the UCAPA that applies exclusively to international adoptions. Other states have adopted similar laws.

Another concern is that some of the factors that the court may consider to determine whether a credible risk of abduction of a child exists, do not in and of themselves display evidence of such a risk. For example, obtaining a child's school records or birth certificate could be a simple exercise of parental responsibility rather than evidence of an abduction about to take place. Others argue that because certain risk factors are vague or ambiguous, all risk factors should be regrouped and prioritized into those factors that require immediate action and those that are merely contributing but not dispositive of abduction.

Section 8 includes measures to prevent abduction that some view as taking away fundamental liberties (such as the right to travel) and eliminating the presumption of innocence that even alleged criminal offenders now enjoy. Section 9 permits a court to issue an *ex parte* warrant to take physical custody of

the child if that court finds a credible risk that the child is imminently likely to be wrongfully removed. Some characterize the *ex parte* mechanism as a potential weapon for abuse of one spouse by the other. The opportunity for a hearing exists *only* if the respondent petitions for a hearing, the time frame for such a hearing (within the next judicial day unless a hearing on that date is impossible, in which event the court shall hold the hearing on the first judicial day possible) may be insufficient, and the warrant may be issued *even without a hearing*. Equally troubling, however, is language in Section 9 requiring that the warrant specifically direct “law enforcement officers to take physical custody of the child immediately” and “provide for the safe interim placement of the child pending further order of the court”. Although this directive mirrors language in the UCCJEA (§2A:34-85), the trauma of thrusting a very young child whose parent is the abductor into the hands of even the most concerned law enforcement officer may outweigh the benefit contemplated by the proposed provision.

Commission Recommendation

The Commission has considered the UCAPA but does not recommend its adoption. The UCAPA does not provide authority beyond the current powers of New Jersey judges in custody matters. The Commission did not address deficiencies in the Uniform Law or possible modifications to sections 7, 8 and 9 of the Official Text to correct them, concluding that the UCAPA is not necessary in light of the broad powers of the New Jersey chancery courts.

The New Jersey Constitution provides for the establishment and jurisdiction of the New Jersey Superior Court (see Article 6, §3, ¶¶1 and 2) and for division of the Superior Court into three distinct sections, including a Chancery Division, “which shall include a family part.” (see Article 6, §3, ¶3.) N.J.S. 2A:34-23 permits a court:

“to make such order as to the alimony or maintenance of the parties, and also as to the care, custody, education, and maintenance of the children, or any of them, as the circumstances of the parties and the nature of the case shall render fit, reasonable and just . . .”

Invoking these constitutional and statutory provisions, New Jersey courts have adopted the “best interests” standard in determining the needs and welfare of children in the State. See *Mayer v. Mayer*, 150 N.J. Super. 556, 562 (Ch. Div. 1977) (court has broad discretion in dealing with custody of the child while being aware that the welfare and happiness of the child is the controlling consideration.)

New Jersey courts exercise broad powers when the disputed issues concern children. See *Paterno v. Paterno*, 254 N.J. Super. 190, 193 (Ch. Div. 1991) (“Nowhere are the equitable powers of the Chancery Division more crucial than in the realm of child custody and visitation in post-matrimonial actions.”)

See also *Vannucchi v. Vannucchi*, 113 N.J. Super. 40 (App. Div. 1971), *certification denied*, 58 N.J. 163 (1971) (chancery division has authority under *parens patriae* jurisdiction to regulate custody which authority, firmly established in our jurisprudence, has its origin in the protection that is due to the incapacitated or helpless); and *Brown v. Parsons*, 136 N.J. Eq. 493 (E. & A. 1945) (chancery court's authority is so broad that where the welfare of the child so requires, permanent custody may be fixed even disregarding the legal rights of parents.)



STATE OF NEW JERSEY

N J L R C

NEW JERSEY LAW REVISION COMMISSION

Final Report

Relating to

Uniform Prudent Management of Institutional Funds Act

January 2008

John M. Cannel, Esq., Executive Director
NEW JERSEY LAW REVISION COMMISSION
153 Halsey Street, 7th Fl., Box 47016
Newark, New Jersey 07101
973-648-4575
(fax)973-648-3123
email: [njlr.org](mailto:njlrc@njlr.org)
web site: <http://www.njlrc.org>

Uniform Prudent Management of Institutional Funds Act

INTRODUCTION

The National Conference of Commissioners on Uniform State Laws (NCCUSL) promulgated the “Uniform Prudent Management of Institutional Funds Act” (UPMIFA) in 2006 recommending the Act for adoption in all states. The UPMIFA replaces and updates the 1972 Uniform Management of Institutional Funds Act (UMIFA) adopted in 47 states, including the State of New Jersey, effective 1975, and codified at *N.J.S.A. 15:18 et seq.* Thirteen States have adopted the UPMIFA and bills are presently pending in eight additional legislatures in 2007.¹ Pursuant to its statutory obligation, the NJLRC considers recommendations of NCCUSL.² Hence, the examination of the 2006 “Uniform Prudent Management of Institutional Funds Act” is within the purview of the functions of the Commission in reporting its recommendations to the Legislature. The Commission has reviewed and considered the Act and recommends that the Legislature enact the Official text of the Act, without adopting the optional provision contained in Section 4, subsection (d).³

Current New Jersey Law

The State of New Jersey adopted in 1975 the “Uniform Management of Institutional Funds Act” promulgated by NCCUSL in 1972. The case law reported under this statute is consistent with the principles of the UPMIFA. Consequently, if New Jersey were to adopt the 2006 Act, that adoption would not alter any case law. The adoption would change the language of the existing statute, but not to any detriment, and would improve the regulatory environment in which managers of charitable trusts operate to achieve the objectives of the funds. The UPMIFA incorporates prudential standards of money management consistent with modern portfolio theory of efficient markets and establishes a framework for money managers to obtain the highest returns for the funds subject to the overriding mandate of donor intent and to statutorily-defined prudent investment standards.

The Uniform Prudent Management of Institutional Funds Act

¹ See NCCUSL at http://www.nccusl.org/Update/uniformact_factsheets/uniformacts-fs-upmifa.asp.

² *N.J.S.A. 1:12A-8(c)* provides that the NJLRC shall: “Receive and consider suggestions and recommendations from the American Law Institute, the National Conference of Commissioners on Uniform State Laws, and other learned bodies and from judges, public officials, bar associations, members of the bar and from the public generally, for the improvement and modification of the general and permanent statutory law of the State, and to bring the law of this State, civil and criminal, and the administration thereof, into harmony with modern conceptions and conditions....”

³ Appendix I of the Tentative report contains the Official Text of the UPMIFA, with the deleted subsection (d) of section 4 marked by a strikethrough. Appendix II contains a NCCUSL developed comparison table of the two Acts.

The first question that arises is: why has NCCUSL decided to revise the earlier Act. The answer to that question requires a deviation into the historical development of law governing management of charities and endowments. In short, the law has not kept pace with market developments.

Brief History

“American charities manage substantial funds in conjunction with carrying out their charitable purposes, holding some funds for operating needs and others as endowments”.⁴ American universities, for example, manage endowment funds exceeding 100 billion. Given the sheer magnitude of assets under management, legal rules have developed gradually to provide a system of guidance for institutional money managers and Boards of Directors of charities.

Without repeating the historical backdrop of charities⁵, certain factors are salient to an understanding of the emergence of the UMIFA and its successor, the UPMIFA. Prior to the American Revolution, most charities were established as trusts under English law and trust law applied to them. Shortly thereafter, most charities were organized as non-profit corporations, though some charities continued to be organized as charitable trusts. This development produced an ambiguity as to which law applied to charities: trust law or corporate law. Courts often used a combination of these disciplines to resolve questions, although the dominant trend was to organize a charity as a non-profit corporation.

The problem of applying trust law to charities was its inherent conservatism. The “prudent man rule” required a trustee to invest trust property as the trustee would invest his own property. Consequently, to avoid an accusation of imprudence, trustees adopted conservative investment strategies, essentially investing in bonds and high dividend yielding stocks, and avoiding growth equities, regardless of whether that strategy best served the interests of the charity. In addition, accounting definitions of “income” and “principle” derived from trust law exacerbated matters. Expendable income covered only interest and dividends, and explicitly excluded capital gains. Conservative accounting principles hence began to dictate investment decisions ignoring the effects on conservation of the principal of the charitable corpus. As the

⁴ Susan N. Gary, *Charities, Endowments, and Donor Intent: The Uniform Prudent Management of Institutional Funds Act*, 41 Ga. L. Rev. 1277 (2007). Note that Professor Gary was the reporter for the UPMIFA. See also for empirical data about the growth of charitable funds under management, Garry W. Jenkins, *Incorporation Choice, Uniformity, and the Reform of NonProfit State Law*, 41 Ga. L. Rev. 1113 (2007)(substantiating the declarations made by Professor Gary, summarising uniform law developments in the area, and demonstrating that, unlike for-profit entities, the nonprofit sector does not forum shop for state of incorporation. Nonprofits virtually are all incorporated in the State where their activities are centered).

⁵ *Id.* at 1-4.

value of charities increased, this situation became untenable and led to the “Cary and Bright Study”.

That study delineated the defects of applying trust law to charitable corporations and laid the foundations for the development of the UMIFA. In short, the Cary and Bright Study found trust law inconsistent with modern portfolio management based on the theory of efficient markets.⁶ For example, trust law forbid delegation, restricted risk analysis on an asset-by-asset basis, thereby forbidding total-return investing, and established a standard of prudential performance inconsistent with the responsible management of charitable corporations and trusts.⁷ Hence, the UMIFA was developed, permitting investment on a total-return basis, expanding the range of portfolio management, revising the standard of care, and achieving state uniformity as attested by its adoption in 47 States and the District of Columbia.

Since 1972, legal developments in Trust Law, as demonstrated by the Uniform Prudent Investor Act⁸, and the 1987 Revised Model Non-profit Corporation Act (RMNCA), have caught up with, and surpassed, the concepts captured by the UMIFA.⁹ The UPIA modernised the standards guiding fiduciary investment decisions and implicitly applied to charities organised as non-profit corporations. In addition, the RMNCA articulated the duties a manager must follow in the management of a non-profit corporation. While these legal developments did not produce inconsistencies in the law between the UMIFA and the Prudent Investor Act, NCCUSL decided it was appropriate to update and modernize the provisions of the UMIFA.

Key Points of the UPMIFA

1. *Sphere of application.* The UPMIFA applies to most charitable trusts, except those managed by corporate trustees and individuals. Thus all trusts managed by bank trustees are excluded from the scope of the UPMIFA. The Act applies to institutions organized and operated exclusively for charitable purposes, broadly defined, and the term “institutions” includes charitable organizations created as non-profit corporations, unincorporated associations, governmental subdivisions and agencies, and “any other

⁶ The “efficient market” thesis states no more than that securities prices reflect all information and that their prices reflect their fair value.

⁷ The phrase “risk analysis on an asset-by-asset basis” reflects textbook theory on the relationship between risk and return. Risk is a measure of volatility or uncertainty of returns, while returns are the expected receipts or cash flows expected from any investment. *E.g.*, A.A. Gropelli, *Finance*, 76 (5th ed. 2006). Hence, the term “total return investing”.

⁸ New Jersey enacted the Prudent Investor Act in 1997 codified at *N.J.S.A.* 3B:20-11.1 et seq.

⁹ The New Jersey Non-profit Corporation Act, enacted in 1983, codified at *N.J.S.A.* 15A:1-1 *et seq.*, is not based on the 1987 Revised Model Non-profit Corporation Act. Rather, it is based on the then existing New Jersey Business Corporation Act, enacted in 1968 as expressly noted in *N.J.S.A.* 15A:1-1(c)(3). The current New Jersey Business Corporation Act was enacted in 1988, *N.J.S.A.* 14A:1-1 et seq. The Commission responsible for drafting the Revised New Jersey Business Corporation Act drew upon various sources to draft the statute, including the extant version of the Model Business Corporation. In any event the different derivation of New Jersey non-profit law does not impact the decision to adopt the UPMIFA.

form of entity” organized and operated exclusively for charitable purposes. *Result:* no change in coverage; however, it should be noted that the Drafting Committee considered expanding the scope to include funds held by all charities, a proposition ultimately rejected due to opposition by the American Bankers Association.¹⁰

2. *Standard of care.* Section 3 delineates the prudential standards applicable to managing and investing an intuitional fund. The Act gives primacy to the intent of the donor as expressed in the gift instrument. Subject to this intent, the institution is given broad discretion to appropriate and accumulate funds to carry out the purposes of the charity, provided the institution acts in “good faith” and “with the care that an ordinarily prudent person in a like position would exercise under similar circumstances”. Subsection (a) of Section (4) also sets forth a list of factors the institution is obligated to consider if relevant and thereby provides certain explicit guidelines for institutional management that the UMIFA did not contain. Portfolio managers are given freedom to invest in a broad range of assets consistent with modern portfolio theory. The standard is borrowed from the RMNCA. *Result:* clearer standards, more investment freedom.

The standard of care for trustees and members of any committee of a non-profit corporation established under New Jersey law is: “Trustees and members of any committee designated by the board shall discharge their duties in good faith and with that degree of diligence, care and skill which ordinary, prudent persons would exercise under similar circumstances in like positions”. *N.J.S.A.* 15A:6-14. This standard does not differ in any significant respect from the standard set forth for directors in the RMNCA. Section 8.30 of the Model Act, in pertinent part, provides, “A director shall discharge his or her duties as a director, including his or her duties as a member of a committee: (1) in good faith; (2) with the care an ordinarily prudent person in a like position would exercise under similar circumstances; and (3) in a manner the director reasonably believes to be in the best interests of the corporation.”¹¹

3. *Endowment Spending and the Historic Dollar Value Rule.* Section 2 of the UMIFA distinguishes between an “endowment fund” and an “institutional fund”. The distinction is extremely nuanced. An “endowment fund” is an institutional fund that under the terms of the gift instrument is not wholly expendable on current basis”. In practical terms, it is a restricted fund meaning that the trustees may not spend the principal of the

¹⁰ The bankers feared that, if a state did not adopt the Uniform Prudent Investment Act, the Uniform Principal and Income Act, and the Uniform Trust Code, a trustee might confront conflicting rules. The bankers also maintained that the retroactive application of UPMIFA had the potential to cause problems with trusts created under the UMIFA that did not apply to trusts with corporate trustees. Professor Gary at page 6 persuasively picks apart these arguments and suggests a state may wish to provide blanket coverage to all charitable trusts. New Jersey has adopted the Uniformed Principal and Income Act of 2001 codified at *N.J.S.A.* 3B:19A-35; and has adopted the Uniform Prudent Investor Act confided at *N.J.S.A.* 3B:20-11.1 to 11.12. New Jersey has not adopted the Uniform Trust Code.

¹¹ The standard set for directors and officers of a for-profit business corporation is set forth in *N.J.S.A.* 14A:6-1(2). It is a characterisation of the business judgment rule, that is, provided a director acts within his or her powers conferred by the articles of association, and acts in good faith in arriving at a decision, that decision is protected against a liability claim.

endowment, but only expend its appreciation, investing the principal to produce income and maintain the fund in perpetuity. Special rules for endowment funds are set forth in Section 4. The UMIFA permitted expenditures from the endowment fund provided the appreciation exceeded the historic dollar value of the fund at the time of contribution. If the current value of the fund fell below the HDV, investment managers were prohibited from spending any of the funds assets. The UPMIFA abolishes the historic dollar value rule for cogent reasons. Under UPMIFA, managers can spend an amount deemed prudent after consideration of donor intent that the fund continues indefinitely, the purposes of the fund, and relevant economic circumstances. The Official Comment to Section 4 provides, "The Drafting Committee concluded that eliminating historic dollar value and providing institutions with more discretion would not lead to depletion of endowment funds." Instead, the new policy enables institutional managers "to be responsive to short-term fluctuations in the value of the fund." Under this rule, with obligatory requirements still applicable, managers will make expenditure or accumulation decisions based on business cycles and pertinent economic data. *Result:* reasonable improvement away from statutorily fixed standard, but clear departure from existing law. The concern is to maintain purchasing power while allowing for making a distribution representing a reasonable spending rate.¹²

4. *Optional 7% rule of imprudence.* To rebut concerns that the abolition of the HDV rule would run contrary to donor intent in certain cases and lead to an acceleration of expenditure, the UPMIFA contains an optional rule in subsection (d) of section (4) establishing a presumption of imprudence if the fund spends more than 7% of its value in one year as the fund's value is measured over a three year rolling average period. The presumption is rebuttable. However, once triggered, the institution carries the burden of going forward to demonstrate that its decision was prudent as measured by the standard set forth in Section 4. The optional rule does not create a "safe harbour" rule for institutions. Even if the institution spends less than 7% of its value, as computed under the 3-year rolling average formula, the institution may be found to have acted imprudently. For example, the 7% figure includes management and administrative expenses that may be deemed too high, or the institution may be found to have violated the standards of Section 4 despite expenditures beneath the 7% ceiling. *Result:* State must choose; there are pros and cons to statutorily fixed limits.¹³ However, in the opinion of the Commission, the New Jersey State Legislature should avoid adoption of the mechanical rule of subsection (d) of Section 4. It is an anachronism deriving from the tradition of identifying "legally approved lists" of investments and spending limits applicable to charities and endowments, the very tradition the UPMIFA has rejected.

¹² *Note:* Legal and accounting rules often do not coincide. This is the case with the abolition of the HDV rule. Because no part of an endowment fund may be considered permanently restricted under accounting rules, the Financial Accounting Standard Board may wish to consider how it classifies gains. This question was beyond the scope of the NCCUSL project.

¹³ Professor Gary notes, "a prudence standard coupled with more detailed guidance ... [provides] the best rule to govern endowment spending". In addition, donor intent provisions, investment policies, and the rules of prudence set forth in the Act taken together are sufficient restraints on money managers.

5. *Delegation.* Section 5 provides that the institution may delegate to an “external agent” management and investment of the fund subject to donor restriction and to the standards of prudential management. The delegation provision incorporates the delegation rule found in Section 9 of the UPIA. Section 5 imposes duties of care and responsibility upon the agent, and permits cascading delegation, that is, a re-delegation is permitted for managers with special expertise in certain areas. *Result:* reasonable rule, given developments under UPIA and RMNCA.

6. *Cy pres and deviation.*¹⁴ The UMIFA provided for the release and modifications of restrictions on the fund. Section 6 of the UPMIFA follows this principle, but clarifies the application of cy pres. First, the donor may always release or modify a restriction contained in the gift instrument provided the decision is memorialised in a “record,” a defined UPMIFA term. In addition, the institution, upon application to a court, may request modification of a restriction, if the restriction: (1) “has become impracticable or wasteful [a UTC term], (2) impairs the management and investment of the fund, or (3) due to circumstances not anticipated by the donor, the modification shall promote the purposes of the fund. The Attorney General is notified of any action and has the right to be heard. Subsection (c) parallels subsection (b) but covers “a particular charitable purpose” as well as restriction. These rules conform to, and derive from, the Uniform Trust Act. However, under the UPMIFA, “modification due to unanticipated circumstances applies to administrative provisions, termed restrictions on management or investment, and not to restrictions on use”, that may be modified only by cy pres. Hence, the law creates three categories: (1) release, (2) deviation, and (3) cy pres.

An exception for a court action is permitted for a small and old fund defined as an institutional fund valued at less than \$25,000, more than 20 years old, the institution uses the fund’s property consistent with its intended purposes. Under the exception, the institution need only notify the Attorney General. The reasoning for the exception is that, given the size of the fund, it is impractical and wasteful to require a court proceeding. In any event, the Attorney General has supervisory powers. *Result:* clarification, with reasonable exception.

7. *Retroactivity.* The UPMIFA applies retroactively as well as prospectively.

Impact on New Jersey Law

Adoption of the UPMIFA does not produce an adverse effect on New Jersey Law. Reported litigation is sparse and that which is reported reveals that New Jersey law would be improved by adoption of the Act as providing improved clarity for the judiciary. New Jersey courts have considered three decisions related to the UMIFA: *Midlantic Nat. Bank v. Frank G. Thompson Foundation*, 170 N.J. Super. 128 (CH. 1979), *Johnson v. Johnson*, 212 N.J. Super. 368 (Ch. 1986), and the *Matter of Estate of Dickerson*, 193

¹⁴ The two terms often are interchangeable and difficult to distinguish.

N.J. Super. 353 (Ch. 1983). Nothing stated or held in these cases contradicts, or is inconsistent with, any principle contained in the UPMIFA. In the *Matter of Estate of Dickerson*, Rutgers University, the administrator of two privately funded trusts, challenged the legality of restrictions limiting scholarships to students intending to study for the Protestant Ministry. Joined by the Attorney General, Rutgers based its claims upon violations of the Establishment Clause, the New Jersey Constitution [Article 1, par. 5], and the Law Against Discrimination, *N.J.S.A. 10:5-1 et seq.* The court found that the restrictions did not violate the law. Since the UPMIFA does not preclude a release, cy pres or deviation action, the *Matter of Estate of Dickerson* is consistent with the approach of the revised UPMIFA. The court in *Midlantic* confirmed the right of delegation, that is, the non-profit corporation was not precluded from entering into a contract with the executor-bank for custodial and investment advice. It also confirmed the right of investment managers to recover reasonable compensation for their services, and distinguished between the standard of performance between charitable corporations and a trust for a charitable purpose. Consistent with the existing law of the UMIA, the court found that the appropriate standard was expressed in *N.J.S.A. 15:18-20* [a standard of ordinary business care and prudence], and was not expressed by any heightened standard of performance applicable to trustees under trust law. The case of *Johnson* involved a determination of whether the managers of a trust committed negligence in their administration of the endowment; the court found that the theory of portfolio management adopted by the administrators did not amount to a violation of their duty of care, though the fund underperformed benchmark indexes in certain years. Section 4 of the UPMIFA sets out clearly the standard by which to evaluate the conduct of the institution managing the trust, and therefore provides better guidance for the court should a court be faced with an argument similar to the one posed in *Johnson*. That standard does not conflict with New Jersey law governing non-profit entities. *N.J.S.A. 15A:6-14*. Consequently, adoption of the UPMIFA in New Jersey would not unsettle established law.

Conclusion

The New Jersey Law Revision Commission therefore recommends that the New Jersey Legislature adopt the Official Text of the Uniform Prudent Management of Institutional Funds Act, without adopting the optional subsection (d) provision of Section 4 and with select language amendments set forth in the draft submission, and recommends repeal of the Uniform Management of Institutional Funds Act.

UNIFORM PRUDENT MANAGEMENT OF INSTITUTIONAL FUNDS ACT

SECTION 1. SHORT TITLE. This act may be cited as the Uniform Prudent Management of Institutional Funds Act.

SECTION 2. DEFINITIONS. In this act:

(1) “Charitable purpose” means the relief of poverty, the advancement of education or religion, the promotion of health, the promotion of a governmental purpose, or any other purpose the achievement of which is beneficial to the community.

(2) “Endowment fund” means an institutional fund or part thereof that, under the terms of a gift instrument, is not wholly expendable by the institution on a current basis. The term does not include assets that an institution designates as an endowment fund for its own use.

(3) “Gift instrument” means a record or records, including an institutional solicitation, under which property is granted to, transferred to, or held by an institution as an institutional fund.

(4) “Institution” means:

(A) a person, other than an individual, organized and operated exclusively for charitable purposes;

(B) a government or governmental subdivision, agency, or instrumentality, to the extent that it holds funds exclusively for a charitable purpose; and

(C) a trust that had both charitable and noncharitable interests, after all noncharitable interests have terminated.

(5) "Institutional fund" means a fund held by an institution exclusively for charitable purposes. The term does not include:

(A) program-related assets;

(B) a fund held for an institution by a trustee that is not an institution; or

(C) a fund in which a beneficiary that is not an institution has an interest, other than an interest that could arise upon violation or failure of the purposes of the fund.

(6) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, for-profit corporation, non-profit corporation, government or governmental subdivision, agency, or instrumentality, or any other legal or commercial entity.

(7) "Program-related asset" means an asset held by an institution primarily to accomplish a charitable purpose of the institution and not primarily for investment.

(8) "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

Comment

Section 2(6) of the New Jersey Act differs from the Official Text in that the term “for-profit corporation” is substituted for the term “public corporation”, and that the term “non-profit corporation” is added in the definition of “person”.

SECTION 3. STANDARD OF CONDUCT IN MANAGING AND INVESTING INSTITUTIONAL FUND.

(a) Subject to the intent of a donor expressed in a gift instrument, an institution, in managing and investing an institutional fund, shall consider the charitable purposes of the institution and the purposes of the institutional fund.

(b) In addition to complying with the duty of loyalty imposed by law other than this [act], each person responsible for managing and investing an institutional fund shall manage and invest the fund in good faith and with the care an ordinarily prudent person in a like position would exercise under similar circumstances.

(c) In managing and investing an institutional fund, an institution:

(1) may incur only costs that are appropriate and reasonable in relation to the assets, the purposes of the institution, and the skills available to the institution; and

(2) shall make a reasonable effort to verify facts relevant to the management and investment of the fund.

(d) An institution may pool two or more institutional funds for purposes of management and investment.

(e) Except as otherwise provided by a gift instrument, the following rules apply:

(1) In managing and investing an institutional fund, the following factors, if relevant, must be considered:

- (A) general economic conditions;
- (B) the possible effect of inflation or deflation;
- (C) the expected tax consequences, if any, of investment decisions or strategies;
- (D) the role that each investment or course of action plays within the overall investment portfolio of the fund;
- (E) the expected total return from income and the appreciation of investments;
- (F) other resources of the institution;
- (G) the needs of the institution and the fund to make distributions and to preserve capital; and
- (H) an asset's special relationship or special value, if any, to the charitable purposes of the institution.

(2) Management and investment decisions about an individual asset must be made not in isolation but rather in the context of the institutional fund's portfolio of investments as a whole and as a part of an overall investment strategy having risk and return objectives reasonably suited to the fund and to the institution.

(3) Except as otherwise provided by law other than this [act], an institution may invest in any kind of property or type of investment consistent with this section.

(4) An institution shall diversify the investments of an institutional fund unless the institution reasonably determines that, because of special circumstances, the purposes of the fund are better served without diversification.

(5) Within a reasonable time after receiving property, an institution shall make and carry out decisions concerning the retention or disposition of the property or to rebalance a portfolio, in order to bring the institutional fund into compliance with the purposes, terms, and distribution requirements of the institution as necessary to meet other circumstances of the institution and the requirements of this act.

(6) A person that has special skills or expertise, or is selected in reliance upon the person's representation that the person has special skills or expertise, has a duty to use those skills or that expertise in managing and investing institutional funds.

SECTION 4. APPROPRIATION FOR EXPENDITURE OR ACCUMULATION OF ENDOWMENT FUND; RULES OF CONSTRUCTION.

(a) Subject to the intent of a donor expressed in the gift instrument , an institution may appropriate for expenditure or accumulate so much of an endowment fund as the institution determines is prudent for the uses, benefits, purposes, and duration for which the endowment fund is established. Unless stated otherwise in the gift instrument, the assets in an endowment fund are donor-restricted assets until appropriated for expenditure by the institution. In making a determination to appropriate or accumulate, the institution shall act in good faith, with the care that an ordinarily prudent person in a like position would

exercise under similar circumstances, and shall consider, if relevant, the following factors:

- (1) the duration and preservation of the endowment fund;
- (2) the purposes of the institution and the endowment fund;
- (3) general economic conditions;
- (4) the possible effect of inflation or deflation;
- (5) the expected total return from income and the appreciation of investments;
- (6) other resources of the institution; and
- (7) the investment policy of the institution.

(b) To limit the authority to appropriate for expenditure or accumulate under subsection (a), a gift instrument must specifically state the limitation.

(c) Terms in a gift instrument designating a gift as an endowment, or a direction or authorization in the gift instrument to use only “income”, “interest”, “dividends”, or “rents, issues, or profits”, or “to preserve the principal intact”, or words of similar import:

- (1) create an endowment fund of permanent duration unless other language in the gift instrument limits the duration or purpose of the fund; and
- (2) do not otherwise limit the authority to appropriate for expenditure or accumulate under subsection (a).

Comment

The New Jersey Act deletes subsection (d) and prior references to that subsection. The Commission decided that the 7% rule of imprudence was an anachronism deriving from outdated sources of law and was contrary to the

objectives of the Revised Uniform Prudent Management of Institutional Funds Act.

SECTION 5. DELEGATION OF MANAGEMENT AND INVESTMENT FUNCTIONS.

(a) Subject to any specific limitation set forth in a gift instrument or in law other than this act, an institution may delegate to an external agent the management and investment of an institutional fund to the extent that an institution could prudently delegate under the circumstances. An institution shall act in good faith, with the care that an ordinarily prudent person in a like position would exercise under similar circumstances, in:

(1) selecting an agent;

(2) establishing the scope and terms of the delegation, consistent with the purposes of the institution and the institutional fund; and

(3) periodically reviewing the agent's actions in order to monitor the agent's performance and compliance with the scope and terms of the delegation.

(b) In performing a delegated function, an agent owes a duty to the institution to exercise reasonable care to comply with the scope and terms of the delegation.

(c) An institution that complies with subsection (a) is not liable for the decisions or actions of an agent to which the function was delegated.

(d) By accepting delegation of a management or investment function from an institution that is subject to the laws of this state, an agent submits to the jurisdiction of the courts of this state in all proceedings arising from or related to the delegation or the performance of the delegated function.

(e) An institution may delegate management and investment functions to its committees, officers, or employees as authorized by law of this state other than this act.

SECTION 6. RELEASE OR MODIFICATION OF RESTRICTIONS ON MANAGEMENT, INVESTMENT, OR PURPOSE.

(a) An institution may release or modify, in whole or in part, a restriction contained in a gift instrument on the management, investment, or purpose of an institutional fund if the release or modification does not allow a fund to be used for a purpose other than a charitable purpose of the institution, and:

(1) The donor consents to the modification of the gift instrument in a record, or, if the donor is deceased, the surviving spouse of the donor consents to the modification of the gift instrument in a record, or

(2) The donor is deceased without a surviving spouse, the children of the donor unanimously consent in a record to the modification of the gift instrument.

(b) The court, upon application of an institution, may modify a restriction contained in a gift instrument regarding the management or investment of an institutional fund if the restriction has become impracticable or wasteful, if it impairs the management or investment of the fund, or if, because of circumstances not anticipated by the donor, a modification of a restriction will further the purposes of the fund. The institution shall give notice to the Attorney General in accordance with the rules of court of the application, and the Attorney

General must be given an opportunity to be heard. To the extent practicable, any modification must be made in accordance with the donor's probable intention.

(c) If a particular charitable purpose or a restriction contained in a gift instrument on the use of an institutional fund becomes unlawful, impracticable, impossible to achieve, or wasteful, the court, upon application of an institution, may modify the purpose of the fund or the restriction on the use of the fund in a manner consistent with the charitable purpose of the institution or charitable intent of donor. The institution shall give notice to the Attorney General of the application in accordance with the rules of court, and the Attorney General must be given an opportunity to be heard.

(d) An institution should release, in whole or in part, a restriction contained in the gift instrument without application to the court, if: (1) an institution determines that a restriction contained in a gift instrument on the management, investment, or purpose of an institutional fund is unlawful, impracticable, impossible to achieve, or wasteful, (2) the institutional fund subject to the restriction has a total value less than \$100,000, (3) the institution will use the property in a manner consistent with the charitable purposes of the institution or charitable intent of the donor, and (4) the institution gives 60 days notice by certified mail to the Attorney General and any charity that is a contingent beneficiary named in the gift instrument.

Comment

Subsection (a) deviates from the Official Text by providing an option for the surviving spouse of the donor, or if deceased, the surviving children of the donor, to consent to a modification of the gift instrument in a record under the

circumstances set forth in that subsection. Subsection (b) and (c) clarify that an institution provides notice to the Attorney General in accordance with New Jersey Court Rules. Subsection (d) is rewritten for clarity and enlarges the scope of the exception for modification on notice alone by increasing the value of the fund to \$100,000 from \$25,000. Subsection (d) also specifies that notice is to be sent by certified mail to the Attorney General and to any charity that is a named contingent beneficiary in the gift instrument.

SECTION 7. REVIEWING COMPLIANCE. Compliance with this [act] is determined in light of the facts and circumstances existing at the time a decision is made or action is taken, and not by hindsight.

SECTION 8. APPLICATION TO EXISTING INSTITUTIONAL FUNDS. This act applies to institutional funds existing on or established after the effective date of this act. As applied to institutional funds existing on the effective date of this act this act governs only decisions made or actions taken on or after that date.

SECTION 9. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT. This act modifies, limits, and supersedes the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001 et seq., but does not modify, limit, or supersede Section 101 of that act, 15 U.S.C. Section 7001(a), or authorize electronic delivery of any of the notices described in Section 103 of that act, 15 U.S.C. Section 7003(b).

SECTION 10. UNIFORMITY OF APPLICATION AND CONSTRUCTION. In applying and construing this uniform act, consideration shall be given to the

need to promote uniformity of the law with respect to its subject matter among states that enact it.

SECTION 11. EFFECTIVE DATE. This act takes effect

SECTION 12. REPEAL. The following acts and parts of acts are repealed:

(a) The Uniform Management of Institutional Funds Act, N.J.S. 15:18 *et seq.*



STATE OF NEW JERSEY

N J L R C

NEW JERSEY LAW REVISION COMMISSION

FINAL REPORT

Relating to

UNIFORM TRADE SECRETS ACT

December 2008

John M. Cannel, Esq., Executive Director
NEW JERSEY LAW REVISION COMMISSION
153 Halsey Street, 7th Fl., Box 47016
Newark, New Jersey 07101
973-648-4575
(Fax) 973-648-3123
Email: njlrc@njlrc.org
Web site: <http://www.njlrc.org>

UNIFORM TRADE SECRETS ACT

Introduction

In 1969, the National Conference of Commissioners on Uniform State Laws (NCCUSL) organized a special committee to develop a uniform trade secrets act, relying heavily upon the definition of “trade secret” from the Restatement of Torts (First). At that time, state statutes that protected trade secrets emphasized keeping innovations secret, but the federal patent law encouraged public disclosure of innovations. An impetus for creating a uniform law was the patent bar’s effort to resolve this dichotomy.

The Uniform Trade Secrets Act (UTSA) was approved by NCCUSL in 1979 and recommended for adoption in all states. It was amended in 1985 to further clarify the intent of the 1979 official text.¹ The UTSA codifies the basic principles of common law trade secret protection, preserving the essential distinctions from patent law and the remedies for trade secret misappropriation as developed in case law. State trade secret law, notwithstanding its commercial importance, had up to that point evolved in an uneven manner. States that were commercial centers generated more reported decisions than did states that were less populous and more agricultural. Uniform trade secret protection was deemed necessary because of the uncertainty concerning the parameters of trade secret protection and the appropriate remedies for misappropriation.

The UTSA provides a cause of action for actual or threatened misappropriation of trade secrets. It permits the imposition of injunctive relief in order to eliminate the commercial advantage that otherwise would be derived from the misappropriation. It also provides an award of damages that includes actual loss and unjust enrichment for misappropriation that is not taken into account in computing actual loss. Punitive damages, in an amount not exceeding twice any damage award, are recoverable for willful and malicious misappropriation. Attorney’s fees are also recoverable.

The Restatement of Torts (First) definition of “trade secret” required that a trade secret be “continuously used in one’s business”. The definition ultimately adopted in the UTSA extends protection to a plaintiff who has not yet had an opportunity or acquired the means to put a trade secret to use. “Trade secret” is generally defined as information that derives economic value, actual or potential, from its proprietary nature and is the subject of reasonable efforts to maintain its secrecy.

Misappropriation includes acquisition of a trade secret by a person who knows or has reason to know it was acquired by “improper means” as well as disclosure or use of it without consent by a person who uses “improper means.”

¹ The 1985 amendment modified the sections on damages, injunctive relief, the effect on other law and the effective date of the act.

Misappropriation also includes other conduct relating to the perpetrator's knowledge of the secrecy or duty to maintain the secrecy of the trade secret.

The UTSA provides for a three year statute of limitations and permits the grant of protective orders and other discovery protections.

The UTSA has been adopted in 47 jurisdictions: the District of Columbia, and every state except for New Jersey, New York, Massachusetts and Texas.² Many of those jurisdictions have adopted the Uniform Act with modifications, some quite significant. Upon review and consideration, the Commission recommends that the Legislature enact the 1985 UTSA with several modifications, as set forth below.

Current New Jersey Law

Trade secrets misappropriation law in New Jersey dates back to the early 1900s. No single definition of trade secret exists in New Jersey case law; thus, our courts often look to the factors set forth in the Restatement of Torts (First) to determine whether information constitutes a trade secret.

A New Jersey plaintiff generally must establish six elements to support a claim of misappropriation of trade secrets under state law, including (1) that a trade secret exists; (2) that the secret was communicated by plaintiff to a third party in confidence; (3) that the secret was disclosed by the third party to another in breach of such confidence; (4) that the secret was acquired by a competitor with knowledge of the breach of confidence; (5) that the secret was used by a competitor to the detriment of the plaintiff; and (6) that the plaintiff took precautions to maintain the secrecy of the trade secret.

In New Jersey, however, courts have held that information need not rise to the level of a trade secret to be protected. The key to determining whether information is protectable, as determined in *Lamorte Burns & Co., Inc. v. Walters*, 167 N.J. 285 (2001), is the relationship of the parties at the time of disclosure and the intended use of the information. The common law rule articulated in *Lamorte* has expanded New Jersey trade secrets misappropriation law.

New Jersey also has adopted court rule 4:10-3(g), pursuant to which parties to litigation may seek to limit the disclosure of a trade secret or other confidential research, development or commercial information, including, as developed through case law, the limiting of access to attorneys and experts only.

² Texas has a well-developed common law tradition, also derived from the Restatement of Torts (First), but no civil statute. Massachusetts regulates the embezzlement, stealing and unlawful taking away, carrying away, copying or obtaining by fraud or deception of any trade secret. Bills to adopt the UTSA were introduced in the New York Senate and Assembly as recently as January 2008.

Modifications to the Uniform Act

In reviewing the UTSA, the Commission considered New Jersey's rich common law trade secret and related jurisprudence. Included in this jurisprudence is a common law definition of "improper means" which is not fully reflected in the Uniform Act definition. The Commission also examined the manner in which other jurisdictions had modified the Uniform Act, particularly the definition of "trade secret" and the provision for attorney's fees, in the context of our State's well-established jurisprudence.

As a result, the Commission modifies the Official Text definitions of "improper means", "misappropriation" and "trade secret" and adds two new definitions derived from the comments to the Uniform Act, one for "proper means" and the other for "reverse engineering." The Commission also revises section 4 of the UTSA, Attorney's Fees, to include the award of costs and fees for the service of expert witnesses. A definition of "bad faith" is also added to this section. Section 5, Preservation of Secrecy, now references R. 4:10-3(g) of the Rules Governing the Courts of the State of New Jersey. Section 7, Effect on Other Law, is altered to make the language consistent with other New Jersey statutory language, now providing for a cumulative remedy unless rights or remedies are specifically superseded.

The proposed legislation is numbered beginning with 56:14-1 *et seq.*, since placement of the act at the end of Title 56 of the New Jersey Statutes, which pertains to Trade Names, Trade-Marks and Unfair Trade Practices, seems appropriate. A comment appears after each section.

56:14-1. Short title.

This ~~{Aact}~~ shall be known and may be cited as the ~~Uniform~~ New Jersey Trade Secrets Act.

COMMENT

This section appears near the end of the Uniform Act as section 9. In the revision, the Commission moved the section to the beginning of the statute in keeping with customary New Jersey statutory practice. All subsequent sections were renumbered accordingly. This section also names the law the New Jersey Trade Secrets Act because the modifications made to the Uniform Act are very specific to New Jersey common law trade secret practice.

56:14-2. Definitions.

As used in this ~~[Aact]~~, unless the context requires otherwise:

(1) "Improper means" includes theft, bribery, misrepresentation, breach or inducement of a breach of a an express or implied duty to maintain the secrecy of or to limit the use or disclosure of a trade secret, or espionage through electronic or other means, access that is unauthorized or exceeds the scope of

authorization, or other means violative of a person's rights under the law of this State;

(2) "Misappropriation" ~~means~~ is defined as:

(i) acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means; or

(ii) disclosure or use of a trade secret of another without express or implied consent of the trade secret owner by a person who

(A) used improper means to acquire knowledge of the trade secret; or

(B) at the time of disclosure or use, knew or had reason to know that ~~his~~ the knowledge of the trade secret was derived or acquired through improper means; or

~~(I) derived from or through a person who had utilized improper means to acquire it;~~

~~(II) acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use; or~~

~~(III) derived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use; or~~

(C) before a material change of ~~his [or her]~~ position, knew or had reason to know that it was a trade secret and that knowledge of it had been acquired ~~by accident or mistake~~ through improper means.

(3) "Person" ~~means~~ is defined as a natural person, corporation, business trust, estate, trust, partnership, association, joint venture, government, governmental subdivision or agency, or any other legal or commercial entity.

(4) "Proper means" includes discovery by independent invention, discovery by reverse engineering, discovery under a license from the owner of the trade secret, observation of the information in public use or on public display, obtaining the trade secret from published literature, or discovery or observation by any other means that is not improper. A person who misappropriates a trade secret may not use as a defense to the misappropriation that proper means to acquire the trade secret existed at the time of the misappropriation.

(5) "Reverse engineering" is defined as the process of starting with the known product and working backward to find the method by which it was developed so long as the acquisition of the known product was lawful or from sources having the legal right to convey it, such as the purchase of the item on the open market.

(6) "Trade secret" ~~means~~ is defined as information, held by one or more people, without regard to form, including a formula, pattern, business data, compilation, program, device, method, technique, design, diagram, drawing, invention, plan, procedure, prototype or process, that:

(i) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and

(ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

COMMENT

This section differs from the Uniform Act in several ways. The Commission expanded the definition of “improper means” to reflect its broader definition in New Jersey common law. “Improper means” now also includes conduct previously made part of the Uniform Act definition of “misappropriation”. The definition of “misappropriation” is accordingly modified. Definitions of “proper means” and “reverse engineering” based, in part, on the comments section to the Official Text of the Uniform Act are added. The definition of “trade secret” is transformed, using a conglomeration of several other state-modified definitions and including additional information not in the Official Text. Finally, in the Official Text, the definitions section appears at the beginning. Here, it has been placed after the title section.

56:14-3. Injunctive relief.

a. Actual or threatened misappropriation may be enjoined. Upon application to the court, an injunction shall be terminated when the trade secret has ceased to exist, but the injunction may be continued for an additional reasonable period of time in order to eliminate commercial advantage that otherwise would be derived from the misappropriation.

b. In exceptional circumstances, an injunction may condition future use upon payment of a reasonable royalty for no longer than the period of time for which use could have been prohibited. Exceptional circumstances include, but are not limited to, a material and prejudicial change of position prior to acquiring knowledge or reason to know of misappropriation that renders a prohibitive injunction inequitable.

c. In appropriate circumstances, affirmative acts to protect a trade secret may be compelled by court order.

COMMENT

This section adopts the Official Text of the Uniform Act except for numbering. This section is numbered section 2 in the Official Text.

56:14-4. Damages.

a. Except to the extent that circumstances including a material and prejudicial change of position prior to acquiring knowledge or reason to know of misappropriation renders a monetary recovery inequitable, a complainant is entitled to recover damages for misappropriation. Damages can include both the actual loss caused by misappropriation and the unjust enrichment caused by

misappropriation that is not taken into account in computing actual loss. In lieu of damages measured by any other methods, the damages caused by misappropriation may be measured by imposition of liability for a reasonable royalty for a misappropriator's unauthorized disclosure or use of a trade secret.

b. If willful and malicious misappropriation exists, the court may award exemplary damages in an amount not exceeding twice any award made under subsection (a).

COMMENT

This section adopts the Official Text of the Uniform Act except for minor word modification in subsection a., removal of parentheses around the reference to subsection a. in subsection b., and renumbering. This section is numbered section 3 in the Official Text.

56:14-5. Attorney's fees.

~~If (i) a claim of misappropriation is made in bad faith, (ii) a motion to terminate an injunction is made or resisted in bad faith, or (iii) willful and malicious misappropriation exists, the court may award reasonable attorney's fees to the prevailing party.~~

The court may award to the prevailing party reasonable attorney's fees and costs, including a reasonable sum to cover the service of expert witnesses, if (i) willful and malicious misappropriation exists, (ii) a claim of misappropriation is made in bad faith, or (iii) a motion to terminate an injunction is made or resisted in bad faith. For purposes of this section, "bad faith" is that which is undertaken or continued solely to harass or maliciously injure another, or to delay or prolong the resolution of the litigation, or that which is without any reasonable basis in fact or law and not capable of support by a good faith argument for an extension, modification or reversal of existing law.

COMMENT

This section adopts the Official Text of the Uniform Act but reverses the order of the paragraph and clarifies language. A definition of "bad faith" is also added to this section, similar to the proposed pending bills in New York, as is the inclusion of costs and expert witness fees, similar to California's law. This section is numbered 4 in the Official Text.

56:14-6. Preservation of secrecy.

In an action under this ~~[Act]~~, a court shall preserve the secrecy of an alleged trade secret by reasonable means, ~~which may include~~ There shall be a presumption in favor of granting protective orders in connection with discovery proceedings, in accordance with R. 4:10-3 (g), which may include provisions limiting access to confidential information to only the attorneys for the parties and their experts, holding in-camera hearings, sealing the records of the action, and ordering any person involved in the litigation not to disclose an alleged trade secret without prior court approval.

COMMENT

The Commission added language to link this provision to existing New Jersey law pertaining to protective orders set forth in R. 4:10-3 of the Rules Governing the Courts of the State of New Jersey. This section is numbered 5 in the Official Text.

56:14-7. Statute of limitations.

An action for misappropriation must be brought within 3 years after the misappropriation is discovered or by the exercise of reasonable diligence should have been discovered. For the purposes of this section, a continuing misappropriation constitutes a single claim.

COMMENT

This section adopts the Official Text of the Uniform Act except for numbering. This section is numbered section 6 in the Official Text.

56:14-8. Effect on other law.

~~(a) Except as provided in subsection (b), this [Act] displaces conflicting tort, restitutionary, and other law of this State providing civil remedies for misappropriation of a trade secret~~

~~(b) This [Act] does not effect:~~

~~(1) contractual remedies, whether or not based upon misappropriation of a trade secret;~~

~~(2) other civil remedies that are not based upon misappropriation of a trade secret; or~~

~~(3) criminal remedies, whether or not based upon misappropriation of a trade secret.~~

a. The rights, remedies and prohibitions accorded by the provisions of this act are hereby declared to be in addition to and cumulative of any other right, remedy or prohibition accorded by the common law or statutes of this State and nothing contained herein shall be construed to deny, abrogate or impair any such common law or statutory right, remedy or prohibition except as expressly superseded in subsection b.

b. This act shall supersede conflicting tort, restitutionary, and other law of this State providing civil remedies for misappropriation of a trade secret.

c. In any action for misappropriation of a trade secret brought against a public entity or public employee, the provisions of the "New Jersey Tort Claims Act" (N.J.S. 59:1-1 et seq.) shall also supersede any conflicting provisions of this act.

COMMENT

The Commission added new subsections a. and b. to provide for a cumulative remedy except as specifically superseded, thereby making the

language consistent with statutory construction in other New Jersey statutes. This section is also numbered 7 in the Official Text.

56:14-9. Uniformity of application and construction.

This {Aact} shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this {Aact} among states enacting it.

COMMENT

This section adopts the Official Text of the Uniform Act except for minor changes as noted and numbering. This section is numbered section 8 in the Official Text.

56:14-10. Severability.

If any provision of this {Aact} or its application to any person or circumstances is held invalid, the invalidity does not affect other provisions or applications of the {Aact} which can be given effect without the invalid provision or application, and to this end the provisions of this {Aact} are severable.

COMMENT

This section adopts the Official Text of the Uniform Act with minor changes as noted.

56:14-11. Time of taking effect.

This {Aact} takes effect on _____ and does not apply to misappropriation occurring prior to the effective date. With respect to a continuing misappropriation that began prior to the effective date, the {Aact} also does not apply to the continuing misappropriation that occurs after the effective date.

COMMENT

This section adopts the Official Text of the Uniform Act with minor changes as noted.

56:14-12. Repeal. [deleted]

~~The following Acts and parts of Acts are repealed:~~

COMMENT

This section is deleted as no acts or parts of acts are repealed by the adoption of the Uniform Act in New Jersey.



STATE OF NEW JERSEY
NEW JERSEY LAW REVISION COMMISSION

FINAL REPORT

Relating to

UNIFORM TRUST CODE

June 9, 2008

Current as of December 5, 2008

John M. Cannel, Esq., Executive Director
NEW JERSEY LAW REVISION COMMISSION
153 Halsey Street, 7th Fl., Box 47016
Newark, New Jersey 07101
973-648-4575
(Fax) 973-648-3123
Email: njlrc@njlrc.org
Web site: <http://www.njlrc.org>

THE UNIFORM TRUST CODE

INTRODUCTION

The Uniform Trust Code (2000 version) [UTC 2000, rev'd and am'd 2005] was the product of several years of drafting and was motivated by the objective of providing a comprehensive Trust Code for all states, as it was the view of several prominent bodies that the law of trusts was thin in some states, non-uniform in certain matters, and scattered throughout statutory law. The UTC 2000 primarily was modelled upon the California Trust Code, deemed the best state codification of trust law, and the Restatement (3rd) of Trusts. Twenty-one states have enacted UTC 2000.¹ New Jersey has not adopted the Act. Since 2000, the UTC has undergone several revisions and amendments. The current version is the amended and revised UTC 2005.

This Final Report and Recommendations is set forth in two parts. The First Part is a general description based on a reading of the Official Text and secondary literature. It highlights main features of UTC 2005 that the drafters, the reporter and expert commentary deemed significant changes from the predecessor statute. The UTC Official Text and its commentary run 179 pages.

The Second Part of this Final Report and Recommendations summarises the work of the New Jersey *ad hoc* Committee on the Uniform Trust Code.² The Committee is comprised of New Jersey's leading experts in the field of Trusts and Probates. During a several year period, the Committee studied the Official Text, modified Official Text language, deleted non-conforming sections, repealed New Jersey law rendered obsolete by the Uniform Trust Code, and prepared a summary of their changes that is reproduced here.

In addition, the Committee has worked with the Office of Legislative Services, and the New Jersey version is prepared in bill form to the satisfaction of the Committee. The New Jersey Law Revision Commission has been informed of the activities of the *ad hoc* Committee, has reviewed the Draft Final Bill and endorses without reservation or qualification the work product of the *ad hoc* Committee. Consequently, the New Jersey Law Revision Commission recommends that the New Jersey Legislature enact the New Jersey Uniform Trust Code.

Part One: General Description

¹ Data based on information obtained from the "The National Conference of Commissioners on Uniform State Laws" website last visited June 9, 2008, found at http://www.nccusl.org/Update/uniformact_factsheets/uniformacts-fs-utc2000.asp. There are four 2008 introductions.

² The members of the *ad hoc* Committee are: Richard Lert (Chair), Michael Backer, Andrew DeMaio, Glenn Henkel, Richard Kahn, Robert Pless, Warren Racusin, and Jordan Weitberg.

Select Background Issues of UTC 2000

1. Drafting Process. The drafting committee consisted of the Uniform Law Commissioners; the reporter was David M. English, the W.F. Fratcher Missouri Endowed Professor of Law at the University of Missouri-Columbia. Major groups participating in the process included: the American Bar Association; the American College of Trust and Estate Counsel; the American Bankers Association; and the California and Colorado State bars.

2. Reasons for the Code. The main reason was the growing use of trusts, particularly in the estate planning area but also developments of commercial trusts, and the recognition that state law taken as a whole was too thin to support the structure of trusts. While the primary source of trust law in most states is the Restatement of Trusts, the drafting committee found gaps in the law and failure to provide guidance on several practical issues. In addition, there are uniform related uniform acts that, if adopted, may be repealed and/or integrated, if a state were to adopt the UTC.

3. Related Uniform Acts. Examples of related Uniform Acts on trusts and related subjects are:

- Uniform Prudent Investor Act
- Uniform Probate Code [Article VII would be repealed]
- Uniform Trustee Powers Act
- Uniform Common Trust Fund Act
- Uniform Custodial Trust Act
- Uniform Management of Institutional Funds Act
- Uniform Principal and Income Act
- Uniform Statutory Rule Against Perpetuities
- Uniform Testamentary Additions to Trusts Act

New Jersey has adopted several of the above: Uniform Prudent Investor Act, Uniform Probate Code, Uniform Management of Institutional Funds Act, Uniform Principal and Income Act, and the Uniform Statutory Rules against Perpetuities. In addition, New Jersey statutory law on trusts and related subjects is enormous. Therefore, a careful examination of how the UTC would affect New Jersey Law is a major undertaking, and will require substantial study and time.

4. Relationship to the Restatement of Trusts. The UTC 2000 was drafted in close coordination with the Restatement (3rd) of Trusts and with the revision of the restatement of Property: Wills and Donative Transfers. Consequently, the UTC 2000 may be described loosely as a codification of a majority of provisions of the Restatement. In the view of the Reporter, this procedure is superior to the Restatement, as it is binding law if enacted in the state and provides clarity to practitioners in the field. Having said this, the UTC 2000 does not displace the common law of trusts but supplements it.

Select Key Issues of UTC 2000

1. Scope. The UTC 2000 applies only to express trusts and does not apply to constructive trusts or other judicially crafted trusts that are not express trusts. An express trust is a trust created by the express intention of a settler having the capacity to create that trust and having adequate property interests to fund it. The purpose may be charitable or noncharitable. § 102. Also see § 401 for methods of creating trust. An interesting question raised by the UTC, as it applies to commercial trusts, is whether a trust is a gratuitous transfer or a business deal, that is, a contract. Charitable trusts certainly are donative transfers [gifts], but the varieties of commercial trusts do not fall within that category.³ Examples of commercial trusts are pension trusts, investment trusts [mutual funds], real estate investment trusts [REITS], oil and gas royalty trusts and asset securitization. A 1997 estimate states that more than 90% of money held in trust in the United States is held in commercial trusts as opposed to personal trusts.⁴

2. Default Provisions. The entire UTC 2000 consists of default statutory provisions that may be overridden by the Trust instrument. The only exceptions for mandatory rules are set forth in § 105. They are:

- The requirements for creating a trust
- The rights of third parties in their dealings with the trustees
- The power of the court to take certain actions, such as to remove a trustee
- The trustee's obligation act in good faith, in accordance with the purpose of the trust, and to administer the trust for the benefit of the beneficiaries
- Limits on the settlor's ability to waive the duty to keep beneficiaries informed of the existence and on the administration of the trust

3. Nonjudicial Settlement Agreements. UTC 2000 encourages out of court settlement of contests. "Interested Persons" may by unanimous consent enter into binding agreements covering a range of matters that a court would have the power to approve. The list of issues set forth in § 111(d) that may be resolved is non-exhaustive. For example, "interested persons" may determine the interpretation or construction of trust terms; transfer the trust's principal place of administration; and determine the resignation or appointment of a trustee. These Nonjudicial settlements raise the question of representation as sometimes beneficiaries may be incapacitated, not yet born or unascertained. To resolve this problem, the UTC 2000 has incorporated doctrines of virtual representation [a not yet born beneficiary represented by another beneficiary with a similar interest], representation by fiduciaries, and appointment of a guardian ad litem. § 303 deal with representation issues.

4. Principal Place of Administration. This issue is important as it affects which state's income tax applies to the trust and determines which court has primary jurisdiction over

³ Excluded also from the ambit of commercial trusts are the stream of governmentally created "trusts", the deed of trust to transfer real property, and reference to trusts in bankruptcy proceedings.

⁴ John H. Langbeinn, *The Secret Life of The Trust: The Trust as an Instrument of Commerce*, 107 Yale L.J. 165, 166 (1997)

the trust. The problem arises in the context of trustees, advisors, operation facilities being located in different jurisdictions. UTC § 108(a) takes the view that a provision in the trust designating the place of administration is valid provided the trustee's principal place of business is located in the designated jurisdiction, or a trustee is a resident of the designated jurisdiction, or all or part of the trust's administration occurs in the designated place. §108 also contains rules for determining the place of administration where the trust instrument has failed to make a designation.

5. Uneconomic Trust. A trustee without a court order may terminate a trust if the value of the trust property is insufficient to justify the cost of administration. The UTC 2000 uses a bracketed figure of \$50 000, but states are free to raise the amount, for example, to \$100,000. This issue is noted because the Commission approved the Uniform Prudent Management of Institutional Funds Act that contains in §6 a provision permitting a trustee to remove a restriction if the fund' value is less than \$100,000. The UTC would add on the additional authority to terminate the trust and distribute the property.

6. Revocable Trust Presumption. The UTC 2000 reverses the common law assumption that trusts are irrevocable. §602(a). The reversal follows the current trend of most common trusts. The settlor may make the trust irrevocable by providing for that provision.

6. Duties and Powers of Trustee. These duties and powers are delineated in detail in §§801 through 817. As noted previously, these provisions may be overridden by specific terms in the trust, except for the duty to inform, duty to act in good faith and requirement to act in accordance with the purposes of the trust and for the benefit of the beneficiaries.

7. Remedies for Breach of Trust. These provisions are set forth in §§ 1001 through 1009. According to Professor English, "The measure of damages for breach of trust is designed to restore the beneficiaries to the position they would have been in had the breach not occurred. But is also serves another purpose - to prevent the trustee from profiting from the breach. Consequently, under the Code the trustee is liable for the higher of the profit made by the trustee or harm caused to the beneficiaries."§1002(a).

8. Dealing with Third Persons. UTC 2000 follows the theory that commercial transactions between trustees and third parties [that is, persons other than trustees or beneficiaries] should be treated like any commercial transaction to lubricate the flow of commerce and advance the purposes of the fund. If stricter standards applied, third persons would not take the increased risk of dealing with a trust and take its business elsewhere.

9. Creditor's Claims; Spendthrift and Discretionary Trusts. First, the UTC 2000 allows for spendthrift provisions provided the provision restrains the voluntary and involuntary transfer of the beneficiary's interest. §502(a). In this circumstance, a creditor cannot reach the interest of the beneficiary until the distribution is received by the beneficiary. Exceptions to spendthrift provisions are set forth in §503, the most significant, though

most obvious, is the unenforceability of a spendthrift provision against a claim of the State or federal government pursuant to law. Significantly, the UTC 2000 permits creditors of the settlor to reach assets of the trust when the settlor is designated a beneficiary of the trust. “Consequently, the drafter’s rejected the approach taken in Alaska and Delaware allowing a settlor to take a beneficial interest immune from creditor claims. NJ Law in this area is consistent with the UTC 200. *E.g.*, *Estate of DeMartino v. Division of Medical Assistance and Health Services*, 373 N.J. Super 210 (App. Div. 2004), *certif. denied*, 182 N.J. 485 (2005)(rejecting claim of estate trustee that assets of testamentary trust were beyond reach of state to recover Medicaid paid benefits for deceased spouse since at time of creation of trust, decedent had sufficient interest in the trust assets though that interest fell short of legal and beneficial ownership).

Part Two: Ad Hoc Committee Commentary

The general review is secondary to the explanations and commentary of the ad hoc Committee setting forth its reasons to modification of the Official Text. It is of pre-eminent importance for understanding the New Jersey Uniform Trust Code. The Commentary is taken verbatim from the reports of the Committee members.

NEW JERSEY UNIFORM TRUST CODE AD HOC COMMITTEE PREFATORY STATEMENT INTRODUCING SUMMARY OF CODE ARTICLES

The Uniform Trust Code (2000) is the first national codification of the law of trusts, promulgated by the National Conference of Commissioners on Uniform State Laws (NCCUSL), organized to provide states with non-partisan, well-conceived and well-drafted legislation that brings clarity and stability to critical areas of state statutory law.

The following is a summary of the work of an *ad hoc* Committee of New Jersey lawyers who are either Fellows of the American College of Probate Counsel, the Real Property Probate and Trust Law Section of the New Jersey State Bar Association, or both. The Committee members who worked on the legislation are Michael Backer, Andrew DeMaio, Glenn Henkel, Richard Kahn, Richard Lert, Robert Pless, Warren Racusin, and Jordan Weitberg. Each article was assigned to Committee member who acted as reporter. Each report was then reviewed by the entire Committee. The Uniform Trust Code was primarily intended to provide statutory and policy guidance for the many jurisdictions that do not have a well developed body of case law. In the case of New Jersey, there is a well developed body of State law, which nevertheless has gaps.

The Committee adhered to existing case law, as known, deviating only in cases where there were sufficient gaps in the law or there were strong policy grounds for a reversal of the law. The primary stimulus to the Commissioners' drafting of the Uniform Trust Code was the greater use of trusts in recent years, both in family estate planning and in commercial transactions, both in the United States and internationally. This greater use of the trust, and consequent rise in the number of day-to-day questions involving trusts, has led to a recognition that the trust law in many States is thin. It has also led to a recognition that the existing Uniform Acts relating to trusts, while numerous, are fragmentary. The Uniform Trust Code will provide States with precise, comprehensive, and easily accessible guidance on trust law questions. On issues on which States diverge or on which the law is unclear or unknown, the Code, for the first time, provides a uniform rule as a starting point for further consideration. The Code also contains a number of innovative provisions.

Default Rules: Most of the Uniform Trust Code consists of default rules that apply only if the terms of the trust fail to address or insufficiently cover a particular issue. Pursuant to 3B:31-5, a drafter is free to override a substantial majority of the Code's provisions. The important exceptions are set forth in 3B:31-5(b).

Innovative Provisions: Much of the Uniform Trust Code is a codification of the common law of trusts. But the Code does contain a number of innovative provisions. Among the more significant are specification of the rules of trust law that are not subject to override in the trust's terms (3B:31-5), the inclusion of a comprehensive article on representation of beneficiaries (Article 3), rules on trust modification and termination that will enhance flexibility (3B:31-31 through 3B:31-38), and the inclusion of an article collecting the special rules pertaining to revocable trusts (Article 6).

**NEW JERSEY UNIFORM TRUST CODE
SUMMARY OF ARTICLE 1
GENERAL PROVISIONS AND DEFINITIONS**

Article 1 of the UTC contains definitions and general provisions. Within those definitions and provisions, however, lie some of the UTC's key policy issues. The definitions within 3B:31-3 lend substance to many of the provisions throughout the trust code. For example, the definition of "qualified beneficiary" determines which trust beneficiaries are entitled to notice of certain actions and whose consent is required for others.

3B:31-11 expands this definition by providing that certain other persons (including the Attorney

General with respect to a charitable trust) have the same rights as a qualified beneficiary. 3B:31-5 states that most of the UTC's provisions are default rules, which may be modified or negated by the drafter of the trust instrument. Some UTC provisions, however, are mandatory, and therefore cannot be modified through a trust instrument. For example, 3B:31-5(b)(11) provides that the time periods for commencing a judicial proceeding concerning a trust may not be altered by the terms of a trust instrument. 3B:31-5(b)(8) provides that a trust agreement may not modify the duty of a trustee to respond to a beneficiary's request for information regarding the trust, provided that the beneficiary has reached the age of 35 and is a qualified beneficiary as defined in 3B:31-3.

3B:31-7 and 3B:31-8 establish rules regarding the governing law of a trust and the administrative situs (principal place of administration) of a trust. As a general rule, the drafter of a trust agreement may designate which state's law shall govern and in which jurisdiction the trust shall be administered. There are, however, exceptions. 3B:31-8 also sets forth a procedure for changing the situs of a trust.

3B:31-11 provides statutory authority for the nonjudicial settlement of a trustee's accounts and other matters related to trust administration. This provision permits the efficient and economical administration of a trust, particularly when there are no disputes among the trustee and the beneficiaries.

The definitions and general provisions within Article 1, together with the later provisions of the UTC, create certainty and clarity within the field of trust law in New Jersey.

**NEW JERSEY UNIFORM TRUST CODE
ARTICLE 2
JUDICIAL PROCEEDINGS**

This article should not be enacted. It relates to the role of the courts in the administration of trusts, jurisdiction of trustees and beneficiaries, subject matter jurisdiction and venue, all of which matters are preempted in New Jersey by the Rules Governing the Courts of New Jersey.

**NEW JERSEY UNIFORM TRUST CODE
SUMMARY OF ARTICLE 3
REPRESENTATION**

This article deals with representation of beneficiaries, both representation by fiduciaries (personal representatives, trustees, guardians, and conservators), and what is known as virtual representation. Representation is a topic not adequately addressed under the trust law of most States. Representation is addressed in the Restatement (First) of Property §§ 180-186 (1936), but the coverage of this article is more complete.

3B:31-17 is the introductory section, laying out the scope of the article. The representation principles of this article have numerous applications under this Code. The representation principles of the article apply for purposes of settlement of disputes, whether by a court or non-judicially. They apply for the giving of required notices. They apply for the giving of consents to certain actions.

3B:31-18 through 3B:31-21 cover the different types of representation. 3B:31-18 deals with representation by the holder of a general testamentary power of appointment. (Revocable trusts and presently exercisable general powers of appointment are covered by 3B:31-48, which grant the settlor or holder of the power all rights of the beneficiaries or persons whose interests are subject to the power). 3B:31-19 deals with representation by a fiduciary, whether of an estate, trust, conservatorship, or guardianship. The section also allows a parent without a conflict of interest to represent and bind a minor or unborn child. 3B:31-20 is the virtual representation provision. It provides for representation of and the giving of a binding consent by another person having a substantially identical interest with respect to the particular issue. 3B:31-21 authorizes the court to appoint a representative to represent the interests of unrepresented persons or persons for whom the court concludes the other available representation might be inadequate. The provisions of this article are subject to modification in the terms of the trust. See 3B:31-5. Settlers are free to specify their own methods for providing substituted notice and obtaining substituted consent.

**NEW JERSEY UNIFORM TRUST CODE
SUMMARY OF ARTICLE 4
CREATION, VALIDITY, MODIFICATION, AND TERMINATION OF TRUST**

Article 4 deals with how a trust is validly created, modified and terminated. In particular, the rules on when a trust may be terminated or modified are a significant addition to this sometimes-murky area of New Jersey law. The changes include procedures for terminating a trust whose material purposes have been accomplished and procedures that allow a trust to be terminated irrespective of material purpose where the settlor and all trust beneficiaries consent.

The rules on modification and termination generally are designed to carry out the settlor's intent consistent with the purposes of the trust, while giving beneficiaries flexibility where changes would otherwise be limited to the express terms of the trust that are often non-existent.

3B:31-22 through 3B:31-30 deal with the creation of a trust and the purposes for a trust. The New Jersey committee decided not to adopt UTC 3B:31-28 that allows a trust to be created based on an oral declaration without a trust instrument, and added a clause to 3B:31-22 providing that a written instrument is required in order to create a trust. 3B:31-23 states the requirements for creation of a trust, including the requirement that the same person not be the sole trustee and the sole beneficiary. If the sole trustee is also the sole beneficiary of the income interests, then a different person or persons must hold the remainder interests or the trust will not be valid.

3B:31-24 recognizes the validity of trusts created in other jurisdictions provided the requirements of the statute are met, including the requirement that the trust be in writing. As for trust purposes, under 3B:31-25 a trust generally may be enforced if its purposes are lawful, not contrary to public policy, and possible to achieve. Under 3B:31-27 a trust induced by fraud or duress is not valid. 3B:31-26 addresses valid purposes for charitable trusts and 3B:31-30 addresses situations where non-charitable trusts without ascertainable beneficiaries are valid. 3B:31-29 addresses trust for the care of animals. Although New Jersey has an existing statute that addresses trusts for animals, the New Jersey committee recommends the adoption of the UTC provision because the UTC provision is broader and to make our statute consistent with the uniform law.

3B:31-31 through 3B:31-38 deal with the modification and termination of a trust. These provisions deal with the purposes for modification and termination and the procedures for modification and termination. The general provision is contained in 3B:31-31, which summarizes the grounds on which a trust may be terminated and specifies which persons may bring an action to terminate a trust.

3B:31-32 describes the circumstances when a non-charitable trust may be compelled by the beneficiaries, with or without the consent of the settlor. If the settlor and all beneficiaries consent, a non-charitable trust may be modified or terminated even if doing so is inconsistent with a material purpose of the trust. Without the settlor's consent, and only with the consent of all the beneficiaries, the trust may be modified or terminated only if the court concludes that continuance of the trust is not necessary to

achieve any material purpose of the trust. Significantly, a spendthrift provision in the terms of the trust is not presumed to be a material purpose of the trust, though an interested party will be able to offer proof of material purpose.

Under 3B:31-33, a court may modify the administrative or dispositive terms of a trust if doing so will further the purposes of the trust. 3B:31-34 addresses modification or termination of a charitable trust and 3B:31-35 addresses modification or termination of an uneconomical trust. 3B:31-36 provides for the reformation of a trust to conform to a settlor's probable intent and is designed to be consistent with New Jersey's probable intent doctrine as it applies to trusts under N.J.S.A. 3B:3-33.1(b). 3B:31-37 permits modification to achieve a settlor's tax objectives, consistent with existing New Jersey law. 3B:31-38 provides for the combination of two or more trusts into a single trust and the division of a single trust into two or more trusts, provided the requirements of the section are met. This provision is similar to existing New Jersey law under N.J.S.A. 3B:14-23(r), and the New Jersey committee modified the UTC section to conform to the existing statute.

**NEW JERSEY UNIFORM TRUST CODE
SUMMARY OF ARTICLE 5
CREDITOR'S CLAIMS; SPENDTHRIFT AND DISCRETIONARY TRUSTS**

Article Five of the Uniform Trust Code deals with spendthrift provisions in trusts. This Article has generated the most interest and controversy from States that have considered the UTC. Spendthrift clauses are generally enforceable in NJ except for the self settled trust. To the extent that the UTC proposed statutory procedural changes, we suggested that, consistent with current NJ Practice, procedural issues be reserved for the NJ Court rules.

Article 501 recites the general rule that "spendthrift provisions" (e.g., trust language that prevents a beneficiary or the beneficiary's creditors from attaching the trust corpus) are to be honored. There are a variety of situations in New Jersey where there are statutory and/or judicially recognized protection is afforded to a trust. Accordingly, the proposed language was modified to clarify that existing law, (See N.J.S.A. 2A:17-50, et seq. which is a statutory restriction on an ability of a creditor to attach an income stream) continue to override the terms of the UTC rules. Moreover, the intention of the revision to the language is to protect other existing provisions such as, N.J.S.A. 25:2-1, et seq. (protection from attachment in the case of a self-settled Trust that is a Qualified Retirement Account); N.J.S.A. 17B:24-6 (the inability of a creditor to attach proceeds of life insurance policies); N.J.S.A. 17B:24-7 (the inability of creditors to attach annuity proceeds); N.J.S.A. 17B:24-8 (the inability of creditors to attach health and disability insurance benefits); and, N.J.S.A. 17B:24-9 (the inability of creditors to attach proceeds of group insurance policies).

3B:31-40 addresses both involuntary alienations, as well as voluntary alienations, and is consistent with a substantial body of New Jersey case law which has been acknowledged in our state for more than 100 years. Because the proposed statute

seems to restrict the application of the Spendthrift Provisions to the beneficiary clarification was provided, as the law should protect trustee to apply a spendthrift provision to an involuntary alienation. N.J.S.A. 3B:11-1 is the statute which now applies to spendthrift trusts but is limited to self settled trusts. Under New Jersey law a spendthrift provision is a material provision of a trust. *Heritage Bank North, N.A. v. Hunterdon Medical Center*, 164 N.J.Super. 33 (App.Div. 1978). Finally, current New Jersey law authorizes a party to disclaim notwithstanding any limitation in the nature of a Spendthrift Provision. See, N.J.S.A. 3B:9-11.

The Uniform Trust Code 3B:31-41 provides that there are certain creditors (i.e., “exception creditors”) that are can attach a Trust with a spendthrift provision. Other “exception creditors” in the UTC would be (i) child support; (ii) a spouse; (iii) a former spouse who has a judgment for support or maintenance; (iv) a judgment creditor who has provided services for the protection of a beneficiary’s interest; and (v) governmental claims. Our proposed suggestion for 503 is a deviation from the provision suggested by the commissioners. In New Jersey there are certain recognized creditors that are “excepted” from the application of the spendthrift clause, thus additional provisions are unnecessary. Adding additional “protected classes” as exception creditors has drawn national criticism. Our proposal clarifies the protection as to special needs trusts. Under New Jersey law, no creditors can compel distribution from a trust. The creditor can attach distributions once made to the beneficiary.

As a general rule, Settlers are authorized to create Trusts for the benefit of a beneficiary and vest total discretion in a Trustee to administer the Trust and make distributions without interference by a Court. 3B:31-42 codifies these rules. A Trustee would be subject to the tax authorization contained in I.R.C. §2041 as already codified in N.J.S.A. 3B:11-4.1, et seq. The remaining changes from the Uniform act are made to be consistent with changes to 3B:31-41, discussed above.

3B:31-43 appears to re-codify N.J.S.A. 3B:11-1, where at the right of any creator to a Trust to receive either income or principal of the Trust, or any part of either thereof, presently or in the future, shall be freely alienable and shall be subject to the claims of creditors, notwithstanding any provision to the contrary in the terms of the Trust.

3B:31-44 provides that creditors can attach a distribution that is “overdue” and 3B:31-45 clarifies that Trust assets not available for a trustees personal obligations. Both sections appear to be a valid restatement of New Jersey law. While we believe the principles would be understood, a codification of the rules would be helpful.

**NEW JERSEY UNIFORM TRUST CODE
SUMMARY OF ARTICLE 6
REVOCABLE TRUSTS**

Article 6 addresses the use of revocable trusts as alternatives to Wills and seeks to clarify certain issues in connection with the use of revocable trusts. It creates some important changes from current New Jersey law, particularly (i) presuming that a trust is revocable, and (ii) establishing that the capacity to make a trust is the same as the capacity to make a Will. We have generally followed this approach, while making clear that the intent of the creator of the trust should control in determining whether a trust is to be revocable or irrevocable.

3B:31-46 provides that the capacity required to create, amend or revoke a trust is the same as that required to execute a Will. 3B:31-47 provides that a trust is revocable unless the terms of a trust expressly provide that it is irrevocable or unless there is clear and convincing evidence that it is irrevocable. It also sets forth the circumstances in which a settlor, a settlor's attorney in fact or guardian may revoke or amend a revocable trust.

3B:31-48 provides that the Trustee of a revocable trust is responsible only to the settlor of the trust. It also provides that the holder of a power of withdrawal over a trust has the same rights as a settlor with respect to the property subject to such power. 3B:31-49 sets forth time limits on contesting the validity of a revocable trust after the death of the settlor. These time limits generally conform to the time limits for contesting the probate of a Will. It also protects a Trustee who makes distributions from the trust after the settlor's death unless the Trustee knows of a pending or possible contest.

UNIFORM TRUST CODE SUMMARY OF ARTICLE 7 OFFICE OF TRUSTEE

Article 7 of the UTC contains a series of default rules dealing with the office of trustee, many of which are already dealt with and firmly established in Chapters 11, 14 and 18 of Title 3B, our Rules of Court and our case law. 3B:31-50 and 3B:31-51 address the process of qualifying a trustee, including procedures for acceptance or declination of this office and bonding the trustee. 3B:31-52 addresses the duties and responsibilities of and other issues that may arise between or among co-trustees; for example, this Section permits co-trustees to act by majority action and specifies how and what happens when one of several dissents from a course of action and the extent to which the others shall act when one is unable or has properly delegated performance of a function. Many of these provisions are already addressed at N.J.S. 3B:11, as indicated more specifically in our Committee comments.

3B:31-53 through 3B:31-56 address changes in the office of trustee; i.e., when and how a vacancy must be filled, the procedure for resignation, grounds for removal and the duties and obligations of a resigning or removed trustee. Where the Committee determined that these issues were already adequately addressed in our Probate Code or our Rules of Court and the provisions of the Uniform Act were redundant, they have not been enacted.

3B:31-57 and 3B:31-58 prescribe standards for trustee compensation and reimbursement for expenses advanced. Since the matter of trustee compensation is addressed comprehensively at N.J.S. 3B:18, 3B:31-57 has not been enacted. Except for the Court's authority to issue letters of testamentary trusteeship and to order bond, all of the provisions of this Article are subject to modification by the express terms of the governing instrument.

**NEW JERSEY UNIFORM TRUST CODE
SUMMARY OF ARTICLE 8
DUTIES AND POWERS OF TRUSTEE**

Article Eight sets forth the basic duties and certain powers of trustees. The concepts are, for the most part, firmly embedded in our statutory and case law. Several are complementary to and broaden duties and powers stated in our Prudent Investor Act, such as the fundamental duties to act in good faith in accordance with the terms of the trust and applicable law, and to act prudently, impartially, and with undivided loyalty to the trust's beneficiaries.

ARTICLE EIGHT enacts specific duties concerning keeping trust beneficiaries informed, an area of the law heretofore decidedly unclear in New Jersey and elsewhere. This Article embraces and expands on the authorization in the Prudent Investor Act to delegate managerial functions. All of the provisions in this Article may be modified or overridden by the express terms of the governing instrument, except for the fundamental obligations to act in good faith for the benefit of the beneficiaries and in accordance with the terms of the governing instrument creating the trust.

The New Jersey Drafting Committee has proposed some revisions to several of the sections of the nationally promulgated Uniform Trust Code for purposes of clarifying specific language, or making the language used consistent with traditional language familiar to New Jersey fiduciaries and trusts and estates lawyers. For example, in dealing with the duty of loyalty, we have recommended reference to the duty of "undivided loyalty." Several of our proposed modifications are intended to keep this Article compatible with and complementary to our Prudent Investor Act, such as the duty of the trustee to notify qualified beneficiaries of delegations of duties and powers.

We opted not to re-enact our Prudent Investor Act and specific fiduciary powers codified in N.J.S.A. 3B:14-23 so as to incorporate them into our Uniform Trust Code because these statutes also govern fiduciaries not subject to the Uniform Trust Code, such as executors and guardians. The Committee saw no need to have parallel but somewhat different fiduciary powers exclusively governing trustees.

**NEW JERSEY UNIFORM TRUST CODE
ARTICLE 9
UNIFORM PRUDENT INVESTOR ACT**

Enacted, with variations, in New Jersey as the Prudent Investor Act, L. 1997, c. 26, effective June 5, 1997, N.J.S.A. 3B:20-11.1 et. seq. Decision is not to include within the UTC.

**NEW JERSEY UNIFORM TRUST CODE
ARTICLE 10
LIABILITY OF TRUSTEE AND RIGHTS OF PERSONS DEALING WITH TRUSTEE**

Article 10 addresses liability of trustees and trustee dealings with persons other than beneficiaries. With respect to the rights of beneficiaries, the article lists the remedies for breach of trust (§1001); specifies how money damages are to be determined (§1002); and specifies certain trustee defenses, including the addition of a statute of limitations for claims alleging breach of trust (§1005) and a provision on enforcing exculpatory clauses (§1008).

With respect to transactions by trustees with third persons, the UTC encourages trustees and third persons to engage in commercial transactions to the same extent as if no trust was involved. Addressed are personal liability of the trustee for contract or tort and the rights of bona fide purchasers. §1010-1012. To protect the privacy of the trust, a procedure is provided whereby a trustee may verify authority by means of a certificate instead of providing the third person with a copy of the trust instrument. §1013. The Article does not include §1004, which provides that the court, in judicial proceedings relating to the administration of the trust, may award attorney's fees against the trustee, the trust, or even a beneficiary, as justice and equity may require. The matter of attorney's fees is left with existing Court Rules and developing case law.

**NEW JERSEY UNIFORM TRUST CODE
SUMMARY OF ARTICLE 11
MISCELLANEOUS PROVISIONS**

Article 11 of the UTC contains miscellaneous administrative provisions. It provides for the effective date of the trust code, and states that the provisions of the trust code generally apply to trusts created before, on or after the effective date. The bill provides that it will take effect 180 days following enactment.

Article 11 also includes a severability clause and clarifies the status of the trust code under the federal statutory law regarding electronic records and signatures. 3B:31-93 repeals three sections of existing law that are unnecessary or are inconsistent with the trust code.

STATUTES RECOMMENDED FOR REPEAL OR AMENDMENT

The following statutes are recommended for repeal: N.J.S. 3B:11-5, N.J.S. 3B:11-6, N.J.S. 3B:11-7, N.J.S. 3B:11-38, and the following for amendment: N.J.S. 3B:14-37.

CONCLUSION

Therefore, it is recommended that the New Jersey Legislature enact the New Jersey Uniform Trust Code in the form produced by the New Jersey *ad hoc* Committee on the Uniform Trust Code.

ARTICLE 1 GENERAL PROVISIONS AND DEFINITIONS

3B:31-1 SHORT TITLE

This act shall be known and may be cited as the “Uniform Trust Code”

[Source UTC § 101]

3B:31-2 SCOPE

This act applies to express trusts, charitable or noncharitable, and trusts created pursuant to a statute, judgment, or decree that requires the trust to be administered in the manner of an express trust.

[Source UTC § 102]

3B:31-3 DEFINITIONS

As used in this act:

“Action,” with respect to an act of a trustee, includes a failure to act.

“Charitable trust” means a trust, or portion of a trust, created for a charitable purpose described in subsection a. of N.J.S. 3B:31-26.

“Environmental law” means a federal, state, or local law, rule, regulation, or ordinance relating to protection of the environment.

“Interests of the beneficiaries” means the beneficial interests provided in the terms of the trust.

“Jurisdiction,” with respect to a geographic area, includes a State or country.

“Power of withdrawal” means a presently exercisable general power of appointment other than a power exercisable only upon consent of the trustee or a person holding an adverse interest.

“Property” means anything that may be the subject of ownership, whether real or personal, legal or equitable, or any interest therein.

“Qualified beneficiary” means a beneficiary who, on the date the beneficiary’s qualification is determined: (A) is a distributee or permissible distributee of trust income or principal; (B) would be a distributee or permissible distributee of trust income or principal if the interests of the distributees described in subparagraph (A) terminated on that date; or (C) would be a distributee or permissible distributee of trust income or principal if the trust terminated on that date.

“Revocable,” as applied to a trust, means revocable by the settlor without the consent of the trustee or a person holding an adverse interest.

“Settlor” means a person, including a testator, who creates, or contributes property to, a trust. If more than one person creates or contributes property to a trust,

each person is a settlor of the portion of the trust property attributable to that person's contribution except to the extent another person has the power to revoke or withdraw that portion.

"Spendthrift provision" means a term of a trust which restrains both voluntary and involuntary transfer of a beneficiary's interest.

"State" means a State of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States. The term includes an Indian tribe or band recognized by federal law or formally acknowledged by a State.

"Terms of a trust" means the manifestation of the settlor's intent regarding a trust's provisions as expressed in the trust instrument or as may be established by other evidence that would be admissible in a judicial proceeding.

"Trust instrument" means an instrument executed by the settlor that contains terms of the trust, including any amendments thereto.

"Trustee" includes an original, additional, and successor trustee, and a cotrustee.

[Source UTC § 103]

3B:31-4 KNOWLEDGE

a. Subject to subsection b., a person has knowledge of a fact if the person:

(1) has actual knowledge of it;

(2) has received a notice or notification of it; or

(3) from all the facts and circumstances known to the person at the time in question, has reason to know it.

b. An organization that conducts activities through employees has notice or knowledge of a fact involving a trust only from the time the information was received by an employee having responsibility to act for the trust, or would have been brought to the employee's attention if the organization had exercised reasonable diligence. An organization exercises reasonable diligence if it maintains reasonable routines for communicating significant information to the employee having responsibility to act for the trust and there is reasonable compliance with the routines. Reasonable diligence does not require an employee of the organization to communicate information unless the communication is part of the individual's regular duties or the individual knows a matter involving the trust would be materially affected by the information.

[Source UTC § 104]

3B:31-5 DEFAULT AND MANDATORY RULES

a. Except as otherwise provided in the terms of the trust, this act governs the duties and powers of a trustee, relations among trustees, and the rights and interests of a beneficiary.

- b. The terms of a trust prevail over any provision of this act except:
- (1) the requirements for creating a trust;
 - (2) the duty of a trustee to act in good faith and in accordance with the purposes of the trust;
 - (3) the requirement that a trust and its terms be for the benefit of its beneficiaries, and that the trust have a purpose that is lawful, not contrary to public policy, and possible to achieve;
 - (4) the power of the court to modify or terminate a trust under N.J.S. 3B:31-31 through 3B:31-37;
 - (5) the effect of a spendthrift provision and the rights of certain creditors and assignees to reach a trust as provided in N.J.S. 3B:31-39 through 3B:31-44;
 - (6) the power of the court under N.J.S. 3B:31-50 to require, dispense with, or modify or terminate a bond;
 - (7) the power of the court under subsection b. of N.J.S. 3B:31-56 to adjust a trustee's compensation specified in the terms of the trust which is unreasonably low or high;
 - (8) The duty under subsections a. and b. of NJS 3B:31-71 to respond to the request of a qualified beneficiary of an irrevocable trust who has attained the age of 35 years for a copy of the trust instrument or for other information reasonably related to the administration of the trust;
 - (9) the effect of an exculpatory term under N.J.S. 3B:31-94;
 - (10) the rights under N.J.S. 3B:31-96 through 3B:31-99 of a person other than a trustee or beneficiary;
 - (11) periods of limitation for commencing a judicial proceeding;
 - (12) the power of the court to take such action and exercise such jurisdiction as may be necessary in the interests of justice; and
 - (13) the subject-matter jurisdiction of the court and venue for commencing a proceeding as provided in N.J.S. 3B:31-15 and 3B:31-16.

[Source UTC § 105]

3B:31-6 COMMON LAW OF TRUSTS; PRINCIPLES OF EQUITY

The common law of trusts and principles of equity supplement this act, except to the extent modified by this act or another statute of this State.

[Source UTC § 106]

3B:31-7 GOVERNING LAW

The meaning and effect of the terms of a trust are determined by:

(1) the law of the jurisdiction designated in the terms unless the designation of that jurisdiction's law is contrary to a strong public policy of the jurisdiction having the most significant relationship to the matter at issue; or

(2) in the absence of a controlling designation in the terms of the trust, the law of the jurisdiction having the most significant relationship to the matter at issue.

[Source UTC § 107]

3B:31-8 PRINCIPAL PLACE OF ADMINISTRATION

(a) Without precluding other means for establishing a sufficient connection with the designated jurisdiction, terms of a trust designating the principal place of administration are valid and controlling if:

(1) a trustee's principal place of business is located in or a trustee is a resident of the designated jurisdiction; or

(2) all or part of the administration occurs in the designated jurisdiction.

(b) A trustee is under a continuing duty to administer the trust at a place appropriate to its purposes, its administration, and the interests of the beneficiaries.

(c) Without precluding the right of the court to order, approve, or disapprove a transfer, the trustee, in furtherance of the duty prescribed by subsection (b), may transfer the trust's principal place of administration to another State or to a jurisdiction outside of the United States.

(d) The trustee shall notify the qualified beneficiaries of a proposed transfer of a trust's principal place of administration not less than 60 days before initiating the transfer. The notice of proposed transfer must include:

(1) the name of the jurisdiction to which the principal place of administration is to be transferred;

(2) the address and telephone number at the new location at which the trustee can be contacted;

(3) an explanation of the reasons for the proposed transfer;

(4) the date on which the proposed transfer is anticipated to occur; and

(5) the date, not less than 60 days after the giving of the notice, by which the qualified beneficiary must notify the trustee of an objection to the proposed transfer.

(e) The authority of a trustee under this section to transfer a trust's principal place of administration terminates if a qualified beneficiary notifies the trustee of an objection to the proposed transfer on or before the date specified in the notice.

(f) In connection with a transfer of the trust's principal place of administration, the trustee may transfer some or all of the trust property to a successor trustee designated in the terms of the trust or appointed pursuant to Section 704.

[Source UTC § 108]

3B:31-9 METHODS AND WAIVER OF NOTICE

a. Notice to a person under this act or the sending of a document to a person under this act must be accomplished in a manner reasonably suitable under the circumstances and likely to result in receipt of the notice or document. Permissible methods of notice or for sending a document include first-class mail, personal delivery, delivery to the person's last known place of residence or place of business, or a properly directed textual electronic message.

b. Notice otherwise required under this act or a document otherwise required to be sent under this act need not be provided to a person whose identity or location is unknown to and not reasonably ascertainable by the trustee.

c. Notice under this act or the sending of a document under this [Code] may be waived by the person to be notified or sent the document.

d. Notice of a judicial proceeding must be given as provided in the applicable rules of civil procedure.

[Source UTC § 109]

3B:31-10 OTHERS TREATED AS QUALIFIED BENEFICIARIES

a. Whenever notice to qualified beneficiaries of a trust is required under this act, the trustee must also give notice to any other beneficiary who has sent the trustee a request for notice.

b. A charitable organization expressly designated to receive distributions under the terms of a charitable trust or a person appointed to enforce a trust created for the care of an animal or another noncharitable purpose as provided in Section 408 or 409 has the rights of a qualified beneficiary under this act.

c. The [attorney general of this State] has the rights of a qualified beneficiary with respect to a charitable trust having its principal place of administration in this State.

[Source UTC § 110]

3B:31-11 NONJUDICIAL SETTLEMENT AGREEMENTS

a. For purposes of this section, "interested persons" means persons whose consent would be required in order to achieve a binding settlement were the settlement to be approved by the court.

b. Except as otherwise provided in subsection c. or any other provision of this Chapter, interested persons may enter into a binding nonjudicial settlement agreement with respect to any matter involving a trust.

c. A nonjudicial settlement agreement is valid only to the extent it does not violate a material purpose of the trust and includes terms and conditions that could be properly approved by the court under this act or other applicable law.

d. Matters that may be resolved by a nonjudicial settlement agreement include:

- (1) the interpretation or construction of the terms of the trust;
- (2) the approval of a trustee's report or accounting;
- (3) direction to a trustee to refrain from performing a particular act or the grant to a trustee of any necessary or desirable power;
- (4) the resignation or appointment of a trustee and the determination of a trustee's compensation;
- (5) transfer of a trust's principal place of administration; and
- (6) liability of a trustee for an action relating to the trust.

e. Any interested person may request the court to approve a nonjudicial settlement agreement, to determine whether the representation as provided in N.J.S. 3B:31-17 through N.J.S. 3B:31-21 was adequate, and to determine whether the agreement contains terms and conditions the court could have properly approved.

[Source UTC § 111]

3B:31-12 RULES OF CONSTRUCTION

The rules of construction that apply in this State to the interpretation of and disposition of property by will also apply as appropriate to the interpretation of the terms of a trust and the disposition of the trust property.

[Source UTC § 112]

ARTICLE 3 REPRESENTATION

3B:31-13 REPRESENTATION: BASIC EFFECT

(a) Notice to a person who may represent and bind another person under this article has the same effect as if notice were given directly to the other person.

(b) The consent of a person who may represent and bind another person under this article is binding on the person represented unless the person represented objects to the representation before the consent would otherwise have become effective.

(c) Except as otherwise provided in N.J.S. 3B:31-32 and N.J.S. 3B:31-47, a person who under this article who represents a settlor who lacks capacity may receive notice and give a binding consent on the settlor's behalf.

[Source UTC § 301]

3B:31-14 REPRESENTATION BY HOLDER OF GENERAL TESTAMENTARY POWER OF APPOINTMENT

a. To the extent there is no conflict of interest between the holder of a general testamentary power of appointment and the persons represented with respect to the particular question or dispute, the holder may represent and bind persons whose

interests, as permissible appointees, takes in default, or otherwise, are subject to the power.

b. A holder of a general power of appointment in favor of the holder or holder's estate shall not be deemed to have a conflict with permissible appointees and takers in default.

[Source UTC § 302]

3B:31-15 REPRESENTATION BY FIDUCIARIES AND PARENTS

To the extent there is no conflict of interest between the representative and the person represented or among those being represented with respect to a particular question or dispute:

(1) [conservator] may represent and bind the protected person whose estate the [conservator] controls;

(2) [guardian] of the person may represent and bind the ward if a [conservator] of the ward's estate has not been appointed;

(3) an agent having authority to act with respect to the particular question or dispute may represent and bind the principal;

(4) a trustee may represent and bind the beneficiaries of the trust;

(5) a personal representative of a decedent's estate may represent and bind persons interested in the estate; and

(6) a parent may represent and bind the parent's minor or unborn child if a [conservator] or [guardian] for the child has not been appointed.

[Source UTC § 303]

3B:31-16 REPRESENTATION BY PERSONAL HAVING SUBSTANTIALLY IDENTICAL INTEREST

Unless otherwise represented, a minor, incapacitated, or unborn individual, or a person whose identity or location is unknown and not reasonably ascertainable, may be represented by and bound by another having a substantially identical interest with respect to the particular question or dispute, but only to the extent there is no conflict of interest between the representative and the person represented.

[Source UTC § 304]

3B:31-17 APPOINTMENT OF REPRESENTATIVE

(a) If the court determines that an interest is not represented under NJS 3B:31-17 -- 3B:31-20, or that the otherwise available representation might be inadequate, the court may appoint a guardian ad litem or other representative to receive notice, give consent, and otherwise represent, bind, and act on behalf of a minor, incapacitated, protected person or unborn individual, or a person whose identity or location is

unknown. A guardian ad litem or other representative may be appointed to represent several persons or interests.

(b) Such guardian ad litem or other representative may act on behalf of the individual represented with respect to any matter arising under this Act, whether or not a judicial proceeding concerning the trust is pending.

(c) Such guardian ad litem or other representative may consider the benefit accruing to the living members of the individual's family.

[Source UTC § 305]

ARTICLE 4

CREATION, VALIDITY, MODIFICATION AND TERMINATION OF TRUST

3B:31-18 METHODS OF CREATING A TRUST

A trust may be created by:

(1) transfer of property under a written instrument to another person as trustee during the settlor's lifetime or by will or other written disposition taking effect upon the settlor's death;

(2) written declaration by the owner of property that the owner holds identifiable property as trustee; or

(3) written exercise of a power of appointment in favor of a trustee.

[Source UTC § 401]

3B:31-19 REQUIREMENTS FOR CREATION

(a) A trust is created only if:

(1) the settlor has capacity to create a trust;

(2) the settlor indicates an intention to create the trust;

(3) the trust has a definite beneficiary or is:

(A) a charitable trust;

(B) a trust for the care of an animal, as provided in N.J.S. _____; or

(C) a trust for a noncharitable purpose, as provided in N.J.S. _____;

(4) the trustee has duties to perform; and

(5) the same person is not the sole trustee and the sole beneficiary of all beneficial interests.

(b) A beneficiary is definite if the beneficiary can be ascertained now or in the future, subject to any applicable rule against perpetuities.

(c) A power in a trustee to select a beneficiary from an indefinite class is valid. If the power is not exercised within a reasonable time, the power fails and the property

subject to the power passes to the persons who would have taken the property had the power not been conferred.

[Source UTC § 402]

3B:31-20 WRITTEN TRUSTS CREATED IN OTHER JURISDICTIONS

A written trust not created by will is validly created if its creation complies with the law of the jurisdiction in which:

- (1) the trust instrument was executed; or
- (2) at the time the trust was created, the settlor was domiciled, had a place of abode, or was a national; or
- (3) at the time the trust was created, a trustee was domiciled or had a place of business; or
- (4) at the time the trust was created, any trust property was located.

[Source UTC § 403]

3B:31-21 TRUST PURPOSES

A trust may be enforced only to the extent its purposes are lawful, not contrary to public policy, and possible to achieve. A trust and its terms must be for the benefit of its beneficiaries.

[Source UTC § 404]

3B:31-22 CHARITABLE PURPOSES; ENFORCEMENT

(a) A charitable trust is one that is created for the relief of poverty, the advancement of education or religion, the promotion of health, governmental or municipal purposes, or other purpose the achievement of which is beneficial to the community.

(b) If the terms of a charitable trust do not state a particular charitable purpose or beneficiary, and the trustee or other person authorized to state a particular charitable purpose or name a particular charitable beneficiary fails to make a selection, the court may select one or more charitable purposes or beneficiaries. The selection must be consistent with the settlor's intention to the extent it can be ascertained.

(c) A proceeding to enforce a charitable trust may be brought by the settlor, by the Attorney General, by the trust's beneficiaries or by other persons who have standing.

[Source UTC § 405]

3B:31-23 CREATION OF TRUST INDUCED BY FRAUD, DURESS

A trust is void to the extent its creation was induced by fraud, duress, or undue influence.

[Source UTC § 406]

3B:31-24 TRUST FOR CARE OF ANIMAL

(a) A trust may be created to provide for the care of an animal alive during the settlor's lifetime. The trust terminates upon the death of the animal or, if the trust was created to provide for the care of more than one animal alive during the settlor's lifetime, upon the death of the last surviving animal.

(b) A trust authorized by this section may be enforced by a person appointed in the terms of the trust or, if no person is so appointed, by a person appointed by the court. A person having an interest in the welfare of the animal may request the court to appoint a person to enforce the trust or to remove a person appointed.

(c) Property of a trust authorized by this section may be applied only to its intended use, except to the extent the court determines that the value of the trust property exceeds the amount required for the intended use. Except as otherwise provided in the terms of the trust, property not required for the intended use must be distributed to the settlor, if then living, otherwise to the settlor's estate.

[Source UTC § 408]

3B:31-25 NONCHARITABLE TRUST WITHOUT ASCERTAINABLE BENEFICIARY

Except as otherwise provided in N.J.S. _____ or by another statute, the following rules apply:

(1) A trust may be created for a noncharitable but otherwise valid purpose without a definite or definitely ascertainable beneficiary or for a noncharitable purpose to be selected by the trustee.

(2) A trust authorized by this section may be enforced by the settlor or by a person appointed in the terms of the trust or, if no person is so appointed, by a person appointed by the court.

(3) Property of a trust authorized by this section may be applied only to its intended use, except to the extent the court determines that the value of the trust property exceeds the amount required for the intended use. Except as otherwise provided in the terms of the trust, property not required for the intended use must be distributed to the settlor, if then living, otherwise to the settlor's estate.

[Source UTC § 409]

3B:31-26 MODIFICATION OR TERMINATION OF TRUST; PROCEEDINGS FOR APPROVAL OR DISAPPROVAL

(a) In addition to the methods of termination prescribed by N.J.S. _____ through N.J.S. _____, a trust terminates to the extent the trust is revoked or expires pursuant to its terms, no purpose of the trust remains to be achieved, or the purposes of the trust have become unlawful, contrary to public policy of this State, or impossible to achieve.

(b) A proceeding to approve or disapprove a proposed modification or termination under N.J.S. _____ through N.J.S. _____, or trust combination or division under N.J.S. _____, may be commenced by a trustee or beneficiary, and a proceeding to approve or disapprove a proposed modification or termination under N.J.S. _____ may be commenced by the settlor. The settlor of a charitable trust may maintain a proceeding to modify the trust under N.J.S. _____.

[Source UTC § 410]

3B:31-27 MODIFICATION OR TERMINATION OF NONCHARITABLE IRREVOCABLE TRUST BY CONSENT

(a) A noncharitable irrevocable trust may be modified or terminated upon consent of the settlor and all beneficiaries, even if the modification or termination is inconsistent with a material purpose of the trust. A settlor's power to consent to a trust's modification or termination may be exercised by an agent under a power of attorney only to the extent expressly authorized by the power of attorney or the terms of the trust; or by the settlor's guardian with the approval of the court supervising the guardianship if an agent is not so authorized.

(b) A noncharitable irrevocable trust may be terminated upon consent of all of the beneficiaries if the court concludes that continuance of the trust is not necessary to achieve any material purpose of the trust. A noncharitable irrevocable trust may be modified upon consent of all of the beneficiaries if the court concludes that modification is not inconsistent with a material purpose of the trust.

(c) A spendthrift provision in the terms of the trust is not presumed to constitute a material purpose of the trust.

(d) Upon termination of a trust under subsection (a) or (b), the trustee shall distribute the trust property as agreed by the beneficiaries.

(e) If not all of the beneficiaries consent to a proposed modification or termination of the trust under subsection (a) or (b), the modification or termination may be approved by the court if the court is satisfied that:

(1) if all of the beneficiaries had consented, the trust could have been modified or terminated under this section; and

(2) the interests of a beneficiary who does not consent will be adequately protected.

[Source UTC § 411]

3B:31-28 MODIFICATION OR TERMINATION BECAUSE OF UNANTICIPATED CIRCUMSTANCES OR INABILITY TO ADMINISTER TRUST EFFECTIVELY

(a) The court may modify the administrative or dispositive terms of a trust or terminate the trust if, because of circumstances not anticipated by the settlor, modification or termination will further the purposes of the trust. To the extent practicable, the modification must be made in accordance with the settlor's probable intent.

(b) The court may modify the administrative terms of a trust if continuation of the trust on its existing terms would be impracticable or wasteful or impair the trust's administration.

(c) Upon termination of a trust under this section, the trustee shall distribute the trust property in a manner consistent with the purposes of the trust.

[Source UTC § 412]

3B:31-29 MODIFICATION OR TERMINATION OF CHARITABLE TRUST (CY PRES)

(a) Except as otherwise provided in subsection (b), if a particular charitable purpose becomes unlawful, impracticable, impossible to achieve, or wasteful:

- (1) the trust does not fail, in whole or in part;
- (2) the trust property does not revert to the settlor or the settlor's estate; and
- (3) the court may modify or terminate the trust by directing that the trust property be applied or distributed, in whole or in part, in a manner consistent with the settlor's charitable purposes.

(b) A provision in the terms of a charitable trust that would result in distribution of the trust property to a noncharitable beneficiary prevails over the power of the court under subsection (a).

[Source UTC § 413]

3B:31-30 MODIFICATION OR TERMINATION OF UNECONOMIC TRUST

(a) After notice to the qualified beneficiaries, the trustee of a trust having a total value less than \$100,000 may terminate the trust if the trustee concludes that the value of the trust property is insufficient to justify the cost of administration.

(b) The court may modify or terminate a trust or remove the trustee and appoint a different trustee if it determines that the value of the trust property is insufficient to justify the cost of administration.

(c) Upon termination of a trust under this section, the trustee shall distribute the trust property in a manner consistent with the purposes of the trust.

(d) This section does not apply to an easement for conservation or preservation.

[Source UTC § 414]

3B:31-31 REFORMATION TO CORRECT MISTAKES

The court may reform the terms of a trust, even if unambiguous, to conform the terms to the settlor's probable intent if it is proved by clear and convincing evidence that there was a mistake of fact or law, whether in expression or inducement.

[Source UTC § 415]

3B:31-32 MODIFICATION TO ACHIEVE SETTLOR'S TAX OBJECTIVES

To achieve the settlor's tax objectives, the court may modify the terms of a trust in a manner that is not contrary to the settlor's probable intent. The court may provide that the modification has retroactive effect.

[Source UTC § 416]

3B:31-33 COMBINATION AND DIVISION OF TRUSTS

(a) Subject to subsection (b),

(1) the trustees of two or more trusts or parts of trusts may combine the trusts or parts thereof into a single trust, even if such trusts or parts thereof are created by different settlors or under different instruments, and even if the trusts have different trustees; and

(2) the trustees of a single trust may divide the trust into two or more separate trusts, in which case distributions provided by the governing instrument may be made from one or more of the separate trusts.

(b) A combination or division under this section may be effected only if the result does not impair rights of any beneficiary or adversely affect achievement of the purposes of the trust.

[Source UTC § 417]

ARTICLE 5

CREDITOR'S CLAIMS; SPENDTHRIFT AND DISCRETIONARY TRUSTS

3B:31-34 RIGHTS OF BENEFICIARY'S CREDITOR OR ASSIGNEE

Except as otherwise provided by law, to the extent a beneficiary's interest is not protected by a spendthrift provision, a creditor or assignee of the beneficiary may reach the beneficiary's interest by attachment of present or future distributions to or for the benefit of the beneficiary, subject to N.J.S.A. 2A:17-50 et seq. or any other applicable law. The court may limit the award to such relief as is appropriate under the circumstances.

[Source UTC § 501]

3B:31-35 SPENDTHRIFT PROVISION

(a) A spendthrift provision is valid only if it restrains both voluntary and involuntary transfer of a beneficiary's interest.

(b) A term of the trust providing that the interest of a beneficiary is held subject to a "spendthrift trust" or words of similar import, is sufficient to restrain both voluntary and involuntary transfer of the beneficiary's interest.

(c) A beneficiary may not transfer an interest in a trust in violation of a valid spendthrift provision and, except as otherwise provided in sections 501 to 507, inclusive, of this act, a creditor or assignee of the beneficiary may not reach the interest or a distribution by the trustee before its receipt by the beneficiary.

(d) A spendthrift provision is valid even though a beneficiary is named as the sole trustee or as a co-trustee of the trust.

[Source UTC § 502]

3B:31-36 EXCEPTIONS TO SPENDTHRIFT PROVISION

Even if a trust contains a spendthrift provision, the following shall apply:

(a) Special Needs

(1) Protected Person means a person who is

a) an aged, blind, or disabled individual as defined at 42 U.S.C. 1382c;

b) developmentally disabled as defined at N.J.S. 30:1AA-2; or

c) under age 18 (or over age 18 and a full time student) with serious disabilities that reasonably may prevent the individual from being self sufficient as an adult.

(2) Special Needs Trust means an OBRA '93 Trust (as defined at N.J.S. 3B:11-37) or other trust governed by a written trust instrument which

a) grants trustees full discretion to determine whether and when to distribute;

b) limits distributions during the trust term to distributions to benefit one or more Protected Persons (although others may realize incidental benefits);

c) provides that the trustees do not have any obligation to pay the Protected Persons' obligations or fund their support;

d) does not give the Protected Persons any right to require trustees to distribute at a specific time or for a particular purpose or to assign or encumber interests in the trust; and

e) evidences the grantor's intent to supplement rather than replace or impair government assistance that the Protected Persons receive or for which they otherwise may be eligible.

(b) Notwithstanding any other provision of this Act or other law

(1) trustees of a Special Needs Trust are not required to distribute for any particular purpose or at any particular time during the trust term;

(2) all creditors (including, but not limited to, spendthrift exception creditors) of a Protected Person may not reach or attach a Protected Person's interest in a Special Needs Trust and neither creditors nor courts may require the trustees to distribute to satisfy a Protected Person's creditor's claim;

(3) a Special Needs Trust shall not be required to repay government aid provided to a Protected Person unless the aid was provided on the basis that the Special Needs Trust would repay the aid when the Protected Person dies (or the Special Needs Trust sooner terminates) and the Special Needs Trust instrument expressly calls for such repayment; and

(4) a Special Needs Trust shall terminate at such time as provided in its governing instrument.

(c) Notwithstanding sections 501 and 502 of this Section, trustees of a Special Needs Trust must exercise their discretion in good faith to further trust purposes and courts may exercise their equity authority to remedy trustee abuses of discretion.

[Source UTC § 503]

3B:31-37 DISCRETIONARY TRUSTS EFFECT OF STANDARD

(a) Whether or not a trust contains a spendthrift provision, a creditor of a beneficiary may not compel a distribution that is subject to the trustee's discretion, even if:

(1) The discretion is expressed in the form of a standard of distribution; or

(2) The trustee has abused the discretion.

(b) This section does not limit the right of a beneficiary to maintain a judicial proceeding against a trustee for an abuse of discretion or failure to comply with a standard for distribution.

(c) With respect to the powers set forth in N.J.S.A. 3B:11-4.1, the provisions of this section shall apply even though the beneficiary is the sole trustee or a co-trustee of the trust.

[Source UTC § 504]

3B:31-38 CREDITOR'S CLAIM AGAINST SETTLOR

(a) Whether or not the terms of a trust contain a spendthrift provision, the following rules apply:

(1) During the lifetime of the settlor, the property of a revocable trust is subject to the claims of the settlor's creditors.

(2) With respect to an irrevocable trust, a creditor or assignee of the settlor may reach the maximum amount that can be distributed to or for the settlor's benefit. If a trust has more than one settlor, the amount the creditor or assignee of a particular settlor may reach may not exceed the settlor's interest in the portion of the trust attributable to that settlor's contribution.

(3) After the death of a settlor, and subject to the settlor's right to direct the source from which liabilities will be paid, the property of a trust that was revocable at the settlor's death is subject to claims of the settlor's creditors, costs of administration of the settlor's estate, the expenses of the settlor's funeral and disposal of remains, and to a surviving spouse and children to the extent the settlor's probate estate is inadequate to satisfy those claims, costs, expenses, and

(b) For purposes of this section:

(1) during the period the power may be exercised, the holder of a power of withdrawal is treated in the same manner as the settlor of a revocable trust to the extent of the property subject to the power; and

(2) upon the lapse, release, or waiver of the power, the holder is treated as the settlor of the trust only to the extent the value of the property affected by the lapse, release, or waiver exceeds the greater of the amount specified in Section 2041(b)(2) or 2514(e) of the Internal Revenue Code of 1986, or Section 2503(b) of the Internal Revenue Code of 1986, in each case as in effect on the effective date of this act, or as later amended.

[Source UTC § 505]

3B:31-39 OVERDUE DISTRIBUTION

(a) For the purposes of this section, "mandatory distribution" means a distribution of income or principal that the trustee is required to make to a beneficiary under the terms of the trust, including a distribution upon termination of the trust. The term excludes a distribution subject to the exercise of the trustee's discretion, regardless of whether the terms of the trust (1) include a support or other standard to guide the trustee in making distribution decisions, or (2) provide that the trustee "may" or "shall" make discretionary distributions, including distributions pursuant to a support or other standard.

(b) Except as otherwise provided in N.J.S.A. 3B:11-4.1 of this act, whether or not a trust contains a spendthrift provision, a creditor or assignee of a beneficiary may reach a mandatory distribution of income or principal, including a distribution upon termination of the trust, if the trustee has not made the distribution to the beneficiary within a reasonable time after the mandated distribution date.

[Source UTC § 506]

3B:31-40 PERSONAL OBLIGATIONS OF TRUSTEE

Trust property is not subject to personal obligations of the trustee, even if the trustee becomes insolvent or bankrupt.

[Source UTC § 507]

ARTICLE 6 REVOCABLE TRUSTS

3B:31-41 CAPACITY OF SETTLOR OF REVOCABLE TRUST

The capacity required to create, amend, revoke, or add property to a revocable trust, or to direct the actions of the trustee of a revocable trust, is the same as that required to make a will.

[Source UTC § 601]

3B:31-42 REVOCATION OR AMENDMENT OF REVOCABLE TRUST

(a) Unless the terms of a trust expressly provide that the trust is irrevocable, or that it is proved by clear and convincing evidence that the settlor intended for it to be irrevocable, the settlor may revoke or amend the trust. This subsection does not apply to a trust created under an instrument executed before [the effective date of this [Code]].

(b) If a revocable trust is created or funded by more than one settlor:

(1) to the extent the trust consists of community property, the trust may be revoked by either spouse acting alone but may be amended only by joint action of both spouses; and

(2) to the extent the trust consists of property other than community property, each settlor may revoke or amend the trust with regard to the portion of the trust property attributable to that settlor's contribution; and

(c) The settlor may revoke or amend a revocable trust:

(1) by substantial compliance with a method provided in the terms of the trust; or

(2) if the terms of the trust do not provide a method or the method provided in the terms is not expressly made exclusive, by:

(A) a later will or codicil that expressly refers to the trust or specifically devises property that would otherwise have passed according to the terms of the trust; or

(B) any other writing manifesting clear and convincing evidence of the settlor's intent.

(d) Upon revocation of a revocable trust, the trustee shall deliver the trust property to the settlor as the settlor directs.

(e) A settlor's powers with respect to revocation, amendment, or distribution of trust property may be exercised by an agent under a power of attorney only to the extent expressly authorized by the terms of the trust and the power.

(f) A guardian of the settlor may exercise a settlor's powers with respect to revocation, amendment, or distribution of trust property only with the approval of the court supervising the guardianship.

(g) A trustee who does not know that a trust has been revoked or amended is not liable to the settlor or settlor's successors in interest for distributions made and other actions taken on the assumption that the trust had not been amended or revoked.

[Source UTC § 602]

3B:31-43 SETTLOR'S POWERS; POWERS OF WITHDRAWAL

(a) While a trust is revocable [delete optional "and the settlor has capacity to revoke the trust"], rights of the beneficiaries are subject to the control of, and the duties of the trustee are owed exclusively to, the settlor.

[Source UTC § 603]

3B:31-44 LIMITATION ON ACTION CONTESTING VALIDITY OF REVOCABLE TRUST; DISTRIBUTION OF TRUST PROPERTY

(a) A person may commence a judicial proceeding to contest the validity of a trust that was revocable at the settlor's death within the earlier of:

(1) [three] years after the settlor's death; or

(2) "4 months, in the case of a resident, or 6 months, in the case of a nonresident" after the trustee sent the person a copy of the trust instrument and a notice informing the person of the trust's existence, of the trustee's name and address, and of the time allowed for commencing a proceeding.

(b) Upon the death of the settlor of a trust that was revocable at the settlor's death, the trustee may proceed to distribute the trust property in accordance with the terms of the trust. The trustee is not subject to liability for doing so unless:

(1) the trustee knows of a pending judicial proceeding concerning the validity of the trust; or

(2) a potential contestant has notified the trustee in writing of a possible judicial proceeding to contest the validity of the trust and the trustee has received written notice of a judicial proceeding commenced within 90 days after the contestant sent the notification.

(c) A beneficiary of a trust that is determined to have been invalid is liable to return any distribution received.

[Source UTC § 604]

ARTICLE 7 OFFICE OF TRUSTEE

3B:31-45 ACCEPTING OR DECLINING TRUSTEESHIP

a. Except as otherwise provided in subsection (c), a person designated as trustee accepts the trusteeship:

(1) in the case of a testamentary trustee or substituted testamentary trustee, as provided in N.J.S. 3B:11-2, and

(2) in the case of any other trustee,

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

(ii) if the terms of the trust do not provide a method or the method provided in the terms is not expressly made exclusive, by accepting delivery of the trust property, exercising powers or performing duties as trustee, or otherwise indicating acceptance of the trusteeship.

b. A person designated as trustee who has not yet accepted the trusteeship may renounce the trusteeship. A designated trustee who does not accept the trusteeship within a reasonable time after knowing of the designation is deemed to have renounced the trusteeship.

c. A person designated as trustee, without accepting the trusteeship, may:

(1) act to preserve the trust property if, within a reasonable time after acting, the person sends a renunciation of the trusteeship to the settlor or, if the settlor is dead or lacks capacity, to the qualified beneficiaries and to any designated successor trustee; and

(2) inspect or investigate trust property to determine potential liability under environmental or other law or for any other purpose.

[Source UTC Sec. 701]

3B:31-46 TRUSTEE'S BOND

a. A trustee shall give bond to secure performance of the trustee's duties as prescribed by N.J.S. 3B:15-1 et seq. if the court or surrogate finds that a bond is needed to protect the interests of the beneficiaries or is required by the terms of the trust and the court has not dispensed with that requirement.

b. Unless otherwise directed by the court, the cost of a bond is an expense of the trust.

[Source UTC § 702]

3B:31-47 COTRUSTEES

(a) Cotrustees who are unable to reach a unanimous decision may act by majority decision. A dissenting trustee who joins in carrying out a decision of the majority but expresses his dissent in writing promptly to his cotrustees shall not be liable for the act of the majority.

(b) If a vacancy occurs in a cotrusteeship, the remaining trustee or cotrustees shall act for the trust unless the trust instrument provides otherwise.

(c) A cotrustee must participate in the performance of a trustee's function unless the cotrustee is unavailable to perform the function because of absence, illness, disqualification under other law or other temporary incapacity or the cotrustee has properly delegated the performance of the function.

(d) If a cotrustee is unavailable to perform duties because of absence, illness, disqualification under other law, other temporary incapacity or a vacancy remains unfilled and prompt action is necessary to achieve the purposes of the trust or to avoid injury to the trust property, the remaining cotrustee or a majority of the remaining cotrustees shall act for the trust.

(e) A trustee may not delegate to a cotrustee the performance of a function the settlor reasonably expect the trustees to perform jointly. Unless a delegation was irrevocable, a trustee may revoke a delegation previously made.

(f) A trustee who does not join in an action of a cotrustee or cotrustees because of absence, illness, disqualification or other temporary incapacity shall not be liable for that action.

(g) Notwithstanding subsection (a) or (f), every trustee shall exercise reasonable care to:

- (1) prevent a cotrustee from committing a breach of trust; and
- (2) compel a cotrustee to redress a breach of trust.

[Source UTC § 703]

3B:31-48 VACANCY IN TRUSTEESHIP; APPOINTMENT OF SUCCESSOR

(a) A vacancy in a trusteeship occurs if:

- (1) a person designated as trustee renounces the trusteeship;
- (2) a person designated as trustee cannot be identified or does not exist;
- (3) a trustee resigns or is discharged;
- (4) a trustee is disqualified or removed;
- (5) a trustee dies; or
- (6) a guardian or conservator is appointed for an individual serving as trustee.

(b) If one or more cotrustees remain in office, a vacancy in a trusteeship need not be filled unless the trust instrument provides otherwise. A vacancy in a trusteeship shall be filled if the trust has no remaining trustee.

(c) A vacancy in a trusteeship of a noncharitable trust that is required to be filled shall be filled in the following order of priority:

(1) by a person designated pursuant to the terms of the trust to act as successor trustee;

(2) by a person appointed by unanimous agreement of the qualified beneficiaries;
or

(3) by a person appointed by the court.

(d) A vacancy in a trusteeship of a charitable trust that is required to be filled shall be filled in the following order of priority:

(1) by a person designated pursuant to terms of the trust to act as successor trustee; or

(2) by a person appointed by the court.

(e) Whether or not a vacancy in a trusteeship exists or is required to be filled, the court may appoint an additional trustee or special fiduciary whenever the court considers the appointment desirable for the administration of the trust.

[Source UTC § 704]

3B:31-49 RESIGNATION OF TRUSTEE

(a) A trustee may resign:

(1) upon at least 30 days' notice to the qualified beneficiaries, the settlor, if living, all cotrustees, and the trustee or trustees, if any, designated pursuant to the terms of the trust to succeed the resigning trustee; or

(2) with the approval of the court.

(b) In approving a resignation, the court may issue orders and impose conditions reasonably necessary for the protection of the trust property.

(c) Any liability of a resigning trustee or of any sureties on the trustee's bond for acts or omissions of the trustee is not discharged or affected by the trustee's resignation.

[Source UTC § 705]

3B:31-50 REMOVAL OF TRUSTEE

(a) The settlor, a cotrustee, or a beneficiary may request the court to remove a trustee, or a trustee may be removed by the court on its own initiative.

(b) The court may remove a trustee for any of the reasons stated in N.J.S. 3B:14-21.

(c) Pending a final decision on a request to remove a trustee, or in lieu of or in addition to removing a trustee, the court may order such appropriate relief as may be necessary to protect the trust property or the interests of the beneficiaries.

[Source UTC § 706]

3B:31-51 DELIVERY OF PROPERTY BY FORMER TRUSTEE

(a) Unless a cotrustee remains in office or the court otherwise orders, and until the trust property is delivered to a successor trustee or other person entitled to it, a trustee who has resigned or been removed has the duties of a trustee and the powers necessary to protect the trust property.

(b) A trustee who has resigned or been removed shall proceed expeditiously to deliver the trust property within the trustee's possession to the cotrustee, successor trustee, or other person entitled to it, but a resigning trustee may retain a reasonable reserve for the costs of finalizing that trustee's administration of the trust.

[Source UTC § 707]

3B:31-52 REIMBURSEMENT OF EXPENSES

(a) In addition to the compensation allowed by N.J.S. 3B:18-2 et. seq., a trustee is entitled to be reimbursed out of the trust property for:

(1) expenses that were properly incurred in the administration of the trust; and

(2) to the extent necessary to prevent unjust enrichment of the trust, expenses that were not properly incurred in the administration of the trust.

(b) An advance by a trustee of money or other property for the protection of the trust gives rise to a lien against trust property to secure reimbursement.

[Source UTC Sec. 709]

ARTICLE 8

DUTIES AND POWERS OF TRUSTEE

3B:31-53 DUTY TO ADMINISTER TRUST

Upon acceptance of a trusteeship, the trustee shall administer the trust in good faith, in accordance with its terms and purposes and interests of the beneficiaries, and in accordance with this act and other applicable law.

[Source UTC § 801]

3B:31-54 DUTY OF LOYALTY

(a) A trustee shall administer the trust with undivided loyalty to and solely in the best interests of the beneficiaries.

(b) Subject to the rights of persons dealing with or assisting the trustee as provided in Section 1012, a sale, encumbrance, or other transaction involving the investment or management of trust property entered into by the trustee for the trustee's own personal account or which is otherwise affected by a conflict between the trustee's fiduciary and personal interests is voidable by a beneficiary affected by the transaction unless:

(1) the transaction was authorized by the terms of the trust;

(2) the transaction was approved by the court;

(3) the beneficiary did not commence a judicial proceeding within the time allowed by Section 1005;

(4) the beneficiary consented to the trustee's conduct, ratified the transaction, or released the trustee in compliance with Section 1009; or

(5) the transaction involves a contract entered into or claim acquired by the trustee before the person became trustee.

(c) A sale, encumbrance, or other transaction involving the investment or management of trust property is presumed to be affected by a conflict between personal and fiduciary interests if it is entered into by the trustee with:

(1) the trustee's spouse or domestic partner;

(2) the trustee's parents, parents' descendants, or the spouse or domestic partner of any of the foregoing;

(3) an agent or attorney of the trustee; or

(4) a corporation or other person or enterprise in which the trustee, or a person that owns a significant interest in the trustee, has an interest that might affect the trustee's judgment.

(d) A transaction between a trustee and a beneficiary that does not concern trust property but that occurs during the existence of the trust or while the trustee retains significant influence over the beneficiary and from which the trustee obtains an advantage attributable to the existence of the trust is voidable by the beneficiary if the beneficiary establishes that the transaction was unfair to the beneficiary.

(e) A transaction not concerning trust property in which the trustee engages in the trustee's individual capacity involves a conflict between personal and fiduciary interests if the transaction concerns an opportunity properly belonging to the trust.

(f) [Reserved]

(g) In voting shares of stock or in exercising powers of control over similar interests in other forms of enterprise, the trustee shall act in the best interests of the

beneficiaries and shall vote to elect or appoint directors or other managers who will manage the corporation or enterprise in the best interests of the beneficiaries.

(h) This section does not preclude the following transactions, if fair to the beneficiaries:

(1) an agreement between a trustee and a beneficiary relating to the appointment or compensation of the trustee;

(2) payment of reasonable compensation to the trustee;

(3) a transaction between the trust and another trust, decedent's estate, guardianship, conservatorship, or other fiduciary relationship of which the trustee is a fiduciary or in which a beneficiary has an interest;

(4) a deposit of trust money in a regulated financial-service institution operated by or affiliated with the trustee; or

(5) an advance by the trustee of money for the protection of the trust.

(i) The court may appoint a special fiduciary to make decisions with respect to any proposed transaction that might violate this section if entered into by the trustee.

[Source UTC § 802]

3B:31-55 DUTY OF IMPARTIALITY

If a trust has two or more beneficiaries, the trustee shall act impartially in investing, managing, and distributing the trust property, giving due regard to the beneficiaries' respective interests.

[Source UTC § 803]

3B:31-56 DUTY OF PRUDENT ADMINISTRATION

A trustee shall administer the trust as a prudent person would, by considering the purposes, terms, distributional requirements, and other circumstances of the trust. In satisfying this standard, the trustee shall exercise reasonable care, skill, and caution.

[Source UTC § 804]

3B:31-57 COSTS OF ADMINISTRATION

In administering a trust, the trustee may incur only costs that are appropriate and reasonable in relation to the trust property, the purposes of the trust, and the skills of the trustee.

[Source UTC § 805]

3B:31-58 DUTY TO USE SPECIAL SKILLS

A trustee who has special skills or expertise, or is named trustee in reliance upon the trustee's representation that the trustee has special skills or expertise, has a duty to use those special skills or expertise.

[Source UTC § 806]

3B:31-59 DELEGATION BY TRUSTEE

(a) A trustee may delegate ministerial, administrative and management duties and powers that a prudent trustee of comparable skills could properly delegate under the circumstances.

(b) A trustee shall exercise reasonable care, skill, and caution in:

(1) selecting an agent;

(2) establishing in writing the scope and terms of the delegation, consistent with the purposes and terms of the trust; and

(3) periodically reviewing the agent's actions in order to monitor the agent's performance and compliance with the terms of the delegation.

(c) A trustee shall provide reasonable written notice to the qualified beneficiaries on

each occasion upon which the trustee delegates duties pursuant to this section, including

the identity of the agent.

(d) A trustee who complies with subsections (b) and (c) is not liable to the beneficiaries or to the trust for an action of the agent to whom the function was delegated.

(e) In performing a delegated function, the agent shall owe to the trustee and the beneficiaries the same duties as the fiduciary and shall be held to the same standards as the fiduciary.

(f) By accepting a delegation of powers or duties from the trustee of a trust that is subject to the law of this State, an agent submits to the jurisdiction of the courts of this State, even if the delegation agreement provides otherwise.

[Source UTC § 807]

3B:31-60 POWERS TO DIRECT

(a) While a trust is revocable, the trustee may follow a direction of the settlor that is contrary to the terms of the trust.

(b) If the terms of a trust confer upon a person other than the settlor of a revocable trust the power to direct certain actions of the trustee, the trustee shall act in

accordance with a written exercise of the power unless the attempted exercise is contrary to the terms of the trust or the trustee knows the attempted exercise would constitute a breach of a fiduciary duty that the person holding the power owes to the beneficiaries of the trust.

(c) The terms of a trust may confer upon a trustee or other person a power to direct the modification or termination of the trust.

(d) A person, other than a beneficiary, who holds a power to direct is required to act in good faith with regard to the purposes of the trust and the interests of the beneficiaries. The holder of a power to direct is liable for any loss that results from breach of the holder's failure to act in good faith.

[Source UTC § 808]

3B:31-61 CONTROL AND PROTECTION OF TRUST PROPERTY

A trustee shall take reasonable steps to take control of and protect the trust property.

[Source UTC § 809]

3B:31-62 RECORDKEEPING AND IDENTIFICATION OF TRUST PROPERTY

(a) A trustee shall keep adequate records of the administration of the trust.

(b) A trustee shall keep trust property separate from the trustee's own property.

(c) Except as otherwise provided in subsection (d), a trustee shall cause the trust property to be designated so that the interest of the trust, to the extent feasible, appears in records maintained by a party other than a trustee or beneficiary.

(d) If the trustee maintains records clearly indicating the respective interests, a trustee may invest as a whole the property of the trust with other fiduciary accounts maintained by the trustee.

[Source UTC § 810]

3B:31-63 DUTY TO ENFORCE AND DEFEND CLAIMS

A trustee shall take reasonable steps to enforce claims of the trust and to defend claims against the trust.

[Source UTC § 811]

3B:31-64 DUTY TO COLLECT TRUST PROPERTY AND REDRESS BREACHES OF TRUST

(a) A trustee shall take reasonable steps to compel a former trustee or other person to deliver trust property to the trustee.

(b) A trustee shall take reasonable steps to redress a breach of trust known to the trustee to have been committed by a former trustee.

[Source UTC § 812]

3B:31-65 DUTY TO DISCLOSE AND DISCRETION TO PERIODICALLY REPORT

(a) Unless unreasonable under the circumstances, a trustee shall promptly respond to a beneficiary's request for information related to the administration of a trust.

(b) A trustee, upon request of a beneficiary, shall promptly furnish to the beneficiary a copy of the trust instrument.

(c) A trustee seeking the protection of Section [92(a)] of this act [U.T.C. §905(a)] may provide the beneficiaries with a report of the trust property, liabilities, receipts, and disbursements, including the source and amount of the trustee's compensation, a listing of the trust assets, and, if feasible, their respective market values.

[Source UTC § 813]

3B:31-66 DISCRETIONARY POWERS

Notwithstanding the breadth of discretion granted to a trustee in the terms of the trust, including the use of such terms as "absolute", "sole", or "uncontrolled", the trustee shall exercise a discretionary power in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries.

[Source UTC § 814]

3B:31-67 GENERAL POWERS OF TRUSTEE

(a) Except as limited by N.J.S.A. 3B:11-4.1 and other express statutory restrictions, a trustee, without authorization by the court, may exercise:

- (1) powers conferred by the terms of the trust; or
- (2) except as limited by the terms of the trust:
 - (A) all powers over the trust property which an unmarried competent owner has over individually owned property;
 - (B) any other powers appropriate to achieve the proper investment, management, and distribution of the trust property; and
 - (C) any other powers conferred by this Act and by Title 3B.

(b) The exercise of a power is subject to the fiduciary duties prescribed by this Act and by Title 3B.

[Source UTC § 815]

3B:31-68 DISTRIBUTION ON TERMINATION

(a) Upon the occurrence of an event terminating or partially terminating a trust, the trustee shall proceed expeditiously to distribute the trust property to the persons entitled to it, subject to the right of the trustee to retain a reasonable reserve for the payment of debts, expenses, and taxes.

(b) Upon termination or partial termination of a trust, the trustee may mail or deliver a proposal for distribution to all persons who have a right to object to the proposed distribution. The proposal shall notify all persons who have a right to object to the proposal of their right to object and that their objection must be in writing and received by the trustee within 30 days after the mailing or delivery of the proposal. The right of any person to object to the proposed distribution on the basis of the kind or value of asset he or she or another beneficiary is to receive, if not waived earlier in writing, terminates if he or she fails to object in writing received by the trustee within 30 days after mailing or delivery of the proposal.

[Source UTC § 817]

ARTICLE 10

LIABILITY OF TRUSTEES AND RIGHTS OF PERSONS DEALING WITH TRUSTEE

3B:31-69 REMEDIES FOR BREACH OF TRUST

(a) A violation by a trustee of a duty the trustee owes to a beneficiary is a breach of trust.

(b) To remedy a breach of trust that has occurred or may occur, the court may:

- (1) compel the trustee to perform the trustee's duties;
- (2) enjoin the trustee from committing a breach of trust;
- (3) compel the trustee to redress a breach of trust by paying money, restoring property, or other means;
- (4) order a trustee to account;
- (5) appoint a special fiduciary to take possession of the trust property and administer the trust;
- (6) suspend the trustee;
- (7) remove the trustee as provided in Section 706;
- (8) reduce or deny compensation to the trustee;
- (9) subject to Section 1012, void an act of the trustee, impose a lien or a constructive trust on trust property, or trace trust property wrongfully disposed of and recover the property or its proceeds; or
- (10) order any other appropriate relief.

[Source UTC § 1001]

3B:31-70 DAMAGES FOR BREACH OF TRUST

(a) A trustee who commits a breach of trust is liable to the beneficiaries affected for the greater of:

(1) the amount required to restore the value of the trust property and trust distributions to what they would have been had the breach not occurred; or

(2) the profit the trustee made by reason of the breach.

(b) If more than one trustee is liable to the beneficiaries for a breach of trust, a trustee is entitled to contribution from the other trustee or trustees based upon the comparative degree of culpability for the breach. However, a trustee who committed the breach of trust in bad faith or with reckless indifference to the purposes of the trust or the interests of the beneficiaries is not entitled to contribution from a trustee who was not guilty of such conduct. Furthermore, a trustee who received a benefit from the breach of trust is not entitled to contribution from another trustee to the extent of the benefit received.

[Source UTC § 1002]

3B:31-71 DAMAGES IN ABSENCE OF BREACH

(a) A trustee is accountable to an affected beneficiary for any profit made by the trustee arising from the administration of the trust, even absent a breach of trust, except where the interest in the transaction involved is fully disclosed to the beneficiary and consent is freely given.

(b) Absent a breach of trust, a trustee is not liable to a beneficiary for a loss or depreciation in the value of trust property or for not having made a profit.

[Source UTC § 1003]

3B:31-72 LIMITATION OF ACTION AGAINST TRUSTEE

(a) A beneficiary may not commence a proceeding against a trustee for breach of trust more than six months after the date that the beneficiary or a representative of the beneficiary was sent a report that adequately disclosed the existence of a potential claim for breach of trust and informed the beneficiary of the time allowed for commencing a proceeding.

(b) A report adequately discloses the existence of a potential claim for breach of trust if it provides sufficient information so that the beneficiary or representative knows of the potential claim or should have inquired into its existence.

(c) If subsection (a) does not apply, a judicial proceeding by a beneficiary against a trustee for breach of trust must be commenced within five years after the first to occur of:

(1) the removal, resignation, or death of the trustee;

(2) the termination of the beneficiary's interest in the trust; or

(d) For purposes of subsection (a), a beneficiary is deemed to have been sent a report if:

(1) in the case of a beneficiary having capacity, it is sent to the beneficiary; or

(2) in the case of a beneficiary who under Article 3 may be represented and bound by another person, if it is received by his representative.

(e) this section does not preclude an action to recover for fraud or misrepresentation related to the report.

[Source UTC § 1005]

3B:31-73 RELIANCE ON TRUST INSTRUMENT

A trustee who acts in reasonable reliance on the terms of the trust as expressed in the trust instrument is not liable to a beneficiary for a breach of trust to the extent the breach resulted from the reliance.

[Source UTC § 1006]

3B:31-74 EVENT AFFECTING ADMINISTRATION OR DISTRIBUTION

If the happening of an event, including marriage, divorce, performance of educational requirements, or death, affects the administration or distribution of a trust, a trustee who has exercised reasonable care to ascertain the happening of the event is not liable for a loss resulting from the trustee's lack of knowledge.

[Source UTC § 1007]

3B:31-75 EXCULPATION OF TRUSTEE

(a) A term of a trust relieving a trustee of liability for breach of trust is unenforceable to the extent that it:

(1) relieves the trustee of liability for breach of trust committed in bad faith or with reckless indifference to the purposes of the trust or the interests of the beneficiaries; or

(2) was inserted as the result of an abuse by the trustee of a fiduciary or confidential relationship to the settlor.

(b) An exculpatory term drafted or caused to be drafted by the trustee is invalid as an abuse of a fiduciary or confidential relationship unless the trustee proves that the exculpatory term is fair under the circumstances and that its existence and contents were adequately communicated to the settlor.

[Source UTC § 1008]

3B:31-76 BENEFICIARY'S CONSENT, RELEASE, OR RATIFICATION

A trustee is not liable to a beneficiary for breach of trust if the beneficiary, while having capacity, consented to the conduct constituting the breach, released the trustee from liability for the breach, or ratified the transaction constituting the breach, unless:

(1) the consent, release, or ratification of the beneficiary was induced by improper conduct of the trustee; or

(2) at the time of the consent, release, or ratification, the beneficiary did not know of the beneficiary's rights or of the material facts relating to the breach.

[Source UTC § 1009]

3B:31-77 LIMITATION ON PERSONAL LIABILITY OF TRUSTEE

(a) Except as otherwise provided in the contract, a trustee is not personally liable on a contract properly entered into in the trustee's fiduciary capacity in the course of administering the trust if the trustee in the contract disclosed the fiduciary capacity.

(b) A trustee is personally liable for torts committed in the course of administering a trust, or for obligations arising from ownership or control of trust property, including liability for violation of environmental law, only if the trustee is personally at fault.

(c) A claim based on a contract entered into by a trustee in the trustee's fiduciary capacity, on an obligation arising from ownership or control of trust property, or on a tort committed in the course of administering a trust, may be asserted in a judicial proceeding against the trustee in the trustee's fiduciary capacity, whether or not the trustee is personally liable for the claim.

[Source UTC § 1010]

3B:31-78 INTEREST AS GENERAL PARTNER

(a) Except as otherwise provided in subsection (c) or unless personal liability is imposed in the contract, a trustee who holds an interest as a general partner in a general or limited partnership is not personally liable on a contract entered into by the partnership after the trust's acquisition of the interest if the fiduciary capacity was disclosed in the contract or in a statement previously filed pursuant to the New Jersey Uniform Partnership Act (1996) or the Revised New Jersey Uniform Limited Partnership Act of 1976.

(b) Except as otherwise provided in subsection (c), a trustee who holds an interest as a general partner is not personally liable for torts committed by the partnership or for obligations arising from ownership or control of the interest unless the trustee is personally at fault.

(c) The immunity provided by this section does not apply if an interest in the partnership is held by the trustee in a capacity other than that of trustee or is held by the trustee's spouse or one or more of the trustee's descendants, siblings, or parents, or the spouse of any of them.

(d) If the trustee of a revocable trust holds an interest as a general partner, the settlor is personally liable for contracts and other obligations of the partnership as if the settlor were a general partner.

[Source UTC § 1011]

3B:31-79 CERTIFICATION OF TRUST

(a) Instead of furnishing a copy of the trust instrument to a person other than a beneficiary, the trustee may furnish to the person a certification of trust containing the following information:

- (1) that the trust exists and the date the trust instrument was executed;
- (2) the identity of the settlor;
- (3) the identity and address of the currently acting trustee;
- (4) the powers of the trustee;
- (5) the revocability or irrevocability of the trust and the identity of any person holding a power to revoke the trust;
- (6) the authority of cotrustees to sign and whether all or less than all are required in order to exercise powers of the trustee; and
- (7) the name in which title to trust property may be taken.

(b) A certification of trust shall be signed by all persons identified as currently acting as trustees.

(c) A certification of trust must state that the trust has not been revoked, modified, or amended in any manner that would cause the representations contained in the certification of trust to be incorrect.

(d) A certification of trust need not contain the dispositive terms of a trust.

(e) A recipient of a certification of trust may require the trustee to furnish copies of those excerpts from the original trust instrument and later amendments which designate the trustee and confer upon the trustee the power to act in the pending transaction.

(f) A person who acts in reliance upon a certification of trust without knowledge that the representations contained therein are incorrect is not liable to any person for so acting and may assume without inquiry the existence of the facts contained in the certification. Knowledge of the terms of the trust may not be inferred solely from the fact that a copy of all or part of the trust instrument is held by the person relying upon the certification.

(h) A person making a demand for the trust instrument in addition to a certification of trust or excerpts is liable for damages if the court determines that the person did not act in good faith in demanding the trust instrument.

(i) This section does not limit the right of a person to obtain a copy of the trust instrument in a judicial proceeding concerning the trust.

[Source UTC § 1013]

ARTICLE 11 MISCELLANEOUS PROVISIONS

3B:31-80 ELECTRONIC RECORDS AND SIGNATURES

The provisions of this act governing the legal effect, validity, or enforceability of electronic records or electronic signatures, and of contracts formed or performed with the use of such records or signatures, conform to the requirements of Section 102 of the Electronic Signatures in Global and National Commerce Act (15 U.S.C. Section 7002) and supersede, modify, and limit the requirements of the Electronic Signatures in Global and National Commerce Act.

[Source UTC § 1102]

3B:31-81 SEVERABILITY CLAUSE

If any provision of this act or its application to any person or circumstances is held invalid, the invalidity does not affect other provisions or applications of this act which can be given effect without the invalid provision or application, and to this end the provisions of this act are severable.

[Source UTC § 1103]

3B:31-82 EFFECTIVE DATE

Effective Date. This act shall take effect on the 180th day following enactment.

[Source UTC § 1104]

3B:31-83 REPEALER

The following sections are repealed:

N.J.S. 3B:11-5 through 3B:11-7.

[Source UTC § 1105]

3B:31-84 APPLICATION TO EXISTING RELATIONSHIPS

a. Except as otherwise provided in this act:

(1) this act applies to all trusts created before, on, or after its effective date;

(2) this act applies to all judicial proceedings concerning trusts commenced on or after its effective date;

(3) this act applies to judicial proceedings concerning trusts commenced before its effective date unless the court finds that application of a particular provision of this act would substantially interfere with the effective conduct of the judicial proceedings or

prejudice the rights of the parties, in which case the particular provision of this act does not apply and the superseded law applies;

(4) any rule of construction or presumption provided in this act applies to trust instruments executed before the effective date of the act unless there is a clear indication of a contrary intent in the terms of the trust; and

(5) an act done before the effective date is not affected by this act.

(b) If a right is acquired, extinguished, or barred upon the expiration of a prescribed period that has commenced to run under any other statute before the effective date of the act, that statute continues to apply to the right even if that statute has been repealed or superseded by this act.

[Source UTC § 1106]



STATE OF NEW JERSEY

N J L R C

NEW JERSEY LAW REVISION COMMISSION

FINAL REPORT

Relating to

TITLE 1 – ACTS, LAWS AND STATUTES

DECEMBER, 2008

NEW JERSEY LAW REVISION COMMISSION

153 Halsey Street, 7th Fl., Box 47016

Newark, New Jersey 07101

973-648-4575

(Fax)973-648-3123

email: njlrc@njlrc.org

Website: <http://www.lawrev.state.nj.us>

TITLE 1 – ACTS, LAWS AND STATUTES

Introduction

This draft of revised Title 1 retains most of the substance of the current provisions, but simplifies and clarifies the language. Oddities of legislative diction and verb forms were eliminated. The Commission chose not to make recommendations concerning the Legislative Commissions.

Certain provisions contain significant changes. Sections 5-1 and 5-2 contain clarifications regarding preparation of laws after enactment. Current provisions focus on the printing of the annual volume of laws. While that publication remains important, the legislative public internet site has become equally important in publication of the law. Revision is needed to reflect that change.

Section 5-3, dealing with the authority to correct statutes, also incorporates significant change. The section clarifies that, in accord with current practice, corrections can be made at any time. However, it also provides for a system to make and maintain a record of corrections; that provision is new. Section 5-4 gives the Office of Legislative Services the authority to recompile statutes. The concept is new, although there have been instances in the past when statutes were assigned new compilation numbers. The proposed section requires concurrence by the Attorney General (as in statutory corrections) and provides for a system of recording that a statute has been recompiled.

The last significant change is the creation of a simplified system for citing statutes. See, Section 1-7. The current system requires three different forms of citation depending on when and in what form the statute was enacted. No policy considerations support the current system; its complications are merely a matter of history.

Sections that were specific to the implementation of the Revised Statutes of 1937 or of Title 2A of the statutes (effective 1952) and that have no continuing importance have been deleted.

The sections concerning this Commission have been left unchanged. It seemed inappropriate to make any recommendation for changes that affect the Commission directly. The section on the Uniform Law Commissioners has also been left alone. It is one of those sections in limbo, saved from repeal but not compiled. Perhaps the Uniform Law on Uniform Law Commissioners should be considered.

Chapter 1: Provisions Relating to Statutes Generally

1A-1. Words and phrases defined; number, gender

a. Unless it is otherwise expressly provided or there is something in the subject or context repugnant to the meaning, the following words and phrases, when used in any statute, shall have the meaning given to them by this section.

(1) Affirmation; affirmed. See "Oath; sworn," infra, this section.

(2) "Assessor" when used in relation to the assessment of taxes or water rents or other public assessments includes all officers, boards or commissions charged with the duty of making assessments unless a particular officer, board or commission is specified.

(3) "Census" when used with reference to the population of this State, or of any subdivision, means the latest Federal census effective within this State.

(4) "Collector" when used in relation to the collection of taxes or water charges or other public assessments, includes all officers charged with the duty of collecting those taxes, water charges or assessments, unless a particular officer is specified.

(5) "Folio" or "sheet" consists of 100 words, and in all cases where an entry of any writing or copy is to be paid for, the sheet or folio shall consist of 100 words.

(6) "General election" means the annual election held on the first Tuesday after the first Monday in November. Any statute that provides that a public officer be elected, or a public question be voted on at an election at which members of the General Assembly are elected, or words to that effect, shall mean "at a general election."

(7) Month; year. The word "month" means a calendar month, and the word "year" means a calendar year.

(8) "Municipality and municipal corporation" include cities, towns, townships, villages and boroughs, and any municipality governed by a board of commissioners or an improvement commission.

(9) Oath; sworn. The word "oath" includes "affirmation" and the word "sworn" includes "affirmed."

(10) "Person" includes a corporation, association, partnership or other entity, as well as a natural person, unless restricted by the context to a natural person or specifically restricted as to some entities.

(11) "Personal property" includes goods and chattels, rights and credits, moneys and effects, evidences of debt, choses in action and all written instruments by which any right to, interest in, or lien or encumbrance upon, property or any debt or financial obligation is created, acknowledged, evidenced, transferred, discharged or defeated, in whole or in part, and everything which may be the subject of ownership except real property as defined in this section.

(12) "Population" means the population as shown by the latest Federal census effective within this State, and shall be construed as synonymous with "inhabitants."

(13) "Property" and "other property," unless limited by the context to either real or personal property, includes both real and personal property.

(14) "Real estate" and "real property" include lands, tenements and hereditaments and all rights thereto and interests therein.

(15) "Registered mail" includes "certified mail" and any commercial courier service that provides similar services.

(16) "Revision law" means a statute that is expressed in its title or body to be a revision of any part of the statutory law.

(17) "State" includes any State, territory or possession of the United States and the District of Columbia.

(18) "Taxing district" when used in a law relating to the assessment or collection of taxes, assessments or water rates or water rents, include every political division of the State, less than a county, whose inhabitants, governing body or officers have the power to levy taxes, assessments or rates.

(19) "Term of court" means a stated session or stated sessions of that court.

(20) "United States" includes every State, territory and possession of the United States, including the District of Columbia.

b. Number; gender. When a statute uses words importing the singular number or masculine gender, it shall include and apply to plural persons or things and to females and corporate bodies.

Source: 1:1-2; 1:1-25.

Comment

Most of this section is substantively identical with its source. However, the definitions of "sheet," "ship" and "territory" have been deleted as unnecessary and the definitions of "magistrate" and "Revised Statutes" have been deleted as anachronistic. The definition of "term of court" is derived from 1:1-25. The provision on number and gender has been moved to a separate section.

1A-2. Effect of definitions on treaties, compacts, or agreements

Definitions of words and phrases applicable to statutes generally shall not be construed to limit or enlarge any provision in any treaty, compact or agreement between this State and any other state or the United States, including agreements resulting from reciprocal legislation.

Source: 1:1-3.

Comment

This section is substantially identical to 1:1-3.

1A-3. Partial unconstitutionality

If any part of a statute is determined by a court to be unconstitutional, invalid or inoperative, the statute shall be enforced to the extent that it is not unconstitutional, invalid or inoperative, and the determination shall not invalidate or make ineffectual any other statute.

Source: 1:1-10.

Comment

This section is substantially identical to 1:1-10.

1A-4. Seal; sealed

Every instrument to which it is required or permitted by law that a seal be attached shall be deemed to be sealed when a mark or device indicating a seal is printed or marked on it or affixed to it. No instrument shall be questioned for lack of a wax seal. This section shall apply to sealings by corporations and individuals; but any sealing required or permitted by law of a public officer, or body having an official seal shall be by the impress of that official seal.

Source: 1:1-2.1.

Comment

Though simplified in language, this section is substantially identical to 1:1-2.1. The section may be unnecessary but is included as an act of caution.

1A:1-5. Time; standard time

The standard time of this State shall be Eastern Standard Time, the time of the seventy-fifth meridian west from Greenwich, except that the standard time of this State shall be Eastern Daylight Time, 1 hour in advance of this prescribed time while daylight time is in effect.

Source: 1:1-2.3.

Comment

This section is substantially identical to 1:1-2.3 except that the specification of a particular period during which daylight time is in effect has been deleted.

1A:1-6. Notice or communication required to be sent, taken, or transmitted out of United States; Acts of Congress to control

If there is a legal requirement that notice be sent or an action be taken outside of the United States, and federal law prohibits the notice or action or requires license or consent as a condition for it, the requirement for the notice or action shall be dispensed with.

Source: 1:1-2.5.

Comment

This section is substantially similar to 1:1-2.5. That section was enacted in 1942 to deal with problems caused by World War II. It is retained because it may have continuing importance. The source statute dispensed with notice outside the United States that was prerequisite for “the granting of any relief, the holding of any meeting or the doing of anything under or pursuant to any such statute, law, ordinance, rule, regulation, requirement, practice, order, judgment, decree, charter, certificate of incorporation, by-law, resolution, contract, agreement, or undertaking.” This section dispenses with any notice or action outside the United States that is prevented by federal law.

1A:1-7. Citation of statutes.

a. Every statute that has been assigned a compilation number and compiled within the New Jersey Statutes, whether the number was assigned as part of the Revised Statutes, or as part of a revision law enacted in the New Jersey Statutes, or by the compilation of the section of the pamphlet laws by the Office of Legislative Services, may be cited for any purpose as N.J.S. followed by the compilation number. Any other statute may be cited by its year and chapter number.

b. The legislation contained within any title, subtitle, part, chapter, article, section or group of sections of the New Jersey Statutes may be cited by reference to the title, subtitle, part, chapter, article, section or group of sections. References to more than one title, subtitle, chapter, article, section or other division of statutes in series, shall be taken to include both the first and last numbers referred to.

c. If any statute or part of a statute, which is repealed or superseded by the enactment of a later statute, is re-enacted in substance in the later statute, a reference in any other statute to the repealed or superseded statute shall be deemed to be a reference to the part of the later statute that corresponds in substance to the repealed or superseded statute.

Source: 1:1-5.1; 1:1-7; 1:1-8; 1:1-9.

Comment

Subsection (a) is derived from 1:1-5.1 but has been changed to allow citation to any compiled in the form N.J.S. _____. Now, statutes in the 1937 Revised Statutes are referred to as R.S. _____, certain statutes enacted as revision laws as N.J.S. _____, and other statutes as P.L. _____, c. _____ followed by C. and the compilation number in parentheses. The complication of this system makes citation to statutes in legislation more difficult than it needs to be and obscure to the general public. Mistakes in citation have caused mistakes in listing the sections to be repealed. The complication of the system has caused the courts to ignore the official system and require citations to the New Jersey Statutes Annotated, a proprietary publication. The only reason for the current system is historical; its distinctions serve no substantive purpose.

Subsection (b) is an amalgam of 1:1-7 and 1:1-8. However, the changes in subsection (a) make this subsection far more important. Under the current system, if one cites N.J.S. 2C, Chapter 20, the citation would not be held to include such sections as 2C:20-1.1, -2.1, -3.1, -7.1, -11.1, and –23 through –37 which were enacted after the criminal code and technically are not to be cited in the form N.J.S. _____. As a result, caution is now necessary in using cumulative citations. With the abolition of the trifurcated system, the use of cumulative citations becomes simpler and safer.

Subsection (c) is a simplification of 1:1-9.

1A:1-8. Acts done, rights acquired, etc., under repealed acts not affected by repeal

The repeal of any statutory provision, by the enactment of

- a. the Revised Statutes,
- b. the New Jersey Statutes, or
- c. any other revision law,

shall not affect or invalidate any act done or right or limitation vested or accrued, or any bonds issued, or taxes or assessments levied or imposed, or any tax sale had, or invalidate, limit, or affect any right, title, estate, privilege, immunity or power or conveyance of either real or personal property, acquired, had, made under, or validated by, the statutory provision that was repealed.

Source: 1:1-11.

Comment

Though simplified in language, this section is substantially identical to 1:1-11.

Chapter 2: Construction of Statutes

1A:2-1. General rules of construction

In construing statutes of this State, both civil and criminal, words and phrases shall be construed with their context, and, unless inconsistent with the manifest intent of the Legislature or unless another or different meaning is expressly indicated, shall be given their generally accepted meaning, according to the customary usage of the language. Technical words and phrases, and words and phrases having a technical or special meaning in the law shall be construed in accordance with that meaning.

Source: 1:1-1.

Comment

This section is substantially identical to 1:1-1.

1A:2-2. Repeal of repealing statute

The repeal of a statutory provision that repealed an earlier statute or part of a statute shall not of itself revive the earlier statute or part.

Source: 1:1-3.2.

Comment

This section is substantially identical to 1:1-3.2.

1A:2-3. Reference to revised statute

A reference in a statute to another statute that is revised by a revision law shall be construed to be a reference to the provisions of the revision law corresponding in substance to, or superseding, the statute revised.

Source: 1:1-3.3.

Comment

This section is substantially identical to 1:1-3.3.

1A:2-4. Construction as continuation of heretofore existing laws

The provisions of a revision law not inconsistent with those of the laws revised shall be construed as a continuation of the prior laws.

Source: 1:1-4.

Comment

This section is substantially identical to 1:1-4.

1A:2-5. Classification and arrangement; effect on construction

The classification and arrangement of the sections of the Revised Statutes of 1937 and the classification and arrangement of statutes compiled by the Office of Legislative Services have been made for the purpose of convenience, reference and orderly arrangement, and therefore no implication or presumption of a legislative construction is to be drawn from them.

Source: 1:1-5.

Comment

The portion of the section that refers to the Revised Statutes is substantially identical to 1:1-5. The section has been expanded to apply the same rule to those sections that are compiled by the Office of Legislative Services. In both cases, an administrative body rather than the legislature arranged the sections. Since the Legislature did not determine the arrangement, the arrangement is no indication of legislative intent.

1A:2-6. Outlines, analyses and headnotes not part of statutes

In the interpretation of a statute, an outline or analysis of the contents of a title, chapter or article, a cross reference or cross reference note and a headnote or source note to a section shall not be deemed to be a part of the statute.

Source: 1:1-6.

Comment

This section is substantially identical to 1:1-6.

1A:2-7. Construction and effect of statutes compiled or saved from repeal

Statutes and parts of statutes included in the Revised Statutes designated as "saved from repeal" shall have effect only to the extent that they were effective at the time the Revised Statutes took effect. Such statutes or parts of statutes shall not be deemed repealed except insofar as they are inconsistent with the provisions of the Revised Statutes but, insofar as they may have been repealed, amended or superseded by legislation subsequent to their enactment, they shall remain superseded, amended or repealed.

Source: 1:1-21.

Comment

Though simplified in language, this section is substantially identical to 1:1-21.

Chapter 3: Technical Matters Relating to Statutes

1A:3-1. Enacting clause of laws; numbering sections; engrossing of bills

All laws of this State shall begin in the following style: "Be it enacted by the Senate and General Assembly of the State of New Jersey" after which shall follow the sections numbered consecutively 1, 2, 3, et cetera, in Arabic numerals, each number being followed immediately by the significant words of the section, without the prefix of the word "that" or the words "and be it enacted" , or any other formal prefix whatsoever. The Legislature shall cause all bills to be engrossed in conformity to the provisions of this section and N.J.S. 1A:3-2.

Source: 1:2-1.

Comment

This section is substantially identical to 1:2-1.

1A:3-2. Chapters designated by Arabic numerals

Arabic numerals shall be used to designate the numbers of the chapters of the pamphlet laws in the order in which they are enacted.

Source: 1:2-2.

Comment

This section is identical to 1:2-2.

1A:3-3. Effective date of public laws

A public law shall go into effect on the fourth day of July after its passage, unless otherwise specially provided in the law.

Source: 1:2-3.

Comment

This section is substantially identical to 1:2-3.

1A:3-4. Format of bills, joint resolutions for Governor's signature.

Every bill and every joint resolution that has passed the Legislature shall be presented to the Governor in the same text as that in which it passed the Legislature. A bill or joint resolution in which material enclosed in bold-faced brackets is included shall, if it becomes law, be construed as though the material so enclosed was omitted from the bill. A legend shall be affixed to the bottom of the first page of the bill or joint resolution indicating that material so enclosed is intended to be omitted from the bill or joint resolution, when it becomes law.

Source: 1:2-3.1.

Comment

This section is substantially identical to the first part of 1:2-3.1. The material on summaries of appropriations has been deleted as unnecessary. That subject is covered by a later statute, 1:2-3.2, which has been retained.

1A:3-5. Display of summaries of appropriations

Unless it is otherwise expressly provided, the following display, or a substantially similar display, of summaries of appropriations as may appear within an annual appropriations act shall not be deemed to be part of that act but shall be for the purpose of displaying summaries of the items of appropriations made elsewhere within that act:

Summary of Appropriations - Department of [Name of Department]

Appropriations by Category:

Direct State Services.....	\$(subtotal)
Grants-in-Aid.....	\$(subtotal)
State Aid.....	\$(subtotal)

Appropriations by Fund:

General Fund.....	\$(subtotal)
Property Tax Relief Fund.....	\$(subtotal)
Casino Revenue Fund.....	\$(subtotal)

Source: 1:2-3.2.

Comment

This section is identical to 1:2-3.2.

Chapter 4: Enacted Bills and Resolutions

1A:4-1. Delivery to Governor; signing by Governor and delivery to Secretary of State

a. On the passage of a bill or the adoption of a joint resolution by both Houses of the Legislature, the bill or resolution shall be delivered to the Governor.

b. If the Governor approves the bill or joint resolution, the Governor shall sign it and deliver it to the Secretary of State to be filed. The laws and joint resolutions of each session of the Legislature shall be kept separately according to the year in which they were passed. Bills and joint resolutions shall be kept safely in the Secretary of State's Office and not allowed to be removed from there for any purpose.

Source: 1:2-5.

Comment

This section has been shortened and simplified but is substantially identical to 1:2-5.

1A:4-2. Bills not signed or vetoed by Governor; filing by Secretary of State

If a bill passes both Houses of the Legislature, and is presented to the Governor pursuant to Article V, Section I, paragraph 14, of the Constitution of this State, and the bill is not returned to the house in which it originated within the time limited by the Constitution, and as a result the bill has become a law, the Governor shall sign a certificate on the bill of the time the bill was presented and deliver the bill to the Secretary of State who shall endorse and sign a certificate on it of the time the bill was delivered and file the bill in the same manner as the other laws of the same session of the Legislature.

Source: 1:2-6.

Comment

Though simplified this section is substantially identical to 1:2-6.

1A:4-3. Bills passed after Governor's veto; filing by Secretary of State

a. If a bill that is passed by both Houses of the Legislature and presented to the Governor, returned to the House in which it originated by the Governor with objections, and shall nevertheless afterwards become a law in the manner prescribed by Article 5 §1 ¶14(a) of the Constitution notwithstanding the Governor's objections, the chief administrative officer of the House in which final legislative action occurred shall deliver it to the Secretary of State, who shall file

the bill in the same manner as the other laws of the same session of the Legislature.

b. If a bill that is passed by both Houses of the Legislature and presented to the Governor, is returned to the House in which it originated by the Governor with objections and a recommendation for amendment as prescribed by Article 5 §1 ¶14(b)(3), is amended and approved by both Houses of the Legislature and approved by the Governor, the Governor shall sign it and deliver it to the Secretary of State to be filed.

Source: 1:2-7.

Comment

Though simplified subsection (a) is similar to 1:2-7. However, it provides that the chief administrative officer of the house in which the last legislative action occurred, rather than the presiding officer of the house in which the bill originated delivers the bill to the Secretary of State. That reflects current practice. Subsection (b) is new. It provides a procedure when there is a conditional veto. There is no provision on that subject in current statutes.

1A:4-4. Certified copies of filed bills and resolutions; use as evidence

The Secretary of State shall give copies of any law or joint resolution filed pursuant to this title to any person requesting them. The copies, when certified by the Secretary of State to be true copies, shall be received in evidence in any court of the State, and shall have the same effect as if the originals were produced. The Secretary of State shall charge the fee set by law for furnishing copies.

Source: 1:2-8.

Comment

Though simplified this section is substantially identical to 1:2-8.

1A:4-5. Printed laws as evidence

Laws printed by authority of this State shall be received in evidence before any court in this State.

Source: 1:2-4.

Comment

This section is substantively identical to 1:2-4.

Chapter 5: Publication

1A:5-1. Preparation of laws.

a. Every bill enacted into law during the an annual session of a Legislature shall be given a chapter number as a law of that legislative year in the form:

L.(year of law), ch.(chapter number of law). Chapter numbers shall be assigned sequentially in order of the time the bill became law.

b. As soon as practicable after any law is enacted, the Office of Legislative Services shall prepare the law for printing and for inclusion the public internet site established pursuant to N.J.S. 52:11-78. The Office of Legislative Services shall:

(1) assign a compilation number to each section of a law that is part of the general and permanent law to govern its placement within the New Jersey Statutes;

(2) add a headnote descriptive of a section's contents to the beginning of each section if the section was not enacted with a headnote; and

(3) correct errors in the text of a law as provided by N.J.S. 1A:5-3,

c. In preparing a law in the form for inclusion in the annual volume of laws and for compilation in the Laws of New Jersey, the Office of Legislative Services shall:

(1) omit from the text of a law all material that is enclosed in bold-faced brackets, together with the brackets and all related footnotes; and

(2) cause material appearing in the text as underlined or printed in italics to be printed in the same manner as other material is printed.

d. In preparing the annual appropriations act, the Office of Legislative Services shall include all displays of summaries of appropriations that appear within the act and include a legend indicating that material included within the summaries is for the purpose of displaying summaries of the items of appropriations set forth elsewhere within that law and, while included within the text of the law, is not intended to be part of the law.

Source 1:3-1

Comment

This section contains the parts of 1:3-1 that are concerned with the processing of an enacted statute immediately after it becomes law. Other parts of 1:3-1 that directly relate to the annual printing of statutes enacted during the legislative year are in the next section. Subsection (a) is derived from parts of the first paragraph of 1:3-1 and from 1:3-3.1. Subsection (b) is also derived from the first paragraph of 1:3-1. Subsection (c) is derived from the same source. The distinction between the two subsections is that subsection (c) refers to preparation of the version of a statute that contains only the final version of a section and does not show the changes made during the legislative process, or in the case of an amendment to an existing section, the changes from prior law. Subsection (d) continues the special provisions on appropriation acts found in 1:3-1.

1A:5-2. Annual volume of laws

a. The Legislative Services Commission, through the Office of Legislative Services, shall direct and superintend the printing of the annual volume of laws containing:

(1) every law and joint resolution enacted during the annual session of a Legislature;

(2) every concurrent resolution for submission to the people of a proposed amendment of the Constitution agreed to during the annual session of a Legislature; and

(3) those proclamations of the Governor made during the previous year that are to be printed with the laws.

b. Every bill enacted into law during an annual session of a Legislature shall be printed in numerical order by chapter number. Every joint and concurrent resolution shall be numbered according to the date it was approved and printed in numerical order.

c. The laws enacted at each session of the Legislature shall be printed in the style established by the Legislative Services Commission, through the Office of Legislative Services. Preceding the first chapter of the pamphlet laws, shall be the legislative list of members' names arranged by Senate and General Assembly districts. Following the last chapter of the pamphlet laws, shall be the joint resolutions arranged in numerical order, proposed amendments to the Constitution, and those proclamations of the Governor made during the annual session that are to be printed with the laws.

Source: 1:3-2; 1:3-3; 1:3-3.1; 1:3-4.

Comment

The introductory language in subsection (a) is substantially identical to section 1:3-3. The numbered paragraphs of that subsection that govern the contents of the annual volume of laws are derived from 1:3-4. The subsection has been changed to indicate that, in accord with settled practice, concurrent resolutions, other than those proposing Constitutional amendments are not printed in the Annual Volume of Laws. The same material is duplicated in 1:3-2. Though simplified in form, subsection (b) is substantially identical to section 1:3-3.1. Subsection (c) is substantially identical to section 1:3-4. The reference in the source section to printing "in the same general style as heretofore" has been deleted as unnecessary given the power of the Legislative Services Commission to modify the style.

1A:5-3. Correction of statutes.

a. The Office of Legislative Services, with the concurrence of the Attorney General, may correct errors in the text, but not the title, of a law that will not affect the substance of the law. Errors that may be corrected include:

- (1) errors in references to other laws,
 - (2) errors in punctuation and spelling, and other obvious errors in form,
- and,
- (3) errors caused when two or more amendments to the same section of law inadvertently omit provisions of, and fail to refer to, one another.

b. When a correction is made, a note shall be made in the public internet site established pursuant to N.J.S. 52:11-78. If a correction is made before the annual volume of laws is printed that includes the law that was corrected, a note shall be appended to the law in the annual volume indicating the correction that was made. If correction was made at a later time, a note shall be made in the next annual volume of laws indicating the compilation number of the section corrected and the correction made.

Source: 1-3-1.

Comment

Subsection (a) is substantially identical to the parts of section 1:3-1 that provide for the correction of statutes. However, separating this material from the provision on preparation of statutes for printing makes it more clear that if an error is found after printing of the annual volume of laws, the error may be corrected.

Subsection (b) is new. There is no current requirement that the substance of an error correction be published. Corrections are made internally within the Office of Legislative Services and parties known to be interested, such as law publishers, are notified. Most corrections are small and obvious in their cause and purpose. A few, however, may be puzzling to a person who compares the law as enacted to the law as compiled. Better practice would seem to provide a mechanism to record corrections and thereby obviate any possible problem. That is the purpose of subsection (b).

1A:5-4. Change of compilation number assigned to statute

a. When the Office of Legislative Services determines that a change in the compilation numbers assigned to a section or group of sections would serve the convenience of users of the statutes, the Office may change the compilation numbers with the concurrence of the Attorney General.

b. When the Office of Legislative Services changes the compilation numbers assigned to a section or group of sections, a note shall be made in the next annual volume of laws and on the public internet site established pursuant to N.J.S. 52:11-78 indicating the old and new compilation number of each section changed.

Source: new.

Comment

The authority to decide where to compile statutes is stated in 1:3-1 and is repeated in 52:11-61(g). The power to compile laws is stated in the context of the process that takes place immediately after enactment. As a result, the Office of Legislative Services has been hesitant to change the compilation number assigned to a statute at a later time. In a few instances the compilation numbers assigned to statutes have been changed. The most significant of these, where material was moved between titles of the statutes, occurred many years ago. But there have been some instances in the past few years where statutes have been renumbered, usually within the same chapter. While the Office of Legislative Services may now recognize a recompilation power, it has used it cautiously and in very limited cases.

Obviously, the power to recompile statutes would be useful. Not all decisions on compilation turn out to be right. Some may be errors, but others, while correct when made, become less appropriate with the passage of time and more legislation on related subjects. Minor arrangement problems and problems of numeration could be solved by changes in compilation. As a matter of caution, the proposed section requires the concurrence of the Attorney General for any recompilation. That requirement is taken for current statutory provisions on correction of errors.

However, recompilation of a statute years after it was enacted can cause problems. A person who follows an old citation and looks for the statute is apt to find a blank without explanation. Certainly, some form of paper trail needs to be provided to prevent confusion. For that reason, subsection (b) requires that a note be made in the next annual volume of laws and on the Legislature's public internet site whenever a statute is recompiled.

1A:6-1. Preparation of Senate Journal and Assembly Minutes

a. The Senate Journal and the Assembly Minutes shall be printed in the manner the Senate and General Assembly direct. The Senate Journal shall include the minutes of joint meetings of the Legislature. The Senate Journal and the Assembly Minutes shall each contain an index for the entire session

b. The Secretary of the Senate shall prepare the Senate Journal for printing. The Clerk of the General Assembly shall prepare the Assembly Minutes for printing.

c. The Senate and General Assembly shall determine the number of copies of the Senate Journal and Assembly Minutes to be printed and distribution of the copies. The Office of Legislative Services shall supervise the printing, binding and distribution.

d. After the Senate Journal and Assembly Minutes have been prepared, the originals shall be deposited in the Office of the Secretary of State.

Source: 1:4-1; 1:4-2; 1:4-4; 1:4-5.

Comment

The first sentence of subsection (a) is derived from 1:4-1. The second sentence is derived from 1:4-2 and the third from 1:4-4. Though some detail has been deleted as unnecessary, subsections (b) and (d) are substantially similar to the balance 1:4-2. Subsection (c) is substantially identical to 1:4-5. The second sentence of the subsection also replaces 1:4-7.

1A:6-2. Current legislative printing; subscriptions; cost; advance copies of laws

a. The Office of Legislative Services shall provide a complete set of the bills and resolutions introduced in any year in the Legislature, together with the usual index slips, daily memoranda, advance parts of the Senate Journal and the Assembly Minutes and advance copies of laws, to any person who requests them and pays the annual subscription fee in an amount to be set by the Legislative Services Commission. The bills and resolutions, slips, daily memoranda, advance parts of the Journal and Minutes and advance copies of laws shall be mailed to the person at the time they are mailed to members of the Legislature.

b. The Office of Legislative Services shall provide an advance copy of each law, prior to the printing of the annual edition of the laws, to any person who requests them and pays the annual subscription fee set by the Legislative Services.

Source: 1:4-6.

Comment

Though much shortened, this section is substantially identical to 1:4-6.

Chapter 7: Referendums

1A:7-1. Acceptance filed with Secretary of State

When a statute is adopted or accepted by the voters of a county or municipality at an election, the clerk of the county or municipality shall make a return stating that fact to the Secretary of State within ten days after the result of the election is ascertained. The Secretary of State shall file the return.

Source: 1:5-1.

Comment

This section is substantially identical to 1:5-1.

1A:7-2. Statement of adoption or acceptance published in volume of laws; effect

a. When a statute is adopted or accepted by the voters of the State, or a proposed statute becomes effective by action of the voters of the State, and when the clerk of a county or municipality makes a return as required by this

chapter, the volume of laws enacted by the next ensuing Legislature shall include a statement setting forth the title of the act, the year of its enactment, its chapter number in the printed volume of laws and the date when it was adopted, accepted or made effective.

b. The statement published by the Secretary of State pursuant to this section shall be prima facie evidence of the fact that such statute has been adopted, accepted or made effective, and of the date when it was adopted, accepted or made effective.

Source: 1:5-2.

Comment

This section is substantially identical to 1:5-2.

7-3. Format of petition for referendum

When a petition is circulated within a county, municipality, school district, or special district for the purpose of gathering the signatures of registered voters to place a referendum question on the ballot, each page of the petition shall be arranged to contain, in addition to such other content required by law, double spacing between the signature lines of the petition so that each signer is afforded sufficient space to provide his or her printed name, address and signature.

Source: 1:5-3

Comment

This section is substantially identical to subsection (a) of 1:5-3. Subsection (b) of the source statute, which required notification of the content of the statute, has been deleted as executed.

Chapter 8: Private laws

1A:8-1. Notice of application for passage of private, local or special bill; publication

a. When the Constitution requires notice of the intention to apply for the passage of a bill, the notice shall contain a correct statement of the general object of the bill, be signed by at least one of the parties intending to apply for its passage, and be published, except as provided by subsection (b), at least one week before the introduction of the bill, and after the first day of January preceding introduction, in at least one of the newspapers published in each county in which the bill is, or is likely, to take effect.

b. The notice of intention to apply for the passage of a bill to repeal the charter of a corporation, or bill to repeal the charter and dispose of the property of a corporation, shall publish it in a daily newspaper published in Trenton for at least six consecutive days prior to the introduction of the bill. A copy of the notice shall be served personally on the president, secretary, registered agent or a director of the corporation, if such officer or agent can be found within the State. If no officer or agent can be found within the State, by personal service of such

copy upon them or one of them out of the State, or by mailing a copy to them or one of them, directed to the residence or post-office address of the officer or agent, if known.

c. Proof of the publications required by this section shall be by oath or affirmation in writing, made by the publisher, or authorized agent, of every newspaper in which publication was made. The proof shall contain a copy of the published notice, and shall be presented with the bill when introduced, and, after final vote on the bill, shall be filed and deposited by the officers of the Legislature the Office of the Secretary of State. After the adjournment of each Legislature, the Secretary of State shall record every proof of publication that relates to any bills that have become laws. Certified copies of recorded proof of publication shall be received in evidence for any purpose for which the original proof would be received.

d. The publication in the pamphlet laws published by the State of any law, as to which notice of intention to apply for its passage is required by the constitution, shall be prima facie evidence that the notice required by the Constitution has been given in the manner required by this chapter.

Source: 1:6-1; 1:6-3; 1:6-4; 1:6-5; 1:6-6.

Comment

Subsection (a) is substantially identical to 1:6-1. Subsection (b) is substantially identical to 1:6-3. Subsection (c) is substantially identical to 1:6-4 and 1:6-5. Subsection (d) is identical to 1:6-6. Section 1:6-7, which punished false statements of proof of publication, has been deleted as unnecessary.

1A:8-2. Assessments on private, local and special acts

a. Each private, local or special act or supplement thereto, except those that refer to benevolent, religious, charitable or educational institutions shall be assessed the sum of twenty-five dollars, and, until the assessment is paid into the State Treasury, the act shall not have the force and effect of law. If a person interested in the act fails to pay the assessment before the first day of July after its passage, the act shall cease, and be void to all purposes as though the it had not been passed.

b. The State Treasurer, during the month of July, shall report to the Governor every law, with its date of approval or passage, which has become inoperative or void by reason of nonpayment of the assessment levied pursuant to this section, and the Governor shall issue a proclamation under the Great Seal of the State, setting forth the particulars of the report. The proclamation shall be filed by the Secretary of State and be printed as required of other proclamations. A printed copy of the proclamation, shall be evidence that the laws listed in it have become void, and no such law shall be received in evidence as a valid and operative law, unless proof is made to the satisfaction of the court that the assessment was in fact paid into the Treasury within the time prescribed by this section.

Source: 1:6-8; 1:6-9.

Comment

Subsection (a) is substantially identical to 1:6-8. Subsection (b) is substantially identical to 1:6-9.

1A:8-3. Petition for passage of private, special local law

The governing body of a municipality or county may petition the Legislature for the passage of a private, special or local law regulating the internal affairs of the municipality or county when authorized by ordinance of the municipality or by resolution of the county, specifying the general nature of the law sought to be passed, adopted by the municipality or county.

Source: 1:6-10.

Comment

This section is substantially identical to 1:6-10.

1A:8-4. Petition requesting filing of petition with Legislature

a. When a petition signed by at least 20% or 15,000, whichever is less, of the registered voters of the municipality or county requesting the Legislature for passage of a private, special or local law regulating the internal affairs of the municipality or county and specifying the general nature of the law sought to be passed, is filed with the clerk of the municipality or county, the clerk shall examine the petition and ascertain whether or not it is signed by the required number of registered voters. Within ten days after the petition is filed, the clerk shall attach a certificate showing the result of the examination and submit the petition to the governing body of the municipality or county.

b. If the clerk certifies the sufficiency of the petition, the governing body, within 30 days after the filing of the petition, shall either adopt a resolution authorizing the filing of a petition with the Legislature for the passage of a private, special or local law of the general nature described in the petition, or adopt a resolution authorizing the submission of the proposal to file such a petition to the voters at the next general election, or if the resolution is adopted within 90 days preceding the election, then at the succeeding general election, in the case of a county or at the succeeding general or municipal election, whichever occurs first, in the case of a municipality.

c. If the resolution adopted provides for submission of the proposal to the voters of the municipality or county, the question shall be placed upon the official ballots at the election specified.

d. If a majority of all of the votes cast favors adoption, within 30 days after the election, the governing body shall adopt a resolution authorizing the filing of a petition with the Legislature for the passage of a private, special or local law of the general nature described in the petition.

e. If an ordinance or resolution authorizing the filing of a petition with the Legislature for the passage of a private, special or local law is adopted, it shall be the duty of the chief executive officer of the municipality or county, to cause a petition, describing the general nature of the private, special or local law sought to be passed, to be prepared and signed by the officer and attested by the clerk of the municipality or county, and to cause notice of the intention to apply for the passage of a bill to be published as required by this chapter at the next session of the Legislature at which the application can be made, and to prepare a private, special or local bill for the action of the Legislature.

f. The original of the petition for the passage of such a law, together with a certified copy of the ordinance or resolution authorizing the its filing, shall be presented and filed with the bill when the bill is introduced and, after final vote upon the bill, shall be filed in the office of the Secretary of State with the proof of publication of the notice of intention to apply for the passage of the bill.

g. A private, special or local law passed pursuant to a petition as provided in this section shall become operative in the municipality or county only when adopted by the voters of the municipality, unless otherwise prescribed in the law. The question of the adoption of the law shall be submitted to the voters of the municipality or county at the next general election succeeding the its passage unless it was passed within 25 days preceding that election, in which case it shall be submitted at the next general election, in the case of a county, or the next general or municipal election, whichever shall occur first, in the case of a municipality.

Source: 1:6-11; 1:6-12; 1:6-13; 1:6-14; 1:6-15; 1:6-17; 1:6-18.

Comment

Subsection (a) is substantially identical to 1:6-11. Subsection (b) is substantially identical to 1:6-12. Most of 1:6-13 relates to use of paper ballots; that part has been deleted; the remaining substance is continued as subsection (c). Subsection (d) is substantially identical to 1:6-14. Subsection (e) is substantially identical to 1:6-15. Subsection (f) is substantially identical to 1:6-16. Subsection (g) is substantially identical to 1:6-17 and 1:6-18. Sections 1:6-19 and 1:6-20 have been deleted as unnecessary.

Chapter 9; Application to determine validity of statute or joint resolution

1A:9-1. Application to determine validity of statute or joint resolution

a. If, at any time within one year after any law or joint resolution has been filed with the Secretary of State, the Governor has reason to believe that the law or joint resolution was not duly passed by both Houses of the Legislature, or approved by the Governor or otherwise made effective as law in the manner required by the Constitution, the Governor may direct the Attorney General to apply to the Superior Court, to have the law or joint resolution adjudged void. Thereupon the Attorney General shall prepare, sign and prosecute the application.

b. Any two or more citizens of the State may, within the time prescribed by subsection (a), present to the Superior Court an application, of the kind authorized by that subsection to be presented by the Attorney General. The applicants may prosecute the application, and the Attorney General may, if required so to do by the Governor, defend on behalf of the State.

c. The court, on the application, shall inquire summarily into the circumstances and may, for that purpose, order witnesses to be subpoenaed and sworn or depositions taken. Any citizen of the State may appear before the court in defense and subpoena and examine and cross-examine witnesses.

d. After a full hearing the court may, if satisfied that the constitutional and statutory provisions relating to the enactment and approval of laws and joint resolutions have not been complied with, adjudge the law or joint resolution or any part thereof to be void.

e. If the court adjudges a law or joint resolution, or any part of it, to be void, the clerk of the court shall deliver a certified copy of the judgment to the Governor, who shall issue a proclamation under the great seal of the State, setting forth the judgment. The proclamation shall be filed, published and printed with the laws and shall be judicially noticed in courts of the State. After the entry of the judgment, a law or joint resolution adjudged void shall not be judicially noticed by the courts of the State.

f. When an application presented by citizens under subsection (b) of this section is dismissed, the court shall tax the costs and necessary expenses of the Attorney General, including a fee to the Attorney General not to exceed \$500 in any one case, and shall order payment by the citizens. Payment may be enforced by execution.

Source: 1:7-1; 1:7-2; 1:7-3; 1:7-4; 1:7-5; 1:7-6; 1:7-7.

Comment

Subsection (a) is identical to 1:7-1 except for minor changes in wording and the deletion of the reference to the Appellate Division rather than the Superior Court generally. Subsection (b) is substantially identical to 1:7-3. The first sentence of subsection (c) is substantially similar to 1:7-2 except that material on notice has been deleted as unnecessary. The second sentence is substantially identical to 1:7-5. Subsection (d) is identical to 1:7-3. Subsection (e) 1:7-6. Subsection (f) 1:7-7.

Sections On Which No Recommendation Is Made

1:8-1. Appointment, powers and duties of commissioners

L.1909, c. 154, p. 229 [C.S. p. 4987, s.s. 79 to 82], entitled "An act to authorize the appointment of commissioners to represent this State in the commission for the promotion of uniform legislation in the United States,"

approved April seventeenth, one thousand nine hundred and nine, saved from repeal. [This act authorizes the appointment of three commissioners for three-year terms, without compensation, except traveling and other expenses incurred in the discharge of their official duties, whose duties are to examine certain subjects such as marriage and divorce, et cetera, as to which uniformity of legislation in the various states is desirable, to confer as to such legislation with commissioners appointed by other states for the same purposes, to consider and draft uniform acts to be submitted for approval by the several states, to devise and recommend such other and further course of action as will tend to promote uniformity of legislation, and to make annual and other reports to the Governor for transmission to the Legislature.]

1:12A-1. Law Revision Commission

There is created in the Legislative Branch of State Government a commission to be known as the New Jersey Law Revision Commission.

L. 1985, c. 498, s. 1, eff. Jan. 21, 1986.

1:12A-2. Membership

The commission shall consist of:

a. The chairman of the Senate Judiciary Committee, or its successor, who shall serve while chairman of that committee;

b. The chairman of the Assembly Judiciary, Law, Public Safety and Defense Committee, or its successor, who shall serve while chairman of that committee;

c. The Deans, or their designees, of Rutgers Law School, Newark; Rutgers Law School, Camden; and Seton Hall Law School; and

d. Four attorneys admitted to the practice of law in this State, two to be appointed by the President of the Senate, no more than one of whom shall be of the same political party, and two to be appointed by the Speaker of the General Assembly, no more than one of whom shall be of the same political party.

L. 1985, c. 498, s. 2, eff. Jan. 21, 1986.

1:12A-3. Terms

Of the members of the commission first appointed, two shall be appointed for terms of four years and two for terms of five years. Thereafter, members shall be appointed for terms of five years. Members shall serve until the appointment and qualification of their successors.

L. 1985, c. 498, s. 3, eff. Jan. 21, 1986.

1:12A-4. Vacancies

Vacancies shall be filled for the unexpired terms in the same manner as the original appointments were made.

L. 1985, c. 498, s. 4, eff. Jan. 21, 1986.

1:12A-5. No compensation

Members of the commission shall not receive any compensation, but they shall be reimbursed for expenses incurred in the performance of their duties.

L. 1985, c. 498, s. 5, eff. Jan. 21, 1986.

1:12A-6. Chairman

The commission shall elect one member thereof as chairman, who shall serve for a term of two years.

L. 1985, c. 498, s. 6, eff. Jan. 21, 1986.

1:12A-7. Employees

The commission may appoint employees and consultants as may, in its judgment, be necessary, prescribe their qualifications and duties, and fix their compensation within the availability of amounts appropriated for that purpose.

L. 1985, c. 498, s. 7, eff. Jan. 21, 1986.

1:12A-8. Functions; duties

The commission shall promote and encourage the clarification and simplification of the law of New Jersey and its better adaption to present social needs, secure the better administration of justice and carry on scholarly legal research and work. It shall further be the duty of the commission to:

a. Conduct a continuous examination of the general and permanent statutory law of this State and the judicial decisions construing it, for the purpose of discovering defects and anachronisms therein, and to prepare and submit to the Legislature, from time to time, legislative bills designed to

- (1) Remedy the defects,
- (2) Reconcile conflicting provisions found in the law, and
- (3) Clarify confusing and excise redundant provisions found in the law;

b. Carry on a continuous revision of the general and permanent statute law of the State, in a manner so as to maintain the general and permanent statute law in revised, consolidated and simplified form under the general plan and classification of the Revised Statutes and the New Jersey Statutes;

c. Receive and consider suggestions and recommendations from the American Law Institute, the National Conference of Commissioners on Uniform State Laws, and other learned bodies and from judges, public officials, bar associations, members of the bar and from the public generally, for the improvement and modification of the general and permanent statutory law of the State, and to bring the law of this State, civil and criminal, and the administration thereof, into harmony with modern conceptions and conditions; and

d. Act in cooperation with the Legislative Counsel in the Office of Legislative Services, to effect improvements and modifications in the general and permanent statutory law pursuant to its duties set forth in this section, and submit to the Legislative Counsel and the Division for their examination such drafts of legislative bills as the commission shall deem necessary to effectuate the purposes of this section.

L. 1985, c. 498, s. 8, eff. Jan. 21, 1986.

1:12A-9. Annual report

The commission shall report annually to the Legislature on or before February first in each year.

L. 1985, c. 498, s. 9, eff. Jan. 21, 1986.

1:14-12. New Jersey Corporate and Business Law Study Commission

a. There is created in the Legislative branch of State Government a permanent commission to be known as The New Jersey Corporate and Business Law Study Commission.

b. The commission shall consist of three members who are admitted to practice law in New Jersey, and who are distinguished in the field of corporate and business law to be appointed as follows: one member shall be appointed by the Governor; one by the President of the Senate; and one by the Speaker of the General Assembly. All members shall serve for a term of three years and shall be eligible for reappointment.

c. Vacancies shall be filled in the same manner as the original appointment, but for the unexpired term only.

d. The members of the commission shall serve without compensation, but shall be reimbursed for necessary expenses actually incurred in the performance of their duties under this act.

L.1989,c.163,s.1.

1:14-13. Organization

The commission shall organize as soon after the appointment of its members as is practicable, shall choose a chairman from among its members and shall appoint a secretary who need not be a member of the commission.

L.1989,c.163,s.2.

1:14-14. Duties, powers

a. It shall be the duty of the commission to study and review all aspects of the statutes, legislation and decisions of the courts in this State and other states relating to business entities, including business corporations and partnerships and the issuance of ownership interests or securities thereby. In addition the commission shall study and review all aspects of the law governing non-profit corporations in this State and other states.

b. The commission shall have the power to call to its assistance and avail itself of the services of employees of any State, county or municipal department, board, bureau, commission or agency as it may require and as may be available to it for its purposes, to hold public hearings from time to time, and to employ counsel, stenographic and clerical assistants and incur traveling and other miscellaneous expenses as it may deem necessary in order to perform its duties, and as may be within the limits of funds appropriated or otherwise made available to it for its purposes.

L.1989,c.163,s.3.

1:14-15. Annual report; recommended legislation

The commission shall file annually with the Governor and the Legislature a report containing its findings and recommendations, accompanying its report with any proposed legislation which it may desire to recommend for enactment.

L.1989,c.163,s.4.

Statutes To Be Compiled in Other Places

1:1-2b. "Blighted area" and "renewal area"

The term "blighted area" as defined and used in the statutes of this State may also be designated as a "renewal area" and the terms "blighted area" and "renewal area" may be used interchangeably in all ordinances, resolutions, determinations and official actions taken by governmental bodies and agencies in connection with projects and programs for the clearance, planning, development or redevelopment of areas pursuant to law.

1:1-2.2. Surety; sureties

When a bond, recognizance, guarantee or obligation is required or permitted to be given by any law, or by any charter, ordinance, rule or regulation of any county, municipality, school district, board, body, organization, court or public officer, with surety or sureties or security, including freehold security, for the performance of any act, duty or obligation or the refraining from the doing of

any act, the same may be executed as surety or sureties by any company or corporation authorized to carry on the business specified in paragraph "g" of section 17:17-1 or authorized to transact such business in this State by section 17:32-1 of the title Corporations and Institutions for Finance and Insurance, with the operation and effect provided and prescribed by chapter 31 of said title (s. 17:31-1 et seq.).



STATE OF NEW JERSEY
NEW JERSEY LAW REVISION COMMISSION
TENTATIVE REPORT

Relating to

CONSTRUCTION LIEN LAW

DECEMBER 2008

This tentative report is distributed to advise interested persons of the Commission's tentative recommendations and to notify them of the opportunity to submit comments. The Commission will consider these comments before making its final recommendations to the Legislature. The Commission often substantially revises tentative recommendations as a result of the comments it receives. If you approve of the tentative report, please inform the Commission so that your approval can be considered along with other comments.

COMMENTS SHOULD BE RECEIVED BY THE COMMISSION NOT LATER THAN MARCH 1, 2009.

Please send comments concerning this tentative report or direct any related inquiries, to:

Marna L. Brown, Esq., Counsel
NEW JERSEY LAW REVISION COMMISSION
153 Halsey Street, 7th Fl., Box 47016
Newark, New Jersey 07102
973-648-4575
(Fax) 973-648-3123
Email: mlb@njlrc.org
Web site: <http://www.njlrc.org>

CONSTRUCTION LIEN LAW

Introduction

Title 2A:44A-1 through 38, known as the Construction Lien Law, became effective in 1994, replacing the old Mechanic's Lien Law, which, up until that time, had applied to non-public construction projects. The purpose of the law is twofold: first, to enable private project contractors, subcontractors and suppliers to secure payment for their labor and materials by a lien filing process, and second, to protect property owners from exposure to double payment for work or materials for which they have already paid. Thus, the law outlines the procedures for filing and perfecting the lien claim, establishing the amount of the lien claim, and then enforcing the lien. Considered remedial in nature by the legislature, the Construction Lien Law has been construed by the courts so as to achieve its remedial purpose.

Since its enactment, the law has been the subject of litigation concerning the meaning and application of key concepts -- such as the lien fund and the lien claim -- especially where the contractor has ceased working on the project, having gone out of business or filed for bankruptcy prior to contract completion. Although court holdings have further clarified and enhanced the statute, court dicta underscore the need for additional clarity. Attorneys are troubled by what they perceive as contradictory interpretations of the statute by federal and state courts, particularly in the area of residential construction contracts.

As the project progressed, the Commission learned that at the time of the statute's enactment, the initial drafters contemplated further revision would be necessary. The American Arbitration Association advised that construction industry claimants were confounded by the current law. The Commission further discovered that lower court judges, attempting to apply recent decisions of higher courts, wanted clarification. All seem to agree that revision is long overdue.

The proposed revision focuses on several areas. The concept of "residential construction" continues to be unclear. The term "residential construction"-- used interchangeably with the terms "residential housing construction" and "home construction" in current section 2A:44A-21 -- is not defined. Potential claimants providing work or services for multi-use and multi-dwelling properties are unsure whether to invoke the provisions that pertain to residential properties. If invoked, those provisions -- 2A:44A-18, 2A:44A-19, 2A:44A-20 and 2A:44A-21 -- do not guide claimants comfortably through the process of filing and perfecting residential construction contract lien claims for work on real property developments such as condominiums and cooperatives, especially work on common elements or commonly shared structures or areas. The role of community associations in the lien claim process is not specified. Lien claimants are uncertain against whom to file lien claims and how to serve

them. The parameters of the arbitration proceeding and the obligations of the arbitrator are confusing. Thus, addressing concerns regarding the statute's residential construction provisions is a primary focus of the revision.

Other important definitions are absent from the law. Although the term "claimant" is defined, the term "lien claim" is not. The term "lien fund", though essential to application of the law, also is not defined. The definition of "contract" is inconsistent with current case law. Even the definition of "filing" is problematic. The current definition appears to intend that a document, in order to be "filed", must be *both* lodged for record and indexed. But this definition is unsatisfactory to many attorneys because the date a document lodged for record is actually indexed is not within the filer's control. As a result, section 2A:44A-2 (Definitions) also is a necessary part of the revision.

Some provisions of the statute are awkward and imprecise. Other provisions that would improve application of the statute are nonexistent. For example, the formula for calculating the "lien fund" in section 2A:44A-10 is densely worded and difficult to understand. A lien claimant's successful application of the statute, however, is dependent upon proper use of this formula. At the same time, the method by which the "lien fund" is to be distributed to multiple lien claimants, on a pro rata basis, is not explained in the current statute. No provisions even attempt to address this important issue.

Other provisions conflict with construction industry practice and are not workable or desirable. The time requirements for filing a residential construction lien claim illustrate this problem.

Every construction lien claim, whether residential or nonresidential in nature, must be filed within 90 days after the last work, services, material or equipment is provided for which the payment is claimed. For claimants seeking to place liens on residential real estate, however, a potential claimant must first file a Notice of Unpaid Balance and Right to File Lien ("NUB"), which is a condition precedent to filing any lien arising under a residential construction contract. Unless the parties have agreed in writing to an alternative dispute resolution mechanism, the claimant must then also serve, simultaneously with the service of the NUB, a demand for arbitration, satisfy American Arbitration Association procedures for instituting an expedited proceeding before an arbitrator, and then arbitrate the claim. The arbitrator must then determine within 30 days whether the lien claim is valid. Unless the potential claimant in a residential construction context prevails in the arbitration or alternative dispute resolution, a lien claim may not be filed.

Filing the NUB, serving the Demand for Arbitration and obtaining an arbitrator's determination regarding the validity of the lien claim all must be accomplished within the same 90-day time period afforded the nonresidential construction lien claimant. This creates obvious time constraints for the

residential construction lien claimant that cannot easily be met. A potential claimant also may wait too long to file the NUB or serve the arbitration demand only to discover that the lien claim is time-barred. Thus, the current act does not set out realistic time limitations for each step in the process of filing a lien claim for residential construction.

Provisions adapted or carried over from the old Mechanics Lien Law are ambiguous or confusing in the context of the Construction Lien Law. For example, sections 2A:44A-10 and 2A:44A-22 both discuss mortgage priority but neither refers to the other nor is one easily distinguishable from the other in application.

Finally, commenters express frustration with the current form of lien claim, the process for amending a lien claim, the inconsistency of arbitration awards, and the lack of a comprehensive mechanism to address failure to discharge the lien once the claim is paid or satisfied.

The Commission addresses these and other concerns by (a) clarifying and adding defined terms, especially pertaining to the meaning of “residential”; (b) clarifying (and in some cases rearranging) provisions for the filing and amending of the lien claim and for the calculation, distribution and enforcement of the lien fund (new sections 2A:44A-9.1, 2A:44A-23, and 2A:44A-24 for example, are also added); (c) amplifying provisions for discharging a satisfied lien claim; (d) adopting court pronouncements regarding the concepts of contract price, lien fund and lien claim; (e) further defining the arbitrator’s role, and (f) modifying and adding time limits for filing and perfecting residential construction contract lien claims. The Commission also revises some language simply to make it easier for participants in the construction industry to use the law. The changes enhance application of the act and make clearer the procedures to be followed in order to process and perfect a construction lien claim.

The most significant changes from the current law are set forth below:

1. **2A:44A-2. - Definitions.** The terms “lien claim”, “lien fund” and “community association” are now defined for the first time. Rather than refer to the meaning of person “as defined in R.S. 1:1-2” (which appears in the current definition of “claimant”), “person” is now its own defined term. The meaning of residential construction has been clarified by (i) revision of the existing definitions of “residential construction contract” and “residential purchase agreement”, and (ii) addition of the following new defined terms: “dwelling”, “real property development”, “residential construction”, and “residential unit”.

The definition of “filing” has been modified to address practical concerns, making a distinction for purposes of enforcement of the lien claim between parties within the construction chain with notice of the claim and third parties outside the construction chain without notice of the claim. In addition, the

definition of “contract” now provides for a signature “by the party against whom the lien claim has been asserted” and also includes delivery slips that refer to a specific site or project where the materials are delivered or used.

2. 2A:44A-3. – Entitlement to lien for work, services, material or equipment provided pursuant to contract. A distinction is now made between a lien for work and services provided as part of the common elements or common areas of a residential or nonresidential property development and a lien for work and services provided for the unit itself. The former lien attaches to the interest of the owner in the property being developed but not to the unit owner’s interest in the real property. A lien attaches to the unit owner’s interest only for work and services provided within or as part of that unit. This section now also distinguishes liens filed against owners from those filed against community associations for work performed as part of the common elements of a real property development. The circumstances under which a landlord or other party with an interest in the property may be subject to a lien for improvements to the real property made by a tenant are now clarified. Finally, current 2A:44A-19 is now merged into this section.

3. 2A:44A-6. – Filing of lien claim; requirements. This section is revised substantially to make the lien claim filing procedure easier to understand. The distinction between “filing” and “lodging for record” for purposes of enforceability of the lien is now part of this section. In order to provide sufficient time to comply with the procedures set forth in section 2A:44A-21, the time frame for the filing of residential construction contract lien claims also is extended to 120 days.

4. 2A:44A-7. – Mailing of lien claim; proof of services. The procedure for serving the lien claim is now clearer and more consistent with industry practice.

5. 2A:44A-8. – Construction lien claim; form. The proposed lien claim form is based on the form in current section 2A:44A-8, but designed to be easier to understand, more relevant to industry practice and more useful for its intended purpose.

6. 2A:44A-9.1. – Relationship to lien fund, maximum liability; impermissible reductions of lien fund. This section is entirely new. In plain language, the section now incorporates the formula for calculating the lien fund (excised from current section 2A:44A-10) and adopts recent court determinations to explain what may be deducted from the lien fund. This section is intended to create a better understanding of the relationship between lien claims and the lien fund and how the lien fund is calculated.

7. 2A:44A-10. - Attachment of lien claim; priority of bona fide purchasers and other liens; maximum liability. This section now deletes any

reference to the lien fund calculation (that calculation has been excised, revised and incorporated into the new section 2A:44A-9.1), focusing instead on attachment of the lien and the priority of first recorded interests and liens affecting real property. Reference to section 2A:44A-22, which also pertains to mortgage priority, is also included. The modified language is consistent with actual construction lien practice.

8. 2A:44A-11. – Amendment of lien claim, form. This section now illustrates those circumstances when a lien claim would be amended, clarifying that an amendment to cure a violation of section 2A:44A-15 is impermissible.

9. 2A:44A-13. – Construction lien book; construction lien index book; filing and notation fees. Language is clarified and reference made to N.J.S. 22A:2-29 where fee amounts are already stated. Those fee amounts also have been updated.

10. 2A:44A-16 – Joinder of party defendants; defenses. Most of this section is now incorporated into a new section 2A:44A-24. Hence, current section 2A:44A-16 has been deleted from the proposed revised statute.

11. 2A:44A-19. – Attachment of lien to interest of owner for work performed in a condominium or cooperative unit. Subsection a., modified to comport with the new definition of “residential unit”, and subsection b. of this section are both now incorporated into the revised section 2A:44A-3. Hence, current section 2A:44A-19 has been deleted from the proposed revised statute.

12. 2A:44A-20. – Notice of unpaid balance; right to file lien; form. This section now includes a form of NUB that comports with the changes made to section 2A:44A-8 and the form of lien claim. Other language is now consistent with proposed changes to section 2A:44A-10.

13. 2A:44A-21. – Legislative findings; additional requirements for filing of lien on residential construction. Since the time frame for lodging for record residential lien claims now is extended to 120 days, the time frame for lodging for record the NUB has also changed; the NUB now must be lodged for record within 60 days from the last date of provision of work, services, material or equipment for which payment is claimed. This provision now describes the documents that are served along with service of the demand for arbitration and makes clear the time frame for completion of the arbitration. This section also modifies the types of determinations that the arbitrator must make and adds provisions that seek to avoid the problems associated with multiple, inconsistent arbitrations by (i) urging one arbitrator to determine all related claims and (ii) providing for the consolidation of multiple arbitrations into a single proceeding at the arbitrator’s discretion.

14. 2A:44A-22. – Priority of mortgages over liens. This provision now distinguishes section 2A:44A-10, which applies to mortgages first recorded, from

section 2A:44A-22, which applies to mortgages that are recorded after the lien claim is filed. The section also now applies to the advancement of funds required by mortgage loan closings, such as pre-paid taxes and interest.

15. 2A:44A-23. – Payment of lien claims; distribution of proceeds.

This proposed new section, a blend, in part, of the current sections 2A:44A-23 and 2A:44A-28, sets forth the process by which lien claims are paid out pro rata from the lien fund, not addressed in the current statute. As a result, section 2A:44A-28 is unnecessary and therefore deleted entirely from the statute.

16. 2A:44A-24 – Suit to enforce lien claim. This proposed section is entirely new and replaces the current **Judgment; filing and content of statement** section. Sections 2A:44A-25, 2A:44A-26, 2A:44A-28 and 2A:44A-29 have been modified or eliminated accordingly. Section 2A:44A-16, pertaining to joinder, has also been incorporated into this section and consequently deleted entirely from the proposed revised statute.

17. 2A:44A-25. – Writs of execution; 2A:44A-26 – Special writs of execution; sale and conveyance of land; 2A:44A-28 – Proceeds of sale; distribution. These existing sections are deleted in the revision because of the proposed changes to sections 2A:44A-23 and 2A:44A-24.

18. 2A:44A:30. – Filing of certificate to discharge lien claim of record.

This section now includes a summary proceeding for discharging a lien claim and imposes consequences for not canceling or discharging a lis pendens upon discharge of the claim. New proposed subsection c. also now enables an owner within thirteen months after the date of the lien claim, and upon the filing of an appropriate affidavit, to obtain a discharge of a lien claim that has been fully paid and satisfied.

19. 2A:44A-31.1. – Bond; form. This section is entirely new and provides a form of bond to be used in order to discharge the construction lien.

20. 2A:44A-33. – Lien claim; discharge of record. This section now enables the county clerk to discharge a fully paid and satisfied lien claim, under specific circumstances, upon receipt of the owner's submission of the appropriate affidavit.

Modifications to section descriptors are also recommended throughout the statute as needed.

2A:44A-1. Short title –

This act shall be known and may be cited as the "Construction Lien Law."

COMMENT

No changes have been made to this section of the current law.

2A:44A-2. Definitions

“Claimant” means a person, ~~as defined in R.S. 1:1-2,~~ having the right to file a lien claim on real property pursuant to ~~the provisions of this act.~~

COMMENT

The current law does not define “person” but refers to it within the definition of “claimant.” Since the word “person” is used throughout the statute, it is now separately defined.

“Contract” means any agreement, or amendment thereto, in writing, signed by the party against whom the lien claim is asserted and evidencing the respective responsibilities of the contracting parties, including but not limited to price or other consideration to be paid, and a description of the benefit or improvement to the real property subject to lien. ~~which, [I]n the case of a supplier, “contract” shall include a delivery or order slip referring to the site or project to which materials have been delivered or where they were used and signed by the party against whom the lien claim is asserted or that party’s authorized agent, the owner, contractor, or subcontractor having a direct contractual relation with a contractor, or an authorized agent of any of them. A writing that is “signed” bears a mark or symbol intended to authenticate it.~~

COMMENT

The new language adds formality to the definition of “contract” by requiring essential terms, such as price, or where appropriate, evidence of benefit or improvement to the property subject to lien. This is especially important since the statute affects property rights on a unilateral basis. The contract must be “signed” in accordance with the decision in *Gallo v. Sphere Construction Corp.*, 293 N.J. Super. 558 (Ch. Div. 1996.) The additional language regarding separate delivery slips incorporates comments by the court in *Legge Industries v. Joseph Kushner Hebrew Academy*, 333 N.J. Super. 537 (App. Div. 2000), consistent with construction industry practice, wherein deliveries are often “signed for” by authorized representatives of the parties in the construction chain and materials may be used at a construction site though delivered elsewhere.

“Contract price” means the amount specified in a contract for the provision of work, services, material or equipment.

COMMENT

No changes have been made to this section of the current law.

“Community association” means a condominium association, a homeowners’ association, a cooperative association, or any other entity created to administer or manage the common elements and facilities of a real property

development that, directly or through an authorized agent, enters into a contract for improvement of the real property.

COMMENT

This definition is new. It has been added here because of modifications to section 2A:44A-3 which will now affect many other sections of the statute.

“Contractor” means any person in direct privity of contract with the owner of real property, or with a community association in accordance with section 2A:44A-3, for improvements thereto to the real property. A construction manager who enters into a single contract with an owner or community association for the performance of all construction work within the scope of a construction manager’s contract, a construction manager who enters into a subcontract, or a construction manager who is designated as an owner’s or community association’s agent without entering into a subcontract is also a “contractor” for purposes of this act. A licensed architect, engineer or land surveyor or certified landscape architect who is not a salaried employee of the contractor or the owner or community association, performing professional services related to the improvement of property in direct contract with the property owner shall be considered a “contractor” for the purposes of this act.

COMMENT

Reference to “community association” is added because of modifications to section 2A:44A-3.

“County clerk” means the clerk of the county in which real property to be improved is situated.

COMMENT

No changes have been made to this section of the current law.

“Day” means a calendar day unless otherwise designated.

COMMENT

This definition is new. It is included for clarification only and to accommodate concerns of the American Arbitration Association and attorneys.

“Dwelling” means a one-, two- or three-family residence that is freestanding or shares a party wall without common ownership interest in that party wall. A dwelling may be part of a real property development.

COMMENT

This definition is new. The term “dwelling” is not defined in current section 2A:44A-2 although referred to in the current definitions of “residential construction contract” and “residential purchase agreement.” This definition, along with the new definition of “residential unit”, (see later in this section) attempts to clarify what is included within the meaning of “residential”.

“Equipment” means any machinery or other apparatus, including rental equipment delivered to the site to be improved or used on the site to be

improved, whether for incorporation in the improved real property or for use in the construction of the improvement of the real property ~~but not incorporated therein~~. A lien for equipment shall arise only for equipment used on site for the improvement of real property, including equipment installed in the improved real property. In the case of rental equipment, the amount of any lien shall be limited to the rental rates as set forth in the rental contract.

COMMENT

No changes have been made to this section of the current law other than stylistic changes as noted.

“Filing” means the (i) lodging for record and (ii) the indexing of the documents authorized to be filed or recorded pursuant to this act in the office of the county clerk in the county where the property subject to the lien is located, or, in the case of real property located in more than one county, in the office of the county clerk of each such county. A document is “lodged for record” if it is delivered to the county clerk and the clerk marks the document with a date and time stamp or other mark indicating the date and time received.

COMMENT

The additional language clarifies that the lien claim form or any other document authorized to be filed by the statute is to be filed where the property subject to lien is located. The revision also defines the terms “lodged for record” so as to make clearer both the definition of “filing” and new section 2A:44A-6 which makes a distinction between “filing” and “lodging for record” for purposes of enforcement of the lien claim.

“Improvement” means any actual or proposed physical changes to real property ~~by resulting from the provision of work, or services or material~~ by a contractor, ~~or subcontractor,~~ or supplier pursuant to ~~the terms of~~ a contract, whether or not such physical change is undertaken, and includes the construction, reconstruction, alteration, repair, renovation, demolition or removal of any building or structure, any addition to a building or structure, or any construction or fixture necessary or appurtenant to a building or structure for use in conjunction therewith. “Improvement” includes excavation, digging, drilling, drainage, dredging, filling, irrigation, land clearance, grading or landscaping. “Improvement” shall not include the mining of minerals or removal of timber, gravel, soil, or sod which is not integral to or necessitated by the improvement to real property. “Improvement” shall not include public works or improvements to real property contracted for and awarded by a public entity. Any work or services requiring a license for performance including, but not limited to, architectural, engineering, plumbing or electrical construction, shall not constitute an improvement unless performed by a licensed claimant.

COMMENT

The term “renovation” has been added to the definition of improvement. The current law was not consistent with the language in section 2A:44A-21,

which speaks of “renovations” to residential property. Also the word “changes” was made singular and references to “material” and “suppliers” were added.

“Interest in real property” means any ownership, possessory security or other enforceable interest, including, but not limited to, fee title, easement rights, covenants or restrictions, leases and mortgages.

COMMENT

No changes have been made to this section of the current law.

“Lien” or “construction lien” means a lien on the owner’s interest in the real property arising pursuant to ~~the provisions of~~ this act.

COMMENT

No changes have been made to this section of the current law other than stylistic changes as noted.

“Lien claim” means a claim, by a claimant, for money for the value of work, services, material or equipment furnished in accordance with a contract and based upon the contract price and any amendments thereto, that has been secured by a lien pursuant to this act.

COMMENT

This definition is new. The current law does not define “lien claim” even though the word “claimant” is defined as a ‘person . . . having the right to file a lien claim on real property pursuant to the provisions of this act’ and the term “lien claim” is used in many sections of the act.

“Lien fund” means the pool of money from which one or more lien claims may be paid. The amount of the lien fund shall not exceed the maximum amount for which an owner can be liable. The amount of the lien that attaches to the owner’s interest in the real property cannot exceed the lien fund.

COMMENT

This definition is new. The current law does not define “lien fund” even though the term is expressed or implied throughout the act.

“Material” means any goods delivered to, or used on the site to be improved, for incorporation in the improved real property, or for consumption as normal waste in construction operations; or for use on site in the construction or operation of equipment used in the improvement of the real property but not incorporated therein. The term “material” does not include fuel provided for use in motor vehicles or equipment delivered to or used on the site to be improved.

COMMENT

No changes have been made to this section of the current law.

“Mortgage” means a loan which is secured by a lien on real property.

COMMENT

No changes have been made to this section of the current law.

“Owner” or “owner of real property” means any person, including a tenant, with an ~~estate~~ or interest in real property who personally or through an authorized agent enters into a contract for improvement of the real property. “Owner” or “owner of real property” shall not include a “community association” that holds record title to real property or has an interest in real property.

COMMENT

This section has been modified to exclude community associations holding record title to real property from the definition of “owner”. Community associations, in accordance with revised sections 2A:44A-3 and 2A:44A-24, cannot sell property commonly shared even if such property is titled to the community association itself and not to the property owners who share it.

“Person” means an individual, corporation, company, association, society, firm, limited liability company, limited liability partnership, partnership, joint stock company or any other legal entity, unless restricted by the context to one or some of the above.

COMMENT

This definition was extracted from the current definition of “claimant” and updated.

“Public entity” includes the State, and any county, municipality, district, public authority, public agency, and any other political subdivision or public body in the State.

COMMENT

No changes have been made to this section of the current law.

“Real property development” means all forms of residential and non-residential real property development now existing or yet to be developed including but not limited to a condominium subject to P.L. 1969, c.257 (C. 46:8B-1 et seq.), a housing cooperative subject to P.L.1987, c.381 (C. 46:8D-1 et seq.), a fee simple townhouse development, a horizontal property regime as defined in section 2 of P.L. 1963, c. 168 (C.46:8A-2), and a planned unit development as defined in section 3.3 of P.L. 1975, c.291 (C.40:55D-6).

COMMENT

This definition is new but adopts language from the current definitions of “residential construction contract” and “residential purchase agreement.” The current law does not define “real property development”, although references to different types of developments appear in multiple sections of the current law. The definition includes specific types of developments referenced in multiple sections of the current law while allowing for other forms of property development yet to be created.

“Residential construction” also referred to as “residential housing construction” or “home construction” means construction of or improvement to a dwelling, or dwellings, or any portion thereof, or any residential unit, or units or

any portion thereof. In the case of a real property development, "residential construction" or "residential housing construction" or "home construction" also includes all offsite and onsite infrastructure and sitework improvements required by a residential construction contract, master deed, or other document, the common elements of the development (which may also include by definition the offsite and onsite infrastructure and sitework improvements), and those areas or buildings commonly shared.

COMMENT

This definition is new. Notably, section 2A:44A-21 a. references three different sets of terms, all intended to have the same meaning: "construction of residential housing", "home construction" and "residential construction". The addition of this new definition along with the new definitions of "dwelling" and "residential unit" (and the revised definitions of "residential construction contract" and "residential purchase agreement") together enhance the meaning and application of the residential construction provisions of the statute. All offsite and onsite infrastructure and sitework improvements are now included within the definition of "residential construction."

"Residential construction contract" means ~~any written~~ a contract for the construction of or improvement to a ~~one- or two-family dwelling, or dwellings,~~ or any portion thereof, ~~of the dwelling, which shall include any or a~~ residential unit, or units or any portion thereof in a real property development. ~~in a condominium subject to the provisions of P.L.1969, c.257 (C.46:8B-1 et seq.), any residential unit in a housing cooperative, any residential unit contained in a fee simple townhouse development, any residential unit contained in a horizontal property regime as defined in section 2 of P.L.1963, c.168 (C.46:8A-2), and any residential unit contained in a planned unit development as defined in section 3.3 of P.L.1975, c.291 (C.40:55D-6.)~~

COMMENT

This language now better reflects the legislative intent language in section 2A:44A-21, which is consistent with the holding in *In re Kara Homes*, 363 B.R. 399 (Bankr. D. N.J. 2007), especially with reference to the protections noted (*i.e.*, New Home Warranty and Builders' Registration Act). Also, the current law uses the words "written contract". The word "written" has been eliminated since the word "contract" is already defined as "any agreement, or amendment thereto, in writing." Finally, the language is less cluttered now that "dwelling" and "residential unit" have been separately defined.

"Residential purchase agreement" means a ~~written~~ contract between a buyer and a seller for the purchase of a ~~one- or two-family dwelling or dwellings,~~ or any residential unit or units in a real property development. ~~in a condominium subject to the provisions of P.L.1969, c.257 (C.46:8B-1 et seq.), any residential unit in a housing cooperative, any residential unit contained in a fee simple townhouse development, any residential unit contained in a horizontal property regime as defined in section 2 of P.L.1963, c.168 (C.46:8A-2), and any~~

~~residential unit contained in a planned unit development as defined in section 3.3 of P.L.1975, c.291 (C.40:55D-6).~~

COMMENT

The current statute uses the words “written contract”. The word “written” has been eliminated since the word “contract” is already defined as “any agreement, or amendment thereto, in writing . . .” The words “or dwellings” and “or units” are also added, consistent with the holding in *In re Kara Homes*.

“Residential unit” means a unit in a real property development designed to be transferred or sold for use as a residence, and the design evidenced by a document, such as a master deed or declaration, recorded with the county clerk in the county where the real property is located, or a public offering statement filed with the Department of Community Affairs. “Residential unit” includes a unit designed to be transferred or sold for use as a residence that is part of a multi-use or “mixed use” development project. “Residential unit” does not include a unit designed for rental purposes or a unit designed to be transferred or sold for non-residential use.

COMMENT

This definition is new. The current law does not define “residential unit” even though the term is used elsewhere in the definitions and text of the statute. The above definition makes the touchstone for ascertaining whether a development of units is designed for residential use either the recording of a master deed or declaration with the county clerk or the filing of a public offering statement with the Department of Community Affairs. As a consequence, a party may be held to have had constructive notice that certain real property developments are residential in nature. A “dwelling” may be part of a real property development, as its definition indicates.

The definition also expressly excludes a residential unit designed for rental use such as a rental unit in an apartment building. The intent of these modifications is to make the definitions of “residential construction contract” and “residential construction” (set forth above) more concise.

“Services” - means professional services performed by a licensed architect, engineer, ~~or~~ land surveyor, or certified landscape architect, who is not a salaried employee of the contractor, a subcontractor or the owner and who is in direct privity of contract with the owner for the preparation of plans, documents, studies, or the provision of other services by a licensed architect, engineer or land surveyor prepared in connection with a ~~proposed or an actual physical change~~ improvement to real property, whether or not such ~~physical change improvement~~ is undertaken.

COMMENT

The term “improvement” replaces “proposed or an actual physical change” because that term is already defined in the statute to include proposed or actual physical change.

“State” means the State of New Jersey and any office, department, division, bureau, board, commission or agency of the State.

COMMENT

No changes have been made to this section of the current law.

“Subcontractor” means any person providing work or services in connection with the improvement of real property pursuant to a contract with a contractor or pursuant to a contract with a subcontractor in direct privity of contract with a contractor.

COMMENT

No changes have been made to this section of the current law.

“Supplier” means any supplier of material or equipment, including rental equipment, having a direct privity of contract with an owner, community association, contractor or subcontractor in direct privity of contract with a contractor. The term “supplier” shall not include a person who supplies fuel for use in motor vehicles or equipment delivered to or used on the site to be improved or a seller of personal property who has a security agreement providing a right to perfect either a security interest pursuant to Title 12A of the ~~New Jersey Statutes~~ or a lien against the motor vehicle pursuant to applicable law.

COMMENT

Reference to “community association” is added because of modifications to section 2A:44A-3.

“Work” means any activity, including but not limited to labor, performed in connection with the improvement of real property. The term “work” includes architectural, engineering, or surveying services provided by salaried employees of a contractor or subcontractor, as part of the work of the contractor or subcontractor, provided, however, that the right to file a lien claim for those services shall be limited to the contractor or subcontractor.

COMMENT

No changes have been made to this section of the current law except the addition of the words “but not limited to” after the word “including”. The Commission, requested by a security guard services provider to specifically include security guard services within the definition of “work” and “services”, determined that such a request raised a policy issue best left to the Legislature. That issue is whether lien rights should exist under the statute for work that does not involve or impact, directly, the design, planning or construction stages of a project, but is collateral to the project, such as the services of security guards, insurers, accountants, attorneys and other similar work. If the definition of “work”

were broadened to include those collateral work and service providers currently excluded from the protections of the statute, such lien rights would exist for such collateral services.

2A:44A-3. Entitlement to lien for work, services, material or equipment provided pursuant to contract

a. Any contractor, subcontractor or supplier who provides work, services, material or equipment pursuant to a contract, shall be entitled to a lien for the value of the work or services performed, or materials or equipment furnished in accordance with the contract and based upon the contract price, subject to the provisions of sections 9 and 10 ~~2A:44A-6; 2A:44A-9, 2A:44A-9.1 and 2A:44A-10 of this act.~~ The lien shall attach to the interest of the owner or unit owner in the real property, or filed against the community association, subject to in accordance with this section.

b. For purposes of this section, (i) "interest of the owner of the real property development" includes interest in any residential or nonresidential units not yet sold or transferred and the proportionate undivided interests in the common elements attributable to those units; (ii) "unit owner" means an owner of an interest in a residential or nonresidential unit who is not a developer of the property and acquires the unit after the master deed or master declaration is recorded, or after the public offering statement is filed with the Department of Community Affairs; and (iii) "interest of the unit owner" includes the proportionate undivided interests in the common elements of the real property development.

c. In the case of a condominium, notwithstanding the Condominium Act, or in the case of any other real property development with common elements or common areas or facilities, if the contract of improvement is (i) with the owner of the real property development, then the lien shall attach to the interest of such owner, but if the contract of improvement is (ii) with the community association, the lien claim shall be filed against the community association but shall not attach to any real property. In either case, if the work, services, material or equipment are performed or furnished as part of the common elements or facilities of a real property development, the lien shall not attach to the interest of the unit owner.

d. If the work, services, material or equipment are performed or furnished solely within or as part of a residential or nonresidential unit, the lien shall attach only to the interest of the unit owner.

e. If a tenant contracts for improvement of the real property, the lien shall attach to the leasehold estate of the tenant and to the interest in the property of any person who (i) has expressly authorized the contract for improvement has not been authorized in writing signed by the person against whom the lien claim is asserted, which writing provides that the person's interest is subject to a lien for this improvement, by the owner of a fee simple interest in the improved real property, or (ii) has paid, or agreed in writing to pay, the majority of the cost of the improvement; or (iii) is a party to the lease or sublease that created the leasehold interest of the tenant and the lease or sublease provides that the

person's interest is subject to a lien for the improvement. the lien shall attach only to the leasehold interest of the tenant.

f. If an interest in real property is lawfully conveyed after work, services, material or equipment are performed or furnished but before a lien attaches, the lien shall attach only to the interest retained by the owner or unit owner or community association, as the case may be, who contracted for the work, services, material or equipment and not to the interest previously conveyed.

g. Nothing in this act shall be construed to limit the right of any claimant from pursuing any other remedy provided by law.

COMMENT

New subsection b. defines relevant terms now included within this section. New subsections c. and d. explain that the right to lien for the value of work performed for the common elements of any real property development cannot in any case attach to the individual unit owners' interests once the development has been built and ownership of the residential or nonresidential units transferred to purchasers except to the extent that there is real property remaining in the hands of the original developer. In the case of work or services performed as part of the common elements of a real property development, the revised language provides that a lien may be filed against the owner of the real property development or against a community association depending upon who contracts for the work or services performed. A lien may attach to the interest of a residential or nonresidential unit owner, however, *only* for the value of work performed solely within or as part of that unit. Thus, subsection a. of current section 2A:44A-19 is incorporated into this new subsection d.

The revision to subsection e. attempts to counter the effect of the court holding in *Cherry Hill Self Storage, LLC v. Racanelli Construction Company, Inc.* WL 1756914 (App. Div. 2007), which required the landlord to authorize in writing a contract for improvement by a tenant to leasehold property even though the lease provided that the tenant was permitted to contract to have the work done, the landlord was required to contribute to the work to be done in the form of a rent credit, and the landlord had the right to compel the tenant to make certain modifications to the building plans. In practice, the lease may not provide that the landlord approve each and every improvement proposed by the tenant. The tenant's ability to obtain written authorization for a proposed improvement in a timely fashion often may not be possible. The landlord, however, should not be obligated to bear the burden of the lien if the landlord has done nothing more than sign a lease that contemplates a tenant improvement. The proposed modification in subsection e. attempts to address those instances where the lien should attach to any other interest in addition to the leasehold interest.

New subsection f. incorporates language taken from current section 2A:44A-19 b., modified slightly, and incorporated here.

2A:44A-4 – Attachment of liens for improvements

Liens for the following improvements shall attach to real property only in the manner herein prescribed. In the case of an improvement:

a. Involving a dock, wharf, pier, bulkhead, return, jetty, piling, groin, boardwalk or pipeline above, on or below lands under waters within the State's jurisdiction, the lien shall be on the improvements together with the contracting owner's interest in the lots of land in front of or upon which the improvements are constructed and any interest of the contracting owner of the land in the land or waters in front of the land;

b. Involving removal of a building or structure or part of a building or structure from its situs and its relocation on other land, the lien shall be on the contracting owner's interest in the improved real property on which the building or structure has been relocated;

c. Involving excavation, drainage, dredging, landfill, irrigation work, construction of banks, making of channels, grading, filling, landscaping or the planting of any shrubs, trees or other nursery products, the lien shall be on the land to which the improvements are made, and shall not be upon the adjoining lands directly or indirectly benefited from the improvements.

COMMENT

No changes have been made to this section of the current law.

2A:44A-5 - Prohibited liens and claims

No liens shall attach nor shall a lien claim be filed:

a. For materials that have been furnished or delivered subject to a security agreement which has been entered into pursuant to Chapter 9 of Title 12A ~~of the New Jersey Statutes~~ (N.J.S. 12A:9-101 ~~et seq.~~ *et seq.*);

b. For public works or improvements to real property contracted for and awarded by a public entity; provided, however, that nothing herein shall affect any right or remedy established pursuant to the "municipal mechanic's lien law", N.J.S. 2A:44-125 ~~et seq.~~ *et seq.*;

c. For work, services, material or equipment furnished pursuant to a residential construction contract unless there is strict compliance with sections ~~20 and 21~~ 2A:44A-20 and 2A:44A-21 ~~of this act.~~

COMMENT

The revision replaces references to sections of the act with references to the title and section numbers. It also italicizes references to the abbreviation for the Latin *et sequens*.

2A:44A-6. Filing of lien claim; requirements

~~a. A lien claim shall be signed, acknowledged and verified by oath of the claimant or, in the case of a partnership or corporation, a partner or duly authorized officer thereof, and filed with the county clerk not later than 90 days following the date the last work, services, material or equipment was provided for which payment is claimed. No lien shall attach, or be enforceable under the provisions of this act and, in the case of a residential construction contract, compliance with sections 20 and 21 of this act, unless the lien claim is filed in the form, manner and within the time provided by this section and section 8 of this act, and a copy thereof served on the owner and, if any, the contractor and the subcontractor, against whom the claim is asserted, pursuant to section 7 of this act.~~

a. A contractor, subcontractor or supplier entitled to file a lien pursuant to section 2A:44A-3 shall do so as set forth in subsections (1) and (2).

(1). The lien claim form as prescribed by section 2A:44A-8 shall be signed acknowledged and verified by oath of the claimant setting forth (i) the specific work or services performed, or material or equipment provided pursuant to contract; and (ii). the claimant's identity and contractual relationship with the owner or community association and other known parties in the construction chain.

(2). In all cases except those involving a residential construction contract, the lien claim form shall then be lodged for record within 90 days following the date the last work, services, material or equipment was provided for which payment is claimed. In the case of a residential construction contract, the lien claim form shall be lodged for record, as required by section 2A:44A-21 b.(8), not later than 10 days after receipt by the claimant of the arbitrator's determination, and within 120 days following the date the last work, services, material or equipment was provided for which payment is claimed. If requested, at the time of lodging for record the clerk shall provide a copy of the lien claim form marked with a date and time received.

b. No lien shall attach, or be enforceable under this act unless the lien claim or other document permitted to be filed under this act is (i) filed in the manner and form provided by this section and section 2A:44A-8; and (ii) a copy thereof served in accordance with section 2A:44A-7, except that every document lodged for record that satisfies the requirements of this section, even if not yet filed, shall be enforceable against parties with notice of the document. A document must be first filed, however, in order to be enforceable against third parties without notice of the document, including but not limited to an owner, bona fide purchaser, mortgagee, or grantee of an easement, lessee or a grantee of any other interest in real estate.

c. In the case of a residential construction contract the lien claim must also comply with sections 2A:44A-20 and 2A:44A-21.

d. For purposes of this act, warranty or other service calls, or other work, materials or equipment provided after completion or termination of a claimant's contract shall not be used to determine the last day that work, services, material or equipment was provided.

COMMENT

The revisions attempt to clarify the current law, incorporate recent court pronouncements, and accommodate the needs of residential construction contract claimants. These claimants need more time to file claims because of the requirements prior to filing the lien, *i.e.*, the filing of a Notice of Unpaid Balance and Right to File Lien (NUB), the service of a demand for arbitration with the American Arbitration Association, the arbitration procedure itself, and the determination by the arbitrator of whether the lien is valid.

The current law asks the reader to file a lien claim form with insufficient direction or explanation. New subsection a. attempts to provide such direction. New subsection b. also explains that the act of lodging a lien claim for record (or a NUB or amended lien claim) preserves the enforceability of the lien claim or other document as against parties with notice of the claim so long as the document satisfies the timeframe, form of lien claim and service requirements of the statute. However, a document must be filed (which includes indexing) in order for it to be effective as to third parties.

2A:44A-7. Mailing of lien claim; proof of service

a. Within 10 ~~business~~ days following the ~~filing~~ lodging for record of a lien claim, the claimant shall, ~~by personal service or registered or certified mail, return receipt requested, postage prepaid, serve on the owner, or community association in accordance with section 2A:44A-3, and, if any, the contractor and subcontractor against whom the claim is asserted, or mail a copy of the completed and signed lien claim substantially in the form as prescribed in by section 8 2A:44A-8 of the act and marked "received for filing" or a similar stamp with a date and time or other mark indicating the date and time received by the county clerk. Service shall be by personal service as prescribed by the Rules Governing the Courts of the State of New Jersey or by (i) simultaneous registered or certified mail or commercial courier whose regular business is delivery service and (ii) ordinary mail addressed to the last known business or residence address or place of residence of the owner or community association, and, if any, of the contractor and the or subcontractor, against whom the claim is asserted. Proof of timely mailing shall satisfy the requirement of service of the lien claim. A lien claim served upon a community association need not be served upon individual "unit owners" as defined in section 2A:44A-3.~~

b. The service of the lien claim provided for in this section shall be a condition precedent to enforcement of the lien; however, the service of the lien claim outside the prescribed time period shall not preclude enforceability unless the party not timely served proves by a preponderance of the evidence that the late service has materially prejudiced its position. Disbursement of funds by the

~~owner, community association, a contractor or subcontractor who has not been properly served, or the creation or conveyance of an interest in real property by the an owner who has not been properly served, without actual knowledge of the filing of the lien claim, shall constitute prima facie evidence of material prejudice. that the party has been materially prejudiced.~~

COMMENT

By the addition of lettered subsections, the revision clarifies current law and emphasizes that service of the lien claim upon the owner, community association and possible contractors and subcontractors, by personal service, or simultaneous certified or registered mail or commercial courier *and* ordinary mail, is a condition precedent to enforcement of the lien. The section now also provides that the claimant shall serve a lien claim form that has been marked "received for filing" or a similar stamp by the county clerk. The revision also makes clear that disbursement without proper service (not actual knowledge) is the key to evidence of prejudice; since the statute provides for the option of service by certified mail, actual knowledge of the lien claim filing may not occur.

2A:44A:8. Construction lien claim; form

The lien claim shall be filed in substantially the following form:

CONSTRUCTION LIEN CLAIM

~~TO THE CLERK, COUNTY OF _____:~~

~~In accordance with the terms and provisions of the "Construction Lien Law," P.L.1993, c.318 (C.2A:44A-1 et al.), notice is hereby given that:~~

~~1. (Name of claimant) of (address of claimant) has on (date) claimed a construction lien against the below stated real property of (owner against whose property the lien is claimed), in the amount of (\$ _____), for the value of the work, services, material or equipment provided in accordance with a contract with (name of contracting party with whom claimant has a contract) for the following work, services, materials or equipment:~~

- ~~a.~~
- ~~b.~~
- ~~c. (etc.)~~

~~2. The amount due for work, services, materials or equipment delivery provided by claimant in connection with the improvement of the real property, and upon which this lien claim is based, is as follows:~~

~~Total contract amount: _____ \$ _____~~
~~Amendments to contract: _____ \$ _____~~
~~Total contract amount and amendments to contract: _____ \$ _____~~
~~Less: Agreed upon credits: _____ \$ _____~~
~~Contract amount paid to date: _____~~
~~_____ \$ _____~~

Amendments to contract amount paid to date: _____
 \$ _____
 TOTAL REDUCTIONS FROM CONTRACT AMOUNT AND
 AMENDMENTS TO
 CONTRACT: _____ \$ _____
 TOTAL LIEN CLAIM AMOUNT: _____ \$ _____
 Notice of Unpaid Balance and Right to File Lien (if any) was previously
 filed with the County Clerk of County on _____ 19 _____ as No. in Book _____
 Page _____.

3. This construction lien is claimed against the interest of _____
 (name) as (check one):
 Owner _____
 Lessee _____
 Other (describe): _____

in that certain tract or parcel of land and premises described as Block _____,
 Lot _____, on the tax map of the _____ of _____, County of _____, State of New
 Jersey, for the improvement of which property the aforementioned work,
 services, materials or equipment was provided.

4. The work, services, materials or equipment was provided pursuant to
 the terms of a written contract (or, in the case of a supplier, a delivery or order
 slip signed by the owner, contractor, or subcontractor having a direct contractual
 relation with a contractor, or an authorized agent of any of them), dated _____,
 between (claimant) and (name of other contracting party) of (address).

5. The date of the provision of the last work, services, material or
 equipment for which payment is claimed is (date): _____.

NOTICE TO OWNER OF REAL PROPERTY

Your real estate may be subject to sale to satisfy the amount asserted by
 this claim. However, your real estate cannot be sold until the facts and issues
 which form the basis of this claim are decided in a legal proceeding before a
 court of law. The lien claimant is required by law to commence suit to enforce
 this claim.

The claimant filing this lien claim shall forfeit all rights to enforce the lien
 and shall be required to discharge the lien of record, if the claimant fails to bring
 an action in the Superior Court, in the county in which the real property is
 situated, to establish the lien claim:

1. Within one year of the date of the last provision of work, services, material
 or equipment, payment for which the lien claim was filed; or

2. Within 30 days following receipt of written notice, by personal service
 or certified mail, return receipt requested, from the owner requiring the claimant
 to commence an action to establish the lien claim.

You will be given proper notice of the proceeding and an opportunity to
 challenge this claim and set forth your position. If, after you (and/or your
 contractor or subcontractor) have had the opportunity to challenge this lien claim,
 the court of law enters a judgment against you and in favor of the claimant filing

~~this lien claim, and thereafter you fail to pay that judgment, your real estate may then be sold to satisfy the judgment.~~

~~You may choose to avoid subjecting your real estate to sale by doing either of the following:~~

- ~~1. You (or your contractor or subcontractor) can pay the claimant and obtain a discharge of lien claim from the claimant; or~~
- ~~2. You (or your contractor or subcontractor) can cause the lien claim to be discharged by filing a surety bond or making a deposit of funds as provided for in section 31 of P.L.1993, c.318 (C.2A:44A-31).~~

~~If you (or your contractor or subcontractor) choose to pay the claimant under 1. above, you will lose your right to challenge this lien claim in a legal proceeding before a court of law.~~

~~If you (or your contractor or subcontractor) choose to discharge the lien claim by filing a surety bond or making a deposit of funds as provided in section 31 of P.L.1993, c.318 (C.2A:44A-31), you will retain your right to challenge this lien claim in a legal proceeding before a court of law.~~

~~NOTICE TO SUBCONTRACTOR OR CONTRACTOR:~~

~~This lien has been filed with the county clerk and served upon the owner of the real estate. This lien places the owner on notice that the real estate may be sold to satisfy this claim unless the owner pays the claimed sum to this claimant.~~

~~_____ Signed _____~~

~~_____ For _____ Individual, Firm
or Corporation~~

~~Date:~~

~~CLAIMANT'S REPRESENTATION AND VERIFICATION~~

~~Claimant represents and verifies that:~~

- ~~1. The amount claimed herein is due and owing at the date of filing, pursuant to claimant's contract described in the construction lien claim.~~
- ~~2. The work, services, material or equipment for which this lien claim is filed was provided exclusively in connection with the improvement of the real property which is the subject of this claim.~~
- ~~3. This claim has been filed within 90 days from the last date upon which the work, services, materials or equipment for which payment is claimed was provided.~~
- ~~4. The foregoing statements made by me are true, to the best of my knowledge. I am aware that if any of the foregoing statements made by me are false, this construction lien claim will be void and that I will be liable for damages to the owner or any other person injured as a consequence of the filing of this lien claim.~~

~~_____ Name of Claimant _____~~

Signed _____

Type or Print Name and Title

Date: _____

TO THE CLERK, COUNTY OF _____ :

In accordance with the "Construction Lien Law," N.J.S.2A:44A-1 et seq., notice is hereby given that (only complete those sections that apply):

1. On (date), I, (name of claimant), individually, or as a partner of the claimant known as (name of partnership), or an officer/member of the claimant known as (name of corporation or LLC) (circle one and fill in name as applicable), located at (business address of claimant), claim a construction lien against the real property of (name of owner of property subject to lien), in that certain tract or parcel of land and premises described as Block _____, Lot _____, on the tax map of the (municipality) of _____, County of _____, State of New Jersey, (or if no Block and Lot is assigned, a metes and bounds or other description of the property) in the amount of \$(lien claim amount), as calculated below for the value of the work, services, material or equipment provided. (If the claim is against a community association in accordance with section 2A:44A-3, set forth the name of the community association and the name and location of the property development.) The lien is claimed against the interest of the owner, unit owner, or against the community association in accordance with section 2A:44A-3, or other party (circle one; if "other", describe: _____.)

2. In accordance with a written contract for improvement of the above property, dated _____, with the property owner, community association, contractor, or subcontractor (circle one), named or known as (name of appropriate party), and located at (address of owner, unit owner, community association, contractor or subcontractor), this claimant performed the following work or provided the following services, material or equipment:

- a. _____
- b. _____
- c. _____ etc.

3. The date of the provision of the last work, services, material or equipment for which payment is claimed is _____, 20__.

4. The amount due for work, services, material or equipment delivery provided by claimant in connection with the improvement of the real property, and upon which this lien claim is based, is calculated as follows:

A. Initial Contract Price: \$ _____

B. Executed Amendments to Contract Price/Change Orders:
\$ _____

C. Total Contract Price (A + B) = \$ _____

D. If Contract Not Completed, Value Determined in Accordance with the Contract of Work Completed or Services, Material, Equipment Provided :

E. Total from C or D (whichever is applicable): \$ _____

F. Agreed upon Credits: \$ _____

G. Amount Paid to Date: \$ _____

TOTAL LIEN CLAIM AMOUNT E - [F + G] = \$ _____

NOTICE OF UNPAID BALANCE AND ARBITRATION AWARD

If Residential Construction Contract, complete 5 and 6 below; if not residential, complete 5 below, only if applicable. If not residential and 5 is not applicable, skip to Claimant's Representation and Verification.

5. A Notice of Unpaid Balance and Right to File Lien (if any) was previously filed with the County Clerk of _____ County on _____, 20 _____ as No. _____, in Book _____ and Page _____.

6. An award of the arbitrator (if residential) was issued on _____ in the amount of \$ _____.

CLAIMANT'S REPRESENTATION AND VERIFICATION

Claimant represents and verifies under oath that:

1. I have authority to file this claim.
2. The claimant is entitled to the amount claimed at the date of lodging for record of the claim, pursuant to claimant's contract described above.
3. The work, services, material or equipment for which this lien claim is filed was provided exclusively in connection with the improvement of the real property which is the subject of this claim.
4. This claim form has been lodged for record with the County Clerk where the property is located within 90 or, if residential construction, 120 days from the last date upon which the work, services, material or equipment for which payment is claimed was provided.
5. This claim form has been completed in its entirety to the best of my ability and I understand that if I do not complete this form in its entirety, the form may be deemed invalid by a court of law.
6. This claim form will be served as required by statute upon the owner or community association, and upon the contractor or subcontractor against whom this claim has been asserted, if any.
7. The foregoing statements made by me in this claim form are true, to the best of my knowledge. I am aware that if any of the foregoing statements made

by me in this claim form are willfully false, this construction lien claim will be void and that I will be liable for damages to the owner or any other person injured as a consequence of the filing of this lien claim.

Name of Claimant _____
Signed _____

(Type or Print Name and Title)

SUGGESTED NOTARIAL FOR INDIVIDUAL CLAIMANT:

STATE OF NEW JERSEY
COUNTY OF [] ss:

On this _____ day of _____ 20____, before me, the subscriber, personally appeared [person signing on behalf of claimant(s)] who, I am satisfied, is/are the person(s) named in and who executed the within instrument, and thereupon acknowledged that claimant(s) signed, sealed and delivered the same as claimant's (s') act and deed, for the purposes therein expressed.

NOTARY PUBLIC

SUGGESTED NOTARIAL FOR CORPORATE OR LIMITED LIABILITY CLAIMANT:

STATE OF NEW JERSEY
COUNTY OF [] ss:

On this _____ day of _____ 20____, before me, the subscriber, personally appeared [person signing on behalf of claimant(s)] who, I am satisfied is the Secretary [or other officer/manager/agent] of the Corporation [partnership or limited liability company] named herein and who by me duly sworn/affirmed, asserted authority to act on behalf of the Corporation [partnership or limited liability company] and who, by virtue of its Bylaws, or Resolution of its Board of Directors [or partnership or operating agreement] executed the within instrument on its behalf, and thereupon acknowledged that claimant signed, sealed and delivered same as claimant's act and deed, for the purposes herein expressed.

NOTARY PUBLIC

NOTICE TO OWNER OF REAL PROPERTY
NOTICE TO CONTRACTOR OR SUBCONTRACTOR, IF APPLICABLE

The owner's real estate may be subject to sale to satisfy the amount asserted by this claim. However, the owner's real estate cannot be sold until the facts and issues which form the basis of this claim are decided in a legal

proceeding before a court of law. The lien claimant is required by law to commence suit to enforce this claim.

The claimant filing this lien claim shall forfeit all rights to enforce the lien claim and shall be required to discharge the lien claim of record, if the claimant fails to bring an action in the Superior Court, in the county in which the real property is situated, to establish the lien claim:

1. Within one year of the date of the last provision of work, services, material or equipment, payment for which the lien claim was filed; or

2. Within 30 days following receipt of written notice, by personal service or certified mail, return receipt requested, from the owner or community association, as appropriate, requiring the claimant to commence an action to establish the lien claim.

You will be given proper notice of the proceeding and an opportunity to challenge this claim and set forth your position. If, after the owner (and/or contractor or subcontractor) has had the opportunity to challenge this lien claim, the court of law enters a judgment against any of you and in favor of the claimant filing this lien claim, and thereafter judgment is not paid, the owner's real estate may then be sold to satisfy the judgment. A judgment against a community association for a claim of work, services, material or equipment pursuant to a contract with that community association cannot be enforced by a sale of real estate.

The owner may choose to avoid subjecting the real estate to sale by the owner (or contractor) either:

1. paying the claimant and obtaining a discharge of lien claim from the claimant, by which the owner will lose the right to challenge this lien claim in a legal proceeding before a court of law; or

2. causing the lien claim to be discharged by filing a surety bond or making a deposit of funds as provided for in section 2A:44A-31, by which the owner will retain the right to challenge this lien claim in a legal proceeding before a court of law.

COMMENT

This is a new form of lien claim relying upon the original. The new lien claim form is intended to be easier to use and incorporates suggestions by construction lien law practitioners regarding the appropriate method of calculation of the lien claim amount, etc. This new form also incorporates the change in time limitations for filing residential construction lien claims now in section 2A:44A-6, replaces the "19 " date year with a "20 " date year, and provides suggested notarial language.

2A:44A-9. Amount of lien claim; limited to contract price or any unpaid portion thereof

a. The amount of a lien claim shall ~~be limited to the~~ not exceed the unpaid portion of the contract price, or any unpaid portion thereof, whichever is less, of the claimant's contract for the work, services, material or equipment provided.

COMMENT

By the deletions and insertions noted, the revision attempts to make clearer and less ambiguous the current law.

2A:44A-9.1. Relationship to lien fund; maximum liability; impermissible reductions of lien fund

a. For purposes of the act, the "first tier lien claimant" means a contractor claimant; the "second tier lien claimant" means a claimant who is a subcontractor to the contractor or a supplier to the contractor; and the "third tier lien claimant" means a claimant who is a subcontractor to the second tier lien claimant or a supplier to the second tier lien claimant. No lien rights exist for lower than third tier lien claimants.

b. Except as set forth in sections 2A:44A-15 and 2A:44A-21, and subject to section 2A:44A-7 and subsection c. below, the lien fund shall not exceed:

(1) in the case of a first tier lien claimant or second tier lien claimant, the earned amount of the contract between the owner and the contractor minus any payments made prior to service of a copy of the lien claim; or

(2) in the case of a third tier lien claimant, the lesser of (i) the amount in (1) above, or (ii) the earned amount of the contract between the contractor and the subcontractor to the contractor, minus any payments made prior to service of a copy of the lien claim.

c. A lien fund regardless of tier shall not be reduced by payments by the owner, or community association in accordance with section 2A:44A-3, that do not discharge the obligations for the work performed or services, material or equipment provided, including but not limited to:

(1) payments not in accordance with written contract provisions; or

(2) payments yet to be earned upon lodging for record of the lien claim; or

(3) liquidated damages; or

(4) collusive payments; or

(5) use of retainage to make payments to a successor contractor after the lien claim is lodged for record; or

(6) setoffs or backcharges, absent written agreement by the claimant, except for any setoffs upheld by judgment that are first determined by (i) arbitration or alternate dispute resolution in a proceeding conducted in

accordance with section 2A:44A-21 or (ii) any other alternate dispute resolution agreed to by the parties.

d. Subject to subsection c. above, no lien fund exists, if, at the time of service of a copy of the lien claim, the owner or community association has fully paid the contractor for the work performed or for services, material or equipment provided.

e. For purposes of a lien fund calculation, the "earned amount of the contract", is the contract price unless the party obligated to perform has not completed the performance in which case the "earned amount of the contract" is the value, as determined in accordance with the contract, of the work performed and services, materials or equipment provided.

f. If more than one lien claimant will participate in a lien fund, the lien fund shall be established as of the date of the first of the participating lien claims lodged for record unless the earned amount of the contract increases, in which case the lien fund shall be calculated from the date of the increase.

COMMENT

The current law is confusing to the reader. It does not explain the relationship between the lien claim and the lien fund. It also separates discussion of the amount of the lien claim (section 2A:44A-9) from discussion of the maximum liability of the owner (a part of section 2A:44A-10). At the same time, a large portion of current section 2A:44A-10 addresses attachment of the lien and priority of bona fide purchasers and other liens. Maximum liability of the owner is a subject worthy of its own section. Thus, for clarity and coherence, the portion of current section 2A:44A-10 of the act pertaining to the maximum liability of the owner for lien claims was deleted from section 2A:44A-10 and incorporated into a new section 2A:44A-9.1.

New section 2A:44A-9.1 attempts to make clearer the formula to be applied when calculating the amount of the lien fund, replacing current section 2A:44A-10 a. and b. As the court explained in *Sil-Kemp Concrete, Inc. v. Conte & Ricci Const. Co.*, 2005 WL 3742261 (App. Div. 2005), depending upon the claimant's position in the chain of construction, there may be up to three tiers of lien fund in multiple lien scenarios which must be compared to each other in order to determine the full extent of the owner's liability. These are the prime contractor, subcontractor/supplier and sub to the subcontractor. The present confusion in applying section 2A:44A-10 a. and b. is also well illustrated in *Riggs Distler & Co., Inc. v. Valero Refining Company, et al.*, 2005 WL 2897483 (D.N.J. 2005) where the lien claimants argued that application of current section 2A:44A-10 mandated that the only relevant contracts were the prime contract and the contract between themselves and their subcontractor. The court in *Riggs Distler* disagreed, concluding that the underlying policy of protecting both the interests of the contractors in getting paid and the owners in paying just once for the same work can be fulfilled only if the entire construction chain is considered and credit given to all payments that were earned and due even if not subsequently forwarded down the chain.

New section 2A:44A-9.1 c. further adopts the conclusions of a series of recent court decisions both before and after the New Jersey Supreme Court's seminal opinion in *Craft v. Stevenson Lumber*, 179 N.J. 56 (2004). These decisions discuss those attempted reductions to the lien fund which are *not* permissible, specifically, *Labov Mechanical, Inc. v. East Coast Power, L.L.C.*, 377 N.J. Super. 240 (App. Div. 2005) (liquidated damages); *Craft v. Stevenson*, *supra* (advanced payments); *Legge Industries v. Joseph Kushner Hebrew Academy*, 333 N.J. Super. 537 (App. Div. 2000) (advanced payments and retainage used for post-filing payments to a successor contractor). By the inclusion of subsection d., the new section 2A:44A-9.1 also adopts the *Craft* court's determination that the lien fund will never include what the owner has already legitimately paid; in other words, once the contract or the value of the work or materials has been fully paid, there is no fund against which to measure an unpaid lien claimant's entitlement because nothing is owed. Subsection e. also adopts the *Craft* court's reasoning that the contract price may be "reformed" where the obligated party walks off the job before the work is completed, in which case the lien fund should be calculated based on the total amount due at that time.

Finally, subsection f. was added for further clarification of the timing of the lien fund determination, while acknowledging the distinction set forth by the court in *Triple "R" Enterprises, Inc. v. Pezotti*, 344 N.J. Super. 31 (N.J. Super. 2001) where the first lien claimant had settled its claim, prior to the time the plaintiff lien claimant had filed its lien claim, and the court held that the lien fund accrued from the date of the plaintiff's filing, not the date of the filing of the earlier settled lien claim. The terms "lodging for record" are used here, rather than "filing", because the date the document lodged for record is actually filed is not within the control of the claimant as earlier discussed. Application of subsection f. is illustrated as follows: Claimant A lodges for record a lien claim on April 1; Claimant B lodges for record a lien claim on April 14. If neither claimant A nor B settles prior to lien claim enforcement, both will participate in the lien fund and the lien fund will accrue as of April 1. If claimant A, however, settles its lien claim on April 13, the lien fund accrues on the date of the lodging for record of Claimant B's claim, *i.e.*, April 14. Claimant A, having resolved its claim, is no longer a participant in the lien fund.

2A:44A-10. Attachment of lien claim; priority of bona fide purchasers and other liens; maximum liability

Subject to the limitations of sections ~~6~~ 2A:44A-3 and 2A:44A-6 ~~of this act~~, the lien claim shall attach to the interest of the owner from and after the time of filing of the lien claim. Except as provided by section ~~20~~ 2A:44A-20 ~~of this act~~, no lien claim shall attach to the ~~estate~~ interest acquired by a bona fide purchaser as evidenced by a recordable document recorded or lodged for record before the date of filing of the lien claim. ~~first recorded or lodged for record;~~ nor shall a lien claim, except as provided by sections 2A:44A-20 and 2A:44A-22, enjoy have a priority over any mortgage, judgment or other lien or interest in

real estate first recorded, lodged for record, filed or docketed. A lien claim filed under the provisions of this act shall be subject to the effect of a ~~an~~ Notice of ~~s~~Settlement filed pursuant to P.L. 1979, c. 406 (C. 46:16A-1 ~~et seq~~ et seq.)

~~Except as set forth in sections 15 and 21 of this act, the maximum amount for which an owner will be liable or an interest in real property subject to a lien under this act for one or more lien claims filed pursuant to this act shall not be greater than:~~

~~a. In the case of a lien claim filed by a contractor, the total amount of the contract price of the contract between the owner and the contractor less the amount of payments duly made, if any, prior to receipt of a copy of the lien claim pursuant to section 7 of this act, by the owner to the contractor or any other claimant who has filed a lien claim or a Notice of Unpaid Balance and Right to File Lien pursuant either to a contract with the contractor and any subcontractor or supplier, or a contract between a subcontractor of the contractor and any supplier or other subcontractor; or~~

~~b. In the case of lien claim filed by a subcontractor or supplier, the amount provided in subsection a. of this section, or the contract price of the contract between the contractor or subcontractor and the subcontractor or supplier, as applicable, pursuant to which the work, services, materials or equipment is provided by the subcontractor or supplier, less the amount of payments duly made, if any, prior to receipt of a copy of the lien claim pursuant to section 7 of this act, to the contractor or supplier or any other claimant who has filed a lien claim or a Notice of Unpaid Balance and Right to File Lien pursuant to a contract with such subcontractor or supplier, whichever is less.~~

COMMENT

The portion of current section 2A:44A-10 relating to the maximum liability of the owner was deleted and a new section 2A:44A-9.1 created in its place as noted in the Comment to section 2A:44A-9.1 above. The revision also clarifies language and replaces references to sections 6 and 20 of the act with references to the title and section numbers. Because the reference to the maximum liability of the owner is no longer a part of this section, the Commission also recommends modifying the descriptor as underlined.

2A: 44A-11. Amendment of lien claim, form

A lien claim may be amended for any appropriate reason, including but not limited to correcting inaccuracies or errors in the original lien claim form, or revising the amount claimed because of (i) additional work performed or services, material or equipment provided or (ii) the release of a proportionate share of an interest in real property from the lien in accordance with section 2A:44A-18 or (iii) the partial payment of the lien claim. ~~by the filing of an amendment with the county clerk.~~ A lien claim may not be amended to cure a violation of section 2A:44A-15. The amended lien claim, which shall be filed with the county clerk, shall comply with all the conditions and requirements for the filing of an original lien claim, including but not limited to the notice requirements of section 7

~~2A:44A-7 of this act, as well as the conditions and requirements of this section and shall be~~ subject to the limitations of sections ~~40~~ 2A:44A-9.1 and 2A:44A-10 of ~~this act~~. That portion of the amended lien claim in excess of the amount previously claimed shall attach as of the date of filing of the ~~amended~~ original lien claim. That excess amount shall also be used to calculate the lien fund pursuant to section 2A:44-9.1 f.

The amended lien claim shall be filed in substantially the following form:

AMENDMENT TO CONSTRUCTION LIEN CLAIM

TO THE CLERK, COUNTY OF

1. On *(date)*, the undersigned claimant, *(name of claimant)* of *(address of claimant)*, filed a CONSTRUCTION LIEN CLAIM in the amount of (\$) DOLLARS for the value of the work, services, material or equipment provided in accordance with the contract between claimant and *(name)* as of *(date)*.

2. This construction lien claim was claimed against the interest of *(name)* as ~~(check-circle one)~~: owner, unit owner, community association Lessee or other ~~(describe)~~ party; *(if "other", describe: _____)* in that certain tract or parcel of land and premises described as Block ____, Lot ____, on the tax map of the *(municipality)* of _____, County of _____, State of New Jersey, for the improvement of which property the aforementioned work, services, materials or equipment was provided. *(If the claim was against a community association in accordance with section 2A:44A-3, set forth the name of the community association and the name and location of the property development.)*

3. This amends a lien claim which was previously lodged for record on _____, 20__ and filed with the County Clerk of _____ County on _____, 19-20__ and recorded on _____, 20__ as No.____ in Book No.____, Page ____. A Notice of Unpaid Balance and Right to File Lien *(if any)* was previously filed with the County Clerk of _____ on _____, 19-20__ and recorded on _____, 20__ as No.____ in Book No.____, Page ____.

4. Amendments to the original claim were recorded in the office of the County Clerk on _____, 19-20__ as No.____ in Book No.____, Page _____. *(Complete if applicable.)*

5. Effective the date of the filing lodging for record of this AMENDMENT TO CONSTRUCTION LIEN CLAIM, the value of the lien is claimed to be in the total amount of (\$) DOLLARS, inclusive of all prior lien claims or amendments thereof.

6. The work, services, material or equipment provided upon which this Amendment is made are:

a. _____

- b. _____
- c. _____ (etc.)

7. The date of the provision of the last work, services, material or equipment for which payment is claimed is (*date*).

8. The reason for this amendment is:

CLAIMANT'S REPRESENTATION AND VERIFICATION

(Same as for lien claim)

NOTICE TO OWNER OF REAL PROPERTY

(Same as for lien claim)

NOTICE TO SUBCONTRACTOR OR CONTRACTOR

(Same as for lien claim)

COMMENT

The revision replaces references to sections of the act with references to the title and section numbers and changes the year date from "19 " to "20 ". It also conforms this section to the revised section 2A:44A-8, pertaining to the form of the lien claim, making clear that an amendment to construction lien claim can be used for any appropriate purpose including but not limited to correcting inaccuracies and altering the amount of the lien claim. Line 8 is added to set forth the reason for the amendment. Reference to "community association" is added because of modifications to section 2A:44A-3. The language expressing what may be addressed by amendment also has been revised to clarify, but not limit, the appropriate reasons for amending a lien claim. Language has also been added to clarify that a lien claim may not be amended to cure a violation of section 2A:44A-15.

2A:44A-12. Notice of lien claim; authorized withholding of amount claimed from contract price

Upon receipt of notice of a lien claim, the owner, or community association in accordance with section 2A:44A-3, shall be authorized to withhold and deduct the amount claimed from the unpaid part of the contract price that is or thereafter may be due and payable to the contractor or subcontractor, or both. The owner or community association may pay the amount of the lien claim to the claimant unless the contractor or subcontractor against whose account the lien is filed notifies the owner or community association and the lien claimant in writing within 20 days of service of the lien claim upon both the owner or community association and the contractor or subcontractor, that the claimant is not owed the monies claimed and the reasons therefor. Any such payment made by the owner or community association shall constitute a payment made on account of the contract price of the contract with the contractor or subcontractor, or both, against whose account the lien is filed.

COMMENT

Reference to "community association" is added because of modifications to section 2A:44A-3.

2A:44A-13. Construction lien book; construction lien index book; filing and notation fees

a. ~~Each~~ The county clerk shall provide a book designated as the "Construction Lien Book" in which ~~each clerk shall be entered~~ each Notice of Unpaid Balance and Right to File Lien, ~~and Amended Notice of Unpaid Balance and Right to File Lien, and each~~ and Amended Notice of Unpaid Balance and Right to File Lien, ~~and each~~ and lien claim and amended lien claim, and ~~each~~ and discharge, subordination or release of a lien claim or Notice of Unpaid Balance and Right to File Lien presented for filing pursuant to ~~the provisions of this act.~~

b. The county clerk shall cause marginal notations to be made upon each ~~filed document filed pursuant to this act,~~ filed document, as follows: (i) upon each Notice of Unpaid Balance and Right to File Lien whenever an Amended Notice of Unpaid Balance and Right to File Lien or a discharge relative thereto the date an amendment to that Notice or discharge thereof, and related lien claim or amendment thereto is filed; (ii) upon each lien claim, the date whenever an amendedment thereto lien claim relative thereto is filed; and the date a discharge, subordination or release thereof is filed. ~~upon each Notice of Unpaid Balance and Right to File Lien whenever a lien claim or amended lien claim relative thereto is filed; upon each lien claim or amended lien claim whenever a discharge, subordination or release of a lien claim relative thereto is filed.; and~~ (iii) In addition, the clerk shall cause a notation of commencement of an action to enforce a lien claim to be made upon the affected lien claim or amended lien claim the date of the filing of the Notice of Lis Pendens pertaining to the real property subject to the lien claim relative thereto.

c. The failure of the clerk to cause a marginal notation to be made in accordance with subsection b. shall not affect the validity, priority or enforceability of any document filed pursuant to this act.

d. The county clerk shall provide and maintain ~~on a daily basis~~ an index book designated as the "Construction Lien Index Book", setting forth therein in ~~alphabetically order, and~~ arranged by the owners' or community associations' names of the owners, and by the claimants' names of the claimants, each Notice of Unpaid Balance and Right to File Lien, Amended Notice of Unpaid Balance and Right to File Lien, lien claim, amended lien claim, discharge, subordination and release of a lien claim or Notice of Unpaid Balance and Right to File Lien.

e. Each county clerk shall charge ~~the following~~ fees for the filing and marginal notations of the documents authorized to be filed by this act as set forth in N.J.S. 22A:2-29.:

Each Notice of Unpaid Balance and Right to File Lien or Amended Notice of Unpaid Balance and Right to File Lien
.....	\$4.50 \$15.00
Each lien claim or amended lien claim
.....	\$4.50 \$15.00
Each discharge, subordination or release of lien claim or release of Notice of Unpaid Balance and Right to File Lien
.....	\$2.00 \$15.00
Each marginal notation
.....	\$1.00 \$5.00

COMMENT

The revision clarifies language and refers to N.J.S. 22A:2-29 for the fee amounts, which increased in 2004. Reference to "community associations" is added because of modifications to section 2A:44A-3.

2A:44A-14. Failure to bring action; forfeiture of lien; liability for costs and expenses

a. A claimant filing a lien claim shall forfeit all rights to enforce the lien, and shall immediately discharge the lien of record in accordance with section 2A:44A-30, if the claimant fails to bring an action in the Superior Court, in the county in which the real property is situated, to ~~establish~~ enforce the lien claim:

(1) Within one year of the date of the last provision of work, services, material or equipment, payment for which the lien claim was filed; or

(2) Within 30 days following receipt of written notice, by personal service or certified mail, return receipt requested, from the owner, community association, contractor, or subcontractor against whose account a lien claim is filed, requiring the claimant to commence an action to ~~establish~~ enforce the lien claim.

b. Any lien claimant who forfeits a lien pursuant to ~~subsection a. of this section and fails to discharge that lien of record in accordance with section 30 2A:44A-30 of this act~~, shall be liable for all court costs, and reasonable legal

expenses, including but not limited to attorneys' fees, incurred by the owner, community association, ~~the~~ contractor, or subcontractor, or the total costs and legal expenses of all or any combination of them, in defending or causing the discharge of the lien claim. The court ~~may~~ shall, in addition, enter judgment against the claimant who fails to discharge the lien for damages to any of the parties adversely affected by the lien claim.

~~c. Whenever any claimant shall commence an action in the Superior Court of New Jersey to enforce a lien claim as provided by this act, the claimant shall cause a Notice of Lis Pendens to be filed in the office of the county clerk or register pursuant to the provisions of N.J.S. 2A:15-6 et seq.~~

~~d. c.~~ Any disputes arising out of the improvement which is the subject of a lien claim but which are unrelated to any action to enforce a lien claim may be brought in a separate action.

COMMENT

The revised language incorporates modifications suggested by construction lien law practitioners and makes additional reference to section 2A:44A-30, as appropriate. Current subsection c. is here deleted but incorporated into a new section 2A:44A-24. Reference to "community association" is added because of modifications to section 2A:44A-3.

2A:44A-15. Forfeiture of lien rights; improper filing

a. "Without basis" for purposes of this section means frivolous, false, unsupported by a contract, or made with malice or bad faith or for any improper purpose.

~~a.b.~~ If a lien claim is without basis, the amount of the lien claim is willfully overstated, or the lien claim is not filed lodged for record in substantially the form or in the manner or at a time not in accordance with ~~the provisions of~~ this act, the claimant shall forfeit all claimed lien rights and rights to file subsequent lien claims to the extent of the face amount claimed in the lien claim. The claimant shall also be liable for all court costs, and reasonable legal expenses, including but not limited to attorneys' fees, incurred by the owner, community association in accordance with section 2A:44A-3, contractor or subcontractor, in defending or causing the discharge of the lien claim. The court shall, in addition, enter judgment against the claimant for damages to any of the parties adversely affected by the lien claim.

~~b.c.~~ If a defense to a lien claim is without basis, the party maintaining the defense shall be liable for all court costs, and reasonable legal expenses, including but not limited to attorneys' fees, incurred by any of the parties adversely affected by the defense to the lien claim. The court shall, in addition, enter judgment against the party maintaining ~~the frivolous~~ this defense for damages to any of the parties adversely affected thereby ~~said~~ defense.

~~c.d.~~ If a lien claim is forfeited pursuant to this section, or section 2A:44A-14 ~~of this act~~, nothing herein shall be construed to bar the filing of a subsequent

lien claim, provided, however, any subsequent lien claim shall not include a claim for the work, services, equipment or material claimed within the forfeited lien claim.

COMMENT

The revised language attempts to give further meaning to the words “without basis” as they apply to both the claim and the defense thereto. Language mirrored in the court rules (R.1:4-8 pertaining to frivolous litigation) is incorporated where appropriate. Reference to “community association” is added because of modifications to section 2A:44A-3.

2A:44A-16. Party defendants joined by claimant, entitlement to defense [deleted and incorporated into section 2A:44A-24]

~~a. A claimant shall join as party defendants the contractor or subcontractor who is alleged to have failed to make the payments for which the lien claim has been filed and any other person having an interest in the real property that would be adversely affected by the judgment. A party required to be joined under this subsection shall be joined if feasible pursuant to R.4:28-1(a) of the Rules Governing the Courts of the State of New Jersey, unless prohibited by law.~~

~~b. Any party to an action to establish a lien shall be entitled to any defense available to any other party in contesting the amount for which a claimant seeks to have his lien reduced to judgment.~~

COMMENT

The revision to section 2A:44A-24 incorporates portions of this section. Thus, this section is deleted in its entirety.

2A:44A-17. Lien claims unabated by death of party in interest

No lien claim under this act or right thereto shall abate by reason of the death of any party in interest and the right to the lien claim may be asserted by the personal representative of a deceased contractor, subcontractor, or supplier against the personal representative of a deceased owner, contractor or subcontractor.

COMMENT

No changes have been made to this section of the current law.

2A:44A-18. Residential construction contract; calculation of proportionate share

This section shall solely apply to work, services, material or equipment furnished under a residential construction contract. If a lien attaches to an interest in real property, the lien claimant shall release a proportionate share of the interest in real property from the lien upon receipt of payment for that proportionate share. This proportionate share shall be calculated in the following manner:

a. If there is a contract between the lien claimant and the owner or other writing signed by the parties which provides for an allocation by lot or tract, or otherwise, that allocation of the proportionate share shall be binding upon the lien claimant. Absent a contract between the lien claimant and the owner or other writing signed by the parties, any allocation made shall be proportionate to each lot if subdivision approval has been granted or to each tract if no subdivision approval is required or has been granted.

b. If the work performed by the lien claimant was for a condominium, in which a master deed is filed before the lien attaches, or for work performed for a cooperative in which a master declaration is filed before the lien attaches, then the proportionate share shall be allocated in an amount equal to the percentage of common elements attributable to each residential unit, subject to the limitations of section 2A:44A-3 b. and c.

c. If subsection a. or b. of this section does not apply, then the lien shall not be released as to any portion of the interest in real property ~~unless the lien claimant and the owner otherwise agree in a writing signed by both parties.~~

d. If a lien claimant receives payment of ~~it's~~ the proportionate share but refuses to discharge ~~it's~~ the lien claim, then upon application to a court having jurisdiction thereof, the court shall order the discharge of the lien claim to the extent of that proportionate share. The lien claimant shall be further subject to ~~the provisions of section 2A: 44A-30 of this act,~~ and any amounts to be paid shall be paid from the amount due the claimant.

COMMENT

The revised language incorporates modifications suggested by construction lien law practitioners and makes additional reference to section 2A:44A-3, as appropriate.

2A:44A-19. Attachment of lien to interest of owner for work performed in a condominium or cooperative unit [deleted and incorporated into section 2A:44A-3]

~~a. For work performed solely within a unit in a condominium or cooperative, the lien shall only attach to the interest of the owner in the condominium or cooperative unit.~~

~~b. If an interest in real property is conveyed after work is performed but before a lien attaches to the property, then the lien shall attach to the real property retained by the owner, but shall not attach to the real property or interest previously conveyed.~~

COMMENT

The language of this section has been incorporated into section 2A:44A-3. Thus, this section is deleted in its entirety.

2A:44A-20. Notice of unpaid balance; right to file lien; form

a. All valid liens filed pursuant to this act shall attach to the interest of the owner from the time of filing of the lien claim ~~in the office of the county clerk subject to this section and the provisions of sections 2A:44A-3, 2A: 44A-6 and 2A:44A-10 of this act.~~

~~ab.~~ In the event of the creation, conveyance, lease or mortgage of an estate or interest in real property to which improvements have been made that are subject to the lien provisions of this act, a A lien claim validly filed under this act shall have priority over any prior creation, conveyance, lease or mortgage of an estate or interest in real property to which improvements have been made, only if the claimant has filed with the county clerk prior to that creation, conveyance, lease or mortgage, a Notice of Unpaid Balance and Right to File Lien is filed before the recording or lodging for record of a recordable document evidencing that conveyance, lease or mortgage. The Notice of Unpaid Balance and Right to File Lien shall be filed in substantially the following form:

~~TO THE CLERK, COUNTY OF~~

~~In accordance with the terms and provisions of the "Construction Lien Law," P.L.1993, c.318 (C.2A:44A-1 et al.), notice is hereby given that:~~

~~1.(Name of claimant) of (address of claimant) has on (date) a potential construction lien against the below described property of (owner against whose property the lien will be claimed), in the amount of (\$ _____), for the value of the work, services, material or equipment provided in accordance with a contract with (name of contracting party with whom claimant has a contract) for the following work, services, materials or equipment:~~

~~a. b.~~

~~c. (etc.)~~

~~2.The amount due for work, services, materials or equipment provided by claimant in connection with the improvement of the real property, and upon which this lien claim is based is as follows:~~

~~Total contract amount: \$~~

~~Amendments to contract: \$~~

~~Total contract amount and amendments to contract: \$~~

~~Less: Agreed upon credits:\$~~

~~Contract amount paid to date: \$~~

~~Amendments to contract amount paid to date: \$~~

~~TOTAL REDUCTIONS FROM CONTRACT AMOUNT AND AMENDMENTS TO CONTRACT: \$~~

~~TOTAL LIEN CLAIM AMOUNT: \$~~

~~3. This construction lien is to be claimed against the interest of (name) as (check one):~~

~~Owner~~

~~Lessee~~

~~Other (describe): in that certain tract or parcel of land and premises described as Block , Lot , on the tax map of the of , County of , State of New Jersey, for the improvement of which property the aforementioned work, services, materials or equipment was provided.~~

~~4. The work, services, materials or equipment was provided pursuant to the terms of a written contract (or, in the case of a supplier, a delivery or order slip signed by the owner, contractor, or subcontractor having a direct contractual relation with a contractor, or an authorized agent of any of them), dated, between (claimant) and (name of other contracting party) of (address).~~

~~5. The date of the provision of the last work, services, material or equipment for which payment is claimed is (date).~~

~~6. The written contract (is) (is not) (cross out inapplicable portion) a residential construction contract as defined in section 2 of this act.~~

~~7. This notification has been filed prior or subsequent to completion of the work, services, materials or equipment as described above. The purpose of this notification is to advise the owner and any other person who is attempting to encumber or take transfer of said property described above that a potential construction lien may be filed within the 90 day period following the date of the provision of the last work, services, materials or equipment as set forth in paragraph 5.~~

CLAIMANT'S REPRESENTATION AND VERIFICATION

Claimant represents and verifies that:

~~1. The amount claimed herein is due and owing at the date of filing, pursuant to claimant's contract described in the Notice of Unpaid Balance and Right to File Lien.~~

~~2. The work, services, material or equipment for which this Notice of Unpaid Balance and Right to File Lien is filed was provided exclusively in connection with the improvement of the real property which is the subject of this Notice of Unpaid Balance and Right to File Lien.~~

~~3. The Notice of Unpaid Balance and Right to File Lien has been filed within 90 days from the last date upon which the work, services, materials or equipment for which payment is claimed was provided.~~

~~4. The foregoing statements made by me are true, to the best of my knowledge.~~

~~Name of Claimant~~

~~Signed~~

~~Type or Print Name and Title~~

~~Date:~~

~~b. In the event that the claimant elects to file a Notice of Unpaid Balance and Right to File Lien as described above, it shall not be necessary to serve a copy of said Notice of Unpaid Balance and Right to File Lien upon any interested party.~~

~~c. After the filing of a Notice of Unpaid Balance and Right to File Lien, any person claiming title to or an estate or interest in or a lien upon the real property described in the Notice of Unpaid Balance and Right to File Lien, shall be deemed to have acquired said title, estate, interest or lien with knowledge of the anticipated filing of a lien claim, and shall be subject to the terms, conditions and provisions of that lien claim within the period provided by section 6 of this act and as set forth in the Notice of Unpaid Balance and Right to File Lien. A Notice of Unpaid Balance and Right to File Lien filed under the provisions of this act shall be subject to the effect of a notice of settlement filed pursuant to P.L.1979, c.406 (C.46:16A-1 et seq.).~~

~~d. The Notice of Unpaid Balance and Right to File Lien shall be effective for 90 days from the date of the provision of the last work, services, materials or equipment delivery for which payment is claimed as set forth in paragraph 5 of the Notice of Unpaid Balance and Right to File Lien.~~

~~e. The filing of a Notice of Unpaid Balance and Right to File Lien shall not constitute the filing of a lien claim in accordance with the provisions of this act, nor does it extend the time for the filing of a lien claim in accordance with the provisions of this act.~~

~~f. Failure to file a Notice of Unpaid Balance and Right to File Lien shall not affect the claimant's lien rights arising under the provisions of this act, to the extent that no creation, conveyance, lease or mortgage of an interest in real property has taken place prior to the filing of a Notice of Unpaid Balance and Right to File Lien or lien claim.~~

~~g. A Notice of Unpaid Balance and Right to File Lien may be amended by the filing of an Amended Notice of Unpaid Balance and Right to File Lien in accordance with the provisions of this section.~~

TO THE CLERK, COUNTY OF _____:

NOTICE OF UNPAID BALANCE AND RIGHT TO FILE LIEN

In accordance with the "Construction Lien Law," N.J.S. 2A:44A-1 et seq., notice is hereby given that:

1. (Name of claimant), individually or as a partner of the claimant known as (name of partnership), or an officer/member of the claimant known as (name of corporation or LLC) (please circle one and fill in name as applicable) located at

(business address of claimant) has on (date) a potential construction lien against the real property of (name of owner of property subject to lien), in that certain tract or parcel of land and premises described as Block _____, Lot _____, on the tax map of the (municipality) of _____, County of _____, State of New Jersey, in the amount of (\$ _____), as calculated below for the value of the work, services, material or equipment provided. (If claim is against a community association in accordance with section 2A:44A-3, set forth the name of the community association and the name and location of the property development.) The lien is to be claimed against the interest of the owner, unit owner, or other party, or against the community association (circle one; if "other", describe: _____.)

2. The work, services, material or equipment was provided pursuant to the terms of a written contract (or, in the case of a supplier, a delivery or order slip signed by the owner, community association, contractor, or subcontractor having a direct contractual relation with a contractor, or an authorized agent of any of them), dated _____, between (claimant) and owner, unit owner, community association, contractor or subcontractor (circle one), named or known as (name of other contracting party) and located at (address of other contracting party), in the total contract amount of (\$ _____) together with (if applicable) amendments to the total contract amount aggregating (\$ _____).

3. In accordance with the above contract, this claimant performed the following work or provided the following services, material or equipment:

- a. _____
- b. _____
- c. _____ etc.

4. The date of the provision of the last work, services, material or equipment for which payment is claimed is (date.)

5. The amount due for work, services, material or equipment provided by claimant in connection with the improvement of the real property, and upon which this lien claim is based is calculated as follows:

A. Initial Contract Price: \$ _____
 B. Executed Amendments to Contract Price/Change Orders:
 \$ _____
 C. Total Contract Price (A + B) = \$ _____
 D. If Contract Not Completed, Value Determined in Accordance with Contract of Work Completed or Services, Material or Equipment Provided

 E. Total from C or D (whichever is applicable): \$ _____
 F. Agreed upon Credits: \$ _____
 G. Amount Paid to Date: \$ _____
 TOTAL LIEN CLAIM AMOUNT E - [F + G] = \$ _____

6. The written contract (is) (is not) (cross out inapplicable portion) a residential construction contract as defined in section 2A:44A-2 of this act.

7. This notification has been lodged for record prior or subsequent to completion of the work, services, material or equipment as described above. The purpose of this notification is to advise the owner or community association and any other person who is attempting to encumber or take transfer of said property described above that a potential construction lien may be lodged for record within the 90-day period, or in the case of a residential construction contract within the 120-day period, following the date of the provision of the last work, services, material or equipment as set forth in paragraph 5.

CLAIMANT'S REPRESENTATION AND VERIFICATION

Claimant represents and verifies that:

1. I have authority to file this Notice of Unpaid Balance and Right to File Lien.

2. The claimant is entitled to the amount claimed herein at the date this Notice is lodged for record, pursuant to claimant's contract described in the Notice of Unpaid Balance and Right to File Lien.

3. The work, services, material or equipment for which this Notice of Unpaid Balance and Right to File Lien is filed was provided exclusively in connection with the improvement of the real property which is the subject of this Notice of Unpaid Balance and Right to File Lien.

4. The Notice of Unpaid Balance and Right to File Lien has been lodged for record within 90 days, or in the case of a residential construction contract within 60 days, from the last date upon which the work, services, material or equipment for which payment is claimed was provided.

5. The foregoing statements made by me are true, to the best of my knowledge.

Name of Claimant _____

Signed _____
(Type or Print Name and Title) _____

SUGGESTED NOTARIAL FOR INDIVIDUAL CLAIMANT:

STATE OF NEW JERSEY

COUNTY OF [] ss:

On this day of 20 , before me, the subscriber, personally appeared [person signing on behalf of claimant(s)] who, I am satisfied, is/are the person(s) named in and who executed the within instrument, and thereupon acknowledged that claimant(s) signed, sealed and delivered the same as claimant's (s') act and deed, for the purposes therein expressed.

NOTARY PUBLIC

SUGGESTED NOTARIAL FOR CORPORATE OR LIMITED LIABILITY CLAIMANT:

STATE OF NEW JERSEY
COUNTY OF [] ss:

On this day of 20 , before me, the subscriber, personally appeared [person signing on behalf of claimant(s)] who, I am satisfied is the Secretary [or other officer/manager/agent] of the Corporation [partnership or limited liability company] named herein and who by me duly sworn/affirmed, asserted authority to act on behalf of the Corporation [partnership or limited liability company] and who, by virtue of its Bylaws, or Resolution of its Board of Directors [or partnership or operating agreement] executed the within instrument on its behalf, and thereupon acknowledged that claimant signed, sealed and delivered same as claimant's act and deed, for the purposes herein expressed.

NOTARY PUBLIC

b.c. In the event that the A claimant elects to file a Notice of Unpaid Balance and Right to File Lien as described above, it shall not be necessary to need not serve a copy of said Notice of Unpaid Balance and Right to File Lien upon any interested party.

e. d. After the filing of a Notice of Unpaid Balance and Right to File Lien, any person claiming title to or an estate or interest in or a lien upon the real property described in the Notice of Unpaid Balance and Right to File Lien, shall be deemed to have acquired said title, estate, interest or lien with knowledge of the anticipated filing of a lien claim, and shall be subject to the terms, conditions and provisions of that lien claim within the period provided by section 6 2A:44A-6 of this act and as set forth in the Notice of Unpaid Balance and Right to File Lien. A Notice of Unpaid Balance and Right to File Lien filed under the provisions of this act shall be subject to the effect of a nNotice of sSettlement filed pursuant to P.L.1979, c. 406 (C.46:16A-1 et seq.)

d. e. The Notice of Unpaid Balance and Right to File Lien shall be effective for 90 days or in the case of a residential construction contract claim for 120 days from the date of the provision of the last work, services, materials or equipment

delivery for which payment is claimed as set forth in paragraph 5 of the Notice of Unpaid Balance and Right to File Lien.

e- f. The lodging for record or filing of a Notice of Unpaid Balance and Right to File Lien shall not constitute the lodging for record or filing of a lien claim ~~in accordance with the provisions of this act~~, nor does it extend the time for the filing lodging for record of a lien claim, ~~in accordance with the provisions of this act~~.

f. g. Failure to file a Notice of Unpaid Balance and Right to File Lien shall not affect the claimant's lien rights arising under ~~the provisions of this act~~, to the extent that no ~~creation~~, conveyance, lease or mortgage of an interest in real property ~~has taken place~~ occurs prior to the filing of a Notice of Unpaid Balance and Right to File Lien or lien claim.

g- h. A Notice of Unpaid Balance and Right to File Lien may be amended by the filing of an Amended Notice of Unpaid Balance and Right to File Lien in accordance with ~~the provisions of this section~~.

COMMENT

The revised language incorporates modifications suggested by construction lien law practitioners and the American Arbitration Association to make it easier to meet the time constraints for filing residential construction lien claims. It also incorporates changes required by the modification to the time limitations in section 2A:44A-6 and conforms to the changes made to sections 2A:44A-8 and 2A:44A-10. Reference to "community association" is added because of modifications to section 2A:44A-3. However, a lien against a community association does not attach to an interest in real property and real property cannot be sold in order to satisfy the lien.

2A:44A-21. Legislative findings; additional requirements for filing of lien on residential construction

a. The Legislature finds that the ability to sell and purchase residential housing is essential for the preservation and enhancement of the economy of the State of New Jersey and that while there exists a need to provide contractors, subcontractors and suppliers with statutory benefits to enhance the collection of money for goods, services and materials provided for the construction of residential housing in the State of New Jersey, the ability to have a stable marketplace in which families can acquire homes without undue delay and uncertainty and the corresponding need of lending institutions in the State of New Jersey to conduct their business in a stable environment and to lend money for the purchase or finance of home construction or renovations requires that certain statutory provisions as related to the lien benefits accorded to contractors, subcontractors and suppliers be modified. The Legislature further finds that the construction of residential housing generally involves numerous subcontractors and suppliers to complete one unit of housing and that the multiplicity of lien claims and potential for minor monetary disputes poses a serious impediment to the ability to transfer title to residential real estate expeditiously. The Legislature

further finds that the purchase of a home is generally one of the largest expenditures that a family or person will make and that there are a multitude of other State and federal statutes and regulations, including but not limited to the "New Home Warranty and Builders' Registration Act", P.L.1977, c. 467 (C.46:3B-1 ~~et seq.~~ et seq.) and "The Planned Real Estate Development Full Disclosure Act", P.L.1977, c. 419 (C.45:22A-21 ~~et seq.~~ et seq.), which afford protection to consumers in the purchase and finance of their homes, thereby necessitating a different treatment of residential real estate as it relates to the rights of contractors, suppliers and subcontractors to place liens on residential real estate. The Legislature declares that separate provisions concerning residential construction will provide a system for balancing the competing interests of protecting consumers in the purchase of homes and the contract rights of contractors, suppliers and subcontractors to obtain payment for goods and services provided.

b. The filing of a lien for work, services, material or equipment furnished pursuant to a residential construction contract shall be subject to the following additional requirements:

(1) As a condition precedent to the filing of any lien arising under a residential construction contract, a lien claimant shall first file a Notice of Unpaid Balance and Right to File Lien by lodging for record the Notice within 60 days following the last date that work, services, material or equipment were provided for which payment is claimed in accordance with ~~the provisions of subsection ab.~~ of section ~~20~~ 2A:44A-20 of this act, and comply with ~~all other provisions~~ the remainder of this section.

(2) Upon ~~the filing its lodging for record,~~ of a Notice of Unpaid Balance and Right to File Lien, ~~service of the Notice of Unpaid Balance and Right to File Lien shall be effected served~~ in accordance with the provisions of for the service of lien claims in section 7 2A:44A-7 of this act.

(3) Unless the parties have otherwise agreed in writing to an alternative dispute resolution mechanism, ~~simultaneously with the service under paragraph (2) of this subsection~~ within 10 days from the date the Notice of Unpaid Balance and Right to File Lien is lodged for record, the lien claimant shall also serve a demand for arbitration and fulfill all the requirements and procedures of the American Arbitration Association to institute an expedited proceeding before a single arbitrator designated by the American Arbitration Association. The demand for arbitration may be served in accordance with the provisions for the service of lien claims in section 2A:44A-7 along with (i) a copy of the completed and signed Notice of Unpaid Balance and Right to File Lien and (ii) proof by affidavit that the Notice of Unpaid Balance and Right to File Lien has been lodged for record. If not yet provided at the time of the service of the demand for arbitration, a copy of the Notice of Unpaid Balance and Right to File Lien marked "filed" by the clerk's office shall be provided by the claimant to the parties and the arbitrator, as a condition precedent to the issuance of an arbitrator's determination.

(3.1) All arbitrations of Notices of Unpaid Balance and Right to File Lien pertaining to the same residential construction shall be determined by the same arbitrator, whenever possible. The claimant, owner, or any other party may also request consolidation in a single arbitration proceeding of the claimant's Notice of Unpaid Balance and Right to File Lien with any other Notice of Unpaid Balance and Right to File Lien not yet arbitrated but lodged for record by a potential lien claimant whose name was provided in accordance with section 2A:44A-37. Such request shall be made in the demand for arbitration or, in the case of a request by a person other than the claimant, by letter to the arbitrator assigned to the arbitration or, if none has been assigned, to the appropriate arbitration administrator, within five days of when the demand for arbitration is served. The arbitrator shall grant or deny a request for a consolidated arbitration proceeding at the arbitrator's discretion.

(4) Upon the closing of all hearings in the arbitration, the arbitrator shall make the following determinations: (a) whether the Notice of Unpaid Balance and Right to File Lien was in compliance with section ~~20~~ 2A:44A-20 of this act and whether service was proper under section ~~7~~ 2A:44A-7 of this act; (b) the earned amount of the contract between the owner and the contractor in accordance with section 2A:44A-9.1; ~~(bc)~~ the validity and amount of any lien claim which may be filed pursuant to the Notice of Unpaid Balance and Right to File Lien; ~~(c)~~ d the validity and amount of any liquidated or unliquidated setoffs or counterclaims to any lien claim which may be filed; and ~~(d)~~ e the allocation of costs of the arbitration among the parties. When making the above determinations, the arbitrator shall also consider all determinations made by that arbitrator in any earlier arbitration proceeding pertaining to the same residential construction.

(5) ~~In the event~~ If the amount of any setoffs or counterclaims presented in the arbitration ~~are unliquidated and~~ cannot be determined by the arbitrator in a liquidated amount, the arbitrator, as a condition precedent to the filing of the lien claim, shall order the lien claimant to post a bond, letter of credit or funds with an attorney-at-law of New Jersey, or other such person or entity as may be ordered by the arbitrator in such amount as the arbitrator shall determine to be 110% of the approximate fair and reasonable value of such setoffs or counterclaims, but in no event ~~shall the bond, letter of credit or funds exceed~~ greater than the amount of the lien claim which may be filed. This 110% limitation ~~regarding for~~ any bond, letter of credit or funds shall also apply to any alternative dispute resolution mechanism to which the parties may agree. When making the above determinations, the arbitrator shall consider all determinations made by that arbitrator in any earlier arbitration proceeding pertaining to the same residential construction.

(6) The arbitrator shall make such determinations set forth in paragraphs (4) and (5) of this subsection and the arbitration proceeding shall be completed within 30 days of receipt of the lien claimant's demand for arbitration by the American Arbitration Association unless no response is filed, in which case the arbitrator shall make such determinations and the arbitration proceeding shall be deemed completed within 7 days after the time within which to respond has

expired. These That time periods for completion of the arbitration shall not be extended unless otherwise agreed to by the parties and approved by the arbitrator. If an alternative dispute mechanism is ~~alternatively~~ agreed to between the parties, such determination shall be made as promptly as possible making due allowance for all time limits and procedures set forth in this act. The arbitrator shall resolve a dispute regarding the timeliness of the demand for arbitration.

(7) Any contractor, subcontractor or supplier whose interests are affected by the filing of a Notice of Unpaid Balance and Right to File Lien under ~~section 14~~ of this act shall be permitted to join in such arbitration; but the arbitrator shall not determine the rights or obligations of any such parties except to the extent those rights or obligations are affected by ~~the~~ a lien claimant's Notice of Unpaid Balance and Right to File Lien.

(8) Upon determination by the arbitrator that there is an amount which, pursuant to a valid lien shall attach to the improvement, the lien claimant shall, within 10 days of the lien claimant's receipt of the determination, file lodge for record such lien claim in accordance with ~~the provisions of section 8 2A:44A-8 of this act~~ and furnish any bond, letter of credit or funds required by the arbitrator's decision. The failure to ~~file~~ lodge for record such a lien claim, or furnish the bond, letter of credit or funds, within the 10-day period, shall cause any lien claim to be invalid.

(9) Except for the arbitrator's determination itself, any such determination shall not be considered final in any legal action or proceeding, and shall not be used for purposes of collateral estoppel, res judicata, or law of the case to the extent applicable. Any finding of the arbitrator pursuant to ~~the provisions of this act~~ shall not be admissible for any purpose in any other action or proceeding.

(10) If ~~either~~ the lien claimant or the owner or community association in accordance with section 2A:44A-3 is aggrieved by the arbitrator's determination, then ~~either~~ the aggrieved party may institute a summary action in the Superior Court, Law Division, for the vacation, modification or correction of the arbitrator's determination. The arbitrator's determination shall be confirmed unless it is vacated, modified or corrected by the court. The court shall render its decision after giving due regard to the time limits and procedures set forth in this act and shall set time limits for lodging for record the lien claim if it finds, contrary to the arbitrator's determination, that the lien claim is valid or the 10-day requirement for lodging for record required by paragraph 8 of this subsection has expired.

(11) In the event a Notice of Unpaid Balance and Right to File Lien is filed and the owner conveys its interest in real property to another person before a lien claim is filed, then prior to or at the time of conveyance, the owner may make a deposit with the county clerk where the improvement is located, in an amount no less than the amount set forth in the Notice of Unpaid Balance and Right to File Lien. For any deposit made with the county clerk, the county clerk shall discharge the Notice of Unpaid Balance and Right to File Lien or any related lien claim against the real property for which the deposit has been made. After the

issuance of the arbitrator's determination set forth in paragraphs (4) and (5) of this subsection, any amount in excess of that determined by the arbitrator to be the amount of a valid lien claim shall be returned forthwith to the owner who has made the deposit. The balance shall remain where deposited unless the lien claim has been otherwise paid, satisfied by the parties, forfeited by the claimant, invalidated pursuant to paragraph (8) of this subsection or discharged under section ~~33 2A:44A-33~~ of this act. Notice shall be given by the owner in writing to the lien claimant within five days of making the deposit.

(12) Solely for those lien claims arising from a residential construction contract, if a Notice of Unpaid Balance and Right to File Lien is determined to be without basis, the amount of the Notice of Unpaid Balance and Right to File Lien is significantly overstated, or the Notice of Unpaid Balance and Right to File Lien is not ~~filed~~ lodged for record in (i) substantially the form, or (ii) in the manner, or (iii) at a time, ~~not~~ in accordance with the provisions of this act, then the claimant shall be liable for all damages suffered by the owner or any other party adversely affected by the Notice of Unpaid Balance and Right to File Lien, including but not limited to all court costs, reasonable attorneys' fees and legal expenses incurred.

(13) If the aggregate sum of all liens ~~claims~~ attaching to any real property that is the subject of a residential construction contract exceeds the amount due under a residential purchase agreement, less the amount due under any previously recorded mortgages or liens other than construction liens, then upon entry of judgment of all such lien claims, each lien claim shall be reduced pro rata. Each lien claimant's share then due shall be equal to the monetary amount of the lien claim multiplied by a fraction in which the denominator is the total monetary amount of all valid claims on the owner's interest in real property against which judgment has been entered, and the numerator is the amount of each particular lien claim for which judgment has been entered. The amount due under the residential purchase agreement shall be the net proceeds of the amount paid less previously recorded mortgages and liens other than construction liens and any required recording fees.

COMMENT

The revised language incorporates modifications suggested by construction lien law practitioners and the American Arbitration Association to set workable time limitations for each step of the residential construction claim process including conclusion of the arbitration itself. The new time frames for filing the NUB and serving the demand for arbitration are included to permit sufficient time for the demand for arbitration to be served and the arbitration to take place while still meeting the 120-day time frame for filing the lien claim. The revision also permits extension of the 120-day time frame if the court, upon review of the arbitrator's determination in accordance with subsection (10) of this section, finds the arbitrator was in error and the lien claim is valid.

Subsections b. (3) and (6) have been further modified in order to avoid disputes between the parties about timeliness and to provide further guidance to the arbitrators. Subsections b. (4) and (5) have been modified, and subsection b.

(3.1) added, to accommodate the concerns of the New Jersey Builder's Association. The arbitrator has been given the authority to determine the earned amount of the contract between the owner and the contractor in order to effectuate a revised section 2A:44A-31, which allows for the capping of bonding requirements with regard to residential construction lien claims. New subsection b. (3.1) gives the arbitrator discretion, at the request of a party, to consolidate NUB arbitrations pertaining to the same residential construction and requires that, whenever possible, the same arbitrator determine all arbitrations of NUBs pertaining to the same residential construction. This revision hopefully will help eliminate inconsistent awards. Distinctions between "filing" and "lodging for record" also are noted.

2A:44A-22. Priority of mortgages over liens

~~Nothing in this act shall be deemed to supersede the mortgage priority provisions of P.L. 1985, c. 353 (C. 46:9-8).~~

a. Every mortgage recorded before the filing of a lien claim or the filing of a Notice of Unpaid Balance and Right to File Lien in accordance with section 2A:44A-20, shall have priority as to the land or other interest in real property described and any improvement wholly or partially erected or thereafter to be erected, constructed or completed thereon, over any lien established by virtue of this act, to the extent that

(1) the mortgage secures funds that have been advanced or the mortgagee is obligated to advance to or for the benefit of the mortgagor before the filing of the lien claim or Notice of Unpaid Balance and Right to File Lien in accordance with section 2A:44A-20; or

(2) the mortgage secures funds advanced after the filing of a lien claim or the filing of a Notice of Unpaid Balance and Right to File Lien in accordance with section 2A:44A-20, and the funds are applied in accordance with subsection (b) (1) through (7) inclusive of this section.

b. Every mortgage recorded after the filing of a lien claim or the filing of a Notice of Unpaid Balance and Right to File Lien in accordance with section 2A:44A-20, shall have priority as to the land or other interest in real property described and any improvement wholly or partially erected or thereafter to be erected, constructed or completed thereon, over any lien which may be established by virtue of this act to the extent that the mortgage secures funds which have been applied to:

a. (1) The payments of amounts due to any claimants who have filed a lien claim or a Notice of Unpaid Balance and Right to File Lien;

b. (2) The payment to, or the securing of payment by, the party against whose interest the lien claim is filed of all or part of the purchase price of the land covered thereby and any subsequent payment made for the improvements to the land, including but not limited to any advance payment of interest to the holder of the mortgage as required by the mortgagee as a condition of the loan;

e. (3) The payment of any valid lien or encumbrance ~~which~~ that is, or can be established as, prior to a lien provided for by this act;

d. (4) The payment of any tax, assessment or other State or municipal lien or charge due or payable at the time of or within 60 days after such payment, as required by the mortgagee as a condition of the loan;

e. (5) The payment of any premium, counsel fee, consultant fee, interest or financing charges, or other cost related to the financing, any of which are required by the lender to be paid by the owner, provided that the total of same shall not be in excess of 10 percent of the principal amount of the mortgage securing the loan upon which they are based;

f. (6) The [p]ayment to the owner of that portion of the purchase price of the real property on which the improvements are made or to be made which have previously been paid by the owner, exclusive of any interest or any other carrying costs of such real property, provided, however, that at the time of the payment of such funds to the owner, the budget upon which the loan was made indicated that the amount of the loan is not less than the total of: (4a) the purchase price of the real property, (2b) the cost of constructing the improvements, and (3c) any cost listed in subsections e b.3., d4. and e5. of this section; or

g. (7) An escrow in an amount not to exceed 150% of the amount necessary to secure payment of charges, described in subsections a. b. (1), e. (3), d. (4) and e. (5) of this section.

c. Nothing in this act shall be deemed to supersede the mortgage priority provisions of P.L. 1985, c. 353 (C. 46:9-8.4 et seq.) or diminish the effect of a Notice of Settlement filed pursuant to P.L. 1979, c. 406 (C.46:16A-1 et seq.).

COMMENT

For the most part, the revised language incorporates modifications suggested by construction lien law practitioners. A mortgage for advance of funds used for improvements to the property takes priority over other liens, including but not limited to any advance of mortgage interest or taxes collected at time of loan closing. However, in an attempt to reconcile section 2A:44A-10 with this section, which together posed a claimed ambiguity in *Sovereign Bank v. Silverline Holdings Corp.*, 368 N.J. Super. 1 (App. Div. 2004), this section is now divided into three subsections. The first subsection explains the priority of a mortgage recorded before the filing of a lien claim (wherein priority is secured to the extent the funds have been advanced); the next subsection explains the priority of a mortgage recorded after the filing of a lien claim (wherein priority is secured to the extent the funds are applied as set out in the statute); and the last subsection retains the priority provisions of N.J.S. 46:9-8.1 *et seq.* Since, as a general rule, a mortgage normally enjoys priority only to the extent it is funded, the proposed revision is more consistent with existing legal principles.

2A:44A-23. Payment of lien claims; distribution of proceeds

~~All lien claims established by judgment shall be concurrent and shall be paid pro rata out of the lien fund and the proceeds of the sale authorized by this act.~~

a. The amount due a lien claimant shall be paid only after the lien claim has been established by judgment, or, in the case of an execution sale, only to those lien claimants whose lien claims were filed before application was made to the court for distribution of the sale proceeds. All lien claims established by judgment are "valid claims" that shall be concurrent and shall be paid as provided in subsection (c) below.

b. The sheriff or other officer conducting an execution sale authorized by sections 2A:44A-24 shall pay the proceeds to the clerk of the Superior Court and the Superior Court shall provide proper disposition of sale proceeds to the persons entitled thereto under the act.

c. The Superior Court shall order the distribution of a lien fund, after its calculation in accordance with section 2A:44A-9.1, in the following manner:

(1) If there are first tier lien claimants, the lien fund shall be allocated in amounts equal to their valid claims. If the total of those claims would exceed the maximum liability of the owner (or community association) as provided by section 2A:44A-9.1, the allocations shall be reduced pro rata so as not to exceed that maximum liability;

(2) From the allocation to each first tier lien claimant, amounts shall be allocated equal to the valid claims of second tier lien claimants whose claims derive from contracts with that first tier lien claimant. If the total of the claims is less than the allocation to that first tier lien claimant, the first tier lien claimant shall be paid the balance. If the total of the claims exceeds the allocation to that first tier lien claimant, the second tier claimants' allocations shall be reduced pro rata so as not to exceed that first tier lien claimant allocation.

(3) From the allocation to each second tier lien claimant, amounts shall be allocated equal to the valid claims of third tier lien claimants whose claims derive from contracts with that second tier lien claimant. If the total of the claims is less than the allocation to that second tier claimant, the second tier lien claimant shall be paid the balance. If the total of the claims exceeds the allocation to that second tier lien claimant, the allocation to the third tier lien claimants shall be reduced pro rata so as not to exceed that second tier lien claimant allocation.

(4) If there are no first tier lien claimants, the lien fund for second tier lien claimants shall be allocated in amounts equal to that second tier's valid claims. If the total of the claims of any group of second tier lien claimants exceeds the lien fund for that group of claimants as provided by section 2A:44A-9.1, the allocations shall be reduced pro rata so as not to exceed that lien fund.

(5) If there are no first or second tier lien claimants, the lien fund for third tier lien claimants shall be allocated in amounts equal to that third tier's valid

claims. If the total of the claims of any group of third tier lien claimants exceeds the lien fund for that group of claimants as provided by section 2A:44A-9.1, the allocations shall be reduced pro rata so as not to exceed that lien fund.

COMMENT

The section is new. It merges some of the current section 2A:44A-23 with current section 2A:44A-28. This provision attempts to set out the process by which lien claims are disbursed from the lien fund. Because of the merger of two sections within this section, the Commission also recommends modification of the descriptor as underlined. Reference to “community association” is added because of modifications to section 2A:44A-3.

2A:44A-24. Judgment; filing and content of statement Suit to enforce lien claim; entitlement to defense; joinder of party defendants; distribution of surplus funds

~~When judgment is obtained under this act there shall be filed in the office of the county clerk a statement signed and sealed by the clerk of the court, containing:~~

- ~~a. The name of the court;~~
- ~~b. The names of the parties;~~
- ~~c. Whether judgment is against the owner, contractor or subcontractor, or against the building and land only, or both; and~~
- ~~d. The amount and date of judgment.~~

~~There shall be filed with, or as part of, the statement, an oath of the claimant, his attorney or agent, stating the amount currently due thereon based on an updated statement of the amount owing on the judgment.~~

a. Subject to the further requirements of section 2A:44A-14, and in the case of lien claims arising from residential construction contracts the additional requirements of section 2A:44A-21, a lien claim arising under this act shall be enforced by a suit commenced in the Superior Court in the county in which the real property affected by lien is located within one year of the date of the last provision of work, services, material or equipment, payment for which the lien claim was filed.

b. A lien claimant shall join as party defendants the owner (community association, if applicable in accordance with section 2A:44A-3), contractor or subcontractor alleged to have failed to make payments for which the lien claim has been filed and any other person having an interest in the real property that would be adversely affected by the judgment. The court shall order joinder of necessary parties or determine if it is appropriate for the suit to proceed if party defendants are not joined.

c. The court shall stay the suit to the extent that the lien claimant's contract or the contract of another party against whose account the lien claim is

asserted provides that any disputes pertaining to the validity or amount of a lien claim are subject to arbitration or other dispute resolution mechanism.

d. Upon commencement of the suit, the lien claimant shall cause a Notice of Lis Pendens to be filed in the office of the county clerk or register pursuant to N.J.S. 2A:15-6 et seq.

e. A party to a suit to enforce a lien claim shall be entitled to assert any defense available to any other party in contesting the amount for which a claimant seeks to have the lien reduced to judgment.

f. The judgment to be entered in a suit to enforce a lien claim shall (i) establish the amount due to the lien claimant; and (ii) direct the public sale by the sheriff or other such officer as the court may direct of the real property and improvement affected by the lien. The proceeds of the sale shall be distributed in accordance with section 2A:44A-23. If funds are realized at the sale in an amount greater than the lien fund, the surplus funds shall be distributed in accordance with law.

g. Nothing in this act shall bar recovery of money damages pursuant to a lien claim arising under this act.

h. A judgment obtained against a community association that is unpaid may be enforced by assessment against unit owners as they would be assessed for any other common expense, after reasonable notice, and in a manner directed by the court. In ordering assessments, the court shall be guided by the master deed, bylaws or other document governing the association. A judgment shall not be enforced by the sale of any common elements, common areas or common buildings or structures of a real property development.

COMMENT

This section is new. It sets out the parameters for enforcing a lien claim by a suit in the Superior Court and attempts to conform this section with section 2A:44A-25, both of which were taken from the old Mechanics' Lien Law and inserted in the Construction Lien Law due to the hybrid nature of a proceeding to enforce a lien claim under the old statute. The requirement to file a notice of lis pendens has been inserted here. The current section 2A:44A-24 is eliminated and most of current section 2A:44A-16 is merged with this new section.

In merging current section 2A:44A-16 into this section, the new proposed language eliminates any distinction between an action to establish a lien and a suit to enforce a lien, and sets forth the procedure for joinder, notice, and enforcement of judgment. New subsection b. provides guidance with regard to a claimant's failure to join dispensable parties. As a practical matter, if all lien claimants are not joined, the lien fund cannot be calculated and accurate pro rata distribution to lien claimants cannot be made. New subsection d. sets out the procedure for enforcing judgments against community associations and clarifies that enforcement by the sale of common elements or common buildings or structures is against public policy and therefore prohibited.

The modification to subsection f. eliminates the need for section 2A:44A-29, and that section accordingly has been deleted. The Commission also recommends modification of the descriptor as underlined.

2A:44A-25. Writs of execution

If judgment in an action to enforce a lien claim under this act is entered in favor of the lien claimant ~~against the owner, contractor or subcontractor, a writ of execution may issue thereon, as in other cases; in accordance with the judgment. if against the improvements and land, a special writ of execution may issue to make the amount recovered therein by sale of the improvements and land.~~

~~If both general and special judgments are given, both writs of execution may issue, separately or combined in one writ, and one of such writs may issue after the return of the other for the whole amount recovered or the residue as the case may require.~~

COMMENT

The changes to section 2A:44A-24 make necessary the modifications to this section.

~~2A:44A-26. Special writs of execution; sale and conveyance of land~~ [deleted]

~~When a special writ of execution has issued under this act, the sheriff or other officer shall advertise, sell and convey the improvement and land in the same manner as in the case of other execution sales.~~

COMMENT

The changes to sections 2A:44A-24 and 2A:44A-25 make this section unnecessary and it is therefore eliminated.

2A:44A-27. Interest in residential property, priority to all subsequent liens

The interests in real property set forth in section ~~21~~ 2A:44A-21 ~~of this act~~ shall have priority to all subsequent liens under this act upon the land and upon the improvements thereon, except such as may be removable as between landlord and tenant, which may be sold and removed by virtue of any lien for the erection, construction or completion of the same, free from the prior encumbrances.

COMMENT

The revision replaces reference to section 21 of the act with reference to the title and section numbers.

2A:44A-28. Proceeds of sale; distribution [deleted and incorporated into section_2A:44A-23]

~~The sheriff or other officer conducting the sale authorized by this act shall pay the proceeds thereof to the clerk of the Superior Court, who shall distribute the proceeds among the lien claims filed under this act before an application for distribution thereof is made to the court. The Superior Court shall provide proper disposition of proceeds of any sale to the persons entitled thereto under this act. The amount due a lien claimant shall not be paid over to him until after his lien claim has been established by judgment.~~

COMMENT

The revision to section 2A:44A-23 incorporates portions of this section making this section unnecessary and it is therefore eliminated.

2A:44A-29. Surplus funds; distribution [deleted and incorporated into section 2A:44A-24]

~~If the proceeds of the sale of the improvements or land under any judgment obtained under this act shall be more than sufficient to pay the judgments of the claimants entitled to payment out of the proceeds of the sale under this act, any surplus shall be distributed by the court out of which the special writ of execution issued, to the defendants holding liens, subject to that of claimants, according to priority of their respective liens as determined in the judgment.~~

COMMENT

The changes to sections 2A:44A-24 and 2A:44A-25 incorporate portions of this section making this section unnecessary and it is therefore eliminated.

2A:44A-30. Filing of certificate to discharge lien claim of record

a. When a lien claim has been filed and the claim has been paid, satisfied or settled by the parties or forfeited by the claimant, the claimant or his claimant's successor in interest or his attorney shall, within 30 days of payment, satisfaction or settlement, or within 7 days of demand by any interested party, file with the county clerk a certificate, duly acknowledged or proved, directing the county clerk to discharge the lien claim of record, which certificate shall contain:

- (1) The date of filing the lien claim;
- (2) The book and page number endorsed thereon;
- (3) The name of the owner of the land (or the community association, if applicable) named in the notice;
- (4) The location of the property; and
- (5) The name of the person for whom the work, services, equipment or materials was provided.

b. If the claimant shall fail or refuse to file this the certificate, as set forth in subsection (a), then upon application by any party in interest may proceed in a summary manner by filing an order to show cause in accordance with the Rules Governing the Courts of the State of New Jersey, upon notice to the claimant, to be served upon him in the same manner as provided by section 7 of this act, or upon satisfactory proof that the claimant cannot be served, any A judge of the Superior Court may, upon good cause being shown and absent receipt of written objections and grounds for same, order the lien claim discharged on the return date of the order to show cause. The county clerk shall thereupon attach the certificate or order to the original notice of lien claim on file and shall note on the record thereof "discharged by certificate" or "discharged by court order," as the case may be and any lien foreclosure action shall be dismissed with prejudice.

c. In those circumstances in which the lien claim has been paid in full, the lien claimant has failed to file a lien claim discharge pursuant to this section, and at least thirteen months have elapsed since the date of the lien claim, the owner or community association may, in accordance with section 2A:44A:33, submit for filing a duly acknowledged discharge certificate substantially in the form provided by subsection a. accompanied by an affidavit setting forth the circumstances of payment as set forth below:

OWNER (OR COMMUNITY ASSOCIATION) AFFIDAVIT OF PAYMENT
TO DISCHARGE LIEN CLAIM

TO THE CLERK, COUNTY OF

The undersigned, being duly sworn upon the undersigned's oath, avers as follows:

1. I am an owner of real property located at (address of property subject to lien), in that certain tract or parcel of land and premises described as Block _____, Lot _____, on the tax map of the (municipality) of _____, County of _____, State of New Jersey (In the case of a community association, I am an [officer/manager/agent] of the community association, [name of community association] for property located at [location of property development].)

2. On or about (date), I caused to be sent to (name of contractor or subcontractor to whom payment was made), located at (address designated for payment by the filed lien claim form), the final payment in the amount of (\$ _____) in full satisfaction of a certain lien claim dated (date) which was filed by (name of lien claimant) against the real property designated in paragraph 1, on (date) in the office of the county clerk of the County of (name of county) in Construction Lien Book _____, Page _____.

3. At least thirteen months have elapsed since the date of the lien claim and 90 days before filing this affidavit, I mailed or caused to be mailed by certified mail to the last known address of the lien claimant as set forth in the filed lien claim form written notice of my intention to file a discharge certificate with

respect to the lien claim. To the best of my knowledge and belief, no written communication denying or disputing payment in full of the lien claim has been received from the lien claimant (name.)

4. Wherefore, the undersigned directs the county clerk of the County of (name of county) to cause to be filed the discharge certificate accompanying this affidavit, and further directs the county clerk to cause a notation of the discharge of the lien to be endorsed upon the margin of the record of the original lien claim, stating that the discharge is filed, and setting forth the date, book and page number of the filed discharge.

Name of Owner/Community Association
Signed

(Type or Print Name and Title)

NOTARIAL FOR INDIVIDUAL OWNER

STATE OF NEW JERSEY
COUNTY OF [] ss:

On this _____ day of _____ 20____, before me, the subscriber, personally appeared [name of owner/community association] who, I am satisfied, is/are the person(s) named in and who executed the within instrument, and thereupon acknowledged that the owner/community association signed, sealed and delivered the same as the owner's/community association's act and deed, for the purposes therein expressed.

NOTARY PUBLIC

NOTARIAL FOR CORPORATE OR LIMITED LIABILITY OWNER/COMMUNITY ASSOCIATION:

STATE OF NEW JERSEY
COUNTY OF [] ss:

On this _____ day of _____ 20____, before me, the subscriber, personally appeared [person signing on behalf of owner/community association] who, I am satisfied is the Secretary [or other officer/manager/agent] of the Corporation [partnership or limited liability company] named herein and who by me duly sworn/affirmed, asserted authority to act on behalf of the Corporation [partnership or limited liability company] and who, by virtue of its Bylaws, or Resolution of its Board of Directors [or partnership or operating agreement] executed the within instrument on its behalf, and thereupon acknowledged that the owner/community association signed, sealed and delivered same as

owner's/community association's act and deed, for the purposes herein expressed.

NOTARY PUBLIC

e.d. Any lien claimant who fails to discharge a lien claim of record pursuant to this section shall be liable for all court costs, and reasonable legal expenses, including but not limited to attorneys' fees, incurred by the owner, community association, the contractor, or subcontractor, or any combination of owner, community association, contractor and subcontractor, as applicable, to discharge or obtain the discharge of the lien, and in addition thereto, the court may shall enter judgment against the claimant for damages to any or all of the parties adversely affected by the failure to discharge the lien.

e. Upon discharge of record in all cases, the party who filed the enforcement action shall cause the Notice of Lis Pendens to be cancelled or discharged of record pursuant to N.J.S. 2A:15-6 et seq. Any party who filed the enforcement action who fails to cancel or discharge the lis pendens of record pursuant to this section shall be liable for all court costs, and reasonable legal expenses, including but not limited to attorneys' fees, incurred by the owner, community association, the contractor, or subcontractor, or any other interested party, or any combination thereof, as applicable, to obtain the cancellation or discharge of the lis pendens, and in addition thereto, the court shall enter judgment against the claimant for damages to any or all of the parties adversely affected by the failure to cancel or discharge the lis pendens.

COMMENT

The revision provides a summary disposition procedure for those lien claims that are paid, satisfied, settled or forfeited in the event the claimant fails or refuses to file a certificate discharging the lien in accordance with *Kvaerner Process, Inc. v. Barham-McBride Joint Venture*, 368 N.J. Super 190, 198-200 (App. Div. 2004), where the court held a summary proceeding to discharge a construction lien, brought by the general contractor, was appropriate although not expressly provided by statute. Now the statute will provide the availability of such summary disposition by any interested party.

In addition, a new subsection c. is added to provide for the discharge of a lien by an owner's discharge certificate in the event that a fully paid and satisfied lien claim is not discharged within 13 months of the date of the claim. A mechanism for cancelling the lis pendens is also included, with consequences imposed for failure to do so. Reference to "community association" is added because of modifications to section 2A:44A-3.

2A:44A-31. Bond in favor of lien claimant; surety; conditions

a. When a lien claim is filed against any improvement and land under this act, the owner, community association in accordance with section 2A:44A-3,

contractor or subcontractor may execute and file with the proper county clerk a bond in favor of the lien claimant, with a surety company, duly authorized to transact business in this State, as surety thereon, ~~in an amount equal to 110% of the amount claimed by the lien claimant and~~ The amount of the bond shall be equal to 110% of the amount claimed by the lien claimant but in the case of a lien claim arising from a residential construction contract, no greater than the earned amount of the contract between the owner and the contractor as determined by the arbitrator in accordance with section 2A:44A-21b.(4). The bond shall be filed, in accordance with the language set forth in section 2A:44A-31.1, along with a payment in the amount of \$25, conditioned upon the payment of any judgment and costs that may be recovered by the lien claimant under this claim. Any form of bond proffered in accordance with this statute containing language inconsistent with the language set forth in section 2A:44A-31.1, shall be the basis for a cause of action to strike such language from the form of bond.

b. As an alternative, the owner, community association, contractor or subcontractor may deposit with the clerk of the Superior Court of New Jersey, funds constituting an amount equal to 110% of the amount claimed by the lien claimant ~~and~~ along with a payment in the amount of \$25, conditioned upon the payment of any judgment and costs that may be recovered by the lien claimant under this claim. The deposit may be made without the necessity of commencing any legal action. The written receipt provided by the court clerk for the deposit made may be filed with the county clerk as evidence of that deposit.

c. Any surety bond filed with the county clerk under this section shall be discharged, and any deposit with the clerk of the Superior Court shall be returned to the depositor, without court order, upon presentment by the owner, community association, contractor or subcontractor of any of the following:

~~(a)~~ (1) a duly acknowledged certificate as provided in paragraphs (2) or (3) of subsection a. of section ~~33 2A:44A-33~~ of this act;

~~(b)~~ (2) an order of discharge as provided in paragraph ~~(34)~~ of subsection a. of section ~~33 2A:44A-33~~ of this act;

~~(c)~~ (3) a judgment of dismissal or other final judgment against the lien claimant; or

~~(d)~~ (4) a true copy of a Stipulation of Dismissal, with prejudice, executed by the lien claimant or its representative in any action to foreclose the lien claim which is subject to the surety bond or deposit.

COMMENT

The revised language references section 2A:44A-31.1, a new provision suggested by construction lien law practitioners. Subsection letter designations are added to each paragraph. Revisions to subsection (1) and (2) replace references to section 2A:44A-33 with references to the appropriate title and section numbers. Reference to the arbitrator's determination in accordance with section 2A:44A-21b.(4) has been added in order to cap the bonding requirements

for residential construction lien claimants. Also reference to “community association” is added because of modifications to section 2A:44A-3.

2A:44A-31.1. Bond; form

The bond shall be filed in substantially the following form:

(Name of Bond Company)
(Bond No. _____)

BOND DISCHARGING CONSTRUCTION LIEN

WHEREAS, on the (date), (name of claimant) (hereinafter “Lienor”) filed a Construction Lien for the sum of (amount written out) (\$ _____), in the office of the Clerk of the County of (name of county where lien claim was filed), (hereinafter “Clerk”), against the real property of owner, (name of owner), or community association (or name of community association) Lot (#), Block (#), (or name and location of the property development in the case of a community association) Township of (name of municipality), County of (name of county), State of New Jersey as more fully set forth in the notice of lien, a true copy of which is attached hereto, and which lien was filed (date lien claim was filed) in book (#), page (#).

WHEREAS, in accordance with the New Jersey Lien Law, the Principal is permitted to file a bond for 110% of the lien amount, which would be a total bond penalty of (amount written out) (\$ _____) (hereinafter “Penal Sum”).

NOW THEREFORE, in consideration of the discharge of said lien by the Clerk, the Principal and (name of bond company) having an office at (address of bond company) pursuant to the statute provided, jointly and severally undertake and become bound to the Clerk in an amount not exceeding the Penal Sum, inclusive of all interest and costs, conditioned for the payment of any and all judgments that may be rendered against said property in favor of the Lienor, its successors or assigns, in any action or proceedings to enforce the alleged lien herein.

Dated:

Name of Claimant
Signed _____
By: (Printed name of signatory)

Name of Bond Company
Signed _____
By: (Printed name of signatory)

COMMENT

Construction lien law practitioners suggested that a form of the bond be made part of the act for easier reference. The Commission recommends the

adoption of the underlined descriptor. Reference to "community association" is added because of modifications to section 2A:44A-3.

2A:44A-32. Release, discharge from claim

When the bond, deposit or any combination thereof, authorized by section ~~31~~ 2A:44A-31 of this act, is properly filed or deposited, the improvements and land described in the lien claim shall thereupon be released and discharged from the claim and no execution shall issue against the improvements and land. The words "released by bond" or "released by deposit of funds," as applicable, and a reference to the time and place of filing of the bond or deposit shall be entered by the county clerk upon the record of the lien claim.

COMMENT

The revision replaces reference to section 31 of the act with reference to the title and section numbers.

2A:44A-33. Discharge of record of lien claim

a. A lien claim ~~may~~ shall be discharged of record by the county clerk:

(1) Upon the execution and filing with the county clerk of a surety bond, or the deposit of funds with the clerk of the Superior Court of New Jersey, in favor of the claimant in an amount equal to 110% of the amount of the lien claim; or

(2) Upon receipt of a duly acknowledged certificate, discharging the lien claim from the claimant having filed the lien claim, or his claimant's successor in interest, or his attorney; or

(3) Pursuant to the filing of an owner's or community association's discharge certificate in accordance with section 2A:44A-30, provided that 90 days prior to the filing of the affidavit, substantially in the form set forth below, the lien claimant is notified by certified mail at the lien claimant's last known address of the owner's or community association's intent to file a discharge certificate and no written communication from the lien claimant denying or disputing payment in full of the lien claim is filed with the county clerk and served on the owner or community association; or

~~(34)~~ Pursuant to an order of discharge by the court.

b. When judgment of dismissal or final other judgment against the lien claimant is entered in an action to enforce the lien claim under this act and no appeal is taken within the time allowed for an appeal, or if an appeal is taken within the time allowed for an appeal, or if an appeal is taken and finally determined against the lien claimant, the court before which the judgment was rendered, upon application and written notice to the lien claimant as the court shall direct, shall order the county clerk to enter a discharge of the lien claim.

c. If an appeal is taken by the claimant, the claim shall be discharged unless the claimant posts a bond, in an amount to be determined by the court, to protect the owner or community association from the reasonable costs, expenses

and damages which may be incurred by virtue of the continuance of the lien claim encumbrance.

d. Upon discharge of record of the lien claim, unless the action for enforcement also involves claims, by way of counterclaim, cross claim or interpleader, arising out of or related to the improvements that are the subject of the lien claim in which the owner or community association is an interested party, the court shall also order that the owner or community association shall no longer be a party to an action to enforce the lien claim, and the surety issuing the bond shall be added as a necessary party.

e. Discharge of record of a lien claim will automatically discharge of record the Notice of Unpaid Balance and Right to File Lien filed in connection therewith.

COMMENT

The revision accommodates the concern of construction lien law practitioners that even if a bond has been posted, in those cases where enforcement of the action also involves claims by way of counterclaim or cross claim arising out of or related to the improvements that are the subject of the lien claim, the owner should remain involved in the proceeding. The county clerk may also now discharge a lien upon receipt of the owner's submission of a discharge certificate under certain circumstances. References to gender have been eliminated. Finally, reference to "community association" is added because of modifications to section 2A:44A-3.

2A:44A-34. Filing of book and page number of original record of lien claim

A discharge, subordination or release of a lien claim or Notice of Unpaid Balance and Right to File Lien, a receipt of payment of a lien claim, or any order of the court discharging or releasing a lien claim, shall recite the book and page number of the original record of the lien claim, and a full description of the property discharged or released. The county clerk may refuse to discharge a lien claim unless ~~the provisions of this section have been~~ is satisfied.

COMMENT

No changes have been made to this section of the current law other than stylistic changes as noted.

2A:44A-35. Discharge, subordination or release of claim, notice of unpaid balance and right to file; recording; acknowledgment and endorsement

A discharge, subordination or release of a lien claim or Notice of Unpaid Balance and Right to File Lien shall be duly acknowledged or proved, and recorded in a properly indexed book for that purpose. A notation of the record of the discharge of a lien claim or Notice of Unpaid Balance and Right to File Lien shall be endorsed upon the margin of the record in the book where the original lien or Notice of Unpaid Balance and Right to File Lien is recorded stating that the discharge is filed ~~and recorded~~, giving the date of filing ~~and recording~~ and setting forth the book and the page number where the discharge, or receipt of

payment of the lien or order or owner's or community association's discharge certificate discharging the lien, is recorded.

COMMENT

The revision accommodates the submission of an owner's or community association's discharge certificate. Reference to "community association" is added because of modifications to section 2A:44A-3. References to "and recording" and "and recorded" are deleted because they are unnecessary. The revised definition of "filing" clearly includes lodging for record and indexing.

2A:44A-36. Liability for fraudulently depriving person of benefits of this act

A person who fraudulently deprives a person entitled to the benefits of this act shall be liable to that person for any damages resulting therefrom.

COMMENT

No changes have been made to this section of the current law.

2A:44A-37. Furnishing list of subcontractors and suppliers pursuant to contract or upon written request; penalties for failure to furnish

a. If required in a contract or upon written request from an owner or community association to a contractor, a subcontractor, or both, the contractor or subcontractor shall, within 10 days, provide the owner or community association with an accurate and full list of the names and addresses of each subcontractor and supplier who may have a right to file a lien pursuant to ~~the provisions of this act.~~

b. If required in a contract or upon written request from a contractor to a subcontractor, the subcontractor shall, within 10 days, provide the contractor with an accurate and full list of the names and addresses of each subcontractor or supplier who may have a right to file a lien pursuant to ~~the provisions of this act.~~

c. Any list provided pursuant to ~~the provisions of subsection a. or b. of this section~~ shall be verified under oath by the person providing it same.

d. Reliance upon the verified list ~~by the person requesting same or by the owner~~ shall be prima facie evidence establishing the bona fides of payment made in reliance thereon and shall constitute an absolute defense to any claim that the party making such payment should have made additional inquiry to determine the identity of potential claimants.

e. Any person to whom a written request has been made pursuant to ~~the provisions of subsections a. or b. of this section~~ who does not provide a list in compliance with this section shall be directly liable in damages to (i) the party requesting the list or to (ii) the owner or community association, including, but not limited to, court costs and the reasonable legal expenses, including attorneys' fees, incurred by ~~said party or the owner or both,~~ any or all of them, in defending

or causing the discharge of a lien claim asserted by a party whose name ~~has been~~ is omitted from the list.

COMMENT

Reference to “community association” is added because of modifications to section 2A:44A-3. Other stylistic changes have been made.

2A:44A-38. Waiver of construction lien rights unlawful and deemed void; exceptions

Waivers of construction lien rights are against public policy, unlawful, and void, unless given in consideration for payment for the work, services, materials or equipment provided or to be provided, and such waivers shall be effective only upon and to the extent that such payment is actually received.

COMMENT

No changes have been made to this section of the current law other than to make “material” singular as it is throughout the statute.



STATE OF NEW JERSEY

NEW JERSEY LAW REVISION COMMISSION

Tentative Report

Relating to

**Title 22A
November 2008**

This tentative report is distributed to advise interested persons of the Commission's tentative recommendations and to notify them of the opportunity to submit comments. The Commission will consider these comments before making its final recommendations to the Legislature. The Commission often substantially revises tentative recommendations as a result of the comments it receives. If you approve of the tentative report, please inform the Commission so that your approval can be considered along with other comments.

COMMENTS SHOULD BE RECEIVED BY THE COMMISSION NOT LATER THAN JANUARY 21, 2009.

Please send comments concerning this tentative report or direct any related inquiries, to:

Laura Tharney, Deputy Director
NEW JERSEY LAW REVISION COMMISSION
153 Halsey Street, 7th Fl., Box 47016
Newark, New Jersey 07101
973-648-4575
(Fax) 973-648-3123
Email: lct@njlrc.org
Web site: <http://www.njlrc.org>

Title 22A

Introduction

Title 22A contains the general fees pertaining to civil actions, probate actions and criminal actions. The Title also includes other provisions regarding various fees and the disposition of fees.

The updating of this Title has been inconsistent. Certain sections of the Title, including certain filing fees, have remained reasonably current. Other sections, including those pertaining to the service of documents and the costs awarded in various courts, have been updated less frequently and some sections remain unchanged since their enactment in 1953.

After reviewing the Title, New Jersey Law Revision Commission Staff has proposed certain sections for removal as anachronistic. Other sections have been consolidated and reorganized. The sections proposed for removal are set forth below. Other proposed changes are explained in the Comment section following each section of the draft statute. Sections proposed for removal from the Title are as follows:

1. 22A:1-5 was substantially eliminated since the dollar amounts listed were inconsistent with other provisions of the statute (that section includes, for example, a fee for serving a subpoena of \$0.35 and mileage reimbursement of \$0.04/mile).

2. 22A:1-6 was replaced, in the draft, with the section including the proposed flat-fee mileage calculation.

3. 22A:2-2 includes costs in the Supreme Court such as counsellor's fees of \$10 and \$20. This section was eliminated as not representative of actual costs (it sets the award for prevailing on a contested motion or application at \$10, and for arguing a cause before the Supreme Court, \$25). In this section and in similar sections mentioned below, it was of concern to Staff that the costs recovered were no longer meaningful and that the value of the time spent to prepare the application for costs would routinely exceed the costs received.

4. 22A:2-5 was eliminated by consolidating this section with 22A:2-1. 22A:2-5 simply states that the fees in the Appellate Division are the same as those in the Supreme Court.

5. 22A:2-9 lists costs that may be awarded to a party in the Law Division, ranging from \$10 to \$50. The section was eliminated as not representative of actual costs (examples include costs awarded for an appeal to the Law Division, \$10; for a voluntary dismissal, \$20) [see 22A:2-2 above for a more detailed explanation of the reasoning].

6. 22A:2-10 lists costs that may be awarded to a party in Chancery Division, ranging from \$10 to \$125. The section was eliminated as not representative of actual costs for reasons similar to those mentioned in 22A:2-2 above.

7. 22A:2-11 also addresses costs that might be awarded and provided that if the matter does not proceed to a final judgment, the attorney is allowed one-half of the amount normally allowable as costs. Like the costs sections discussed above, this one was eliminated.

8. 22A:2-14 was eliminated because Staff was informally advised that it is no longer relevant.

9. 22A:2-16 lists fees for recording documents and making copies in probate matters. This section was eliminated on the basis that it is inconsistent with other fees listed elsewhere in the Title and because the fees are calculated per folio.

10. 22A:2-17 addresses the issue of fees for proceedings begun prior to the effective date of the Title (1953). This section was eliminated in the hope that no such actions remain.

11. 22A:2-25 lists fees for filing, entering or docketing papers with the Deputy Clerk of the Superior Court. This section was eliminated as apparently duplicative of, and inconsistent with, other listed fees.

12. 22A:2-26 lists a motion fee of \$9 and was eliminate because that fee is inconsistent with other motion fees listed in the Title.

13. 22A:2-31 reduces fees for probating a will or filing for administration or guardianship if the value of the estate in question is less than \$100 or \$200. This section was eliminated as no longer relevant in part because the dollar amounts listed have not been updated since 1953.

14. 22A:2-32 reduces fees for probating a will or filing for administration or guardianship if the estate of the testator, intestate, minor or ward does not exceed \$1000 and the testator or intestate died while in active military service during a time of war or emergency or if the minor or ward in question is the child of such a person. The section was eliminated as no longer relevant in part because the dollar amount listed has not been updated since 1953.

15. 22A:2-33 reduces fees for the auditing, stating or allowance of accounts under circumstances where the estate does not exceed \$200 or \$500. This section, too, was eliminated as no longer relevant because the dollar amounts have not been updated since 1953.

16. 22A:2-34 includes fees of \$0.25 and \$0.12 payable by the Surrogate to the Clerk of the Court for recording the name and other limited information

about each testator or intestate. This section was eliminated as potentially obsolete since the amounts to be paid have not been updated since 1953.

17. 22A:2-41 sets forth the amounts to be included in taxed costs for witnesses and appraisers and was eliminated for same reasons as similar provisions.

18. 22A:2-42 sets forth the amounts to be included as taxed costs for attorneys' fees in Special Civil Part matters, replevin actions and matters in which a party has been adjudged in contempt. This section was eliminated for the same reasons as similar provisions *but* it is of concern to Staff that the provision regarding attorneys fees in Special Civil Part actions is still viable and should potentially be included in the final draft.

19. 22A:3-6 provides for imprisonment for failure to pay costs assessed against a party at a rate of one day of imprisonment for each \$1 of costs imposed and was eliminated for that reason.

20. 22A:4-2 includes fees of the surveyors general and was eliminated as no longer relevant.

21. 22A:4-6 provides for a fee of \$3 to be paid to the County Clerk for attending sessions of the Law Division in the county and was eliminated as obsolete.

22. 22A:4-11 includes a mileage fee of \$0.10/mile and was eliminated as inconsistent with other mileage fees established by the Title.

23. 22A:4-12 includes fees for searches performed by the Clerk of the Court or the County Clerks and Registers of Deeds and Mortgages and was eliminated on the basis that it no longer appeared to be relevant and, if it is still valid, it is inconsistent with other provisions of the Title.

24. 22A:4-14 includes fees for administering oaths, taking affidavits, taking proof of a deed and taking acknowledgements and was eliminated as no longer relevant.

Of the modifications proposed by this draft, the largest single substantive change is the inclusion of a flat-fee mileage listing for the counties that is proposed to replace the hundreds of different mileage fees assigned to individual municipalities throughout the State. Another substantive change is the adjustments of the filing fees for an initial paper in an action to make that fee nearly uniform across the courts. Other fees were modestly adjusted to round them to the nearest dollar and to make all dollar figures multiples of either \$5 or \$10.

Previously, the draft contained an adjustment of the costs for the copying of documents to more closely align with the charges permitted by the Open

Public Records Act (47:1A-5). OPRA provides for charges on a sliding scale, ranging from \$0.75/per page to \$0.25/per page. Since all other fees in this section were rounded to the nearest dollar, the copying fees in prior drafts were reduced to \$1 in this Title. The difficulty with making that change arises as a result of the manner in which budgeting is handled in the Surrogate's Offices and the County Clerk's Offices. It appears that a portion of the funds collected for the copying of documents by staff members in these offices are retained by the offices and, in some circumstances, represent a significant part of the office budget. Revising the costs for copying would result in a significant and negative impact on the budget. Since the monies in question are used for things like updated computer systems and software, it does not appear appropriate to adjust the copying charges at this time.

The balance of the nonsubstantive changes involve rearrangement, consolidation and updating of the sections. Since the draft represents a modification of the entirety of the Title, the statutory sections have been renumbered as 22B.

Not all of the changes to the language are indicated by underlining or strikeout. For ease of review, however, changes to dollar amounts are reflected in that manner as are changes that were made to eliminate (strikeout) or include (underline) language found in the September 2008 draft after meetings with individuals from the County Clerk's Offices and the Surrogate's Offices.

General Civil

22B:1-1. Payment or waiver of fees

a. Attorneys for the parties shall be liable and responsible for all fees charged to their respective clients by the clerks of the Supreme Court and the Superior Court, unless the court directs otherwise.

b. All fees allowed by law for the services of the Supreme Court, Superior Court, and any justice or judge thereof, whether such services be performed in open court or in chambers, shall be taxed, collected and accounted for by the clerks of the respective courts in the same manner as fees allowed to such clerks.

c. The clerk of any court shall not charge any New Jersey State officer paid from State funds and conducting State business, or a State department, board, body or commission for the filing of a paper or the rendering of a service for which a fee is normally charged.

d. Unless otherwise indicated, no service described in this Title shall be performed by a clerk, surrogate, officer or other individual from whom the service is sought unless the specified fee for that service is paid or payment is waived.

e. The clerk of the court shall issue process, subpoena, or any other order, without requiring the payment of a fee, when any duly authorized ethics committee of a county or state bar association within the State, which has been recognized as such by the Supreme Court, makes an application pursuant to the Rules of the Supreme Court.

f. The payment of fees to any New Jersey court or its clerk may be waived by the court if a party demonstrates its poverty and seeks the appropriate relief.

g. The collection of any fee included in this Title may be waived in particular circumstances by general rule or special order of the Supreme Court, or by an order of any court made pursuant to authority granted by a rule of the Supreme Court.

h. In any cause or proceeding in which the papers filed with the clerk of the Superior court shall be exceptionally numerous or other work done by the clerk shall be exceptionally onerous, the clerk may make application to the court, on notice, for an order fixing and allowing a reasonable additional fee to be paid for the use of the State. The court may make an order fixing and allowing such additional fee, if any, as shall be deemed just and reasonable under the circumstances and directing how and by whom the fee shall be paid.

Source: 22A:1-7; 22A:2-3; 22A:2-4; 22A:2-18; 22A:2-21; 22A:2-22; 22A:2-23; 22A:2-37.1; 22A:4-16.

COMMENT

This section contains general provisions consolidated from various sections of the statute. The language in subsection: (a) is 22A:2-21; (b) is 22A:4-16; (c) is 22A:2-22; (d) is section 22A:2-37.1 (similar language appears in

22A:4-19 and 22A:5-1); (e) is 22A:2-3; (f) is 22A:1-7; (g) is 22A:2-3 and 22A:2-23; and (h) is 22A:2-18.

It is not clear who pays for things like fees for service and advertising if the court is able to waive those fees.

Information is sought from commenters as to which fees are payable to the various clerks, but are to be made payable to the Treasurer of the State of New Jersey. Once this information is received, the language will be adjusted accordingly.

22B:1-2. Initial filing fees in Superior Court

Except as set forth in 22A:2-37.1, and in probate matters not filed in the Chancery Division, Probate Part, the amount to be paid for the filing of the first paper in any action in the Law or Chancery Divisions of the Superior Court, including Tax Court, shall cover all fees payable in that action through and including the entry of final judgment, taxation of costs, copy costs, and the issuance and recording of final process, except as may be otherwise provided by law, or by the rules of court. The amounts paid by the parties shall be:

- a. By the plaintiff, \$250.
- b. By any person filing an answer with a counterclaim or a third party claim, \$250.
- c. By any person other than the plaintiff filing any other paper, including a third-party complaint, \$135.
- d. In Tax Court proceedings:

(1) There shall be no filing fee charged for a counterclaim or responsive pleading filed by the taxing district.

(2) When Multiple Causes of Action are included in a Single Complaint or Counterclaim:

(A) If a complaint or counterclaim in an action to review a real property tax assessment includes more than one separately assessed parcel of property in common ownership the first paper filing fee imposed by a. above shall be charged for the first separately assessed parcel of property included in the complaint and \$50 shall be charged for each additional separately assessed parcel of property of said property owner included in the complaint.

(B) Condominiums:

(i) When properties are in the same ownership and part of the same master deed, if a complaint or counterclaim in an action to review a real property tax assessment includes more than one parcel of real property separately assessed pursuant to the provisions of N.J.S.A. 46:8A-26

(Horizontal Property Act) or N.J.S.A. 46:8B-19 (Condominium Act), the filing fee for the first separately assessed parcel of property of the property owner shall be the first paper filing fee imposed by a. above, and \$50 for each additional separately assessed parcel of property of said property owner included in the complaint.

(ii) When property has been assessed separately pursuant to the provisions of N.J.S.A. 46:8A-26 (Horizontal Property Act) or N.J.S.A. 46:8B-19 (Condominium Act), separately assessed properties that are not in common ownership may not be combined in one complaint or counterclaim.

(3) If a complaint in an action to review a state tax, such as sales tax, gross income tax, corporation business tax or others, includes more than one separate state tax, the filing fee shall be \$200 for the first separate state tax and \$50 for each additional state tax included in the complaint.

Source: 22A:2-6; 22A:5-1; *Rule 8:12.*

COMMENT

The word “proceeding” was eliminated in the first sentence as redundant and potentially confusing.

The fee for the filing of the first paper (set forth in subsection (a)) was raised to \$250 to make the initial filing in most of the courts consistent.

The Chancery Division language from Sections 22A:2-12 and 22A:2-13 was consolidated here so that the Law Division and Chancery Division sections could be combined. It appears that continuing the practice of separate provisions for those two Divisions was more a historical artifact than a practical necessity, so they have been combined in this section. The fee for the filing of the first paper was raised to \$250 for all first papers, not just divorce or dissolution of a civil union, to make the initial filing in most of the courts consistent.

It is not clear if the language from 22A:2-12 regarding the forwarding of \$25 of the filing fee to the Clerk of the Superior Court must be retained. It was eliminated in this draft.

The language of subsection d. was taken from the Court Rules and included here for the sake of consistency. Further revision to this language may be required.

22B:1-3. Filing fees for papers filed during an action

Upon the filing, entering, docketing, or recording of the following papers or documents by any party to any action in the Law, Chancery or Appellate Divisions of the Superior Court, or the Supreme Court, as appropriate, the party shall pay to the clerk the following fees:

- a. Motion, \$30.
- b. The fee for filing of the first paper in any motion, petition or application, if not in a pending action or if made after dismissal or judgment entered, other than withdrawal of money deposited in court, shall be \$30.
- c. Order to show cause, other than an order to show cause which issues as original process, \$45.
- d. Transfer of action from Law Division to Special Civil Part, no charge. Transfer of an action from Special Civil Part to Law Division, \$45.
- e. Signing and issuing a subpoena, \$5.

Source: 22A:2-6 (a); 22A:2-7 (b) and (e); New (c) and (d).

COMMENT

The language of the initial section was modified to include a reference to the Supreme Court since the Clerk of that Court also affixes the seal of the Court and performs other actions set forth in this section.

Subsection (b) was moved from the prior 22A:2-7 to this section on the recommendation of a reviewer, but it is not clear that it fits most cleanly here.

Subsection (c) is new. The filing fee for an order to show cause is proposed at \$45, even though that exceeds the fee for a standard motion, since it has been suggested that an order to show cause is more labor-intensive for the court personnel than a typical motion.

Subsection (d) is new. The filing fee for the transfer of a matter from Special Civil Part to Law Division is proposed at \$45. The fee is presently only \$15, but it is not clear if that should be increased since the filing fee for the Law Division far exceeds the filing fee in the Special Civil Part and even \$45 does not make up the difference.

Subsection (e) includes the subpoena reference here, rather than in the later section dealing with fees for actions generally taken post-disposition, which is where it previously appeared.

22B:1-4. Fees in Special Civil Part of the Superior Court and ~~Small Claims Division of the Tax Court~~

a. In all civil actions and proceedings in the Special Civil Part of the Superior Court, Law Division, only the following fees shall be charged:

(1) Filing of small claim or complaint in tenancy, one defendant	\$ 15 <u>25</u>
Each additional defendant	<u>\$2</u> 5
(2) (A) Filing of complaint or other initial pleading containing a counterclaim, cross-claim or third party complaint in all other civil actions, whether commenced without process or by summons, capias, replevin or attachment where the amount	
i) exceeds the small claims monetary limit, one defendant	\$50
ii) does not exceed the small claims monetary limit, one defendant	\$32 <u>35</u>
(B) Each additional defendant	<u>\$2</u> 5
(3) Filing of appearance or answer to a complaint or third party complaint in all matters except small claims	<u>\$25</u>
(4) Service of Process in this paragraph is defined as the simultaneous mailing of papers, by ordinary and certified mail, return receipt requested, to the defendant at the address provided by the plaintiff. Service of process shall include the service of: the summons by mail (each defendant); summons by mail (each defendant) at place of business or employment with postal instructions to deliver to addressee only; reservice of summons by mail, each defendant; and wage execution by mail to a federal agency	\$5
(5) Reservice of summons or other original process by court officer, each defendant	\$3 <u>5</u>
plus	
	mileage fee
(6) Substituted service of process by the clerk upon the Chief Administrator of the New Jersey Motor Vehicle Commission	<u>\$20</u>
(7) Jury of six persons	\$50
(8) Issuing warrant for possession in tenancy	\$15
(9) Issuing warrant to arrest, commitment or writ of capias ad respondendum, each defendant	\$15
(10) Issuing or filing writ of execution or an order in the nature of execution, writs of replevin and attachment issued subsequent to summons	<u>\$15</u>
(11) Advertising property under execution or any order	<u>\$15</u>
(12) Selling property under execution or any order	<u>\$15</u>
(13) Issuing exemplified copy of judgment:	
(A) Two pages	\$5
(B) Each additional page	\$1

b. The mileage fee charged by a court officer shall be as set forth in the section pertaining to court officers in this Title.

~~c. Fees for proceedings in the Small Claims Division of the Tax Court shall be the same as the fees associated with a small claims action in Superior Court generally.~~

d. Fees and costs for civil proceedings in municipal court shall be the same as those imposed for similar services in the Special Civil Part.

Source: 22A:2-37.1; 22A:2-43; 22A:5-1.

COMMENT

Section 22A:2-43 and parts of section 22A:5-1 have been consolidated with this section. This section remains substantially unchanged but subsection lettering and numbering has been inserted for ease of reference. Modest changes to some of the fees have been made simply to make the charges multiples of \$5. The distinction in the fee for the first defendant in an action and any subsequent defendant has been removed as unnecessary.

This section was modified to delete references to fees effective before and after five years from the effective date of amendments to the statute in 2003. The assumption is made that any changes to the statute as a result of this project would be effective after the time that the new fee structure was to be implemented, so that language is included here as (a)(4).

References to civil causes in municipal court have been removed from this section as obsolete.

Subsection (b) was revised in an effort to remove mileage references since it was suggested that those references were unnecessarily problematic. A more detailed explanation is provided in the "Mileage" section below.

Subsection (c) was eliminated as inaccurate. The fees for the Small Claims Division of the Tax Court are set by Court Rule.

Subsection (d) is taken from 22A:2-43.

Section 22A:4-12 and 22A:4-14 were eliminated as no longer applicable.

22B:1-4a. Fees for Small Claims Division of the Tax Court

a. A fee of \$35 shall be collected by the Tax Court on the filing of a complaint or counterclaim when the case is alleged to be within the small claims jurisdiction.

b. The small claims fee shall be supplemented, whenever notice is given by the court that the matter is not within the small claims jurisdiction, so that the total fee paid is that established for the filing of a first paper in the Law or Chancery Division of the Superior Court.

c. If a complaint or counterclaim involves multiple causes of action and the matter is within the small claims jurisdiction the filing fee shall be \$35 for the first state tax or separately assessed parcel of property and \$10 for each additional state tax or separately assessed contiguous parcel of property having the same ownership included in the complaint.

d. When properties are in the same ownership and part of the same master deed, if a complaint or counterclaim in an action to review a real property tax assessment includes more than one parcel of real property separately assessed pursuant to the provisions of N.J.S.A. 46:8A-26 (Horizontal Property Act) or N.J.S.A. 46:8B-19 (Condominium Act), the filing fee for the first separately assessed parcel of property of the property owner, if all of the parcels of the property owner are within the jurisdiction of the small claims division, shall be \$35 for the first separately assessed parcel of property of the property owner and \$10 for each additional separately assessed parcel of property of said property owner included in the complaint. When property has been assessed separately pursuant to the provisions of N.J.S.A. 46:8A-26 (Horizontal Property Act) or N.J.S.A. 46:8B-19 (Condominium Act), separately assessed properties that are not in common ownership may not be combined in one complaint or counterclaim.

e. No fee shall be paid upon the filing of a complaint in the small claims jurisdiction in an action where the sole issue is eligibility for any homestead credit, rebate, or refund program administered by the Division of Taxation or a senior citizen's or veteran's exemption or deduction.

Source: Rule 8:12.

COMMENT

The language in this section was taken from the Court Rules and included here for the sake of consistency. Further revision to this language may be required.

22B:1-5. Payment of juror fees

a. Every person serving as a grand or petit juror in New Jersey courts, other than a person compensated pursuant to 2B:20-16, shall receive \$35 for each day's attendance at the court.

b. The Assignment Judge of the vicinage shall designate the method of juror payment. The Assignment Judge shall keep an account of all juror fees paid under this section and provide each juror with a statement of the number of days the juror served and the amount of fees to which the juror is entitled.

Source: 22A:1-1.1.

COMMENT

Although this section of the statute was updated fairly recently, the current \$5 per diem for jurors would not even be sufficient to enable a juror to purchase a lunch for him or herself in or near most of the courthouses in the State.

The changes in this section were made in response to Assembly bill 2125, which was introduced in February of 2008 and which proposed an increase in compensation for jurors. This section also addresses the problem posed by the fact that grand jurors serve on non-consecutive days (as do petit jurors on trials that are carried) and thus would not qualify for increased compensation under the current statutory scheme. \$35 per day certainly represents a significant increase in the payment to jurors but it may not make sense to pay a juror less for a day of jury service than is paid to a witness for an appearance. A2125 increased the juror payment to \$40 per day. This draft retains the \$35/day already included in the statute. A2125 also creates a conflict with 2B:20-16 that this draft avoids.

22B:1-6. Fees of witnesses and others

a. A witness required to attend or appear before: a court; a committee of the Legislature directed to conduct an investigation or inquiry; a commissioner or commissioners; a master; a referee; an arbitrator; an officer taking a deposition; or any proceeding issuing out of any court shall receive:

(1) For attendance in the witness's county of residence, \$25 per day.

(2) For attendance in a county other than the witness's county of residence, \$45 per day.

b. The fees in subsection (a) shall not be paid when the witness is attending the proceeding as a governmental agent and the hearing is before a legislative committee or a governmental agency is a party to the proceeding.

Source: 22A:1-4.

COMMENT

This section was initially proposed for elimination on relevance grounds. The reimbursement in the current statute is so low as to be nearly meaningless. The current per diem for witnesses would not likely even cover parking costs for the witness, let alone the cost of transportation to and from the facility at which they are required to appear. Informal comments, however, suggested that it is important to retain this section, but that the calculation of mileage for this purpose can be prohibitively complex, so the suggestion was made to incorporate a flat rate for witness compensation.

Subsection (b) is new. It replaces current statutory language which calls for the compensation of the secretary of State or a clerk who appears as a witness. The language was changed because it is not clear why an individual attending on behalf of the State, county or municipality who will be compensated by his or her department, should receive additional compensation from the party compelling attendance.

It is not clear from the statutory language who pays the amounts set forth above.

22B:1-7. Bonds, bail, recognizance

The following fees are associated with bonds, bail and recognizance:

- a. Recording all official bonds with acknowledgment and proof of their execution, ~~\$9~~ \$10;
 - b. Filing all papers related to recognizance or civil bail, \$30;
 - c. Filing discharge, attachment bond, ~~\$9~~ \$10;
 - d. Filing and recording filiation bond, ~~\$9~~ \$10;
 - e. Filing satisfaction of or order discharging filiation bond, ~~\$9~~ \$10;
- and
- f. Recording or discharging sheriff's bond, ~~\$9~~ \$10.

Source: 22A:2-29.

COMMENT

The language pertaining to bonds, bail, and recognizances were formerly a part of Section 22A:2-29. This section was created as a part of the division of the former 2-29 into fees payable to the Superior Court and fees payable to the County Clerk as a result of discussions with a sampling of County Clerk's offices. In this section, the fee for filing and entering a recognizance of civil bail was increased to \$30 to match the fee for filing and entering a recognizance set forth in Section 22A:2-29. It may be necessary to clarify the reference to "civil bail" in (b).

22B:1-8. Superior Court fees for actions generally taken post-disposition

Upon the filing, entering, docketing, or recording of the following papers or documents by any party to any action in the Law, Chancery or Appellate Divisions of the Superior Court, or the Supreme Court, as appropriate, the party shall pay to the clerk the following fees:

- a. Affixing the seal of the court to any document, an exemplification, a warrant of satisfaction, a master's certificate certifying the master's appointment, recording assignment of judgment or release, issuing and recording executions (except as otherwise provided), \$5.
- b. Recording of instruments not specified in this article, and all other papers or services provided by the clerk, \$5.
- c. Commissions on appeals accounts and deposits for security for costs: 2% on \$100 or less; 1 1/2% on the excess of \$100.
- d. Commissions on paying out trust fund accounts (including all funds, moneys or other assets brought into and deposited in court): 2 1/2% on the first \$100; 2% on the next \$900; 1 1/2% on the excess of \$1,000.

e. Withdrawal of money deposited in court where the sum to be withdrawn is:

- (1) less than \$100, no fee;
- (2) \$100 or more but less than \$1,000, \$5;
- (3) \$1,000 or more, \$10.

f. Entering judgment on bond and warrant by attorney and issuance of one final process, or recording of judgment in the civil judgment and order docket, or satisfaction of judgment or other lien, \$35.

g. Docketing judgments or orders from other courts or divisions except from the Special Civil Part, \$35. Docketing judgments or orders from the Special Civil Part, \$10. No fee shall be paid by any municipal court to docket a judgment of conviction and amount of assessment, restitution, fine, penalty or fee pursuant to 2C:46-1(a).

h. Except as otherwise provided for probate proceedings, the first copy of any order, judgment, pleading or other paper shall be certified by the Clerk of the Supreme Court or the Clerk of the Superior Court, as the case may be, and supplied to the attorney or litigant, free of charge, if a copy is furnished to the clerk for certification. All copies other than the first copy, supplied by the attorney or litigant, shall be furnished upon the payment of \$5 for the first five pages thereof, and \$1 for each page in excess of five; with a minimum charge of \$5.00 made for any such copy.

Source: 22A:2-6; 22A:2-7; 22A:2-19; 22A:2-20; 22A:2-29; 22A:4-12.

COMMENT

The language of the initial section was modified to include a reference to the Supreme Court since the Clerk of that Court also affixes the seal of the Court and performs other actions set forth in this section.

22A:2-7(b) was eliminated as no longer necessary.

In Subsection (f), the fee for entering a judgment on the bond and warrant by an attorney was increased to match the fee set forth for what seems to be the same thing in 22A:2-29 and to match the fee for docketing or recording of a judgment.

The former Section 22A:2-20 has been consolidated here as parts of subsections (c) - (g).

The former section 22A:2-19 was consolidated here as (h). The amount for pages in excess of five was raised from \$0.75 to \$1 per page to be consistent with other costs imposed in this Title. The section was otherwise substantively unchanged.

Parts of the former 22A:4-12 were consolidated with this section and eliminated on the grounds that it is no longer relevant.

22B:1-9. Special Civil Part, Law Division and Small Claims Division, Tax Court fees for actions generally taken post-disposition

a. In all actions and proceedings in the Special Civil Part of the Superior Court, Law Division, the following fees shall be charged:

(1) Issuing warrant for possession in tenancy	\$15
(2) Issuing warrant to arrest, commitment or writ of capias ad respondendum, each defendant	\$15
(3) Issuing or filing writ of execution or an order in the nature of execution, writs of replevin and attachment issued subsequent to summons	\$5
(4) Advertising property under execution or any order	\$10
(5) Selling property under execution or any order	\$10
(6) Issuing exemplified copy of judgment:	
(A) Two pages	\$5
(B) Each additional page	\$1

b. Mileage charged by a court officer shall be as set forth in the section pertaining to court officers in this Title.

c. Fees for proceedings in the Small Claims Division of the Tax Court shall be the same as the fees associated with a small claims action in Superior Court generally.

d. Fees and costs for civil proceedings in municipal court shall be the same as those imposed for similar services in the Special Civil Part.

Source: 22A:2-37.1; 22A:2-43; 22A:5-1.

COMMENT

Section 22A:2-43 and parts of section 22A:5-1 have been consolidated with section 22A:37.1, which remains substantially unchanged although subsection lettering and numbering has been inserted for ease of reference.

Subsection (b) was revised in an effort to remove mileage references since it was suggested that those references were unnecessarily problematic. A more detailed explanation is provided in the "Mileage" section below.

Subsection (c) may require additional clarification to accomplish the consolidation of the Small Claims Division of the Tax Court and the Small Claims fees generally. If not, the language will be modified.

Subsection (d) is taken from the former 22A:2-43. References to civil causes in municipal court were removed as obsolete.

22B:1-10. Order for payment of expenses and costs

a. The Supreme Court may provide for the payment, to a prevailing party, of the cost of the transcript, and of printing the briefs, appendices, and other

disbursements and expenses by either party and allow it to be taxed in the bill of costs, as the court deems just.

b. A party to whom costs are awarded or allowed in the Law or Chancery Divisions of the Superior Court is entitled to include in the bill of costs the necessary disbursements, as follows:

- (1) The statutory witness fee;
- (2) The costs of taking depositions, when taxable by order of the court;
- (3) The costs for publication where publication is required;
- (4) The costs paid for a certified copy of a document or a map, recorded or filed in any public office, obtained for use in a trial or any other proceeding;
- (5) Sheriff's fees for service of process or other documents;
- (6) All filing and docketing fees paid to the clerk of court;
- (7) Other reasonable and necessary expenses taxable according to the course and practice of the court, or by express provision of law or rule of court.

Source: 22A:2-3; 22A:2-8.

COMMENT

Subsection (a) is 22A:2-3. It remains substantively unchanged. References to general and special rules in that section have been removed.

Subsection (b) is 22A:2-8. In (b)(1), the phrase “statutory witness fee” replaces “legal fees of witnesses, including mileage for each attendance” and the reference to “masters, commissioners and other officers” was stricken. In (b)(3) and (b)(4), the term “legal fee” has been replaced with “costs” to make it clear that it covers the cost of the publication or the document, not the fee paid to an attorney associated with the publication or procurement of the document. In (b)(4) “deposition or other paper or document” was replaced with “document”. In (b)(4) the phrase “necessarily used or obtained for use” was replaced with “obtained for use”. In (b)(4) the phrase “in a trial of an issue of fact or the argument of an issue of law” was replaced with “in a trial or other proceeding”. In (b)(5) the term “document” was substituted for “mandate or proceeding”. In (b)(6) the words “and charges” were removed after “fees”.

22B:1-11. Fees for appeals

a. The Clerk of the Supreme Court or the Clerk of the Superior Court, Appellate Division shall charge, for the filing or entering of the: notice of appeal, notice of cross-appeal, notice of petition for certification, notice of cross-petition for certification or notice of petition for review, \$250.

b. Motion, \$30.

c. The fee for filing of the first paper in any motion, petition or application, if not in a pending action or if made after dismissal or judgment entered, other than withdrawal of money deposited in court, shall be \$30.

d. In cases appealed to the Law Division of the Superior Court from any inferior court or tribunal, the Clerk of the Law Division shall charge, for filing a notice of appeal and other appeal papers and proceedings, including judgment in the Superior Court or an order of dismissal, \$75.

e. For filing notice of appeal in any division of the Superior Court and forwarding copy to the Appellate Division or Supreme Court, \$10.

Source: 22A:2-1; 22A:2-20; 22A:2-27.

COMMENT

The former Section 22A:2-1 and the former Section 22A:2-5 have been combined as (a) and (c). 22A:2-5 was deleted since it only referenced the former section and indicated that the same fees, costs and allowances applied to the Appellate Division.

Subsections (b), and (c) are new.

The appeal language from Section 22A:2-27 was imported and inserted as (d), so that it was included with the other appeal language. The last sentence of that section indicating where the money was to be paid was removed as unnecessary after December 31, 1994.

Subsection (e) is from 22A:2-20 and may no longer be necessary.

Court Officers

22B:2-1. Mileage

Mileage paid to any court officer, including Sheriff's Officers and Special Civil Part Officers for travel within a single county to serve or execute any process, writ, order, execution, notice, warrant or other service for which a payment of mileage is to be made to that officer shall be as follows:

- a. In Atlantic County: ~~\$15~~ 20;
- b. In Bergen County: ~~\$40~~ 15;
- c. In Burlington County: ~~\$40~~ 15;
- d. In Camden County: ~~\$40~~ 15;
- e. In Cape May County: ~~\$40~~ 15;
- f. In Cumberland County: ~~\$15~~ 20;
- g. In Essex County: ~~\$40~~ 15;
- h. In Gloucester County: ~~\$40~~ 15;
- i. In Hudson County: ~~\$5~~ 10;
- j. In Hunterdon County: ~~\$40~~ 15;
- k. In Mercer County: ~~\$40~~ 15;
- l. In Middlesex County: ~~\$40~~ 15;
- m. In Monmouth County: ~~\$40~~ 15;
- n. In Morris County: ~~\$40~~ 15;
- o. In Ocean County: ~~\$15~~ 20;
- p. In Passaic County: ~~\$40~~ 15;
- q. In Salem County: ~~\$40~~ 15;
- r. In Somerset County: ~~\$40~~ 15;
- s. In Sussex County: ~~\$40~~ 15;
- t. In Union County: ~~\$5~~ 10; and
- u. In Warren County: ~~\$40~~ 15.

Source: New.

COMMENT

This section is new. It was suggested that the use of mileage fee calculations is unnecessarily complicated. Currently, there are separate mileage fee calculations for Sheriff's Officers and for Special Civil Part Officers. There are currently mileage fee calculations listed for the municipalities within each county. The lists of municipalities for the Sheriff's Officers, however, differ in some instances, from those listed for the Special Civil Part Officers. The number

of municipalities listed for a county varies from 12 to 187. Since the compensation by mileage system has been in place for such a long period of time, there were concerns about eliminating it entirely. As a result, the current mileage figures were reviewed and averages calculated for each county. The mileage fees for Special Civil Part Officers were higher than those for the Sheriff's Officers so those figures were selected as the baseline since they might more accurately reflect the recent increase in fuel costs. The average figures were then rounded up to the nearest \$5 or \$10 increment.

Comment is being sought on this issue from the Sheriff's Officers and the Special Civil Part Officers to determine if this more streamlined mileage treatment is workable. Preliminary, informal comments from the Special Civil Part Officers suggested that since the old fees based on mileage calculations were, in fact, burdensome to the officers because they were so low, adding \$5 to each of the fees would result in a mileage fee that the officers could more readily accept because they would no longer be bearing so much of the cost themselves. It is noted that the federal mileage reimbursement rate is, at this point, nearly double that of the State reimbursement rate.

It is noted that while some states use mileage fee calculations with varying mileage reimbursement rates, there are states that use a flat fee and some that use a 'hybrid' approach -- Alaska, for example charges \$25 for service of civil process for the first 25 miles or portion thereof, and uses a mileage fee calculation only for each mile in excess of 25.

Some preliminary, informal comments from Sheriffs officers objected to the flat fee mileage calculation on the basis that officers would be losing when required to serve documents to locations farther from the Courthouse than the average location. It was also suggested that a flat fee mileage calculation contemplates one attempt at service, while some Sheriff's offices make three or five attempts before returning the papers unserved. Another commenter suggested that if the flat fee calculation is for a round-trip, that a surcharge be added for distances over a certain number of miles. Other commenters, however, favored the flat fee after examining the proposed flat fee in comparison to their current fee schedules and finding them favorable. Also cited in support of changing to a flat fee was the reduction in the clerical effort that is currently required to manage the fees. One general comment suggested that anywhere a flat fee could be imposed for a service, it would be helpful to do so.

22B:2-2. Sheriff's Officers and other officers; general fees

a. Sheriffs and other officers authorized to perform the following services shall receive the listed fees for the enumerated services, in addition to the mileage fee allowed by this Title:

(1) For serving every summons and complaint, attachment, or any mesne process issuing out of the Superior Court:

(A) For the first defendant or party, within or outside

of the State, on whom the process is served, including in
matrimonial and dissolution of civil union actions
\$22 25

(B) For every other defendant, per person
\$20

(C) Spouses or civil union partners both named in process
shall be considered one defendant, except when living separately.

(2) Serving capias ad respondendum, capias ad satisfaciendum,
warrant of commitment, writ of ne exeat \$48

50

~~(3) Serving order to summon juries and return \$8 10~~

(4) Serving every execution against goods or lands and
making an inventory and return \$48

50

(5) For returning every writ \$2 5

(6) Executing every writ of: possession and return; attachment;
sequestration; or replevin issued out of any court
\$48 50

(7) Rescheduling the execution of a writ of possession \$15

~~(7) Serving notice on a defaulting juror, to be paid by the juror
\$1 5~~

~~(8) For making return when served with a writ of habeas corpus
\$2 5~~

~~(9) For producing a prisoner held in custody on capias ad
respondendum, before a court taking bail
\$2 5~~

(10) For taking a bond and inventory pursuant to law, concerning
insolvent debtors, to be paid by the defendant \$0.50

1

~~(11) For all services of the sheriff or other officer pursuant to
a claim of exemption on execution or other civil process for seizure
of property, including \$1 to be paid by the sheriff to each of
three appraisers appointed \$5~~

(12) Special request charges, including requests for service of
information subpoenas, service of documents at unusual hours, service of
turn-over orders, and other items not listed elsewhere in this Title
\$15

(13) Miscellaneous charges:

(A) Producing a plain copy, per page

\$1

(B) Producing a certified copy, per page \$5

(C) Service by certified mail, per item mailed \$5

(D) Processing a returned check, plus bank fee \$20

b. An officer shall receive payment for mileage, pursuant to the mileage
section of this Title, for serving or executing any process or papers, transporting

an offender to State prison, or serving any warrant or *capias ad testificandum*. The mileage fee calculations listed in this Title include fees for transportation within a single county. If an officer must travel in more than one county, when transporting a prisoner, for example, then the mileage fees listed for each county in which the officer must travel may be added together for a total mileage figure.

c. The sheriff shall be entitled to retain 5% out of the total amount of fees collected on a forfeited recognizance, whether before or after execution, or from amercements, or from fines and costs on conviction, on indictment or otherwise, whether these fees are payable to the State or to the County treasurer.

d. When a duly authorized ethics committee of a County or State Bar Association, recognized as such by the Supreme Court, requires the service of a process of subpoena issued pursuant to 22A:2-4, no fee shall be required for making such service.

e. If more than one document involving the same case is served on the same individual at the same time, only one fee (the highest fee applicable to any of the documents) may be charged.

Source: 22A:4-8; 22A:4-9; 22A:4-10.

COMMENT

This section was originally the consolidation of several sections, which were then divided into two sections, a general section (this one) and a section pertaining to execution sales (below). The fees in this section have been modified, as in other sections, so that they are multiples of \$5 or \$10.

Preliminary, informal comments from Sheriffs officers suggested the deletion of subsections (a)(3), (7), (8), (9), and (11) as obsolete.

A new subsection (a)(7) was added, similar to the language in the execution section pertaining to the rescheduling of an execution sale, to reflect the fact that when an eviction has to be rescheduled, the sheriff's officer needs to set a new date, print new service orders, post the new sale information on the premises and send a confirming letter to the attorneys involved in the case.

Subsections (a)(12) and (13) were inserted at the request of preliminary informal comments received from Sheriff's officers.

It was also suggested by Sheriff's officers that the language in (a)(1)(A) regarding the service of a summons specifically referring to matrimonial/dissolution actions was confusing because it appeared to imply that the fee did not apply to all actions. Additional clarification may be necessary.

Subsection (b) is new. It was suggested by Sheriff's officers that additional clarification is needed to specify what this section applies to and who pays the fee.

Subsection (e) is new, included after a review of some of the statutes in other states.

22B:2-3. Sheriff's Officers and other officers; fees pertaining to execution

a. The sheriff shall be entitled to the following fees on execution sales:

- (1) the minimum fee for an execution sale
 - \$50
 - (A) on all sums not exceeding \$5,000 6%
 - (B) on all sums exceeding \$5,000 4% on
exces
s
- (2) Making statement of execution, sales and execution fees
\$10
- (3) Advertising the property for sale, provided the sheriff or
deputy sheriff attend to the advertisement
\$20
- (4) Posting property for sale
\$20
- (5) For the crier of the venue, when the sheriff proceeds to sell,
per day the crier shall be actually employed in such sale
\$5
- (6) Every adjournment of a sale, ~~but no more than one
adjournment per sale is allowed, and if the sheriff shall have
several executions against a defendant, the fees for advertising,
attending and adjourning will only be allowed once~~
\$28 30
- (7) Drawing and making a deed to a purchaser of real property
\$75
- (8) Drawing and making a bill of sale to the purchaser of personal
property, when required or demanded \$20
- (9) On an execution against wages, commissions and salaries, the
sheriff shall charge the same percentage fees on all sums collected as the
percentage fees applicable in cases of execution sales.
- (10) When the execution is settled without actual sale, the officer
shall receive 1/2 of the amount allowed in case of actual sale.

b. When more than one execution is issued out of the Superior Court on a judgment, each sheriff to whom the execution is directed and delivered shall be entitled to collect and receive from the defendant named in the execution the fees allowed by law for making a levy and return and statement thereon, or for such other services as may be actually performed by that sheriff. The sheriff who collects the amount named in the execution or any part thereof, shall be entitled to the legal percentage upon whatever amount may be so collected by that sheriff. If a judgment is settled between the parties and the amount due thereon is not collected by either sheriff, the percentage on the amount collected which

would be due the sheriff if only one execution had been issued shall be equally divided among the several sheriffs who received executions.

c. The sheriff shall file a taxed bill of costs with the clerk of the court that issued the execution, within such time as the court shall direct, or forfeit all fees. If a sheriff charges for services not performed, or not allowed by law, or takes greater fees than is allowed by law, the sheriff shall be liable for the damages sustained by the aggrieved party, including a penalty of \$30, which shall be recovered in a summary proceeding.

Source: 22A:4-8.

COMMENT

This section was originally the consolidation of several sections, which were then divided into two sections, a general section (above) and a section pertaining to execution sales (this section).

Preliminary informal comments from Sheriff's officers indicated that there are no deputy sheriffs and that the term should be stricken from (a)(3). The commenters also raised the issue of adjournments, indicating that while only one adjournment is permitted, the reality is that there are sometimes multiple adjournments (supported by at least one decision by the Court). Sheriff's offices that currently charge for each adjournment would like to continue to do so.

22B:2-4. Compensation of Special Civil Part Officers

a. Unless otherwise specified, the serving officer shall receive \$5 for service of any summons, notice, third party complaint, subpoena, writ or court order for each party on whom the document is served. The provisions of this section shall not apply to cases on behalf of the State where the officer serving the document is paid a salary or per diem.

b. If a judgment is vacated for any reason after a court officer has made a levy, and subsequently the judgment is reinstated or the case is settled, the fee for the court officer shall again be taxed in the costs and collected on payment of the judgment or settlement amount.

c. The Clerk of the Special Civil Part shall pay to the officers designated by the Assignment Judge to serve process as follows:

(1) Warrant to arrest, capias, or commitment, for each defendant served	\$15
(2) Serving writ and summons in replevin, taking bond and any inventory, one defendant	\$6-10
Each additional defendant	\$2-5
(3) Serving and executing warrant for possession in tenancy	\$10

d. The Clerk of the Special Civil Part shall pay to officers designated by the Assignment Judge to serve wage executions on a federal agency an amount equal to the established fee for each wage execution served.

e. If a document is required to be re-served, the party seeking re-service is again required to pay the service fee.

f. If more than one document involving the same case is served on the same individual at the same time, only one fee (the highest fee applicable to the service of any of the documents) may be charged.

g. The following fees for officers of the Special Civil Part shall be taxed in the costs and collected on execution, writ of attachment or any order amounting to an execution on a final judgment, or on a valid and subsisting levy of an execution or attachment that may be the effective cause in producing payment or settlement of a judgment or attachment:

- | | |
|---|--------|
| (1) For advertising property under execution or any order | \$10 |
| (2) For selling property under execution or any order | \$10 |
| (3) On every dollar collected on execution, writ of attachment, or any order, | \$0.10 |

Source: 22A:1-5; 22A:1-6; 22A:2-37.2.

COMMENT

Subsection (a) consolidates the original Section 22A:1-5 with 22A:1-6 since it was not clear why there should be a difference in the compensation for service of writs and subpoenas. In addition, the rate of compensation was changed from compensation by mile, to a flat fee compensation which fee was calculated based on a review of the statutory mileage award and the service fee (in the current statute, the mileage award is \$0.04/mile and the service fee is \$.035).

Subsections (b)-(e) are from 22A:2-37.2. Language duplicating that set forth in other sections of the statute was removed. Any service fees different from the \$5 set forth in (a) are included in this subsection.

It was recommended that provisions pertaining to cases in the Law Division be separated from those pertaining to the Special Civil Part, but since the provisions in (a) and (b) appear to pertain to both, this section has not been divided into two sections. Additional revision may be required.

Subsection (f) is new.

Probate

22B:3-1. Proceedings in the Probate Part

The following fees shall be paid to the Surrogate of the county of venue for performing services in all probate proceedings in the Superior Court, Chancery Division, Probate Part, and to the Surrogate's Court, as appropriate, which shall constitute the entire fees to be collected by the Surrogate or the Clerk down to the final disposition of the cause, unless provided otherwise in this section:

a. General:

(1) Upon the filing of the first paper in a Probate Part action, the filing fee is the same as that charged for an initial filing fee in the Law or Chancery Division of the Superior Court. ~~This fee applies to probate proceedings including those: relative to a presumption of death (with an additional fee for advertising); for the sale of land to pay debts (with an additional fee for advertising); for the sale of land in fulfillment of a contract made by decedent; for the sale of land within one year of death; for sale of a minor's land; and for the distribution, filing, and entering of a complaint plus the recording and the filing of a judgment. This fee also applies to proceedings for: the adoption of adults and minors; the appointment of a conservator (with or without a jury trial); and for the determination of incapacity and the appointment of a guardian for the alleged incapacity (with or without a jury trial);~~

(2) Upon the filing of an answering pleading or motion in the Probate Part, \$135; and

(3) Upon the filing of the first paper in application for relief filed subsequent to the final judgment, \$30.

b. Miscellaneous:

- | | | |
|---|------------------|------|
| (1) Adjournment or continuance | _____ | \$15 |
| (2) Issuing miscellaneous orders of Court, each page | | \$5 |
| (3) Proceedings relative to appointment of guardian | | |
| ad litem | | \$25 |
| (4) Assignment of legacy or interest, per page | | \$5 |
| plus \$5 for county clerk certificate if necessary | | |
| (5) Motion in Chancery Division, Probate Part, requires the same fee as that charged for motions in the Law, Chancery and Appellate Divisions of the Superior Court | | \$45 |
| (6) Services regarding assignment for benefit of creditors not including accounting (funds to be used in county in which collected) | | \$75 |
| (7) Minimum charge for all other papers in Chancery Division, Probate Part | | \$5 |

Source: 22A:2-15; 22A:2-30; 22A:2-35.

COMMENT

Changes were made to the former 22A:2-30 based on informal comments received from individuals knowledgeable about the duties and responsibilities of Surrogates.

In subsection (a), the fees were modified to make them equivalent to those paid in other Law or Chancery Division actions. The language has been revised since the earlier draft to replace the listed fee with language tying the fee to the fee imposed in the Law and Chancery Divisions. In subsection (a)(1) a substantial block of the language was removed as unnecessary after preliminary discussions with several individuals from Surrogates Offices.

The language in subsection (b) including a fee for an adjournment or continuance should be reviewed. Since changes were made to the statute in an effort to rationalize the fees and eliminate unnecessary or inappropriate distinctions. In subsection (b)(1), the fee for an adjournment or continuance was removed since several Surrogates Offices indicated that such a fee is not charged. The Motion fee language was linked to the fee for motions in the Superior Court to insure that the fees remain consistent if the motion fee in the Superior Court changes. Rationalizing the filing fees and making them consistent suggests that other fees for things that occur in both the Probate Part and the Law and Chancery Divisions generally should also be the same.

22B:3-2. Fees payable to the Surrogate

The following fees are payable to the Surrogate:

a. Accounting:

(1) Auditing, stating, reporting and recording, microfilming or photostating, accounts of executors, administrators, guardians, trustees, assignees, including drawing judgment depending on estate, but excluding advertising costs:

<u>(A) Up to and including \$10,000</u>	<u>\$100</u>
<u>(B) From \$10,001 to \$25,000</u>	<u>\$125</u>
<u>(C) From \$25,000 to \$50,000</u>	<u>\$150</u>
<u>(D) From \$50,001 to \$100,000</u>	<u>\$300</u>
<u>(E) From \$100,001 to \$200,000</u>	<u>\$600</u>
<u>(F) Exceeding \$200,000</u>	<u>0.5% of the</u>
	<u>estate</u>

(2) For each page of accounting, in excess of one, \$35

(3) In computing the amount of an estate to fix the fees of the surrogate for auditing and reporting the account, the balance from a prior trust account shall be excluded.

~~(4) No fees for services of the surrogate shall be charged against the recipient of any pension, bounty or allowance in proceedings concerning these funds, pursuant to 3B:13-9 through 3B:13-14.~~

b. Commissions on Deposits: Surrogate commissions on deposits shall be: 0.5% if under \$100; 0.25% on excess over \$100 and under \$1,000; 0.125% on excess over \$1,000.

c. The following fees for services of the surrogate include all services in preparation of application, filing proof of death, deposition of one witness, qualification of executor, filing power of attorney, surrogate's certificate, judgment for probate, letters testamentary, making plain copy of a will, binding, recording, microfilming or photostating, comparing, docketing, reporting to the Division of Taxation in the Department of the Treasury, reporting and transmission to the Clerk of the Superior Court.

(1) Probate of a will of not more than two pages, with letters \$100
Each additional page,
\$ 5

(2) Probate of a will of not more than two pages
without letters,
\$50
Each additional page,
\$5

The services here exclude letters, surrogate's certificate
and qualification of executor.

(3) Probate of each codicil, not exceeding one page, \$25
Where codicil requires an additional witness, \$5

(4) Reopening probate proceedings for qualification of
executor or taking proof of extra witness,
\$25

(5) Admitting one witness in a probate proceedings, \$0
Each additional witness, \$5

(6) Recording and comparing, microfilming or photostating,
each additional page of will or codicil, \$5

(7) Filing, entering, issuing and recording, microfilming
or photostating, proceedings in commission for
deposition of foreign witness to a will or codicil,
\$35

(8) Producing plain extra copy of a will, per page,
\$3 1

(9) Producing certified extra copy of a will, first page, \$5 10
Each additional page
\$5

(10) Producing certified copy of a will with proofs for New Jersey
county, not exceeding two pages, including will and codicil, \$50
Each additional page,
\$5

(11) Filing wills without probating (as where there are
no assets), each page,
\$5

Cover letter stating no assets, \$5	
Death Certificate, (12) Exemplifying a will for another state, not exceeding two pages, including will and codicil, plus cost of Certificate of Secretary of State when required, \$85	\$5
Each additional page, \$5	
(13) Recording, microfilming or photostating, docketing, indexing, filing and reporting to the Division of Taxation in the Department of the Treasury an exemplified copy of will and probate proceedings from another state, per page, \$5	
(14) Recording, microfilming or photostating, docketing, indexing and filing a certified copy of will with proofs from New Jersey, per page, \$5	
(15) Recording, microfilming or photostating certified transcripts of wills admitted to probate and probate proceedings or letters of administration and administration proceedings granted by the Superior Court, per page,	\$5
d. Letters of Trusteeship: Acceptance of trustee and letters of trusteeship, including one certificate, \$50	
e. Letters of Administration: (1) General administration, including preparation of application, bond, surety affidavits, necessary recording, microfilming or photostating, indexing, filing, reporting to the Division of Taxation in the Department of the Treasury and the Clerk of the Superior Court of original letters including power of attorney, authorization to accept service of process, and death certificate, Other documents, per page \$5	\$125
(2) Exemplifying administration,	\$75
(3) Certified copy of administration, \$50	
(4) Affidavits of surviving spouse or next of kin where the value of the real and personal assets of the estate does not exceed \$20,000 or \$10,000, respectively,	5% of estate
f. Administration ad prosequendum \$50	

g. Letters of Guardianship for a minor:		
	(1) Granting letters of guardianship, acceptance of guardianship and filing of power of attorney,	\$50
	(2) Filing affidavits of estates of minors where value of real and personal estate does not exceed \$5,000, per page,	\$5
	(3) Filing miscellaneous petitions and orders, per page,	\$5
h. Inventories: Filing, entering and recording, microfilming or photostating, inventory, not exceeding one page, and affidavits of appraisers and executor,		\$25
	Each additional page,	\$5
	For all services in appointment of appraisers	\$25
i. Payment of proceeds of judgment in favor of a minor: Fees payable on each withdrawal of proceeds of a judgment in favor of a minor that is on deposit with the surrogate, including petitions and orders provided and prepared by the surrogate oceeds of a judgment in favor of a minor, in lieu of bond, pursuant to 3B:15-16 and 3B:15-17 (in addition to fees payable under Letters of Guardianship):		
<u>10</u>	(1) Up to and including \$500,	\$20
	(2) From \$501 to and including \$1,000,	\$25 <u>20</u>
	(3) From \$1,001 to and including \$5,000,	\$30
	(4) From \$5,001 to and including \$10,000,	\$35
<u>40</u>	(5) From \$10,001 to and including \$25,000,	\$40
<u>50</u>	(6) From \$25,001 to and including \$50,000,	\$60
	(7) In excess of \$50,000,	\$100
j. Miscellaneous Charges:		
	(1) Issuing <u>or re-issuing</u> short certificates,	\$5
	(2) Validating a short certificate within one year of issue date,	\$3 <u>5</u>
	(3) Issuing subpoenas, each,	\$25
	(4) Marking true copies of subpoenas, each,	\$3 <u>5</u>

(5) Marking true copies, orders to show cause, each,	\$3
(6) Marking true copies of other papers, each,	\$3
(7) Authorization of process,	
\$5	
(8) Swearing each witness,	_____
\$2	
(9) Recording, microfilming or photostating all papers not otherwise provided for, each page	
\$5	
(10) Making copies not otherwise provided for, each page	
\$3	
(11) Filing transcript of death certificate,	\$5
(12) Filing the power of attorney, per page	
\$5	
Plus cost of postage.	
(13) Search fee, per estate	
\$10	
(14) Proceedings relative to appointment of a guardian ad litem,	
\$25	
(15) Renunciation, <u>per</u> person, filing, entering, and recording or photostating,	\$5
Each additional person,	\$3 <u>1</u>
(16) Caveat, filing or withdrawing,	
\$25	
(17) Combined refunding bond and release, per page, filing, entering, microfilming, and recording or photostating,	\$5
Additional charge for county clerk's certificate,	\$5
(18) Release, per page	
\$5	
Additional charge for county clerk's certificate,	\$5
(19) Filing all papers not otherwise provided for,	
\$5	
(20) Photocopying of a two-page will, plain copy,	
\$6 <u>5</u>	
Each additional page,	
\$3 <u>1</u>	
(21) Service of Process by Surrogate under 3B:14-48	\$25
(22) Duplicating or copying of microfiches, digital tapes, high density disks, optically scanned and recorded materials or any other media used to record or preserve records, per medium recorded	_____
\$150	
(23) Processing a returned check, plus bank fee	
\$20	

k. All other fees payable to the Surrogate as a Deputy Clerk of the Superior Court, other than for adoption, and all costs to a party in any action,

motion or proceeding in the Probate Part shall be the same as allowed for similar services in the Chancery Division of the Superior Court. All fees shall be used in the county in which they are collected.

l. Other papers or services: The minimum charge for all other papers or services by the surrogate, \$5.

Source: 22A:2-15; 22A:2-30; 22A:2-35; 22A:2-36.

COMMENT

In subsection (a)(1) the fees were modified in an effort to make them more consistent with other fees.

Subsection (a)(3) was originally modified to reference a prior “trust” account since the language of the existing language was not clear but individual commenters from Surrogates Offices advised that limiting it to trust accounts improperly excludes guardianships, executors, etc. so the word “trust” was removed.

Subsection (a)(4) was removed because it was suggested that all accountings should pay the required fee and none of the individuals offering comments on this section had ever heard of a situation that was covered by this specific provision.

Also in subsection (a) the reference to preparing notice of settlement of accounts and sending those notices to the newspaper was eliminated since it is no longer included in the Court Rules.

In subsection (b), references to the 1948 statute were removed as no longer necessary. The commission schedule may require further modification.

Subsection (c)(12) was modified to increase the fee for exemplification to include the old fee of \$75 plus the standard \$9 exemplification charge – the total was rounded up to \$85 from \$84. The subsection pertaining to accounting was merged into the accounting language found in 22A:2-15 and the higher fees from the two sections were used.

References in subsection (c) to microfilming or photostatting should be changed to a technologically neutral term.

Limited changes have been made to subsection (e) to this time to reflect informal comments received.

Changes were made to the fee schedule in subsection (i).

Changes were made to subsection (j) in response to informal comments received regarding current practice and procedure. It is not clear what (i)(7) refers to.

Subsection (j)(1) was modified and (j)(2) eliminated after preliminary discussion with individuals from Surrogates Offices. It was suggested that there should be no charge for validating short certificates since those certificates should be deemed valid. It was suggested that the removal of subsections (5), (6) and (8) was appropriate. Subsection (j)(15) was revised to reflect a charge of \$5 per renunciation since the renunciation by each individual requires the same amount of staff time and effort. Subsection (j)(22) has been proposed for elimination on the basis that the fee seems out of line with the technologies listed. It was suggested that some language must be included in this section of the statute that deals with the electronic provision of records and at least one the Surrogates Offices is considering whether or not it would be appropriate to charge by the MB or GB of data rather than by the medium on which it is provided. Additional research is needed in this area to see if any other states have crafted language that might be of assistance in this area.

Section 22A:2-36 has also been consolidated with this section as (k).

Modest changes to some of the fees have been made simply to make the charges multiples of \$5. Photocopying has been made \$1 per page throughout. The fees for marking true copies and swearing of witnesses have been stricken as no longer commonly used. Additional modifications to the language or to the fees may be appropriate, but further research is required. It is not yet clear, for example, why the filing fees for the first paper in the actions described in this section were not raised to \$250 to make them consistent with the other modified filing fees in Superior Court.

Criminal

22B:4-1. Fees for criminal proceedings and penalty proceedings in all courts.

a. The costs recoverable in any proceeding in any court for the collection and enforcement of a penalty pursuant to the Penalty Enforcement Law (2A:58-1 et seq.) shall be the same as in actions in the court and shall be recoverable by the plaintiff in the event of a judgment for the plaintiff. The fees to the court and the court officers shall be as provided for criminal proceedings.

b. For violations of Title 39 or any other case, \$35 shall be allowed for court costs in any criminal proceedings in the municipal courts. No charge shall be made for the services of any salaried police officer of the State, County or Municipal Police.

c. In municipal court proceedings, the court shall impose court costs within the maximum limits authorized by this section, as follows:

- (1) For every violation of any statute or ordinance
\$25

The court shall not suspend the collection of this court cost assessment. These court cost assessments shall be collected by the municipal court administrator for deposit into the Automated Traffic System Fund, created pursuant to 2B:12-30.

- (2) For each fine, penalty and forfeiture imposed and collected under the authority of law for any violation of the provisions of Title 39 or any other motor vehicle or traffic violation in this State
\$0.50

The court shall not suspend the collection of this court cost assessment. These court cost assessments shall be collected by the municipal court administrator for deposit into the "Emergency Medical Technician Training Fund" established pursuant to 26:2K-54 et al.

- (3) For every violation of any statute or ordinance, to fund the Statewide modernization of the Automated Traffic System
\$35

The court shall not suspend the collection of this court cost assessment. These court cost assessments shall be collected by the municipal court administrator for deposit into the Automated Traffic System Statewide Modernization Fund, established pursuant to 2B:12-30.1.

d. The provisions of this act shall not prohibit the taxing of additional costs, when authorized by 39:5-39, for:

- (1) Certificate of judgment \$45
- (2) Certified copy of paper filed with the court as a public record, per page \$45

Each additional page

\$1

(3) Copy of a public record filed with the court, each page

~~\$2~~1

e. In addition to any fine imposed, when a supplemental notice is sent for failure to appear on a return date, the cost shall be \$10 per notice, unless satisfactory evidence is presented to the court that the notice was not received.

f. Court officers: From the fees allowed for court costs, the court clerk shall pay, for serving a warrant or summons; serving a subpoena; serving an execution; advertising property under execution; the sale of property under execution; and the serving of a commitment; \$2. For the transport of a defendant, the court officers shall be paid the actual cost of transport.

g. An officer shall receive payment for mileage pursuant to the Mileage section of this Title for serving or executing any process or papers, transporting an offender to State prison, or serving any warrant or capias ad testificandum. Those mileage fee calculations include fees only for transportation within a single county. If an officer must travel in more than one county, when transporting a prisoner, for example, then the mileage fees listed for each county in which the officer must travel may be added together for a total mileage figure.

h. If defendant is found guilty of any offense, he shall pay the court costs, but if, on appeal, the judgment is reversed, the costs shall be reimbursed to defendant. If defendant is found not guilty, the costs shall be paid by the prosecutor, except when the Chief Administrator of the New Jersey Motor Vehicle Commission, a peace officer, or a police officer was the prosecutor.

i. Money received in accordance with this section by a municipal court or a court with jurisdiction in one municipality shall, unless otherwise provided by law, be accounted for by the court and paid to the municipal treasurer and to the officer respectively within 30 days from its receipt.

Source: 22A:3-4; 2A:3-5.

COMMENT

These sections remain substantially unchanged but it is of concern to Staff that court costs in excess of \$33 are routinely imposed in municipal courts throughout the State. Modest changes to some of the fees have been made simply to make the charges multiples of \$5.

Subsection (b) was streamlined.

The reference to “constables” in (f) was removed on recommendation of a reviewer as archaic. In subsection (f), instead of having different fees ranging from \$0.70 to \$1.50, the services were consolidated and \$2 listed as the fee for each. It is not clear how the “actual cost of transport” is calculated.

The language in (g) is new and mirrors the modified language pertaining to mileage in civil matters.

Section 22A:3-5 has been consolidated with this section as subsection (i).

County and Municipal Clerk Fees

22B:5-1. Fees payable to the County Clerk

County clerks and registers of deeds and mortgages shall charge the following fees for enumerated services:

a. Recording of documents pertaining to real property generally:

(1) For recording any instrument:

(A) First page

\$30

(B) Each additional page or its part

\$10

(C) Each rider, insertion, addition, or any map, plat or sketch filed or recorded pursuant to 48: 3-17.3, section 2(c)

\$10

~~(2) Mortgages:~~

~~(A) Subordination, release, partial release or postponement of a lien to lien of mortgage~~

~~_____ \$20~~

~~(B) Notation _____ \$5~~

~~(3) For entering the a marginal notation of an order, judgment, statement or warrant discharging, annulling a notice of lis pendens and for filing such order, judgment or statement~~ \$10

~~(4) For filing a lis pendens in a foreclosure action:~~

~~(A) Filing a lis pendens foreclosure First page~~ \$30

~~(B) Each additional page or its part~~

~~_____ \$10~~

~~(B) Notation _____ \$10~~

~~(5) For preparing and transmitting to the assessor, collector, or other custodian of the assessment map of any taxing district, the abstract of an instrument evidencing title to realty~~ \$10

~~(6) For entering the marginal notation of a discharge or release of a New Jersey building and loan or savings and loan mortgage forwarding abstract~~

~~_____ \$10~~

~~(7) For entering the marginal notation of a discharge, assignment, postponement or release of a mortgage, other than building and loan and savings and loan mortgages~~

~~_____ \$10~~

~~(8) For the cancellation of any mortgage or tax sale certificate~~

~~\$20~~

~~(A) Each additional volume and page~~

~~_____ \$20~~

~~(9) For a marginal notation of the discharge of a mortgage in counties where mortgages are indexed under a system requiring a duplication of indices and description~~ \$10

~~(10) For filing and recording notice of federal tax lien or other~~

federal lien or certificate discharging such lien	\$25
(11) For filing a notice of settlement	
\$20	
(12) For filing each map, plat, plan or chart (except when presented by the State or its agencies or filed pursuant to 48:3-17.3(c))	
\$55	
(13) For recording tax sale certificate, except by municipalities, or a redemption or assignment of tax sale certificate, first page	_____
\$30	
Each additional page or part thereof _____	
\$10	
(14) For indexing any recorded instrument in excess of 5 parties, per each name in excess of 5	
\$6 <u>5</u>	
(15) For recording tax sale certificate, lien, deed, or related instrument by a municipality	
\$8 <u>10</u>	
(16) For recording vacations or dedications of roads, first page	_____
\$30	
Each additional page or part thereof _____	
\$10	
(17) For disclaimers	\$15
(18) For reimbursement agreements	
No fee	
(20) For the county clerk attending, by deputy or in person, the daily sessions of the Law Division of the Superior Court in that county, per day	
\$3	
(19) Construction lien:	
(A) Filing construction lien	\$15
(B) Issuing <u>Filing</u> notice of unpaid balance, discharge	
\$15	
(C) Notation	\$5 <u>10</u>
(D) Bond	\$25
(20) Physician or hospital liens:	
(A) Filing each notice of physician's lien	\$15
(B) Entering upon the record the discharge of a physician's lien	\$15
(C) Filing each hospital lien claim	\$15
(D) Discharge of hospital lien	\$15
(21) Building	
(A) Filing building contract	_____ \$25
(B) Filing discharge of building contract	_____ \$15
(C) Notation	_____ \$5
(D) Filing building specifications	_____ \$25
(E) Filing building plans	_____ \$25

b. Miscellaneous charges:

(1) Issuing county clerk's certificate, any instrument	\$5
(2) Copies of all papers, per page	\$2
(3) Marking as a true copy, any instrument	_____
_____	\$2
(4) Exemplification, Certification any instrument	\$10
(Plus \$4 <u>2</u> per page of instrument)	

c. Recording of documents not pertaining to real property, generally:

(1) Recording or filing all instruments not herein stated	_____
_____	7.50 <u>10</u>
(2) For recording veteran's discharge papers	No fee
(3) Certified copy of veteran's discharge	No fee
(4) Recording firefighter's certificate	No fee
(5) Registering physician	\$25
(6) Nonbusiness corporation, recording:	
(A) Certificates of incorporation of churches, religious societies and congregations	\$25
(B) Amendments to certificates of incorporation of churches, religious societies and congregations,	\$25
(7) Bank merger agreements, recording:	
(A) First page	\$25
(B) Each additional page	\$5
(C) Certificates, each	\$5
(8) Tradenames, firms, partnerships, filing:	
(A) Certificate of name, (see 56:1-1 et seq.)	\$50
(B) <u>Amendment</u>	<u>\$50</u>
(C) Certificate of dissolution of tradename	(see 56:1-6 et seq.) \$25
(D) Partnership agreement (see 42:1-1 et seq.)	\$50
(9) Building and loan or savings and loan associations:	
(A) Change of name	_____ \$25
_____	50
(B) Dissolution	_____ \$25
(10) Certificates for limited-dividend housing associations, recording:	
(A) First page	_____ \$20
_____	25

	(B) Each additional page_____	
	_____ \$5	
	(11) Certificates for urban renewal associations, recording:	
	(A) First page_____	\$20
<u>25</u>		
	(B) Each additional page_____	
	_____ \$5	
	(12) Judgments:	
	(A) Recording judgment_____	
	_____ \$15	<u>35</u>
	(B) Filing, entering and recording judgment on bond and warrant by attorney_____	
<u>\$37.50</u>	<u>35</u>	
	(13) Issuing certificate for docketing Superior Court transcript_____	\$9 <u>10</u>
	(14) Recording assignment of judgment_____	
	_____ \$15	
	(15) Issuing transcript of judgment_____	\$7.50
<u>10</u>		
	(16) Filing or entering on the record of discharge, cancellation, release, or satisfaction of a judgment by satisfaction piece, execution returned satisfied or otherwise_____	
_____	\$15	
	(17) Recording and indexing postponement of the lien of judgment._____	\$20
	(18) Filing satisfaction or order for discharge of attachment_____	
	_____ \$15	
	(19) <u>Recording Inheritance Tax Waiver</u>	<u>\$15</u>
	(A) Recording collateral inheritance waiver or receipt	\$15
	(B) Recording inheritance tax waiver.	\$15

d. Commissions and oaths:

	(1) Administering oaths to notaries public and commissioners of deeds	
	\$15	
	(2) Issuing <u>County Clerk's</u> certificate of authority of notary to take proof, acknowledgment of affidavit	\$5
	(3) Issuing certificate of the commission and qualification of notary public for filing with other county clerks	
	\$15	
	(4) Filing certificate of the commission and qualification of notary public with County Clerk of county other than where notary has qualified	\$15

e. For searches of records, the County Clerk shall receive:

—(1) for searches of all records except those enumerated in

- ~~this subsection, for each name, each year, each book~~ _____
~~\$0.04~~
- ~~(2) for a search of the records of assignments of mortgages,
for each name, each year, each book~~ _____
~~\$0.05~~
- ~~(3) For a search of mechanic's lien claims, for each name,
each book, each year~~ _____
~~\$0.06~~
- ~~(4) For a search of the records of registered mortgages,
for each name, each year, each book~~ _____
~~\$0.07~~
- ~~(5) For each search of the records of physician's lien claims
which shall include cost of search and certificate thereof~~ _____
~~\$0.50~~
- ~~(6) For each search of the records of hospital lien claims
which shall include cost of search and certificate thereof~~ _____
~~\$0.50~~
- ~~(7) For copies of abstracts of all deeds, mortgages, judgments
or other records included in a search certificate, for each folio~~ _____
~~\$0.08~~
- ~~(8) For drawing a certificate and seal for a search~~ _____
~~\$0.20~~

Source: 22A:2-7; 22A:2-29; 22A:4-4.1.

COMMENT

The fee language from 22A:4-4.1 was consolidated.

The fee language from Section 22A:2-29 was imported. In (b), charges for comparing and making copies, typing and comparing photostats, and marking as a true copy were eliminated as obsolete.

Parts of the former 22A:4-12 are included here.

Subsection (a)(2) was eliminated as outdated after preliminary discussions with County Clerk's Offices. Subsection (a)(3) was modified since the charge for any marginal notation is \$10 and it was suggested that listing some of the kinds of marginal notations increased the potential for confusion. Subsection (a)(4) was revised to more accurately reflect the costs associated with a lis pendens in a foreclosure action and to clarify that the costs associated with a foreclosure lis pendens differ from that filed in a non-foreclosure action (in which the standard recording fee is charged).

Other subsections in a. were removed as unnecessary since they referred specifically to kinds of marginal notation or recording that were sufficiently addressed by the general language pertaining to recording and marginal notations. (See, a.(6), (7), (9), (13) and (16) for example). In subsection a.(8) the reference to tax sale certificates was added to reflect the practice although no

such provision currently exists in the law. The reference to additional volumes and pages in subsection a.(8) was added to cover situations in which multiple mortgages were recorded and then must be cancelled. Subsection a.(19) was modified to reflect the fact that the County Clerk's Office does not issue a NUB, it files them and to update the change for a notation to match the charge for notations in all other circumstances. It was suggested that the provisions of subsection a. (21) are obsolete and have been since the Construction Lien Law was enacted.

Subsection b.(4) was changed to reflect the fact that the County Clerks do not exemptify documents, they certify them. And the per page fee was reinstated because, without it, an individual could obtain a certified document that was hundreds of pages long for the fee of \$10 even though the County Clerk's Office is required to provide the copies for certified documents.

Subsection c.(1) was removed because it was suggested that since the County Clerks do not (except as otherwise stated) record documents that does not pertain to real property, a provision such as this one is confusing because it makes it look as though the Clerk must record documents that individuals prepare relating to vehicles and other items/issues that are not real property. Subsections c(9) through (18) were removed as apparently obsolete. The provisions of subsection c(13) through (18) however, may have continuing relevance to the Courts and additional research is needed on this issue. The language of subsection c(19) was streamlined.

The language in subsection d(2) was revised as a result of preliminary discussions with representatives from County Clerk's offices.

The charges in (e) may no longer be relevant and are proposed for elimination on that ground.

Modest changes to some of the fees have been made simply to make the charges multiples of \$5. Photocopying has been made \$1 per page throughout. The fees for marking true copies have been stricken as no longer commonly used. Some fees in this section were modified to make them more consistent with other fees in this and other sections of the statute. The changes are generally minor.

Some limited language has been removed from this section based on the informal comments received from the County Clerks. Language calling for a fee of \$3 per day for the County Clerk to attend Court sessions was proposed for removal as no longer relevant. Reference to making copies and comparing them was removed, as was the fee of \$2 associated with that task.

The fee associated with issuing a nonalcoholic beverage ID card was eliminated as it appears that these cards are no longer issued by the County Clerks.

22B:5-2. Filing fees payable to the municipal clerk

Municipal clerk's shall charge the following fees associated with mechanic's liens:

- a. Filing, indexing and recording mechanic's lien claim
~~\$9~~ 10
- b. Recording, filing and noting on the record the discharge, release or satisfaction of a mechanic's lien claim
~~\$9~~ 10
- c. Extension of lien claim
~~\$3~~ 5
- d. Filing statement in mechanic's lien proceeding
~~\$9~~ 10
- e. Filing, recording and indexing mechanic's notice of intention
~~\$4.50~~ 5
- f. Filing a court order to discharge notice of intention and noting the discharge on the record
~~\$15~~
- g. Filing, recording and indexing stop notice
~~\$4.50~~ 5
- h. Filing a certificate discharging a stop notice and noting the discharge on the record
~~\$4.50~~ 5
- i. Filing a court order discharging a stop notice and noting the discharge on the record
~~\$9~~ 10
- j. Filing a certificate discharging mechanic's notice of intention and noting the discharge on the record
~~\$4.50~~ 5
- k. Filing certificate from court of commencement of suit
~~\$4.50~~ 5
- l. Filing a court order amending a mechanic's notice of intention
~~\$9~~ 10

Source: 22A:2-29.

COMMENT

Part of the fee language from Section 22A:2-29 was imported and included here since the County Clerks informally advised that they no longer record these documents.

Fees of Certain State and County Officers

22B:6-1. Fees of State Treasurer

The State Treasurer shall collect fees for the enumerated services as follows:

a. Filing any original business certificate for which no other fee is fixed by statute or regulation, \$125.

b. Filing any change or amendment to a previously filed document for which no other fee is fixed by statute or regulation, \$75.

c. Issuing any certificate or filing any other document for which no other fee is fixed by statute or regulation, \$25. This subsection shall not apply to:

(1) Certificates of appointments for gubernatorial appointees;

(2) Documents filed by public bodies under the "Open Public Meetings Act," 10:4-6 et seq.;

(3) Financial disclosures filed by State officials;

(4) Oaths of office;

(5) Resignation of office holders;

(6) Documents filed by other State government entities indexed in the department's miscellaneous file.

d. Certification or exemplification of any document on file, \$25.

e. Certification or exemplification of any signature on file, including the issuance of a certificate for proving a document outside the United States, also known as an apostille, \$25; except that in cases of adoption of a child, the fee for an apostille shall be \$5.

f. Filing a certified copy of an order of change of name, \$50.

g. Paper copy of any document on file, \$1 per page. If a roll of microfilm images is requested, the State Treasurer shall collect a fee of \$1 for each image on the microfilm roll. If a microfiche copy of a microfiche is requested, ~~\$3~~5.

h. Filing a proof of publication, \$10.

Source: 22A:4-1.

COMMENT

This section remains substantially unchanged, and no change of the substance is contemplated. Subsection (a) was renumbered for ease of reference. 22A:4-2 was removed as no longer relevant.

22B:6-2. Commissioner of Banking and Insurance

a. The Commissioner of Banking and Insurance shall be paid a \$5 service fee for accepting service of process as the attorney for:

- (1) a foreign insurance company or association;
- (2) a banking, saving, trust, guaranty, safe deposit, indemnity, mortgage, investment, or building and loan corporation or association organized under the laws of any other State or of any foreign government;
- (3) a foreign fraternal beneficiary association;
- (4) any person, co-partnership, association or corporation engaged in the business of making small loans; and
- (5) a foreign building and loan association.

b. The plaintiff in an action shall be entitled to recover the amount of the service fee as part of the taxable costs if the plaintiff prevails in the action.

Source: 22A:4-3.

COMMENT

This section remains unchanged in substance but has been streamlined. Subsection lettering and numbering was added for ease of reference. If this section is still relevant, then it may be appropriate to update the fees.

Time of collection of fees

22B:7-1. Collection of fees in advance; deposits; accounts

a. Surrogates, registers of deeds and mortgages, county clerks, clerks of courts, sheriffs and the Secretary of State, for their own protection, may exact in advance of a service the fees and costs therefor.

b. For convenience, the officers listed above may receive reasonable deposits in advance to meet the fees and costs of persons who may desire such services, except that sheriffs and the Clerk of the Superior Court shall be required so to do. Such officers shall account to depositors at least once in 4 months for the sums deposited, except that the Clerk of the Supreme Court, the Clerk of the Superior Court, sheriffs, and the Secretary of State shall so account at least annually.

c. The Secretary of State shall provide for the establishment of accounts for persons making application therefor, under such terms and conditions as may be fixed by the Secretary of State.

d. Whenever any surrogate, register of deeds and mortgages, county clerk or sheriff shall be requested by the State or any of its agencies to file, enter and docket, record, make a copy, search or perform any other service in their respective offices for which costs, fees or compensation is allowed, such officer shall perform the service requested without exacting payment in advance of the lawful fees but such officer shall render to the State, or the agency thereof making such request, a monthly statement of all such fees due and payable. No officer shall become personally liable to his or her county for the payment of such fees and costs until they shall have been actually paid to the officer.

e. The Secretary of State is authorized to establish reasonable fees for the specialized research, reference, and reproduction services provided by the State Archives, Division of Archives and Records Management in the Department of State, involving permanent historical documents in any format or medium. Such fees shall be established pursuant to the provisions of the Administrative Procedure Act, and shall reflect the actual costs of the services, including labor and overhead. All fees collected by the State Archives for such services shall be paid into the existing nonlapsing "Archives User Fees Account" administered by the Division of Archives and Records Management.

Source: 22A:4-19; 22A:4-20; 22A:4-21.

COMMENT

This section consolidates three former sections; all remain substantially unchanged, and no change of the substance is contemplated. Subsection lettering was added for ease of reference.

Preliminary, informal comments by Sheriff's officers requested a modification in subsection (b) to reflect that they are required to account to depositors only upon the depositor's request.

Responsibility for Fees Collected

22B:8-1. Accounting for fees by Clerk of Supreme Court and Clerk of Superior Court

a. Except as otherwise provided by statute, fees, costs, allowances, percentages and other perquisites which the Clerk of the Supreme Court, the Clerk of the Superior Court, and their office assistants are allowed by law to charge and receive for official acts or services they may render, shall be for the sole use of the State as public money, to be regularly accounted for and paid over as hereinafter set forth.

b. The Clerk of the Supreme Court and the Clerk of the Superior Court shall on the tenth day of each month, render a full and itemized statement of account and return to the Director of the Division of Budget and Accounting of all such sums received by them or their assistants and of all sums which may have been charged or taxed, or which may have accrued or become payable for services during the month preceding the making of such statement. The statement of account shall be made under oath in such form as the Director shall specify, and shall be filed in his office to be audited by him and kept as a public record.

c. All such fees, costs, allowances, percentages and other perquisites shall be paid to the State Treasurer on or before the tenth day of each month, and whether collected or not, such officers shall be personally liable for the payment.

d. The penalty for each day's neglect of any such officer in rendering his account or in paying over such money to the State Treasurer shall be \$100, to be recovered in the name of the State in a civil action in the Superior Court, in the proceeding in lieu of prerogative writ against the clerks.

Source: 22A:4-15.

COMMENT

This section remains substantially unchanged, and no change of the substance is contemplated. Subsections were numbered for ease of reference.

22B:8-2. Disposition of fees of county officers

a. All fees, costs, allowances, percentages and other perquisites of whatever kind which surrogates, county clerks in their several capacities, registers of deeds and mortgages, and sheriffs or persons employed in their offices are entitled to charge and receive for any official acts or services they may render shall be for the sole use of the county and shall be accounted for regularly to the county treasurer; however, such monies shall be utilized to increase the salaries of surrogates, county clerks, registers of deeds and

mortgages and sheriffs, except as provided in 22A:4-8.1, 22A:4-17.1 and 22A: 4-17.2.

b. Such accounting shall be made on or before the fifteenth day of each month on form blanks supplied by the county treasurer. The statement of account shall clearly set forth all sums charged or taxed or which shall have accrued or become payable during the preceding month. Such statements shall be made under oath and filed in the office of the county treasurer as public records.

c. Such statements when received by the county treasurer shall be forthwith audited by the county auditor or other proper officer.

d. On or before the twentieth day of each month surrogates, county clerks, registers of deeds and mortgages, and sheriffs shall pay over the amount of such fees and moneys to the county treasurer and such officers shall be personally liable to the county for such fees and moneys.

e. The penalty for each day's neglect to file the required statement of account or to pay over such moneys shall be \$100 to be recovered in the name of the board of chosen freeholders of the county in a civil action in the Superior Court, and said officers may also be proceeded against by proceeding in lieu of prerogative writ.

Source: 22A:4-17.

COMMENT

This section remains substantially unchanged, and no change of the substance is contemplated. Subsections were numbered for ease of reference.

22B:8-3. County treasurer responsible for certain fees received by or deposited with the county sheriff

a. The county treasurer shall be responsible for all fees received by or deposited with the county sheriff pursuant to 22A:4-8. The county sheriff shall account to the county treasurer for all these fees.

b. The county treasurer shall deposit into a trust fund dedicated to the sheriff's office \$2 of each fee over the amount of \$3 received for a service enumerated in 22A:4-8. Such sums shall be deposited within 10 days of receipt by the county treasurer. Monies in the trust fund shall be used to upgrade and modernize the services provided by their offices. As used in this section, "to upgrade and modernize the services" shall not include the costs associated with employing personnel and shall not include offset of existing salary or new positions. The monies in the trust fund shall not be used for budgetary reduction by the counties.

c. Notwithstanding any provision of law to the contrary, monies received by a county sheriff attributable solely to the amount of fee increases for services enumerated in 22A:4-8 pursuant to the amendments set forth in section 5 of P.L.2001, c.370, that exceed in any year the amount by which the annual minimum salary of the sheriff, fixed pursuant to 40A:9-104, exceeds the amount

of the county sheriff's salary in effect on November 1, 2000, shall be used for budgetary reduction by the county and shall be reflected as a county tax levy reduction.

Source: 22A:4-8.

COMMENT

This section remains unchanged, and no change of the substance is contemplated.

22B:8-4. Return of portion of fees to surrogate, county clerk, or register of deeds and mortgages; use

a. The county treasurer shall return to the county clerk or the register of deeds and mortgages \$2 of each fee received for the recording, filing or canceling of a document in the office of the county clerk or register of deeds and mortgages. Such sums shall be returned within 10 days of receipt of the fee by the county treasurer.

b. Monies received by the county clerks or registers of deeds and mortgages pursuant to the provisions of subsection a. shall be used to upgrade and modernize the services provided by their offices.

c. The provisions of subsection a. shall not apply to fees received from municipalities for recording, filing or canceling documents.

d. Notwithstanding any provision of law to the contrary, monies received by a county clerk attributable solely to the amount of fee increases for services enumerated in 22A:2-29 pursuant to the amendments set forth in section 2 of P.L.2001, c.370 and enumerated in 22A:4-4.1 pursuant to the amendments set forth in section 4 of P.L.2001, c.370, that exceed in any year the amount by which the annual minimum salary of the county clerk fixed pursuant to 40A:9-76 exceeds the amount of the county clerk's salary in effect on November 1, 2000, shall be used for budgetary reduction by the county and shall be reflected as a county tax levy reduction.

e. Notwithstanding any provision of law to the contrary, monies received by a register of deeds and mortgages attributable solely to the amount of fee increases for services enumerated in 22A:4- 4.1 pursuant to the amendments set forth in section 4 of P.L.2001, c. 370 that exceed in any year the amount by which the annual minimum salary of the register of deeds and mortgages fixed pursuant to 40A:9-92 exceeds the amount of the salary of the register of deeds and mortgages in effect on November 1, 2000, shall be used for budgetary reduction by the county and shall be reflected as a county tax levy reduction.

f. The county treasurer shall return to the county surrogate \$2 of each fee received for the probate of a will; for the grant of general administration; for the grant of letters of guardianship; for the grant of letters of trusteeship for the filing of inventories; for the filing of accountings; and for any other proceeding filed, recorded or issued in the surrogate's court. Such sums shall be returned within 10 days of receipt by the county treasurer.

g. Monies received by the county surrogates pursuant to the provisions of subsection a. of this section shall be used to upgrade and modernize the services provided by their offices. These monies shall not be used for budgetary reduction by the counties.

h. Notwithstanding any provision of law to the contrary, monies received by a county surrogate attributable solely to the amount of fee increases for services enumerated in 22A:2-30 pursuant to the amendments set forth in 22A:2-30, that exceed in any year the amount by which the annual minimum salary of the surrogate fixed pursuant to 2B:14-3 exceeds the amount of the surrogate's salary in effect on November 1, 2000, shall be used for budgetary reduction by the county and shall be reflected as a county tax levy reduction.

Source: 22A:4-17.1; 22A:4-17.2.

COMMENT

This section remains substantially unchanged, and no change of the substance is presently contemplated.

Revenue

22B:9-1. Increased fees under P.L.1996, c.52, use; fund

a. An amount equal to 95% of the increase in fees collected pursuant to the provisions of 22A:2-51 shall be annually appropriated to the Department of Community Affairs for the provision to the poor of legal assistance in civil matters by Legal Services of New Jersey and to the Judiciary to fund 10 Superior Court judgeships, to supplement funds appropriated from other sources in a fiscal year for these purposes. An appropriation pursuant to this section shall not be used to replace appropriations from any other source for these purposes.

b. An amount equal to 5% of the increase in fees collected pursuant to the provisions of 22A:2-51 shall be annually appropriated to the Department of State, Higher Educational Services, to be allocated equally among Rutgers-Newark Law School, Rutgers-Camden Law School and Seton Hall Law School for clinical programs which provide free legal representation to the poor, to supplement funds appropriated from other sources in a fiscal year for these purposes. An appropriation pursuant to this section shall not be used to replace appropriations from any other source for these purposes.

c. A non-lapsing, revolving fund is created in the State Department of the Treasury, into which the Treasurer shall deposit annually an amount equal to the revenue derived from the increase in the fees collected pursuant to 22A:2-51. Interest and other income earned on moneys deposited into this fund shall be credited to the fund. Moneys in the fund shall be appropriated and distributed annually exclusively for the purposes set forth in subsections (a) and (b). The State Treasurer shall have performed an audit of this fund biennially following the effective date of 22A:2-51 and the results of the audit shall be included in the report required pursuant to subsection (d).

d. The State Treasurer shall submit annual report to the Legislature on the use of the fees collected pursuant to 22A:2-51 and deposited into the fund created pursuant to subsection (c). The report shall be submitted to the President of the Senate and Speaker of the General Assembly, and the Senate Budget and Appropriations Committee, Assembly Appropriations Committee, Senate Judiciary Committee, and Assembly Judiciary Committee or their successors.

Source: 22A:2-51.

COMMENT

This section remains substantially unchanged, and no change of the substance is contemplated.

22B:9-2. Dedicated check off fee revenues for upgrading and modernizing services, capital plan.

With regard to all increased check off fee charges, the revenues from which are dedicated to upgrading and modernizing the services provided by the offices of constitutional officers, pursuant to the provisions of 22A:4-8.1 or any other provision of law:

a. Each constitutional officer shall prepare and submit to the board of chosen freeholders, for its approval, a five-year capital plan setting forth the capital purposes to which the check off fee revenues are to be applied. These purposes shall include improving recording and election system when applicable;

b. Any dispute concerning the use of the check off fee revenues shall be submitted to and resolved by the assignment judge of the county, who shall be the final arbiter of such disputes;

c. Check off fee revenues shall not be used for budgetary reduction by the county and the Director of the Division of Local Government Services in the Department of Community Affairs shall require the amendment of any county budget that is not in compliance with the requirements of this subsection;

d. Interest earned on check off fee revenues held in a dedicated or trust account shall accrue to that account and shall be used only for the purposes of check off fee revenues.

Source: 22A:2-51.1.

COMMENT

This section remains substantially unchanged, and no change of the substance is contemplated.

22B:9-3. New Jersey Public Records Preservation Account

a. The "New Jersey Public Records Preservation Account," a dedicated account within the Department of the Treasury, is established. Notwithstanding any other provision of law to the contrary, monies received by a county clerk attributable solely to the amount of increases to the fees imposed pursuant to

22A:4-4 shall be paid by the county clerk to the Treasurer for deposit in the New Jersey Public Records Preservation Account, \$2 of which shall be allocated for grants to counties and municipalities for the management, storage and preservation of public records and \$3 of which shall be allocated to the Division of Archives and Records Management within the Department of State for the management, storage and preservation of public records.

b. The State Division of Archives and Records, in consultation with the State Records Committee, may, pursuant to the provisions of the Administrative Procedures Act, make, adopt, amend, or repeal such rules and regulations as the Division finds necessary to carry out the provisions of this section.

Source: 22A:4-4.2.

COMMENT

This section remains substantially unchanged, and no change of the substance is contemplated. 22A:4-4 was repealed in 1965 and replaced by 22A:4-4.1.



State of New Jersey

Tentative Report

Relating to

PUBLIC ASSISTANCE LAW

June 2008

This preliminary draft is distributed to advise interested persons of the Commission's tentative recommendations and to notify them of the opportunity to submit comments. The Commission will consider these comments before making its recommendations to the Legislature. The Commission expects to revise this draft as a result of the comments it receives. If you approve of the draft, please inform the Commission so that your approval can be considered along with other comments.

All comments must be received by: **September 1, 2008.**

Please send comments concerning this tentative report or direct any related inquiries, to:

John M. Cannel, Esq., Executive Director
NEW JERSEY LAW REVISION COMMISSION
153 Halsey Street, 7th Fl., Box 47016
Newark, New Jersey 07101
973-648-4575
Fax: 973-648-3123
Email: njlrc@njlrc.org
Web site: <http://www.njlrc.org>

PUBLIC ASSISTANCE LAW

Introduction

Many of the statutes in the earlier chapters of Title 44- The Poor Law were enacted in the nineteenth century. Others date from the 1920's and before. They are archaic, in substance and in style, and do not reflect current reality and practice. Repealed and superseded terms and statutory citations exist in numerous sections. Also found in many sections are unconstitutional provisions for deporting people who lack legal "settlement" in New Jersey to other states. It appears that as times and welfare programs changed, very little of the old law was repealed. Thus, when categorical relief was established in the 1930's, new chapters were added but the old statutes on indoor and outdoor relief were left in place. When poverty programs were established in the 1960's, more material was added. With welfare reform in the 1990's, more was added, but very little was repealed or amended to bring it up to date. The result is that most of Title 44 completely anachronistic. Very little of it is read or relied on by those who administer welfare programs. These parts of Title 44 should be revised or deleted. However, there are a few statutes that are of continuing importance buried among statutes that have no modern function. For example, sections in chapter 1 establish the basic duties of the counties and municipalities. Those must be retained.

The modern parts of Title 44 also need revision. Two main laws with confusingly similar names govern assistance to the needy in New Jersey. One, the "Work First New Jersey" act, N.J.S. 44:10-55 et seq., L. 1997, resulted from the federal "Personal Responsibility and Work Opportunity Reconciliation Act of 1996," 42 U.S.C. Section 601, et seq., which established a federal block grant for temporary assistance for needy families and enabled the states to design their own welfare programs. This act replaced earlier programs including: aid to families with dependent children, general assistance, emergency assistance for recipients, and the Family Development Initiative. N.J.S. 44:10-58(b). The two main relief programs established by this act are Temporary Assistance for Needy Families (TANF) and General Assistance (GA). TANF is the successor to the federally funded categorical programs; GA is the continuation of the municipal general assistance for those people who do not fit within the categorical programs. The 21 county welfare agencies administer TANF using Federal and State funds.

The Work First New Jersey General Assistance Act, N.J.S. 44:8-107 et seq., L. 1997, the second main law, replaced the State's General Assistance law of 1947. The relationship between the two "Work First" laws is obfuscated by their statutory language. The Work First New Jersey General Assistance Act seems to establish a general assistance program for "needy, single adults and

couples without dependent children” N.J.S. 44:8-108. In fact, the act serves to provide for municipal governance of the General Assistance program established by the other “Work First” act. In 1995, most provisions were amended to allow either the municipality or the county, where appropriate, to run the program. County welfare agencies administer the majority of general assistance programs; however 103 of New Jersey’s 566 municipalities still maintain their own offices for local administration. The State funds general assistance.

This draft proposes that the entire Title be called “Public Assistance Law” and that the distinctions between Assistance (now Chapter 8) and Temporary Assistance for Needy Families (currently Chapter 10) be clarified to remove meaningless and unnecessary duplication. The substantive provisions explain who is eligible, what benefits one receives, and the work requirements. Administrative provisions comprise a separate chapter.

Chapter 1 – Legislative Findings; Definitions

1-1. Legislative findings

a. The Legislature finds and declares that the law of New Jersey has always imposed a duty on the public entities to provide assistance to eligible persons. Nothing in this law, by enactment, or repeal, is intended to affect that basic duty. If the programs continued in this law do not provide all necessary assistance to eligible persons, additional assistance shall be provided by public entities as in the past.

b. An eligible person shall be given appropriate assistance during the time an application for assistance is being considered.

c. This act along with other law to implement all federal categorical public assistance programs and to provide for those persons who need assistance and who are not eligible under federal categorical programs through the General Assistance Program.

Source: 44:8-120, New.

COMMENT

Subsections (a) and (c) are new and are intended to assure that recompilation of poor law dating back to the nineteenth century does not disturb the basic common law principle that there is a public duty to assist the needy. Subsection (b) derives from 44:8-120 and emphasizes that assistance is allowed to begin before the entire inquiry process initiated by an application concludes.

1-2. Definitions

“Alternative work experience” means unpaid work and training only with a public, private nonprofit or private charitable employer to provide a recipient with the experience to adjust to, and learn how to function in, an employment setting and the opportunity to combine that experience with education and job training. An alternative work experience participant shall not be assigned to work for a private, for profit employer.

“Commissioner”, unless otherwise specified, means the Commissioner of the Department of Human Services.

“Community work experience” means unpaid work and training only with a public, private nonprofit or private charitable employer, provided to a recipient to enable the recipient to adjust to, and learn how to function in, an employment setting. Placements are directed toward groups directly involved in public service. A community work experience participant shall not be assigned to work for a private, for profit employer

“Dependent child” means a child:

- a. under the age of 18;
- b. under the age of 19 and a full-time student in a secondary school or an equivalent level of vocational or technical training, if, before the student attains

age 19, the student may reasonably be expected to complete the student's program of secondary school or training; or

c. under the age of 21 and enrolled in a special education program, who is living in New Jersey with the child's natural or adoptive parent or legal guardian, or with a relative designated by the commissioner in a place of residence maintained by the relative as the relative's home.

"Eligible alien" means one of the following

a. a qualified alien, admitted to the United States prior to August 22, 1996, who is eligible for means-tested, federally funded public benefits pursuant to federal law;

b. a refugee, asylee, victim of human trafficking, or person granted withholding of deportation under federal law for the person's first five years after receiving that classification in the United States pursuant to federal law;

c. a qualified alien who is a veteran of, or on active duty in, the armed forces of the United States, or the spouse or dependent child of that person pursuant to federal law;

d. a recipient of refugee and entrant assistance activities or a Refugee Resettlement entrant pursuant to federal law;

e. a legal permanent resident alien who has worked 40 qualifying quarters of coverage as defined under Title II of the federal Social Security Act; except that for any period after December 31, 1996, a quarter during which an individual received means-tested, federally funded public benefits shall not count toward the total number of quarters;

f. a qualified alien admitted to the United States on or after August 22, 1996, who has lived in the United States for at least five years and is eligible for means-tested, federally funded public benefits pursuant to federal law; or

g. a qualified alien who has been battered or subjected to extreme cruelty in the United States by a spouse, parent or a member of the spouse or parent's family residing in the same household as the alien, or a qualified alien whose child has been battered or subjected to extreme cruelty in the United States by a spouse or parent of the alien, without the active participation of the alien, or by a member of the spouse or parent's family residing in the same household as the alien. In either case, the spouse or parent shall have consented or acquiesced to the battery or cruelty and there shall be a substantial connection between the battery or cruelty and the need for benefits to be provided. This subsection shall not apply to an alien during any period in which the individual responsible for the battery or cruelty resides in the same household or eligible household as the individual subjected to the battery or cruelty. Benefits shall be provided to the extent and for the period of time that the alien or alien's child is eligible for the program. "Qualified alien" is defined according to section 431 of Title IV of Pub. L. 104-193, 8 U.S.C.A. § 1641.

“Eligible household” means:

a. a person or couple with one or more dependent children to whom they are legally or blood-related, or of whom they are legal guardian, and who live together as a household unit;

b. a unit comprised of individuals living together and functioning as one economic unit and whose relationship is based upon a blood or legal relationship, i.e., one that is created through marriage, adoption or legal guardianship procedures;

c. a single person without dependent children;

d. a couple without dependent children; and

e. dependent children only.

“Employable person” means a person applying for or receiving assistance under this act who is not prevented from working by physical or mental disability as defined in the commissioner’s regulations.

“Full-time employment” means employment unsubsidized by any level of government in which a person is engaged for at least 35 hours a week.

“Full-time post-secondary student” means a student enrolled for a minimum of 12 credit hours in a post-secondary school.

“General assistance” means assistance provided to eligible single adults and couples without dependent children who are willing to work but cannot be employed because of physical or mental disability or inability to find employment.

“Income” includes commissions, salaries, self-employed earnings, child support and alimony payments, interest and dividend earnings, wages, receipts, unemployment compensation, any legal or equitable interest or entitlement owed that was acquired by a cause of action, suit, claim or counterclaim, insurance benefits, temporary disability claims, estate income, trusts, federal income tax refunds, State income tax refunds, homestead rebates, lottery prizes, casino and racetrack winnings, annuities, retirement benefits, veterans’ benefits, union benefits, or other sources that the commissioner may define as income, except that if individual development accounts for recipients are established by regulation of the commissioner, any interest or dividend earnings from such an account shall not be considered income.

“Income eligibility standard” means the income eligibility threshold based on eligible household size established by regulation of the commissioner for benefits provided within the limit of funds appropriated by the Legislature.

“Legal guardian” means a person who exercises continuing control over the person or property, or both, of a child, including any specific right of control over an aspect of the child’s upbringing, whether or not pursuant to a court order.

“Non- eligible caretaker” means a relative caring for a dependent child, or a legal guardian of a minor child who, in the absence of a natural or adoptive

parent, assumes parental responsibility and has income which exceeds the income eligibility standard.

“Poverty level” means the official poverty level based on family size, established and adjusted under Section 673(2) of Subtitle B of the “Community Services Block Grant Act,” Pub. L. 97-35 (42 U.S.C. sect. 9902(2)).

“Residence” means the place where a person is present and declares an intent to remain.

“Services” means any Work First New Jersey benefits that are not provided in the form of cash assistance.

“Standard of need” means the minimum amount of income and in-kind benefits or services needed by families and single persons living in New Jersey in order to maintain a decent and healthy standard of living, as established by regulation of the commissioner, and shall include necessary items such as housing, utilities, food, work-related transportation, clothing and personal and household essentials.

“State Board” means the State Welfare Board.

“TANF” means the program established under Title IV-A of the federal Social Security Act that provides cash assistance to eligible needy families with children and assists them in obtaining and retaining employment.

“Title IV-A” means the provisions of Title IV-A of the federal Social Security Act governing the program of aid to families with dependent children the State Plan to implement those provisions that were in effect until August 22, 1996, including income methodologies for determining eligibility under those provisions and plan.

“Title IV-D” means the provisions of Title IV-D of the federal Social Security Act governing paternity establishment and child and medical support enforcement activities and requirements.

“Work activity” means employment and employment related activities defined by regulation of the commissioner. “Work activity,” however, shall include any activities included as work by federal regulations.

Source: 44:10-4, 44:10-34, 44:10-44, 44:10-57, 44:10-71, 44: 10-108., NJDHS, DFD bulletin New Jersey State Plan for Temporary Assistance for Needy Families FFY 2006-FFY 2008, p. 5, p. 7, p. 17.

COMMENT

The draft combines all the definitions of the four source sections into one provision.

1-3. Construction in general

- a. The provisions in this chapter shall not be construed to be exclusive.
- b. A particular grant of power contained in this chapter shall be held to be in specification but not in limitation of general powers.

Source: 44:1-2.

COMMENT

The Division of Family Development consultants asked that this be added.

Chapter 2 - Provisions Applicable to both Work First New Jersey Programs: General Assistance and Temporary Assistance for Needy Families

2-1. Work First New Jersey Programs

a. Two programs compose Work First New Jersey (WFNJ) the State's assistance program:

1) General Assistance (GA) gives cash benefits and supportive services to persons who are not eligible for TANF such as single adults or families without children.

2) Temporary Assistance for Needy Families (TANF), the New Jersey implementation of the federal categorical program, gives temporary cash benefits and support to enable families to get and keep jobs.

b. To receive assistance from TANF or GA, a person must:

1) either work, look for work, participate in an approved work activity, or qualify for an exemption to work-related requirements; and

2) cooperate with paternity determination requirements and with child support requirements if the person has dependent children.

c. A person may not simultaneously receive benefits from both TANF and GA.

Source: New

COMMENT

This concise description is partially based upon the Department of Human Services, Division of Family Development (NJDHS, DFD) bulletin New Jersey State Plan for Temporary Assistance for Needy Families, FFY 2006-FFY 2008, pp. 5, 7, 11, which explains New Jersey's welfare reform program which followed the reforms of the federal "Personal Responsibility and Work Opportunity Reconciliation Act of 1996."

2-2. Adult recipient required to seek work

a. Each adult recipient shall continuously and actively seek employment, as defined by the commissioner, in an effort to remove the recipient's eligible household from the program. The commissioner may assign a recipient to a work activity. The recipient shall sign an individual responsibility plan as provided in subsection (f) of this section, in order to participate in the program. The plan shall state the terms of the work activity requirements that the recipient must fulfill in order to receive benefits.

b. In accordance with Pub. L. 104-193, §407 (codified at 42 U.S.C.A. § 607), a recipient in an eligible household with dependent children shall begin a work activity, self-directed job search or other activities which the commissioner determines, prior to having received 24 months of benefits; except that if the recipient is a full-time post-secondary student in a course of study related to employment as defined by regulation, the recipient shall be required to do another work activity for no more than 15 hours a week, subject to the recipient satisfactorily progressing toward completion of the post-secondary course of study.

c. A recipient shall comply with work activity requirements in order to remain eligible for benefits. The participation rate shall be calculated in accordance with federal requirements. A recipient may be required to participate in one or more work activities for a maximum aggregate hourly total of 40 hours per week.

d. A recipient shall not be required to engage in a work activity if child care, including after-school child care for children over six years of age, is unavailable for the recipient's dependent child.

e. The commissioner may allow a recipient to be deferred temporarily from work activity requirements for periods less than 12 months if the recipient is:

(1) a woman in the third trimester of pregnancy;

(2) a person certified by an examining physician to be unable to engage in any gainful occupation because of a physical or mental defect, disease or impairment; or

(3) the parent or relative of a child younger than 12 weeks who is providing care for that child, except that, the deferral may be extended for an appropriate period of time if medically necessary for the parent or child.

f. After being determined eligible for benefits, each adult recipient who is not deferred or exempted under this act shall be assessed for potential and readiness for work, including, but not limited to, skills, education, past work experience and any barriers to securing employment, and, as appropriate, a screening and assessment for substance abuse. For all recipients who are not deferred or exempt, the county or municipal welfare agency and the recipient jointly shall develop an annual individual responsibility plan specifying the steps that will be taken by each to assist the recipient to secure employment. The plan shall include specific goals for each adult member or minor parent in the eligible household, and may include specific goals for a dependent child member of the eligible household. The goals shall include, but not be limited to, requirements for parental participation in a dependent child's primary school program, immunizations for a dependent child, and regular school attendance by a dependent child. Recipients who are job ready shall be placed immediately in a self-directed job search. Within the limits of the amount of funds allocated by the commissioner, other recipients shall be placed in appropriate work activities according to their individual assessments.

g. The county or municipal agency shall ensure necessary case management for recipients, appropriate to their degree of job readiness, according to regulations. The most intensive case management shall be directed to recipients facing the most serious barriers to employment.

h. A recipient:

(1) shall not be placed in a position at a particular workplace:

(a) that was previously filled by a regular employee if that position, or a substantially similar position at that workplace, has been made vacant through a demotion, substantial reduction of hours or a layoff of a regular employee in the previous 12 months, or has been eliminated by the employer during the previous 12 months;

(b) in a manner that infringes upon a wage rate or an employment benefit, or violates the contractual overtime provisions of a regular employee at that workplace;

(c) in a manner that violates an existing collective bargaining agreement or a statutory provision that applies to that workplace;

(d) in a manner that supplants or duplicates a position in an existing, approved apprenticeship program;

(e) by or through an employment agency or temporary help service firm as a community work experience or alternative work experience worker;

(f) if there is a contractual or statutory recall right to that position at that workplace; or

(g) if there is an ongoing strike or lockout at that workplace.

(2) A person who believes to have been adversely affected by a violation of this subsection, or the organization duly authorized to represent the collective bargaining unit to which that person belongs, shall be given an opportunity to meet with a designee of the Commissioner of Labor or the Governor's Office of Employee Relations. The designee shall attempt to resolve the complaint of the alleged violation within 30 days of the date of the request for the meeting. If the complaint is not resolved within the 30-day period, the complainant may appeal to the New Jersey State Board of Mediation in the Department of Labor for expedited binding arbitration in accordance with the rules of the Board. If the arbitrator finds that a violation has occurred, the arbitrator shall provide an appropriate remedy. Both parties to the dispute shall bear equally the cost of the arbitration.

(3) Nothing in this subsection shall prevent a collective bargaining agreement from containing additional protections for a regular employee.

i. The Commissioner of Labor, acting in conjunction with the Commissioners of Banking and Insurance, Commerce and Economic Development, Community Affairs, Education, Health and Senior Services,

Human Services, Labor and Transportation, shall implement all elements of the program and establish initiatives to help move recipients toward self-sufficiency.

j. The commissioner shall take necessary actions to ensure that the program meets the requirements to qualify for the maximum amount of federal funds due to the State under Pub. L. 104-193.

Source: 44:10-62.

COMMENT

The draft streamlines the language of the source and omits, as unnecessary because executed, requirements that were set for the years between 1997 and 2002 in subsection (c).

2-3. Determination of eligibility for benefits

a. Benefits under the Work First New Jersey program shall be determined according to standards of income and resources established by the commissioner. These standards shall take into account, for the determination of eligibility and the provision of benefits, all income and resources of all persons in the eligible household of which the applicant or recipient is a member, except as provided by law governing the Work First New Jersey program and as prescribed by the commissioner. The benefits to be granted shall be governed by standards established by regulation of the commissioner. The commissioner may set income and resource eligibility and benefits standards that differ with respect to types of eligible households.

b. A recipient, as a condition of eligibility for benefits, shall, subject to good cause exception as defined by the commissioner, be required to:

(1) cooperate to establish the paternity of a child whose paternity is undetermined and to establish and participate in the enforcement of child and medical support obligations;

(2) cooperate with work requirements established by the commissioner;

(3) make application for any other assistance for which members of the eligible household may qualify;

(4) be income and resource eligible as defined by the commissioner, including the deeming of income and resources as appropriate;

(5) provide all necessary documentation which shall include the federal Social Security numbers (SSN) for all eligible household members, except for an eligible alien who cannot be assigned a SSN due to status, or make application for the SSN;

(6) sign an agreement to repay benefits in the event of receipt of income or resources; and

(7) comply with personal identification requirements as a condition of receiving benefits, which may employ the use of high technology processes for the detection of fraud.

c. An applicant shall not be eligible for benefits when the applicant's eligibility is the result of a voluntary cessation of employment without good cause, as determined by the commissioner, within 90 days prior to the date of application for benefits.

d. A voluntary assignment or transfer of income or resources within one year prior to the time of application for benefits for the purpose of qualifying therefore shall render the applicant and the applicant's eligible household members ineligible for benefits for a period of time determined by regulation of the commissioner.

e. Any income or resources that are exempted by federal law for purposes of eligibility for benefits shall not reduce the amount of benefits received by a recipient and shall not be subject to a lien or be available for repayment to the State or county agency for benefits received by the individual.

Source: 44:10-45.

COMMENT

The draft provision is substantively like the source.

2-4. Disregards applied to earned income in computing cash assistance benefits

In computing the cash assistance benefit provided to recipients, disregards shall be applied to the earned income of each person in the eligible household as determined by regulations promulgated by the commissioner.

Source: 44:10-37.

COMMENT

The draft provision is similar to the source but allows regulatory flexibility to allow the Commissioner to follow federal regulations.

2-5. Eligibility of citizens; eligible aliens

Only those persons who are United States citizens or eligible aliens shall be eligible for benefits under the Work First New Jersey program. Single adults or couples without dependent children who are legal aliens who meet federal requirements and have applied for citizenship, shall not receive benefits for more than six months unless (1) they attain citizenship, or (2) they have passed the English language and civics components for citizenship, and are awaiting final determination of citizenship by the federal Immigration and Naturalization Service.

Source: 44:10-48.

COMMENT

The draft provision is identical to the source subsection (a).

2-6. Persons ineligible for assistance

The following persons shall not be eligible for assistance and shall not be considered to be members of an eligible household:

- a. non-eligible caretakers, except that the eligibility of a dependent child shall not be affected by the income or resources of a non- eligible caretaker;
- b. Supplemental Security Income recipients, except for the purposes of receiving emergency assistance benefits pursuant to section 2-9;
- c. illegal aliens;
- d. other aliens who are not eligible aliens;
- e. a person absent from the home who is incarcerated in a federal, State, county or local corrective facility or under the custody of correctional authorities, except as provided by regulation of the commissioner;
- f. a person who: is fleeing to avoid prosecution, custody or confinement after conviction, under the laws of the jurisdiction from which the person has fled, for a crime or an attempt to commit a crime, which is a felony or a high misdemeanor under the laws of the jurisdiction from which the person has fled; or is violating a condition of probation or parole imposed under federal or state law;
- g. a person admitted or committed to an institution other than a residential substance abuse treatment facility that provides for the needs of the person.

Source: 44:10-48.

COMMENT

The draft provision is substantively identical to the source subsection (b) (1) through (6); subsection (g) has been added to reflect settled practice.

2-7. Persons ineligible for assistance due to controlled dangerous substance conviction

a. A person convicted on or after August 22, 1996 under federal or state law of any offense which is classified as a felony or crime under the laws of the jurisdiction involved and which has an element the possession, use, or distribution of a controlled substance as defined in the federal "Controlled Substances Act," 21 U.S.C. sect. 802(6); except that a person convicted of any such offense which has as an element the possession or use only of such a controlled substance may be eligible for Work First New Jersey benefits, and food stamp benefits under the federal "Food Stamp Act of 1977," 7 U.S.C. sect. 2011 et seq., if the person enrolls in or has completed a licensed residential drug treatment program. Eligibility for benefits shall commence upon the person's enrollment in the drug treatment program, and shall continue during the person's active participation in, and upon completion of, the drug treatment program, except that during the person's active participation in a drug treatment program and the first 60 days after completion of a drug treatment program, the commissioner shall provide for testing of the person to determine if the person is free of any controlled substance. If the person is not free of any controlled

substance during the 60-day period, the person's eligibility for benefits pursuant to this paragraph shall be terminated; except that this provision shall not apply to the use of methadone by a person who is actively participating in a drug treatment program as prescribed by the drug treatment program. The commissioner, in consultation with the Commissioner of Health and Senior Services, shall adopt regulations to carry out the provisions of this paragraph, which shall include the criteria for determining active participation in and completion of a drug treatment program.

b. Cash benefits, less a personal needs allowance, for a person receiving benefits under the Work First New Jersey program who is enrolled in and actively participating in a licensed residential drug treatment program shall be issued directly to the drug treatment provider to offset the cost of treatment. Upon completion of the drug treatment program, the cash benefits then shall be issued to the person. In the case of a delay in issuing cash benefits to a person receiving Work First New Jersey benefits who has completed the drug treatment program, the drug treatment provider shall transmit to the person those funds received on behalf of that person after completion of the drug treatment program;

Source: 44:10-48.

COMMENT

The draft provision is identical to the source subsection (b)(7).

2-8. Persons ineligible due to fraudulent misrepresentation

a. A person found in a judicial or administrative proceeding to have fraudulently misrepresented residence in order to obtain public benefits in two or more states or jurisdictions, shall be ineligible for benefits for a period of 10 years.

b. A person who intentionally makes a false or misleading statement or misrepresents, conceals or withholds facts for the purpose of receiving public benefits, shall be ineligible for benefits for a period of six months for the first violation, 12 months for the second violation, and permanently for the third violation.

c. A person who purposely makes a false statement to qualify for public benefits and thereby receives benefits for which the person is not eligible shall be subject to prosecution for a crime.

Source: 44:10-48.

COMMENT

The draft provision is identical to source subsections (b)(8) and (9) and (c).

2-9. Emergency assistance; extension

a. Emergency assistance shall be provided only to recipients of Work First New Jersey and persons receiving Supplemental Security Income in emergent situations, as the commissioner determines, for up to 12 cumulative

months, except that the commissioner may provide for an extension of emergency assistance for up to six additional months to:

(1) an eligible household with dependent children, if the commissioner determines that a case of extreme hardship exists. The commissioner shall review each case on a monthly basis during the six-month period and shall continue the emergency assistance only if the commissioner determines that the extreme hardship continues to exist. If the extreme hardship continues to exist at the end of the six-month period, the commissioner may provide an additional six months of emergency assistance to no more than 10% of those eligible households with dependent children which are receiving temporary rental assistance under the emergency assistance component of the program, based upon the most current data available; and

(2) no more than 10% of single adults and couples without dependent children who are receiving temporary rental assistance under the emergency assistance component of the program, if the commissioner determines that a case of extreme hardship exists. The commissioner shall review each case on a monthly basis during the six-month period and shall continue the emergency assistance only if the commissioner determines, based upon the monthly review that the extreme hardship continues to exist.

b. Any form of emergency assistance provided pursuant to this section shall count toward the maximum period of emergency assistance allowed.

c. A person receiving emergency assistance shall contribute from the person's income toward the payment of all emergency shelter arrangements, including temporary housing and temporary rental assistance, in accordance with regulations adopted by the commissioner. As a condition of receipt of emergency assistance, a person shall be required to take all reasonable steps to end the person's dependency on emergency assistance and take all other actions which the commissioner requires.

d. The commissioner shall adopt regulations to establish classifications for hotel or motel per diem rates in accordance with the level of enhanced services provided at a participating hotel or motel.

e. The provisions of this section shall apply to a person who receives general assistance after the effective date of this act and is subsequently transferred directly into the Work First New Jersey program.

Source: 44:10-51.

COMMENT

The draft provision is substantially like the source.

2-10. Repayment obligation; sanctions

a. A person shall be required to satisfy any sanction or repayment obligation incurred pursuant to any federal or State law governing assistance, including any repealed by this act, as a condition of eligibility for benefits.

b. When a parent or relative with whom a dependent child is living applies for or receives benefits for that child, and it appears that there is pending entitlement to a payment to the child or to the parents or relatives, of funds arising from a claim or interest legally or equitably owned by the child or by the parents or relatives, other than that portion of a personal injury award which a court specifically awards to a child to make the child whole as a result of an injury, the county agency, as a condition of eligibility or continuation of eligibility for benefits, may require parents, or relatives, to execute a written promise to repay from anticipated funds, the amount of benefits to be granted from the date of entitlement to that payment. Upon refusal to repay in accordance with the written promise, including refusal by any person acting for or on behalf of parents or relatives, the county agency may take necessary action under State law to enforce the promise, for which the granting or continuing of benefits shall be due consideration. Any payments from the settlement of the claim or interest legally or equitably owned by the child or by parents or relatives made by any person acting for or on behalf of parents or relatives, after notice of claim by the county agency and before express written approval by the county agency shall cause that person to be liable the county agency in the amount of the payment.

c. When any child for whom benefits have been paid pursuant to this act or assistance paid pursuant to an act repealed by this act, shall die prior to the child's 21st birthday, and shall leave an estate, the total amount of benefits or assistance paid to that child shall be a valid and enforceable claim against that estate, with priority over all other unsecured claims except reasonable funeral expenses and terminal medical and hospital expenses, and the county agency shall take necessary action under State law to enforce that claim.

d. When a person applies for or receives benefits, and it appears that there is pending entitlement to a payment to the person of funds arising from a claim or interest legally or equitably owned by the person, the county or municipal agency, as a condition of eligibility or continuation of eligibility for benefits, may require the person to execute a written promise to repay from anticipated funds, the amount of benefits to be granted from the date of entitlement to that payment. Upon refusal to repay in accordance with the written promise, including refusal by any person acting for or on behalf of the person, the county or municipal agency may take necessary action under State law to enforce the promise, for which the granting or continuing of benefits shall be due consideration. Any payments from the settlement of the claim or interest legally or equitably owned by the person made by any person acting for or on behalf of the person, after notice of claim by the county or municipal agency and before express written approval by the county or municipal agency shall cause that person to be liable the county or municipal agency in the amount of the payment.

e. The county agency, with the consent of the Division of Family Development in the Department of Human Services, may compromise and settle any claim for repayment of benefits paid pursuant to this act or assistance paid pursuant to any act repealed by this act.

Source: 44:10-64.

COMMENT

The draft provision deletes redundant language and reletters the subsections. Subsection (d) reflects settled practice allowing a welfare agency to be reimbursed for benefits paid to an adult while a claim is pending.

2-11. Primary responsibility for support; benefits eligibility

a. All adult persons, except as otherwise provided in the Work First New Jersey program, are charged with the primary responsibility of supporting and maintaining themselves and their dependents; the primary responsibility for the support and maintenance of minor children is that of the parents and family of those children; and benefits shall be provided only when other means of support and maintenance are not present to support the eligible household.

b. Benefits shall be temporary and serve the primary goal of fostering self-sufficiency.

c. Failure to cooperate with any of the program eligibility requirements without good cause, as determined by the commissioner, shall result in ineligibility for benefits for some or all eligible household members.

d. If the county or municipal assistance agency determines, from an applicant's written statement signed under oath, that the applicant needs benefits immediately because the applicant's available resources are insufficient, according to the commissioner, to meet minimal current living expenses pursuant to regulations adopted by the commissioner, of the applicant's eligible household, the county or municipal agency shall issue cash assistance benefits or appropriate services to the applicant on the date of application, subject to the applicant's meeting all other program eligibility requirements.

e. The commissioner shall establish by regulation, standards and procedures to screen and identify applicants and recipients with a history of being subjected to domestic violence and refer these recipients to counseling and supportive services. The commissioner may waive program requirements, including, but not limited to, the time limit on benefits, residency requirements, child support cooperation requirements, and the limitation on increase of cash assistance benefits as a result of the birth of a child, in cases where compliance with such requirements would make it more difficult for a recipient to escape domestic violence or unfairly penalize the recipient who is or has been victimized by such violence, or who is at risk of further domestic violence.

Source: 44:10-59.

COMMENT

The draft is substantially like the source, but omits as unnecessary because already executed, subsection (e) which states that the commissioner shall establish regulations.

2-12. Noncompliance to result in loss of certain cash benefits.

In an assistance unit with a single adult or couple without dependent children or a single adult or couple with dependent children, the failure of a recipient to actively cooperate with the Work First New Jersey program, established pursuant to P.L.1997, c.38 (C.44:10-55 et seq.), or participate in work activities under the program, without good cause as determined by the commissioner, shall result in a loss of cash assistance benefits in accordance with the provisions of this section.

Prior to the imposition of a sanction, the county or municipal welfare agency shall determine whether good cause for noncompliance exists. Good cause shall include, but is not limited to, disability or other circumstances, as defined by the commissioner, which effectively impair a recipient's ability to actively cooperate with the Work First New Jersey program or participate in work activities under the program.

a. Prior to the imposition of a sanction, the county or municipal welfare agency shall ensure that, in consultation with the recipient, an assessment has been given in accordance with subsection f. of section 8 of P.L.1997, c.38 (C.44:10-62), and a determination has been made that barriers do not exist which are likely to prevent the recipient from complying with the work requirements or other activities specified in the individual responsibility plan; provided that, this prerequisite to the imposition of a sanction shall not apply if the recipient, without good cause, has refused to cooperate with the conduct of the assessment.

The county or municipal welfare agency shall determine if a sanctionable offense has occurred and whether good cause exists by:

(1) reviewing the case record to determine whether a comprehensive assessment or other information in the file indicates that good cause for noncompliance exists, and

(2) outreaching to the recipient, to attempt, in consultation with the recipient, to determine the reason for noncompliance and whether it constitutes good cause.

If good cause requires that services be provided in order for the recipient to comply, then services shall be provided prior to any reassignment of work activities, as appropriate.

The recipient shall be provided with reasonable accommodations in work activities for identified disabilities and, when necessary given the condition, deferred from participation.

The recipient shall be advised of the right to contest the sanction if he disagrees with the agency determination to impose the sanction.

b. In an assistance unit with one adult, if the adult fails to actively cooperate with the program or participate in work activities without good cause,

the cash assistance benefit provided to the assistance unit shall be reduced by the pro-rata share of the noncompliant adult for one month.

(1) If the adult fails to actively cooperate with the program or participate in work activities by the end of the first-month pro-rata sanction, without good cause, the assistance unit's cash assistance case shall be suspended for one month. If the participant complies by the end of the suspension month, the suspension shall be lifted.

(2) If the adult fails to actively cooperate with the program or participate in work activities by the end of the suspension month, without good cause, the assistance unit's cash assistance case shall be closed for a minimum one-month period, and the assistance unit shall be required to reapply in order to receive further cash assistance benefits.

c. In an assistance unit with two adults, if one adult fails to actively cooperate with the program or participate in work activities without good cause, the cash assistance benefit provided to the assistance unit shall be reduced by the pro-rata share of the noncompliant adult for one month. If the adult fails to comply by the end of the sanction month, the pro-rata reduction shall continue until the recipient demonstrates an intent to comply.

If both adults fail to actively cooperate with the program or participate in work activities without good cause, the cash assistance benefit provided to the assistance unit shall be reduced by the pro-rata share of the noncompliant adults for one month. If both adults fail to actively cooperate with the program or participate in work activities by the end of the sanction month, without good cause, the assistance unit's cash assistance case shall be closed for a minimum one-month period, and the assistance unit shall be required to reapply in order to receive further cash assistance benefits.

d. If a dependent child 16 years of age or older fails to comply with the requirement for school attendance or other work activity participation, without good cause, the dependent child shall be subject to a pro-rata reduction of cash assistance benefits for one month. If the dependent child fails to comply by the end of the sanction month, the pro-rata reduction shall continue until the dependent child demonstrates an intent to comply.

e. If a cash assistance case is closed due to a sanction, and the recipient is receiving emergency assistance benefits, then the household shall continue to receive emergency assistance benefits for one month immediately following the case closure.

If the recipient comes into compliance and reapplies for cash assistance benefits, the emergency assistance benefits shall be reinstated if the emergency still exists.

f. If a recipient who is less than 18 years of age is living in a Work First New Jersey-funded appropriate living arrangement because the recipient is unable to live with a parent, guardian, or other adult relative, funding for the living arrangement shall continue for one month immediately following the case closure.

g. An adult recipient who voluntarily quits a job without good cause, as defined by regulation of the commissioner, shall render the entire assistance unit ineligible for cash assistance benefits for a period of two months from the date the county agency or municipal welfare agency, as appropriate, makes the determination that the recipient quit the job.

Source: 44:10-63.1.

COMMENT

The section is identical to the source.

2-13. Community, alternative work experience not employment; exceptions

a. A recipient's participation in a community or alternative work experience provided by a sponsor pursuant to this act shall not be considered employment for any purpose, except that it shall be regarded as employment for the purposes of:

(1) the "Law Against Discrimination," N.J.S. 10:5-1 et seq., and the sponsor, not the program, shall be deemed the employer in any action brought under that act;

(2) the "New Jersey Public Employees' Occupational Safety and Health Act," N.J.S. 34:6A-25 et seq., if the sponsor is a public employer subject to that act;

(3) the "Conscientious Employee Protection Act," N.J.S. 34:19-1 et seq., and the "Worker and Community Right to Know Act," N.J.S. 34:5A-1 et seq.; and

(4) 34:15-1 et seq., subject to the provisions of this act;

b. The recipient shall be entitled, to the same degree as any similarly-situated employee of the sponsor, to family leave pursuant to the "Family Leave Act," N.J.S. 34:11B-1 et seq., and family and medical leave pursuant to federal law.

Source: 44:10-65.

COMMENT

The draft provision is substantially like the source.

2-14. Workers' compensation status of recipient participating in community, alternative work

a. For the purposes of R.S. 34:15-1 et seq., a recipient who participates in a community or alternative work experience shall be regarded as an employee of the State and the sponsor. The State shall provide the recipient and the dependents of the recipient with all compensation required, and defenses and remedies available, except for:

(1) compensation provided for temporary disability pursuant to subsection (a) of R.S. 34:15-12; and

(2) medical and hospital services provided pursuant to R.S. 34:15-15 unless the recipient becomes ineligible for medical assistance under the "New Jersey Medical Assistance and Health Services Act," N.J.S. 30:4D-1 et seq.

If the recipient has been subject to an injury or illness producing a temporary disability, the program shall not provide compensation pursuant to subsection (a) of R.S. 34:15-12, but the recipient shall receive cash benefits from the program and shall be deferred from the work activity requirements. The recipient shall be exempted from the 60-month time limit for receipt of benefits during the first 90 days of each period of temporary disability subject to the provisions of this section.

b. The amount of compensation provided pursuant to R.S. 34:15-1 et seq. for other than temporary disability shall be calculated as if the recipient's weekly wage was 60% of the statewide average weekly wages earned by all employees covered by the unemployment compensation law, R.S. 43:21-1 et seq. The program may provide this compensation by purchasing and serving as the master policyholder for any insurance, self-insurance, or an administrative services contract; or by other appropriate means.

c. Compensation which a recipient receives pursuant to R.S. 34:15-1 et seq. for a disability caused by an injury or illness arising out of the community or alternative work experience, and which is permanent in quality and partial or total in character, shall not be regarded as earned income for the purposes of section 2-4 and there shall not be a disregard for that amount in computing the cash assistance benefit provided to the recipient.

d. Compensation which a dependent of a recipient receives pursuant to R.S. 34:15-1 et seq. for the death of the recipient caused by an injury or illness which arises out of community or alternative work experience shall not be regarded as earned income for the purposes of section 2-4 and there shall not be a disregard for that amount in computing the cash assistance benefit provided to the dependent.

Source: 44:10-66.

COMMENT

The draft provision streamlines language of the source and breaks the single paragraph of the source into logical subsections.

2-15. Injury, illness, death arising from community, alternative work

a. Any recipient participating in community or alternative work, or dependent of the recipient, who receives compensation, benefits, or both from the State pursuant to section 2-14 of this act for an injury, illness or death arising out of community or alternative work experience shall surrender any other compensation or benefits from the sponsor or the State for that injury, illness or death. The sponsor of the recipient, the State and the employees of the sponsor shall not be liable for the injury, illness or death for which the recipient or dependent of the recipient receives the compensation, benefits, or both, except for an intentional wrong.

b. "Sponsor" means a private nonprofit employer, private charitable employer, or public employer that provides a community or alternative work experience to a recipient.

Source: 4:10-67.

COMMENT

The draft provision streamlines the language of the source.

2-16. Tort action against program; reimbursement

a. The sole recourse of a person, other than a recipient or a sponsor, who is injured as a result of an act or omission of a recipient in connection with the recipient's community or alternative work experience, shall be to file an action against the program.

b. The program shall have available all of the notice requirements and the defenses available to the State under the "New Jersey Tort Claims Act," N.J.S. 59:1-1 et seq., except that the program shall not have available to it the defense that the recipient is not a public employee.

c. The program shall reimburse the fund established pursuant to N.J.S. 59:12-1 for all costs incurred by the fund in connection with a recipient's participation in community or alternative work experience.

Source: 4:10-68, 4:10-69.

COMMENT

The draft provision combines the two sources and streamlines their language.

2-17. Time limit on benefit eligibility; exemptions

A recipient's eligibility for benefits shall be limited to a total of 60 cumulative months, except as otherwise provided in this act, regardless of whether the recipient meets more than one assistance unit criteria during that 60-month period. Receipt of assistance from federal block grant funds for temporary assistance for needy families provided by another state or territory pursuant to the federal "Personal Responsibility and Work Opportunity Reconciliation Act of 1996," Pub.L.104-193, shall count towards the 60-month time limit. The provisions of this section shall apply to a person who receives general public assistance pursuant to P.L.1947, c.156 after the effective date of this act and is subsequently transferred directly into the Work First New Jersey program. Receipt of benefits as a dependent child or minor parent shall not count towards the 60-month time limit in the event that the dependent child or minor parent becomes a head of household in the child's or parent's own right for the purposes of receiving benefits.

b. A recipient shall be exempted from the 60-month time limit established pursuant to subsection a. of this section if the recipient is:

(1) over 60 years of age;

(2) the parent or other relative of a disabled child or other disabled dependent who must provide full-time care for the disabled child or other disabled dependent;

(3) permanently disabled, including, but not limited to, a person eligible for disability insurance benefits under Title II of the federal Social Security Act (42 U.S.C.s.401 et seq.), as defined by regulation of the commissioner; or
(4) chronically unemployable as defined by regulation of the commissioner.

c. A recipient may receive an extension of no more than 12 cumulative months beyond the 60-month time limit established pursuant to subsection a. of this section, to be granted in increments that shall not exceed six months, if the commissioner determines that the recipient meets one of the following criteria:

(1) the recipient or the recipient's dependent child would be subject to extreme hardship or incapacity, as defined by regulation of the commissioner, if benefits were terminated;

(2) the recipient is engaged in full-time employment but remains eligible for benefits due to earned income disregards provided for under section 4 of P.L.1997, c.13 (C.44:10-37);

(3) the recipient has not received an opportunity to engage in work activities as specified in the individual responsibility plan pursuant to subsection f. of section 8 of P.L.1997, c.38 (C.44:10-62); or

(4) the recipient was engaged in full-time employment and was income-ineligible for benefits but was terminated from the employment through no fault of the recipient.

Source: 4:10-72.

COMMENT

The draft provision is substantively like the source.

2-18. Supportive services

The program shall provide supportive services to a recipient as a last resort when no other source of support is available; however the recipient shall be required to seek continuously other sources of support. Supportive services shall include, but not be limited to, one or more of the following:

a. child care services, including after-school child care, for eligible dependent children, to be provided during the recipient's program eligibility period and for 24 consecutive months following ineligibility for benefits as a result of receipt of earned income. An adult recipient who continues to be eligible to receive child care services following ineligibility for benefits, and an adult recipient who is employed but continues to receive benefits, shall pay a copay for child care services in accordance with a sliding fee scale established by the commissioner, which shall be no greater than the child care co-payment schedule established pursuant to N.J.A.C. 10:81-14.18A;

b. transportation services to be provided directly by the program or through an allowance or other means of subsidy by which the recipient may purchase transportation; and

c. a limited allowance for each eligible household to cover work-related expenses necessary to engage in required work activities, as determined by the commissioner.

Source: 44:10-38.

COMMENT

The draft provision is substantively identical to subsection (a) of the source.

2-19. Work First New Jersey Program, failure to cooperate, sanctions.

In an assistance unit with a single adult or couple without dependent children or a single adult or couple with dependent children, the failure of a recipient to actively cooperate with the Work First New Jersey program, established pursuant to P.L.1997, c.38 (C.44:10-55 et seq.), or participate in work activities under the program, without good cause as determined by the commissioner, shall result in a loss of cash assistance benefits in accordance with the provisions of this section.

Prior to the imposition of a sanction, the county or municipal welfare agency shall determine whether good cause for noncompliance exists. Good cause shall include, but is not limited to, disability or other circumstances, as defined by the commissioner, which effectively impair a recipient's ability to actively cooperate with the Work First New Jersey program or participate in work activities under the program.

a. Prior to the imposition of a sanction, the county or municipal welfare agency shall ensure that, in consultation with the recipient, an assessment has been given in accordance with subsection f. of section 8 of P.L.1997, c.38 (C.44:10-62), and a determination has been made that barriers do not exist which are likely to prevent the recipient from complying with the work requirements or other activities specified in the individual responsibility plan; provided that, this prerequisite to the imposition of a sanction shall not apply if the recipient, without good cause, has refused to cooperate with the conduct of the assessment.

The county or municipal welfare agency shall determine if a sanctionable offense has occurred and whether good cause exists by:

(1) reviewing the case record to determine whether a comprehensive assessment or other information in the file indicates that good cause for noncompliance exists, and

(2) outreaching to the recipient, to attempt, in consultation with the recipient, to determine the reason for noncompliance and whether it constitutes good cause.

If good cause requires that services be provided in order for the recipient to comply, then services shall be provided prior to any reassignment of work activities, as appropriate.

The recipient shall be provided with reasonable accommodations in work activities for identified disabilities and, when necessary given the condition, deferred from participation.

The recipient shall be advised of the right to contest the sanction if he disagrees with the agency determination to impose the sanction.

b. In an assistance unit with one adult, if the adult fails to actively cooperate with the program or participate in work activities without good cause, the cash assistance benefit provided to the assistance unit shall be reduced by the pro-rata share of the noncompliant adult for one month.

(1) If the adult fails to actively cooperate with the program or participate in work activities by the end of the first-month pro-rata sanction, without good cause, the assistance unit's cash assistance case shall be suspended for one month. If the participant complies by the end of the suspension month, the suspension shall be lifted.

(2) If the adult fails to actively cooperate with the program or participate in work activities by the end of the suspension month, without good cause, the assistance unit's cash assistance case shall be closed for a minimum one-month period, and the assistance unit shall be required to reapply in order to receive further cash assistance benefits.

c. In an assistance unit with two adults, if one adult fails to actively cooperate with the program or participate in work activities without good cause, the cash assistance benefit provided to the assistance unit shall be reduced by the pro-rata share of the noncompliant adult for one month. If the adult fails to comply by the end of the sanction month, the pro-rata reduction shall continue until the recipient demonstrates an intent to comply.

If both adults fail to actively cooperate with the program or participate in work activities without good cause, the cash assistance benefit provided to the assistance unit shall be reduced by the pro-rata share of the noncompliant adults for one month. If both adults fail to actively cooperate with the program or participate in work activities by the end of the sanction month, without good cause, the assistance unit's cash assistance case shall be closed for a minimum one-month period, and the assistance unit shall be required to reapply in order to receive further cash assistance benefits.

d. If a dependent child 16 years of age or older fails to comply with the requirement for school attendance or other work activity participation, without good cause, the dependent child shall be subject to a pro-rata reduction of cash assistance benefits for one month. If the dependent child fails to comply by the end of the sanction month, the pro-rata reduction shall continue until the dependent child demonstrates an intent to comply.

e. If a cash assistance case is closed due to a sanction, and the recipient is receiving emergency assistance benefits, then the household shall continue to receive emergency assistance benefits for one month immediately following the case closure.

If the recipient comes into compliance and reapplies for cash assistance benefits, the emergency assistance benefits shall be reinstated if the emergency still exists.

f. If a recipient who is less than 18 years of age is living in a Work First New Jersey-funded appropriate living arrangement because the recipient is unable to live with a parent, guardian, or other adult relative, funding for the living arrangement shall continue for one month immediately following the case closure.

g. An adult recipient who voluntarily quits a job without good cause, as defined by regulation of the commissioner, shall render the entire assistance unit ineligible for cash assistance benefits for a period of two months from the date the county agency or municipal welfare agency, as appropriate, makes the determination that the recipient quit the job.

Source: 44:10-63.1

COMMENT

This section is identical to its source which was enacted in 2007.

Chapter 3 – General Assistance Program

3-1. Income from other sources; deductions from assistance; exception

a. An applicant for assistance who receives or is entitled to receive income from other sources or compensation may remain eligible to receive assistance if the income or compensation is less than the program eligibility standards.

b. Other income or compensation as defined by the Commissioner shall be deducted in the manner prescribed by law from the amount of assistance which the applicant otherwise would be entitled to receive.

c. Any money received because of a settlement agreement or judgment in a lawsuit brought against a manufacturer or distributor of “Agent Orange” for damage resulting from exposure to “Agent Orange” shall not be subject to a lien or be available for repayment to the State, county or municipality for public assistance the applicant receives.

Source: 44:8-125.

COMMENT

This section is substantially similar to the source provision which was amended in 1995 to include counties as well as municipalities.

3-2. Inquiry into eligibility; record

a. A person who applies for assistance shall submit an affidavit attesting to the correctness of the application.

b. The agency administering assistance shall inquire into the facts and circumstances of the case, including customary place of abode, family connections, living conditions, resources, income, and causes of the person's need, and other matters that state regulations require.

c. A written record of the inquiry shall be made in the form prescribed by the commissioner.

Source: 44:8-119, 44:8-121, 44:8-122.

COMMENT

The draft combines the sources. In subsection (b), the phrase "family connections" condenses provisions in earlier statutes (N.J.S. 44:1-87 and 44:4-82) that directed the "overseer" to ascertain whether family members existed who were "by law required and able to maintain" the needy person.

3-3. Type and extent of assistance; revocation; continuing duty

a. Assistance to eligible persons may be provided by:

(1) cash assistance, or

(2) any other method authorized by the agency administering general assistance in compliance with regulations.

b. The extent of individual grants shall be determined in accordance with standards and budgets which the commissioner authorizes by regulation.

c. Assistance may be discontinued when the person receiving it is no longer eligible.

d. As provided by regulations, a recipient has a continuing duty to inform the agency providing assistance of changes in financial or personal situation which impact benefit eligibility.

Source: 4:8-123, 44:8-124, 44:8-127, New.

COMMENT

Draft provision Subsections (a)–(c) combine the three sources. Subsection (d) is new and imposes a responsibility upon the recipient to report changes that impact eligibility.

3-4. Employable persons to work; exemption; noncompliance

a. An employable person receiving assistance shall be required to comply with the work requirements of Section 2-2, except for good cause as determined by the commissioner.

b. The commissioner, by regulation, may determine to exempt a person from the work requirement for reasons of physical or mental impairment, age, illness, injury, caretaker responsibilities, employment or unsuitability.

c. Any person who without good cause does not comply with the work requirements, according to regulations, shall be subject to loss of cash and any other assistance benefits as provided by this Title.

Source: 44:8-114.

COMMENT

The draft streamlines the source.

3-5. Certain medical assistance allowed

a. Single adults and couples without dependent children shall not be eligible for medical assistance for inpatient or outpatient hospital care or long-term care under the program, except that medical assistance shall be provided for the following, in accordance with regulations adopted by the commissioner:

(1) inpatient hospitalization costs for a recipient of general assistance who is admitted to a hospital licensed by the Department of Health and Senior Services which is not eligible to receive a charity care subsidy from the Health Care Subsidy Fund established pursuant to N.J.S. 26:2H-18.51 et al, and to which payments were made prior to July 1, 1991, on behalf of patients receiving general assistance; and

(2) nursing home costs for an alien residing in a Medicaid certified nursing facility prior to the effective date of this act who is not Medicaid-eligible under Pub. L. 104-193; which assistance shall continue until the person is no longer eligible for long-term care.

b. The provisions of this section shall not affect the eligibility of a single adult or a couple without dependent children for the New Jersey Family Care Health Coverage Program established pursuant to N.J.S. 30:4J-4.

Source: 44:10-40.

COMMENT

The draft is substantially like its source. Subsection (b) was added in 2000.

3-6. Immediate public assistance

Immediate public assistance shall be rendered promptly to any person who appears to be eligible for assistance. Immediate public assistance shall be the responsibility of the director of welfare where the person is found at the time of application except that persons residing in facilities providing residential therapeutic medical services are the responsibility of the municipality of their customary place of abode prior to placement in such facility.

Source: 44:8-120.

COMMENT

The draft streamlines the source provision.

Chapter 4 – Temporary Assistance for Needy Families (TANF)

4-1. Evaluation of caregiver's eligibility for benefits

A person other than a parent or stepparent who is a caregiver to a dependent child who is that caregiver's legal or blood relative or guardian, shall be evaluated to determine whether that person is eligible for benefits.

Source: 44:10-35.

COMMENT

The draft is substantively identical to the source.

4-2. Eligibility of parent for benefits

a. A parent eligible for benefits, married to a person who is not the parent of one or more of the eligible parent's children, shall not be eligible for benefits if the household income exceeds the income eligibility standard.

b. The eligible parent's children shall be eligible for benefits according to a sliding income scale established by the commissioner which does not take into account the income of the eligible parent's spouse.

c. The spouse of the eligible parent and the spouse's child, if any, who is living with the family, who is not the eligible parent's child, shall not be eligible for benefits.

Source: 44:10-36.

COMMENT

The draft provision is substantively identical to the source.

4-3. Eligibility of certain drug offenders for food stamps and medical services

a. A person convicted of any offense that has as an element the distribution of a controlled substance as defined in section 102(6) of the federal "Controlled Substances Act," 21 U.S.C. sect. 802(6), who meets the eligibility criteria for Work First New Jersey General Assistance or Work First New Jersey Temporary Assistance to Needy Families benefits may receive food stamp benefits under the federal "Food Stamp Act of 1977," 7 U.S.C. sect. 2011 et seq. The department shall determine eligibility for food stamps and the eligibility may continue upon completion of a licensed residential drug treatment program.

b. A person convicted of any offense that has as an element the distribution of a controlled substance as defined in section 102(6) of the federal "Controlled Substances Act," 21 U.S.C. sec.802(6), who meets the eligibility criteria for Work First New Jersey General Assistance benefits may receive medical services only. The medical services shall not exceed benefits offered in the Work First New Jersey General Assistance program. Access to these medical services is limited to the time a person is receiving treatment in a licensed residential drug treatment program.

c. Eligibility for benefits under subsection (a) or (b) of this section shall commence upon the person's enrollment in the drug treatment program, and shall continue during the person's active participation in, and upon completion of, the drug treatment program, except that during a person's active participation in a drug treatment program and the first 60 days after completion of a drug treatment program, the commissioner shall provide for testing of the person to determine if the person is free of any illegal controlled substance. If the person is not free of any illegal controlled substance during the 60-day period, the person's eligibility for benefits pursuant to this section shall be terminated; this provision shall not apply to the use of methadone by a person who is actively participating in a drug treatment program, as prescribed by the drug treatment program.

d. The Commissioner of Human Services, in consultation with the Commissioner of Health and Senior Services, shall adopt regulations to implement this section, which shall include the criteria for determining active participation in and completion of a drug treatment program.

Source: 44:10-48.1.

COMMENT

The draft is substantially like the source, but omits a concluding subsection which defines "WFNJ-GA" and "WFNJ-TANF"; the definition sections for both aspects of the Work First New Jersey program define "benefits" and "assistance unit." No analogous provisions exist in the CFR.

4-4. Notification required when dependent child is absent from home

a. A dependent child who has been or is expected by a parent, legal guardian or caretaker relative to be absent from the home for a period of time established by regulation of the commissioner, shall remain eligible for benefits during that period, except that, an absence for periods or for reasons other than those stated in the regulations adopted by the commissioner shall be cause for denial or termination of benefits for that dependent child.

b. A parent, legal guardian or caretaker relative who does not report the absence of a dependent child to the county agency by the end of the five-day period beginning on the day that the parent, legal guardian or caretaker relative becomes aware that the child is absent, shall be ineligible for benefits pursuant to federal law for a period of time which the commissioner decides.

Source: 44:10-50.

COMMENT

The draft provision is substantially like the source.

4-5. Medical services

a. Medical assistance shall be provided to an eligible household with dependent children pursuant to N.J.S. 30:4D-1 et seq.

b. In accordance with the provisions of N.J.S. 30:4D-6(c) which provides for a continuation of medical assistance for a period of 24 consecutive months after TANF benefits have been terminated due to:

(1) coverage solely of the adult head of an eligible household by an employer's health insurance plan shall not preclude other members of the eligible household from receiving the additional 24 months of medical assistance; and

(2) an eligible household with dependent children which, using the limits and methodologies contained in Title IV-A, would not be eligible for cash assistance under Title IV-A as a result of the collection of child or spousal support under Title IV-D of the federal Social Security Act, 42 U.S.C. 651 et seq., shall receive an additional four consecutive months of medical assistance beginning with the first month of ineligibility under the provisions of Title IV-A.

Source: 44:10-38.

COMMENT

The draft provision is substantively identical to subsection (b) of the source.

4-6. Subsidy for campus-based child care

A public college which provides campus-based child care and any work activity to a recipient as part of that recipient's individual responsibility plan pursuant to Section 2-2, shall receive a subsidy for the provision of child care from the commissioner in accordance with regulations adopted by the commissioner.

Source: 44:10-39.

COMMENT

The draft provision is substantively identical to the source.

4-7. Signing application for benefits constitutes assignment of child support rights

a. The signing of an application for benefits under the Work First New Jersey program shall constitute an assignment of any child support rights pursuant to Title IV-D on behalf of individual eligible household members to the county agency. The assignment shall terminate with respect to current support rights when a determination is made by the county agency that the person in the eligible household is no longer eligible for benefits. The determination of the amount of repayment to the county agency and distribution of any unpaid support obligations that have accrued during the period of receipt of benefits shall be determined by regulation of the commissioner in accordance with federal law.

b. An eligible household eligible for benefits and in receipt of child support shall receive, in addition to its regular grant of cash assistance benefits, a monthly amount determined under regulations promulgated by the Commissioner in accordance with federal law and based on the amount of current child support received for that month

Source: 44:10-49.

COMMENT

To the extent that the draft provision differs from its source, it reflects federal law and practice.

4-8. No increase in benefits due to birth of a child; exceptions

a. The level of cash assistance benefits payable to an eligible household with dependent children shall not increase as a result of the birth of a child during the period in which the eligible household is eligible for benefits, or during a temporary period in which the eligible household is ineligible for benefits pursuant to a penalty imposed by the commissioner for failure to comply with benefit eligibility requirements, after which the eligible household is again eligible for benefits.

b. The provisions of subsection (a) shall not apply to medical assistance pursuant to N.J.S. 30:4D-1 et seq. or to food stamp benefits, pursuant to the federal "Food Stamp Act of 1977," 7 U.S.C. sect. 2011 et seq.

c. For an eligible household with dependent children in which the adult or minor parent recipient gives birth to an additional child during the period in which the eligible household is eligible for benefits, or during a temporary penalty period of ineligibility for benefits after which the eligible household again becomes eligible for benefits, the commissioner shall provide that in computing the amount of cash assistance benefits to be granted to the eligible household, the following shall be deducted from the monthly earned income of each employed person in the eligible household:

(1) earned income disregards; and

(2) after application of the earned income disregards, the total countable income shall be compared for eligibility purposes and subtracted for cash assistance benefit calculation purposes from the eligibility standard for the eligible household size, adjusted to include any person for whom cash assistance has not been received due to the application of subsection (a) provisions.

d. This section shall not apply to an eligible household with dependent children for a child born less than 10 months after applying for and receiving cash assistance benefits.

e. This section shall not apply to the birth of a child that occurs as a result of rape or incest.

Source: 44:10-61.

COMMENT

The draft provision is substantially like the source. Language has been simplified. One subsection has been deleted.

4-9. Benefits requirements, persons younger than 18 years with a dependent child

a. If an applicant or recipient is younger than 18 years, has never been married, and is pregnant or is caring for a dependent child, the applicant or recipient shall be required, as a condition of eligibility for benefits for the applicant or recipient and the applicant's or recipient's dependent child to:

(1) reside in a home maintained by, and have the benefits paid to, the applicant's or recipient's parent, legal guardian, or other adult relative; and

(2) engage in a work activity if the applicant or recipient has completed secondary education.

b. The commissioner shall exempt from the provisions of paragraph (1) of subsection (a) of this section an applicant or recipient who the commissioner determines during the application or eligibility redetermination process to present evidence that the parent, legal guardian or other adult relative with whom the applicant or recipient would be required to reside in order to be eligible for benefits:

(1) refuses or is unable to allow the applicant or recipient, or that person's dependent child, to reside in that adult's home;

(2) poses a threat to the emotional health or physical safety of the applicant or recipient or that person's dependent child;

(3) has physically or sexually abused the applicant or recipient, or the applicant's or recipient's dependent child, or poses a risk of doing so; or

(4) has exhibited neglect with respect to the needs of the applicant or recipient or the applicant's or recipient's dependent child.

c. In determining to exempt an applicant or recipient pursuant to this subsection, the commissioner shall get information directly from that applicant or recipient when there has been any known circumstance or incident of physical or sexual abuse, or upon the applicant's or recipient's request.

d. For an applicant or recipient and the applicant's or recipient's dependent child who are exempted from the requirements of subsection (a)(1), in accordance with subsection (b), the county agency, pursuant to the commissioner's guidelines, shall determine the most appropriate living arrangements in the best interest of the applicant or recipient and the applicant's or recipient's dependent child.

e. The commissioner shall exempt from the provisions of subsection (a)(2) an applicant or recipient whom the commissioner determines by assessing the person's ability and aptitude, to lack a reasonable prospect of successfully completing the academic requirements of a high school or equivalency program of study.

f. The commissioner also may exempt an applicant or recipient from the provisions of subsection (a) if the commissioner determines the exemption to be

in the best interest of the applicant or recipient and the applicant's or recipient's dependent child.

g. The commissioner shall arrange an appropriate review mechanism for an applicant or recipient to present evidence that would provide the basis for an exemption.

Source: 44:10-60.

COMMENT

The draft provision streamlines the language of the source.

Chapter 5 – Administration

5-1. Reports on Work First New Jersey program

a. The commissioner, in cooperation with other affected agencies of State government, shall report biennially to the Governor and the Legislature on the Work First New Jersey program including in the report any recommendations for changes in the law or regulations governing the program that the commissioner deems necessary to further the goals of the program. The commissioner shall determine the manner and terms of the reporting in accordance with the requirements of federal law.

b. The commissioner shall issue a public report at least quarterly concerning the number of recipients: (1) in the program, (2) classified as exempt from time limits or deferred from work requirements, (3) classified as to the degree of employability as defined by the commissioner, (4) who have obtained employment, (5) terminated from the program and the reasons for the terminations; and: (1) the average wages and benefits earned by recipients, (2) the types of employment obtained by recipients and whether the employment is in the public or private sector, (3) the average length of stay in their jobs by recipients who reapply for benefits, (4) and the number of former recipients who have re-entered the program after being terminated.

c. To the extent not provided by subsections (a) or (b), the commissioner shall conduct research appropriate for evaluating the outcomes for recipients, and the benefits, costs and other effects of the program, and shall submit any report resulting from the research to the Governor and the Legislature, and make copies available to the public.

Source: 44:10-41.

COMMENT

The draft provision is substantially like the source except that it omits the final paragraph of the source, as unnecessary as executed (Studying the Michigan Civilian Conservation Corps program and submitting a report to the Governor and Legislature by January 1, 1998).

Federal law does not provide the guidelines for the State Commissioner reporting to state officials; requirements for reporting to the federal officials are provided in 45 C.F.R. § 265: Data Collection and Reporting Requirements.

Specifically, § 265.3 deals with quarterly reports (TANF data report, TANF Financial Report, SSP-MOE Data Report), and § 265.9 deals with annual reports.

5-2. Updating standard of need

a. The commissioner annually shall update the regulation establishing a standard of need.

b. The standard of need shall serve only as a benchmark against which the Legislature may decide on appropriations to fund cash assistance benefits to recipients.

Source: 44:10-42.

COMMENT

The draft is substantively identical to the source.

5-3. Disclosure of applicant's information

a. Information concerning applicants or recipients shall not be disclosed except for purposes directly connected with the administration of the program, in accordance with regulations adopted by the commissioner. Any person or entity under contract to provide services to the program shall comply with these regulations.

b. This section shall not prohibit the exchange of information among agencies, organizations or other entities as prescribed by the commissioner or pursuant to federal requirements.

Source: 44:10-47.

COMMENT

The draft provision is substantially like the source.

5-4. Waiving compliance with Work First New Jersey program for certain projects

a. For an experimental, pilot or demonstration project that the commissioner judges will likely assist in promoting the objectives of the Work First New Jersey program, or to promote the objectives of the Title IV-D child support enforcement program in the State, the commissioner may waive compliance with the requirements of the Work First New Jersey program to the extent deemed necessary to carry out the project and for a period not exceeding three years, during which the commissioner shall report the project's progress to the Legislature at least every six months.

b. However, the commissioner shall not waive compliance with the provisions of Section 2-2 or implement a pilot or demonstration project that circumvents or obstructs a collective bargaining agreement.

c. The commissioner shall provide an opportunity for public comment prior to the project's implementation.

d. The commissioner shall establish any appropriate fiscal or evaluative terms and conditions for the project.

Source: 44:10-53.

COMMENT

The draft is substantively like the source, but streamlines and organizes the content.

5-5. County agency implementation of TANF program

The county agency shall be responsible for implementing the Temporary Assistance for Needy Families program in accordance with regulations adopted by the Commissioner and ensuring that all eligible persons residing in the county have access to benefits.

Source: 44:10-73.

COMMENT

The draft provision derives from Subsection (a) of the source provision.

5-6. Reimbursement for administrative costs

The State, in accordance with procedures established by the commissioner, shall reimburse the county for 100% of the administrative costs incurred of providing cash assistance benefits to the eligible single adults and couples without dependent children residing in a municipality which has transferred its administration of general administration to the county, up to the maximum amount allocated for that county by the commissioner and within the limits of funds available for that purpose.

Source: 44:10-73.

COMMENT

The draft provision derives from source Subsection (b).

5-7. Municipal administration of General Assistance Program

a. A municipality that now administers its General Assistance Program may continue to do so. By resolution, the municipality may end its administration of the Program and transfer responsibility for administration to the county. A copy of the resolution shall be provided to the Division of Family Development in the Department of Human Services within three days of its passage.

b. For a municipality that administers general assistance, the commissioner may:

(1) allow issuance of cash assistance benefits, in accordance with regulations, by check, electronic benefit distribution, or other appropriate means; and

(2) require the municipality to report information necessary for proper administration of the program through electronic means, as prescribed by regulation.

c. The Division of Local Government Services in the Department of Community Affairs shall not include the municipality's general assistance budget in its budget review and approval process.

d. A municipality that administers general assistance shall be responsible for all administrative costs of providing benefits to eligible single persons and couples without dependent children. The State shall reimburse the municipality for 100% of cash assistance benefits paid to recipients of general assistance.

e. If the commissioner determines by financial or performance audit that a municipality has failed to administer benefits pursuant to this subsection in accordance with standards established by regulation of the commissioner, the commissioner may: take appropriate action pursuant to N.J.S. 30:1-12.2; recoup any funds identified by that audit, and require the transfer by the municipality of its administration of general assistance to the county. Prior to affecting the transfer, the commissioner shall specify in writing to the municipality the financial or performance deficiencies determined by the audit and give the municipality a reasonable opportunity to correct those deficiencies, in accordance with regulations. If the municipality fails to correct the deficiencies, the commissioner may proceed with the transfer.

Source: 44:10-73.

COMMENT

The draft provision omits two current subsections, (a)(6) and (d), as unnecessary as executed.

5-8. Allocation of federal funding; state reimbursement of counties

a. The commissioner shall allocate among the counties the federal funding available for administrative costs from the federal block grant funds for temporary assistance for needy families provided to New Jersey under Pub. L. 104-193. The State shall reimburse the county agency for up to 50% of the total administrative costs of the TANF program, but no more than the maximum amount allocated for that county by the commissioner and within the limits of available funds. The county shall fund the remaining administrative costs. The county's share of cash assistance benefits to TANF recipients shall be 5% of total cash assistance benefits costs, and the remaining 95% shall be funded by the State from State and federal funds.

b. The State shall reimburse the county agency for 100% of cash General Assistance benefits.

c. The Commissioner of Labor in consultation with the Commissioner of Human Services shall allocate among the counties the funding available for work activities as defined in Section 1-2, and case management activities applicable to work activities, from State appropriations and federal block grant funds for

temporary assistance for eligible households provided to the State. Costs incurred by the counties for work activities and case management shall be reimbursed up to the maximum amount allocated for the county by the commissioner, and within the limits of available funds.

Source: 44:10-74.

COMMENT

The draft provision is substantially like the source.

5-9. State's share; additional payment

During the period July 1 through December 31 of each year the State shall pay to each county an amount equal to the county share of the total expenditures for the period January 1 through December 31 of that year. The State shall also pay to each county welfare board the full amount of any funds received by the State from the federal government as federal participation with respect to the costs of administration of the program of old age assistance by such county welfare board.

Source: 44:7-25.

COMMENT

The draft provision is identical to the second sentence of the source.

5-10. Payments by State to each county welfare board

The State shall pay to each county welfare board the full amount of any funds received by the State from the federal government as federal participation with respect to expenditures made by such county welfare board for assistance for the blind and assistance for the permanently and totally disabled, plus an additional amount of 75% of the balance of such expenditures after deducting the amount of such federal participation. During the period July 1 through December 31 of each year the State shall pay to each county an amount equal to the county share of the total expenditures for the period January 1 through December 31 of that year.

The State shall also pay to each county welfare board the full amount of any funds received by the State from the federal government as federal participation with respect to the costs of administration of the program of assistance for the blind and assistance for the permanently and totally disabled by such county welfare board.

Source: 44:10-40.

COMMENT

The draft provision is substantively identical to the source provision. It also replaces 44:7-40 and 44:7-46

5-11. Implementation of electronic benefit distribution system

a. The department shall continue the electronic benefit distribution system in every county of the State.

b. All cash assistance and food stamp benefits shall be provided through the issuance of a single benefit card utilizing the electronic benefit distribution system. The commissioner may include additional programs in this system.

c. No charge, including a fee imposed by a terminal owner, shall be imposed upon a person receiving cash assistance, food stamp or other benefits for participating in the electronic benefit transfer system, except as follows:

(1) after three free cash automatic teller machine withdrawals in a month, the department may deduct a transaction fee from a recipient's account for each subsequent withdrawal; and

(2) a recipient shall be required to pay a fee for a replacement benefit card in an amount determined by the commissioner, which may be deducted from the recipient's account in accordance with federal law.

d. The Department of Human Services shall cycle the issuance of benefits over multiple dates throughout the month in a manner that best serves TANF and food stamp recipients within the framework of the electronic benefit distribution system in each county.

e. The commissioner may determine the need for appropriate benefit card security measures, as well as whatever personal identification technology is included on the benefit card, to access cash assistance, food stamp or other benefits under the electronic benefit distribution system.

Source: 44:10-5.6, 44:10-75.

COMMENT

The draft omits the source subsection (c)(3) which explicitly states that it will expire two years after the "effective date of the single Statewide electronic benefits distribution contract that is let pursuant to P.L. 1997, c. 37 (C. 44:10-71 et al.). The draft substitutes a newer provision, 44:10-5.6 (1991), for the similar source subsection (c).

5-12. Social security number used as common identifier of individuals

The federal Social Security number shall be used as the common identifier of individuals for any record, license, certificate or other document identifying a person by name that is used by an agency of State government to the extent permitted by federal law. The Commissioner shall preserve the confidentiality of Social Security numbers and divulge them only as required by law.

Source: 44:10-76.

COMMENT

The draft omits the last sentence of the source which requires the agencies to implement the section by July 1, 1998. The second sentence is new but reflects established practice.

5-13. Establishment, implementation of technological investment

The Commissioner of Labor, in consultation with the Commissioner of Human Services, is authorized to establish and implement necessary technological investments appropriate to create a Statewide community-based electronic network designed to link federal, State and local government agencies, nonprofit entities and private business entities, for the effective exchange of information relating to, and management of, the Work First New Jersey program and other related programs.

Source: 44:10-77.

COMMENT

The draft provision is substantially like the source.

5-14. Municipal Agency; Local Assistance Board

a. Each municipality that administers a General Assistance program shall have an agency to conduct the program and to fulfill any other municipal duty of providing appropriate assistance to eligible persons.

b. Except as otherwise provided by law regarding municipal government, each municipality that administers a general assistance program shall have a Local Assistance Board of three or five members to supervise the program.

c. Unless the Local Assistance Board contracts for services of a municipal welfare director of an adjoining municipality, the Board shall appoint a Municipal Director of Welfare to hold office for five year terms. The municipal welfare director shall be a citizen of the State of New Jersey; be able to read and write the English language; be capable of keeping records as required by law; and demonstrate adequate knowledge of public assistance laws. The municipal director shall receive a salary set by the municipal governing body. In case of a vacancy, a temporary acting Director may be appointed to serve for up to ninety days.

d. The Board shall determine the staffing for its assistance program. All staff shall have the qualifications required by State regulations.

e. If a municipality ceases to administer its general assistance program, the duties of the municipal welfare director in regard to that program shall cease, and the county director shall assume those functions. All duties of the municipality in regard to general assistance to the poor shall be transferred to the county.

Source: New, 44:8-145.1, 44:1-74, 44:8-117, 44:8-117.1.

COMMENT

Archaic provisions remain in Title 44 regarding appointment (44:1-73) and abolishment (44:1-73.1) of municipal overseers of the poor. The draft provision takes into account the 1995 law, 44:8-145.1, which allows a municipality in agreement with its county to transfer its financial and operational responsibility for the administration of the "Work First New Jersey Public Assistance Act" (WFNJ-PA) to the county agency. The municipal agency is then abolished.

Subsection (b) combines and streamlines 44:1-74, 44:8-117. It ignores 44:8-115, a 1947 provision that specifies that a "local assistance board shall be composed of three or five persons ... and at least one of them shall be a woman." Subsection (c) is derived from 44:8-117.1. The provision allows staffing for all public assistance functions performed by the agency. Subsection (e) clarifies the law, specifying that when a municipality gives control of the general assistance program to the county, the full responsibility of the municipality is transferred to the county.

5-15. County agency

a. Every county shall have an agency to administer state and federal assistance programs and other assistance.

b. Appropriations for assistance shall be subject to the approval of the county government.

c. The agency shall have a staff in accordance with regulations of the commissioner.

d. The county director shall have subpoena power to compel attendance of an applicant and other persons in New Jersey and the production of pertinent documents in the State, and the power to administer oaths, and to reject an application for assistance if an applicant fails to obey a summons or subpoena or fails to testify, subject to agency approval. Failure to obey a summons or subpoena issued by the county director or failure to testify shall be punishable by the Superior Court as a civil contempt, but no commitment for contempt shall exceed 90 days.

e. The county agency shall have authority to establish wages, terms and conditions of employment for its employees through collective negotiation with an authorized employee organization, but all employees other than legal counsel shall be within the classified service.

(1) The agreement between an agency and an authorized employee organization is binding on both parties and not subject to approval by the Commissioner of Human Services.

(2) If the Commissioner of Human Services determines that a provision in an agreement between a county agency and an authorized employee organization does not comply with federal law and that it endangers continued receipt of federal funds, the Commissioner shall advise the county agency and authorized employee organization in writing, specifying the federal law and giving the reason for non-compliance.

(3) If the federal government notifies the Commissioner that the State's administration of a federal assistance program does not comply with federal law because of a negotiated agreement between a county agency and an authorized employee organization, the Commissioner shall notify the county agency and authorized employee organization in writing.

(4) When the Commissioner notifies a county agency and an authorized employee organization, the Commissioner shall provide them with an opportunity to meet with the Commissioner to determine if the Commissioner's finding is correct, and an opportunity to conform voluntarily to comply with federal law.

(5) If the Commissioner subsequently determines that the negotiated agreement does not comply with federal law, the Commissioner shall exercise only the authority over wages, terms and conditions of employment in the county agency necessary to ensure that the agreement complies with federal law.

(6) If the federal government acts or notifies the Commissioner of Human Services that it may act to affect wages or terms and conditions of employment in a county agency, the Commissioner shall consult with the county agency and authorized employee organization which may be affected by the Commissioner's position on the federal action.

Source: New, 44:1-20, 44:7-20, 44:7-6.1, 44:7-6.2, 4:7-6-3.

COMMENT

Counties have always had and continue to have duties in regard to provide public assistance. Numerous existing provisions mandate the public policy of the State: "[E]very needy person shall ... be entitled to receive such public assistance as may be appropriate" (44:8-109), "The State shall provide ... public assistance to the persons eligible therefore" (44:8-114), "Immediate public assistance shall be rendered promptly to any needed person" (44:8-120), et al.

Pursuant to the federal "Personal Responsibility and Work Opportunity Reconciliation Act of 1996," 42 U.S.C. Sect. 601 et seq., New Jersey adopted its "Work First New Jersey Act" in 1997, which replaced earlier aid/assistance to dependent children laws. It provides that "The county agency shall be responsible for implementing the Work First New Jersey program in accordance with regulations adopted by the commissioner and ensuring that all eligible persons residing in the county have access to benefits" N.J.S. 44:10-73(a). The Act further states, "The commissioner shall allocate among the counties the federal funding available for administrative costs from the federal block grant funds for temporary assistance for needy families provided to New Jersey" N.J.S. 44:10-74(a). The draft provision states explicitly at the outset that the county level is responsible for administering federal and state funds. Subsection (a) also provides for additional assistance as needed.

Subsection (b) derives from 44:1-20. Subsections (d) and (e) streamline current law.

5-16. Establishment of Board to direct agency

a. In a county that has not undergone charter reform pursuant to N.J.S. 40:41A, the Board of Chosen Freeholders shall establish a County Board of Social Services to direct its agency's program.

b. The county welfare board shall

(1) supervise the assistance program in its county.

(2) comply with the requirements of the Open Public Meetings and Open Public Records Act.

(3) certify all bills and accounts, including salaries and wages, and provide for their payment in accordance with the approved county budget.

(4) be a body corporate with power to sue and be sued, and to make bylaws.

(5) meet regularly once a month, and at other times as necessary or as regulations provide.

g. Attendance at any Board meeting by four members, at least two of whom are citizen members, shall constitute a quorum.

h. Members shall receive no compensation for their services, but shall be allowed their actual and necessary expenses.

Source: New, 4:7-7, 44:1-10, 44:1-10.1, 44:1-10.2, 44:1-15, 44:1-19, 44:1-21 44:4-22.

COMMENT

Subsection (a) is new and reflects the decision in Am. Fed. State, Cty. Mun. Emp. v. Hudson Welfare Board, 141 N.J. Super. 25, 34 (Ch. Div. 1976): the Optional County Charter Act, N.J.S. 40:41A-1 et seq. authorizes a county to abolish and reorganize its welfare board as long as the replacement provides the same functions as before. Six of New Jersey's 21 counties have undergone charter reform. The proposed provision substitutes "program" for "welfare-house" in source provision 44:1-10 and acknowledges the 1979 provisions, 44:1-10.1 and 44:1-10.2, which allow a name change for the board, and eliminate the need for stating that wherever one name appears it shall mean the other as well.

5-17. Membership of board

a. The Board of Chosen Freeholders shall appoint between five and seven persons who reside in the county to be members of the agency board. An agency board member may hold another office but may not be an employee of the board.

b. Two designated members of the County Board of Chosen Freeholders and the county adjuster shall be ex officio members of the agency board.

Source: 44:1-11, 44:7-9.

COMMENT

The draft streamlines the source provisions.

5-18. Officers; Employees

a. The board annually shall elect from among its members a chairperson, vice-chairman and secretary-treasurer, and shall appoint other officers, assistants and employees necessary to carry out the provisions of this chapter, subject to compliance with the personnel standards and regulations of the Merit System Board or State Division or both.

b. The director shall not be a member of the board.

c. The board may set the compensation of the director and other employees within the limits of the sums which the Board of Chosen Freeholders and the State provide.

d. The director, officers, assistants and other employees shall be subject to regulations made by the board and by the State division.

e. Regular employees may certify affidavits and acknowledgements and shall be vested with the powers and authority exercised by other persons authorized to do so.

f. Employees shall hold their office or employment during good behavior, and may be removed for just cause, if it is established upon written charges at a hearing held after due notice has been given by the board.

g. All paid officers and employees of a board operating under the Merit System Board, except an attorney serving as legal counsel, shall be classified in the competitive class of the classified service; all officers and employees of a board not operating under the Merit System Board shall be similarly classified under personnel standards established by the State division.

Source: 44:7-9.

COMMENT

The provision streamlines the language of the source.

5-19. Secretary-treasurer

a. The secretary-treasurer of a county board shall receive from the county treasurer and from the State its share for old age assistance and its administration, and shall place the sums in a special account or accounts for the board to disburse.

b. The secretary-treasurer shall furnish bond conditioned on faithful performance of duties, in an amount fixed by the board and approved by the County Board of Chosen Freeholders and by the State division.

Source: 4:4-23, 4:7-10.

COMMENT

The provision is substantively identical to its sources.

5-20. Term; vacancies; compensation and expenses

- a. Members shall serve for five years.
- b. Vacancies shall be filled for the unexpired term only.

Source: 44:1-12, 44:1-13.

COMMENT

This provision is substantively like the source provisions.

5-21. Funding; annual report

a. The budget of the board shall be subject to approval by the county government.

b. The agency board annually shall report to the county government. The report shall include, but need not be limited to, information about financial management, expenditures, other operations of the program, the number of persons the program serves, and recommendations.

Source: 44:1-20, 44:1-23.

COMMENT

Subsection (a) is substantially identical to its source, 44:1-20. Subsection (b) follows its source, 44:1-23, but allows inclusion of unenumerated information.

5-22. Director of County Assistance Program

a. The board shall appoint a director of its County Assistance Program. If qualified, the county adjuster may be appointed, but shall not serve as an ex-officio member of the board.

b. The director shall:

(1) be classified in the competitive class of the classified service of the Merit System Board, except that the working test period for the position of director of welfare shall be set by the Board at between six and twelve months; and

(2) be a citizen of New Jersey and of the United States;

(3) be capable of making and keeping required records and reports; and

(4) be expert in assistance service, with administrative experience.

Source: New, 4:4-33, 44:7-11.

COMMENT

The provision streamlines the sources.

5-23. Deputy Director

a. A county director may appoint a person to serve as deputy director for general assistance.

b. The deputy director shall have the same qualifications as a director, shall be under the director's supervision, and shall be vested, on the board's approval, with the same powers as the director.

c. The deputy director shall be classified in the competitive class of the classified service.

Source: 44:7-11, 44:8-145.2.

COMMENT

Subsection (a) is substantively like the 1995 source provision, 44:8-145.2. Subsections (b) and (c) streamline the other source provision.

5-24. Other employees

The county board shall appoint employees necessary to carry out the provisions of this chapter. All employees other than legal counsel shall be part of the classified service.

Source: 44:4-34, New.

COMMENT

The draft streamlines the source. The second sentence of the draft includes new language and reflects current practice.

5-25. Service and remuneration of transferred employees; services to municipal agency

a. The transfer of a person who was a full-time employee of a municipal assistance agency, or who worked on a full-time basis for municipal assistance agencies in two or more municipalities, on November 13, 1995, to the county assistance agency with the agreement of the county assistance agency shall not result in reduction of remuneration nor in the length of service credited to that employee.

b. A county and municipality may arrange by mutual agreement for one or more former municipal assistance agency employees employed by the county welfare agency to continue to provide services from a municipal building.

Source: 44:8-145.4.

COMMENT

The draft is substantively identical to the source provision. The phrase, "with the agreement of the county assistance agency" in subsection (a) reflects the provisions of 44:8-145.1

5-26. Duties of the director of Assistance Programs

The director of assistance of a municipality, or the county director shall:

a. Supervise review of the eligibility of every person receiving assistance;

b. Reconsider the amount and type of assistance given, and alter or suspend the assistance, as circumstances require;

c. Find ways to effect self-support for persons unable to maintain themselves, or find other persons or agencies able and willing to support those persons;

d. Keep records of investigation, supervision, assistance, rehabilitation, and certifications of persons for employment or benefits, and cancellations of them, in the forms required by the commissioner;

Source: 44:7-11, 44:8-118.

COMMENT

Streamlines the language of the source. By amendment in 1995, the county director was added to the statute.

5-27. Public assistance trust fund account

a. Every payment for State aid for assistance made to a municipality or county shall be deposited in an assistance trust fund account and shall be used only for payment of the cost of assistance, exclusive of administrative costs, and in the year for which the State aid is granted.

b. Any balance remaining in the account after all payments have been made or provided for, shall be used for the same purpose and with the same limitation for the next year.

Source: 44:8-138.

COMMENT

The draft extends the provision to include the county.

5-28. Transfer of current budget appropriation for assistance

A municipality or county receiving State aid for relief for any year shall not transfer the current year's budget appropriation for assistance to any other current budget appropriation without specific approval of the Commissioner.

Source: 44:8-139.

COMMENT

The draft extends the provision to include the county.

5-29. Exploitation of recipients prohibited

Municipal or county assistance agencies are prohibited from directly or indirectly exploiting or permitting to be exploited assistance recipients for political purposes.

Source: 44:8-126.

COMMENT

The draft adds county assistance agencies; the source mentions only the municipal ones.

5-30. Distribution of voter registration forms and instructions

The director or other chief administrative officer of each agency or officer administering assistance under the Work First New Jersey program shall:

a. Cause each assistance agency or office to provide copies of voter registration forms, instructions and declination forms to each person who applies in person for services or assistance, or to seek a recertification, renewal or change of address.

(1) An employee of the agency or office shall ask each person whether the person, if not already registered to vote from the place of present residence, wishes to be registered, and shall state that choosing to register or not to register will not affect eligibility for services or assistance.

(2) The employee shall review the forms to determine whether or not the person wishes to register to vote.

(a) If the person does not wish to register, the employee shall assist the person in completing the declination form and tell the person that the employee will retain the form.

(b) If the person wishes to register, the employee shall assist the person in completing the voter registration form; shall tell the applicant that the applicant may leave the completed form with the employee or may mail it to the Secretary of State; and if the applicant leaves the form, shall accept it, stamp or mark its lower right hand corner with the date received, and forward it to the Secretary of State. The employee shall give each applicant who registers to vote the same degree of assistance in completing the voter registration form as the agency or office provides for completion of its own forms, unless the applicant refuses that assistance;

b. Provide for a continuous supply of forms and instructions to every agency and office providing assistance under the Work First New Jersey program, 42 U.S.C. sect. 601 et seq., and the federal "Food Stamp Act of 1977;"

c. Provide the forms and instructions in both English and Spanish languages to agencies and offices located in counties in which bilingual sample ballots are required;

d. Provide for collection of completed voter registration forms by any employee of the agency or office for transmittal to the Secretary of State;

e. Provide that any person with a disability who receives services or assistance, shall have forms, instructions and assistance provided at home, by an employee of the agency or office;

f. Inform each employee of the agency or office who helps register a person to vote that the employee shall not:

(1) seek to influence an applicant's political preference or party allegiance;

(2) display any political preference or party allegiance;

(3) say anything to an applicant or do anything with the purpose or effect of discouraging the applicant from registering to vote; or

(4) say anything to an applicant or do anything with the purpose or effect of leading the applicant to believe that deciding to register or not to register affects the availability of services or benefits; and

g. assure that no information about a person's declining to register to vote is used for any purpose other than the voter registration.

Source: 44:1-24.2, 44:10-5.9.

COMMENT

The draft provision combines and states more clearly the two source provisions.

5-31. Administration and distribution of state aid for assistance

The Commissioner of Human Services shall administer state aid for assistance for municipalities and counties entitled under this act, from the Municipal Aid Fund and other funds appropriated from the State treasury.

Source: 44:8-110.

COMMENT

The draft provision eliminates excess words from the source.

5-32. Commissioner's duties

The commissioner shall:

a. be the State's agent in negotiating and effecting any reciprocal interstate agreements about transportation of dependents;

b. negotiate with the Federal Government about present or future programs affecting public relief or assistance for which other State statutes make no provision, and administer the program in cooperation with the Federal Government;

c. keep necessary records for administration of State aid.

d. make and amend regulations necessary for administration of State aid which shall be binding upon municipalities or counties;

e. determine whether or not municipalities or counties are complying with all provisions of law regulating administration of State aid;

f. set and enforce standards for investigating and supervising grants for assistance, and forms and procedures necessary for their proper administration; and

g. exercise other powers necessary for administration of State aid.

Source: 44:8-110.3, 44:8-111(d).

COMMENT

The draft combines the sources, removes duplication of the commissioner's rule-making duty, and streamlines the language.

5-33. Centralized registry; updating of information

a. The centralized registry established by the commissioner in the Division of Family Development in the Department of Human Services shall contain names, Social Security numbers and additional identifying information which the commissioner requires, of recipients of benefits under TANF.

b. Each entity administering assistance shall provide information and assistance as requested by the commissioner.

c. The commissioner shall provide for periodic updating of the registry information.

Source: 44:8-111.1.

COMMENT

The draft changes the source language to reflect that the registry is already established, and makes the provision more concise.

5-34. Reciprocal provision of central registry information; comparison checks

a. The commissioner shall make the centralized registry information available to other states and shall seek reciprocal provision of similar information from those states to the Division of Family Development.

b. The commissioner shall provide use of the registry for comparison checks of assistance recipient records between entities administering assistance within the State.

Source: 44:8-111.2.

COMMENT

The draft streamlines the source.

5-35. Commissioner's powers

The commissioner may:

a. Prescribe the number and qualifications of personnel employed or to be employed in administering assistance in each municipality or county;

b. Require each municipality or county to keep records of, and make reports on, the administration of State aid within each municipality or county in the form and containing the information that the commission finds necessary, and investigate to verify the facts stated in the records and reports;

c. Investigate assistance administration within each municipality or county and determine the compliance or noncompliance of the municipality or county

with the laws governing administration of State aid for relief and with the department's standards and requirements;

d. Withhold State aid payment from any municipality or county that does not keep records or make reports or comply with laws governing State aid administration or the department's standards and requirements;

e. Consult with and advise any municipal or county officials regarding assistance problems in their municipality or county;

f. Make regulations to implement this act.

Source: 44:8-112.

COMMENT

The draft streamlines the source. By amendment in 1995, county was added to all municipal references.

5-36. Commissioner's powers over municipal and county administration

The commissioner may, for each municipality or county in which assistance is administered by the commissioner:

a. Directly distribute sums allotted as State aid as provided by this act; and

b. Use the municipal or county government organizations for administration of assistance to assist the commissioner.

Source: 44:8-113.

COMMENT

The draft eliminates the first two subsections of the source as duplicative: their content is required in 4-2(d) and 4-2(c), (d), and 4-3(a). By amendment in 1995, county was added to all municipal references.

5-37. Determining amount of State aid; advance payments; deductions

The commissioner may make payments from time to time to a municipality or county in advance based on the commissioner's estimates of the municipality's or county's assistance cost and may adjust later payments when the municipality's or county's actual cost is determined.

Source: 44:8-129, 44:8-130, 44:8-131.

COMMENT

Though simplified in light of current practice, the section continues the substance of the source sections.

5-38. Rebates for pharmaceutical products; requirements

a. The commissioner shall contract with manufacturers of pharmaceutical products to provide rebates for pharmaceutical products covered under this act on the same basis as is required under the "Pharmaceutical Assistance to the Aged and Disabled" program (C. 30:4D-20 et seq.) and "Senior Gold Prescription

Discount Program” (C. 30:4D-43 et seq.) and in section 1927(a) through (c) of the federal Social Security Act (42 U.S.C. sect. 1396r-8(a)-(c)).

b. A manufacturer who participates in the General Assistance program pursuant to this section shall provide to the commissioner information the commissioner requests that is necessary to carry out the purposes of this section.

Source: 44:8-159.

COMMENT

The draft deletes two sentences that are irrelevant after the 2005 date of enactment.

5-39. Opportunity for hearing

a. If an applicant’s or recipient’s claim for benefits is denied, reduced, suspended, terminated or not acted upon within a reasonable time, in accordance with regulations adopted by the commissioner, the commissioner shall insure that the applicant or recipient is afforded the opportunity for a hearing conducted by the Office of Administrative Law in accordance with the “Administrative Procedure Act,” N.J.S. 52:14B-1 et seq.

b. A recipient who requests a hearing within the timely notice period shall continue receiving current benefits pending the outcome of the hearing.

Source: 44:10-52.

COMMENT

This provision applies to both GA and TANF.

5-40. Disbursement of funds for legal services for successful appeals

a. The Division of Family Development in the Department of Human Services shall disburse funds from the Payments to Municipalities for Cost of General Assistance Fund for fees to an attorney or a legal entity providing legal services who represents a recipient of assistance in an appeal of a claim for federal Supplemental Security Income benefits pursuant to the federal Social Security Act, 42 U.S.C. 1381 et seq., if the appeal is decided in favor of the recipient. The fees to the attorney or legal entity providing legal services shall be a fixed amount set by the Commissioner of Human Services’ rules and regulations.

b. No disbursement shall be made unless the attorney or legal entity providing legal services submits a petition and a copy of the favorable decision to the Division of Family Development within 60 days of the date of receipt of the favorable appeal decision. The disbursement of fees to the attorney or to the legal entity providing legal services shall be made within 30 days of the required information’s submission by the attorney.

Source: 44:8-110.1.

COMMENT

The draft streamlines, and is substantially like, the 1996 source provision.

5-41. Reduction of amount of payments to municipalities for cost of general assistance funds

The Division of Family Development shall reduce the amount of payments to municipalities for cost of general assistance funds otherwise required to be paid to the municipal assistance department as reimbursement for the assistance provided while the Supplemental Security Income claim was appealed.

Source: 44:8-110.2.

Comment

The draft is substantially like the 1996 source provision.

Chapter 6 – Recipients' Representatives

6-1. Definitions

As used in this chapter:

"Court" means the Superior Court in the county whose welfare board is responsible for making payments of public assistance to or for the benefit of the recipient or, in cases where a representative payee has been appointed pursuant to this act, the Superior Court having made such appointment.

"Functionally incompetent" means subject to a mental, physical or emotional condition which renders the individual incapable of receiving and utilizing payments of public assistance in a manner conducive to the health and well-being of himself and his dependents.

"Representative payee" means a person appointed by a court to act for a recipient to the extent of receiving and administering payments of public assistance.

"Public assistance" means "old age assistance" and "disability assistance" as authorized by Revised Statutes, Title 44, chapter 7; "blind assistance" as authorized by Revised Statutes, Title 30, chapter 6; "assistance for dependent children" as authorized by chapter 86, laws of 1959; together with amendments and supplements to any of the foregoing; and any other program administered through the county welfare boards, by whatever name now or hereafter known, which is authorized to provide financial assistance to needy persons in the form of money payments.

"Recipient" means a person who has been found eligible to receive payments of public assistance.

"Welfare board" means the county welfare board responsible for making payments of public assistance to or for the benefit of the recipient.

Source: 44:11-1.

COMMENT

The provisions of this chapter are identical to their sources except that the word “chapter” has been substituted for the word “act” in sections 6-1 and 6-8.

6-2. Appointment of representative payee; contents of complaint

Whenever it appears necessary to appoint a representative payee for a recipient who is functionally incompetent, a complaint seeking such appointment may be filed with the court by the welfare board. The complaint shall set forth the name, age and place of residence of the recipient; the name and place of residence of the nearest relative of the recipient, if known; and that the recipient has been found otherwise eligible to receive a grant of public assistance.

Source: 44:11-2.

6-3. Statement of incompetency by director of welfare board

A verified statement by the director of the welfare board, or his authorized representative, annexed to the complaint and setting forth that a review by the State Bureau of Assistance indicates that the recipient is functionally incompetent, shall be prima facie evidence of the necessity for the appointment.

Source: 44:11-3.

6-4. Hearing; evidence; appointment of representative

Upon the filing of a complaint and verified statement as provided by this act, the court shall proceed in a summary manner to hear testimony for the purpose of determining whether the recipient is functionally incompetent. The written certification of two physicians who have been in the actual practice of medicine and surgery in this State for at least five years shall be sufficient, but not required, evidence to establish such condition of the recipient. If the court is satisfied that the recipient is functionally incompetent, such court shall appoint a fit and proper person as representative payee for such recipient.

Source: 44:11-4.

6-5. Powers and duties of representative

A representative payee appointed pursuant to this act shall be authorized and empowered to receive payments of public assistance made for and on behalf of the recipient, and to administer such payments for the sole benefit of such recipient, in accordance with the laws and regulations governing such payments. Nothing in this act shall authorize or empower such representative payee to receive, hold or administer any other property, real or personal, of the recipient nor to act as representative of the recipient in any other manner whatsoever.

Source: 44:11-5.

6-6. Responsibility for payments; statement of account; disposition of balance on death or discharge of representative

a. A representative payee appointed pursuant to this act shall be personally responsible for the proper expenditure of all payments of public assistance made on behalf of the recipient, but shall not be required to give bond, and shall not be entitled to compensation for any acts or services performed.

b. At least once each year following appointment as representative payee, or upon discharge from such office, or upon notice that payments of public assistance are being discontinued, such representative payee shall file with the court a statement of account under oath showing the total amount of moneys received, the amount disbursed on behalf of the recipient, and the balance, if any, remaining in the hands of the representative payee. No further action by the court shall be required if there is annexed to such statement an approval of the account signed by the director of the welfare board or his authorized representative.

c. Any balance of assistance payments remaining in the hands of a representative payee at the time of his discharge from office, or at the time of discontinuance of public assistance, shall be repaid to the welfare board by such representative payee.

d. Should any representative payee die while in office, his personal representative shall file a statement of account and make disposition of any balance of assistance payments as provided in this section.

Source: 44:11-6.

6-7. Discharge of representative

a. When at a hearing held upon application of the recipient the court determines from the certification of two physicians, or other acceptable evidence, that the recipient is no longer functionally incompetent, the court may discharge the representative payee.

b. Whenever it appears upon application and good cause shown by the representative payee or the welfare board that such representative payee should be relieved of his duties, the court may discharge such representative payee and, if the circumstances still require, appoint in his stead some other fit and proper person.

Source: 44:11-7.

6-8. Liberal construction; costs

This chapter shall be liberally construed to secure the beneficial intent and purpose hereof. All proceedings under this act shall be without costs except witness fees as required.

Source: 44:11-8.

Chapter 7 – Supplementary Assistance

7-1. Definitions

As used in this act:

a. "Basic payment" means any supplemental security income payment made to an aged, blind or disabled person by the government pursuant to the Federal Act.

b. "Eligible person" means any person meeting the State or government eligibility requirements for receipt of a basic payment, or a State supplementary payment, or both.

c. "Essential person" means any needy person residing with an eligible person who is recognized by State regulation to be essential to the well-being of the eligible person and whose needs are included in the determination of the needs of the eligible person.

d. "Federal Act" means Title XVI of the Social Security Act, as amended, 42 U.S.C. 1381-1383.

e. "Government" means the Federal Government of the United States of America and the agencies thereof.

f. "Legally liable relative" means any person designated by any law of this State as having a duty to support an eligible person or a duty to contribute to the support of an eligible person.

g. "Lien" means any legally perfected encumbrance or claim against the property or resources of an individual, authorized by this Act or Title 30 of the Revised Statutes.

h. "Supplemental Security Income Program" means the program established pursuant to the Federal Act, which makes payments to eligible persons.

i. "Supplementary payment" means any supplementary assistance payment as defined in the Federal Act made to an aged, blind or disabled person under eligibility requirements of this State.

Source: 44:7-85.

COMMENT

The draft is similar to the source.

7-2. Eligibility; determination of amount

Any person whose income, including any basic payment, is below the assistance standard established by the commissioner and the government pursuant to the Federal Act is eligible for supplementary payments. The existence of an essential person may be considered in determining the amount of any supplementary payment made to an eligible person.

Source: 44:7-86.

COMMENT

The draft is identical to the source provision.

7-3. Duties of the commissioner

The commissioner shall:

a. Enter into agreements with the government to secure the administration of supplementary payments by the government that the commissioner deems appropriate.

b. Make and amend regulations:

(1) To implement the terms of the agreement with the government for the administration by the government of supplementary payments; and

(2) To secure social services for eligible persons and for such other aged, blind or disabled persons as the commissioner may designate.

c. Transfer funds appropriated for the payment of supplementary payments, to the government in amounts and at times as the commissioner shall deem appropriate in order to provide for supplementary payments to eligible persons in this State.

d. Pay to the government funds necessary to reimburse the government's expenses in collecting additional information needed for the State to make eligibility determinations for medical assistance under the "New Jersey Medical Assistance and Health Services Act," P.L.1968, c.413 (C.30:4D-1 to 30:4D-19).

e. Require welfare agencies to perform eligibility determinations that the commissioner deems necessary for the continuation of the New Jersey Medical Assistance Program under the "New Jersey Medical Assistance and Health Services Act," P.L.1968, c.413. The commissioner shall pay to the counties a reasonable amount to reimburse the welfare boards for their expenses in making eligibility determinations.

f. Take appropriate steps to secure maximum federal financial participation in providing assistance to eligible persons residing in residential health care facilities.

g. Ensure that eligible persons residing in a residential health care facility have reserved to them a monthly amount, from payments received under the provisions of the act to which this act is a supplement or from any other income, as a personal needs allowance. The personal needs allowance may vary according to the type of facility in which an eligible person resides, but in no case shall be less than \$25.00 per month.

h. Ensure that any eligible person who receives medical assistance under subparagraph (4)(a) of subsection a. or under paragraph (11), (13) or (14) of subsection b. of section 6 of P.L.1968, c.413 (C.30:4D-6) receives \$10.00 per month, in addition to benefits received pursuant to 42 U.S.C. s. 1382(e)(1)(B). If the government cannot pay this \$10.00 monthly increase, the commissioner shall

pay this increase and shall ensure that this increase is not considered income for Supplemental Security Income program purposes. However, if the government increases the benefit level under 42 U.S.C. s. 1382(e)(1)(B), the commissioner shall allow the government to pay this increase and shall reduce its payment to an eligible recipient by an equal amount.

i. Assess welfare boards at the beginning of each fiscal year in the same proportion that the counties currently participate in the federal categorical assistance programs, in order to obtain the amount of each county's share of supplementary payments for eligible persons in this State, based upon the number of eligible persons in the county.

Source: 44:7-87.

COMMENT

The draft streamlines the source.

7-4. Duties and responsibilities of welfare boards

Welfare boards shall:

a. perform all the functions under the former federal categorical assistance programs that the government will not perform pursuant to the agreement between the State and the government.

b. Provide social services to persons designated to receive services pursuant to this Act.

Source: 44:7-88.

COMMENT

The draft streamlines the source.

7-5. Nonliability of recipient of supplementary payments or recipient's legally liable relative for repayment;

a. Supplementary payments shall not be considered a loan by the State or by the welfare boards.

b. No requirement under this Act or Title 30 of the Revised Statutes relating to the pledging of property or to the reimbursement of assistance shall be imposed upon, and no liens shall be made or enforced against, a recipient of supplementary payments for the purpose of recouping payments. Recoupment shall be required for specific State expenditures from lump sum retroactivity SSI payments.

c. No requirement of support, contribution, or legal liability therefor, may be enforced against a legally liable relative of a person receiving supplementary payments or other payments made by the welfare boards pursuant to this Act.

Source: 44:7-89.

COMMENT

The draft omits source references to programs which no longer exist.

7-6. Eligibility for medical assistance under New Jersey Medical Assistance and Health Services Act

a. Any person eligible for basic payments under the Federal Act, any person eligible for supplementary payments and any essential person, may be determined by regulations of the commissioner to be eligible for medical assistance under the New Jersey Medical Assistance and Health Services Act, P.L.1968, c. 413.

b. Any person who would be financially eligible for basic payments or supplementary payments, or both, who is in an institution and financially ineligible for such payments by reason of the lower maximum income eligibility level under the Federal Act for persons residing in institutions, shall be eligible for medical assistance under the New Jersey Medical Assistance and Health Services Act, P.L.1968, c. 413.

Source: 44:7-90.

COMMENT

The draft is substantially like the source.

Chapter 8 - Responsibility for Burial Expenses

8-1. Responsibility for Burial Expenses.

a. When a person dies who is receiving assistance under a Work First New Jersey assistance program, the agency that was providing assistance shall be responsible for the necessary and reasonable expenses of burial as determined by the commissioner.

b. Except as provided by subsection (a), when a person dies without an ascertainable estate sufficient to pay for burial expenses, the county of the decedent's residence shall be responsible for the necessary and reasonable expenses of burial beyond those payable by the decedent's estate and by any government payment available for that purpose.

c. When an unidentified or unclaimed dead body is found, the county in which it is found shall be responsible for the necessary and reasonable expenses of burial.

Source: New.

COMMENT

This formulation reflects current practice. Earlier related statutes are: 30:4C-32, 40A:9-49.1, 44:1-157.1, 44:4-119, 4:7-13, 49:4-158.

Chapter 9 - Individual Development Accounts

9-1. Findings, declarations regarding individual development accounts

a. The Legislature finds and declares that:

(1) Economic well-being does not come solely from income, spending and consumption, but also requires savings, investment and accumulation of assets, since assets can improve economic stability, connect people with a viable and hopeful future, stimulate development of human and other capital, yield personal and social dividends and enhance the welfare of offspring.

(2) With the enactment of the "Work First New Jersey Act," P.L.1997, c.38 (C.44:10-55 et seq.) and companion legislation, emphasizing moving people off of public assistance and into employment, there is an urgent need to provide incentives for savings accounts that will complement and stabilize the movement of people from public assistance and into employment.

(3) Income-based social policy should be complemented with asset-based social policy, because while income-based policies ensure that consumption needs, including food, child care, rent, clothing and health care are met, asset-based policies provide the means to achieve some degree of economic self-sufficiency.

(4) The State of New Jersey should develop policies, such as individual development accounts, that promote higher rates of personal savings and net private domestic investment.

b. It is the intent of the Legislature, therefore, to provide for the establishment of individual development accounts which accounts are designed to:

(1) provide individuals and families, especially those with limited means, an opportunity to accumulate assets;

(2) facilitate and mobilize savings;

(3) promote education, home ownership and micro enterprise development; and

(4) stabilize families and build communities.

Source: 44:10-87

COMMENT

The provisions of this chapter are identical to their sources except that the word "chapter" has been substituted for the word "act" in section 9-2.

9-2. Definitions regarding individual development accounts

As used in this chapter:

"Account holder" means a person who is the owner of an individual development account.

"Commissioner" means the Commissioner of Community Affairs.

"Community-based organization" means a not-for-profit organization described in section 501(c)(3) of the Internal Revenue Code of 1986 (26 U.S.C. s.501(c)(3)) and exempt from taxation under section 501(a) of the Internal Revenue Code of 1986 (26 U.S.C. s.501 (a)), that is approved by the commissioner to implement the New Jersey Individual Development Account Program established under this act.

"Department" means the Department of Community Affairs.

"Economic literacy" means a basic understanding of budgets and savings accounts, credit and interest and how to use financial services; and having a savings plan and using it to reach the account holder's savings goal for an individual development account.

"Eligible individual" means an adult with an annual household gross income up to a maximum of 200 percent of the official poverty level.

"Financial institution" means a state or federally chartered bank, savings bank, savings and loan association or credit union with an office in this State.

"Fund" means the Individual Development Account Fund established pursuant to 42 U.S.C. s.604(h) and 45 C.F.R. Part 263 (45 C.F.R. s.263.0 et seq.).

"Individual development account" means an account established pursuant to 42 U.S.C. s.604(h) and 45 C.F.R. Part 263 (45 C.F.R. s.263.0 et seq.) in trust for an eligible individual that is a trust account pursuant to the "Multiple-party Deposit Account Act," P.L.1979, c.491 (C.17:16l-1 et seq.).

"Program" means the New Jersey Individual Development Account Program established pursuant to the provisions of this act.

"Program contributor" means a person or entity who makes a contribution to an individual development account reserve fund, except that "program contributor" does not mean the account holder.

"Reserve fund" means the individual development account reserve fund created by a community-based organization for the purposes of: funding the costs incurred in the administration of the program; receiving matching funds from the State; and providing matching funds for individual development accounts pursuant to section 5 of this ac.

Source: 44:10-88

9-3. New Jersey Individual Development Account Program

a. The New Jersey Individual Development Account Program is hereby established within the Department of Community Affairs. The purpose of this

program shall be to provide each eligible individual in this State with an opportunity to establish an individual development account in a financial institution, to the extent funding will permit. The individual development account may be used for any of the purposes specified under subsection c. of section 5 of this act.

b. There is established in the department, the Individual Development Account Fund. This fund shall be used by the commissioner to provide:

(1) grants to community-based organizations selected by the commissioner to participate in the program; and

(2) a State match of one dollar for every one dollar of earned income deposited into an individual development account by the account holder, except that the maximum amount provided as a match per individual development account per calendar year shall be \$1,500. The earned income deposited into an individual development account shall not be deposited on behalf of the account holder by a third party.

Community-based organizations may raise additional, non-federal or State funds to increase the State match rate and the State maximum annual match amount.

c. The commissioner shall implement this program by entering into agreements with community-based organizations which the commissioner shall select through a request for proposal process, pursuant to the provisions of P.L.1987, c.7 (C.52:14-34.4 et seq.).

d. In reviewing the proposals of community-based organizations, the commissioner shall consider the following factors:

(1) the not-for-profit status of the organization;

(2) the fiscal accountability of the organization;

(3) the ability of the organization to provide its moneys or raise moneys from program contributors for matching contributions which are in addition to State matching funds;

(4) the plan of the organization for the development, implementation and management of an individual development account program;

(5) the capacity of the organization to provide economic literacy training, either directly or through another provider;

(6) the organization's history of working with low-income populations;

(7) the target population and the extent to which the organization plans to exceed the 33.3 percent minimum participation under this act by current or former Work First New Jersey recipients pursuant to P.L.1997, c.38 (C.44:10-55 et seq.), or Aid to Families with Dependent Children recipients or Temporary Assistance for Needy Families recipients pursuant to 42 U.S.C. s.601 et seq.; and

(8) the length of time, in months and years, of the operation of the program, taking into account the resources that are available to the organization.

e. (1) The commissioner shall select community-based organizations and enter into a contract for services with each organization selected that requires the organization to establish and maintain an individual development account reserve fund and work with each eligible individual and any local financial institution to establish an individual development account, among other services to be provided for eligible individuals and their households, if any.

(2) The commissioner shall have the discretion to disburse moneys from the fund in a manner and an amount the commissioner deems appropriate and consistent with the community-based organization's contract for services and proposal selected pursuant to this subsection and subsections c., d. and f. of this section.

f. (1) No more than 10 percent of the federal Temporary Assistance for Needy Families funds under this act may be used for administrative purposes by a community-based organization selected to participate in the program.

(2) No more than 10 percent of the federal Temporary Assistance for Needy Families funds under this act may be used to provide economic literacy training and one-on-one financial counseling to account holders by an organization selected to participate in the program.

g. At all times, a minimum of 33.3 percent of the account holders participating in the program shall be current or former Work First New Jersey recipients pursuant to P.L.1997, c.38 (C.44:10-55 et seq.) or Aid to Families with Dependent Children recipients or Temporary Assistance for Needy Families recipients pursuant to 42 U.S.C. s.601 et seq., unless otherwise authorized by the commissioner.

Source: 44:10-89

9-4. Opening an individual development account; conditions

a. An eligible individual may, in agreement with a community-based organization selected by the commissioner pursuant to section 4 of this act, open an individual development account for the purpose of accumulating and withdrawing moneys for specified expenditures pursuant to this section. Upon satisfaction of the organization's requirements for economic literacy by an account holder, the organization shall certify to the commissioner that the account holder may withdraw moneys from the account on the approval of the organization, without penalty, for any of the expenditures listed in subsection c. of this section.

b. The commissioner shall establish by regulation:

(1) the minimum monthly deposit amount that each account holder shall be required to maintain and the maximum monthly deposit amount that each account holder shall be permitted to make, during their participation in the program;

(2) the minimum time period the account holder shall maintain an individual development account, pursuant to section 4 of this act, in order to be eligible to withdraw the moneys deposited and receive the State matching funds, pursuant to this subsection and subsections c., d. and e. of this section;

(3) the prior notice of the account holder's intent to, and purpose for, withdrawing individual development account funds and the minimum time period that an account holder shall give notice to the individual development account trustee community-based organization prior to an approved withdrawal in order to be eligible to receive State matching funds pursuant to this subsection and subsections c., d. and e. of this section; and

(4) the maximum length of time an account holder may participate in the program.

c. Upon satisfaction of the provisions of subsections a. and b. of this section by the community-based organization:

(1) the account holder may, upon the approval of the community-based organization, withdraw moneys from the account holder's individual development account in the form of a joint check or transfer of funds made payable to the account holder and the payee of the approved withdrawal, pursuant to 45 C.F.R. s.263.22, for any of the following purposes:

(a) post-secondary educational expenses as defined in 42 U.S.C. s.604(h)(5) and 45 C.F.R. s.263.20;

(b) qualified acquisition costs of a primary residence as defined in 42 U.S.C. s.604(h)(5) and 45 C.F.R. s.263.20; and

(c) qualified business capitalization expenses, as defined in 42 U.S.C. s.604(h)(5) and 45 C.F.R. s.263.20.

(2) if the account holder withdraws any moneys from the account and uses those moneys, or any part of those moneys, for a purpose other than that permitted pursuant to this subsection, the account holder shall forfeit all matching funds associated with the unapproved withdrawal. The account holder shall receive only the moneys which the account holder has deposited into the account.

(3) the commissioner, in consultation with the Commissioner of Human Services, shall establish procedures to ensure that funds held in an individual development account under this act are withdrawn for qualified purposes only, as defined in this subsection. Penalties for unapproved withdrawals may include taxing the withdrawal as income and, as applicable, including the withdrawal as income or resources in determining eligibility for federal and State public assistance pursuant to 45 C.F.R. s.263.23.

d. Community-based organizations approved by the department shall establish an individual development account in trust for an eligible individual in a financial institution as required pursuant to this act. Organizations may, with the approval of the commissioner, employ methods to maximize the efficiency of multiple individual development accounts, such as pooling deposits into a single

account held by the financial institution, with individual account information maintained by the organization. In addition, with the approval of the commissioner, organizations shall develop an efficient means of providing the match portion of an individual development account, such as matching deposits at the time of approved withdrawal only. Organizations acting as trustees under this act shall, at all times, maintain current account information, without regard to the chosen method of administration, on all individual development accounts, which shall include: the individual development account balance, a time indexed record of deposits and withdrawals made by the account holder and the current match level. Community-based organizations under this act shall certify to the department that the accounts have been established pursuant to the provisions of this act in trust for the account holder in the manner approved by the commissioner.

e. A community-based organization establishing an individual development account shall:

(1) sign an agreement with an eligible individual to the effect that the account shall be kept in the name of the eligible individual as the account holder and that the eligible individual shall have an officer of the organization as a trustee of the account;

(2) open and keep the account in the name of the eligible individual, with an officer of the organization as trustee;

(3) permit the account holder to deposit earned income, as defined in 42 U.S.C. s.604(h)(2)(C), into an individual development account which shall be matched by the organization when withdrawn for an approved expenditure, pursuant to subsection c. of this section;

(4) maintain the records of individual development accounts in a manner that enables the organization to determine the amounts deposited by the account holder and amounts paid by the organization as matching funds;

(5) require the individual development account to earn a rate of interest that reasonably reflects the prevailing market rate paid on like deposits by financial institutions in this State, which shall be credited to the account holder;

(6) permit the account holder, after obtaining the signature of the trustee, to withdraw moneys from the account for any of the purposes listed in subsection c. of this section;

(7) remit matching funds in the form of a joint check or transfer of funds made payable to the account holder and the payee of the approved withdrawal, pursuant to 45 C.F.R. s.263.22 at the time the account holder withdraws funds for a purpose permitted pursuant to subsection c. of this section;

(8) work with other community-based organizations and State agencies to coordinate the program with other private and public programs designed for asset accumulation and self-sufficiency, such as transportation, child care and health care services, New Jersey Housing and Mortgage Finance

Agency programs, Federal National Mortgage Association (Fannie Mae) mortgage programs and other programs under the direction of the Department of Human Services, such as the Family Loan Pilot Program and Entrepreneur Development Services Pilot Program;

(9) provide financial counseling to account holders and assist them in establishing a secure, low-risk, effective savings opportunity, for the purposes of an individual development account, for income that is in excess of the individual development account maximum match of \$1,500 per year or income that does not meet the definition of earned income, as defined in paragraph (3) of this subsection, such as federal and State earned income tax credits, homestead and property tax rebates, inheritance, monetary damages recovered in a legal proceeding and income from the sale of an asset. The account shall be tailored to each account holder's resources and financial goals and shall be held in a separate account from the individual development account. Accounts investigated may include money market accounts, individual retirement accounts, certificates of deposit and individual development accounts that do not include matching federal or State funds; and

(10) be deemed to have a fiduciary duty with respect to moneys in an individual development account or reserve fund. The commissioner may require that an organization post and maintain a fidelity bond or other security with regard to the position of the organization as fiduciary for the moneys in an individual development account or reserve fund.

Source: 44:10-90

9-5. Transfer of account on death of holder

a. Notwithstanding the provisions of any other law to the contrary, in the event of the death of the account holder, the ownership of the individual development account shall be transferred to the ownership of a contingent beneficiary, which the account holder shall name at the time the account is established and may change at any time. If the beneficiary is deceased or otherwise cannot accept the transfer, the moneys in the individual development account derived from the account holder's earned income and any interest accrued thereon shall be transferred to the estate of the account holder.

b. If an individual development account is closed pursuant to subsection a. of this section or an account holder withdraws from the individual development account program or forfeits his State matching funds due to an unauthorized withdrawal, any moneys held for matching funds for that account may be retained in the reserve fund for reallocation to be used as matching funds for new individual development accounts.

Source: 44:10-91

9-6. Money in, interest on account not considered gross income

a. Money deposited into or withdrawn from an individual development account by an account holder pursuant to subsection c. of section 5 of this act or matched by a community-based organization pursuant to paragraph (7) of subsection e. of section 5 of this act shall not be considered gross income otherwise includable as income pursuant to subsections a., b., k., and p. of N.J.S.54A:5-1.

b. Interest earned by an individual development account shall not be considered gross income otherwise includable as income pursuant to subsection e. of N.J.S.54A:5-1.

c. Moneys deposited in an individual development account and the interest from an individual development account under this act shall not be taken into account in determining eligibility or the amount of assistance under State and federal means-tested programs pursuant to 42 U.S.C s.604(h) and 45 C.F.R. s.263.20.

Source: 44:10-92

9-7. Regulations; consultation with Human Services

a. The commissioner shall promulgate regulations pursuant to the "Administrative Procedure Act," P.L.1968, c.410 (C.52:14B-1 et seq.), necessary to effectuate the provisions of this act.

b. The commissioner shall consult with the Commissioner of Human Services regarding the development, operation and administration of the program and ensuring compliance with 42 U.S.C. s.604(h) and 45 C.F.R. Part 263 (45 C.F.R. s.263.0 et seq.).

Source: 44:10-93

9-8. Report to Legislature

a. The commissioner shall report to the Legislature annually on the effectiveness of the program in providing eligible individuals in this State with an opportunity to establish an individual development account and may include in the report recommendations for change, if any, to make the program more effective. This report shall be due within 30 days of the end of the anniversary of the effective date of this section for each year the program is in operation.

b. The Department of Community Affairs shall make available to the Departments of Labor and Human Services necessary individual development account statistical and program information in a usable format and in a timely manner, so that those departments may prepare federal and other reports.

Source: 44:10-94