REPORT AND RECOMMENDATIONS

RELATING TO THE STATUTE OF FRAUDS

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INTRODUCTION

The New Jersey Statute of Frauds, R.S. 25:1-1 to -9, like similar enactments in every state, derives from the Statute for the Prevention of Frauds and Perjuries passed by Parliament in 1677, 29 Charles II, c.3. The English Statute, totalling 24 individual sections, included provisions that required transfers of land to be in writing, discouraged transfers of land in defraud of judgment creditors, and imposed formalities on oral wills of personal property. The Statute also contained provisions which required certain types of agreements to be in writing in order to be enforceable.

The first five sections of the current New Jersey Statute, R.S. 25:1-1 to -5, derive directly from the English Statute. These five sections are those which require most transactions in land or interests in land to be in writing, and provide that certain enumerated types of agreements must be in writing in order to be enforceable. The language of these sections, taken verbatim from the English Statute in 1794, has been retained virtually intact through several complete revisions of the New Jersey statutes. The remaining four sections of the New Jersey Statute of Frauds were added in the nineteenth century. R.S. 25:1-6 and -7 broadened the substantive scope of the Statute by requiring agreements to pay certain debts to be in writing and R.S. 25:1-8 added a rule of construction applicable to the first seven sections. R.S. 25:1-9 governs in detail the writing required for a real estate broker to be entitled to a commission.

The New Jersey Statute of Frauds is in need of in-depth revision. While the Statute has been revised several times as part of comprehensive recompilation projects in the past, the archaic language and expression of the English original has largely survived, making the first five sections opaque and confusing to read. The Statute has been interpreted in a large body of case law that has so changed the meaning of the Statute as to render the literal language of some sections deceptive. In addition, a good deal of this interpretive case law is conflicting and inconsistent.

In the almost 200 years since the adoption of the Statute of Frauds in this State, as well as in other jurisdictions, both the wisdom and efficacy of some of the provisions of the Statute have been debated extensively. During this same time period, however, the Legislature has seen fit not only to add provisions to the original Statute, but also, particularly in recent years, to add similar provisions in other areas of the statutes.[1] It is appropriate under the circumstances to examine the policy reasons underlying the original provisions and to determine whether, and to what extent, these policy reasons remain valid today.

In entitling this project, the Commission has deliberately avoided the use of the term "Statute of Frauds," by way of underlining the fact that limiting opportunities for fraud is only one policy that may be served by imposing a writing requirement. The Commission identified two additional policy reasons that could support the imposition of a writing requirement in certain types of transactions: Protection of consumers, and

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[1] See, e.g., C. 17:16C-21 through -28 (Retail Installment Sales Act requirement that every retail installment contract must be in writing and signed by both buyer and seller); C. 56:8-42 (Health Club Services Act requirement that every health club services contract must be in writing); N.J.S. 12A:8-319 (writing requirement for a contract for the sale of securities) and N.J.S. 12A:1-201 (the Uniform Commercial Code derivative of a section of the original Statute of Frauds). See also R.R. 1:21-7 (writing requirement for attorney contingent fee arrangement).

protection of the interests of third parties in land transactions. In addition, the Commission considered intensively whether the approach of the existing statute - a preclusive writing requirement - was the best method of achieving the policy goals that were identified, or whether the identified policy goals would be better served by imposing a higher standard of proof on transactions not reduced to writing.

The Commission's approach to each type of transaction covered by the existing statute was to identify the policy considerations that would support the imposition of a writing requirement, and then to determine the nature of the writing requirement, if any, that ought to be imposed. The Commission concluded that in some instances a preclusive rule requiring a writing was unnecessary, and to some extent subversive of the Statute's purpose of combatting fraud. Given the sophistication of modern rules concerning discovery and proof, it is the Commission's view that the imposition of a high standard of proof rather than a preclusive rule would unfetter the courts and allow them to best achieve substantial justice in disputes over the validity of parol transactions.

As a result of this method of study the Commission's recommendations range from complete elimination of the writing requirement in certain transactions, modification of provisions concerning leases of real estate, trusts in real estate, and contracts for the sale of real estate, and substantial retention of the preclusive writing requirement in the case of conveyances of land and surety contracts.

The Land Provisions of the Statute of Frauds

Nowhere are the English origins of the American legal system more apparent than in the law of real property. Both our statutes and judicial decisions on the subject are founded in concepts that were established in England over the five centuries prior to 1776. In particular the codified law of this state still incorporates centuries-old English statutes that establish fundamental property law principles. See, e.g., R.S. 46:3-5 (the Statute Quia Emptores Terrarum) and R.S. 46:3-9 (the Statute of Uses). Another such statute is the New Jersey Statute of Frauds, the first five sections of which, R.S. 25:1-1 to 1-5, are derived from the English Statute of Frauds of 1677. Although frequently regarded merely as a rule of contract law, the New Jersey version of the Statute contains a number of provisions that are concerned with transactions in land. Sections 1 and 2 of the New Jersey statute declare most transactions in land to be void unless they are in writing; sections 3 and 4 require most transactions involving trusts in land to be proved by a writing, and section 5(d) requires contracts for the sale of land to be in writing in order to be enforceable.

Because the writing requirement for land transactions is so fundamental to our present-day conveyancing system, it can be difficult to imagine a time when it was otherwise. In England prior to the Statute of Frauds, however, the transfer of land by ceremony rather than by a writing was still valid. This method of conveyance, livery of seizin, derived from feudal concepts of land holding. While this method was workable when most of the population was illiterate and ownership of land was a matter of common knowledge in the community, in the seventeenth century this type of conveyance had largely been superseded by more modern, written forms of conveyancing and the old forms increasingly were used when a secret conveyance was wanted for illicit purposes. The lawmakers of the day came to recognize that ceremonial conveyances of land facilitated tax evasion and fraudulent transfers of land, and made litigation over title to land more difficult to resolve. The Statute of Frauds changed conveyancing practice in England by expressly eliminating conveyances of land by livery of seizin and by requiring conveyances of land to be in writing. The Statute provided that conveyances of land which

were not in writing were "void," and provided that trusts in land were required to be proved by a writing. Requiring conveyances in land to be in writing lessened the opportunity for fraudulent conveyances, tax evasion and disputes over title, and made it possible for grantees to make use of the limited title recordation system which was available at the time. Publicity of land transfers, effectuated by a writing requirement, served a government interest (collection of taxes), a broad public interest (greater security of title generally), and the interests of parties to land transactions (greater reliability in individual transactions).

The Statute of Frauds treatment of executory contracts for the sale of land, as opposed to actual conveyances of land, was less absolute. The Statute of Frauds provided that contracts for the sale of land which were not in writing were merely unenforceable rather than void. Parties were left free to make oral contracts for the sale of land, and to honor their terms, but if one of the parties to an oral contract refused to perform, the oral contract was not enforceable. The provision relating to contracts for the sale of land was one of several types of promises and agreements which were dealt with similarly. These provisions were aimed at reducing the opportunity for fraud which was presented by the civil justice system of the time. The rules relating to admissibility of evidence, among other aspects of the system, facilitated the efforts of individuals who sought to assert false claims based upon breach of contract when in fact no contract had been made. The drafters of the Statute of Frauds addressed this problem by providing that no action could be brought upon certain types of agreements, including contracts for the sale of land, unless the agreement had been reduced to writing.

The framework for conveyancing which was established by the English Statute of Frauds prevailed in New Jersey during colonial times and continued after the Revolution. The Statute of Frauds was one of the first English statutes to be expressly adopted by the New Jersey legislature. See An Act for the prevention of frauds and perjuries, 26th November 1794, Paterson's Laws 133-36 (1800). It is one of the most frequently applied provisions of the New Jersey statutes, and a large body of case law has developed which interprets its provisions.

Over the two centuries since its enactment into law in New Jersey, judicial interpretation has significantly altered the literal terms of the statute. From the earliest times situations presented themselves to the courts in which strict interpretation of the Statute of Frauds land provisions would produce unfair results. Under the general rubric that "the Statute of Frauds should not be used to work a fraud," the courts in New Jersey and elsewhere developed so-called equitable exceptions to the application of the Statute to conveyances, to trusts, and to contracts for the sale of land. Thus, although present conveyances of an interest in land are "void" under the Statute if not in writing, courts have held that a grantor in a parol transaction may be estopped to complain of the lack of a writing in a limited but significant number of circumstances. Contracts for the sale of land are declared unenforceable by section 5(d), but by judicial construction they are enforced in many situations. The source sections concerning trusts in land invalidate parol trusts unless their "creation or declaration" can be "proven" by a writing. Nevertheless, parol trusts are enforced in many situations by the application of the judicially-constructed fictions of resulting trust and constructive trust. As a broad generalization, it can be said that the reason that these Statute of Frauds provisions governing land transactions have been modified so significantly by judicial construction is that their underlying purposes are not always served by strict application of their literal terms.

This revised statute attempts to retain those concepts in the source statute which have continuing validity and to place them in a more logical framework, one which more

accurately reflects the changes that have been brought about by 200 years of judicial interpretation and by other changes in the law. This revised statute retains the fundamental distinction embodied in the source statute between a present conveyance in land and an agreement for the sale of land. The conveyance of an interest in land is an actual transfer of an interest and the revised statute continues to require that the such a transaction be effectuated by a writing. As was the case in 1677, there is a strong governmental and public interest in the publicity of present transactions in land, and those interests continue to the present day. The recording system, which is the cornerstone of the present-day title security system, depends upon the requirement that transfers of an interest in land be in writing. The revised statute contains a limited exception, however, analogous to the estoppel rule developed under the source statute; under certain circumstances, the grantor who enters into an oral transaction may not take advantage of the rule that an unwritten conveyance is void.

A new approach for agreements to convey an interest in real estate is offered by the revised statute. The source statute was drafted in a time prior to the development of modern evidence law. The drafters hoped to discourage perjury in litigation over parol agreements by imposing an absolute prohibition on enforcing an unwritten agreement. This absolute approach was abandoned early in the life of the statute as it became apparent that an absolute prohibition created as much injustice as it prevented. In the case of parol agreements for the sale of land, the development of equitable exceptions to unenforceability mitigated the injustices resulting from absolute unenforceability, but the development of the exceptions has been inconsistent and confusing. The approach of the revised statute is to permit proof of parol agreements. The standard for enforceability is not tied to ancient equity law but to modern evidence law. A parol agreement is considered enforceable between the parties to the agreement if it can be proved by clear and convincing evidence.

A new approach is also offered for trusts in real estate. Under the source statute trusts in real estate were covered by source sections 3 and 4, which expressed rules that combined the concepts of voidability and unenforceability. The judicial interpretation of the source sections resulted in a body of law that has managed to achieve fair results only through the application of the convoluted legal fictions of resulting trust and constructive trust. In this revised statute, a trust in land is treated as a present transfer of an interest which may be coupled with an agreement to transfer an interest or to hold it in trust. This statute treats these aspects of a trust according to the same rules applicable to other present conveyances and other agreements to convey, respectively. The result in most cases will be identical to that under the source statute, but the analysis will be more straightforward.

Section 1 - Definitions

a. An interest in real estate is any right, title or estate in real estate. It includes a lease of real estate, a lien on real estate, a profit, an easement, an interest in a trust in real estate, and a share in a cooperative apartment.

b. A transfer of ownership of an interest in real estate is the sale, gift, creation or extinguishment of an interest in real estate.

Source: R.S. 25:1-1, 25:1-2, 25:1-3, 25:1-4, 25:1-5(d)

COMMENT

Interest in real estate. This definition is noninclusive; it is derived from Orrok v. Parmigiani, 32 N.J. Super. 70 (App. Div. 1954), in which the court construed section 5(d) of the source statute, the provision concerning contracts for sale of "an interest in land" to include contracts for the sale of "any right, title, or estate in, or lien on, real estate," while excluding from that term "agreements which, though affecting lands, do not contemplate the transfer of any title, ownership or possession." 32 N.J. Super. at 75. Section 1 of the source statute has been held to apply to the conveyance of full title to land, Mayberry v. Johnson, 15 N.J.L. 116, 119 (Sup. Ct. 1835), and it has been held to apply as well to the creation of a life estate, Thomas v. Thomas, 20 N. J. Misc. 419 (Ch. 1942), a lien, Nixon v. Nixon, 100 N.J. Eq. 437 (Ch. 1928), and an easement, Sergi v. Carew, 18 N.J. Super. 307 (Ch. 1952); Annunziata v. Millar, 241 N.J. Super. 275, 289 (Ch. Div. 1990). This definition does not include a license. See Forbes v. Forbes, 137 N.J. Eq. 520 (E. & A. 1946), in which the Court of Errors and Appeals held that a parol license may be granted but a license by its nature is merely a revocable permission which may be withdrawn at any time. A so-called irrevocable license is in fact an easement, however, which is included in the definition. Kearny v. Municipal Sanitary Landfill Authority, 143 N.J. Super. 449, 459 (Law Div. 1976).

Interest in a trust in real estate. An interest in a trust in real estate is expressly included in the definition of an interest in real estate. Under the source statutes, trusts in real estate were treated in two separate sections, which facilitated the development of convoluted and confusing rules concerning the enforceability of parol trusts. For example, a parol trust was considered invalid, but a later, written "declaration" of the trust was considered to relate back to the creation of the trust by parol and render the trust valid as against the judgment creditors and heirs of the grantor. See, e.g., Coles v. Osback, 13 N.J. Super. 367, 371 (Ch. Div. 1951), rev'd on application of facts, 22 N.J. Super. 358 (App. Div. 1952). In the proposed statute, the reference to an interest in a trust in real estate in the definition of an interest in real estate is included in order to change the existing rule, to make clear that insofar as a trust in real estate involves the creation or extinguishment of an interest in real estate it must satisfy the requirements imposed by section 2 of the proposed statute on all transactions involving an interest in real estate. Thus, the creation of a parol trust is not effective to transfer ownership of an interest in land. It may, however, be enforceable under section 4 of the proposed statute. Section 4 provides that an agreement to transfer an interest in real estate or to hold an interest in real estate for the benefit of another must either be in writing, or must be proved by clear and convincing evidence, in order to be enforceable. This section is intended to make parol trusts in real estate enforceable according to their terms if they can be proved by clear and convincing evidence. This change is intended to eliminate the necessity for the application of the doctrines of resulting trust and constructive trust in cases involving parol express trusts. See, e.g., Moses v. Moses, 140 N.J. Eq. 575 (E. & A. 1947). Thus, for example, if a grantor transfers legal title to real estate to a trustee subject to an oral agreement that the trustee will reconvey the legal title to the beneficiary of the trust, either the grantor or the beneficiary can enforce the agreement according to its terms if the agreement to reconvey can be proved by clear and convincing evidence under proposed section 4. Enforcing the agreement according to its terms means that either the grantor or the beneficiary can compel the trustee to reconvey to legal title to the beneficiary. One peculiarity of the prior law was that in such circumstances the property would be reconveyed to the grantor, not to the beneficiary.

Transfer of ownership of an interest in real estate. Source section 5(d), the provision concerning contracts for the sale of an interest in land, has been held to apply to contracts to convey full title, e.g., Bernstein v. Rosenzweig, 1 N.J. Super. 48 (App. Div. 1948), and it has been held to require a writing for an agreement authorizing the removal of sand, Brehen v. O'Donnell, 36 N.J.L. 257 (Sup. Ct. 1873), or the removal of timber; Slocum v. Seymour, 36 N.J.L. 138, 13 Am. Rep. 432 (Sup. Ct. 1873), an agreement to allow the construction of buildings on land; Smith v. Smith's Administrators, 28 N.J.L. 208, 78 Am. Dec. 49 (Sup. Ct. 1860), an agreement to partition land, e.g., Woodhull v. Longstreet, 18 N.J.L. 405 (Sup. Ct. 1841); Lloyd v. Conover, 25 N.J.L. 47 (Sup. Ct. 1855), an agreement to make a mortgage on realty, Feldman v. Warshawsky, 125 N.J. Eq. 19 (E. & A. 1938), or to release a mortgage, Jos. S. Naame Co. v. Louis Satanov Real Estate & Mortgage Corp., 103 N.J. Eq. 386 (Ch. 1928), aff'd 109 N.J. Eq 165 (E. & A. 1929), an agreement to devise land, e.g., Lozier v. Hill, 68 N.J. Eq. 300 (Ch. 1904); Klockner v. Green, 54 N.J. 230 (1969), an agreement to purchase a share in a cooperative apartment, Presten v. Sailer, 225 N.J. Super. 178 (App. Div. 1988), an option to purchase real estate, Sutton v. Lienau, 225 N.J. Super. 293, 299 (App. Div. 1988), and an agreement to sell a business which includes land, where the agreement is entire and indivisible, Kufta v. Hughson, 46 N.J. Super. 222, 231 (Ch. Div. 1957).

Gift Transaction. Source section 1 has been applied to gift transactions as well as to sale transactions. Aiello v. Knoll Golf Club, 64 N.J. Super. 156 (App. Div. 1960).

Section 2 - Writing requirement, conveyances of an interest in real estate

a. A transaction intended to transfer ownership of an interest in real estate is not effective to transfer ownership of the interest unless:

(1) a description of the real estate sufficient to identify it, the nature of the interest, the fact of the transfer and the identity of the transferor and the transferee are established in a writing signed by or on behalf of the transferor; or

(2) the transferor has placed the transferee in possession of the real estate as a result of the transaction and the transferee has either paid all or part of the consideration for the transfer or has reasonably relied on the effectiveness of the transfer to the transferee's detriment.

b. A transaction which does not satisfy the requirements of this section is not enforceable except as an agreement to transfer an interest in real estate under section 4 of this Act.

c. This section does not apply to leases.

d. This section does not apply to the creation of easements by prescription or implication.

Source: R.S. 25:1-1, 25:1-2

COMMENT

This section combines the rules of source sections 1 and 2, and applies to all manner of transactions involving an interest in real estate (other than leases, which are dealt with in a separate section): the sale of a fee interest in real estate, the creation of a trust in real estate, a gift of an interest in real estate, and the extinguishment of any interest in real estate. Subsection (a) states the general rule that no transfer of ownership occurs in a parol transaction. Transactions involving an interest in real estate are ineffective to transfer ownership unless they are in a writing which satisfies a number of minimum requirements: the writing must establish the fact of the transfer, the identity of the transferor and the transferee, the identity of the real estate and the nature of the interest being conveyed, and it must be signed.

Signed by the transferor, by the transferor's agent, or by a person authorized by law to execute the writing. This provision changes the rule of source section 1, which required that if the writing was signed by an agent, the agent's authority had to be in writing as well. A writing is sufficient under this section if it is signed by the transferor or by the transferor's agent, or by a person authorized by law to execute the writing. Good practice as well as the requirements of lenders, title insurance companies and grantees undoubtedly will continue to demand that an agent's authority be reduced to writing, but written authority will not be required to satisfy this statute. Questions concerning the validity and extent of a particular agent's authority will be dealt with under otherwise applicable law. See also proposed section 4, which also provides for signature by an agent of an agreement for the conveyance of an interest in real estate.

Note that other applicable principles of law may require that a writing transferring an interest in real estate satisfy additional requirements. For example, a deed signed by the transferor of property but not acknowledged would satisfy the requirements of this section but would not satisfy the requirements of the Recording Statute, R.S. 46:15-1.

Subsection (a) of this section incorporates judicial interpretations of the source statute to the effect that, in some cases, the owner of an interest in real estate who conveys an interest in land in a parol transaction may not take advantage of the rule that such a transaction is ineffective unless it is in writing. This is a very limited exception, applying only in those situations in which the transferor has placed the transferee in possession as a result of the parol transaction and the transferee has either paid consideration for the transfer or has detrimentally relied upon the validity of the transfer. The second situation, detrimental reliance, encompasses completed gift transactions.

Subsection (b) makes clear that the transferee in a parol transaction which does not satisfy the exception provided in subsection (a), e.g., because the transferee has not taken possession, may be able to enforce the transaction under proposed section 4 if the transaction involved an enforceable agreement and its terms can be proved by clear and convincing evidence. Under this section, a parol declaration of a trust will not suffice to transfer ownership of an interest in land. A parol trust may, however, be enforceable as an agreement under section 4 if it can be proved by clear and convincing evidence.

Subsection (c) removes leases from the compass of this section; they are governed by proposed Section 3.

Subsection (d) excepts easements by implication or prescription from this section. Under New Jersey law, easements may be created either by express conveyance, by implication, or by prescription. Leach v. Anderl, 218 N.J. Super. 18, 24 (App. Div. 1987), citing Mahony v. Danis, 95 N.J. 50, 58 (Law Div. 1976). An express easement is created by "a transaction intended to transfer ownership," therefore it falls under the language of proposed section 2(a) and a writing is required. This is consistent with present law. See, e.g., Annunziata v. Millar, 241 N.J. Super. 275 (Ch. 1990). Easements created by implication and prescription traditionally are considered to be outside the Statute of Frauds and proposed section (d) is intended to continue that rule. While they do not fall under the language of proposed section 2(a) as they do not involve "a transaction intended to transfer ownership," there is language in some cases to the effect that the constructive intent of the parties to a transaction gives rise to an easement by necessity. Compare Mahony v. Danis, 95 N.J. at 59 (Schreiber, J., dissenting), citing Blumberg v. Weiss, 129 N.J. Eq. 460 (Ch.), aff'd, 130 N.J. Eq. 203 (E. & A. 1941), with Leach v. Anderl, 218 N.J. Super. at 25; Old Falls, Inc. v. Johnson, 88 N.J. Super, 441, 451 (App. Div. 1965). Therefore, caution dictates the inclusion of proposed subsection 2(d) to make it clear that this proposed statute is not intended to effect any change in the law concerning easements by implication or by prescription.

Section 3 - Writing requirement, leases

A transaction intended to create a lease of real estate for more than three years is not enforceable unless:

a. the leased premises, the term of the lease and the identity of the lessor and the lessee are established in a writing signed by or on behalf of the party against whom enforcement is sought; or

b. the real estate, the term of the lease and the identity of the lessor and the lessee are proved by clear and convincing evidence.

Source: R.S. 25:1-1, 25:1-5(d)

COMMENT

Section 1 of the source statute expressly included leases, and a lease has historically been considered to be an estate in land. In recent years, however, courts have struggled with the fact that modern leases, both residential and commercial, often have more of the characteristics of a contractual agreement than a conveyance of an estate. See, e.g., Sommer v. Kridel, 74 N.J. 446 (1977); Ringwood Associates, Ltd., v. Jack's of Route 23, 153 N.J. Super. 294 (Law Div. 1977). In the context of imposing a writing requirement, the hybrid nature of a lease becomes problematic as well. This problem is reflected in the cases decided under the source statute. In one nineteenth century case the court treated an unsigned lease as an executory contract where the lessee had taken possession, and granted the lessor damages for breach of the lease under the equitable doctrine of part performance. Wharton v. Stoutenburgh, 35 N.J. Eq. 266 (E. & A. 1882). An early twentieth century case refused to use a contractual analysis, however, and held that an unsigned lease for more than three years, under which the lessee had taken possession, paid rent, and made improvements, would not be enforced on contract principles. Clement v. Young-McShea, 69 N.J. Eq. 347 (Ch. 1905). Two recent cases have taken opposite points of view on the treatment of parol leases for more than three years. In Brechman v. Admar, 182 N.J. Super. 259 (Ch. Div. 1981) the court refused to enforce a lease for five years where there was a signed writing that did not satisfy the writing requirement of source section 1 because it did not include the commencement date or term of the lease. The court refused to allow testimony to prove those terms, and also refused to enforce the lease on part performance grounds because the acts taken by the lessee (payment of a deposit, hiring an architect, preparation of blueprints) were considered to be merely preparatory and not in performance of the lease. In Deutsch v. Budget Rent-A-Car, 213 N.J. Super. 385 (App. Div. 1986) the court enforced a partly-performed oral lease for more than three years where the lessee had taken possession and made substantial improvements. The court stated that part performance of the lease was relevant if the acts of part performance "provide a reliable indication that the parties have made an agreement of the general nature sought to be enforced." Proposed section 3 states a separate rule for leases, obviating the necessity to distinguish between their contract and conveyance aspects.

This section sets a different standard for enforceability of parol lease than is set in section 2 for a transaction involving an interest in land. Under proposed section 2 a parol conveyance of an interest in land is effective if the transferee has taken possession of the real estate. It is the Commission's view that in the context of determining whether a parol lease should be enforceable, possession by the lessee is only one factor which may be considered. Possession by a lessee is certainly probative of some lessor-lessee relationship, but possession of itself is likely to be ambiguous as to the length of the lease as well as to other lease terms. As a result, the Commission decided not to impose any single preclusive requirement such as possession for enforceability of a parol lease. See the parallel provision on enforcement of agreements, proposed section 4, which also rejects preclusive requirements for enforceability.

Commissioner Rosen favors an additional requirement - i.e., that the lessor has placed the lessee in possession - for the following reasons. First, cases which enforce parol leases cited above all involve fact situations in which the tenant had, in fact, been placed in possession of the premises. Second, in Commissioner Rosen's view, adding a requirement of possession would make the rule for leases consistent with that for conveyances in proposed section 2.

Section 4 - Enforceability of agreements regarding real estate

An agreement to transfer an interest in real estate or to hold an interest in real estate for the benefit of another is not enforceable unless:

a. a description of the real estate sufficient to identify it, the nature of the interest to be transferred, the existence of the agreement, and the identity of the transferor and the transferee are established in a writing signed by or on behalf of the party against whom enforcement is sought; or

b. a description of the real estate sufficient to identify it, the nature of the interest to be transferred, the existence of the agreement and the identity of the transferor and the transferee are proved by clear and convincing evidence.

Source: R.S. 25:1-3, 25:1-4, 25:1-5(d)

COMMENT

This proposed section is intended to change significantly the statutory rule applicable to the enforcement of parol agreements involving real estate. The source statute provides that contracts for the sale of real estate are not enforceable unless they are in writing. The original purpose of the rule was to discourage the fraudulent assertion of contracts that were never made, but the courts realized soon after the Statute of Frauds was enacted that the strict application of the Statute sometimes resulted in the unjust repudiation of contracts that actually were made. The judicially-created exceptions to the writing requirement were developed to mediate the harsh results of strict enforcement but they have been inconsistently applied, resulting in uncertainty and confusion as to how the Statute will be applied in individual cases.

It is the Commission's view that a preclusive writing requirement is neither necessary nor desirable. The rule of the source statute was conceived before the development of modern concepts of evidence, when a party to an alleged contract was disqualified from testifying in court and thus was seriously hampered in repudiating an alleged contract that was never made; a preclusive writing requirement was a rational approach in that ancient context, but is no longer valid as a general approach to this category of agreements.

The Commission believes that the focus of inquiry in a situation involving an agreement for the sale of an interest in real estate or to hold an interest in real estate for the benefit of another should be whether an agreement has been made between the parties by which they intend to be bound. The intent of parties to be bound usually is manifested by a signed written agreement, but as the history of the Statute shows, in some circumstances parties enter into binding agreements without such a formal manifestation of their assent. Under this proposed section parol agreements are not enforceable unless they are in writing or unless they can be proved by clear and convincing evidence. Thus, if an agreement has not been reduced to a writing which satisfies the minimal requirements of this section, the agreement must be proved by a high standard of proof. The Commission considered and rejected the approach of codifying the traditional requirements of "part performance" or "detrimental reliance," as unnecessarily limiting. The history of the interpretation of the Statute of Frauds shows that courts have had to struggle to fit individual cases into the traditional exceptions, often doing violence to the principles of precedent and stare decisis, in order to achieve just results in cases in which it was clear that there was in fact an agreement between the parties. Equally troubling are the cases in which the courts, admitting the existence of an agreement between the parties, refused to enforce it because of the situation failed to fit precisely within one of the recognized exceptions, often on technical grounds.

It is important to note that this section of the proposed statute is stated in the negative; that is, an agreement is not enforceable unless it satisfies the writing requirement or unless it is proved by clear and

convincing evidence. This proposed section sets a threshold requirement for enforceability but it does not include all of the requirements for enforceability which might be imposed by other applicable principles of law. Thus, for example, the fact that an agreement is manifested by a signed writing does not preclude a party from showing that one of the parties lacked the capacity to contract or that the enforcement of the agreement would be against public policy. Similarly, proof by clear and convincing evidence of all of the elements of a parol agreement outlined in this proposed section does not preclude a party from resisting the enforcement of the agreement by raising defenses such as lack of capacity or violation of public policy.

Clear and convincing evidence. This proposed section expressly requires that, in the absence of a writing, the existence of an agreement between the parties as well as its essential terms must be proved by clear and convincing evidence. The circumstances surrounding a transaction, the nature of the transaction, the relationship between the parties, their contemporaneous statements and prior dealings, if any, all are relevant to a determination of whether the parties made an agreement by which they intended to be bound. Thus, if the parties in question have been negotiating the sale of a multi-million dollar office building over many months through the exchange of a series of redrafted written contracts, it is unlikely that the parties intended to be bound other than in writing. Conversely, if the parties in question have engaged in a series of "handshake" agreements for the purchase and sale of individual building lots in the past, and have honored them in the absence of any writing, their prior conduct could tend to show that they intended to enter into a binding oral agreement. Intent to enter into a binding agreement might also be shown by the actions of the parties in performance of the agreement or even by actions defined in case law under the source statute as ancillary to the performance of the agreement. In Deutsch v. Budget Rent-A-Car, 213 N.J. Super. 385 (App. Div. 1986), the Appellate Division treated the part performance of a parol lease as evidence of the parties' agreement that the lease was for more than three years. The court commented that the doctrine of part performance should be applied to enforce a parol agreement "if part performance provides a reliable indication that the parties have made an agreement of the general nature sought to be enforced."

Consideration. Whether the consideration need be included in an agreement for the sale of land is unclear under present law. R.S. 25:1-8, which was not part of the original Statute of Frauds but was added in 1874, states a general rule that "the consideration of any promise, contract or agreement required to be put in writing by sections 25:1-1 to 25:1-7 of this title, need not be set forth or expressed in such writing, but may be proved by any other legal evidence." This would appear to provide that an agreement for the sale of an interest in land need not include the purchase price, but case law does not bear out this interpretation consistently. Compare Nibert v. Baghurst, 47 N.J. Eq. 201 (Ch. 1890)("Since [the adoption of this section in 1874] it is not necessary that the consideration of a contract, coming within the statute, should be set out in the memorandum") with Johnson v. Lambert, 109 N.J. Eq. 88, 90 (E. & A. 1931)("It is well settled that the memorandum in writing of a contract for sale of lands must contain the full terms of the contract--that is, the names of the buyer and seller, the subject of the sale, the price, the terms of credit, and the conditions of sale, if any there be.")(dicta). Under this proposed section the consideration need not be included in the writing establishing the agreement.

Commissioner Rosen believes that an agreement for the conveyance of an interest in real estate or to hold an interest in real estate for the benefit of another should not be enforceable solely because the agreement can be proved by clear and convincing evidence. In Commissioner Rosen's view, the present law requires also that there be present either part performance or detrimental reliance. These are additional and - in his view - essential equitable principles that justify departure from the requirement of a writing. To enforce parol agreements to convey, hold or lease real estate without compelling equitable circumstances, in Commissioner Rosen's opinion, would be contrary to the reasonable expectations of participants in real estate transactions and would encourage perjury in litigation.

Section 5 - Effect of unwritten transactions

Transactions involving an interest in real estate, and agreements for the transfer of an interest in real estate or to hold an interest in real estate for the benefit of another, which are not established in a writing, are not effective against bona fide purchasers for valuable consideration without notice or lienors without notice.

COMMENT

Both under present law and under this proposed section there are circumstances under which unwritten transactions will affect the ownership of interest in real estate. Inherently such transactions are not recordable and thus they fall outside of the Recording Statute, leaving open the possibility that they may be effective against third parties. See Zwaska v. Irwin, 52 N.J. Super. 27 (Ch. Div. 1958)(parol trust in real estate defeated federal tax lien; Recording Statute does not affect rights in property which are not represented by a deed or instrument). This proposed section assures that unwritten transactions are no more efficacious against third parties than written but unrecorded transactions. This proposed section is intended to reverse the rule of Zwaska v. Irwin.

The Contracts Provisions of the Statute of Frauds

Section 4 of the English Statute of Frauds is one of a number of sections of the original statute that were concerned particularly with suppressing perjury.[2] That section, now section 5 of the New Jersey Statute, provided that "no action may be brought" upon any of five enumerated types of agreements unless the agreement was in writing or there was a written note or memorandum of it. The enumerated types of agreements were those by an executor or administrator of an estate to pay damages out of his own estate, agreements to answer for the debt of another, agreements made upon consideration of marriage, agreements for the sale of an interest in land (discussed above), and agreements not to be performed within a year from their making.

Although it is generally agreed that section 4 of the English statute was intended to suppress perjury,[3] this bare statement of purpose is not helpful in understanding why these particular categories of agreements were singled out for special treatment. With respect to promises of executors and administrators, it has been theorized these promises were included because it was much more common for such a promise to be made, and to be

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[2] Another provision of the English Statute which was concerned with suppressing perjury was section 17, which provided that no contract for the sale of goods of a value of more than ten pounds would be valid unless in writing or evidenced by a writing. Section 17 is the predecessor to Section 2-201 of the Uniform Commercial Code, 12A:2-201, which is outside of the scope of this project.

[3] 6 W. Holdsworth, A History of English Law 379-93 (2d ed. reprinted 1977); accord Teeven, Seventeenth Century Evidentiary Concerns and the Statute of Frauds, 9 Adelaide L. Rev. 252 (1983). Holdsworth theorizes that the concern of the drafters with suppressing perjury arose out of the fact that rules of procedure and evidence were in transition at the time the Statute was adopted. Reaction to the defects in the jury system of the time had given rise to restrictions on the admission of certain kinds of testimony. In particular, the parties to an action frequently were not permitted to testify, leaving defendants unable to refute claims supported by perjured testimony. The approach of the Statute was to require certain types of transactions to be capable of proof only by a writing, to preclude wrongdoers from being able to prosecute a manufactured claim on the basis of perjured testimony alone.

important, in the seventeenth century. Executors and administrators benefitted personally from estates, and there was little compulsion for them to make distributions from an estate. The wide discretion which they enjoyed, coupled with limitations upon the kinds of claims that could legally be made against an estate, made it more likely that an executor or administrator would make, or be claimed to have made, a personal promise to satisfy a claim.[4]

Contracts of suretyship and contracts not to be performed within a year may have been included because they were continuing contracts, which made them more susceptible to the defects in the judicial system of the time, and contracts for the sale of an interest in land, as well as contracts in consideration of marriage, which commonly involved the transfer of real property interests, were included as corollaries to the separate sections on interests in land.[5]

Given the lack of explanatory legislative history it is impossible to say whether specific policy choices motivated the adoption of the New Jersey version of the Statute of Frauds in 1794. It is more likely that the adoption of the Statute was part of the ongoing attempt during that formative period to replicate generally many of the aspects of the English legal system that were considered important. Moreover, it is difficult to say whether the same kinds of evidentiary problems affected litigation involving these kinds of claims in local courts of the time. What is clear is that concern with the assertion of unfounded claims based on parol agreements continued into the nineteenth century. This concern is evidenced by the virtually simultaneous addition of three entirely new provisions to the Statute of Frauds within a two-year period. All three sections paralleled section 4 of the English Statute in that they made certain kinds of promises unenforceable unless in writing. The first provision, enacted in 1873, concerned promises to pay a debt discharged in bankruptcy. Both of the other sections were enacted as part of the 1874 revision. These sections imposed a writing requirement on promises to pay debts contracted during infancy, and on real estate broker contracts. The provisions on real estate broker contracts, section 9 of the present statute, will be dealt with separately below. See proposed section 6 and comment.

Developments in law and in social policy have changed the context in which these provisions now operate, and each provision must be reconsidered individually in light of past experience and present circumstances. Modern commentators have identified three purposes, summarized in the Restatement (Second) of Contracts, which writing requirements may serve with respect to contracts, agreements and promises: a evidentiary purpose of providing "reliable evidence of the existence and terms of the contract"; a cautionary purpose of discouraging precipitous or "ill-considered" action; and a channeling function which "has helped to create a climate in which parties often regard their agreements as tentative until there is a signed writing." Restatement (Second) of Contracts, Statutory Note 281, 286.

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4 Holdsworth, supra at 390-93.

5 Holdsworth, supra at 390-93.

Sections recommended for revision and retention:

R.S. 25:1 5(b) - Promise to Answer for the Debt of Another

Subsection 5(b) of the New Jersey Statute of Frauds provides that "A special promise to answer for the debt, default or miscarriage of another person" must be in writing in order to be enforceable. In a recent case involving a claim by a creditor that an officer of an insolvent corporation had agreed to be liable for the corporation's debt, the court commented that it was the fear of fabricated oral assurances in this type of situation which led to the inclusion of this subsection in the Statute.[6] The Restatement (Second) of Contracts adds that this subsection serves a "cautionary function of guarding the promisor against ill-considered action."[7]

The Commission recommends that this provision of the Statute be retained. It applies to a relatively narrow, definable class of promises which result in a person assuming responsibility for the underlying obligation of another. Because this type of promise is one in which by definition no consideration moves to the promisor, the cautionary and channeling functions of a writing requirement are particularly applicable. In some contexts, it also has an important consumer protection function.

Section 6 - Liability for the obligation of another.

A promise to be liable for the obligation of another person, in order to be enforceable, shall be in a writing signed by the person assuming the liability or by that person's agent. The consideration for the promise need not be stated in the writing.

Source: R.S. 25:1-5(a), 25:1-5(b), 25:1-8

COMMENT

Purpose of the provision. Like source section R.S. 25:1-5(b), this proposed section has an evidentiary purpose, Van Dam Egg Co. v. Allendale Farms, Inc., 199 N.J. Super. 452, 458-459 (App.Div. 1985)(the source section discourages fabricated claims); a cautionary purpose, Restatement (Second) of Contracts, Statutory Note at 281, 286 ("guarding the promisor against ill-considered action") and a channeling function. Id. ("it has helped create a climate in which parties often regard their agreements as tentative until there is a signed writing.")

"Debt of another." The main issue upon which cases under this subsection turn is whether there is a "principal obligation 'of another' than the promisor. The promisor must promise as a surety for the principal obligor" in order for the promise to be within the Statute. Restatement (Second) of Contracts sec. 112, at 293. This provisions does not apply to a promise which amounts to a separate undertaking which involves new consideration and is largely for the promisor's personal benefit. Restatement (Second) of Contracts sec. 112, at 293; Schoor Associates v. Holmdel Heights Construction Co., 68 N.J. 95, 106 (1975).

An early statement of the general rule concerning the types of promises that fall within the Statute's writing requirement is that such promises are collateral, they secondarily obligate the promisor, and they lack new consideration. Thus, where two persons promised to sign a note to pay a third person's debt, where no new consideration moved to them, the promise to sign the note was unenforceable. Wills v. Shinn, 42 N.J.L. 138, 140 (Sup. Ct. 1880). Within this general rule, courts have developed various tests to determine the applicability of the Statute. In the most recent New Jersey Supreme Court opinion on this subject the court discussed the various tests and applied the "leading object or main purpose rule":

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6 Van Dam Egg Co. v. Allendale Farms, Inc., 199 N.J. Super. 452, 458-459 (App.Div. 1985).

7 Restatement (Second) of Contracts sec. 112.

> When the leading object of the promise or agreement is to become guarantor or surety to the promisee for a debt for which a third party is and continues to be primarily liable, the agreement, whether made before or after or at the time with the promise of the principal, is within the statute, and not binding unless evidenced by writing. On the other hand, when the leading object of the promisor is to subserve some interest or purpose of his own, notwithstanding the effect is to pay or discharge the debt of another, his promise is not within the statute.

Schoor Associates v. Holmdel Heights Construction Co., 68 N.J. 95, 106 (1975). In adopting this rule, the court considered and rejected a number of other tests that have been applied by courts or supported by commentators, including the credit test utilized in Romano v. Brown, and the surety test "supported by Professor Williston and others." Id. at 104.

Novations. Because the promise must be one to be a surety, the statute does not apply to novations. See Emerson N.Y. - N.J., Inc. v. Brookwood T.V., 122 N.J. Super. 288, 295 (Law Div. 1973) where the court defined a novation as a transaction "whereby one person promises to assume the debt of another in consideration that the original debtor be discharged therefrom, and the creditor substitutes the promisor in place of the original debtor and extinguishes his debt." In order for a novation to be accomplished, "The discharge of the debtor must be full and complete, operating as an extinguishment of the debt at the time the new promise is made, and as a consideration therefor; but an agreement whereby one guarantor or surety is substituted for another is not within the statute of frauds, although the obligation of the original debtor is not extinguished." 122 N.J. Super. at 295.

Releases. This subsection does not apply to releases. Emerson v. N.Y. - N.J., Inc. v. Brookwood T.V., 122 N.J. Super. 288, 293 (Law Div. 1973). The court commented that "The statute applies to `a special promise to answer for the debt, default or miscarriage of another person' (N.J.S.A. 25:1-5(b)) but it is silent concerning a release from such a promise. Therefore, although a writing may have been required for the guaranty originally, a release from that obligation could be accomplished orally, notwithstanding the statute of frauds."

Executors and administrators. The Commission is recommending repeal of subsection 5(a) of the present statute, R.S. 25:1-5(c) (see discussion below), which requires a writing to enforce the promise of an executor or administrator to be liable for the debt of an estate. Such promises, to the extent that they constitute promises to be liable for the obligation of another, will fall under this proposed section.

Consideration. The provision that the consideration for a promise falling under this section need not be stated in the writing is taken from R.S. 25:1-8. See further discussion of the history of that provision below.

R.S. 25:1-5(c) - Agreements Made Upon Consideration of Marriage

Subsection 5(c) requires a writing to enforce a contract made upon consideration of marriage, that is, a promise in which part or all of the consideration is marriage or a promise to marry. The basic principle of this subsection, that agreements made in consideration of marriage must be writing in order to be enforceable, has been litigated through the years in factually diverse situations.[8] This subsection has been held not to bar

[8] The statute has been held to bar actions on parol promises made in consideration of marriage by a wife who agreed to apply her assets to expenses of her future husband and herself if he would marry her at an early date, Alexander v. Alexander, 96 N.J. Eq. 10, 14 (Ch. 1924); by a prospective spouse to adopt the other spouse's child, Elmer v. Wellbrook, 110 N.J. Eq. 15, 18 (Ch. 1932); by a husband to convey his dwelling to his wife after marriage, Herr v. Herr, 13 N.J. 79, 87 (1953); by a husband to give his prospective bride a

the enforcement of parol agreements between unmarried couples, because the consideration in such cases is not marriage but services rendered in return for promises of future support.[9]

This category of agreements may have been included in the English Statute because they typically involved transfers of real property interests and thus requiring a writing was consistent with the conveyancing and other land sections.[10] In the modern context this provision serves the evidentiary, cautionary and channeling purposes identified as supporting the imposition of a writing requirement.[11]

The Uniform Premarital Agreement Act, C. 37:2-31 to -41, supersedes this subsection with respect to premarital agreements executed on and after its effective date. In addition to imposing a writing requirement on premarital agreements, the Uniform Act imposes additional formal requirements and substantive limitations as well. Subsection 5(c) will continue to be applicable, however, to premarital agreements entered into prior to the effective date of the Uniform Act, and therefore it will be of importance for many years to come. The Commission therefore recommends that subsection 5(c) of the present statute be retained as part of the codified law, and amended to clearly reflect the fact that it has been prospectively superseded by the Uniform Act.

R.S. 25:1-5. Promises or agreements not binding unless in writing

No action shall be brought upon any of the following agreements or promises, unless the agreement or promise, upon which such action shall be brought or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or by some other person thereunto by him lawfully authorized:

[a. A special promise of an executor or administrator to answer damages out of his own estate;

b. A special promise to answer for the debt, default or miscarriage of another person;]

c. An agreement made upon consideration of marriage entered into prior to the effective date of the Uniform Premarital Agreement Act, P.L.1988, c.99[;

d. A contract or sale of real estate, or any interest in or concerning the same; or

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home and a housekeeper, Gilbert v. Gilbert, 66 N.J. Super. 246, 251-252 (App. Div. 1961); by a wife that her husband's mother would come from Hungary and live with them, Koch v. Koch, 95 N.J. Super. 546, 550 (App. Div. 1967). This subsection barred a wife from claiming a death benefit from the husband's employer on the basis of a parol antenuptial agreement, where the husband's niece was a properly-named beneficiary. Pennsylvania Railroad Co. v. Warren, 69 N.J. Eq. 706, 709 (Ch. 1905), and also barred a wife from varying the terms of her husband's will by parol testimony of an antenuptial agreement. Russell v. Russell, 60 N.J.Eq. 282 (Ch. 1900), aff'd, 63 N.J. Eq. 282 (E. & A. 1901).

9 Kozlowski v. Kozlowski, 164 N.J. Super. 162, 177 (Ch. Div. 1978), aff'd, 80 N.J. 378 (1979); Crowe v. Degoia, 203 N.J. Super. 22, 34 (App. Div. 1985), aff'd, 102 N.J. 50 (1986).

10 W. Holdsworth, supra, at 392.

11 See Manning v. Riley, 52 N.J. Eq. 39 (Ch. 1893)("The purpose of the statute is ... to render hasty and inconsiderate oral promises, made to induce marriage, without legal force, and thus to give protection against the consequences of rashness and folly.").

e. An agreement that is not to be performed within one year from the making thereof].[12]

Sections recommended to be repealed:

R.S. 25:1-5(a) Promise of an executor or administrator

Subsection 5(a) of the present New Jersey Statute of Frauds requires a writing to enforce an agreement of an executor or administrator to be personally liable for damages. The Commission recommends that this subsection be repealed. Unlike the situation which obtained in the seventeenth century, the responsibilities of fiduciaries to satisfy the claims of creditors and other claimants, and the manner in which those claims are to be satisfied, are covered in detail in the Probate Code.[13] Under present circumstances this subsection is an anomaly in that it treats separately one class of fiduciaries, while promises by other kinds of fiduciaries to be personally liable for debts are covered under subsection 5(b).[14]

The Commission believes that a separate section for this class of fiduciaries is unnecessary,[15] and that agreements by executors and administrators to be personally liable for the obligations of an estate should be treated under proposed section 6, set forth above, as a subspecies of agreements to be liable for the obligation of another.[16]

R.S. 25:1-5(e) - Contracts Not to be Performed Within One Year of Their Making

Subsection 5(e) of the New Jersey Statute of Frauds provides that "[a]n agreement that is not to be performed within one year from the making thereof" must be in writing in order to be enforceable. It has been theorized that this provision was included in the English Statute because, like the provision concerning surety agreements, it is a type of continuing contract which by its nature is more susceptible to the problems of proof which existed in the court system of the time. In Deevy v. Porter, decided by the Supreme Court

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12 The amended statute would then read:

"No action shall be brought upon any of the following agreements or promises, unless the agreement or promise, upon which such action shall be brought or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or by some other person thereunto by him lawfully authorized:

c. An agreement made upon consideration of marriage entered into prior to the effective date of the Uniform Premarital Agreement Act, P.L.1988, c.99."

13 See, e.g., Title 3B, chapter 22 (payment and proof of claims).

14 See Remington v. Lauter Piano Co., 8 N.J. Misc. 257 (Sup. Ct. 1930)(attorney for trustee liable to pay broker's commission on parol promise because promise was independent undertaking not within Subsection 5(b)); Gallagher v. McBride, 66 N.J.L. 360 (Sup. Ct. 1901)(guardian liable for supplies delivered to ward notwithstanding subsection 5(b) because debt was incurred directly by guardian).

15 Only two cases were found which apply this subsection. Cochrane v. McEntee, 51 A. 279, 280 (Ch. 1896)(a claim against the estate of a decedent, on the basis of the decedent's oral promise to pay a claim against her husband's estate, was disallowed because it came within this subsection); and Sabo v. Crooks, 65 N.J. Super. 260, 261-262 (App. Div. 1961)(appeal remanded for inquiry into possible defense under this section to debt incurred by defendant's husband before his death).

16 See Restatement (Second) of Contracts, sec. 111, which describes agreements of executors and administrators as a subspecies of agreements to be a surety.

in 1953, the court in a case involving this subsection commented of the Statute generally that "[i]t was intended to guard against the perils of perjury and error in the spoken word ... and to protect defendants against unfounded and fraudulent claims."[17] The court also referred to an early opinion of an English court which described the policy of the statute as being to prevent "the leaving to memory the terms of a contract for longer time than a year."[18]

Both courts and secondary authorities have commented that the peculiar language chosen by the drafters of the Statute has not served their purpose well because many long-term contracts or continuing contracts have been held to fall outside the Statute.[19] The Restatement Second of Contracts suggests that the inutility of the chosen language has led to a tendency to construe this subsection narrowly.[20]

The Commission recommends that this subsection be repealed as its language prescribes an arbitrary and illogical class that includes only some long-term contracts. While requiring a writing in the case of long-term contracts serves a salutary evidentiary purpose in a generalized way, the poorly-defined outlines of the present subsection may defeat the legitimate expectations of parties to some long-term contracts and may facilitate the repudiation of otherwise legitimate contractual obligations as often as it prevents the assertion of unfounded claims. The Commission believes that the imposition of a writing requirement should be reserved for more clearly-defined classes of contracts and agreements such as those outlined in the retained provisions.

R.S. 25:1 6 - Ratification of Debts Contracted As a Minor

Section 6 of the New Jersey Statute of Frauds provides that "No action shall be maintained to charge any person upon any promise, made after full age, to pay any debt contracted during infancy, to which infancy would be a defense, unless such promise be put in writing and signed by the party to be charged therewith." Simply put, this section provides that a person cannot be sued on a promise made as an adult to pay for a debt incurred as a minor, if minority would have been a defense, unless the promise was in writing and signed by the person making the promise. This section was adopted in 1874;[21] there is no counterpart to it in the original English Statute of Frauds.

The Commission recommends that this section be repealed as it has little continuing importance.[22] This section is concerned only with ratification of debts as to

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17 Deevy v. Porter, 11 N.J. 594, 595-96 (1953).

18 Deevy v. Porter, 11 N.J. at 597.

19 Deevy v. Porter, 11 N.J. at 596-97 (discussing the historical rationale for this subsection and the various criticisms levelled against it); Restatement (Second) of Contracts sec. 130.

20 Restatement (Second) of Contracts sec. 130.

21 Rev. 1874 p.229, An Act for the prevention of frauds and perjuries, º7.

22 Only two cases actually construe this Section of the Statute, West v. Prest, 98 N.J.L. 209 (E. & A. 1922) and Parker v. Hayes, 39 N.J. Eq. 469 (Ch. 1885).

which minority is a defense, a class of debts which have become greatly circumscribed in the course of this century. The age of majority for purposes of contractual capacity has been lowered to 18, R.S. 9:17B-1, and the common law rule that a minor is liable only when contracting for "necessaries" has been interpreted to allow recovery for the sale of a wide variety of goods and services, depending upon the facts of the case.[23] Minors have also been held liable for debts contracted when they misrepresented their age.[24] Moreover, in those cases in which minority is a defense the minor may be required to make restitution for goods and services received.[25] The development of a policy which favors holding minors liable for debts in a wider set of circumstances mitigates against the retention of a special rule governing ratification of a minor's debts.

R.S. 25:1-7 - Promise to Pay a Debt Discharged in Bankruptcy

This section of the New Jersey Statute of Frauds provides that no action may be brought against a person for any promise to pay a debt from which he "was or shall be" discharged under federal bankruptcy law "unless such promise be made after such discharge, and be put in writing and signed by the party to be charged therewith." This section was adopted in 1874, Rev. 1874, p. 299, sec. 8, to change the common law rule that a parol promise by a bankrupt to pay after discharge revived the debt. There was no counterpart of this Section in the original English Statute of Frauds.

The Commission recommends that this section be repealed as it has been preempted by federal bankruptcy law. The present federal law concerning revival of debts discharged in bankruptcy is contained in subsections 524(c) and 524(d) of the Bankruptcy Code.[26] These provisions allow the reaffirmation of discharged debts only with court approval. Such reaffirmations are not effective unless made prior to discharge and the debtor has up to sixty days after the agreement is filed in court to rescind. If the debtor was not represented by an attorney, the court will not enforce a reaffirmation agreement unless the court finds that the agreement is in the debtor's best interest. Because the federal statute affords a bankrupt far greater protection than the New Jersey provision, section 7 of the New Jersey Statute of Frauds is a nullity.

R.S. 25:1-8 - Consideration Not Expressed in Writing

This section was added in 1874, apparently to reverse judicial decisions which had held that the writing required to enforce a promise to be liable for the debt of another under the predecessor to R.S. 25:1-5(b) must contain a statement of the consideration for the

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[23] E.g., Bancredit, Inc. v. Bethea, 65 N.J. Super. 538. 549 (App. Div. 1961).

[24] E.g., Manasquan v. Savings and Loan Assn v. Mayer, 98 N.J. Super. 163, 164 (App. Div. 1967); R.J. Georke Co. v. Nicolson, 5 N.J. Super. 412, 416 (App. Div. 1949).

[25] See, e.g., Boyce v. Doyle, 113 N.J. Super. 240 (Law Div. 1971), Pemberton B. & L. Assn v. Adams, 53 N.J. Eq. 258 (Ch. 1895); Carter v. Jays Motors, Inc., 3 N.J. Super. 82 (App. Div. 1949);

[26] See the Bankruptcy Reform Act of 1978, 92 Stat. 2549.

promise.[27] The added provision was not limited to promises to be liable for the debt of another, however, but to all sections of the Statute. See Rev. 1874, p. 301, sec. 9. The applicability of the added provision to all required writings under the act rather than only to a writing with respect to liability for the debt of another may have been inadvertent. It was applied to contracts for the sale of land for a time, see Nibert v. Baghurst, 47 N.J. Eq. 201 (Ch. 1890), but later cases on contracts for the sale of land seem to ignore it. E.g. Johnson v. Lambert, 109 N.J. Eq. 88, 90 (E. & A. 1931). The Commission is recommending that this provision not apply to contracts for the sale of land. See proposed section 4 and Comment. The principle of the source section is retained, however, in proposed section 6, the revised version of the source section on promises to be liable for the debt of another.

The Real Estate Broker Provisions of the Statute of Frauds

The provision regulating contracts with real estate brokers is essentially a consumer protection law. The source statute serves to protect the public from "fraud, incompetence, misinterpretation, sharp or unconscionable practice." Ellsworth Dobbs, Inc. v. Johnson, 50 N.J. 528, 553 (1967); Small v. Seldows Stationary, 617 F.2d 992, 996 (3d Cir. 1980). It also discourages agents or brokers from contracting land sales meant to bind owners, unless owners confer written authority. Sadler v. Young, 78 N.J.L. 594, 597 (E. & A. 1910). By preventing overreaching and misunderstanding, the section aids real estate brokers as well as owners. The same reasons that give this provision continued vitality support its extension into broker contracts unrelated to the sale of real estate: contracts with real estate brokers concerning leases and the transfer of other interests in real property and contracts with business brokers.

The Commission recommends retaining and broadening the real estate broker commission provision of the Statute of Frauds and clarifying and simplifying its language.

Section 7. Commissions of real estate broker and business broker; writing required

a. (1) Real estate broker is a licensed real estate broker or other person performing the services of a real estate agent or broker.

(2) Business broker is a person who negotiates the purchase or sale of a business. "Negotiates" includes identifies, provides information concerning, or procures an introduction to prospective parties, or assists in the negotiation or consummation of the transaction. Purchase or sale of a business includes the purchase or sale of good will or of the majority of voting interest in a corporation, and of a major part of inventory or fixtures not in the ordinary course of the transferor's business.

b. Except as provided in subsection (d), a real estate broker who acts as agent or broker on behalf of a principal for the conveyance of an interest in real estate, including

[27] See Restatement (Second) of Contracts sec. 131, comment h and Nibert v. Baghurst, 47 N.J. Eq. 201 (Ch. 1890).

lease interests for less than 3 years, is entitled to a commission only if before or after the conveyance the authority of the broker is given or recognized in a writing signed by the principal or the principal's authorized agent, and the writing states either the amount or the rate of commission. In this subsection, the interest of a mortgagee or lienor is not an interest in real estate.

c. Except as provided in subsection (d), a business broker is entitled to a commission only if before of after the sale of the business, the authority of the broker is given or recognized in a writing signed by the seller or buyer or authorized agent, and the writing states either the amount or the rate of commission.

d. A broker who acts pursuant to an oral agreement is entitled to a commission only if:

(1) within five days after making the oral agreement and before the conveyance, the broker serves the principal with a written notice which states that its terms are those of the prior agreement including the rate or amount of commission to be paid; and

(2) before the principal serves the broker with a written rejection of the oral agreement, the broker either effects the conveyance or, in good faith, enters negotiations with a prospective party who later effects the conveyance.

e. The notices provided for in this section shall be served either personally, or by registered or certified mail, at the last known address of the person to be served.

Source: R.S. 25:1-9

COMMENT

The proposed section is based on R.S. 25:1-9, with the language adjusted to reflect court interpretations of the source section.

The Commission proposal incorporates judicial constructions in two instances. While the source statute refers only to "a broker or real estate agent," the Court has concluded "that all who sell or exchange real estate for or on account of the owner." are included. O'Connor v. Bd. of Com'rs of West Orange, 39 N.J. Super. 230, 234-235 (Law Div. 1956). Hence the inclusion in subsection (a)(1) of the phrase, "or other person."

In subsection (d)(1), the phrase, "terms are those of the prior agreement" brings the statute in accord with decisional law which requires an explicit indication of an oral agreement as well as inclusion of the oral agreement's terms. Soloff v. Atlantic Coast Bldg. and Loan Assn., 10 N.J. Misc. 1150, 1151-1152 (Sup. Ct. 1932), aff'd, 110 N.J.L. 528 (E. & A. 1933); Fontana v. Polish National Alliance, 130 N.J.L. 503, 509 (E. & A. 1943); Smith v. Cyprus Industrial Minerals Co., 178 N.J. Super. 7, 11 (App. Div. 1981). The courts read the source statute as not requiring use of the word "agreement" in the notice. Myers v. Buff, 45 N.J. Super. 318, 321 (App. Div. 1957). The revised section is compatible with that reading.

The Commission recommends broadening the scope of the statute. The source statute applies only when the broker acts on behalf of an owner-seller of real estate. Tanner Associates, Inc. v. Ciraldo, 33 N.J. 51, 67 (1960). The Commission proposal expands the coverage of the section in two ways. First, the proposed section applies to a broker for either party to any conveyance of an interest in real estate. Both "conveyance" and "interest in real estate" are defined in proposed section 1. As a result of the inclusiveness of the definitions, the proposed section affects contracts with brokers relating to the sale or lease of property as well as to other transactions less directly touching real estate: such as the transfer of interests in a co-

operative, or the sale of time shares in property. Unlike the source statute, it applies equally to the transferor and transferee of the interest. The only limitation to the inclusiveness of the proposed statute is the exception for interests of a mortgagee or lienor. The Commission intends to exclude mortgage brokers from the requirements of the statute.

The source statute does not apply to a sale of a business. Bierman v. Liebowitz, 3 N.J. Super. 202, 204 (App. Div. 1949). The Commission proposal, subsection (c) specifically includes these transactions. The same considerations which justify a writing requirement for real estate broker contracts support its extension to business broker contracts. The varying roles of business brokers increases the need for the definition of the relationship in a written document. Since the commission charged by business brokers is often higher than the customary commission of real estate brokers, the importance of unfounded and multiple claims, or of the evasion of just claims, can be great.

The extension of the provision to business brokers requires new definitions in subsection (a)(2). The definitions of "business broker", "negotiates", and "purchase or sale of a business", are based on comparable statutes in Massachusetts (Mass. Ann. Laws ch.259, º7) and New York (N.Y. General Obligations Law º5-701(10)). The inclusion of purchase or sale of "a major part of inventory or fixtures not in the ordinary course of the transferor's business" is derived from the definition of "bulk transfer" in N.J.S. 12A:6-102(1).

TABLE OF DISPOSITIONS

SECTION	DISPOSITION
R.S. 25:1-1	Proposed Sections 1,2,3,4
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R.S. 25:1-5(b)	Proposed Section 6
R.S. 25:1-5(c)	Amended
R.S. 25:1-5(d)	Proposed Sections 1,2,3,4
R.S. 25:1-5(e)	Recommended for repeal
R.S. 25:1-6	Recommended for repeal
R.S. 25:1-7	Recommended for repeal
R.S. 25:1-8	Proposed Section 6
R.S. 25:1-9	Proposed Section 7