

**ANNUAL REPORT OF THE
NEW JERSEY LAW REVISION COMMISSION
1990**

Report to the Legislature of
the State of New Jersey as
provided by C. 1:12A-9.
February 1, 1991



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I. COMPOSITION OF THE COMMISSION

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II. HISTORY AND WORK OF THE COMMISSION

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.

Although this Commission has operated for only four years, the concept of permanent, institutionalized statutory revision and codification is not new in New Jersey. The first Law Revision Commission, which was established in 1925, produced the Revised Statutes of 1937. The Legislature authorized the first Law Revision Commission to continue its operation after the 1937 Revised Statutes were completed. After 1939, the functions of the first Law Revision Commission passed to a number of successor agencies. Most recently, statutory revision and codification were among the duties of

Legislative Counsel (C. 52:11-61). By L. 1985, c. 498, the Legislature transferred the particular functions of statutory revision and codification to the New Jersey Law Revision Commission.

III. PROJECTS AND RECOMMENDATIONS

A. Fee Discrepancies

In 1990, the Commission filed a Report and Recommendations Concerning Fee Discrepancies. The Commission's help was sought to resolve discrepancies between fees mandated by N.J.S. 22A:2-29 (County Clerk fees) and those in three older statutes (N.J.S. 56:1-3 [filing certificates of name], N.J.S. 56:1-7 [filing certificate of dissolution of trade name] and N.J.S. 56:3-16 [filing names or marks used on bottles]). These discrepancies caused problems for practitioners and fee collecting officials.

The Commission proposal removes the conflict as to fees by deleting the fee amounts in N.J.S. 56:1-3 and N.J.S. 56:1-7, as well as the reference in N.J.S. 22A:2-29 to fees collected under N.J.S. 56:3-16.

The Report and Recommendations Concerning Fee Discrepancies is appended to this Annual Report.

B. Uniform Foreign-Money Claims Act

In 1990, the National Conference of Commissioners on Uniform State Laws promulgated the Uniform Foreign-Money Claims Act which, according to its Prefatory Note:

...facilitates uniform judicial determination of claims expressed in the money of foreign countries. It requires judgments and arbitration awards in these cases to be entered in the foreign money rather than in United States dollars. The debtor may pay the judgment in dollars on the basis of the rate of exchange prevailing at the time of payment.

The Commission examined the comprehensive new Act and proposes it for adoption in this State. The "payment day rule" endorsed by the Act will bring the adopting states into agreement with most foreign trading partners and satisfy foreign-money claims without undercompensating or overcompensating foreign-money claimants.

The Report and Recommendations Concerning the Uniform Foreign-Money Claims Act is appended to this Annual Report.

C. Uniform Commercial Code Article 4A

In 1990, the Commission filed a Report and Recommendations recommending the enactment of a new Chapter 4A of the Uniform Commercial Code concerning funds transfers, a method of payment used primarily by business or financial institutions and commonly referred to as wholesale funds transfers. Article 4A establishes rules to govern funds transfers processed through the banking system. The Article primarily applies to commercial wire transfers, but it applies to some consumer transactions as well. Although funds transfers have become a common method of payment, prior to the promulgation of Article 4A, commercial wire transfers were virtually unregulated and New Jersey lacks a comprehensive law regulating them.

Concurrently, the Commission recommended that the Permanent Editorial Board of the Uniform Commercial Code consider an amendment requiring banks to inform consumers who make funds transfers of the risk of loss applicable to those transactions. Article 4A prohibits recovery of consequential damages resulting from miscarried funds transfers. A consumer who makes a funds transfer payment may not realize the limited liability of the bank for miscarried transactions unless informed of the rule.

The Report and Recommendations Concerning Uniform Commercial Code Article 4A "Funds Transfers" is appended to this Annual report.

IV. PROJECTS AWAITING FINAL RECOMMENDATIONS

A. Statute of Frauds

Few New Jersey statutes are of more ancient derivation than the New Jersey Statute of Frauds, R.S. 25:1-1 to 9. Drawn almost verbatim from the English statute of 1677, the New Jersey statute was enacted in 1794 and was included in Paterson's Laws of 1799.

The New Jersey statute has survived several complete revisions of the New Jersey statutes virtually without change other than minor wording changes in the original five sections and the addition of four new sections. The Statute has been construed in hundreds of reported decisions, many of which apply the statute's provisions in ways that are not consistent with their literal terms. The archaic terminology of the Statute's sections, coupled with the volume of reported cases, make the Statute difficult to understand and apply in many situations.

During 1990, the Commission staff prepared an extensive report on the history and interpretation of the statute, on the basis of which the Commission prepared a revised statute. The Commission proposal eliminates archaic and unnecessary provisions in the existing law and modernizes the language in the remaining provisions. Where court interpretation of the Statute of Frauds had been consistent, that interpretation was codified in the Commission draft. On the subject of exceptions to the statute, where court decisions have been inconsistent, the draft proposes clear rules.

In May, the Commission's Tentative Report on Formal Requirements for Real Estate Transactions, Brokerage Agreements and Suretyship Agreements was distributed to the public for comment, and numerous responses were received and considered. A copy of the Tentative Report is appended to this Annual Report. Extensive changes were made in the Commission's original draft and in January 1991 the Second Tentative Report on Writing Requirements for Real Estate Transactions, Brokerage Agreements and Suretyship Agreements was distributed for further public comment. The Commission expects to make a final report to the Legislature when the comments on the Second Tentative Report are received and considered. A copy of the Second Tentative Report is appended to this Final Report.

B. Courts Project

In 1989 the Commission filed a Report and Recommendations on the Organization of the Courts. That report was the beginning of a project to revise the parts of Title 2A concerning the courts and the administration of civil justice. (The current status of the 1989 Report and Recommendations is discussed more fully below under Section VI. PROJECTS PREVIOUSLY COMPLETED.) Three current commission projects constitute a continuation of that effort. These projects are those dealing with the Tax Court, municipal courts and the surrogates.

1. Tax Court:

The Tax Court was established by statute in 1978. To a large extent, the legislation which established the Court simply transferred the functions of the Court's predecessor, the Division of Tax Appeals, to the new Court. The Commission proposal would clarify the jurisdiction and powers of the Tax Court. It eliminates transitional provisions which are important at the

time the court was created. It also eliminates other provisions which appear superfluous in the light of experience. A copy of the tentative report on the Tax Court is appended to this Annual Report.

2. Municipal Court:

The statutes providing for municipal courts are old and do not reflect modern developments or approaches to the municipal court. In addition, like other bodies of law which have accreted over a substantial period of time, the current chapter on municipal courts includes many provisions which appear now either irrelevant or unnecessarily detailed.

The Commission proposal would streamline and modernize the law on municipal courts. It provides for the appointment of temporary and acting municipal judges. It also provides for the position of administrative judge for the municipal courts in a particular vicinage. While this office exists in four vicinages, there is no statute providing for its existence or establishing its functions. The proposal also provides for the employment of prosecutors and the provision of defense for indigents. Neither of these subjects is dealt with in current statutes. Last, it clarifies the power of various officers of the municipal court to act for the court and modernizes the substantive jurisdiction of the court. A copy of the tentative report on municipal courts is appended to this Annual Report.

3. Surrogates:

The current chapter on surrogates, which includes sections dating back to 1882, contains anachronistic references and dollar amounts of salaries, performance bonds. It requires procedures not now actually followed by surrogates. The Commission proposal is for a streamlined and modernized chapter on this subject. The Commission has removed provisions which duplicate those in Title 3B, Administration of Estates, and

has made the provisions compatible with current practice. A copy of the tentative report on surrogates is appended to this Annual Report.

V. PROJECTS UNDER CONSIDERATION

A. Material Witness Statute

In 1990 the Commission approved a project to revise the statutes which authorize detention of material witnesses. The Superior Court in State v. Misik, 238 N.J. Super. 367 (Law Div. 1989) found that the current material witness statutes violate the federal and New Jersey constitutions because the statutes neither require a hearing prior to the deprivation of a witness's liberty nor provide other procedural safeguards to protect the substantive due process rights of a witness. In response to Misik, the Commission is presently working on a draft statute to correct the constitutional defects of existing law.

B. Criminal law

The Commission has also approved a project to examine those portions of criminal law which are not now contained in Title 2C, Code of Criminal Justice. Crimes remaining in Title 2A which were left for later incorporation into the Criminal Code at the time that Code was created will be incorporated into Title 2C. Statutes in other titles which define crimes will also be examined to determine whether they should be incorporated into the Criminal Code. The goal of this project will be to complete the job begun with the promulgation of the New Jersey Criminal Code -- to prepare a comprehensive compilation of New Jersey criminal statutes.

C. Terms of Office

In 1990, the Commission approved a project to examine the problems of determining the dates of commencement and expiration of the terms of office of members of public bodies and related issues. The relevant legal principles are a combination of statute law and case law which leave an uncertainty as to the terms of appointment of members of these bodies. The Commission's goal is a statute that will provide uniform rules governing appointments to public bodies which would apply in the absence of a contrary principle expressed in the statute creating the public body.

D. Transportation

In 1989, in conjunction with the Department of Transportation, the Commission approved a project to revise the law of New Jersey relating to Transportation. This project is large, involving consideration of Titles 27 (Highways) and 6 (Aviation), as well as parts of other titles. It includes projects as diverse as the construction and operation of state highways, and the regulation of billboards, railroads, buses, and aviation. A first draft of more than 100 pages of statutes is nearly completed. Consultations are continuing with the Department of Transportation. The first portion of this project should be completed by this summer.

E. Uniform Commercial Code Articles 3 and 4

In 1990, the Commission approved a project to study the revisions made to Uniform Commercial Code Articles 3 (Commercial Paper) and Articles 4 (Bank Collections) approved by the National Conference of Commissioners on Uniform State Laws and the American Law Institute. The Commission is presently evaluating the changes between the existing and revised articles, and identifying the impact of the revisions upon New Jersey law.

F. Codification

A continuing project of the Commission is consideration of the options for a general recodification of the New Jersey statutes. The Commission has received and considered the advice and proposals of several publishers for a general recodification project and expects to continue that process in the coming year. On an ongoing basis the Commission also recommends the repeal of archaic, superseded, unconstitutional and otherwise invalid statutes.

VI. PROJECTS PREVIOUSLY COMPLETED

A. Report and Recommendation on the Parentage Act

Among Commission's first completed projects was a Report and Recommendation to the Legislature for an amendment to the Parentage Act to clarify an inconsistency between overlapping provisions in Title 2A and Title 3B. A bill implementing the Commission's recommendation, S1346, was introduced into the Legislature by Senator O'Connor. After passing both houses of the Legislature it was signed into law by Governor Florio as P.L. 1991, c.22.

B. Report and Recommendation on Organization of the Courts

Bills implementing the Commission's Report and Recommendation on Organization of the Courts, S1347 and A3166, and a companion bill, S1348, revising over 400 sections of the New Jersey statutes to eliminate references to the abolished County and Country District Courts, were introduced into the Legislature in 1990. Late in March 1991, S1347 and S1348 passed both houses and are currently on the Governor's desk awaiting signature.

C. Article 2A (Leases) of the Uniform Commercial Code

In 1989 the Commission submitted to the Legislature a report recommending the adoption of a modified form of Uniform Commercial Code Article 2A. The modifications recommended by the Commission were based largely on versions of Article 2A that had been adopted in California and Massachusetts. Since the submission of the Commission's report the National Conference of Commissioners on Uniform State Laws and the American Law Institute revised the official text of Article 2A to incorporate many of the California and Massachusetts modifications. A bill implementing the modified version of Article 2A for adoption in New Jersey is now being prepared by the Commission for recommendation to the Legislature.

D. Consumer Lessee Protection Act

In 1989, in connection with the Commission's consideration of Article 2A (Leases) of the Uniform Commercial Code, the Commission recommended to the Legislature the adoption of legislation that would give greater protection to lessees in consumer lease transactions. A bill implementing the Commission's recommendations was introduced as S2791 by Senator O'Connor; it is presently pending in the Senate Commerce and Industry Committee.

E. Statutes Recommended for Repeal

In 1989, the Commission recommended that over 200 sections of the statutes be repealed as invalid, unconstitutional, superseded or archaic. Twelve bills implementing the Commission's recommendations were introduced in the Legislature in 1990 and are presently at various stages in the legislative process. Two of the repealer bills, S2468, limiting wage garnishment of soldiers in World War I for certain debts, and S2473,

regulating the slaughter of trespassing swine, passed both houses of the Legislature and await the Governor's signature.

F. Other Recommendations

The Commission's recommendations for amendment of the Administrative Procedure Act and the proposed Notaries' Liability Act have yet to be introduced in bill form.

Respectfully submitted,

ALBERT BURSTEIN, Chairman
BERNARD CHAZEN
ROGER DENNIS
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EDWARD T. O'CONNOR
HUGO M. PFALTZ, JR.
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**REPORT AND RECOMMENDATIONS
CONCERNING FEE DISCREPANCIES**

**NEW JERSEY LAW REVISION COMMISSION
15 Washington Street
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June, 1990**

INTRODUCTION

Discrepancies between fees mandated by N.J.S. 22A:2-29 and those in N.J.S. 56:1-3, 56:1-7 and 56:3-16 have been brought to the Commission's attention. The Commission has verified the discrepancies and resultant problems: 1) practitioners do not know which fees to pay and 2) fee-collecting officials and practitioners waste resources responding to incorrectly paid fees and repaying fees, respectively.

Three older statutes conflict with N.J.S. 22A:2-29. The first is N.J.S. 56:1-3 which requires two \$5.00 fees from a person filing the certificates of name with a county clerk; the county clerk retains \$5.00 and sends \$5.00 to the Secretary of State. The current practice, as explained by the Bergen County Clerk, is that the higher, newer fees in N.J.S. 22A:2-29 are collected. When the fee is paid, the clerk forwards one-half of the fee to the Secretary of State. The Office of the Secretary of State confirmed the correctness of this procedure.

The second conflicting statute is N.J.S. 56:1-7 which requires two \$1.00 fees from a person filing a certificate of dissolution of trade name with a county clerk. The county clerk retains \$1.00 and sends \$1.00 to the Secretary of State. Again, the current practice is that the higher, newer fee is collected and half of the fee is retained by the county clerk and half forwarded to the Secretary of State.

The third conflicting statute is N.J.S. 56:3-16 which requires that a person filing names or marks used on bottles and other containers pay a fee of \$20.00 to the Secretary of State and a fee of \$5.00 to the county clerk. This total fee amount of \$25.00 greatly exceeds the newer \$4.50 fee of N.J.S. 22A:2-29. The Office of the Secretary of State said that the correct fees are the higher ones of the older statute, N.J.S. 56:3-16. That office recommends raising the \$4.50 fee in N.J.S. 22A:2-29 to the total of \$25.00 in N.J.S. 56:3-16.

The Commission proposal removes conflicting fees by deleting the fee amounts in N.J.S. 56:1-3 and N.J.S. 56:1-7, as well as the reference in N.J.S. 22A:2-29 to fees collected under N.J.S. 56:3-16.

The proposed revisions follow.

22A:2-29. County clerk fees

Upon the filing, indexing, entering or recording of the following documents or papers in the office of the county clerk or deputy clerk of the Superior Court, such parties, filing or having the same recorded or indexed in the county clerk's office or with the deputy clerk of the Superior Court in the various counties in this State, shall pay the following fees in lieu of the fees heretofore provided for the filing, recording or entering of such documents or papers:

In general--

Issuing county clerk's certificate, any instrument	\$3.00
Comparing and making copies, per sheet	\$3.00
Copies of all papers, typing and comparing of photostat, per page	\$1.50
Marking as a true copy, any instrument	\$1.50
Exemplification, any instrument.....	\$7.50
Plus \$1.00 per page of instrument.	
Recording or filing all instruments not herein stated.....	\$7.50

Bonds, bail, recognizances--

Recording all official bonds with acknowledgment and proof of the execution thereof.....	\$9.00
Filing and entering recognizance or civil bail.....	\$9.00
Filing discharge, attachment bond	\$9.00
Filing satisfaction or order discharging recognizance or civil bail.....	\$9.00
Filing and recording filiation bond.....	\$9.00
Filing satisfaction of or order discharging filiation bond.....	\$9.00
Recording or discharging sheriff's bond	\$9.00
Nonbusiness corporation, recording:	
Certificates of incorporation of corporations and associations not-for-profit, and of societies, clubs, credit unions, churches, religious societies and congregations.....	\$15.00
Amendments to certificates of incorporation, all corporations, recording.....	\$15.00
All other corporate certificates, recording.....	\$9.00
Bank merger agreements, recording:	
Three sheets or less.....	\$15.00
Each sheet over three	\$3.00
Certificates, each.....	\$3.00
Trade names, firms, partnerships:	
Certificate of name, filing (see R.S. 56:1-1 et seq.)	\$30.00
Certificate of dissolution of trade name (see [R.S. 56:1A-6] <u>R.S. 56:1-6</u> et seq.).....	\$9.00
[Bottles, et cetera, description (see R.S. 56:3-14 et seq.).....	\$4.50]

Building and loan or savings and loan associations:	
Change of name.....	\$15.00
Dissolution	\$9.00
Certificates for limited-dividend housing associations, recording.....	\$15.00
Certificates for urban renewal associations, recording.....	\$15.00

Judgments, et cetera--

Recording judgments.....	\$9.00
Filing, entering and recording judgment on bond and warrant by attorney.....	\$37.50
Certificate for docketing Superior Court transcript.....	\$9.00
Recording assignment of judgment.....	\$15.00
Issuing transcript of judgment.....	\$7.50
Filing or entering on the record of discharge, cancellation, release or satisfaction of a judgment by satisfaction piece, execution returned satisfied or otherwise.....	\$7.50
For recording and indexing postponement of the lien of judgment	\$15.00
Execution on judgment:	
Issuing warrant on court order.....	\$9.00
Drawing execution	\$9.00
Recording execution.....	\$9.00
Warrant for satisfaction	\$6.00
Writ of attachment.....	\$9.00
Writ of possession.....	\$9.00
Writ of sequestration.....	\$9.00
Discharge of writ.....	\$9.00
Mandate.....	\$15.00

Liens--

Filing, indexing and recording mechanic's lien claim.....	\$9.00
Recording, filing and noting on the record the discharge, release or satisfaction of a mechanic's lien claim.....	\$9.00
Extension of lien claim.....	\$3.00
Filing statement in mechanic's lien proceeding.....	\$9.00
Filing, recording and indexing mechanic's notice of intention.....	\$4.50
Filing a certificate discharging a mechanic's notice of intention and noting the discharge on the record thereof.....	\$4.50
Filing certificate from court of commencement of suit	\$4.50
Filing a court order amending a mechanic's notice of intention.....	\$9.00
Filing a court order to discharge notice	

of intention and noting the discharge on the record thereof	\$9.00
Filing, recording and indexing stop notice	\$4.50
Filing a certificate discharging a stop notice and noting the discharge on the record thereof	\$4.50
Filing a court order discharging a stop notice and noting the discharge on the record thereof	\$9.00
Filing building contract	\$15.00
Filing discharge of building contract.....	\$9.00
Filing building specifications.....	\$7.50
Filing building plans	\$7.50
Filing each notice of physician's lien.....	\$4.50
Entering upon the record the discharge of a physician's lien.....	\$4.50
Filing each hospital lien claim	\$4.50
Discharge of hospital lien	\$4.50
Filing satisfaction or order for discharge of attachment.....	\$9.00
Recording collateral inheritance waiver or receipt.....	\$9.00
Recording inheritance tax waiver	\$9.00
Subordination, release, partial release or postponement of a lien to lien of mortgage.....	\$7.50

Commissions and oaths--

Administering oaths to notaries public and commissioners of deeds.....	\$7.50
For issuing certificate of authority of notary to take proof, acknowledgment of affidavit	\$3.00
For issuing each certificate of the commission and qualification of notary public for filing with other county clerks.....	\$6.00
For filing each certificate of the commission and qualification of notary public, in office of county clerk of county other than where such notary has qualified.....	\$6.00

Miscellaneous--

Filing and recording proceedings for laying out, vacating or dedicating roads.....	\$15.00
Recording firemen's certificates	No charge
Registering physician.....	\$15.00
Issuing alcoholic beverage identification card	\$6.00

56:1-3. Index of certificates; filing fees; copies as evidence

The several county clerks and the Secretary of State shall each keep alphabetical indexes of all persons filing the statements or certificates provided for by sections 56:1-1 and 56:1-2 of this Title[, and for the indexing and filing of such statements or certificates they shall each receive a fee of \$5.00 from the person who presents the same for filing]. Every person who presents for filing any such statement or certificate in the office of the county clerk shall present therewith a duplicate of such statement or certificate for filing with and indexing by the Secretary of State. The county clerk shall, at the time of the filing such statement or certificate with him, collect from the person presenting the same,[in addition to the fee payable to him, the fee payable to the Secretary of State] the fee provided by law for filing and indexing such duplicate statement or certificate, and shall forward to the Secretary of State such duplicate statement or certificate together with [the fee collected for the Secretary of State as aforesaid.] one half of the fee collected.

A copy of any such statement or certificate, duly certified by the county clerk in whose office the same shall have been filed or by the Secretary of State, shall be presumptive evidence in all courts of law in this State of the facts therein contained.

56:1-7. Place and manner of recording dissolution of partnership; fees

The record of dissolution provided for by section 56:1-6 of this Title shall be made by the county clerk and by the Secretary of State by writing the word "dissolved," together with the date of the certificate of dissolution, in the margin of the book or books used for filing trade-name certificates, at or near the place where such trade-name certificate shall have been indexed. For the filing of such certificates and recording the dissolution of the trade-name the county clerk and the Secretary of State shall each receive [a fee of \$1.00] one half of the fee provided by law. The county clerk, at the time of filing such certificate, shall collect from the person presenting the same, in addition to the fee payable to him, the fee payable to the Secretary of State for filing and recording the same, and shall immediately forward to the Secretary of State the duplicate of such certificate together with such fee collected for the Secretary of State as aforesaid.

Respectfully submitted,

ALBERT BURSTEIN, Chairman
BERNARD CHAZEN
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**REPORT AND RECOMMENDATIONS
CONCERNING THE UNIFORM FOREIGN-MONEY CLAIMS
ACT**

**NEW JERSEY LAW REVISION COMMISSION
15 Washington Street
Newark, New Jersey 07102
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May, 1990**

UNIFORM FOREIGN-MONEY CLAIMS ACT

SECTION 1. DEFINITIONS.

In this Act:

(1) "Action" means a judicial proceeding or arbitration in which a payment in money may be awarded or enforced with respect to a foreign-money claim.

(2) "Bank-offered spot rate" means the spot rate of exchange at which a bank will sell foreign money at a spot rate.

(3) "Conversion date" means the banking day next preceding the date on which money, in accordance with this Act, is:

(i) paid to a claimant in an action or distribution proceeding;

(ii) paid to the official designated by law to enforce a judgment or award on behalf of a claimant; or

(iii) used to recoup, set-off, or counterclaim in different moneys in an action or distribution proceeding.

(4) "Distribution proceeding" means a judicial or nonjudicial proceeding for the distribution of a fund in which one or more foreign-money claims is asserted and includes an accounting, an assignment for the benefit of creditors, a foreclosure, the liquidation or rehabilitation of a corporation or other entity, and the distribution of an estate, trust, or other fund.

(5) "Foreign money" means money other than money of the United States of America.

(6) "Foreign-money claim" means a claim upon an obligation to pay, or a claim for recovery of a loss, expressed in or measured by a foreign money.

(7) "Money" means a medium of exchange for the payment of obligations or a store of value authorized or adopted by a government or by inter-governmental agreement.

(8) "Money of the claim" means the money determined as proper pursuant to Section 4.

(9) "Person" means an individual, a corporation, government or governmental subdivision or agency, business trust, estate, trust, joint venture, partnership, association, two or more persons having a joint or common interest, or any other legal or commercial entity.

(10) "Rate of exchange" means the rate at which money of one country may be converted into money of another country in a free financial market convenient to or reasonably usable by a person obligated to pay or to state a rate of conversion. If separate rates of exchange apply to different kinds of transactions, the term means the rate applicable to the particular transaction giving rise to the foreign-money claim.

(11) "Spot rate" means the rate of exchange at which foreign money is sold by a bank or other dealer in foreign exchange for immediate or next day availability or for settlement by immediate payment in cash or equivalent, by charge to an account, or by an agreed delayed settlement not exceeding two days.

(12) "State" means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or a territory or insular possession subject to the jurisdiction of the United States.

OFFICIAL COMMENT

1. "Action." A suit or arbitration may be legal or equitable in nature, but it must be based on a pecuniary claim.

2. "Bank-offered spot rate" is the rate at which a bank will sell the requisite amount of foreign money for immediate or nearly immediate use by the buyer.

3. "Conversion date." Exchange rates may fluctuate from day to day. A date must be picked for calculating the value of foreign money in terms of United States dollars. As used in the Act, "conversion date" means the day before a foreign-money claim is paid or set-off. The day refers to the time period of the place of the payor, not necessarily that of the recipient. The exchange rate prevailing at or near the close of business on the banking day before the day payment is made will be well known at the time of payment. See Comment 2 to Section 7.

4. "Distribution proceeding." In keeping with the concept underlying Section 2, the coverage of this statute is limited to judicial actions and nonjudicial proceedings which involve the creation of a fund from which pro-rata distributions are made to claimants. As provided in Section 8, a different conversion date is required where either input to or outgo from a fund involves two or more different moneys. Thus, the term includes a mortgage foreclosure proceeding, judicial or under a trust deed, distribution of property in divorce and child support proceedings, distributions in the administration of a trust or a decedent's estate, an assignment for the benefit of creditors, an equity receivership, a liquidation by a statutory successor, a voluntary dissolution of a business or a nonprofit enterprise or the like when in each case a fund must be shared among claimants and where, usually, the fund will not satisfy all claimants of the same class. An asset or a liability of the fund must also involve one or more foreign-money claims, but not all of the claims can be in the same money.

5. "Foreign money." Since only the federal government has the power to coin money and regulate the value thereof, the term "foreign" means a government other than that of the United States of America. Special Drawing Rights of the International Monetary Fund are foreign money even though the United States is a member of the Fund. Foreign governments included are all those whose moneys are, in the currency markets of the world, exchangeable for the money of other currencies even though the government is not recognized by the United States.

6. "Foreign-money claim." The term "claim" is not limited to any one party to an action or a distribution proceeding and may be asserted by a plaintiff or a defendant or by a party to an arbitration or distribution proceeding. It may be based on a foreign judgment, or sound in contract, quasi-contract, or tort.

7. "Money." The definition includes composite currencies such as European Currency Units created by agreement of the governments that are members of the European Monetary System or the Special Drawing Rights created under the auspices of the International Money Fund. These are "stores of value" used to determine the quantity of payment in some international transactions.

8. "Money of the claim." See Section 4 and the Comment thereto.

9. "Party." This combines the Uniform Commercial Code's definitions of "person" and "organization," but is limited to those who are parties to transactions or involved in events which could give rise to a foreign-money claim.

10. "Rate of Exchange." A free market rate is to be used rather than an official rate if both exist. Some countries have transactional differences in exchange rates with slightly different rates; for example, in Belgium one rate prevails for commercial and another for financial transactions. Both rates are recognized in money market transactions. The last sentence of the definition indicates that the rate appropriate to the transaction is the rate to be used.

11. "Spot rate" is the term used in the financial markets of the United States for the rate of exchange for immediate or nearly immediate transfers from one money to another, as distinguished from the rates for future options or future deliveries.

In the foreign exchange markets, as in the stock markets, quotations are either "bid" or "ask," and the spread between is where the dealer makes a profit. An "offered spot rate" is the rate at which the offeror will sell the particular money. It is, of course, higher than the rate at which that person will buy the same money. "Spot" refers to the time the trade is made, not the time for settlement, which in spot transactions is often two days after the date of the trade.

12. "State." The definition, as in other Uniform Laws, is extended to include areas given the same, or nearly the same, treatment in law as the states.

SECTION 2. SCOPE.

(a) This Act applies only to a foreign-money claim in an action or distribution proceeding.

(b) This Act applies to foreign-money issues even if other law under the conflict of laws rules of this State applies to other issues in the action or distribution proceeding.

OFFICIAL COMMENT

Under the rules of the conflict of laws, the determination of when a foreign money is converted to United States dollars is generally considered a procedural matter for the law of the forum. Subsection (b) removes any doubt.

SECTION 3. VARIATION BY AGREEMENT.

(a) The effect of this Act may be varied by agreement of the parties made before or after commencement of an action or distribution proceeding or the entry of judgment.

(b) Parties to a transaction may agree upon the money to be used in a transaction giving rise to a foreign-money claim and may agree to use different moneys for different aspects of the transaction. Stating the price in a foreign money for one aspect of a transaction does not alone require the use of that money for other aspects of the transaction.

OFFICIAL COMMENT

1. A basic policy of the Act is to preserve freedom of contract and to permit parties to resolve disputed matters by contract at any time, even as to choice of law problems. The parties may agree upon the date and time for conversion. After entry of judgment the parties may agree upon how the judgment is to be satisfied.

2. Subsection (b) covers cases where, for example, claims for petroleum may be settled in United States dollars but settlement for joint costs of exploration may be in pounds sterling. The parties also may agree on the money to be used for damages. The second sentence recognizes that a price stated in a particular money does not indicate, without more evidence, an intent that all damages from breach are to be in the same money. The principle of freedom of contract allows the parties to allocate the risks of currency fluctuations between foreign moneys as they desire. Sections 4 and 5 provide rules in the absence of special agreements by the parties for determining the money to be used. Parties may by agreement select a particular market or foreign exchange dealer to be used for exchange purposes.

SECTION 4. DETERMINING MONEY OF THE CLAIM.

(a) The money in which the parties to a transaction have agreed that payment is to be made is the proper money of the claim for payment.

(b) If the parties to a transaction have not otherwise agreed, the proper money of the claim, as in each case may be appropriate, is the money:

(1) regularly used between the parties as a matter of usage or course of dealing;

(2) used at the time of a transaction in international trade, by trade usage or common practice, for valuing or settling transactions in the particular commodity or service involved; or

(3) in which the loss was ultimately felt or will be incurred by the party claimant.

OFFICIAL COMMENT

1. Subsection (a) uses "payment" in a broad sense not related to just the price, but to any obligation arising out of a contract to transfer money. See also Section 3(b).

2. Subsection (b) states rules to fill gaps in the agreement of the parties with rules as to the allocation of risks of fluctuations in exchange rates. The three rules will normally apply in the order stated. Prior dealings may indicate the desired money. If there are none, it is appropriate to use the money indicated by trade usage or custom for transactions of like kind. The final rule of subsection (a) is one established in English cases. See The Despina R and the Folias, (1979) A.C. 685. An example is the use of an operating account in United States dollars by a French company to buy Japanese yen for ship repairs; the loss is felt in the depletion of the dollar bank account. Appropriateness of a rule is to be determined by the judge from the facts of the case. See Section 6(d).

SECTION 5. DETERMINING AMOUNT OF THE MONEY OF CERTAIN CONTRACT CLAIMS.

(a) If an amount contracted to be paid in a foreign money is measured by a specified amount of a different money, the amount to be paid is determined on the conversion date.

(b) If an amount contracted to be paid in a foreign money is to be measured by a different money at the rate of exchange prevailing on a date before default, that rate of exchange applies only to payments made within a reasonable time after default, not exceeding 30 days. Thereafter, conversion is made at the bank-offered spot rate on the conversion date.

(c) A monetary claim is neither usurious nor unconscionable because the agreement on which it is based provides that the amount of the debtor's obligation to be paid in the debtor's money, when received by the creditor, must equal a specified amount of the foreign money of the country of the creditor. If, because of unexcused delay in payment of a judgment or award, the amount received by the creditor does not equal the amount of the foreign money specified in the agreement, the court or arbitrator shall amend the judgment or award accordingly.

OFFICIAL COMMENT

1. Subsections (a) and (b) cover different interpretation problems. One arises where the amount of the money to be paid is measured by another money, one of which is foreign. An example is "pay 5,000 Swiss francs in pounds sterling." The issue is the time at which the rate of exchange into pounds sterling is to be applied. Subsection (a) says in a "measured by" situation with no rate specified, the rate of exchange that controls is the one prevailing at or near the close of business on the day before the day of payment. See Section 1(2), the definition of "conversion date."

2. Another problem arises when an exchange rate in effect before a default is used, as in "pay on November 30, 1989, 5,000 Swiss francs in pounds sterling at the exchange rate prevailing on June 30, 1989." In this case, the issue is how long does the specified exchange rate control in the absence of a clear expression of intent?

Inclusion of a fixed rate as of a date before default, under subsection (b), remains effective only if payment is made within a reasonable time after default, not to exceed 30 days. The 30-day limitation accords usually with the expectation of the parties. Parties may agree to a longer time.

3. The most common application of subsection (c) will be found in international loan transactions. For example, a loan by a Japanese bank to an American company could be made with dollars purchased by yen for the purpose. The loan agreement could provide for repayment in dollars of an amount which, when received by the lender, would repurchase the amount of yen used to acquire the dollars advanced.

An exemption is needed from the application of usury laws that may be interpreted to hold that the indexing of the principal amount creates additional interest. See Aztec Properties, Inc. v. Union Planters National Bank, 530 S.W.2d 756 (Tenn. Sup. Ct. 1975). The subsection removes all doubts as to the legal enforceability of such agreements under theories such as usury, merger in a judgment, unconscionability, or the like.

SECTION 6. ASSERTING AND DEFENDING FOREIGN-MONEY CLAIM.

(a) A person may assert a claim in a specified foreign money. If a foreign-money claim is not asserted, the claimant makes the claim in United States dollars.

(b) An opposing party may allege and prove that a claim, in whole or in part, is in a different money than that asserted by the claimant.

(c) A person may assert a defense, set-off, recoupment, or counterclaim in any money without regard to the money of other claims.

(d) The determination of the proper money of the claim is a question of law.

OFFICIAL COMMENT

1. Subsection (a) covers not only the claim of a plaintiff but also the assertion by a defendant of a defense, set-off, or counterclaim. Subsection (b) provides that the money asserted as the money of its defenses by the defendant need not be the same as that of the plaintiff.

2. The money to be used as the money of the claim is a threshold issue to be determined, if contested, by the court after any factual issues as to expenditures, custom, usage, or course of dealing are decided. See subsection (b). If a payment is made or a debt incurred in a money other than that in which the loss was felt, the party asserting the foreign-money claim should establish the amount of the money of the claim used to procure the money of expenditure and the applicable exchange rate used.

3. Judgments may be entered in more than one money when dealings impact on more than one area. An inn-keeper in Mexico, for example, in taking in customers from many countries, should be held to foresee that treatment for injuries at the inn would occur not only in Mexico, but also in the native land of the injured party or in a third country.

SECTION 7. JUDGMENTS AND AWARDS ON FOREIGN-MONEY CLAIMS; TIMES OF MONEY CONVERSION; FORM OF JUDGMENT.

(a) Except as provided in subsection (c), a judgment or award on a foreign-money claim must be stated in an amount of the money of the claim.

(b) A judgment or award on a foreign-money claim is payable in that foreign money or, at the option of the debtor, in the amount of United States dollars which will purchase that foreign money on the conversion date at a bank-offered spot rate.

(c) Assessed costs must be entered in United States dollars.

(d) Each payment in United States dollars must be accepted and credited on a judgment or award on a foreign-money claim in the amount of the foreign money that could be purchased by the dollars at a bank-offered spot rate of exchange at or near the close of business on the conversion date for that payment.

(e) A judgment or award made in an action or distribution proceeding on both (i) a defense, set-off, recoupment, or counterclaim and (ii) the adverse party's claim, must be netted by converting the money of the smaller into the money of the larger, and by subtracting the smaller from the larger, and specify the rates of exchange used.

(f) A judgment substantially in the following form complies with subsection (a):

On this ___ day of _____, 199_, ORDERED that judgment be entered in favor of the Plaintiff and against the Defendant in the sum of _____ (insert amount in the foreign money) with interest at the rate of _____ (insert rate - see Section 9) percent a year from the ___ day of _____, 199_, or, at the option of the judgment debtor, the number of United States dollars which will purchase the _____ (insert name of foreign money) with interest due, at a bank-offered spot rate at or near the close of business on the banking day next before the day of payment, together with costs of _____ (insert amount) United States dollars.

(g) If a contract claim is of the type covered by Section 5(a) or (b), the judgment or award must be entered for the amount of money stated to measure the obligation to be paid in the money specified for payment or, at the option of the debtor, the number of United States dollars which will purchase the computed amount of the money of payment on the conversion date at a bank-offered spot rate.

(h) A judgment must be entered and indexed in foreign money in the same manner, and has the same effect as a lien, as other judgments. It may be discharged by payment.

OFFICIAL COMMENT

1. Subsection (a) changes a number of statutes in the states which can be construed to require all values in legal proceedings to be expressed in United States dollars. Professor Brand, in his article in the Yale Journal of International Law, Vol. 11:139 at page 169, identified 18 states having statutes which could require all judgments to be entered in dollars. They are Arkansas, California, Idaho, Iowa, Louisiana, Maryland, Michigan, Montana, Nevada, New Jersey, New Mexico, New York, South Carolina, Tennessee, Vermont, Virginia, West Virginia, and Wisconsin. Brand, *ibid.* fn. 166. Hence, direct statutory authority must be given the courts in those states, and will be helpful in other states. In some states other statutes may need amendments. See, e.g., Wisc. Stats. 138.01, 138.02, 138.03, and 779.05.

2. Subsection (d) gives defendants the option of paying in dollars which are, at the payment date, practically the economic equivalent of the foreign money awarded. The judgment creditor should be indifferent to whether the debtor exercises the right to pay in dollars as the only difference is a small bank charge for exchanging the dollars for the foreign

money. The concept of the rate of the banking day next before the payment day is taken from Section 131 of the Province of Ontario, Canada, Courts of Justice Act (Ch. 11 Ont. Stats. (1984) as recently amended). It gives the defendant and the sheriff conducting the sale the necessary conversion rate comfortably ahead of its use. Newspaper quotations are usually said to be "at or near the close of business" on the stated date, so that phrase is used in this Act.

3. Subsection (e) provides for netting the affirmative recoveries of a defendant and plaintiff, whether in the same money or in different moneys, but preserving the quantum of each for appellate purposes. The theory is that when claims are reduced to money, they become mutual debts and should be set-off, so that a person's exchange rate fluctuation risk continues only for the surplus in its money of the claim. The set-off is made by the judge or arbitrator.

4. The form of judgment in subsection (f) should be varied appropriately where the money to be paid is measured by a foreign money. See Section 5.

SECTION 8. CONVERSIONS OF FOREIGN MONEY IN DISTRIBUTION PROCEEDING.

The rate of exchange prevailing at or near the close of business on the day the distribution proceeding is initiated governs all exchanges of foreign money in a distribution proceeding. A foreign-money claimant in a distribution proceeding shall assert its claim in the named foreign money and show the amount of United States dollars resulting from a conversion as of the date the proceeding was initiated.

OFFICIAL COMMENT

All claims must be in the same money when determining aliquot shares in a distribution proceeding. The Act requires use of the date the proceeding was initiated for applying the exchange rate to convert foreign-money claims into United States dollars. See Re Lines Bros. Ltd., (1982) 2 All E.R. 99. A claim may be amended to show the proper conversion rate and the proper amount of United States dollars.

SECTION 9. PRE-JUDGMENT AND JUDGMENT INTEREST.

(a) With respect to a foreign-money claim, recovery of pre-judgment or pre-award interest and the rate of interest to be applied in the action or distribution proceeding, except as provided in subsection (b), are matters of the substantive law governing the right to recovery under the conflict-of-laws rules of this State.

(b) The court or arbitrator shall increase or decrease the amount of pre-judgment or pre-award interest otherwise payable in a judgment or award in foreign-money to the extent required by the law of this State governing a failure to make or accept an offer of settlement or offer of judgment, or conduct by a party or its attorney causing undue delay or expense.

(c) A judgment or award on a foreign-money claim bears interest at the rate applicable to judgments of this State.

OFFICIAL COMMENT

1. As to pre-judgment interest, the Act adopts the majority rule in the United States that pre-judgment interest follows the substantive law of the case under conflict of laws rules, both as to the right to recover and the rate. English courts use a different rule, *i.e.*, the borrowing rate used by plaintiff or prevailing in the country issuing the money of the judgment. See Helmsing Schiffarts G.M.B.H. v. Malta Drydock Corp. (1977) 2 Lloyd's Rep. 44 (Maltese money but borrowed in West Germany; German rate); Miliangos v. George Frank (Textiles) Ltd. (No. 2) (1976) 1 QB 487 at 489 (Swiss money, Swiss interest rate). Although pre-judgment interest is one form of damages, provision for pre-judgment interest is not to be taken as indicating that no other damages for delay in payment can be awarded under the substantive law applicable to the determination of damages. *Cf. Isaac Naylor & Sons, Ltd. v. New Zealand Co-operative Wool Marketing Association, Ltd.* (1981) 1 N.Z.L.R. 361 (exchange loss due to delay as additional damages).

2. Allowances of pre-judgment interest in some states depend upon a party's conduct with respect to settlement or delay of the proceeding. Subsection (b) treats these state laws as either procedural in nature or expressions of a significant policy, in either case to be governed by the law of the forum state.

3. Interest on a judgment is considered to be procedural and also goes by the law of the forum. There is a problem here in that there is great discrepancy among the states in the rates for judgment interest. When a judgment is in a foreign money, United States interest rates may result in some overcompensation or undercompensation as compared to what would be awarded in the jurisdiction issuing the foreign money. But in both the United States and in foreign countries, most jurisdictions have fixed statutory rates that do not readily respond to the inflation or deflation of the value of their money in the world market. Hence it was decided to apply the usual rules of the conflict of laws.

SECTION 10. ENFORCEMENT OF FOREIGN JUDGMENTS.

(a) If an action is brought to enforce a judgment of another jurisdiction expressed in a foreign money and the judgment is recognized in this State as enforceable, the enforcing judgment must be entered as provided in Section 7, whether or not the foreign judgment confers an option to pay in an equivalent amount of United States dollars.

(b) A foreign judgment may be entered in accordance with any rule or statute of this State providing a procedure for its recognition and enforcement.

(c) A satisfaction or partial payment made upon the foreign judgment, on proof thereof, must be credited against the amount of foreign money specified in the judgment, notwithstanding the entry of judgment in this State.

(d) A judgment entered on a foreign-money claim only in United States dollars in another state must be enforced in this State in United States dollars only.

OFFICIAL COMMENT

1. Some states have special acts that simply cover the recognition, entry, and enforcement of foreign judgments. Common law enforcement is by action. Subsection (a) refers to the common law method; it is subject to subsection (b) which refers to statutory procedures. Subsection (c) applies to both procedures.

2. Subsection (d) avoids constitutional issues under the full faith and credit clause by requiring that judgments of sister states be enforced as entered in the sister state.

SECTION 11. DETERMINING UNITED STATES DOLLAR VALUE OF FOREIGN-MONEY CLAIMS FOR LIMITED PURPOSES.

(a) Computations under this section are for the limited purposes of the section and do not affect computation of the United States dollar equivalent of the money of the judgment for the purpose of payment.

(b) For the limited purpose of facilitating the enforcement of provisional remedies in an action, the value in United States dollars of assets to be seized or restrained pursuant to a writ of attachment, garnishment, execution, or other legal process, the amount of United States dollars at issue for assessing costs, or the amount of United States dollars involved for a surety bond or other court-required undertaking, must be ascertained as provided in subsections (c) and (d).

(c) A party seeking process, costs, bond, or other undertaking under subsection (b) shall compute in United States dollars the amount of the foreign money claimed from a bank-offered spot rate prevailing at or near the close of business on the banking day next preceding the filing of a request or application for the issuance of process or for the determination of costs, or an application for a bond or other court-required undertaking.

(d) A party seeking the process, costs, bond, or other undertaking under subsection (b) shall file with each request or application an affidavit or certificate executed in good faith by its counsel or a bank officer, stating the market quotation used and how it was obtained, and setting forth the calculation. Affected court officials incur no liability, after a filing of the affidavit or certificate, for acting as if the judgment were in the amount of United States dollars stated in the affidavit or certificate.

OFFICIAL COMMENT

This section protects those who must determine how much should be held subject to a levy or other collection process or what the dollar amount of a supersedeas or other surety bond should be. If the judgment debtor is damaged by a gross overstatement of the dollar amount in the affidavit or certificate of counsel for the judgment creditor or the bank officer, recovery should be against that person.

SECTION 12. EFFECT OF CURRENCY REVALORIZATION.

(a) If, after an obligation is expressed or a loss is incurred in a foreign money, the country issuing or adopting that money substitutes a new money in place of that money, the obligation or the loss is treated as if expressed or incurred in the new money at the rate of conversion the issuing country establishes for the payment of like obligations or losses denominated in the former money.

(b) If substitution under subsection (a) occurs after a judgment or award is entered on a foreign-money claim, the court or arbitrator shall amend the judgment or award by a like conversion of the former money.

OFFICIAL COMMENT

1. Subsection (a) refers to situations in which a country authorizes the issue of a new money to take the place of the old money at a stated ratio. An example is Brazil's recent abolition of cruzeros for cruzados. The subsection mandates that foreign money claims should be subjected to the same ratio.

2. The Act takes no position on the effect of money repudiations or revalorizations so drastic as to be, in effect, confiscations. Remedy, if any, for these is usually found through diplomatic channels. Equally, the Act takes no position on the effect of exchange control laws. The effect, if any, on obligations to pay is left to other law.

SECTION 13. SUPPLEMENTARY GENERAL PRINCIPLES OF LAW.

Unless displaced by particular provisions of this Act, the principles of law and equity, including the law merchant, and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, or other validating or invalidating causes supplement its provisions.

OFFICIAL COMMENT

The section is taken from Section 1-103 of the Uniform Commercial Code.

SECTION 14. UNIFORMITY OF APPLICATION AND CONSTRUCTION.

This Act shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this Act among states enacting it.

SECTION 15. SHORT TITLE.

This Act may be cited as the Uniform Foreign-Money Claims Act.

SECTION 16. SEVERABILITY CLAUSE.

If any provision of this Act or its application to any person or circumstance 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.

SECTION 17. EFFECTIVE DATE.

This Act becomes effective on January 1st following its enactment.

SECTION 18. TRANSITIONAL PROVISION.

This Act applies to actions and distribution proceedings commenced after its effective date.

SECTION 19. REPEAL.

The following statute is repealed:

R.S. 51:2-1.

Respectfully submitted,

ALBERT BURSTEIN, Chairman
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**REPORT AND RECOMMENDATIONS
CONCERNING UNIFORM COMMERCIAL CODE ARTICLE
4A
"FUNDS TRANSFERS"**

**NEW JERSEY LAW REVISION COMMISSION
15 Washington Street
Newark, New Jersey 07102
(201)648-4575
October, 1990**

INTRODUCTION

The National Conference of Commissioners on Uniform State Laws and The American Law Institute have approved a new Article to the Uniform Commercial Code entitled Article 4A "Funds Transfers." The New Jersey Law Revision Commission, pursuant to its authority to review uniform state laws, undertook an examination of Article 4A to determine whether it should be adopted in the State of New Jersey. The Commission recommends that the legislature adopt Uniform Commercial Code Article 4A Official Text 1989. Concurrently, the Commission recommends that the Permanent Editorial Board of the Uniform Commercial Code consider an amendment requiring banks to inform customers who make funds transfers of the risk of loss applicable to those transactions.

Article 4A governs "funds transfers" made through the banking system and allocates the risk of loss between the parties. The Article primarily governs wholesale funds transfers which are transfers of large amounts of money normally made by commercial enterprises. The average size of a payment made through FedWire, a wire service operated by the Federal Reserve Board, was 3.1 million dollars in 1989.¹ The average size of a payment made through the Clearing House Interbank Payments System (CHIPS), a privately operated wire service, was 5.2 million in 1989. The total amount of money transferred through FedWire and CHIPS that year was 373 trillion dollars. Commercial parties obviously are the primary users of funds transfer systems and Article 4A is tailored to reflect banking and commercial practices.

While most funds transfers subject to Article 4A involve large commercial enterprises and large dollar amounts, 25% of all funds transfers are less than \$10,000 dollars. It is not clear what percentage of this 25% consists of consumer transactions.² But consumer funds transfers involving more than one bank are likely to be made through a wire service system. Since Article 4A applies to all transactions, whether commercial or consumer, that are processed through a wire service system, Article 4A may govern some consumer transactions. In addition, Article 4A applies to some consumer transactions processed through an automated clearing house.³

New Jersey lacks a comprehensive statute or body of case law to establish rules for funds transfers. The Electronic Fund Transfer Privacy Act, the only relevant New Jersey law, protects the privacy of consumer electronic funds transfers.⁴ Adoption of Article 4A thus would not displace existing law and would provide the commercial community with a system of rules to govern a new, and popular, method of payment. However, certain aspects of Article 4A are new to New Jersey law. Under Article 4A, the customer in a funds transfer bears a slightly greater risk of loss for an unauthorized payment order than a drawer of a check bears for an

¹ For a discussion of the major wire systems see Scott, Corporate Wire Transfers and the Uniform New Payments Code, 83 Colum. L.Rev. 1664, 1669-1674 (1983). The statistics cited for FedWire and CHIPS are available from the Federal Reserve Board.

² Research indicates that statistics for consumer transactions processed through wire service systems are not available.

³ 12 C.F.R. 205.3(g).

⁴ N.J.S. 17:16K-1 et seq.

unauthorized signature.⁵ Nor does Article 4A allow the recovery of consequential damages for miscarried funds transfers whereas Article 4 allows the recovery of consequential damages proximately caused by the wrongful dishonor of checks by a payor bank.⁶

Commercial parties can protect themselves from the consequences of these new rules because they have the bargaining power to negotiate agreements with their banks. However, consumers who lack equivalent bargaining power may be adversely affected by the Article 4A rules because these rules are new and Article 4A does not require a customer to be notified of them. A consumer might be led to believe incorrectly that the rules of negotiable instruments govern the funds transfer transaction. While the slightly increased risk of loss the customer bears in funds transfers is justified by the nature of the transaction, it might be preferable if Article 4A contained a requirement that banks notify customers of the risk of loss rules, especially the no-consequential damage rule for miscarried funds transfers.

This Final Report summarizes the Commission's analysis of Article 4A. The Commission examined how adoption of Article 4A would affect banking law in New Jersey, identified the impact Article 4A would have upon consumer transactions in this state, and compared the rules of Articles 3 and 4 governing payment made by check with the rules of Article 4A governing payment made by funds transfer. The latter analysis ascertained the differences in the way the Code treats the two forms of payment. This report contains five sections: (1) History and Overview of Article 4A, (2) Comparison of Checks and Payment Orders, (3) Effect of Article 4A upon Consumer Transactions, (4) Impact of Article 4A upon New Jersey law, and (5) Recommendation.

I. HISTORY AND OVERVIEW OF ARTICLE 4A

A. History

Technological advances, especially in the areas of electronics and computers, have revolutionized the banking industry.⁷ These improvements in technology have permitted banks to automate operations and reduce the volume of paper necessary for transactions. One system affected by the technological revolution is the payment system. Traditionally checks have been used to make payments. Today, however, electronic transfers of funds satisfy a substantial volume of commercial obligation without the issuance of a check. The development of legal principles has not kept pace with technological change in the banking industry. Consequently, the law of payments does not reflect actual commercial practices.⁸

⁵ Compare U.C.C. 4A-202 with U.C.C. 4-401.

⁶ Compare U.C.C. 4A-305 with U.C.C. 4-402.

⁷ Comment, Regulation of Wire Transfers and the Recoverability of Consequential Damages, 36 Buffalo L. Rev. 745 (1987).

⁸ Alces, A Jurisprudential Perspective for the True Codification of Payments Law, 53 Fordham L. Rev. 83 (1984).

B. Overview¹⁷

"Article 4A creates a series of rules to govern the resolution of legal issues that may arise out of funds transfers."¹⁸ The rules generally may be varied by agreement of the parties or by the operating rules of funds transfer systems but some rules which protect fundamental policy choices are not variable by agreement.¹⁹ The ability to vary the effect of the rules allows for the development of commercial practices not anticipated by Article 4A and provides a "safety net" for parties that do not negotiate all issues in their contracts. The flexibility of Article 4A combined with its gap-filling function makes it like most other articles of the Code.

Under Article 4A, a "funds transfer" is a series of payment orders by which an originator makes a payment to a beneficiary.²⁰ A payment order is an instruction to pay that is sent by the originator to a bank, or sent by a bank to cause another bank to pay a fixed amount of money to a beneficiary.²¹ The funds transfer begins when the customer of a bank issues a payment order to the bank which instructs the bank to pay a named beneficiary.²² The term "funds transfer" includes any payment order the bank may issue, or any payment order an intermediary bank may issue, to carry out the original payment order.²³ A funds transfer is completed when the beneficiary's bank accepts the payment order for the benefit of the beneficiary.²⁴

Many things can and do go wrong in funds transfers. There are two principal problems: (1) unauthorized funds transfers, and (2) erroneously executed payment orders. A serious but less common problem is a bank's failure to settle accounts. Unauthorized payment orders occur when the bank debits money from the customer's account without the customer's authorization. Erroneously executed payment orders occur for a variety of reasons and include, for example, misdescription of the beneficiary, duplication of payment orders, payment of the wrong amount to the beneficiary and failure to complete the transfer according to the customer's instruction. A bank that becomes insolvent and is unable to settle its accounts jeopardizes the finality of payments to beneficiaries. Article 4A provides comprehensive rules defining the rights and responsibilities of parties to funds transfers to solve these and other problems..

If a loss results from an unauthorized payment order, the customer suffers the loss if the bank accepted the order in good faith, and complied with a commercially reasonable security procedure to verify the authenticity

¹⁷ This section is inherently superficial since Article 4A is difficult, technical and complex. The 1989 Official Text of Article 4A contains comments to each provision which explain its function and meaning. It is not necessary to duplicate the commentary in this report. For a general explanation of Article 4A, see B. Clark, The Law of Bank Deposits, Collections and Credit Cards (1990).

¹⁸ Miller, Uniform Commercial Code Article 4A: A Framework for Transmitting Large Amounts of Funds, 44 Consumer L. Q. Rep. 150, 152 (1990)

¹⁹ U.C.C. 4A-501 and 4A-107.

²⁰ U.C.C. 4A-104(a).

²¹ U.C.C. 4A-103(a)(1).

²² U.C.C. 4A-104(a).

²³ U.C.C. 4A-104(a).

²⁴ Id.

Prior to the promulgation of Article 4A, commercial wire transfers were virtually unregulated.⁹ Uniform Commercial Code Articles 3 and 4 do not apply to wire transfers, although courts have cited analogous provisions in discussing electronic wire transfer systems.¹⁰ Federal Reserve Board regulations presently contain some provisions governing funds transfers but apply only to FedWire and the banks using the Federal Reserve System.¹¹ Non-statutory laws, such as automated clearing house rules and wire transfers system rules, apply to member banks. Private contracts between banks and their customers often do not exist, and if they do, fail to allocate significant risks among the parties.¹²

Most consumer wire transfers are regulated. The federal Electronic Funds Transfer Act of 1978 (EFTA) and its implementing Regulation E regulate electronic fund transfers made by consumers that are not sent through wire service systems such as FedWire and CHIPS.¹³ Consumers who wire money generally use Western Union or American Express.¹⁴ These corporations employ agents, not banks, to transfer the funds and therefore are not subject to Article 4A. However, to the extent that a consumer sends money through the banking system and uses a wire service system, the transaction is covered by Article 4A. Nine states have enacted electronic fund transfer laws which deal with consumer issues: Colorado, Iowa, Kansas, Michigan, Minnesota, Montana, New Mexico, Virginia and Wisconsin.¹⁵ An additional thirteen states, including New Jersey, have enacted statutes that bear upon the consumer aspects of electronic fund transfers, but do not regulate the substance of the transaction. *Id.*

In response to the lack of uniform and comprehensive law regulating commercial funds transfers, the National Conference of Commissioners on Uniform State Laws and the American Law Institute promulgated Article 4A. To date, eleven states have adopted Article 4A and it has been introduced in the legislatures of a number of other states.¹⁶ The Federal Reserve Board has adopted a proposed revision of subpart B to Regulation J to make it consistent with Article 4A. Revised Regulation J is expected to become effective January 1991 and would apply to transactions involving Federal Reserve Banks even if the state in which the Federal Bank is located had not yet adopted Article 4A. The Clearing House International Payments System, a private funds transfer system, also is expected to adopt Article 4A. It appears that in the next few years Article 4A will be adopted in most, if not all, the states.

⁹ Comment, *supra* n. 7 at 750.

¹⁰ Jetton, Evra Corp. v. Swiss Bank Corp.; Consequential Damages for Bank Negligence in Wire Transfers, 9 Rutgers Computer & Tech. L.J. 369, 398 (1983).

¹¹ 12 C.F.R. 210.

¹² Comment, *supra* at 758.

¹³ 15 U.S.C. 1693 *et seq.*

¹⁴ Ramirez, 2 Giants Battle in Money-Wiring, N.Y. Times, Aug. 14, 1990, at D1, col. 3.

¹⁵ N. Penny & D. Baker, The Law of Electronic Fund Transfer Systems, 10-2, 10-7 (1980).

¹⁶ Information on enactment of Article 4A is current to August 15, 1990. The eleven states are named in the Section V of this report.

funds transfer bears a slightly greater risk of loss for an unauthorized instruction to pay than a drawer of a check bears for an unauthorized signature. Additionally, the Code treats the measure of damages for wrongful dishonor of checks differently from the measure of damages for miscarried funds transfers.

IV. IMPACT OF ARTICLE 4A ON NEW JERSEY LAW

New Jersey does not have a statute to regulate the substantive aspects of funds transfers. The Electronic Fund Transfer Privacy Act is a consumer statute concerned with protecting the privacy of financial transactions.³⁸ The Act prohibits a financial institution from disclosing information concerning an electronic funds transfer to third parties unless the Act specifically permits the disclosure.³⁹ Violations of the Act entitle the consumer to obtain actual damages, and if the violation is willful or reckless, the Act entitles the consumer to collect punitive damages.⁴⁰

References to electronic funds transfers are also made in three other statutes unrelated to the regulation of funds transfers. N.J.S. 17:11B-14(1), a provision within an act providing for the regulation and licensing of mortgage bankers and brokers, permits payment of mortgage proceeds by electronic funds transfer. N.J.S. 17:12B-48(17), a provision within the 1963 Savings and Loan Act, allows an association to make payments in the form of electronic transfers. N.J.S. 52:14-15(b) allows the state treasurer to deposit by an electronic funds transfer the pay of a state employee in a banking institution by means of an electronic transfer). In addition, a credit union may maintain automated terminals to transact business with financial institutions.⁴¹

New Jersey case law does not address the issue of electronic funds transfers. However, a New Jersey federal district court, applying Pennsylvania law, establishes some precedent in New Jersey for funds transfers. Mellon Bank N.A. v. Securities Settlement Corp.⁴² The court in Mellon held that a bank which executed a payment order in a funds transfer and made payment to the beneficiary's bank could not recover the payment from its customer because the bank failed to exercise ordinary care to cancel the payment order when instructed to do so by the customer.

Article 4A would apply to all commercial funds transfers and consumer transactions not governed by the Electronic Fund Transfer Act of 1978. Article 4A would not displace the New Jersey Electronic Fund Transfer Privacy Act. Whether the result in Mellon Bank N.A. v. Securities Settlement Corp., would obtain under Article 4A is difficult to ascertain because the Mellon decision does not report enough facts to make this determination. To the extent that Article 4A provides that an order to cancel is ineffective if the receiving bank has accepted the order, a different result probably would obtain under Mellon because the bank accepted the order before it received notice of the cancellation. In any event, the Mellon

³⁸ N.J.S. 17:16K-1 et seq.

³⁹ N.J.S. 17:16K-3.

⁴⁰ N.J.S. 17:16K-6.

⁴¹ N.J.S. 17:13-89(m).

⁴² 710 F.Supp. 991 (D.N.J. 1989).

decision would no longer constitute a precedent for the law of funds transfers if Article 4A were adopted in New Jersey since Article 4A rejects negligence concepts.

V. RECOMMENDATION

The Commission recommends that the New Jersey Legislature adopt Uniform Commercial Code Article 4A "Funds Transfers" 1989 Official Text. Adoption of this Article fills a void with respect to payments made by funds transfers and would not disrupt the law of this State. Article 4A has been adopted in eleven states: California, Colorado, Connecticut, Kansas, Louisiana, Minnesota, New York, Oklahoma, Utah, Virginia, and West Virginia. Major wire service systems such as FedWire and CHIPS also are expected to adopt Article 4A. Concurrently, the Commission recommends that the Permanent Editorial Board of the Uniform Commercial Code consider an amendment requiring banks to inform customers who make funds transfers of the risk of loss provisions applicable to those transfers.

Respectfully submitted,

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STATE OF NEW JERSEY
NEW JERSEY LAW REVISION COMMISSION

TENTATIVE REPORT

relating to

Formal Requirements for Real Estate Transactions,
Brokerage Agreements and Suretyship Agreements

May 1990

This tentative report is being distributed so that interested persons will be advised of the Commission's tentative recommendations and can make their views known to the Commission. Any comments received will be considered by the Commission in making its final recommendations to the Legislature. The Commission often substantially revises tentative recommendations as a result of the comments it receives.

It is just as important to advise the Commission that you approve of the tentative recommendations as it is to advise the Commission that you believe revisions should be made in the recommendations.

Please send comments concerning this tentative report or direct any related inquiries, to:

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TENTATIVE REPORT

relating to

Formal Requirements for Real Estate Transactions, Brokerage Agreements and Suretyship Agreements

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

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).

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 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 parcel 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, 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 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, and it includes a lien on real estate and an interest in a trust in real estate. For purposes of this chapter it does not include a lease.

b. The conveyance of an interest in real estate is any transaction that changes the legal or beneficial ownership of an interest in real estate, including the creation or extinguishment of an interest. The transfer of an interest in real estate does not include a transfer by operation of law.

c. A transfer by operation of law is a transfer that is deemed to take place upon the occurrence of an event, including a transfer that is deemed to take place by virtue of the laws governing intestate succession, or a transfer that takes place as a result of a judicial proceeding.

d. A trust in real estate is created:

(1) by a conveyance of the beneficial ownership of an interest in real estate by the owner of the interest to another person; or

(2) by a conveyance of the legal ownership of an interest in real estate to a grantee, coupled with an agreement by the grantee either to hold the legal ownership for the benefit of the grantor or another person or to convey the legal ownership to the grantor or another person.

e. A lease is the sale of the possession and use of land for a term.

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 taken from Orrok v. Parmigiani, 32 N.J. Super. 70 (App. Div. 1954). 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. Note, however, that leases are expressly excluded from this definition and are separately defined under subsection (e). See the discussion below as to the rationale for treating leases separately.

This definition of "an interest in real estate" is intended to incorporate case law construing the source statute, with the express exception of leases. 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), an easement, Sergli v. Carew, 18 N.J. Super. 307 (Ch. 1952), and a servitude, Droutman v. E.M. & L. Garage, 129

N.J. Eq. (E. & A. 1941). See also 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. Source section 1 has been applied to transactions that are by gift or by purchase. Aiello v. Knoll Golf Club, 64 N.J. Super. 156 (App. Div. 1960).

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, Brehan 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).

"Conveyance of an interest in real estate." This term is very broadly defined as "any change in the legal or beneficial ownership of an interest in real estate," with the exclusion of transfers by operation of law, which is separately defined. Although the terms "conveyance" and "transfer" are virtually identical, see Feldman v. Urban Commercial, Inc., 64 N.J. Super. 364 (Ch. Div. 1960), the term conveyance is used in this subsection because it connotes, albeit slightly, a voluntary transaction. See Restatement of Property sec. 13.

"Transfer by operation of law." The term "by act or operation of law" was interpreted very broadly under the source statutes, especially with regard to trusts. This definition is intended to have somewhat narrower and more specific application than the source term, to include only those transfers which are deemed by express principles of law to take place by virtue of the occurrence of an event. For example, upon the death of an intestate, the legal heirs become owners of the intestate's property, N.J.S. 3B:1-3, even though further action may be necessary for the heirs to obtain written evidence of their ownership, e.g., the issuance of a deed transferring title to real property by the administrator of the intestate's estate. N.J.S. 3B:23-5. Similarly, the doctrine of adverse possession may effect a change in the ownership of property upon the expiration of the statutory period of adverse possession. See N.J.S. 2A:14-5 and -6 and, e.g., Braue v. Fleck, 23 N.J. 1 (1956).

"A trust in real estate." This definition treats trusts in real estate as having the aspects of both a present conveyance of an interest and, in most cases, an agreement either to convey the interest or to hold it for the benefit of another. For example, a trust may be created by a property owner's declaration that he holds the property in trust for another person. Under present law such a declaration operates as a present conveyance of an interest in real estate, i.e., the conveyance of the beneficial interest in the property to another person, while the property owner retains the legal interest as trustee for the other person. Under proposed section 2, such a declaration will not operate to transfer an interest in the property unless it is in writing.

A conveyance by the owner to another person who is to hold the property as a trustee entails both a present conveyance (the conveyance of the legal title to the trustee) and an agreement by the trustee, either to hold the property for the benefit of another or to reconvey it.

Under proposed section 2 the conveyance of the legal title to the trustee must be in writing in order to be valid. In addition, under proposed section 4 the trustee's agreement to hold the property for the benefit of another or to reconvey is an agreement that must either be in writing or must be proved by "clear and convincing evidence."

This definition is included in order to indicate that insofar as a trust in real estate operates as either as a present conveyance or an agreement to convey it must satisfy the requirements imposed by this section on other transactions of the same type. It is also 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. Thus, for example, if a grantor transfers legal title to real estate to a trustee pursuant 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. Enforcing the agreement according to its terms means that either the grantor or the beneficiary can compel the trustee to reconvey legal title to the beneficiary. Under prior law the a parol express trust would not be enforced according to its terms but only through the application of the theories of resulting or constructive trust, the result of which in most cases was a reconveyance of the property to the grantor rather than to the beneficiary. See, e.g., Moses v. Moses, 140 N.J. Eq. 575 (E. & A. 1947).

"Lease." This term is excluded from the definition of an "interest in real estate" in subsection (a) in order to facilitate the treatment of leases in a separate section. The definition here is derived from Thiokol Chemical Corp. v. Morris County Board of Taxation, 41 N.J. 405 (1964). Although a lease has traditionally been considered to be an estate in land, recent cases have struggled with the fact that in the modern context many leases are more in the nature of a contract than a conveyance of an estate in land. See, e.g., Somer v. Kridel, 74 N.J. 446 (1977); Ringwood Associates, Ltd. v. Jack's of Route 23, 155 N.J. Super. 294 (Law. Div. 1977). Leases are defined separately here, and are treated separately under section 3 of this proposed statute, in recognition of their hybrid aspect under modern law.

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

a. A valid conveyance of an interest in real estate shall be in a writing signed by the grantor or the grantor's agent, or by a person authorized by law to execute the writing. The writing shall identify the grantor and grantee and the nature of the interest being conveyed.

b. The conveyance of an interest in real estate which is not valid under subsection a. is valid between the grantor of the interest and the grantee if:

(1) the grantor has placed the grantee in possession of the interest in real estate as a result of the conveyance; and

(2) the grantee has either paid all or part of the consideration for the conveyance or has reasonably relied on the validity of the conveyance to the grantee's detriment.

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

COMMENT

This section combines the rules of source sections 1 and 2, and applies to conveyances of an interest in real estate. Subsection (a) states the general rule that no interest in land is conveyed

by virtue of a parol transaction. Read together with the definitions in proposed section 1, this section makes transactions in real estate or interests in real estate inoperative unless they are in writing, and sets three minimum requirements for a sufficient writing: it must identify the grantor and the grantee and the nature of the interest being conveyed, and it must be signed. Note that other applicable principles of law may require that a writing contain more than merely the minimum specified in this section. For example, a deed signed by the grantor 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.

"Signed by the grantor or the grantor'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 grantor or by the grantor'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 may continue to demand that an agent's authority to execute a conveyance be reduced to writing, but it 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.

Subsection (b) 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 the interest in a parol transaction may not take advantage of the rule of subsection (a) that such a conveyance is invalid. This is a very limited exception, applying only in those situations in which the grantor has placed the grantee in possession as a result of the invalid conveyance and the grantee has either paid consideration for the purchase or has detrimentally relied upon the validity of the conveyance. Example: Ann sells a house to Ben for \$50,000 in a parol transaction, Ben pays the \$50,000 and moves into the house. Ann is not permitted to assert that the parol transaction was invalid in an action by Ben to quiet title. The same principle applies to gift transactions. Example: Ann gives Ben a house, and he moves in and makes improvements. Not only does the parol transaction result in a completed gift under the law of gifts, but Ben may bring an action to quiet title and Ann may not assert that the parol transaction is invalid under this section in that action. Note that purchase transactions and gift transactions differ significantly, however, in that in a purchase transaction there is either implicitly or explicitly an agreement to convey underlying the actual conveyance. The grantor in a parol purchase transaction which does not satisfy the exception provided in subsection (b) of this section may be able to enforce the agreement under proposed section 4 if the agreement and its terms can be proved by clear and convincing evidence.

Section 3 - Writing requirement, leases

a. A valid lease of real estate for more than three years shall be in a writing signed by the lessor or the lessor's agent, or by a person authorized by law to execute the writing. The writing shall identify the lessor and the lessee, the property being leased, the term of the lease and other essential terms.

b. A lease of real estate for more than three years which is not valid under subsection a. of this section is enforceable between the lessor and the lessee if the identity of the lessor and the lessee, the property being leased, the term of the lease and other essential terms 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, Ltc., 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."

The approach of this separate section on leases is to continue to treat a lease as a conveyance of an estate in land in that a writing is required in order to make a lease that is valid as to third parties. This principle supports the policy of the recording statutes, as does the parallel provision in section 2 of the proposed statute, which continues the writing requirement for a valid conveyance of any other interest in land. Subsection (b) of this section, however, treats a lease as a contract as between the lessor and the lessee. Thus, an oral lease for six years may be considered invalid under subsection (a), but it may be enforceable between the lessor and the lessee if the terms can be proved by clear and convincing evidence.

It is the Commission's view that in the context of determining whether a parol lease should be enforceable between the parties, possession by the lessee is only one factor which may be considered. Possession by a lessee is certainly probative of the existence of a lessor-lessee relationship, but it 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, Section 4, which also rejects preclusive requirements for enforceability.

Section 3(b) authorizes enforcement of a parol lease between the parties to it if the material terms are proved by clear and convincing evidence. 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 Section 2.

Section 4 - Enforceability of agreements regarding real estate

An otherwise valid agreement for the conveyance of an interest in real estate, to hold an interest in real estate for the benefit of another, or to make a lease of real estate, is enforceable if the essential terms of the agreement are:

- a. established by a writing signed by the person against whom enforcement of the agreement is sought or by that person's agent, or by a person authorized by law to execute the writing; or
- b. proved by clear and convincing evidence.

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

COMMENT

This section significantly changes the statutory rule applicable to the enforcement of parol agreements involving real estate. It reflects the approach of Deutsch v. Budget Rent-A-Car, 213 N.J. Super. 385 (App. Div. 1986), in which 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." See also Iacono v. Toll Brothers, 225 N.J. Super. 87 (App. Div. 1988), certif. denied, 113 N.J. 329 (1988)(unsigned contract for the sale of land enforceable in the absence of acts of part performance, where the purchaser detrimentally relied on the validity of the contract).

It is the Commission's view that a preclusive list of specific requirements for the enforceability of agreements relating to land, such as the traditional requirements of part performance or detrimental reliance, unnecessarily limits the courts in determining whether a parol agreement should be enforced. The history of the interpretation of the Statute of Frauds shows, especially in recent years, that courts have had to struggle to fit individual cases into the traditional categories of preclusive requirements in order to achieve just results. Under the clear and convincing evidence standard both the traditional factors as well as other probative facts may be considered in determining enforceability.

The traditional rule applied in New Jersey cases to the enforceability of parol contracts for the sale of land was grounded in equitable principles applicable to enforcement of land contracts generally. The proponent of a contract was required to prove the terms of an underlying agreement; it was frequently stated that this proof was required to be clear and convincing. Proof of the agreement itself was not enough, however. The person seeking specific performance of a parol contract typically was required to show that the contract had been partly performed, either by the taking of possession, or the payment of all or part of the purchase price, or both. The traditional rule has been eroded in cases in which it was apparent that the rule would produce unjust results.

Justification for adopting an evidentiary rule for the enforceability of parol agreements for the conveyance of land may be found in the ancient history of the Statute of Frauds. The seventeenth century drafters of the statute were concerned with the false claims of contractual liability, claims which were difficult for defendants to refute under the evidentiary and other procedural rules applicable at the time. Requiring contracts to be in writing was a "bright line" that was reasonable under the circumstances of that time. The rules of procedure and evidence of today's court system are better able to cope with claims founded on perjured testimony, reducing the need for a bright line test of enforceability.

Agreement to hold an interest in real estate for the benefit of another. This section applies to an agreement to convey an interest in real estate as well as to an agreement to hold an interest in real estate for the benefit of another. Agreements to hold for the benefit of another are included in order to make parol trusts directly enforceable according to their terms. See discussion in Comment to proposed section 1.

Agreement to make a lease. An agreement to make a lease is enforceable according to the same rule applicable to contracts for the conveyance of an interest in real estate. Because a lease is expressly excluded from the definition of an interest in land under section 1(a), it is necessary to include agreements to make a lease expressly in this section. See also proposed section 3 which governs leases.

"Otherwise valid." This phrase is included in order to make it clear that this section is not intended to displace other applicable principles such as lack of consideration, mistake, lack of capacity, etc. Thus, for example, a contract for the sale of land which is obtained by duress is not enforceable under this section merely because its essential terms are in a writing which satisfies subsection (a) or can be proven under subsection (b). It should also be understood that it is implicit in this section that the proponent of an agreement be able to prove that there is in fact an agreement between the parties.

"Essential terms of the agreement." What constitutes the essential terms of an agreement will vary according to the nature of the transaction. See, e.g., Miller v. Headley, 109 N.J. Eq. 436 (Ch. 1932), aff'd, 112 N.J. Eq. 89 (E. & A. 1932); Bernstein v. Rosenzweig, 1 N.J. Super. 48 (App. Div. 1948).

Consideration. Whether the consideration need be included in the writing 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."). In this section the phrase "essential terms of the agreement" is left for judicial interpretation on a case-by-case basis. In any event, under subsection 4(b), the consideration may be proved by "clear and convincing evidence." See proposed section 5, which retains the rule that the consideration need not be stated in the writing in the case of promises to be liable for the debt of another. See also the comment to proposed section 5.

Commissioner Rosen believes that an agreement for the conveyance of an interest in real estate, to hold an interest in real estate for the benefit of another, or to make a lease should not be enforceable solely because the agreement can be proved by clear and convincing evidence. In Commissioner Rosen's view, the cases cited above require 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.

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 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

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, R.S. 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.

⁴ Holdsworth, supra at 390-93.

⁵ Holdsworth, supra at 390-93.

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 oral 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: an 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.

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.

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.

Section 5 - 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.")

Obligation 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":

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 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 in 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 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

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 home and a housekeeper, Gilbert v. Gilbert, 66 N.J. Super. 246, 251-252 (App. Div. 1961); by a wife in consideration 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).

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

Sections to be repealed:

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.").

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."

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 5, 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 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

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.

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

¹⁸ *Deevy v. Porter*, 11 N.J. at 597.

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 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.

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, §7.

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).

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);

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 promise.²⁷ The added provision was not limited to promises to be liable for the debt of another, however, but applied 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, leaving to judicial interpretation on a case-by-case basis the decision whether the consideration for a contract for the sale of land need be included in a writing as an "essential term" of the contract. See proposed section 4 and Comment. The principle of the source section is retained, however, in proposed section 5, 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

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

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

"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 6. 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 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 or 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, §7) and New York (N.Y. General Obligations Law §5-701(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
R.S. 25:1-2	Proposed Sections 1,2,3
R.S. 25:1-3	Proposed Sections 1,2,3, 4
R.S. 25:1-4	Proposed Sections 1,2,3,4
R.S. 25:1-5(a)	Proposed Section 5
R.S. 25:1-5(b)	Proposed Section 5
R.S. 25:1-5(c)	Amended
R.S. 25:1-5(d)	Proposed Sections 1,4
R.S. 25:1-5(e)	Deleted
R.S. 25:1-6	Deleted
R.S. 25:1-7	Deleted
R.S. 25:1-8	See Proposed Section 5
R.S. 25:1-9	Proposed Section 6

STATE OF NEW JERSEY
NEW JERSEY LAW REVISION COMMISSION

SECOND TENTATIVE REPORT

relating to

Writing Requirements for Real Estate Transactions,
Brokerage Agreements and Suretyship Agreements

January 1991

This Tentative Report is being distributed so that interested persons will be advised of the Commission's tentative recommendations and can make their views known to the Commission. Any comments received will be considered by the Commission in making its final recommendations to the Legislature. The Commission often substantially revises tentative recommendations as a result of the comments it receives. This Second Tentative Report has incorporated many of the comments received in response to the first Tentative Report distributed in May 1990.

It is just as important to advise the Commission that you approve of the tentative recommendations as it is to advise the Commission that you believe revisions should be made in the recommendations.

Please send comments concerning this Tentative Report or direct any related inquiries, to:

John M. Cannel, Esq., Executive Director
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SECOND TENTATIVE REPORT

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.

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).

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 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 parcel 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 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 lien on real estate, a servitude, and an interest in a trust in real estate.

b. A transaction involving 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 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), an easement, Sergli v. Carew, 18 N.J. Super. 307 (Ch. 1952), and a servitude, Droutman v. E.M. & L. Garage, 129 N.J. Eq. (E. & A. 1941). 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.

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.

Transactions involving 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 involving an interest in real estate is not effective to transfer ownership of an interest in real estate unless:

(1) the real estate, 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 the transferor, by the transferor's agent, or by a person authorized by law to sign the writing; 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.

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 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.

Section 3 - Writing requirement, leases

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

a. the real estate, the term of the lease and the identity of the lessor and the lessee are established in a writing signed by the lessor, by the lessor's agent, or by a person authorized by law to sign the writing; 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. the real estate, 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 the party against whom enforcement is sought, by that party's agent, or by a person authorized by law to sign the writing; or

b. the real estate, 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, leases of 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.

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, R.S. 12A:2-201, which is outside of the scope of this project.

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 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.

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.

⁴ Holdsworth, supra at 390-93.

⁵ Holdsworth, supra at 390-93.

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.

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-

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.

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 provision 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":

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 in 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 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

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 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.").

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
- 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

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

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 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

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.

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.

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 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

²¹ Rev. 1874 p.229, An Act for the prevention of frauds and perjuries, §7.

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).

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);

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 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.

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

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

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 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 personally, or by registered or certified mail, at the last known address of the person to be served. e. The notices provided

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, §7) and New York (N.Y. General Obligations Law §5-701(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
R.S. 25:1-2	Proposed Sections 1,2,3,4
R.S. 25:1-3	Proposed Sections 1,2,3, 4
R.S. 25:1-4	Proposed Sections 1,2,3,4
R.S. 25:1-5(a)	Proposed Section 6
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

DRAFT
REPORT AND RECOMMENDATIONS
ON THE TAX COURT

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CHAPTER 13 - TAX COURT

2B:13-1 Establishment; jurisdiction

a. A Tax Court is hereby established as a court of limited jurisdiction pursuant to Article VI, Section I, paragraph 1 of the New Jersey Constitution.

b. The Tax Court shall be a court of record and shall have a seal.

Source: 2A:3A-1, 2A:3A-3

COMMENT

The language of the first paragraph is nearly identical to source section 2A:3A-1. The second sentence derives from source section 2A:3A-3. The provision in source section 2A:3A-3 concerning the jurisdiction of the Tax Court is encompassed in new 2B:13-2.

2B:13-2 Jurisdiction

a. The Tax Court shall have jurisdiction to review the following classes of cases:

(1) Actions or regulations of a county board of taxation or of the Director of the Division of Taxation;

(2) Actions or regulations of any other state agency or official with respect to a tax matter;

(3) Actions or regulations of any county or municipal official with respect to a tax matter;

(4) any other cases as may be provided by statute.

b. The Tax Court shall have jurisdiction over actions cognizable in the Superior Court which raise issues as to which expertise in matters involving taxation is desirable, and which have been transferred to the Tax Court pursuant to the Rules of the Supreme Court.

c. The Tax Court jurisdiction shall include any powers that may be necessary to effectuate its decisions, judgments and orders.

Source: 2A:3A-4.1, 2A:3A-3, 2A:3A-22

COMMENT

Paragraph (a) replaces former provisions 2A:3A-3 and 2A:3A-4.1 with a catalog of the review jurisdiction of the Tax Court, specific instances of which are contained in Titles 54 and 54A and elsewhere in the statutes.

Paragraph (b) is new. It provides for jurisdiction in the Tax Court over actions transferred from the Superior Court which involve issues as to which the expertise of Tax Court judges is helpful.

Paragraph (c) provides for any additional jurisdiction the Tax Court may require to enforce decisions, judgments or orders. The second paragraph is intended to eliminate the issue raised in Alid, Inc. v. North Bergen Township, 180 N.J. Super. 592 (App. Div. 1981), appeal dismissed as moot, 89 N.J. 388 (1982) over the power of the Tax Court to issue orders which fall

under the definition of the prerogative writs. The court in Alid held that the Tax Court did not have jurisdiction to issue post-judgment orders in the nature of mandamus because the predecessor entity to the Tax Court, the Division of Tax Appeals, had no power to issue such orders. This paragraph gives the Tax Court the statutory jurisdiction to issue any orders necessary to the exercise of its subject-matter jurisdiction.

2B:13-3 Hearing and determination of cases; legal and equitable relief; practice and procedure; decisions

a. The Tax Court, in all causes within its jurisdiction, and subject to law, may grant legal and equitable relief so that all matters in controversy between the parties may be completely determined.

b. The Tax Court shall determine all issues of fact and of law de novo.

c. Practice and procedure in the Tax Court shall be as provided by the Rules of the Supreme Court.

d. Decisions of the Tax Court shall be published in the manner directed by the Supreme Court.

Source: 2A:3A-3, 2A:3A-4

COMMENT

The language of this section is virtually identical to subsections (a) and (b) of the source section. Subsection (c) of the source section is included in new 2B:13-5.

Source: 2A:3A-4, 2A:3A-3

2B:13-4 Appeals

Judgments of the Tax Court may be appealed as of right to the Appellate Division of the Superior Court pursuant to the Rules of Supreme Court.

Source: 2A:3A-4.1, 2A:3A-10

COMMENT

The language of this section is virtually identical to the corresponding provision of 2A:3A-4.1.

2B:13-5 Location for sessions; facilities

a. The Tax Court shall maintain permanent locations in Trenton and Newark and may hold sessions at other locations throughout the State.

b. The State shall provide courtrooms, chambers and offices for the Tax Court at the required permanent locations in Trenton and Newark and by arranging for shared use of existing courtrooms, chambers and offices or other appropriate facilities at other locations throughout the State.

Source: 2A:3A-2, 2A:3A-3

COMMENT

This section is a substantial reenactment of the source sections.

2B:13-6 Judges; number; qualifications

a. The Tax Court shall consist of no less than six, nor more than 12 judges, each of whom shall exercise the powers of the court, subject to Rules of the Supreme Court.

b. The judges of the Tax Court shall have been admitted to the practice of law in this State for at least 10 years prior to appointment and shall be chosen for their special qualifications, knowledge and experience in matters of taxation.

Source: 2A:3A-2, 2A:3A-13

COMMENT

This section is a substantial reenactment of the corresponding provisions of the source sections.

2B:13-7 [NO SECTION]

2B:13-8 Term of office, retirement

a. The judges of the Tax Court shall hold their offices for initial terms of 7 years and until their successors are appointed and qualified, and upon reappointment shall hold their offices during good behavior.

b. The judges of the Tax Court shall be retired upon attaining the age of 70 years, upon the same terms and conditions as a judge of the Superior Court, and shall have the same pension rights as judges of the Superior Court.

Source: 2A:3A-15; 2A:3A-19

COMMENT

The language of this section is virtually identical to the source sections. The provision for staggered terms for the initial appointees to the Tax Court has been eliminated as no longer necessary. This section parallels N.J. Const., Art. VI, §VI, par. 3.

2B:13-9 Compensation not to be reduced; prohibition against gainful employment

a. Each judge of the Tax Court shall receive annual compensation equal to that of a judge of the Superior Court and which shall not be diminished during the term of appointment.

b. The judges of the Tax Court shall not engage in the practice of law or other gainful pursuit nor shall they hold other office or position of profit under this State, any other State or the United States.

Source: 2A:3A-18, 2A:3A-20

COMMENT

The language of these provisions is nearly identical to the source sections. The intent of this section is to subject Tax Court judges to the same rules as are applicable to Superior Court judges. Subsection (b) parallels N.J. Const., Art. VI, §VI, par. 7, which is applicable to judges of the Superior Court and justices of the Supreme Court, and R. 1:15(a). The provision in source section 2A:3A-20 concerning forfeiture of office of a judge who becomes a candidate for elective office has not been included here as it is covered under 2B:2-3 which covers a "judge of any court of this state."

2B:13-10 Impeachment and removal; incapacity

a. The judges of the Tax Court shall be subject to impeachment, and upon impeachment shall not exercise judicial office until acquitted. The judges of the Tax Court shall also be subject to removal from office by the Supreme Court for such causes and in such manner as is provided by law for the removal of judges of the Superior Court.

b. Whenever the Supreme Court certifies to the Governor that a judge of the Tax Court appears to be substantially unable to perform the duties of office, the Governor shall appoint a commission of three persons to inquire into the circumstances. Upon the recommendation of the Commission the Governor may retire the judge from office, on pension, as may be provided by law.

Source: 2A:3A-16, 2A:3A-17

COMMENT

This section is a substantial reenactment of the source sections. It parallels N.J. Const., Art. VI, §VI, par. 3 and 4.

2B:13-11 Presiding judge

The Chief Justice shall appoint one of the judges of the Tax Court to be the presiding judge of the Tax Court. The presiding judge shall, subject to the supervision of the Chief Justice and the Administrative Director of the Courts, be responsible for the administration of the Tax Court.

Source: 2A:3A-14

COMMENT

The language of this section is identical to the source section.

2B:13-12 Annual report

The presiding judge shall submit a report to the Chief Justice of the Supreme Court annually. The report shall be published as part of the Annual

Report of the Administrative Director of the Courts. The report shall contain information and statistics for the previous fiscal year concerning the operation of the Tax Court. The report may also contain such recommendations as the presiding judge may wish to make regarding the clarification or revision of legislation, rules and regulations relating to taxation, or the practice and procedures in the Tax Court.

Source: 2A:3A-24

COMMENT

The language of this section is substantially identical to the source section.

2B:13-13 Assignment of judges to other courts

The Chief Justice may assign judges of the Tax Court to the Superior Court or to any other court as the need appears, and any judge so assigned shall exercise all of the powers of a judge of that court.

Source: 2A:3A-21

COMMENT

The source statute provided for assignment of judges of the Tax Court to the Superior Court, as well as for assignment of judges from the Superior Court to the Tax Court. The latter provision is now contained in 2B:2-2 and need not be repeated in this provision.

2B:13-14 Clerk

The Supreme Court shall appoint to serve at its pleasure a Clerk and a Deputy Clerk of the Tax Court, neither of whom shall be subject to the provisions of Title 11A, Civil Service, of the New Jersey Statutes.

Source: 2A:3A-23

COMMENT

This section is a substantial reenactment of the source section.

2B:13-15 Small Claims Division jurisdiction

The Tax Court shall have a Small Claims Division with jurisdiction in those classes of cases as may be provided by the Rules of the Supreme Court.

Source: 2A:3A-5

COMMENT

This section, like the source statute, provides for a Small Claims Division of the Tax Court. This section leaves the specification of the jurisdiction of the Small Claims Division to court rule.

2B:13-16 Conduct of hearing

The hearing in the Small Claims Division shall be informal, and the judge may receive evidence as the judge deems appropriate for a determination of the case, except that all testimony shall be given under oath. A party may appear on his own behalf or by an attorney or by any other person as may be provided by the Rules of the Supreme Court.

Source: 2A:3A-7

COMMENT

This section is virtually identical to the source section, except for some minor changes to eliminate superfluous language.

2B:13-17 Scope of judgment

The judgment in the Small Claims Division may include orders to correct an assessment roll or a tax roll, or both, modify or cancel an assessment, pay or allow a refund, to take such other action as may be necessary to effectuate the judgment.

Source: 2A:3A-8

COMMENT

This section is identical to the source section.

Title 22A [new section] Fees in the Tax Court

a. The filing fee for the commencement of a proceeding in the Tax Court, other than a proceeding in the small claims division, is \$75.00. The fee for filing a counterclaim, other than one filed by a taxing district, is \$75.00.

b. Additional fees, the reduction or waiver of fees for particular classes of cases, and the fees for the small claims division, shall be established by the Rules of the Supreme Court.

c. No proceeding shall be heard by the Tax Court unless the fees are paid.

d. All fees shall be payable to the clerk of the Tax Court for the use of the State, and shall not be refundable except as specifically provided by the Rules of the Supreme Court.

Source: 2A:3A-4.2, 2A:3A-28

COMMENT

This section combines the provisions of the source sections and eliminates superfluous language.

Table of Dispositions

2A:3A-1	2B:13-1
2A:3A-2	2B:13-5, 2B:13-6
2A:3A-3	2B:13-1, 2B:13-2, 2B:13-3
2A:3A-4	2B:13-2, 2B:13-3, 2B:13-3
2A:3A-4.1	2B:13-2, 2B:13-4
2A:3A-4.2	Title 22A - New Section
2A:3A-5	2B:13-15
2A:3A-6	Unnecessary
2A:3A-7	2B:13-16
2A:3A-8	2B:13-17
2A:3A-9	Unnecessary. See N.J. Const. Art. VI., sec. I, par. 1: Legislative courts and their jurisdiction "may from time to time be established, altered or abolished by law."
2A:3A-10	2B:13-4
2A:3A-11	Unnecessary. See N.J. Const. Art. VI., sec. VI., par. 1. The Governor to nominate and appoint, with the consent of the Senate, "the judges of the inferior courts with jurisdiction extending to more than one municipality."
2A:3A-12	Unnecessary; see note below.*
2A:3A-13	2B:13-6
2A:3A-14	2B:13-11
2A:3A-15	2B:13-8
2A:3A-16	2B:13-10
2A:3A-17	2B:13-10
2A:3A-18	2B:13-9
2A:3A-19	2B:13-8
2A:3A-20	2B:13-9; see also 2B:2-3, presently pending before the Legislature as S1347 and A3166
2A:3A-21	2B:13-13; see also 2B:2-2, presently pending before the Legislature as S1347 and A3166

* The source section provided for appointment of Tax Court judges in equal numbers from the two largest political parties. The Commission believes that while this provision may have been appropriate to deal with the appointment of a group of judges all at one time, as was the case when the Tax Court was established, it is no longer necessary. Elimination of this provision would make the appointment of Tax Court judges subject to the same legislative process as the appointments of Superior Court judges.

2A:3A-22	2B:3A-2
2A:3A-23	2B:13-14
2A:3A-24	2B:13-16
2A:3A-25	Transition provision, no longer necessary.
2A:3A-26	Transition provision, no longer necessary
2A:3A-27	Transition provision, no longer necessary
2A:3A-28	Title 22A - new section
2A:3A-29	Unnecessary

STATE OF NEW JERSEY
NEW JERSEY LAW REVISION COMMISSION

TENTATIVE REPORT

relating to

Municipal Courts

December 1990

This tentative report is being distributed so that interested persons will be advised of the Commission's tentative recommendations and can make their views known to the Commission. Any comments received will be considered by the Commission in making its final recommendations to the Legislature. The Commission often substantially revises tentative recommendations as a result of the comments it receives.

It is just as important to advise the Commission that you approve of the tentative recommendations as it is to advise the Commission that you believe revisions should be made in the recommendations.

COMMENTS SHOULD BE RECEIVED BY THE COMMISSION
NOT LATER THAN JANUARY 10, 1990, to be considered at the
Commission's January meeting.

Please send comments concerning this tentative report or direct any related inquiries, to:

John M. Cannel, Esq., Executive Director
NEW JERSEY LAW REVISION COMMISSION
15 Washington Street, Room 1302
Newark, New Jersey 07102
201-648-4575

2B:12-1. Establishment of municipal courts

- a. Any municipality may establish a municipal court.
- b. Two or more municipalities may enter into an agreement establishing a single joint municipal court and providing for its administration. A copy of the agreement shall be filed with the Administrative Director of the Courts. As used in this chapter, the phrase "municipal court" includes a joint municipal court.
- c. Two or more municipalities may provide jointly for courtrooms, chambers, equipment, supplies and employees for their municipal courts and agree to appoint the same persons as judges and clerks without establishing a joint municipal court. Where municipal courts share facilities in this manner, the identities of the individual courts shall continue to be expressed in the captions of orders and process.

Source: 2A:8-1, 2A:8-3.

COMMENT

Subsection (a) makes no substantive change from the part of 2A:8-1 allowing municipal courts established by single municipalities. Subsection (b) continues the substance of 2A:8-3 relating to joint courts. The last sentence of the subsection has the effect of providing that a joint municipal court functions in the same way as an individual municipal court. This definition obviates the repetition in present law of phrases making particular powers applicable to joint as well as individual courts.

Subsection (c) is new. At present, some municipalities refrain from establishing joint courts because doing so gives the judicial appointment to the governor. N.J. Const., Art. 6, §6, ¶1. This subsection gives municipalities the explicit option of sharing facilities, an option which carries many of the advantages of a joint court but which retains local control over judicial appointment. See, Supreme Court Task Force on the Improvement of Municipal Courts (1985).

2B:12-2. Name of court

The name of a municipal court of a single municipality shall be the "Municipal Court of (insert name of municipality)." The name of a joint municipal court shall be established by the intermunicipal agreement.

Source: 2A:8-1.

COMMENT

This section makes no substantive change from the part of the source section which relates to naming of municipal courts established by single municipalities. The section removes the restrictions on the names of joint municipal courts.

2B:12-4. Judge of municipal court; term of office; appointment

a. Each judge of a municipal court shall serve for a term of 3 years from the date of appointment and until a successor is appointed and qualified. Any appointment to fill a vacancy caused by other than expiration of term shall be made for the unexpired term only; except that if a municipality establishes a legal requirement that the judge of the municipal court devote full time to judicial duties, the first appointment after the establishment of that requirement shall be for a full term of 3 years.

b. In municipalities governed by a mayor-council form of government, the municipal court judge shall be appointed by the mayor with the advice and consent of council. In municipalities governed under the borough law (Chapters 86 to 94 of Title 40 of the Revised Statutes), if the mayor fails to nominate a judge within 30 days after the office becomes vacant, or the council fails to confirm any nomination made by the mayor within 30 days after it is made, then the council shall appoint the judge. Each judge of a municipal court of two or more municipalities shall be nominated and appointed by the Governor with the advice and consent of the Senate. In all other municipalities, the municipal judge shall be appointed by the governing body of the municipality.

Source: 2A:8-5.

COMMENT

The proposed section is a substantial re-enactment of the source provision. The provision in subsection (b) that judges of joint municipal courts be appointed by the Governor is required by the Constitution. N.J. Const., Art. 6, §6, ¶1. The Commission takes no position as to whether the current three-year term is the appropriate one for municipal court judges.

2B:12-5. Additional municipal judges

a. With the written consent of the Assignment Judge of the Superior Court, a municipality may:

- (1) increase the number of judgeships of the municipal court, or
- (2) appoint one or more temporary municipal judges.

b. A temporary judge is an additional judge of the municipal court appointed to meet a special need of limited duration. The procedure for appointment of temporary municipal judges shall be the same as that for other municipal judges, but they shall serve for a term not to exceed one year.

Source: 2A:8-5a, 2A:8-5b, 2A:8-5.2.

COMMENT

This section continues the substance of the source sections with little change. The designations of the various categories of judges have been clarified. What is called an "additional judge" in 2A:8-5a is not a separate class of judge and so is dealt with in this section as an increase in the number of judgeships. What are called "acting judges" in 2A:8-5.2 are called "temporary judges" here. The latter designation better comports with the fact that they have the full power of judges of the municipal court and serve for a term. The phrase "acting

judge" is used in 2B:12-5 for a person who is available to act for a municipal judge temporarily unable to hold court. This class of judge is not given a title in current law. See 2A:8-10.

This section changes the term for a temporary judge. The source statute provided for a one year term in every case. Subsection (b) allows a municipality flexibility to set a term up to one year, fitting the length of the term to the situation requiring the appointment of the temporary judge. This section also makes a slight change in the role of an assignment judge. At present, an assignment judge must request the appointment of temporary judges but need only approve an increase in the number of ordinary judges. There is no reason for this distinction. This section requires assignment judge approval for either change.

2B:12-6. Designation of acting judges

A judge of a municipal court may designate in writing another municipal court judge or an attorney-at-law to act as judge temporarily when the judge is unable to hold the municipal court. A copy of the designation shall be sent to the Assignment Judge of the Superior Court. If a municipal court judge fails to designate a person as acting judge, the Assignment Judge may do so.

Source: 2A:8-10.

COMMENT

This section makes several changes from the source section. First, the section requires that copies of designations of acting judges be sent to an assignment judge. While this notification is now the practice, no statute requires it. In addition, an assignment judge is given the power to appoint an acting judge if the municipal court judge fails to do so. At present, without clear authority, assignment judges exercise much of this power by orders assigning municipal court judges temporarily to other municipal courts. Nomenclature is also changed from that of the source statute. See comment to 2B:12-4.

2B:12-7. Qualifications of judges; compensation

a. Every judge, temporary judge, or acting judge of a municipal court shall be an attorney at law of this State.

b. Judges of municipal courts shall be paid salaries set by the municipalities establishing the court.

Source: 2A:8-7; 2A:8-9.

COMMENT

Subsection (a) both simplifies and extends its source section. The provision allowing certain non-lawyers to continue as municipal court judges is dropped as the last of its beneficiaries has retired. The requirements are extended to temporary and acting judges. At present, it is not clear what qualifications are necessary for these positions.

Subsection (b) continues the substance of its source, 2A:8-9.

2B:12-8. Chief judge

Where there is more than one judge of a municipal court, the municipality may designate one of the judges as the chief judge of the court. The chief judge shall designate the time and place of court and assign cases among the judges.

Source: 2A:8-19.

COMMENT

This section continues the substance of its source insofar as that provision concerns the designation and powers of the chief judge of a municipal court. The other parts of 2A:8-19 appear self-evident or procedural. The designation "presiding judge" in the source section has been changed to "chief judge" to avoid confusion with the position of presiding judge of the municipal courts of a vicinage, renamed administrative judge in 2B:12-9.

2B:12-9. Administrative judge -- Municipal Court

The Chief Justice may appoint a Superior Court Judge or a judge of one of the municipal courts in a vicinage to serve as administrative judge -- municipal court for that vicinage.

The administrative judge may exercise those powers given by this chapter delegated by the assignment Judge and any administrative powers delegated by the Chief Justice or established by rule of the Supreme Court.

If the administrative judge is a municipal court judge, the administrative judge shall be paid by the State for the time devoted to duties as administrative judge. Total compensation for all judicial duties shall not exceed the salary of a Superior Court Judge.

Source: New

COMMENT

While this section is new, it embodies a recommendation of the Supreme Court Task Force on the Improvement of Municipal Courts. (1985; position 1.1) See also Rokos v. Dept. of Treasury, 236 N.J. Super. 174 (App. Div. 1989) As part of pilot projects, two vicinages now have presiding judges. This section adopts the designation "administrative judge" rather than "presiding judge" as more descriptive of the office and to avoid confusion with the position of chief judge of a municipal court. See comment to 2B:12-8

2B:12-10. Municipal court clerk and personnel

a. A municipality shall provide for a clerk and other necessary employees for the municipal court and for their compensation. With approval of the Supreme Court, an officer or employee of the municipality may be designated to serve as clerk of the municipal court. The judge of a municipal court may designate in writing an acting clerk or deputy clerk to serve temporarily for an absent clerk or deputy clerk until the clerk or deputy clerk returns or a new clerk or deputy clerk is appointed.

b. A person employed as the clerk of a municipal court who has held that office continuously for ten years or more may be granted tenure by the

municipality. If tenure is granted, the clerk shall hold office during good behavior and shall not be removed except for good cause established at a fair, public hearing on written charges.

Source: 2A:8-13; 2A:8-13.1; 2A:8-13.2; 2A:8-13.3.

COMMENT

Subsection (a) continues the substance of its sources, 2A:8-13 and 2A:8-13.2. The power of approval of dual office holding is given to the Supreme Court. See, R. 1-17-1.

Subsection (b) extends the policy of its sources, 2A:8-13.1 and 2A:8-13.3. Each of those sections allows a class of municipalities to grant tenure to clerks who have served for ten years. This section gives that power to all municipalities.

2B:12-11. Bond

A municipality may require that a judge or clerk of a municipal court, before assuming the duties of office, enter into bond conditioned upon the faithful performance of duties, in an amount and with a terms set by the municipality.

Source: 2A:8-14.

COMMENT

This section allows a municipality to make a bond a prerequisite for judges and clerks, but unlike its source, does not require it.

2B:12-12. Powers of clerk

All process, orders, warrants, and judgments issued by a municipal court may either be signed by the judge or be attested in the judge's name and signed by the clerk. The municipal court clerk shall have the authority granted by law and Rules of Court to clerks of courts of record.

Source: 2A:8-15.

COMMENT

This section is substantially identical to its source.

2B:12-13. Officers empowered to execute process

Any law enforcement officer or any other person authorized by law may act in the service, execution, and return of process, orders, warrants, and judgments issued by any municipal court.

Source: 2A:8-16.

COMMENT

This section is substantially identical to its source.

2B:12-14. Courtrooms and equipment

Suitable courtrooms, chambers, equipment and supplies for the municipal court shall be provided by the municipality. Courtrooms for a municipal court need not be in that municipality.

Source: 2A:8-18; 2A:8-18.1.

COMMENT

This section is similar in substance to its source sections. In form, it is patterned on the Commission's recommended 2B:6-1(a). The requirement of 2A:8-18.1 that the court meet in the municipality or in an "adjacent" municipality is abandoned as unnecessary. It can be expected that municipalities will choose locations for courtrooms that are convenient to litigants.

2B:12-15. Territorial jurisdiction

A municipal court of a single municipality shall have jurisdiction over cases arising within the territory of that municipality. A joint municipal court shall have jurisdiction over cases arising within the territory of any of the municipalities which the court serves. The territory of a municipality includes any premises or property located partly in and partly outside the municipality.

Source: 2A:8-20.

COMMENT

This section is substantively identical to its source. Sections 2B:12-16 and 17 establish the kinds of offenses which the municipal courts may hear. This section establishes which of those offenses are within the territorial jurisdiction of a particular municipal court.

2B:12-16. Jurisdiction of specified offenses

A municipal court has jurisdiction of the following offenses occurring within the territorial jurisdiction of the court:

- a. Violations of municipal ordinances;
- b. Violations of the motor vehicle and traffic laws;
- c. Disorderly persons offenses, petty disorderly persons offenses and other non-indictable offenses;
- d. Violations of the fish and game laws;
- e. Proceedings to collect a penalty where jurisdiction is granted by statute; and
- f. Any other proceedings where jurisdiction is granted by statute.

Source: 2A:8-21.

COMMENT

This section makes no substantive change from its source. While certain subsections of 2A:8-21 were deleted, any offenses covered by those subsections are sufficiently covered by

subsection (d) of this section. A new subsection (f) is added to refer to the many proceedings conducted under the Penalty Enforcement Law for which the jurisdiction is assigned to the municipal courts by the statutes establishing the penalties.

In general, the municipal courts are given jurisdiction of all penal and quasi-criminal offenses not involving so serious a penalty that indictment and trial by jury are required. However, if because of changes in either statutory or constitutional law certain of the categories in this section come to include cases requiring jury trial, those matters, too, would be within municipal court jurisdiction. The grant of jurisdiction to municipal courts does not require that certain matters be heard only in those courts or deny jurisdiction over the same matters to the Superior Court. As a result, there may be instances where the Rules of Court provide that certain matters be heard only in the Superior Court.

2B:12-17. Jurisdiction of specified offenses where indictment and trial by jury are waived

A municipal court has jurisdiction of the following crimes occurring within the territorial jurisdiction of the court, where the person charged waives indictment and trial by jury in writing and the county prosecutor consents in writing:

- a. Crimes of the fourth degree defined in chapters 17, 18, 20 and 21 of the New Jersey Criminal Code; or
- b. Crimes where the imprisonment that may be imposed does not exceed 1 year.

Source: 2A:8-22.

COMMENT

This section continues the principle that the municipal courts have jurisdiction over certain less serious indictable offenses. The major part of the work of municipal courts concerns non-indictable offenses; that jurisdiction is provided by 2B:12-16. Indictable offenses constitute less than 3/10 of one percent of the total municipal court caseload.

Like its source, the section limits the jurisdiction over Criminal Code crimes to those in particular chapters on crimes against property. However, the section places a further limit based on the degree of the crime in lieu of the limit in 2A:8-22 based on the value of the property stolen or damaged. The standard based on value is difficult to apply in regard to certain crimes and has the capacity to produce anomalous results. Subsection (b) is unchanged in substance from its source; it provides jurisdiction over a few crimes (or misdemeanors) defined outside the Criminal Code which allow jail terms of more than six months but not more than one year. Offenses with penalties of six months or less are included in 2B:12-16(d) and do not require waivers by the parties. See, 2C:1-4(c). The limitation found in the source section on judges who are not attorneys was deleted as no longer required. See comment to 2B:12-6.

2B:12-18. Authority of municipal court judge to commit; notice to county prosecutor

- a. A municipal court has authority to conduct proceedings in a criminal case prior to indictment subject to the Rules of Court.

b. A municipal court shall not discharge a person charged with an indictable offense without first giving the county prosecutor notice and an opportunity to be heard in the case.

Source: 2A:8-23.

COMMENT

The source for this section gives a municipal court judge "the authority of a committing judge or magistrate." That authority, the authority of a justice of the peace in criminal matters, is the power to conduct certain of the early stages of criminal cases. The exact extent of this authority is not clear; State v. Kruise, 32 N.J.L. 313 (Sup. Ct., 1867) holds that the power to issue an arrest warrant is included but the power to set bail is not. However, modern practice has been consistent. A complaint may be filed in a municipal court, and that court may issue search and arrest warrants and summonses. R. 3:4-1(b) and (c) and R. 3:5-1. The first appearance of a criminal defendant in court normally takes place in municipal court, R. 3:4-2, and in most cases, bail is set there. See R. 3:26-2. Probable cause hearings may also be held in municipal court. R. 3:4-3.

This section adopts a different approach from that of its source. It allows a municipal court jurisdiction for any proceeding occurring before indictment. Thus although the section provides a clearer guide as to municipal court authority, it also grants some flexibility for the municipal court to conduct any kind of pre-indictment proceeding, either existing or newly-created, which may be assigned to the municipal courts by court rule.

Subsection (b) is essentially unchanged from its source.

2B:12-19. Municipal housing court; jurisdiction

A municipality in a county of the first class may establish, as a part of its municipal court, a full-time municipal housing court. Municipal housing courts shall have exclusive jurisdiction over actions for eviction involving property in the municipality which are transferred to the municipal housing court by the special civil part of the Superior Court; and shall have concurrent jurisdiction to appoint receivers pursuant to section 6 of P.L. 1966, c. 168 (C. 2A:42-79) and to enforce the provisions of P.L. 1971, c. 224 (C. 2A:42-85 et seq.).

Source: 2A:8-24.1.

COMMENT

This section continues the substance of its source.

2B:12-20. Officials authorized to act for court

a. A clerk or deputy clerk of a municipal court, authorized by the judge of that court, may exercise the power of the municipal court to administer oaths for complaints filed with the municipal court and to issue warrants and summonses.

b. A police officer may exercise the power of the municipal court to issue summonses.

c. The authority of the municipal court to set conditions of pre-trial release may be exercised in accordance with bail schedules promulgated by the Administrative Office of the Courts or by the municipal court, by a clerk or deputy clerk of a municipal court, authorized by the judge of that court, or by any police officer in charge of a police station other than an officer who participated in the arrest of the defendant.

d. A person charged with a non-indictable offense shall be released on summons or personal recognizance within 8 hours after arrest unless a judge has set the conditions for pretrial release and the conditions remain unmet.

e. Any person acting for a municipal court by authority of this section shall immediately file the complaint, warrant, summons or recognizance which was the subject of the action with that court.

Source: 2A:8-27; 2A:8-28.

COMMENT

The purpose of this section is to continue the practice under 2A:8-27 but to provide a clearer statutory basis for that practice. Subsections (a) and (b) of this section control the exercise of the power of the court to administer oaths and to issue process. While 2A:8-27 gives this power both to clerks and to police officers, only clerks now exercise the power to administer oaths and issue warrants. Subsection (a) limits this power to clerks. Subsection (b) gives police officers the power to issue summonses.

Subsection (c) regulates the authority of officers to set conditions of pre-trial release. That power is now exercised in non-indictable cases both by clerks and police officers; subsection (c) follows the source statute and continues that practice. As now provided by N.J.S. 2A:161A-8, when an officer sets conditions for pre-trial release, the officer is required to follow a bail schedule promulgated by the Administrative Office of the Courts. Subsection (c) makes reference to that bail schedule. The section also adds one limitation. Where a person charged with a non-indictable offense is not released within eight hours as a result of conditions set by an officer, a judge must review the case. This limitation is in accord with the policy that release on recognizance or low bail is normally appropriate for non-indictable offenses. See, N.J.S. 2C:6-1.

Current practice restricts the exercise of authority both to issue process, see, R. 3:3-1(a) and State v. Ross, 189 N.J. Super. 67 (App. Div. 1983) and to release on bail, recognizance, or summons. R. 3:4-1 (b), (c), and (d); R. 3:3-26-2; R. 7:5-3. This section reflects these restrictions.

The last paragraph of the source statute, which allowed Port Authority Police to administer oaths for uniform traffic tickets, was deleted. Oaths are no longer required for these tickets.

2B:12-21. Periodic service of imprisonment

A court may order that the sentence of imprisonment be served periodically on particular days, instead of consecutively. The person imprisoned shall be given credit for each day or fraction of a day to the nearest hour actually served.

Source: 2A:8-30.1.

COMMENT

This section continues the substance of its source. The limitation to sentences of 30 days or less was removed to make the section consistent with N.J.S. 2C:43-2(b)(7) which allows night or weekend service of sentences imposed under the Criminal Code without restriction. The only role for the section would be to provide a similar power to order service of the sentence on nights or weekends for sentences for minor violations which are not governed by the Criminal Code. It is not clear whether, even in the absence of this section, a court would find that weekend service was permissible for a disorderly persons offense but not for a traffic offense. The section is retained in the Municipal Court Chapter because almost all jail sentences for violations are imposed in municipal courts. The section is not so limited and would allow a superior court judge the same power to impose a weekend sentence.

2B:12-22. Default in payment of fine; community service

a. Any person sentenced by a municipal court to pay a fine who defaults in payment may be ordered to perform community service in lieu of incarceration or other modification of the sentence with the person's consent.

b. The municipal official in charge of the community service program shall report to the municipal court any failure of a person subject to a court work order to report for work or to perform the assigned work. Upon receipt of such a report the court may revoke its community service order and impose any sentence consistent with the original sentence.

Source: 2A:8-31.1, 2A:8-31.2.

COMMENT

This section continues the substance of its sources, 2A:8-31.1 for subsection (a) and 2A:8-31.2 for subsection (b). Although, the Criminal Code provides specifically for the use of jail in lieu of a fine when the person fined is unable to pay, N.J.S. 2C:46-2, there is nothing inappropriate in the use of another kind of punitive sentence such as community service. Cf, State v. De Bonis 58 N.J. 182, 198-200 (1971). Community service may be made part of any sentence. N.J.S. 2C:43-2 (b)(5). The requirement of the defendant's consent to imposition of a community service order and the penalty for violation of the order are consistent with the Criminal Code's approach to probation. See N.J.S. 2C:45-1(d) and 2C:45-3(b). The reference to indigency in the source section was deleted to allow the use of community service in lieu of jail whenever a fine was not paid. While this section is consistent with the Criminal Code, it is necessary because the Code's application to sentencing of minor penal violations is unclear. See, N.J.S. 2C:1-5.

The section eliminates the reference to restitution. The Criminal Code distinguishes the enforcement of restitution from that of fines. Other punitive sanctions may not be substituted; the restitution is to be collected by enforcement of the judgment. N.J.S. 2C:46-2. The deletion makes this section consistent with the approach taken by the Code and avoids ambiguity in cases involving Criminal Code sentencing.

2B:12-23. Costs charged to complainant in certain cases

In cases where the judge of a municipal court dismisses the complaint or acquits the defendant, and is of the opinion that the charge was false and not made in good faith, the judge may order that the complaining witness pay the costs of court established by law.

Source: 2A:8-32.

COMMENT

This section continues the substance of its source.

2B:12-24. Records and standards for municipal courts

The Supreme Court may prescribe records to be maintained and reports to be filed by the municipal court and may promulgate standards for facilities and staff of municipal courts.

Source: New

COMMENT

While this section is new, it codifies existing practice. The Administrative Office of the Courts enforces standards to assure that each municipal court is able to conduct judicial business appropriately.

2B:12-25. Docketing Judgment

Any judgment of a municipal court assessing a penalty may be docketed in the Superior Court by the party recovering the judgment.

A judgment docketed in the Superior Court shall, from the time of the docketing, operate as though it were a judgment obtained in an action originally commenced in the Superior Court.

After a judgment has been docketed in the Superior Court, no execution shall issue out of the municipal court and no other proceeding on the case shall occur in the municipal court except the granting of a new trial, or the taking of an appeal.

If a new trial is granted or an appeal taken after a judgment is docketed, no execution shall issue from the Superior Court on the judgment pending the final determination of these proceedings.

Source: 2A:8-42; 2A:8-43; 2A:8-48; 2A:8-51; 2A:8-52; 2A:8-53.

COMMENT

This section continues the essential elements of the substance of the source sections. While few civil cases are heard in the municipal courts, the procedure established by this section serves an important function in the enforcement of fines, penalties and restitution. See, N.J.S. 2C:46-2.

2B:12-26. Prosecutor.

A municipality may employ an attorney-at-law as municipal prosecutor to represent the state or municipality in cases in the municipal court. In representation of the state, the prosecutor shall act under the supervision of the county prosecutor.

Source: New.

COMMENT

While no statute now provides for the appointment of municipal prosecutors, only about 3% of the municipalities have not appointed them. This section would make the authority explicit. The section also provides for the authority of the county prosecutor over any municipal prosecutor who is representing the state. This principle is derived from the role of the county prosecutor as the chief law enforcement officer of the county. And c.f. N.J.S. 2A:8-23. The provision is included to assure that the section is not read to allow the municipal prosecutor to do what he wants whether or not his action creates double jeopardy problems for the county prosecutor.

2B:12-27. Defense of indigents

Each municipal court shall provide for the representation of persons entitled by law to appointment of counsel:

- a. by attorneys employed part or full-time by the municipality for that purpose;
- b. by attorneys engaged for particular cases as authorized by the municipality and paid on an hourly or per case basis; or
- c. by attorneys assigned in the manner established by the Supreme Court.

Source: New

COMMENT

While the state Public Defender's Office is authorized to represent persons charged with non-indictable offenses in municipal court, it has never been given sufficient appropriation to allow it to do so. State in re Contempt of Spann, 183 N.J. Super. 62 (App.Div. 1982); N.J.S. 2A:158A-5.2. As a result, municipal courts have been required to provide for representation of indigents charged with offenses which may result in imprisonment or other consequence of magnitude. Rodriguez v. Rosenblatt, 58 N.J. 281 (1971). Some municipalities provide representation through local public defender's offices or other systems of paid counsel. Subsections (a) and (b) allow this course. Many municipalities rely on appointment of counsel without compensation; that is appropriate unless appointments impose an unreasonable burden on attorneys. State in interest of Antini, 53 N.J. 488 (1969); State v. Monaghan, 184 N.J. Super. 340 (App. Div. 1982). Subsection (c) provides for appointed counsel.

Section	Disposition	Comment
2A:8-1	2B:12-1; 2B:12-2	
2A:8-2	deleted	executed
2A:8-3	2B:12-1	
2A:8-4	2B:1-1	
2A:8-5	2B:12-4	
2A:8-5a	2B:12-5	
2A:8-5b	2B:12-5	
2A:8-5c	deleted	unnecessary
2A:8-5.1	deleted	executed
2A:8-5.2	2B:12-5	
2A:8-7	2B:12-7(a)	
2A:8-8	deleted	see note
2A:8-9	2B:12-7(b)	
2A:8-10	2B:12-6	
2A:8-11	deleted	anachronistic
2A:8-12	deleted	see 2B:9-1
2A:8-13	2B:12-10	
2A:8-13.1	2B:12-10	
2A:8-13.2	2B:12-10	
2A:8-13.3	2B:12-10	
2A:8-14	2B:12-11	
2A:8-15	2B:12-12	
2A:8-16	2B:12-13	
2A:8-17	deleted	unnecessary
2A:8-18	2B:12-14	
2A:8-18.1	2B:12-14	
2A:8-19	2B:12-8	
2A:8-20	2B:12-15	
2A:8-21	2B:12-16	
2A:8-22	2B:12-17	
2A:8-23	2B:12-18	
2A:8-24	deleted	see note
2A:8-24.1	2B:12-19	
2A:8-25	deleted	anachronistic
2A:8-26	deleted	see note to 2A:8-24
2A:8-27	2B:12-20	
2A:8-28	2B:12-20	
2A:8-29	deleted	unnecessary
2A:8-30	deleted	unnecessary
2A:8-30.1	2B:12-21	
2A:8-31	deleted	unnecessary
2A:8-31.1	2B:12-22	
2A:8-31.2	2B:12-22	
2A:8-32	2B:12-23	
2A:8-34	deleted	unnecessary
2A:8-35	deleted	unnecessary
2A:8-36	deleted	unnecessary
2A:8-37	deleted	unnecessary
2A:8-38	deleted	unnecessary
2A:8-39	deleted	unnecessary
2A:8-40	deleted	unnecessary

2A:8-41	deleted	see 2B:9-1
2A:8-42	2B:12-25	
2A:8-43	2B:12-25	
2A:8-44	deleted	unnecessary
2A:8-45	deleted	unnecessary
2A:8-46	deleted	unnecessary
2A:8-47	deleted	unnecessary
2A:8-48	2B:12-25	
2A:8-49	deleted	unnecessary
2A:8-50	deleted	unnecessary
2A:8-51	2B:12-25	
2A:8-52	2B:12-25	
2A:8-53	2B:12-25	
2A:8-54	deleted	unnecessary
2A:8-55	deleted	unnecessary

Note to 2A:8-8

This section is unnecessary given the more comprehensive regulation of practice of law by municipal court judges in Court Rule 1:15-1

Note to 2A:8-17

This section gave general civil jurisdiction to municipal courts for cases involving less than \$100. This jurisdiction is not now used.

**REPORT AND RECOMMENDATIONS
CONCERNING SURROGATES**

**NEW JERSEY LAW REVISION COMMISSION
15 Washington Street
Newark, New Jersey 07102
(201)648-4575
January 28, 1991**

SURROGATES

ARTICLE I. IN GENERAL

2B:14-1. Number of surrogates; term; authority; commission

A surrogate shall be elected to serve in each county for a 5-year term commencing January 1 after election.

Source: 2A:5-1, 2A:5.2-1

COMMENT

This section streamlines and combines the provisions of source sections 2A:5-1, 2A:5-2.1, and Art. 7, §2, para. 2 of the New Jersey Constitution.

2B:14-2. Bond of surrogates

A county may require the surrogate to enter into a faithful performance bond and may set the amount and terms of the bond.

Source: 2A:5-2

COMMENT

This section allows each county to determine whether and by which means its surrogate is bonded. The source statute, 2A:5-2, results in duplicate bonding in counties which already have county-wide faithful performance bond coverage. The proposed section eliminates that duplication.

2B:14-3. Salaries of surrogates

Each county shall fix a surrogate's salary which shall not be diminished during the term of office.

Source: 2A:5-3.9

COMMENT

This section retains for the county the power to set its surrogate's salary, but eliminates the four minimum salaries pegged to county populations. The highest minimum listed in the source statute, 2A:5-3.9, is \$24,000. A statewide survey of 1989 salaries shows that every surrogate earns more than \$40,000.

2B:14-4. Nonperformance; referral to Assignment Judge

a. The surrogate and all employees of the surrogate's office shall not perform duties respecting a document or matter if a surrogate:

(1) is a fiduciary under a document, or

(2) has an interest in a matter which gives an appearance of impropriety.

b. When the surrogate and employees are barred from performing their duties, the matter shall be referred to the Assignment Judge of the county for appropriate disposition.

Source: 2A:5-4

COMMENT

This section broadens and makes more specific the contexts presenting possible conflicts of interest for surrogates. The source section, 2A:5-4, pertains to "a fiduciary under a will or otherwise..." The proposed section also provides that the Assignment Judge rather than the defunct county court act when a surrogate is disqualified. The Assignment Judge has the option of sending the matter to another county.

2B:14-5. Filling vacancy in surrogate's office

If a surrogate does not take office within 30 days after the end of the preceding term or a vacancy occurs in the office of surrogate, the governor, with advice and consent of the senate shall fill the vacancy with a person from the political party of the person last elected to the office. The appointed person shall serve until election and qualification of a successor. Election of a successor for a 5-year term shall occur at the next general election unless the vacancy occurs within 37 days before the election, in which case it shall occur at the second succeeding general election.

Source: 2A:5-6, 2A:5-7

COMMENT

This section condenses and combines sections 2A:5-6 and 2A:5-7.

ARTICLE II. DUTIES AND RECORDS OF SURROGATE

2B:14-6. Recorded Documents

The surrogate shall record:

- a. orders and judgments of the Superior Court, Chancery Division, Probate Part;
- b. fiduciary bonds required by law or court order;
- c. accounts of fiduciaries, disclaimers, revocations, requests and renunciations;
- d. wills proved before the surrogate or the Superior Court, together with proofs;
- e. letters testamentary, of administration, of guardianship or of trusteeship issued by the surrogate and relevant documents and inventories;
- f. receipts and releases given to fiduciaries; and
- g. other documents which the surrogate is required by law to record.

Source: 2A:5-20

COMMENT

This section retains subsections (a) through (e) of source section 2A:5-20 and combines source subsections (f) and (g) into one subsection, (f). Five sections of Title 3B, Administration of Estates, refer to documents recorded by the surrogate, but none of the sections pertain to the categories in this section.

2B:14-7. Acknowledgment, proof

Receipts and releases shall be acknowledged or proved prior to recording. The acknowledgment or proof shall be recorded with the receipt or discharge by the surrogate of the county:

- a. issuing the relevant letters;
- b. where the seller of real estate resides; or
- c. where the trust-related property is located.

Source: 2A:5-21

COMMENT

This section substantially reenacts the first paragraph of the source statute 2A:5-21 but substitutes "Receipts and releases" for receipts or discharges. The proposed section eliminates the second paragraph of the source statute because surrogates now stamp rather than sign documents.

2B:14-8. Recording

The surrogate shall determine the means of recording instruments and the county shall furnish equipment and supplies for recording.

Source: 2A:5-22

COMMENT

This section condenses the major provisions of 2A:5-22.

2B:14-9. Documents; transmittal to, and filing with, clerk

On the first Monday in February, May, August and November annually, the surrogate shall file with the Clerk of the Superior Court indexes of all inventories and wills proved before the surrogate or the Superior Court and a report of all letters of administration granted in the previous three months.

Source: 2A:5-18

COMMENT

This provision replaces the source statute 2A:5-18 which requires every surrogate to file all wills and inventories with the Clerk of the Superior Court. Currently, all surrogates microfilm wills proved in their counties then send the original wills to Trenton where the Clerk of the Superior Court numbers and remicrofilms them and retains the original documents. The Clerk of the Superior Court has microfilms of wills dated from 1901, and original wills

from 1980 which are still waiting to be filmed. The proposed statute frees the counties from their burden of shipping documents in large quantities, and obviates duplicate microfilming and its attendant expense in Trenton.

The Superior Court Clerk's office receives one or two queries weekly from persons seeking the name of the county where a will was probated. Presently, that office creates a central index based upon the original wills submitted by the twenty-one surrogates. Using the counties' indexes will enable the Clerk to answer queries with less effort than it now expends in setting up the central index. The Superior Court Clerk's office should encourage all the counties to use a uniform indexing system.

ARTICLE III. EMPLOYEES

2B:14-10. Deputy surrogate; appointment; term; tenure; duties; compensation; bond; special deputy surrogate

a. A surrogate may appoint a deputy surrogate who shall serve at the pleasure of the surrogate.

b. During the surrogate's absence or disability, the deputy surrogate shall exercise all powers and duties of the surrogate's office. The deputy surrogate shall not receive additional compensation as acting surrogate unless provided by law.

c. A county may require that the deputy surrogate enter into a faithful performance bond and may set the amount and terms of the bond.

d. A surrogate may appoint an employee to be special deputy surrogate. The special deputy surrogate shall serve at the pleasure of the surrogate and, during absence or disability of the surrogate and deputy surrogate, the special deputy surrogate shall exercise all the powers and duties of the surrogate.

Source: 2A:5-5, 2A:5-9, 2A:5-11, 2A:5-12, 2A:5-13

COMMENT

This section brings together the provisions of the three source sections pertaining to deputy surrogate (2A:5-5, 2A:5-9, 2A:5-11) and the two source sections regarding special deputy surrogate (2A:5-12, 2A:5-13). Subsection (c) of this section parallels the proposed section 2B:14-2 regarding bond of surrogates. The proposed section deletes tenure which the source section 2A:5-9 specifies for deputy surrogates of first class counties who have served continuously for 10 years or more. The Commission considers that a better policy is to eliminate tenure and enable newly elected surrogates to choose their own deputies and consequently carry out the voters' mandates.

2B:14-11. Special probate clerk

A surrogate may designate one or more employees to serve as special probate clerk. A special probate clerk may exercise the same powers as the surrogate in taking depositions of witnesses to wills, qualifications of executors and administrators, acceptance of trusteeships and guardianships, and oaths and affirmances.

Source: 2A:5-14

COMMENT

This section contains the substance of its source section 2A:5-14.

2B:14-12. Other employees; compensation

A surrogate shall select other employees for the surrogate's office. Compensation of employees in the surrogate's office shall be set by the surrogate and approved by the county board of chosen freeholders.

Source: 2A:5-16

COMMENT

This section derives from source sections 2A:5-16. It deletes the restrictions on compensation for certain employees. The Commissioners consider it appropriate that the surrogates' and county governments' discretion not be restricted.

<u>Source Section</u>	<u>Proposed Section</u>	<u>Comment</u>
2A:5-1	2B:14-1	
2A:5-2	2B:14-2	
2A:5-2.1	2B:14-1	
2A:5-3.9	2B:14-3	
2A:5-4	2B:14-4	
2A:5-5	2B:14-10	
2A:5-6	2B:14-5	
2A:5-7	2B:14-5	
2A:5-8	Deleted	Unnecessary
2A:5-9	2B:14-10	
2A:5-10	Deleted	Unnecessary
2A:5-11	2B:14-10	
2A:5-12	2B:14-10	
2A:5-13	2B:14-10	
2A:5-14	2B:14-11	
2A:5-15	Deleted	Unnecessary
2A:5-16	2B:14-12	
2A:5-16.1	Deleted	Unnecessary
2A:5-17	Deleted	Unnecessary
2A:5-18	2B:14-9	
2A:5-19	Deleted	Unnecessary
2A:5-20	2B:14-6	
2A:5-21	2B:14-7	
2A:5-22	2B:14-8	
2A:5-23	Deleted	Unnecessary
2A:5-24	Deleted	Unnecessary
2A:5-25	Deleted	Unnecessary

NOTE TO 2A:5-17

This section is unnecessary because its subject, creditors, is covered by the following Title 3B sections: 3B:10-8, 17-11, 18-3, 22-4, 22-6.

NOTE TO 2A:5-24 AND 5-25

Proposed statute 2B:1-2, Preservation of court records, renders these sections on instrument destruction and rerecording unnecessary.

NOTE TO 2A:5-23

The subject of this section (requiring a surrogate to index and alphabetize office records weekly) is not a proper one for statutory regulation. The Commission considers the duty to file documents promptly to be inherent in the office of the surrogate.