ANNUAL REPORT OF THE
NEW JERSEY LAW REVISION COMMISSION
1991

Report to the Legislature of
the State of New Jersey as
provided by C. 1:12A-9.
May, 1992

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I. COMPOSITION OF THE COMMISSION

Composition of the Commission for 1991 was:

Albert Burstein, Chairman, Attorney-at-Law

Bernard Chazen, Attorney-at-Law

Roger Dennis, Dean, Rutgers Law School - Camden,
Ex officio, Represented by
Hope Cone, Attorney-at-Law

Marlene Lynch Ford, Chairman, Assembly Committee on the Judiciary, Ex officio

Edward O'Connor, Chairman, Senate Committee on the Judiciary, Ex officio

Hugo M. Pfaltz, Jr., Attorney-at-Law

Ronald J. Riccio, Dean, Seton Hall Law School
Ex officio, Represented by
Ahmed Bulbulia, Professor of Law

Howard T. Rosen, Attorney-at-Law

Peter Simmons, Dean, Rutgers Law School - Newark,
Ex officio

John M. Cannel, Executive Director
Maureen E. Garde, Counsel
John J. Burke, Staff Attorney
Judith Ungar, Staff Attorney

In January of 1992, three new members were added to the Commission: William L. Gormley, Gary W. Stuhltrager and John J. Degnan, replacing Edward O'Connor, Marlene Lynch Ford and Howard T. Rosen, respectively.

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.

The Commission began operation in 1986; however, the concept of permanent, institutionalized statutory revision and codification is not new in New Jersey. The first Law Revision Commission was established in 1925. That commission produced the Revised Statutes of 1937. The intent of the Legislature was that the work of revision and codification continue after the Revised Statutes, so the Law Revision Commission continued in operation. After 1939, its functions passed to a number of successor agencies. Most recently, statutory revision and codification were among the duties of

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

III. PROJECTS AND RECOMMENDATIONS

In 1991, the New Jersey Law Revision Commission filed six final reports: Uniform Commercial Code Article 6 (Bulk Transfers), Municipal Courts, Surrogates, Tax Court, Terms of Appointment and Statute of Frauds.

A. U.C.C. Article 6 (Bulk Transfers)

The Commission filed a Report and Recommendations Concerning the Repeal of Article 6 (Bulk Transfers) of the Uniform Commercial Code, N.J.S. 12A:6-101 et seq. (See Appendix A.) In its report, the Commission recommended that the Legislature repeal Article 6 of the Uniform Commercial Code.

The proposal implemented a recommendation of the Permanent Editorial Board of the Uniform Commercial Code and the National Conference of Commissioners on Uniform State Laws. The Commission studied the recommendation and solicited comments from members of the New Jersey Bar. Based on the responses and its study of the issue, the Commission determined that Article 6 had ceased to protect the interests of creditors in the context of modern commercial transactions. Article 6 contains ambiguous terms, is difficult and inefficient to apply, and, in most circumstances, is waived by both parties. Creditors rely on other laws to protect their security interests in merchandise. To the extent that Article 6 is currently employed, it is expensive and provides little benefit. Repeal of Article 6 will save money for parties transacting business affected by its provisions.

B. Municipal Courts

The Commission filed a Report and Recommendations on Municipal Courts, which recommends modernization and clarification of the statutes on municipal courts and codifies current practice with respect to those courts. (See Appendix B.) Existing statutory law has anachronistic provisions and does not fully reflect current practice. Comments on the Commission's proposals were solicited from the Judiciary and from members of the Bar. The substantive changes proposed by the Report include provisions establishing qualifications and tenure for court administrators, requiring appointment of a municipal prosecutor, and specifying methods of appointment of counsel for indigent defendants. The Commission's proposals coincide with the recommendations of the Supreme Court Task Force on the Municipal Courts.

C. Surrogates

The Commission filed a Report and Recommendations Concerning Surrogates. (See Appendix C.) The current chapter on surrogates contains sections dating back to 1882, which have been repeatedly supplemented and amended. They contain anachronistic references and dollar amounts, and require procedures which do not comport with current practice. Extensive comments on the project were received from the surrogates and the Judiciary. The Commission proposal modernizes the statutes on this subject and removes duplicate provisions in Title 3B, Administration of Estates. Beyond savings achieved by making the statutory law more clear, thereby avoiding litigation or ambiguities, the work on this topic will save money for the State. Current statutes require that copies of wills and inventories filed in the offices of the surrogates be sent to the Superior Court in Trenton. These documents thus are indexed and microfilmed twice. The Commission

proposal would eliminate this unnecessary duplication, saving the courts more than $100,000 per year.

D. Tax Court

The Commission filed a Report and Recommendations on the Tax Court. (See Appendix D.) The Tax Court was established in 1978 by a statute which transferred the functions of the court's predecessor, the Division of Tax Appeals, to the new court. The Commission proposal clarifies the jurisdiction and powers of the Tax Court and eliminates unnecessary provisions.

E. Terms of Appointment

The Commission filed a Report and Recommendations on Terms of Appointment. (See Appendix E.) The proposed statute codifies and clarifies the rules governing the commencement and expiration dates of terms of office for members of public bodies. The proposed statute also establishes rules concerning holdover, successor, replacement and ex officio memberships.

F. Statute of Frauds

The Commission filed a Report and Recommendations Relating to Writing Requirements for Real Estate Transactions, Brokerage Agreements and Suretyship Agreements. (See Appendix F.) This title is more accurate than the existing "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, which was enacted in 1794 and drawn almost verbatim from the English statute of 1677.

The original five sections of the Statute of Frauds require most transactions concerning land to be in writing, and enumerate the types of agreements which must be in writing to be enforceable. The remaining four

sections 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 statute essentially creates mandatory requirements for proof of certain transactions. Numerous decisions apply the statute's provisions in ways that are not consistent with their words. The archaic terminology of the statute's sections, coupled with the large number of reported cases, which have created exceptions and specialized interpretations, often make the statute difficult to understand and apply.

In 1990, the Commission prepared a revised statute based on a staff report delineating the history and interpretation of the Statute of Frauds. The Commission proposal modernized the language of existing law, eliminated archaic and unnecessary provisions and codified settled judicial interpretation of the Statute of Frauds. Where court decisions have been inconsistent, the Commission has proposed clear rules to eliminate ambiguity.

In May 1990, 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. Extensive changes were made to the Tentative Report 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 Tentative Reports were appended to the 1990 Annual Report.

In the Final Report, the Commission recommends elimination of the writing requirement in certain transactions, modification of provisions concerning leases, trusts and contracts for the sale of real estate, and substantial retention of the preclusive writing requirement for conveyances of land and surety contracts. The clarification and simplification of the law by the use of modern language should make it easier for lawyers and those to whom these laws apply understand what is required and should result in the reduction of litigation concerning writing requirements.

IV. PROJECTS AWAITING FINAL RECOMMENDATION

A. Material Witness Statutes

The Commission's Tentative Report relating to Material Witnesses was distributed for public comment in 1991. (See Appendix G.) The Report resulted from the Commission's decision in 1990 to review and revise the existing material witness statutes which have been held to involve possible constitutional problems. (See State v. Misik, 238 N.J. Super. 367 (Law Div. 1989); N.J.S. 2A:162-2 to 2A: 162-4.) A material witness is not accused of a crime. However, his or her appearance may be essential in a criminal case.

The Report contains a proposal to regulate judicial orders directing the appearance or detention of a material witness. A material witness, like any other person, has the right to be free from arbitrary seizure; law enforcement officials need adequate procedures to detain witnesses needed to prosecute crime. The proposed draft statute seeks to establish reasonable procedures which balance the rights of the individual and the needs of the State in law enforcement.

B. Juries

The Commission completed a Tentative Report revising the statutes relating to petit jury and grand jury selection and impaneling in 1991 and distributed it for public comment. (See Appendix H.) This project continues the Commission's revision of the New Jersey statutes concerning the court system. The Commission considers this a particularly important project because it affects so many residents of this State. Aside from elections, jury service is the one time when the ordinary citizen is required to serve in government.

Many of the Commission's proposals derive from recommendations made in 1982 by the Supreme Court Task Force on Jury Utilization and Management. The Commission endorses the Task Force's position on the importance of obligating all citizens to participate in the jury system through the elimination of all occupational exemptions from jury service. The Commission also advocates broadening the jury pool by expanding the source lists of potential jurors.

V. PROJECTS UNDER CONSIDERATION

A. Transportation

In 1989, in conjunction with the Department of Transportation, the Commission approved a project to revise the laws 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 statutes on subjects as diverse as the construction and operation of state highways, and the regulation of billboards, railroads, buses, and aviation. A first draft analysis of more than 100 pages of statutes is nearly completed.

Consultations are continuing with the Department of Transportation to discover which provisions are obsolete and which provisions need clarification. An initial Tentative Report on the first part of the project which replaces Title 6, Aviation, will be filed early in 1992. Once this is done, comments from interested parties will be solicited.

B. Uniform Commercial Code Articles 3 and 4

The Commission commenced a study of 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.

C. Liens and Pre-judgment Remedies

The Commission approved a project to review the statutes in Title 2A which concern liens and pre-judgment remedies. This project continues the effort begun in 1989 to revise Title 2A provisions concerning the courts and the administration of civil justice.

Current New Jersey statutes concerning distress (N.J.S. 2A:33-1 through -23) and replevin (N.J.S. 2A:59-1 through -19) raise constitutional problems because they do not require pre-deprivation notice and hearing. Nine of the Title 2A artisan lien statutes have the same defects. The Commission intends to prepare revised statutes which will simplify and clarify the law as well as cure any possible constitutional defects in the source statutes.

D. Codification

The Law Revision Commission is given the duty of promoting "the clarification and simplification of the law of New Jersey." R.S. 1:12A-8.

Shortly after opening its offices in 1987, the Commission began to study the advisability of a general recompilation of the statutes and the alternatives to a general recompilation project.

The Commission has undertaken individual revision projects ranging in size from the amendment of single statutory sections to the revision of an entire title. The Commission recognizes that another approach to clarifying and simplifying the statutory law is a general recompilation of all the statutes such as the recompliation which produced the 1937 Revised Statutes.

General compilation, sometimes referred to as technical codification, involves examining the total permanent statutory law and rearranging and renumbering the sections to achieve better organization. Normally, very little change is made in the statutes themselves. References are corrected and obviously superseded statutes or those referring to conditions which no longer exist are deleted. Some compilations also delete clearly unconstitutional statutes.

The Commission began its study with a staff survey of all titles of the New Jersey statutes, which included an analysis of the contents of each existing title, the coherence of the material and the need for substantive and organizational revision. The survey results were summarized and presented to the Commission which then considered the advisability of a general recompilation and reviewed proposals for new title divisions to be used in revising the statutes.

In 1991, the Commission met with Albert Porroni, Legislative Counsel, to discuss the costs and benefits of a general recompilation project and the possibility of pursuing alternatives to complete recompilation. As a result of that meeting, the Commission invited publishers of statutory materials to submit proposals analyzing methods of revising the statutes and

the manner in which the publishers might become involved in a revision project. Five publishing companies responded to the Commission's request for informal proposals. Several expressed interest in the project but did not submit written responses. In February 1992, the Commission held a public hearing at which four of the publishers made presentations.

As a result of its study, the Commission reached a number of conclusions concerning the benefits and costs of general recompilation. General recompilation is inherently limited in what it achieves. Recompilation rearranges the statutes, curing problems in classification and numeration. It also can correct references, edit language, and remove the most obviously anachronistic statutes. However, more is desired. The effects of court and administrative decisions and practices have to be considered and statutes have to be edited in ways that accurately reflect the true state of the law.

The present statutory organization is the result of the 1937 revision. A complete revision such as that completed in 1937 would take three to four years and completely occupy the time and attention of the staff and Commission during that time. Several publishers are willing to work with the Commission on a complete revision of the statutes, either at a contract price that includes the purchase of a large number of volumes of the completed, annotated statutes, or at no immediate cost to the State but with the expectation that annotated sets of the statutes would be purchased when the revision was completed. The only direct cost to the State for the recompilation project would be staff salaries, Commission overhead and expenses of the Office of Legislative Services in connection with printing and processing the necessary implementing legislation. However, there would be indirect costs, since the publisher must recoup its investment by selling new

sets of statute books. State and local governments, which need many sets of statutes books, as well as the Bar and other non-public agencies, would incur significant costs for the wholesale replacement of statute books.

The Commission determined that while certain areas in the current arrangement of the statutes present problems, the compilation of 1937 is still serviceable. The most significant problems with the present structure of the New Jersey statutes have less to do with arrangement and more to do with accurate content. For example, some statutes refer to public offices which have been replaced; others are ambiguous when considered in conjunction with other statutes. Many statutes contain anachronistic and invalid sections. Some have serious logical gaps which court opinions have had to fill. Mechanical rearrangement of statutory provisions cannot cure these problems which must be addressed by an in-depth revision.

Revision is well described by Alfred C. Clapp in the foreword to Title 2A of the New Jersey Statues:

> The task of making a revision is primarily to rewrite where language can be improved upon materially without ripping up the fabric of the law satisfactorily settled, to boil down, to clarify, to eliminate the obsolete, to reconcile the inconsistent, to correct clear errors and beyond that, to come forward with new legislation called for by the matter at hand, including that needed to even out justice symmetrically and fill the gaps caused by what Roscoe Pound calls the piecemeal approach of our legislatures.

A revised title should comprise sections which cover the total subject, are clearly written and are consistent with each other. It also sets a logical pattern for future amendments and additions.

The Commission concluded that a mechanical recompilation would not accomplish enough compared to the cost and inconvenience involved. It proposes for the present to continue revising and in some cases reorganizing entire sections and recommending repeal of obsolete provisions. At some

time in the future, sufficient progress in consolidating sections and eliminating obsolete sections will be made to warrant an overall reorganization. At that time, among other things, a redesign should take into account the advantages that accrue from computer access to statutory information.

VI. LEGISLATION ON LAW REVISION COMMISSION PROJECTS

In 1991, three major Law Revision proposals became law: L.1991, c.308 enacted the Commission's recommendation for simplification of the procedures for recordation of title documents; L.1991, c.119 enacted the Commission's proposal clarifying and modernizing the statutes establishing the New Jersey court system; and L.1991, c.91 enacted the Commission's proposal correcting the references to courts throughout the statutes to reflect unification of the court system.

In addition, four parts of the Commission's proposal for repeal of anachronistic and invalid statutes became law: L.1991, c.59, L.1991, c.93, L.1991, c.121, and L.1991, c.148.

REPORT AND RECOMMENDATIONS CONCERNING REPEAL OF ARTICLE 6 BULK TRANSFERS OF THE UNIFORM COMMERCIAL CODE, 12A:6-101 et seq.

NEW JERSEY LAW REVISION COMMISSION
15 Washington Street
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(201)648-4575
July, 1991

Report and Recommendations

Concerning Repeal of Article 6 Bulk Transfers of the Uniform Commercial Code, 12A:6-101 et seq.

Bulk sales statutes were enacted in many states around the turn of the century to combat what had become, it was believed, a common phenomenon: the merchant who acquired retail stock on credit and then would close shop, sell the entire inventory in bulk and disappear with the proceeds. The merchant's creditors could sue on the debt and recover a judgment, but collection was often difficult because the creditor and the proceeds of the sale were difficult to trace. Creditors ordinarily had no recourse against the goods themselves because the sale was usually to a good faith purchaser who took the goods free of any claim by the merchant's creditors.

The drafters of the Uniform Commercial Code incorporated the common features of these bulk sales statutes into Article 6 Bulk Sales of the Uniform Commercial Code. As adopted in New Jersey, Article 6 covers sales "in bulk and not in the ordinary course of business" in enterprises whose "principal business is the sale of merchandise for stock." The transfer must be of "the major part" of the transferor's inventory. Transfers for security (i.e. the giving of a mortgage) are exempt. The seller in a bulk sale is required to notify all of its creditors of the pendency of a bulk sale and must distribute the proceeds to those creditors. The creditors which must be notified are "those holding claims based on transactions or events occurring before the bulk transfer," whether those claims are in contract or tort, and whether they are liquidated or unliquidated, secured or unsecured, contingent or fixed, due or undue. The proceeds of the bulk sale must then be distributed to the creditors. If the notice and distribution requirements of the bulk sales chapter are not complied with, the transfer is deemed "ineffective" against the creditors of the seller and the buyer is liable to the creditors.

Article 6 has engendered criticism and controversy continuously since its inclusion in the Uniform Commercial Code. See, e.g., Rapson, "U.C.C. Article 6: Should It Be Revised or 'Deep-Sixed'?" 38 Business Lawyer 1753 (1983). One of the difficulties in applying Article 6 Bulk Transfers is the confusion that has arisen over the interpretation of its provisions. For example, the article is applicable to the sale of "a major part" of the seller's inventory, yet there is no guidance as to how to measure what constitutes "a major part" in particular circumstances. The commentary to Article 6 suggests that more than 50% is a major part of inventory, yet it does not indicate whether the measurement should be of the number of items in inventory or the value of the items. While most courts have interpreted the provision to apply to 50% of the value of inventory, further questions have arisen in determining what constitutes the total inventory from which the calculation is made. The question has arisen in cases involving enterprises with more than one place of business within a state, or those with places of business both within and without the state.

Another interpretive difficulty in Article 6 involves the determination of the nature and amount of creditors' claims. The definition of a claim is very broad, and includes such things as unliquidated tort claims and contingent claims. The seller in a bulk transfer must therefore determine the kind and nature of such claims which might be asserted, and who might assert them, and then notify the potential claimants of the pendency of the bulk transfer. The requirement of notice to creditors may therefore trigger claims which might not otherwise have been made. The resolution of these types of uncertain legal issues adds to the cost of transactions which are, or arguably might be, covered by Article 6.

Even if the determination of the identity of creditors and the nature of the claims is itself straightforward, the cost of complying with Article 6 can be substantial. For example, even a small retail business may have hundreds of trade creditors, each one of which must be separately identified and sent a notice of the pendency of the bulk sale. In a small business transaction, the cost of extracting the names and addresses of these creditors and sending the required notice can add up rapidly and in some cases consume a significant portion of the proceeds of the sale itself. In this connection, the most consistent comment received by the Commission from New Jersey practitioners concerning the operation of the bulk sales law is that the law is waived in most transactions because compliance would add substantially to the cost and difficulty of completing the transaction. One New Jersey attorney commented to the Commission that in his 30-year experience in practice in the state, "in more cases than not, Article 6 has been waived by the parties. When a transaction was conducted in accordance with the requirements of Article 6, it added substantial expense, required cumbersome contract provisions and closing procedures, and did not appear to be giving substantial added protection to creditors."

The use of waivers of Article 6 in business transactions developed not only in response to the costs involved in compliance, but also in response to the concerns of both sellers and buyers that creditors would respond to the receipt of a notice of bulk sale by assuming that the seller was going out of business or was in financial difficulty. In these cases compliance with Article 6 would have the unsatisfactory result of impairing the financial reputation of a going business.

One of the primary reasons cited by the National Conference of Commissioners on Uniform State Laws and the American Law Institute supporting the repeal of Article 6 is the change in the legal context of modern business transactions since bulk transfer laws were first adopted. First, the Conference and the Institute cited the ready availability to creditors of timely information to assist them in making decisions concerning the extension of credit. Second, the Conference and the Institute referred to the greater opportunities afforded creditors to collect debts under modern statutes. They cited, for example, the promulgation of state long-arm statutes, which give creditors the ability to more readily obtain personal jurisdiction over debtors, and the widespread adoption of the Uniform Fraudulent Transfer Act, which provides remedies in the case of a fraudulent bulk transfer. In addition, creditors are able to protect their interests at the time of extending credit by retaining an Article 9 security interest in the goods which are being sold.

The reasons supporting the retention of Article 6 are not compelling in comparison to the reasons supporting its repeal. While compliance with the provisions of Article 6 often results in the payment of creditors from the proceeds of a bulk sale, there is no evidence that the vast majority of these creditors would not have been paid in the ordinary course of a transaction in the absence of Article 6. Significantly, the remedy provided creditors by Article 6 is largely illusory, as creditors have only a ten-day notice of the pendency of a bulk transfer in which to take some action to protect their interests. Generally, the remedies available to creditors in that short period of time are a levy on the inventory sold to the buyer, the issuance of a writ of attachment or capias, enjoining the transaction and seeking the appointment of a receiver, or the filing of an involuntary bankruptcy petition. The alternative of a levy is available only to a creditor who has a claim which has been reduced to judgment. The writs of attachment and capias require specific factual showings such as intent of the debtor to abscond or intent to defraud which are nonexistent in most cases or in any event, difficult to prove. The standards for obtaining appointment of a receiver or an involuntary bankruptcy petition are equally difficult to establish, and the proceedings are cumbersome. Moreover, the requirements of Article 6 are easily circumvented by those who do have an intent to defraud their creditors, by providing the bulk buyer with an affidavit indicating that they have no unpaid creditors.

In 1990 the National Conference of Commissioners on Uniform State Laws and the American Law Institute studied Article 6 and its relationship to other creditors' rights statutes. The Conference and the Institute jointly recommended that Article 6 be repealed in those states which have enacted it. Alternatively, they proposed a revised Article 6 for those states which perceive a particular problem with bulk sales in their jurisdictions. A copy of the recommendation of the Conference and the Institute is attached to this report as Exhibit A.

The Law Revision Commission received the recommendation of the Conference and the Institute and decided to seek comments concerning the advisability of repealing Article 6 in this state from members of the bar. The comments received by the Commission were uniformly in favor of repeal. The Commission has concluded that the remedies available to creditors in the ordinary course, either before extending credit or in pursuing an unpaid debt, are sufficient, and that the imposition of burdens on all transactions on the assumption that bulk sellers will not satisfy their creditors, are not justified.

Based upon the recommendation of the Conference and the Institute and on the confirmatory comments received from New Jersey attorneys, the Commission recommends that the New Jersey version of Article 6 of the Uniform Commercial Code, N.J.S. 12A:6-101 et seq., be repealed and not replaced.

UNIFORM COMMERCIAL CODE

THE AMERICAN LAW INSTITUTE

NATIONAL CONFERENCE OF
COMMISSIONERS ON UNIFORM
STATE LAWS

REPEALER OF ARTICLE 6 - BULK TRANSFERS

and

[REVISED] ARTICLE 6 - BULK SALES

(States to Select One Alternative)

(With Conforming Amendment to
Article 1)

1989 OFFICIAL TEXT
WITH COMMENTS

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Approved by the American Bar Association
Los Angeles, California, February 13, 1990

UNIFORM COMMERCIAL CODE
REPEALER OF ARTICLE 6 - BULK TRANSFERS
and
[REVISED] ARTICLE 6 - BULK SALES
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UNIFORM COMMERCIAL CODE
REPEALER OF ARTICLE 6 - BULK TRANSFERS
and
[REVISED] ARTICLE 6 - BULK SALES
(States to Select One Alternative)

National Conference of Commissioners on Uniform State Laws

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UNIFORM COMMERCIAL CODE
REPEALER OF ARTICLE 6 - BULK TRANSFERS
and
[REVISED] ARTICLE 6 - BULK SALES
(States to Select One Alternative)

PREFATORY NOTE

Background. Bulk sale legislation originally was enacted in response to a fraud perceived to be common around the turn of the century: a merchant would acquire his stock in trade on credit, then sell his entire inventory ("in bulk") and abscond with the proceeds, leaving creditors unpaid. The creditors had a right to sue the merchant on the unpaid debts, but that right often was of little practical value. Even if the merchant-debtor was found, in personam jurisdiction over him might not have been readily available. Those creditors who succeeded in obtaining a judgment often were unable to satisfy it because the defrauding seller had spent or hidden the sale proceeds. Nor did the creditors ordinarily have recourse to the merchandise sold. The transfer of the inventory to an innocent buyer effectively immunized the goods from the reach of the seller's creditors. The creditors of a bulk seller thus might be left without a means to satisfy their claims.

To a limited extent, the law of fraudulent conveyances ameliorated the creditors' plight. When the buyer in bulk was in league with the seller or paid less than full value for the inventory, fraudulent conveyance law enabled the defrauded creditors to avoid the sale and apply the transferred inventory toward the satisfaction of their claims against the seller. But fraudulent conveyance law provided no remedy against persons who bought in good faith, without reason to know of the seller's intention to pocket the proceeds and disappear, and for adequate value. In those cases, the only remedy for the seller's creditors was to attempt to recover from the absconding seller.

State legislatures responded to this perceived "bulk sale risk" with a variety of legislative enactments. Common to these statutes was the imposition of a duty on the buyer in bulk to notify the seller's creditors of the impending sale. The buyer's failure to comply with these and any other statutory duties generally afforded the seller's creditors a remedy analogous to the remedy for fraudulent conveyances: the creditors acquired the right to set aside the sale and reach the transferred inventory in the hands of the buyer.

Like its predecessors, Article 6 (1987 Official Text) is remarkable in that it obligates buyers in bulk to incur costs to protect the interests of the seller's creditors, with whom they usually have no relationship. Even more striking is that Article 6 affords creditors a remedy against a good faith purchaser for full value without notice of any wrongdoing on the part of the seller. The Article thereby impedes normal business transactions, many of which can be expected to benefit the seller's creditors. For this reason, Article 6 has been subjected to serious criticism. See, e.g., Rapson, U.C.C. Article 6: Should It Be Revised or "Deep-Sixed"? 38 Bus. Law. 1753 (1983).

In the legal context in which Article 6 (1987 Official Text) and its nonuniform predecessors were enacted, the benefits to creditors appeared to justify the costs of interfering with good faith transactions. Today, however, creditors are better able than ever to make informed decisions about whether to extend credit. Changes in technology have enabled credit reporting services to provide fast, accurate, and more complete credit histories at relatively little cost. A search of the public real estate and personal property records will disclose most encumbrances on a debtor's property with little inconvenience.

In addition, changes in the law now afford creditors greater opportunities to collect their debts. The development of "minimum contacts" with the forum state as a basis for in personam jurisdiction and the universal promulgation of state long-arm statutes and rules have greatly improved the possibility of obtaining personal jurisdiction over a debtor who flees to another state. Widespread enactment of the Uniform Enforcement of Foreign Judgments Act has facilitated nation-wide collection of judgments. And to the extent that a bulk sale is fraudulent and the buyer is a party to fraud, aggrieved creditors have a remedy under the Uniform Fraudulent Transfer Act. Moreover, creditors of a merchant no longer face the choice of extending unsecured credit or no credit at all. Retaining an interest in inventory to secure its price has become relatively simple and inexpensive under Article 9.

Finally, there is no evidence that, in today's economy, fraudulent bulk sales are frequent enough, or engender credit losses significant enough, to require regulation of all bulk sales, including the vast majority that are conducted in good faith. Indeed, the experience of the Canadian Province of British Columbia, which repealed its Sale of Goods in Bulk Act

in 1985, and of the United Kingdom, which never has enacted bulk sales legislation, suggests that regulation of bulk sales no longer is necessary.

Recommendation. The National Conference of Commissioners on Uniform State Laws and the American Law Institute believe that changes in the business and legal contexts in which sales are conducted have made regulation of bulk sales unnecessary. The Conference and the Institute therefore withdraw their support for Article 6 of the Uniform Commercial Code and encourage those states that have enacted the Article to repeal it.

The Conference and the Institute recognize that bulk sales may present a particular problem in some states and that some legislatures may wish to continue to regulate bulk sales. They believe that existing Article 6 has become inadequate for that purpose. For those states that are disinclined to repeal Article 6, they have promulgated a revised version of Article 6. The revised Article is designed to afford better protection to creditors while minimizing the impediments to good-faith transactions.

The Official Comment to Section 6-101 explains the rationale underlying the revisions and highlights the major substantive changes reflected in them. Of particular interest is Section 6-103(1)(a), which limits the application of the revised Article to bulk sales by sellers whose principal business is the sale of inventory from stock. In approving this provision, the Conference and the Institute were mindful that some states have expanded the coverage of existing Article 6 to include bulk sales conducted by sellers whose principal business is the operation of a restaurant or tavern. Expansion of the scope of revised Article 6 is inconsistent with the recommendation that Article 6 be repealed. Nevertheless, the inclusion of restaurants and taverns within the scope of the revised Article as it is enacted in particular jurisdictions would not disturb the internal logic and structure of the revised Article.

REPORT AND RECOMMENDATIONS RELATING TO MUNICIPAL COURTS

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INTRODUCTION

In 1989, the New Jersey Law Revision Commission filed a Report and Recommendations on the Organization of the Courts. That Report began a revision of the parts of Title 2A concerning the courts and administration of civil justice. In 1991, the Commission continued the revision by issuing reports on statutes relating to the Tax Court and Surrogates. This Report and Recomendations on the Municipal Courts is the next step in the revision of Title 2A.

The Report modernizes and clarifies the law on municipal courts. It simplifies language and and deletes unnecessary material. The substantive changes which are proposed codify current practice and implement some of the recommendations of the Supreme Court Task Force Report on the Municipal Courts.

2B:12-1. Establishment of municipal courts

a. Every municipality with a population of 100 or more at the latest census shall establish a municipal court. Other municipalities may establish municipal courts.

b. Two or more municipalities, by ordinance, 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, by ordinance or resolution, may provide jointly for courtrooms, chambers, equipment, supplies and employees for their municipal courts and agree to appoint the same persons as judges and administrators 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.

d. An agreement pursuant to subsection (b) or (c) may be terminated as provided in the agreement. If the agreement makes no provision for termination, it may be terminated by any party with reasonable notice and terms as determined by the Vicinage Assignment Judge.

Source: 2A:8-1, 2A:8-3, 2A:8-18.2.

COMMENT

Subsection (a) continues that part of 2A:8-1 allowing municipalities to establish municipal courts. In addition, it requires each municipality with more than 100 residents to establish a court. That obligation may be met by establishing an individual court or a joint court. See subsection (b). Only a few municipalities do not have a municipal court. Subsection (b) continues the substance of 2A:8-3 relating to joint courts. The last sentence of subsection (b) 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 based on 2A:8-18.2. 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) [hereafter Task Force Report]. Subsection (d) provides for the dissolution of agreements for joint courts or shared facilities. While 2A:8-18.2 includes such a provision for shared facilities, there is no parallel provision for joint courts. Because of the range of agreements covered by this subsection and the differences in the severity of problems caused by their termination, a flexible approach was taken as to the amount of notice required and the terms of dissolution.

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 specified in the ordinances establishing the court.

Source: 2A:8-1.

COMMENT

This section does not substantively change the source section concerning the naming of municipal courts established by single municipalities. This section removes the restrictions on the names of joint municipal courts.

2B:12-3. Place of court

Courtrooms and sessions of a municipal court need not be in the municipality for which the court has jurisdiction. If the same person is serving as judge of more than one municipal court, sessions of the respective courts may be combined.

Source: 2A:8-18.1.

COMMENT

While this section is based on 2A:8-18.1, the requirement that the court meet in the municipality or in an "adjacent" municipality is abandoned as unnecessary. It can be expected that municipalities will choose to provide locations for court sessions that are convenient to litigants. The second sentence allows combined court sessions for situations such as where the judge of one municipal court is hearing a case as acting judge of another municipal court, or where municipalities have elected to provide jointly for court facilities. See 2B:12-1(c).

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 not caused by the expiration of term shall be made for the unexpired term only. However, if a municipality requires by ordinance that the judge of the municipal court devote full time to judicial duties or limit law practice to non-litigated matters, 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. 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

This section is a substantial re-enactment of the source provision. The provision in the source section which allowed the council in mayor-council municipalities to appoint the judge when the mayor failed to act was deleted as unnecessary. Since section 2B:12-6 provides for the appointment of acting judges by the vicinage assignment judge, the acting judge would be available to serve until the mayor and council act. 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. The Commission considered a recommendation of the Supreme Court Task Force on the Improvement of the Municipal Courts that full time municipal court judges be granted tenure, see, Task Force Report, pos. 3.2, but was unable to reach a consensus on the issue. While some of the commissioners supported tenure, others thought tenure inappropriate without changes in the method of appointment which would assure a greater degree of review of potential a judge's qualifications.

2B:12-5. Additional municipal judges

a. With the written consent of the Vicinage Assignment Judge, 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 each term of a temporary judge shall not exceed one year.

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

COMMENT

This section continues 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. "Acting judges" in 2A:8-5.2 are called "temporary judges" in subsection (b). 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) gives a municipality the option 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. Presently, an

assignment judge must request the appointment of temporary judges but need only approve an increase in the number of ordinary judges. Since this distinction is unjustified, subsection (b) requires the assignment judge to approve either change.

2B:12-6. Designation of acting judges

Subject to the Rules of Court, the Vicinage Assignment Judge may appoint acting judges of each of the municipal courts in the vicinage to serve as judge temporarily when the judge of that court is unable to hold the municipal court. A person appointed as acting judge shall be a judge of another municipal court or an attorney-at-law. A copy of the appointment of an acting judge for a municipal court shall be sent to the judge of that court.

Source: 2A:8-10.

COMMENT

This section differs significantly from the source section by giving the assignment judge the power to select acting judges. The source statute provides that judges of the municipal courts designate acting judges for their courts, but assignment judges now exercise much of this power without authority by issuing orders that assign municipal court judges temporarily to other municipal courts. As that system of cross-assignments appears to work efficiently, this section provides a statutory basis for it in a form which preserves the individual identity of separate municipal courts as legislative courts with limited geographic jurisdiction. 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 a resident of this State and an attorney-at-law admitted to practice in this State for at least five years.

b. In lieu of any other fees, judges of municipal courts shall be paid annual salaries set by ordinance or resolution of the municipalities establishing the court. The total salary paid to a full-time judge shall not exceed the salary of a Judge of the Superior Court.

c. A municipality, by ordinance, may require that a municipal judge devote full time to judicial duties or limit law practice to non-litigated matters.

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

COMMENT

Subsection (a) both simplifies and extends its source section. The provision of the source section allowing certain non-lawyers to continue as municipal court judges is deleted as the last of its beneficiaries has retired. The requirements are extended to temporary and acting judges. The source section does not define the qualifications necessary for these positions. The subsection adds a qualification for appointment: five-years admission to the practice of law. That requirement reflects the recommendation of the Task Force Report. See Task Force Report, pos. 3.1.

Subsection (b) continues the substance of its source, 2A:8-9. The second sentence of the subsection reflects the recommendation of the Task Force Report. See Task Force Report, pos. 3.5.

Subsection (c) explicitly provides for the common practice of municipalities with busy courts, the establishment of full-time judgeships or the imposition of limitations on the practice of law by judges.

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.

2B:12-9. Presiding judge – Municipal Court

If the Chief Justice designates a Superior Court Judge or a judge of one of the municipal courts in a vicinage to serve as Presiding Judge – Municipal Courts for that vicinage, that judge may exercise powers delegated by the Chief Justice or established by the Rules of Court.

If the Presiding Judge is a municipal court judge, the Presiding Judge shall be paid by the State for the time devoted to duties as Presiding 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 Task Force Report. See Task Force Re Task Force Report, pos. 1.1. See also Rokos v. Dept. of Treasury, 236 N.J. Su 1989). As part of pilot projects, four vicinages now have presiding judges.

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

a. A municipality shall provide for an administrator and other necessary employees for the municipal court and for their compensation. With approval of the Supreme Court, an employee of the municipality, in addition to other duties, may be designated to serve as administrator of the municipal court.

b. The judge of a municipal court may designate in writing an acting administrator or deputy administrator to serve temporarily for an absent administrator or deputy administrator until the administrator or deputy administrator returns or a new administrator or deputy administrator is appointed. The acting administrator or acting deputy administrator shall be paid

at a rate established by the judge but not exceeding that established for the administrator or deputy administrator.

c. A person employed as the administrator of a municipal court who (1) has held that office continuously for five years or more and who is certified as a municipal court administrator as provided by section 2B:12-10.1 or (2) on the effective date of this section has tenure granted under prior law or under Title 11A of the New Jersey Statutes shall hold office during good behavior and may not be removed except for good cause. Any other person employed as the administrator of a municipal court shall serve at the pleasure of the municipality.

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

COMMENT

Subsections (a) and (b) continue 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 (c) extends the policy of its sources, 2A:8-13.1 and 2A:8-13.3. Each source section allows a class of municipalities to grant tenure to administrators who have served for ten years. Subsection (c) gives tenure to any administrator who has served for five years and who has completed the requirements for certification.

2B:12-10.1. Certification of municipal court administrators

a. The Supreme Court may appoint a Municipal Court Administrator Certification Board. That board shall:

1) design examinations for certification of municipal court administrators;

2) establish courses satisfying training requirements in subjects closely related to the duties of a municipal court administrator; and

3) establish procedures and fees for certification.

b. A person shall be certified as a Municipal Court Administrator if the person:

1) has a high school diploma;

2) has a combination of two years of either full-time government employment performing duties related to those of a municipal court administrator or higher education;

3) completes the training required by the board;

4) passes the examination held by the board; and

5) pays any required certification fee.

c. A person who is a municipal court administrator and has been serving in that position for five years on the effective date of this section shall be certified as a municipal court administrator if the person passes the examination held by the board and pays any required certification fee. A person who is a municipal court administrator and has been serving in that position for three years on the effective date of this section shall be certified as a municipal court

administrator if the person completes the training required by the board, passes the examination held by the board and pays any required certification fee.

d. A municipal court administrator certificate may be revoked or suspended by the board for dishonest practices or failure to perform, or neglect of, duties of a municipal court administrator.

Source: New.

COMMENT

This section establishes a mechanism for the certification of municipal court administrators. The approach of certification as a basis for tenure has been adopted for other municipal officials. E.g., N.J.S. 40A:9-30.2 (county purchasing officials); N.J.S. 40A:9-133 (municipal clerks); N.J.S. 40A:9-140.8 (municipal finance officers); and N.J.S. 40A:9-145 (tax collectors). Since municipal court administrators are judicial officers, authority to establish a certification program is placed in the judicial branch.

2B:12-11. Bond or insurance

Before assuming the duties of office, a judge or administrator of a municipal court, or a person employed by the court who handles money shall be covered by a bond or insurance against loss or misappropriation of funds payable to the municipality, county and the State in an amount and with terms set by the municipality.

Source: 2A:8-14.

COMMENT

This section continues the policy of its source but applies to other court officials who handle money in addition to judges and administrators. The section also allows municipalities to use insurance rather than bonds.

2B:12-12. Powers of administrator

Any process, order, warrant, or judgment issued by a municipal court may be signed by the judge or be attested in the judge's name and signed by the administrator. The municipal court administrator shall have the authority granted by law and Rules of Court to administrators and 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, offices, equipment and supplies for the municipal court, its administrator's office and its violations bureau shall be provided by the municipality.

Source: 2A:8-18.

COMMENT

This section is similar to its source section. In form, it is patterned on the Commission's recommended 2B:6-1(a).

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 over the following cases 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 except where exclusive jurisdiction is given to the Superior Court;

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 jurisdiction granted by 2C:25-14 and the diverse 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 over 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 over 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 one 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 N.J.S. 2C:1-4(c). The limitation found in the source section concerning 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 within its territorial jurisdiction 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 within a committing magistrate's authority, but the power to set bail is not. However, in practice, municipal courts exercise this authority. 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. 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 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. An administrator or deputy administrator 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 in charge of a police station, other than an officer who participated in the arrest of the defendant, may exercise the power of the municipal court to administer oaths for complaints filed with the municipal court. Any 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 by an administrator or deputy administrator of a municipal court, who is 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. The authority may be exercised only in accordance with bail schedules promulgated by the Administrative Office of the Courts or by the municipal court.

d. A person charged with a non-indictable offense shall be released on summons or personal recognizance within 12 hours after arrest unless a judge has set the conditions for pretrial release and the conditions remain unmet.

e. A 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 the municipal 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 administrators and to police officers, only administrators now exercise the power to administer oaths and issue warrants. Subsection (a) limits this power to administrators. 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 administrators 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. Subsection (d) adds a restriction: conditions for release set by someone other than a judge must be re-examined by a judge within 12 hours if the defendant has not been released.

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 a sentence of imprisonment be served periodically on particular days, rather than 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 offence but not for a traffic offense. This section is retained in the Municipal Court Chapter because almost all jail sentences for violations are imposed in municipal courts. This 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. A 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 the 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 finds 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

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

After a judgment has been docketed in the Superior Court, the municipal court shall not issue an execution or hold proceedings in the case except that the municipal court may grant a new trial or may process an appeal.

If a new trial is granted or an appeal taken after a judgment is docketed, the Superior Court shall not issue an execution on the judgment pending the final determination of the 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 substance of the source sections. While few civil cases are heard in municipal courts, the procedure established by this section functions to enforce fines, penalties and restitution. See N.J.S. 2C:46-2.

2B:12-26. Prosecutor

A municipality shall employ an attorney-at-law as municipal prosecutor. In representation of the state, the prosecutor shall act under the supervision of the Attorney General and the county prosecutor.

Source: New.

COMMENT

Almost all municipalities now have municipal prosecutors. This section requires every municipality to appoint a prosecutor. This requirement is consistent with the recommendations of the Task Force Report. See Task Force Report, pos. 3.11. However, unlike the Task Force recommendation, this section does not require that the prosecutor appear in every case. The prosecutor decides whether to appear based on experience and caselaw. This section also prohibits the municipal prosecutor from acting contrary to the responsibilities of the county prosecutor. This principle is derived from the role of the county prosecutor as the chief law enforcement officer of the county. Cf. N.J.S. 2A:8-23. This section specifies that the municipal prosecutor who is representing the state is subordinate to the county prosecutor.

2B:12-27. Defense of indigents

A municipality shall employ attorneys-at-law on a full-time, part-time or per-case basis to provide for the representation of persons entitled by law to appointment of counsel.

Source: New.

COMMENT

While the 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 types of punishment. Rodriguez v. Rosenblatt, 58 N.J. 281 (1971). Some municipalities provide representation through local public defender's offices or other systems of paid counsel. This section codifies that procedure. Some municipalities rely on appointment of counsel without compensation. That method is now permissible; State in interest of Antini, 53 N.J. 488 (1969); State v. Monaghan, 184 N.J. Super. 340 (App. Div. 1982); this section requires compensation to appointed counsel to improve the quality of representation and reduce the burden on attorneys.

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:12-3	
2A:8-18.2	2B:12-1(c)	
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
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August 30, 1991

SURROGATES

INTRODUCTION

In 1989, the New Jersey Law Revision Commission filed a Report and Recommendations on the Organization of the Courts. That Report was the beginning of a revision of the parts of Title 2A which concern the courts and administration of civil justice. This project on the law relating to Surrogates is a continuation of that effort.

The current chapter on Surrogates, with 27 sections, some dating back to 1882, includes anachronistic salaries, performance bond amounts and references to county courts. It mandates archaic procedures, such as hand-signing recorded documents, which Surrogates do not follow.

This proposal modernizes language and removes provisions duplicating those of Title 3B, Administration of Estates. The proposed 12 sections are compatible with current practice and with relevant New Jersey Court Rules which became effective September, 1990.

ARTICLE I. IN GENERAL

2B:14-1. Election of Surrogates

A Surrogate shall be elected to serve in each county for a 5-year term commencing January 1 after election. The Surrogate shall be both the Judge and Clerk of the Surrogate's Court.

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, ¶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. The bond, after approval by a judge of the Superior Court, shall be filed with the Secretary of State; a copy shall be filed with the Clerk of the County Board of Freeholders.

Source: 2A:5-2

COMMENT

This section allows each county to determine whether and by what 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. The Supreme Court has the power to set minimum standards for bonding of Surrogates in their role as deputy clerks of the Superior Court, Chancery Division (Probate Part). N.J. Const., Art. 11, §6(c) and N.J. Const., Art. 6, §2, ¶3. It may exercise that power if counties fail to provide for bonding or insurance of Surrogates.

2B:14-3. Salaries of Surrogates

Each county shall fix the Surrogate's salary which shall not be diminished during the term of office or during any consecutive terms served by the Surrogate.

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. Disqualification; referral to Assignment Judge

a. Neither the Surrogate nor any employee of the Surrogate's office may perform duties respecting a matter if the Surrogate is a fiduciary or has an interest in a matter.

b. When the Surrogate and employees are disqualified 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 proposed section also provides that the Assignment Judge, rather than the defunct county court, act when a Surrogate is disqualified. In determining the appropriate disposition of a matter, the Assignment Judge is to decide whether any duties (for example, those of a ministerial nature) may be sent back to, and performed by, the Surrogate's office. Where necessary, the Assignment Judge has the option of sending the matter to another county. Currently any available Superior Court judge handles matters which the Surrogate is disqualified from handling.

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 from the political party of the person last elected to the office. The person appointed 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. 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;

c. accounts of fiduciaries, disclaimers, revocations, renunciations and requests;

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;

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). The reference to recordation of inventories has been deleted since inventories are not filed in cases in Surrogate's Court. Five sections of Title 3B, Administration of Estates, refer to other kinds of documents recorded by the Surrogate not within the categories in this section. Law regarding duties of Surrogates other than recordation exists in Titles 2A and 3B and in the New Jersey Court Rules.

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. which is 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 the terms 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. Filing

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 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 reference to "inventories" in the source statute is deleted since inventories are not filed in cases in Surrogate's Court.

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 maintains 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 maintaining 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; 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.

2B:14-11. Special probate clerk

A Surrogate may designate one or more employees to serve as special probate clerk. A special probate clerk shall serve at the pleasure of the Surrogate and 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. Executive secretary, chief clerk and other employees; compensation

A Surrogate may appoint an executive secretary, chief clerk and other employees for the Surrogate's office. Compensation of employees in the Surrogate's office may be recommended by the Surrogate and approved by the county board of chosen freeholders.

Source: 2A:5-16

COMMENT

This section derives from source section 2A:5-16. Executive clerk is renamed executive secretary. It deletes the restrictions on compensation for certain employees. The Commissioners consider it appropriate that the Surrogates' and county governments' discretion in regard to compensation not be restricted.

Source Section	Proposed Section	Comment
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.

REPORT AND RECOMMENDATIONS CONCERNING THE TAX COURT

NEW JERSEY LAW REVISION COMMISSION
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March, 1991

INTRODUCTION

The Tax Court was established by statute in 1978 as a court of limited jurisdiction under Article VI, Section I, paragraph 1 of the New Jersey Constitution. The court suceeded to the jurisdiction of the Division of Tax Appeals, an administrative agency in the executive branch.

This project is a continuation of the Commission's previous work revising the statutes relating to the Supreme Court and the Superior Court and correcting obsolete references to the abolished county and county district courts, now pending before the Legislature as S1347 and S1348, respectively.

The Commission recommendations include revision of the Tax Court statutes to clarify the jurisdiction and powers of the court and to eliminate transitional provisions which are no longer necessary. The revised statutes would be enacted as part of new Title 2B Courts.

TITLE 2B - COURTS

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 actions or regulations with respect to a tax matter of the following:

(1) Any state agency or official;

(2) A county board of taxation;

(3) A county or municipal official.

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 shall have jurisdiction over any other matters as may be provided by statute.

d. 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) is included to make it clear that the Legislature may provide for jurisdiction of the Tax Court in other provisions of the statutes which currently exist or which may be added in the future without amending this section.

Paragraph (d) provides for any additional jurisdiction the Tax Court may require to enforce decisions, judgments or orders. It 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.

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 the 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 shall arrange for courtrooms, chambers and offices or other appropriate facilities at other locations throughout the State.

Source: 2A:3A-2

COMMENT

This section is a substantial reenactment of the source sections. The reference in the source section to "shared use of existing facilities" has been eliminated as unnecessary.

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 Term of office, retirement

a. The judges of the Tax Court shall hold their offices for initial terms of seven 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 and other benefits 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 phrase "and other benefits" has been added to subsection (b) to make clear that Tax Court judges are entitled to the all of the same retirement benefits as Superior Court judges. 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:13-8 Compensation not to be reduced; prohibition against gainful employment

a. Each judge of the Tax Court shall receive annual compensation and other benefits 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. The phrase "and other benefits" has been added to make clear that Tax Court judges are entitled to the same remuneration in all respects as 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:13-9 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 the causes and in the 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:13-10 Presiding judge

The Chief Justice shall assign 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 substantially identical to the source section.

2B:13-11 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 recommendations by the presiding judge 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:13-12 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:13-13 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:13-14 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:13-15 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 the party's 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.

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:13-3
2A:3A-4.1	2B:13-2, 2B:13-4
2A:3A-4.2	Title 22A - New Section
2A:3A-5	2B:13-14
2A:3A-6	Unnecessary
2A:3A-7	2B:13-15
2A:3A-8	Unnecessary. See 2B:13-2(d).
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:13-10
2A:3A-15	2B:13-7
2A:3A-16	2B:13-9
2A:3A-17	2B:13-9
2A:3A-18	2B:13-8
2A:3A-19	2B:13-7
2A:3A-20	2B:13-8; see also 2B:2-3, presently pending before the Legislature as S1347 and A3166
2A:3A-21	2B:13-12; 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:13-2
2A:3A-23	2B:13-13
2A:3A-24	2B:13-11
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

REPORT AND RECOMMENDATIONS ON TERMS OF APPOINTMENT

NEW JERSEY LAW REVISION COMMISSION
15 Washington Street
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July, 1991

INTRODUCTION

The law governing membership on public bodies is a combination of common law precedents and judicial decisions construing a variety of inconsistent statutes governing individual public bodies. As a result, questions concerning the terms of members on public bodies have been a source of litigation and controversy. The purpose of this proposed statute is to set a more definite standard for determining the commencement and expiration of the term of members of public bodies and to regularize the rules concerning holdover, successor, replacement and ex officio memberships on such bodies.

Section 1 - Definitions

a. A public body is a commission, authority, board, council, committee or any other group of two or more persons established by an official action of the Legislature, the Governor, a county or municipal governing body or any local public body or official, and collectively empowered as a voting body to perform a public governmental function. It does not include a grand or petit jury or any body organized under the authority of the judicial branch of government.

b. An official action is an act or resolution of the Legislature, an executive order of the Governor, or an ordinance, resolution or motion of a county governing body, a municipal governing body, or any other local public body or official.

COMMENT

Public body. The definition of this term is very broad. Entities established under the authority of the judiciary branch are expressly excluded from this definition, as the terms of appointment and other aspects of membership on such bodies as Supreme Court committees and task forces is better left to the court establishing the bodies to determine. Grand and petit juries, while implicitly excluded from the provisions of this proposed act by its terms, are expressly excluded to avoid any questions concerning the applicability of this act. Note, however, that some limitations on the applicability of the act are contained in proposed section 2.

Official action. The definition of this term sets forth the means by which public bodies are created.

Section 2 - Applicability

a. This act shall not apply to positions on public bodies which are filled by election.

b. This act shall not apply to the extent that the official action establishing the public body, or the official action authorizing the establishment of the public body, expressly provides a different rule.

COMMENT

This proposed act would apply to all public bodies organized under the laws of this State, as defined in proposed section 2. Subsections a. and b. of this section contain limitations on the applicability of this proposed act to those public bodies. Subsection a. provides that the terms of the act shall not apply to persons who are elected to office on the public body in question. Note, however, that a person who is an ex officio member of a public body by virtue of election to another public office is covered by the provisions of the act in his ex officio capacity (see proposed section 8), and an elected official who qualifies for appointment to a public body by virtue of election to public office is covered by the act in his capacity as an appointive member (see proposed section 9.)

Subsection b. provides that the rules set forth in this act are intended to apply to a public body unless the official action establishing the public body, or authorizing its establishment, expressly provides a different rule. The purpose of this act is to set forth general "gap filling" rules to cover those situations in which a specific rule has not been included in the act or other official action establishing the public body. Therefore, if the official action establishing the public body provides a specific rule that conflicts with one of the rules set forth in this proposed act, the specific rule will apply. Note that the reference to "the official action authorizing the establishment of the public body" covers situations in which, for example, a state statute authorizes municipalities to establish a planning board, and the statute contains provisions providing for appointment of members, and setting length of terms and qualifications of members. Any specific provisions in such authorizing legislation which conflict with a rule provided in this act control over the gap-filling rules of this act.

Section 3 - Calculation of initial fixed terms of office

a. All initial fixed terms of office on public bodies shall be calculated as beginning on the effective date of the official action which establishes the body, or which creates the initial fixed term of office, regardless of the date when members are appointed and qualified to fill the initial fixed terms.

b. This section shall apply only to public bodies which are created after the effective date of this act, and to initial fixed terms of office which are added to existing public bodies after the effective date of this act.

COMMENT

This section changes the common law rule governing the commencement and expiration of initial terms of office of members appointed to public bodies. The general rule established in judicial decisions concerning legislatively-created bodies is that in the absence of a contrary rule expressed in the legislation, the term of a member appointed to a public body commences on the date of appointment of the member. Haight v. Love, 39 N.J.L. 476 (E. & A. 1877). This general rule sometimes presents problems. First, the date of appointment of a member of a public body may not be readily ascertainable due to variations in the practices of appointing authorities regarding the making of appointments. This may result in confusion and uncertainty as to the date of expiration of a member's term. Second, where the legislation or other official action establishing a public body provides for members with initial terms of different lengths, i.e., staggered terms, and the appointments to those positions are not made simultaneously, the general rule may operate to defeat the intention to stagger the expiration of the terms of some or all members. Thus, for example, if the legislation establishing a public body provides for two members with staggered terms of two and three years, and the three-year member is appointed first, while the two-year member is appointed a year later, the terms of these members will expire at the same time, despite the intention that the terms of these members expire a year apart. The converse is also true. If the legislation establishing a public

body provides for several terms of the same length, any intent that the terms commence and expire simultaneously is defeated if appointments are not made simultaneously.

This legislation provides a date certain from which the commencement and expiration of all appointive terms of a particular public body may be calculated. The date certain will be readily determinable from the official action establishing the public body. Both the initial terms of appointment, and the commencement and expiration of all subsequent terms, would be calculated by reference to this date certain. The establishment of a date certain would preserve the staggering of terms which is often provided in the legislation establishing public bodies.

The purpose of this section is to provide a clear rule for calculating newly-created initial terms of office, not to disturb the status quo on existing public bodies. Therefore, this rule is limited in its applicability to initial terms on newly-created public bodies and to newly-created initial terms on existing public bodies, such as an increase in the membership of an existing public body.

This section is consistent with the distinction made in Monte v. Milat, 17 N.J. Super. 260, 268 (Law Div. 1952), between the term of office and the tenure of an officer. This act regularizes the commencement and expiration of fixed terms of office, independent of the tenure of members appointed for a fixed term. This scheme is carried out in subsequent sections concerning holdover and replacement members (see below).

This provision applies only to appointive members of public bodies; it does not apply to the terms of members who are elected to office on the public body in question. See proposed section 2.

Section 4 - Succeeding terms of office

All fixed terms of office on public bodies which succeed the initial fixed terms shall be calculated as commencing on the appropriate anniversary dates of the commencement of the initial terms, regardless of the date when successor members are appointed and qualified to fill the succeeding fixed terms.

COMMENT

This section expresses the general rule that a new term commences upon the anniversary date of the commencement of the previous term. Thus, a four-year term which commenced on October 1, 1986, expires at the end of September 30, 1990, and a new term begins on October 1, 1990. October 1, 1990, is the "appropriate anniversary date" of a four-year term which commenced on October 1, 1986. The next "appropriate anniversary date" of such a fixed term would be October 1, 1994.

Section 5 - Replacement, holdover and successor members

a. A person who is appointed to a public body to replace an appointed member who has ceased to serve prior to the expiration of the member's fixed term shall serve as a replacement member for the remainder of the fixed term of the member being replaced.

b. A member or a replacement member appointed to a public body, whose fixed term expires without reappointment for a new fixed term, shall continue to serve as a holdover member until a successor member is appointed and qualified.

c. A successor member of a public body is a person who is appointed to replace an appointed member whose fixed term has expired. A successor member who is appointed and qualified after the commencement of a fixed term shall serve the remainder of that term.

d. Holdover, replacement and successor members shall have the same voting and other privileges as members appointed to initial terms.

e. Replacement and successor members shall be appointed and qualified in the same manner as members appointed to initial terms.

COMMENT

This section complements the rule in section 3 that fixed terms of office are distinct from the tenure of members appointed to fixed terms, and clarifies the status of replacement and holdover members. A replacement member is appointed for the unexpired portion of the term of the member being replaced, but may become a holdover member if not reappointed for a new term or if a successor member is not appointed and qualified at the expiration of the fixed term. A holdover member may be replaced at any time by the appointment and qualification of a successor member. Thus, neither the appointment of a replacement member nor the holding-over of a member has an effect on the commencement and expiration of fixed terms. See Monte v. Milat, 17 N.J. Super. 260, 268 (Law Div. 1952), which establishes the principle that the tenure of a holdover member shortens the tenure of the successor member appointed to a fixed term, but does not change the date of commencement or expiration of the fixed term.

Subsection d. provides that replacement, holdover, and successor members have the same voting and other privileges as members appointed to initial terms.

Section 6 - Failure to specify term

If the appointing authority fails to specify the length of the fixed term for which a member has been appointed, the member shall be deemed to be appointed to the longest fixed term which is available to be filled at the time of that member's appointment.

COMMENT

This section provides a rule for determining the length of the term of a member, where terms of different lengths are vacant at the time of appointment and the appointing authority fails to specify the term for which a particular appointee is to serve. Under this section it is presumed that if the appointing authority fails to specify the length of the term to which a particular member has been appointed, the member is being appointed to the longest term available at the time of the appointment.

Section 7 - Appointment for an indefinite term

If the official action establishing a public body provides for the appointment of a member without providing a fixed term, or if the appointment is defined as being "at the pleasure of" the appointing authority, the member may be removed or replaced at any time without cause by the appointing authority or by the successor to the appointing authority, but the member's appointment shall not be automatically terminated either by a vacancy in the office of the appointing authority or by a change in the identity of the appointing authority.

COMMENT

This section expresses the general rule that when the official action establishing a public body does not provide a specific term for an appointed member, that member may be removed or replaced at any time. The general rule is qualified by the provision that a change in the identity of the appointing authority does not automatically terminate the appointment of members appointed for an indefinite term; some affirmative act such as an express removal or appointment of a successor is required. Thus, a newly-elected Governor may remove or replace members of a commission appointed by a previous Governor who are appointed "at pleasure," but the change in the office of Governor does not automatically operate to terminate those previous appointments; the new Governor must affirmatively remove or replace those members.

Section 8 - Ex officio members

a. An ex officio member of a public body is a person who is designated a member of the public body in the official action which establishes the public body by virtue of the person holding another public or private office or position.

b. A person who is an ex officio member of a public body shall cease to serve if the person no longer holds the specified office or position.

c. An ex officio member of a public body shall have the same voting and other privileges as other members.

COMMENT

Subsections a. and b. of this proposed section embody the general rule that a person who serves on a public body as an ex officio member, i.e., by virtue of holding another office or position, serves concurrently with the holding of the other office or position. Note that the other "office or position" may be either a public or a non-public office or position. Thus, the Public Advocate, a cabinet-level officer, may be an ex officio member, as may the dean of a law school. See, e.g., 1:12A-2.

This section also specifies that ex officio members have the same voting and other privileges as other member of the public body.

It should be noted that some public entities have provisions permitting the appointment of persons who qualify by virtue of holding some public office. These types of appointive memberships sometimes are confused with ex officio memberships. The distinction is that an ex officio membership is one to which a person is automatically entitled by virtue of holding another office or position. Thus, for example, if the statue establishing a public body provides that the Secretary of Agriculture shall be a member of the body, the position is an ex

officio one; if the statute provides that the Governor shall appoint "a member of the Governor's cabinet" to a public body, the position is not an ex officio one, as the Governor has the discretion to make an appointment from among the members of the cabinet. These non-ex officio, appointive positions are covered under proposed section 9.

Section 9 - Term of appointed member with specified qualifications

If the official action establishing a public body provides for the appointment of a member who possesses specified qualifications, a vacancy shall be created if the member no longer meets the specified qualifications. A member who no longer possesses the specified qualifications shall continue to serve as a holdover member until a successor is appointed and qualified or until a court of competent jurisdiction determines that the member no longer meets the specified qualifications.

COMMENT

This section concerns the appointment of members who meet certain qualifications specified in the official action which establishes the public body. Because the specified qualifications often include the holding of some private office or position, these types of appointive memberships are sometimes confused with ex officio memberships. Unlike ex officio members, who are not appointed but who automatically are members by virtue of holding a particular office or position, these members qualify for appointment because they meet the specified qualification. For example the act establishing the Criminal Disposition Commission provides for the appointment of "two members of the Senate." 2C:48-1. The specified qualification for appointment need not be the holding of a public or private office or position, however. In some cases the qualification is participation in a particular activity. For example, 4:1C-4 authorizes the Governor to appoint four members who "shall be actively engaged in farming, the majority of whom shall own a portion of the land that they farm" to the State Agriculture Development Committee; 54:47C-13 authorizes the appointment of "growers of asparagus for fresh market" to the Asparagus Industry Council.

Under this section an asparagus farmer who is appointed to a commission as a "grower of asparagus for fresh market" is no longer qualified for membership if she ceases to grow asparagus. Similarly, if a member of the New Jersey Senate who is appointed to a commission resigns from the Senate, that person is no longer qualified. In these cases a vacancy is created, permitting the appointing authority to appoint a new member who meets the specified qualifications. See Oliver v. Jersey City, 63 N.J.L. 634 (E. & A. 1899); (disqualification of municipal official due to acceptance of other office creates a vacancy in the office even though official may continue to function as de facto officer); see also Galloway v. Council of Clark Township, 94 N.J. Super. 527 (App. Div. 1967).

A no-longer-qualified member may serve as a holdover member until a successor is appointed and qualified or until a court of competent jurisdiction determines that the member no longer meets the specified qualifications; this holdover rule thus parallels the provision in proposed section 5 above concerning the holdover of members appointed for a term. There is an important difference between the holdover of members appointed for a term, however, and those who must meet specified qualifications. If the appointment of a member of a public entity is completely within the discretion of the appointing authority, without any specified qualifications (other than the general qualifications for public office), then the failure of an appointing authority to appoint a replacement member at the end of a member's term may be viewed simply as a passive exercise of the authority to appoint. However, in those situations in which certain qualifications are specified for membership on a public body, the failure to appoint a replacement member when an existing member no longer meets the specified

qualifications may be viewed as contrary to the intention of the authority which imposed the qualifications (in most cases, the Legislature). This proposed section takes into account the important public interest in assuring continuity on public bodies by allowing a no-longer-qualified member to act as a holdover member until a successor is appointed and qualified or until the member is removed in a court proceeding. Thus, an appointing authority could not indefinitely retain a no-longer-qualified member by failure to appoint a successor if interested parties brought an action to remove the no-longer-qualified member. See Galloway v. Council of Clark Township, 94 N.J. Super. 527.

REPORT AND RECOMMENDATIONS

RELATING TO WRITING REQUIREMENTS FOR REAL ESTATE TRANSACTIONS BROKERAGE AGREEMENTS AND SURETYSHIP AGREEMENTS

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December, 1991

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.

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

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 parol transactions.

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

The Land Provisions of the Statute of Frauds

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

Because the writing requirement for land transactions is so fundamental to our present-day conveyancing system, it can be difficult to imagine a time when it was otherwise. In England prior to the Statute of Frauds, however, the transfer of land by ceremony rather than by a writing was still valid. This method of conveyance, livery of seizin, derived from feudal concepts of land holding. While this method was workable when most of the population was illiterate and

ownership of land was a matter of common knowledge in the community, in the seventeenth century this type of conveyance had largely been superseded by more modern, written forms of conveyancing and the old forms increasingly were used when a secret conveyance was wanted for illicit purposes. The lawmakers of the day came to recognize that ceremonial conveyances of land facilitated tax evasion and fraudulent transfers of land, and made litigation over title to land more difficult to resolve. The Statute of Frauds changed conveyancing practice in England by expressly eliminating conveyances of land by livery of seizin and by requiring conveyances of land to be in writing. The Statute provided that conveyances of land which were not in writing were "void," and provided that trusts in land were required to be proved by a writing. Requiring conveyances in land to be in writing lessened the opportunity for fraudulent conveyances, tax evasion and disputes over title, and made it possible for grantees to make use of the limited title recordation system which was available at the time. Publicity of land transfers, effectuated by a writing requirement, served a government interest (collection of taxes), a broad public interest (greater security of title generally), and the interests of parties to land transactions (greater reliability in individual transactions).

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

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

Over the two centuries since its enactment into law in New Jersey, judicial interpretation has significantly altered the literal terms of the statute. From the earliest times situations presented themselves to the courts in which strict interpretation of the Statute of Frauds land provisions would produce unfair results. Under the general rubric that "the Statute of Frauds should not be used to work a fraud," the courts in New Jersey and elsewhere developed so-called equitable exceptions to the application of the Statute to conveyances, to trusts, and to contracts for the sale of land. Thus, although present conveyances of an interest in land are "void" under the Statute if not in writing, courts have held that

a grantor in a parol transaction may be estopped to complain of the lack of a writing in a limited but significant number of circumstances. Contracts for the sale of land are declared unenforceable by section 5(d), but by judicial construction they are enforced in many situations. The source sections concerning trusts in land invalidate parol trusts unless their "creation or declaration" can be "proven" by a writing. Nevertheless, parol trusts are enforced in many situations by the application of the judicially-constructed fictions of resulting trust and constructive trust. As a broad generalization, it can be said that the reason that these Statute of Frauds provisions governing land transactions have been modified so significantly by judicial construction is that their underlying purposes are not always served by strict application of their literal terms.

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

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

A new approach is also offered for trusts in real estate. Under the source statute trusts in real estate were covered by source sections 3 and 4, which expressed rules that combined the concepts of voidability and unenforceability. The judicial interpretation of the source sections resulted in a body of law that has managed to achieve fair results only through the application of the convoluted legal fictions of resulting trust and constructive trust. In this revised statute, a trust in land is treated as a present transfer of an interest which may be coupled with an agreement to transfer an interest or to hold it in trust. This

statute treats these aspects of a trust according to the same rules applicable to other present conveyances and other agreements to convey, respectively. The result in most cases will be identical to that under the source statute, but the analysis will be more straightforward.

Section 1 - Definitions

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

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

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

COMMENT

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

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

involving parol express trusts. See, e.g., Moses v. Moses, 140 N.J. Eq. 575 (E. & A. 1947). Thus, for example, if a grantor transfers legal title to real estate to a trustee subject to an oral agreement that the trustee will reconvey the legal title to the beneficiary of the trust, either the grantor or the beneficiary can enforce the agreement according to its terms if the agreement to reconvey can be proved by clear and convincing evidence under proposed section 4. Enforcing the agreement according to its terms means that either the grantor or the beneficiary can compel the trustee to reconvey to legal title to the beneficiary. One peculiarity of the prior law was that in such circumstances the property would be reconveyed to the grantor, not to the beneficiary.

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

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

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

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

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

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

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

c. This section does not apply to leases.

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

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

COMMENT

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

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

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

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

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

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

Subsection (d) excepts easements by implication or prescription from this section. Under New Jersey law, easements may be created either by express conveyance, by implication, or by prescription. Leach v. Anderl, 218 N.J. Super. 18, 24 (App. Div. 1987), citing Mahony v. Danis, 95 N.J. 50, 58 (Law Div. 1976). An express easement is created by "a transaction intended to transfer ownership," therefore it falls under the language of proposed section 2(a) and a writing is required. This is consistent with present law. See, e.g., Annunziata v. Millar, 241 N.J. Super. 275 (Ch. 1990).

Easements created by implication and prescription traditionally are considered to be outside the Statute of Frauds and proposed section (d) is intended to continue that rule. While they do not fall under the language of proposed section 2(a) as they do not involve "a transaction intended to transfer ownership," there is language in some cases to the effect that the constructive intent of the parties to a transaction gives rise to an easement by necessity. Compare Mahony v. Danis, 95 N.J. at 59 (Schreiber, J., dissenting), citing Blumberg v. Weiss, 129 N.J. Eq. 460 (Ch.), aff'd, 130 N.J. Eq. 203 (E. & A. 1941), with Leach v. Anderl, 218 N.J. Super. at 25; Old Falls, Inc. v. Johnson, 88 N.J. Super, 441, 451 (App. Div. 1965). Therefore, caution dictates the inclusion of proposed subsection 2(d) to make it clear that this proposed statute is not intended to effect any change in the law concerning easements by implication or by prescription.

Section 3 - Writing requirement, leases

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

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

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

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

COMMENT

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

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

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

Section 4 - Enforceability of agreements regarding real estate

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

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

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

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

COMMENT

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

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

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

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

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

Consideration. Whether the consideration need be included in an agreement for the sale of land is unclear under present law. R.S. 25:1-8, which was not part of the original Statute of Frauds but was added in 1874, states a general rule that "the consideration of any promise, contract or agreement required to be put in writing by sections 25:1-1 to 25:1-7 of this title, need not be set forth or expressed in such writing, but may be proved by any other legal evidence." This would

appear to provide that an agreement for the sale of an interest in land need not include the purchase price, but case law does not bear out this interpretation consistently. Compare Nibert v. Baghurst, 47 N.J. Eq. 201 (Ch. 1890)("Since [the adoption of this section in 1874] it is not necessary that the consideration of a contract, coming within the statute, should be set out in the memorandum") with Johnson v. Lambert, 109 N.J. Eq. 88, 90 (E. & A. 1931)("It is well settled that the memorandum in writing of a contract for sale of lands must contain the full terms of the contract--that is, the names of the buyer and seller, the subject of the sale, the price, the terms of credit, and the conditions of sale, if any there be.")(dicta). Under this proposed section the consideration need not be included in the writing establishing the agreement.

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

Section 5 - Effect of unwritten transactions

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

COMMENT

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

The Contracts Provisions of the Statute of Frauds

Section 4 of the English Statute of Frauds is one of a number of sections of the original statute that were concerned particularly with suppressing perjury.[2] That section, now section 5 of the New Jersey Statute, provided that "no action may be brought" upon any of five enumerated types of agreements unless the

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

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 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

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[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.

enacted as part of the 1874 revision. These sections imposed a writing requirement on promises to pay debts contracted during infancy, and on real estate broker contracts. The provisions on real estate broker contracts, section 9 of the present statute, will be dealt with separately below. See proposed section 6 and comment.

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

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

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

7 Restatement (Second) of Contracts sec. 112.

COMMENT

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

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

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

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

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

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

Releases. This subsection does not apply to releases. Emerson v. N.Y. - N.J., Inc. v. Brookwood T.V., 122 N.J. Super. 288, 293 (Law Div. 1973). The court commented that "The statute

applies to `a special promise to answer for the debt, default or miscarriage of another person' (N.J.S.A. 25:1-5(b)) but it is silent concerning a release from such a promise. Therefore, although a writing may have been required for the guaranty originally, a release from that obligation could be accomplished orally, notwithstanding the statute of frauds."

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

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

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

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

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[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.").

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 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

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[12] The amended statute would then read:

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

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

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

an anomaly in that it treats separately one class of fiduciaries, while promises by other kinds of fiduciaries to be personally liable for debts are covered under subsection 5(b).[14]

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

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

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

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[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.

[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.

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.

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.

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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);

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 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.

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[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 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 1,2,3,4
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

STATE OF NEW JERSEY

NEW JERSEY LAW REVISION COMMISSION

TENTATIVE REPORT

relating to

Revision of Statutes Concerning Juries

December 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.

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 FEBRUARY 14, 1992, to be considered at the Commission's February 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

INTRODUCTION

In 1982 the Supreme Court Task Force on Jury Utilization and Management completed an extensive study of the jury system and issued a report recommending a wide variety of improvements and modifications in the system of jury selection. Since the issuance of the Task Force Report many improvements have been made in the management of the jury system through changes in court rules and administrative practices. Periods of jury service have generally been decreased, "one day, one trial" systems have been implemented in some counties in order to reduce juror waiting time, and juror yields, i.e., the percentage of summoned jurors who actually appear for jury service, have been improved. However, some of the broader, policy-based recommendations of the Task Force which required legislative change were contained in legislation which was vetoed along with legislation which would have increased juror fees.

This project continues the work of the Law Revision Commission in revising the statutes relating to the New Jersey court system; it constitutes a complete revision in the text and organization of the statutes relating to petit jury and grand jury selection and impaneling. Many of the specific changes recommended in this Report were adopted from the recommendations of the Supreme Court Task Force which were not previously implemented. This Report contains no recommendations, however, on the subject of modifying the present system of juror compensation.

One of the most important recommendations of the Supreme Court Jury Utilization and Management Task Force was that the statutory qualifications for jury service be modified in order to increase the number of citizens eligible for jury service. The Law Revision Commission endorses the position taken by the Supreme Court Task Force on the importance of the civic obligation of all citizens to participate in the jury system. In the words of the Task Force Report, at 10:

> The basic position taken by the Task Force throughout its term was that jury service is an obligation of citizenship in which all citizens are obligated to participate and that no one is too busy or too important to serve. This philosophy is gaining strength throughout the country as part of the many jury reforms being introduced nationwide. The basis for it is fundamental fairness. For years, jury service has been laid on the backs of many of the same people who serve over and over again, while others exercise exemptions or find excuses for not serving. If every citizen did his civic duty and served for one day or one week, serving as a juror once in a lifetime would not be unrealistic. At present, some citizens are serving every few years; this is unfair and should be remedied.

Broadening the jury pool involves a number of specific statutory changes recommended by the Task Force and included in this Report. The first and most important is the elimination of all class and occupational exemptions and disqualifications from jury service. Under the present system automatic exemptions from jury service are available to numerous classes of people, including fish and game wardens, police and fire personnel, physicians and dentists, legislators, and telegraph and telephone operators and linemen. 2A:69-2. Persons either "directly or indirectly connected with the administration of justice" are disqualified from jury service under 2A:69-1. The Task Force report noted that these exemptions and disqualifications result in a significant reduction in the number of persons available for jury service. In one study of the exercise of statutory exemptions, the number ranged as high as 38 and 43 percent in some counties, with a rough average of approximately 20 percent overall. The Task Force Report noted that arguments have been made that some of the exemptions are based on the public necessity of the services provided by police, fire and medical personnel and others included in the exempted classes. As noted in the Task Force Report, however, these arguments are unconvincing, as

vacations, holidays and medical absences are able to be accommodated in these professions and occupations. Moreover, the statutes proposed in this Report include a provision permitting excuses for severe hardship, and a provision permitting deferral of jury service. These provisions will allow any problems stemming from a potential juror's occupational obligations to be dealt with on a case-by-case basis, in the same manner as such issues are raised by citizens in other occupations.

The proposed statutes in this report also include a provisions for a hardship excuse for persons 75 years of age or older, in place of the former disqualification of such persons from jury service. Under this proposed section citizens 75 years of age or older who are able and willing to serve as jurors may do so, while those who are unable may assert the hardship excuse.

Chapter 20 - Qualifications and selection of jurors

2B:20-1. Qualifications of jurors

Every person summoned as a juror:

a. shall be over 18 years of age;

b. shall be able to read and understand the English language;

c. shall be a citizen of the United States;

d. shall be a resident of the county in which the person is summoned;

e. shall not have been convicted of a crime;

f. shall not have any mental or physical disability which will prevent the person from properly serving as a juror; and

g. shall not have served as a juror within the last three years.

Source: 2A:69-1; 2A:69-4

COMMENT

This section combines the separate source sections on qualification and ineligibility for jury service. Certain of the qualification and ineligibility provisions have been eliminated, in accordance with the recommendations of the Supreme Court Jury Utilization and Management Task Force. The upper age limit of 75 for jury service has been eliminated; the new section on excuses from jury service now provides that persons age 75 or over may request an excuse for hardship. The lower age limit has also been changed from 21 to 18. The requirement that jurors be able to write the English language has been eliminated as unnecessary, in accordance with the Task Force recommendation; the requirements that the juror be able to read and understand the English language have been retained. The two-year state residency requirement has been eliminated, to bring the juror eligibility provisions into line with the provisions relating to eligibility to vote and to obtain a driver's license.

The requirement that a juror not be "either directly or indirectly with the administration of justice" has been eliminated, in accordance with the Task Force recommendation that occupational exemptions and qualifications be eliminated. A person's occupation is a factor to be considered in relation to a person's suitability to sit on a particular jury, not as an absolute bar to jury service.

2B:20-2. Preparation of juror source list

a. The names of persons qualified for jury service shall be selected from a single list which shall be composed of the names and addresses of county residents who are registered voters or who are motor vehicle licensees. The county election board and the Division of Motor Vehicles shall provide these lists annually to the Assignment Judge of the county, who shall combine them into a single juror source list.

b. The juror source list shall be compiled once a year, or more often as directed by the Assignment Judge.

Source: 2A:70-1; 2A:70-2; 2A:70-4; 2A:70-6

COMMENT

This section combines the provisions of the source sections, and eliminates some details such as the number of names which must be on a juror list and the requirement that separate lists be prepared for petit jurors and grand jurors. The provision in 2A:70-2 giving the Assignment Judge the discretion to eliminate persons who are in his opinion "unfit for jury service" from the juror list has been eliminated as inappropriate. See the proposed new section on questionnaires, which permits the Assignment Judge to send questionnaires to persons on the juror source list to determine their eligibility for jury service.

In this proposed draft, the Commission has continued the provision in the present statute for the use of voter registration lists and the list of motor vehicle licensees as the source of names of prospective jurors. This Commission is aware, however, of the questions that have been raised concerning the representativeness of these lists, and the probable desirability of using other sources to obtain names of prospective jurors. The Commission is interested in entertaining suggestions as to the availability of additional lists which might increase the representativeness of the present pool of prospective jurors, or of other feasible methods of identifying prospective jurors not presently represented on the voter registration or motor vehicle licensee lists.

2B:20-3. Questionnaires concerning exemption claims and ineligibility

a. The Assignment Judge may direct that questionnaires be sent to potential jurors, requesting that they provide pertinent information concerning their qualifications for jury service, and any claims for exemption, excuse, or deferral.

b. Questionnaires may be sent to all persons on the juror source list, or to persons randomly selected from the juror source list, either prior to or concurrently with the service of a summons for jury service.

Source: 2A:70-5

COMMENT

This proposed section continues the provision in the source section giving each county, at the direction of the Assignment Judge, the option to send questionnaires to persons selected for jury service prior to summoning them for service. The provision in the source section that persons who fail to answer questionnaires are in contempt of court, has been moved to a new section covering failure to appear for service and refusal to serve.

2B:20-4. Public and random selection of jurors

a. Prior to the commencement of each session of the Superior Court, the Assignment Judge shall provide for the drawing of names from the juror source list of

persons to be summoned for service as grand and petit jurors. Both the drawing of names and the assignment of selected names to panels shall be public and random.

b. The Assignment Judge shall specify the number of panels of grand and petit jurors to be drawn, the number of names to be drawn for each panel and the form and manner of preparation of the lists of names drawn. The lists shall state the name and address and, if available, occupation of each juror to be summoned.

c. The Assignment Judge shall provide for the public and random selection of additional panels of grand and petit jurors from the juror source list at any time when it appears that additional panels of jurors will be required.

d. The method of public and random drawing of names from the juror source list and their assignment to panels shall be specified in the Rules of the Supreme Court.

Source: 2A:70-4a; 2A:71-3.1; 2A:71-4; 2A:71-8; 2A:71-10; 2A:71-12

COMMENT

This proposed section combines and simplifies the provisions of the source sections regarding the selection of panels of petit jurors, giving the Assignment Judge of the county the authority to provide for the drawing of an appropriate number of panels prior to the beginning of each session of the Superior Court, and additionally as needed during the session. The method of selection is not specified; the Rules of the Supreme Court may provide for any method of selection that is both public and random. The standard for selection of jurors was discussed in State v. Long, 204 N.J. Super. 469 (Law Div. 1985). The court examined the entire statutory scheme, as well as the constitutional requirements governing the selection of jurors from the juror source list, and concluded that the selection process must be "random," i.e., one "which provides pools of jurors that comprise a representative cross section of the community selected in a manner that gives each person an equal chance to be selected, and which spreads the burden of service evenly among the eligible populace." Id. at 485 n. 9.

2B:20-5. Certification, filing and posting of juror lists

The list of names randomly selected from the juror source list shall be certified by the Assignment Judge and shall be filed in the office of the County Clerk. A copy of the list shall be publicly posted in the office of the County Clerk.

Source: 2A:70-3

COMMENT

This proposed section continues the prior practice requiring certification and filing of juror lists, and their public posting in the office of the County Clerk.

2B:20-6. Designation of period of service for petit jury panels

a. The Assignment Judge shall designate the period of service of each panel of jurors selected from the juror source list.

b. A panel of jurors may be designated to serve during a portion of the then current session of the Superior Court, or during a portion of the next session of the Superior Court.

Source: 2A: 71-9

COMMENT

This section gives the Assignment Judge the power to designate the period of service of each panel of petit jurors. The current practice varies depending upon the needs of each individual county, but is usually one or two weeks. Subsection b. gives the Assignment Judge the power to designate that a panel shall serve during the then current session, or during the next session of the Superior Court. There are three sessions of the Superior Court each year. See R. 1:30-2(b).

2B:20-7. Summoning of jurors

a. Upon receipt of a list of persons selected to serve on a panel of jurors, the sheriff shall, under the direction of the Assignment Judge, cause the persons to be summoned.

b. The sheriff shall make a return to the Assignment Judge of all of the jurors summoned.

Source: 2A:72-2, 2A:72-4

COMMENT

Subsection a. of this proposed section substantially continues the language of source section 2A:72-2. Subsection b. reduces source section 2A:72-4 to its essential content of requiring the sheriff to make a return to the Assignment Judge of all jurors summoned.

2B:20-8. Form and service of summons

a. The summons for jury service shall be by written notice and shall state the date, time and place where the juror is to appear for service.

b. The summons shall be served at least 30 days prior to the date upon which the juror is to appear, by regular mail addressed to the juror's usual residence or business address unless service at another address is ordered by the Assignment Judge. Service of the summons shall be complete upon mailing.

c. If all available panels of jurors are successfully challenged and new panels of jurors must be selected from the juror source list, the Assignment Judge may direct that the summons be served less than 30 days prior to the date upon which the jurors are to appear.

Source: 2A:72-5, 2A:71-11

COMMENT

This proposed section simplifies the language of the source section, and continues the practice of summoning jurors by mail. The jurors must be summoned 30 days before they are required to appear. The thirty day period specified in the source section balances the need of the courts in having sufficient available jurors, and the need of persons summoned for jury service to make appropriate arrangements to permit them to serve. Subsection c. permits service of the summons less than 30 days before the required appearance in the exceptional situation in which all available panels of jurors have been successfully challenged and additional panels of jurors must be summoned.

2B:20-9. Excuses and deferrals by Assignment Judge; in writing

a. A person may be excused from jury service or may have jury service deferred only by the Assignment Judge of the county in which the person was summoned, or by a judge designated by the Assignment Judge.

b. All requests to be excused from jury service or to have jury service deferred shall be in writing and shall include facts supporting the grounds for excuse or deferral. The Assignment Judge may require verification of any of the facts supporting the grounds for the request.

Source: 2A:78-1

COMMENT

This proposed section requires requests for excuses or deferrals to be submitted in writing to the Assignment Judge.

2B:20-10. Grounds for excuse from jury service

An excuse from jury service shall be granted only if jury service will impose a severe hardship due to circumstances which are not likely to change within the following year. Severe hardship includes the following circumstances:

a. The prospective juror has a medical inability to serve which is verified by a licensed physician.

b. The prospective juror will suffer a severe financial hardship which will compromise the prospective juror's ability to support himself, herself, or dependents. In determining whether to excuse the prospective juror, the Assignment Judge shall consider:

(1) the sources of the prospective juror's household income; and

(2) the availability and extent of income reimbursement; and

(3) the expected length of service.

c. The prospective juror is a full-time student and the scheduled jury service is during the school term.

d. The prospective juror has a personal obligation to care for another, including a sick, aged or infirm dependent or a minor child, who requires the prospective juror's personal care and attention, and no alternative care is available without severe financial hardship on the prospective juror or the person cared for.

e. The prospective juror provides highly specialized technical health care services, such as medical and dental services, for which replacement cannot reasonably be obtained.

f. The prospective juror is a health care worker directly involved in the care of a mentally or physically handicapped person, and the prospective juror's continued presence is essential to the regular and personal treatment of that person.

g. The prospective juror is a member of the full-time instructional staff of a grammar school or high school, the scheduled jury service is during the school term, and a replacement cannot reasonably be obtained. In determining whether to excuse the prospective juror or grant a deferral of service, the Assignment Judge shall consider:

(1) the impact on the school of the number and function of teachers called for jury service during the current academic year; and

(2) the special role of certified special education teachers in providing continuity of instruction to handicapped students.

Source: 2A:78-1

COMMENT

This proposed section follows the recommendation of the Supreme Court Jury Utilization and Management Task Force that excuses from jury service be given only in cases of severe hardship. The source section permitted excuses from jury service without setting a standard for the granting of excuses, and permitted the Assignment Judge to designate a later time when the excused juror might serve. This proposed section and the one following it clearly distinguish excuses from deferrals. An excuse from jury service discharges the potential juror's obligation to serve until the juror is next selected from the jury list. A deferral from jury service results in the rescheduling of jury service to a later time within a year.

The severe hardship must be expected to continue for a year period. Thus, for example, if a person has a physical inability to serve due to recuperation from surgery, a deferral of service usually will be appropriate rather than an outright excuse.

2B:20-11. Deferral of jury service

Upon a request for deferral of jury service or upon the denial of a request for an excuse from jury service, the Assignment Judge may order that the jury service of a prospective juror be deferred to another time within the following year.

Source: 2A:78-1

COMMENT

This proposed section complements the new section on excuses from jury service. A prospective juror whose request for an excuse is denied, or who requests a deferral in the first instance, may be granted a deferral of jury service to another time within the following year. No attempt is made in this section to detail the myriad circumstances which would justify the granting of a deferral of jury service; the matter is left to the sound discretion and experience of the Assignment Judge.

2B:20-12. Discharge of unneeded jurors

If the number of jurors in attendance is greater than is necessary for the business of the court, the Assignment Judge may discharge the unneeded jurors before the expiration of the period for which they were summoned.

Source: 2A:78-3

COMMENT

This section is substantially identical to the source section, except for the elimination of the requirement that the jurors to be discharged be randomly selected.

2B:20-13. Failure to respond to questionnaire or summons

a. Persons randomly selected from the juror source list who are sent questionnaires concerning their qualifications for jury service who fail to respond to the questionnaire without reasonable excuse shall be liable for a fine not to exceed $50, payable to the county from which the questionnaire was sent, and may be punished for contempt of court.

b. Persons summoned as jurors who, without reasonable excuse, either fail to appear for jury service or refuse to serve, shall be liable for a fine not to exceed $50, payable to the county in which the person was summoned, and may be punished for contempt of court.

Source: 2A:70-5; 2A:79-1

COMMENT

This section conforms the provisions of the two source sections by imposing a specific fine both for failing to respond to a questionnaire regarding jury service and for failing to appear for service or for refusing to serve. An additional section, 2A: 79-4, containing a sanction for refusal to be sworn as a juror, is recommended for repeal as unnecessary; the refusal to be sworn should be treated under this new section as a refusal to serve.

2B:20-14. Notice and collection of fines

a. The Assignment Judge may direct the sheriff to send written notice to a person who has failed to respond to a questionnaire concerning jury service, or who has failed to appear for jury service or refused to serve, that a fine has been imposed. The notice shall state the amount of the fine, the manner of payment to be made to the sheriff, and the consequences of failure to pay the fine within 30 days of the date specified in the notice. The notice shall be served in the same manner as a summons.

b. If a defaulting juror fails to pay the fine in response to the notice, the Assignment Judge may issue process directing the sheriff to recover the fine and costs by levy on the defaulting juror's personal property.

Source: 2A:79-2, 2A:79-3

2B:20-15. Excuse from employment for jury duty; compensation

Any person employed by any agency or instrumentality of the State or of any political subdivision of the State shall be excused from employment on all days the person is required to be present for jury service in any court of this State or in the United States District Court for New Jersey, and shall be entitled to receive from the employer the person's usual compensation for each day the person is present for jury service, less the amount of per diem fee for each day of jury service as shown on a statement issued to the juror by the sheriff or other court officer making payment of juror fees.

Source: 2A:69-5; 2A:69-6

COMMENT

This proposed section combines the provisions of the source sections and generalizes the language of the source provisions.

2B:20-16. Employment protection

a. An employer shall not deprive an employee of employment, or threaten or otherwise coerce an employee with respect to that employment, because the employee receives a summons, responds, attends court for prospective jury service or serves as a juror.

b. An employer who violates subsection a. of this section is guilty of a disorderly persons offense.

c. If an employer discharges an employee in violation of subsection a. of this section, the employee may bring a civil action for economic damages suffered as a result of the violation and for an order requiring the reinstatement of the employee. The action shall be commenced within 90 days from the date of discharge or the completion of jury service, whichever is later. If the employee prevails, the employee shall be entitled to reasonable attorney's fee fixed by the court.

Source: New

COMMENT

One of the most important recommendations of the Supreme Court Jury Utilization and Management Task Force was that persons summoned for jury service be protected from retaliation by an employer for fulfilling this important civic obligation. This section prohibits employers from firing, threatening or coercing employees who appear for jury service, and declares it a disorderly persons offense to do so. The employee is also provided with a civil action for recovery of economic damages, and for reinstatement, if the employee is fired for appearing for jury service. The term "economic damages" is intended to exclude recovery for pain and suffering and emotional distress.

2B:20-17. Oath of allegiance

The following oath shall be administered to every person summoned for service as a juror who is not excused from service shall, before beginning service upon the panel:

"Do you swear or affirm that you will support the Constitution of the United States and the Constitution of this State?"

Source: 2A:69-1.1

COMMENT

This section eliminates the additional language which was added to the source section in 1953.

Chapter 21 - County grand juries

2B:21-1. Number of grand juries

The Assignment Judge of each county shall impanel one or more grand juries for that county, as the public interest requires. There shall be at least one grand jury serving in each county at all times.

Source: 2A:71-5; 2A:71-6; 2A:71-7

COMMENT

This section has been rewritten to parallel the sections on petit jurors. The particularity of sections 2A:71-6 and 2A:71-7 are unnecessary in light of the generality of this proposed section.

2B:21-2. Impaneling grand jury

a. A grand jury shall consist of not more than 23 persons selected from the panel of jurors summoned for service as grand jurors. The grand jurors shall be selected publicly

and randomly, in the same manner as is provided by statute for the impaneling of petit jurors.

b. The Assignment Judge shall conduct the voir dire of members of the grand jury panel and shall decide all requests for excuse or deferral of service on the grand jury.

c. The prosecutor may object to the selection of any person as a grand juror for cause, on the basis of the person's inability to be impartial or on the grounds that the person does not meet the qualifications specified in [proposed section 2B:20-1]. The objections of the prosecutor shall be made in open court and shall be decided by the Assignment Judge.

Source: 2A:73-1; 2A:78-6; new

COMMENT

The substance of subsection a. of this section is drawn from 2A:73-1, but states in the affirmative that the grand jury consists of no more than 23 members, and that the selection of persons for grand jury service shall be public and random. The source section stated these matters inferentially. Subsections b. and c. are new, but reflect the long-standing practice in the impaneling of a grand jury. The Assignment Judge conducts the selection process and the voir dire; the prosecutor may be present and may object to the selection of any grand juror for cause, on the ground that the juror is unable to be impartial. The prosecutor's objections must be made in open court and be decided by the Assignment Judge; unlike the impaneling of a petit jury, the prosecutor is not entitled to any peremptory challenges in the impaneling of a grand jury.

2B:21-3. Oath of grand jurors

The following oath shall be administered to all of the members of the grand jury:

"Do you as a member of this grand jury of the State of New Jersey and county of (county) swear or affirm that you will support the Constitution of the United States and the Constitution of this State; that you will diligently inquire into all matters brought before you to the best of your skill, knowledge and understanding; that you will take no action through envy, hatred or malice nor for fear, favor or affection, or for reward or the hope of reward; and that you will keep secret the proceedings of the grand jury?"

Source: 2A:73-3

COMMENT

This section continues the substance of the source section while simplifying its language.

2B:21-4. Vacancies in grand jury

A grand juror who becomes ill, dies or does not appear for service after having been sworn may be replaced at the direction of the Assignment Judge. The replacement grand juror shall be selected publicly and randomly from the same panel as the grand juror being replaced or from another panel of grand jurors and shall be sworn in the same manner as the grand juror being replaced.

Source: 2A:73-2

COMMENT

This section continues the substance of the source section while simplifying its language.

2B:21-5. Selection of juror-in-charge and acting juror-in-charge

The juror-in-charge and the acting juror-in-charge of each grand jury shall be selected publicly and randomly from the 23 persons impanelled as members of the grand jury. A person selected as the juror-in-charge or acting juror-in-charge may freely decline to serve in the position, in which case another person shall be selected publicly and randomly to serve.

Source: New

COMMENT

This new section addresses the problem discussed in State v. Russo, 213 N.J. Super. 219, 228-29 (Law Div. 1986), and State v. Ramseur, 106 N.J. 123, 236-38 (1987), concerning the manner in which the foreman and acting foreman of the grand jury are selected. A person selected as juror-in-charge or acting juror-in-charge may freely decline the position, but remains a member of the grand jury.

The Commission recommends the adoption of the terms "juror-in-charge" and "acting juror-in-charge" in lieu of the terms "foreman" and "acting foreman" used in the current statutes or the terms "foreperson" and "acting foreperson" which have been adopted by the judiciary.

2B:21-6. Swearing of witnesses by juror-in-charge

a. The juror-in-charge of the grand jury shall administer the following oath to witnesses who give evidence before the grand jury:

"Do you swear or affirm that you will tell the truth, the whole truth, and nothing but the truth?"

b. The juror-in-charge shall, before being discharged, certify to the court the names of the witnesses who have been sworn.

Source: 2A:73-4

COMMENT

This section continues the substance of the source section while simplifying its language. The text of the oath to be taken by grand jury witnesses has been added.

2B:21-7. Return of indictment

An indictment may be found only upon concurrence of 12 or more grand jurors who either were present during the presentation of the evidence supporting the indictment, or who have read the transcript of the proceedings during which the evidence was presented.

Source: New

COMMENT

This provision codifies the common law rule stated in State v. Reynolds, 166 N.J. Super. 570 (Law Div. 1979) that 12 jurors must vote to return an indictment, as modified in State v. Ciba-Geigy Corp., 222 N.J. Super. 343 (App. Div. 1988), which held that an absent grand juror may cast a valid vote if the grand juror has reviewed the stenographic transcript of the presentation for which the grand juror was absent.

2B:21-8. Transcriptions

In any proceeding before a grand jury the testimony of witnesses, comments by the prosecuting attorney, and colloquy between the prosecuting attorney and witnesses or members of the grand jury shall be transcribed.

Source: 2A:73B-1

COMMENT

This section continues the substance of the source section while simplifying its language.

2B:21-9. Statement of investigation

a. A person who has been investigated by a grand jury and against whom no indictment has been returned, may request the grand jury to issue a statement indicating that a charge against the person was investigated and that the grand jury did not return an indictment from the evidence presented. The grand jury shall issue the statement upon the approval of the court which summoned the grand jury. The statement shall issue upon the completion of the investigation of the charge, but not beyond the end of the grand jury's term.

b. A person who has been called to appear before a grand jury for a purpose other than the investigation of a charge against the person, may request the grand jury to issue a statement indicating that the person was called only as a witness in an investigation, and that the investigation did not involve a charge against the person. The grand jury shall issue the statement upon the approval of the court which summoned the grand jury. The statement shall issue upon the completion of the investigation of the charge, but not beyond the end of the grand jury's term.

Source: 2A:73B-2

COMMENT

This section continues the substance of the source section while simplifying its language.

2B:21-10. Unauthorized disclosure of grand jury proceedings

a. Any person who, with the intent to injure another, purposely discloses any information concerning the proceedings of a grand jury, other than as authorized or required by law, commits a crime of the fourth degree. A public officer or employee who is convicted of a violation of this section shall be dismissed from public office or employment.

b. A person injured as a result of a violation of subsection a. of this section may bring a civil action against the person convicted of the violation. The person convicted shall be liable to the person injured for actual damages, punitive damages of not less than $1,000.00 or more than $100,000.00, reasonable litigation costs and reasonable attorney fees.

Source: 2A:73B-3

COMMENT

This section continues the substance of the source section while simplifying its language.

Chapter 22 - State grand juries

2B:22-1. Impaneling state grand jury

a. There shall be at least one State grand jury with jurisdiction extending throughout the State serving at all times.

b. The State grand jury shall be impaneled by an Assignment Judge of the Superior Court designated for this purpose by the Chief Justice.

c. The Attorney General or the Director of the Division of Criminal Justice may, as the public interest requires, apply in writing to the Assignment Judge requesting that one or more additional State grand juries be impaneled. The judge may, for good cause shown, order the impaneling of additional State grand juries.

Source: 2A:73A-2

COMMENT

This section continues the substance of the source section while simplifying its language.

2B:22-2. Powers and duties

a. A State grand jury shall have the same powers and duties and shall function in the same manner as a county grand jury except that its jurisdiction shall extend throughout the State. The law applicable to county grand juries shall apply to State grand juries to the extent that it is consistent with the specific provisions relating to State grand juries.

b. The Supreme Court may promulgate rules to govern particularly the procedures of State grand juries.

Source: 2A:73A-3

COMMENT

This section continues the substance of the source section while simplifying its language.

2B:22-3. Selection of grand jurors

a. The Administrative Director of the Courts, upon receipt of an order directing the impaneling of a State grand jury, shall prepare a list of prospective jurors randomly drawn from the current juror lists of the several counties. The list of prospective state grand jurors prepared by the Administrative Director of the Courts shall contain numbers of prospective jurors from each county in the same relative proportion as the number of persons on the juror source list of each county bears to the total number of persons on the juror source lists of all counties combined.

b. The designated Assignment Judge shall impanel a State grand jury from the prospective jurors on the list. The selection of jurors for service on the state grand jury shall be public and random.

Source: 2A:73A-4

COMMENT

The Commission recommends that the restriction in the prior statute on the number of state grand jurors from any single county who may serve on a particular state grand jury be abandoned as it raises constitutional questions concerning the randomness and representativeness of the state grand jurors. The Commission recommends a system in which the selection of state grand jurors is completely random and is as similar as possible to the selection process used for county grand jurors. The Commission's recommended solution to the problem of representativeness in state grand juries is the random selection of state grand jurors from a list composed of a proportional number of jurors from each county in the state. Proposed subsection a. provides that the Administrative Director of the Courts shall obtain a list of names from each county of a specific number of prospective grand jurors based upon the number of available jurors in that county, relative to the total number of available jurors in the state.

2B:22-4. Summoning of jurors

The Administrative Director of the Courts shall transmit the names of the prospective jurors selected for service on the State grand jury to the sheriffs of the counties in which the prospective jurors reside. The sheriffs of the respective counties shall cause the prospective jurors resident in their counties to be summoned for service on the State grand jury.

Source: 2A:73A-5

COMMENT

This section continues the substance of the source section while simplifying its language.

2B:22-5. Judicial supervision

The Assignment Judge who issues an order impaneling a State grand jury shall maintain judicial supervision over the grand jury. All indictments, presentments and formal returns of any kind made by a State grand jury shall be returned to the Assignment Judge who impanelled the grand jury.

Source: 2A:73A-6

COMMENT

This section continues the substance of the source section while simplifying its language.

2B:22-6. Presentation of evidence

The Attorney General or his designee shall present evidence to the State grand jury.

Source: 2A:73A-7

COMMENT

This section continues the substance of the source section while simplifying its language.

2B:22-7. Return of indictment or presentment

The Assignment Judge who issues an order impaneling a State grand jury shall designate the county of venue for the purpose of trial of an indictment returned by the

State grand jury. The Assignment Judge may direct the consolidation of an indictment returned by a county grand jury with an indictment returned by a State grand jury and may fix the venue for trial of both indictments.

Source: 2A:73A-8

COMMENT

This section continues the substance of the source section while simplifying its language.

2B:22-8. Expenses

a. The expenses of impaneling a State grand jury and for the performing of its functions and duties shall be paid by the State out of funds appropriated for this purpose to the Department of Law and Public Safety, Division of Criminal Justice.

b. The expenses incurred by a county for the prosecution and trial of State grand jury indictments shall be paid by the State out of funds appropriated for this purpose to the Department of Law and Public Safety, Division of Criminal Justice. The county treasurer shall make application for payment of the expenses to the Assignment Judge of the county, and the Assignment Judge shall certify and fix the amount of the expenses.

Source: 2A:73A-9

COMMENT

This section continues the substance of the source section while simplifying its language.

Chapter 23 - Petit Jurors

2B:23-1. Number of jurors

a. Juries in criminal cases shall consist of 12 persons. Before verdict the parties may stipulate in writing and with court approval that the jury number fewer than 12 except in trials of crimes punishable by death.

b. Juries in civil cases shall consist of 6 persons unless the court shall order a jury of 12 persons for good cause shown.

Source: New

COMMENT

This section reflects the amendments made to the New Jersey Constitution, Art. 1, ¶9, in 1973, and to R. 1:8-2 in 1975.

2B:23-2. Selection of trial jury from panel

a. When a jury is required for trial, the names or identifying numbers of the jurors who constitute the panel or panels from which the jury is to be selected shall be placed on uniform pieces of paper. The pieces of paper shall be rolled up separately and deposited in a box.

b. The box containing the names shall be shaken so as to intermix thoroughly the pieces of paper and the proper officer shall, at the direction of the court, publicly in open court, draw from the box, one at a time, the pieces of paper until the necessary number of persons is randomly selected. If any of the persons so selected is successfully challenged or excused from serving on that jury, the drawing shall be continued until the necessary number of persons is selected.

Source: 2A:74-1; 2A:74-8

COMMENT

This section retains the specific procedure in 2A:74-1 for selecting the jury. In the controlling case, State v. Wagner, 180 N.J. Super. 564 (App. Div. 1981), the trial judge exercised no procedure to assure randomness; he simply placed in the jury box the first fourteen jurors who entered the courtroom. The appellate court reversed the two defendants' convictions, finding it "vital that the juries be selected in a manner wholly free from taint and suspicion. To that end the pertinent practice safeguards in the statute must be carefully observed." Wagner, 180 N.J. Super at 567.

2B:23-3. Impaneling of additional jurors

When a trial is likely to be protracted, the court may direct the impaneling of a jury with additional members having the same qualifications and impaneled and sworn in the same manner as a jury of 12 or 6. All the jurors shall hear the case, but the court for good cause may excuse any of them from service provided the number of jurors is not reduced to less than 12 or 6 in an appropriate civil case. If more than the prescribed number are left on the jury at the conclusion of the court's charge, the clerk of the court in its presence shall, by drawing names, randomly select that number of jurors' names as will reduce the jury to the required number.

Source: 2A:74-2

COMMENT

This section streamlines the source statute amended in 1975.

2B:23-4. Names of jurors drawn for trial jury replaced in pool

After a jury has been selected and sworn, the proper officer shall return the names or identifying numbers of jurors not sworn to try the case to the general pool of eligible jurors before the drawing of another jury. As soon as the jury has rendered a verdict or is discharged by the court, the names or identifying numbers of those jurors shall be returned to the general pool of eligible jurors unless the Assignment Judge directs otherwise.

Source: 2A:74-5

COMMENT

This section is a more concise version of the source statute.

2B:23-5. Oath of jurors

The following oath shall be administered to each juror:

"Do you swear or affirm that you will try the matter in dispute between..., plaintiff, and..., defendant, and give a true verdict according to the evidence?"

Source: 2A:74-6

COMMENT

This section deletes the archaic language of the source section.

2B:23-6. Oath of officer attending jury

The following oath shall be administered to the officer appointed to attend the jury:

"Do you swear or affirm that you will do your best to keep every person sworn on this jury together in a private place, and that you will not allow any person to speak to them, nor speak to them yourself, except by order of the court, and except to ask them if they have agreed on a verdict, until they have so agreed?"

Source: 2A:74-7

COMMENT

This section eliminates the archaic language of the source section.

2B:23-7. Jurors to serve beyond period for which drawn until completion of trial

When a jury does not complete its trial service during the session for which its members are to serve as jurors, the court may order that the jury shall serve until the completion of the trial even though such trial may extend into the next session or sessions.

Source: 2A:74-11

COMMENT

This section reduces the wordiness of the source section.

2B:23-8. Juries drawn from other counties

a. When a court orders a trial by a jury drawn from outside the county in which the court is sitting, the order shall specify the number of jurors to be returned and shall be directed, and made returnable, to the sheriff of the county from which the jury is to be taken. The jurors shall be competent jurors in the county from which they are to be taken and shall be selected in the same manner as the general panel of jurors is selected.

b. The county in which the trial will be held shall pay the expense of summoning and returning the jurors and of their attendance at the court.

Source: 2A:76-1, 2A:76-2

COMMENT

This section condenses and combines the two source sections and the versions of them in the Report of the Jury Utilization and Management Task Force and deletes the designation, "foreign jury."

2B:23-9. Examination of jurors

a. Within the discretion of the court, parties to any trial may question any person summoned as a juror after the name is drawn and before the swearing, and without the interposition of any challenge, to determine whether or not to interpose a peremptory challenge or a challenge for cause.

b. The examination as to competency shall be under oath only in cases in which a death penalty may be imposed. Such examination shall be permitted in order to disclose whether or not the juror is qualified, impartial and without interest in the result of the action. The questioning shall be conducted in open court under the trial judge's supervision.

Source: 2A:78-4

COMMENT

This section is a concise version of the source section and is consistent with R. 1:8-3(a). In State v. Moore, 122 N.J. 420, 457 (1991), the court defined the test for excluding a prospective juror for cause as "whether the person's beliefs or attitudes would substantially interfere with the duties of a juror."

2B:23-10. Challenge to qualifications of jurors

It shall be good cause for challenge to any person summoned as a juror that the person does not possess the qualifications required by [proposed section 2B:20-1] or that the person's name does not appear on the jury lists prepared pursuant to [proposed section 2B:20-4]. If the challenge is verified according to law or on the person's oath, the person shall be discharged.

Source: 2A:69-3, 2A:78-6

COMMENT

This section combines the substantial elements of the two source sections. The second paragraph of 2A:78-6 has been eliminated as duplicative of proposed section 2B:23-14.

2B:23-11. Interest in action by or against county or municipality

Where a county or municipality is or may be a party or otherwise interested in an action, it shall not be a ground for challenge to the jury panel that the sheriff, constables or jurors are inhabitants of the county or municipality, interested in the action, or liable to be taxed therein.

Source: 2A:78-5

COMMENT

This section retains the substance of the versions found in the source section and in the Report of the Jury Utilization and Management Task Force. The statute, passed originally in 1849, was the basis of the recent decision in In re Presentation of Passaic Cty. Grand Jury, 220 N.J. Super. 470 (Law Div. 1986). The court denied petitioners' (former Paterson municipal officials) motion to quash a grand jury presentment which charged them with mismanagement of CETA funds. The court found no evidence that participation of five Paterson residents on the grand jury comprised per se bias and articulated the benefit derived from N.J.S. 2A:78-5 which bars per se disqualification of residents and taxpayers.

2B:23-12. Peremptory challenges

Upon the trial of any action in any court of this State, the parties shall be entitled to peremptory challenges as follows:

a. In any civil action, each party, 6.

b. Upon an indictment for kidnapping, murder, aggravated manslaughter, manslaughter, aggravated assault, aggravated sexual assault, sexual assault, aggravated criminal sexual contact, aggravated arson, arson, burglary, robbery, forgery if it constitutes a crime of the third degree as defined by subsection b. of N.J.S. 2C:21-1, or perjury, the defendant, 20 peremptory challenges if tried alone and 10 challenges if tried jointly and the State, 12 peremptory challenges if the defendant is tried alone and 6 peremptory challenges for each 10 afforded defendants if tried jointly. The trial court, in its discretion, may, however, increase proportionally the number of peremptory challenges available to the defendant and the State in any case in which the sentencing procedure set forth in subsection c. of N.J.S. 2C:11-3 might be utilized.

c. Upon any other indictment, defendants, 10 each; the State, 10 peremptory challenges for each 10 challenges allowed to the defendants. When the case is to be tried by a foreign jury, each defendant, 5 peremptory challenges, and the State, 5 peremptory challenges for each 5 peremptory challenges afforded the defendants.

Source: 2A:78-7

COMMENT

This section is virtually identical to the source section except for the renumbering of the subsections.

2B:23-13. Trial of challenges to jurors

All challenges to panels of jurors or to individual jurors shall be tried by the court.

Source: 2A:78-8

COMMENT

This proposed section retains the substance of the source section.

2B:23-14. Time for making challenges

All challenges to jurors, in any action, shall be made before the juror is sworn.

Source: 2A:78-9

COMMENT

This section is substantially the same as the source section except that it is rephrased in the affirmative; the source section states that challenges "may be made at any time before the juror is sworn." 2A:78-9.

2B:23-15. Jury of view

a. At any time during trial the court may order that the jury view the lands, places or personal property in question to understand the evidence better. The court shall direct the viewing procedure. The order shall be directed to the proper officer, specifying the day

and place in question. Neither side shall give evidence when the jury is viewing. The officer who executes the order shall, by a special return, certify that the view has occurred according to the order.

b. Both parties shall bear equally the expenses of a view.

c. The trial shall proceed even though a view which was ordered is not had.

Source: 2A:77-1, 2A:77-3, 2A:77-2

COMMENT

Subsection a. of the section condenses source section 2A:77-1 and its version in the Report of Jury Utilization and Management Task Force. Subsection b. retains the substance of source section 2A:77-3. Subsection c. condenses source section 2A:77-2.

2B:23-16. Verdict by five-sixths of the jury

In any civil trial by jury, at least five-sixths of the jurors shall render the verdict unless the parties stipulate that a smaller majority of jurors may render the verdict.

Source: 2A:80-2

COMMENT

This section condenses the source section and is consistent with R. 1:8-9.

2B:23-17. Disagreement of jurors

If the jury does not agree on a new verdict, the court may order a new trial.

Source: 2A:80-3

COMMENT

This section modernizes the source section.

SECTIONS TO BE COMPILED ELSEWHERE:

NOTE:

The following revised section should be compiled with the general provisions in Title 2B concerning court personnel.

Employment protection

Clerks and stenographers in the office of the commissioner of juries, who were employed pursuant to N.J.S. 2A:68-12 on the effective date of L.1989, c.87, sec. 14, shall not be deprived of any tenure right or any right of protection provided by Title 11A of the New Jersey Statutes or any pension law or retirement system by virtue of the repeal of N.J.S. 2A:68-12.

Source: 2A:68-12.1

NOTE:

It is presently unclear whether the following three sections are still necessary, considering the general provisions in new Title 2B. If it is necessary to retain them separately, they should be compiled with the general provision in Title 2B concerning court personnel.

2A:73-5. Clerk to grand jury

The county court of each county may, under its seal, appoint a clerk for the grand jury in and for each county, for a term not exceeding 3 years, unless sooner removed by the court. The clerk shall, when requested by the grand jury, attend its sessions, but shall not attend its deliberative sessions.

2A:73-6. Salaries of clerks to grand juries

The clerks to the grand juries shall receive such annual salaries as shall be fixed by the courts appointing them. All salaries herein provided shall be paid monthly by the county treasurer of the respective counties.

Amended by L.1963, c. 82, 1, eff. June 6,1963.

2A:73-7. Assistant to clerk of grand jury

In any county of the first, second, third and fifth classes the assignment judge of the Superior Court for such county may designate 1 or more competent stenographers who are regularly employed at a stated salary in the office of the prosecutor of such county, to act, if and when required in addition to their regular duties, as an assistant to the clerk of the grand jury of such county. The person, or persons, so designated shall, when requested by the grand jury attend its sessions and take minutes of the evidence there adduced. The person or persons so designated shall not be entitled to any extra compensation for their services as assistant to the clerk of the grand jury provided, however, the board of chosen freeholders may fix and pay extra compensation for the person or persons so designated for their services as assistant to the clerk of the grand jury to the extent necessary to compensate such person or persons for such additional responsibilities and work.

Amended by L.1955, c. 242, p. 918, 1, eff. Dec. 15, 1955.

SECTIONS TO BE RECOMMENDED FOR REPEAL:

2B:20-2 Exemptions from jury service [section deleted]

Source: 2A:69-2

COMMENT

This section is no longer necessary as the Commission is recommending the elimination of all exemptions from jury service.

2A:70-4.1. Verification of compliance with act; annual report

The Director of the Administrative Office of the Courts shall monitor compliance with the provisions of this act, and prepare and furnish to the Legislature, on an annual basis, a report on the operation of the jury system in New Jersey, accompanying the same with any recommendations it may desire to recommend for adoption by the Legislature.

L.1979, c. 271, 2.

COMMENT

This section is recommended for repeal as unnecessary.

2A:71-13. Duties of county clerk performed by judge of the county court

If the clerk of a county, upon whom any duty is imposed by this subtitle, or his deputy authorized to act in his place, is for any cause absent at the time and place when and where any of such duties are required to be performed, a judge of the county court may perform the duties of the clerk.

COMMENT

This section is recommended for repeal as unnecessary; note that the county court no longer exists.

2A:71-14. Existing powers not affected

No provision of this subtitle having to do with the drawing and discharge of jurors or panels of jurors shall be held or construed to affect or limit in any way the powers, vested in any court as the successor of another court or courts, which were heretofore had or exercised by the latter court or courts.

COMMENT

This section is recommended for repeal as unnecessary.

2A:72-1. Ordering of jurors; service

Grand and petit jurors shall be ordered by the assignment judge of the superior court for the county or, by his order or in his absence, by a judge designated by him for that purpose, or as provided by this chapter. The petit jurors shall serve in the superior court and county court in the county and may, if such assignment judge so orders, be required to serve in other courts of the county.

COMMENT

This section is recommended for repeal as unnecessary.

2A:72-6. Execution of orders for juries by elisors in particular causes

When an order shall be directed to the elisors for a jury for the trial of a particular cause, the same shall be executed and the jury thereby required shall be summoned by the elisors in the same manner as by law was required to be done in such a case prior to March 9, 1836, notwithstanding any of the provisions of this subtitle relating to the drawing, summoning and impaneling of juries.

Amended by L.1971, c. 2, 5, eff. Jan. 15, 1971.

COMMENT

This section is recommended for repeal as unnecessary.

2A:72-7. Jurors not disqualified for race, color, creed, national origin, ancestry, marital status or sex; penalty

No citizen possessing all other qualifications prescribed by law shall be disqualified for service as a grand or petit juror in any court on account of race, color, creed, national origin, ancestry, marital status or sex, and any officer or other person charged with any duty in the selection or summoning of jurors who shall exclude or fail to summon any citizen for the cause aforesaid shall, on conviction thereof, be deemed guilty of a misdemeanor, and be fined not more than $5,000.00.

COMMENT

This provision is recommended for repeal as unnecessary, as there is an identical provision in Title 10 Civil Rights, enacted as R.S. 10:1-8.

2A:72-8. Accepting reward for summoning or excusing jurors; summoning persons applying to be summoned; forfeiture; recovery; disposition

No sheriff or other officer, or any deputy thereof, shall, directly or indirectly, take, accept or receive money or other reward or thing to summon or return any person for service on any jury or to excuse any person from being summoned or returned or from serving on any jury, nor shall any such officer summon or return any person who may have applied to him to be summoned or returned as a juror.

For every violation of this section the person guilty thereof shall forfeit $150.00, recoverable, with costs, in an action in any court of record of competent jurisdiction. One moiety of the forfeiture recovered shall go to the State and the other moiety to any person prosecuting therefor.

COMMENT

This section is recommended for repeal as unnecessary; this offense is now covered under 2C:30-1 - official misconduct.

2A:73A-1. Persons and number thereof constituting grand jury

This act shall be known and may be referred to as the "State Grand Jury Act."

COMMENT

This section is recommended for repeal as unnecessary.

2A:74-3. Talesmen to complete jury when general panel exhausted; qualifications, challenges and excuses

If, by reason of challenges, excuses, or the default of jurors or otherwise, a sufficient number cannot be had of the jurors on the original panel or on available additional panels, to try the issue or cause, either party may request that the court order the sheriff or other proper officer to summon such number of bystanders or other persons immediately available as may be necessary to complete the jury and make return thereof immediately. Upon such order such persons shall be summoned and a return made. The new talesmen shall be liable to the same challenges as the jurors on the original panel.

COMMENT

This section is recommended for repeal as unnecessary; this procedure for obtaining additional jurors ("talesmen") is no longer used as it raises questions concerning the random selection of the jury from a cross-section of the community.

2A:74-4. Names of selected trial jurors returned by sheriff

When a jury has been selected and sworn, the sheriff or other proper officer shall make a return of their names, as the panel of jurors summoned therein. The return shall be a part of the record in the cause, but the trial of the cause may proceed forthwith although the return has not been made.

COMMENT

This section is recommended for repeal as unnecessary.

2A:74-10. Talesmen for general panel of trial jurors for trial of criminal causes

When the general panel or list of jurors served on a defendant in any criminal case in which he shall be entitled to 20 peremptory challenges shall, from any cause, be exhausted before a jury for the trial of the indictment shall be obtained, the sheriff or other proper officer shall forthwith summon, from among the bystanders or others, such additional number of persons qualified to serve as jurors as may be ordered by the court, and make return thereof immediately, and place the names of the jurors so returned in the box and draw therefrom until the jury is completed. If the first order for talesmen shall prove insufficient, other and further orders may be made until the necessary number of jurors shall be obtained.

The defendant, shall not be entitled to a service of the list of talesmen summoned by order of the court, unless the court shall specially so direct, in which case the court after the general panel has been exhausted shall fix the length of time the list of talesmen shall be so served, before the drawing of the jurors shall proceed.

COMMENT

This section is recommended for repeal as unnecessary; see comment on the repeal of 2A:74-3.

2A:74-12. Effect of such continuance of petit jury

The continuance of such petit jury as aforesaid shall in no wise affect the usual drawing, selecting and serving of further petit juries as provided by law.

COMMENT

This section is recommended for repeal as unnecessary.

2A:75-1. Struck juries; in what courts and when authorized; motion; order

Upon motion in behalf of the state, the plaintiff or defendant, in any cause, civil or criminal, triable by a jury, and in a civil cause, upon proof by affidavit or otherwise to the satisfaction of the court that the nature and importance of the matter in controversy render it reasonable and proper, the superior court or a county court may in its discretion order a jury to be struck for the trial of the cause.

COMMENT

This section is recommended for repeal as unnecessary; struck juries are no longer used.

2A:75-2. Order to jury commissioners; preparation of struck jury list

The order for a struck jury shall designate the time when the jury is to be struck before the court and shall direct the jury commissioners of the county in which the cause is to be tried to prepare a list of 36 or 48 persons or, in special causes or in a criminal cause, a larger number of persons, with their places of abode, the size of the list to rest in the discretion of the court making the order. The order shall describe the nature of the cause, and the jury commissioners shall, in making the list, select persons considered by them to be impartial and best qualified, with respect to knowledge, experience and otherwise, to try the cause. The jury commissioners shall certify 2 copies of the list under their hands as true and correct and, at least 5 days before the day designated in the order for the striking of the jury, shall file 1 certified copy in the office of the clerk of the county.

COMMENT

This section is recommended for repeal as unnecessary; see comment on repeal of 2A:75-1.

2A:75-3. Selection of names for struck jury panel

At the time designated in the order for the struck jury, the jury commissioners shall cause to be delivered to the court a copy of the list certified by them. Thereupon or at an adjourned day, the court may, on its own motion or on motion of any party, strike from the list the names of persons who it shall be made to appear are unfit or not well qualified for service as struck jurors.

The parties or their attorneys shall then proceed to strike single names from the list alternately, or if there are more than 2 parties, then in such order as the court directs, the party applying for the struck jury striking the first name. The striking shall continue until one-half the number of names on the list shall remain. The persons whose names remain shall constitute the jury panel returned to try the cause, and a list of their names and addresses shall be certified by the court as the panel struck for the trial of that cause, and copies of that list may be certified by the clerk of the court. If any party does not appear or is not represented or does not act at the striking, the court shall strike for him.

COMMENT

This section is recommended for repeal as unnecessary; see comment on repeal of 2A:75-1.

2A:75-4. Service of panel upon opposing party and sheriff

The party applying for the struck jury shall, at least 12 days before the day appointed for the trial, serve upon the opposing party a copy of the panel certified by the clerk of the court and, at least 10 days before the day so appointed, deliver another copy and a copy of the order therefor, similarly certified, to the sheriff or other officer authorized to summon such jury, who shall summon the persons named and return the same as the panel to try the cause.

For failure so to serve the opposing party, the court may on his motion, and for failure so to deliver the said copies to the officer, the court shall vacate the order for a struck jury, and the cause shall then be tried by a common jury, unless the court for good cause determines otherwise.

COMMENT

This section is recommended for repeal as unnecessary; see comment on repeal of 2A:75-1.

2A:75-5. Selection of trial jury from struck jury list

Whenever a struck jury panel shall have been returned for the trial of any cause, civil or criminal, as provided by this chapter, the jury for the trial of such cause shall be selected and impaneled from the panel in as nearly as possible the same manner as a jury from the general panel is required to be selected. Should the struck jury panel be for any cause exhausted, the court shall forthwith select from that portion of the general panel of jurors serving at the time such number of additional names as the court may direct with their places of abode, from which the parties shall each strike 6 names in the usual way, and the remaining names shall be placed in the box in the presence of the court and from the names so placed in the box a jury shall be drawn in the usual way. The jurors selected shall constitute the struck jury and a list of their names and addresses shall be certified by the court as struck for the trial of that cause.

COMMENT

This section is recommended for repeal as unnecessary; see comment on repeal of 2A:75-1.

2A:75-6. No common jury unless order for struck jury vacated

An order entered for a struck jury shall remain in force until the cause is tried, and no common jury shall be summoned therein until the order is vacated by the court for good cause.

COMMENT

This section is recommended for repeal as unnecessary; see comment on repeal of 2A:75-1.

2A:75-7. Fees for striking jury in civil action; not taxable as costs

The party applying for a struck jury in any civil action shall pay the fees for striking the same and there shall be no allowance therefor upon the taxation of costs.

COMMENT

This section is recommended for repeal as unnecessary; see comment on repeal of 2A:75-1.

2A:78-2. Discharge of juror by order of court only

No person summoned as a grand or petit juror shall be discharged from attendance except by order of the court in which his attendance may be required.

COMMENT

This section is recommended for repeal as unnecessary.

2A:79-4. Refusal of grand or petit juror to be sworn or take oath of allegiance; fine and recovery

Any grand or petit juror who shall refuse, if required by the court, to take and subscribe the oath of allegiance to this state, shall, for every such refusal be fined by the court in an amount not less than $25 nor more than $100. The clerk of the court shall deliver to the sheriff of the county a certified list of the names of the jurors and the fines awarded, and such sheriff shall thereupon levy and make the fine, with costs, by distress and sale of such jurors' goods and chattels.

COMMENT

This section is recommended for repeal as unnecessary. The refusal to be sworn should be treated as a refusal to serve, which is covered under present section 2A:79-1.

2A:80-1. Special and general verdicts;

The court may require a jury to return a special verdict in the form of a special written finding upon each issue of fact. The court shall not require a general verdict but shall receive it if a jury submits it.

COMMENT

This section is recommended for repeal as unnecessary.

STATE OF NEW JERSEY

NEW JERSEY LAW REVISION COMMISSION

TENTATIVE REPORT

relating to

Material Witnesses

June 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.

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 AUGUST 10, 1991, to be considered at the Commission's August 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
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201-648-4575

INTRODUCTION

The current New Jersey material witness statute empowers judges to issue a warrant to arrest a witness who has knowledge of a crime and who is unlikely to become available for service by subpoena. N.J.S. 2A:162-2. Judges have the authority to bind a witness by recognizance with sufficient surety or to detain the witness. N.J.S. 2A:162-3. If the witness is detained, the law requires the county to provide the witness with "comfortable lodging" and to serve the witness "ordinary food." Id. In addition, the county pays the witness $3.00 for each day the witness is detained. N.J.S. 2A:162-4.

In State v. Misik, 238 N.J. Super. 367 (Law Div. 1989), the judge found that the material witness statute violated the Fourth Amendment, Fourteenth Amendment and Article I, Paragraph I of the New Jersey Constitution, because the statute failed to require a pre-deprivation hearing and to prescribe other procedural safeguards to enforce due process requirements.[1] The court, following analogous federal and state legislation, prescribed guidelines to implement the statute. The court recommended that the Supreme Court promulgate rules or "the legislature enact additional statutory provisions in order to carry out the mandate of the Due Process Clause of both the federal and state constitutions." Id. at 385.

In response to Misik, the New Jersey Law Revision Commission undertook an examination of the existing statutes to repair the constitutional defects noted by the court. The Commission identified five problems. First, the law does not specify that a criminal action must be pending before the state may apply for an arrest warrant. Second, the law does not contain procedural safeguards to make certain the arrest and detention of the witness comply with federal and state constitutional due process requirements. Third, the law does not require the court to impose the least restrictive constraint to detain the witness. Fourth, the statute does not deal with ancillary issues such as the finality of the order for purposes of appeal. Fifth, the language of the law is obsolete.

The proposed draft statute provides a comprehensive regulation of judicial orders directing the appearance or detention of a material witness. The proposal specifies that the Attorney General or a county prosecutor may apply to the Superior Court for a material witness order if two threshold requirements are met: (1) an indictment, accusation or complaint is pending and (2) the alleged witness has information material to the pending criminal action. The proposal identifies the substantive content the application for a material witness order must contain, and establishes distinct standards of review for the issuance of an order to appear or an order to arrest. The proposal also lists the rights that must be afforded to a witness during a material witness hearing. The proposal addresses the conditions of release and conditions of confinement when the latter is appropriate. Finally, the proposal gives the witness miscellaneous statutory rights to enable the witness to appeal and modify the order.

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[1] Article I, Paragraph I of the New Jersey constitution provides that "All persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness.

Section 1 Application for material witness order

a. When a person possesses information material to the prosecution of a pending criminal action or to a criminal investigation pending before a grand jury **and that person is unlikely to respond to a subpoena, the Attorney General or a county prosecutor may apply to a judge of the Superior Court for a material witness order.**

b. The application shall include a copy of any pending indictment, complaint or accusation and an affidavit containing: (1) the name and address of the person alleged to be a material witness, (2) a detailed statement of the facts known by the alleged material witness and their relevance to the pending criminal action or investigation, **(3) a description of evidence from other sources tending to establish the same facts and (4) the reasons why the alleged material witness is unlikely to respond to a subpoena.**

c. If the application requests an arrest warrant, the affidavit shall set forth why immediate arrest is necessary.

Source: 2A:162-2

COMMENT

Subsection (a) substantially changes the source section, which merely established the power to bind material witnesses. Subsection (a) allows the Attorney General or a county prosecutor to apply to the Superior Court for a material witness order only when two conditions exist: (1) there is a pending indictment, accusation, complaint or grand jury investigation, and (2) a person possesses information material to the pending criminal action. If these threshold requirements do not exist, the Attorney General or a county prosecutor may not make an application to the Superior Court for a material witness order.

The requirements of this subsection differ in one important respect from those suggested by State v. Misik. The court in Misik would limit applications to situations where a complaint, indictment or accusation was pending. This section, in addition, allows applications where a grand jury is conducting an investigation. The addition recognizes that a witness's testimony may be necessary to determine the identity of the person to be indicted. In those cases, the prosecutor may know specifically what facts were sought from the material witness without having sufficient information to file a complaint. The second requirement of the subsection, an affidavit containing a detailed statement of the facts known by the alleged material witness and their relevance to the pending investigation, should provide a sufficient safeguard against the use of material witness orders where specific need cannot be shown.

Subsection (b) requires the application to include a copy of any indictment, accusation or complaint and an affidavit setting forth the facts in support of the application. The objective of this subsection is to give the court factual information to evaluate the allegations of the Attorney General or a county prosecutor. An application reposing upon the bare allegations of the Attorney General or a county prosecutor constitutes an invalid application.

Subsection (c) governs the special situation where the Attorney General or a county prosecutor seeks to arrest the alleged material witness. In this event, the application must establish that without the arrest the material witness will not be available as a witness.

Section 2 Order to appear

a. If there is probable cause to believe that a material witness order may issue against the person named in the application, the judge may order the person to appear at a hearing to determine whether the person should be adjudged a material witness.

b. The order and a copy of the application shall be served personally upon the alleged material witness at least 48 hours before the hearing and shall advise the person of: (1) the time and place of the hearing and (2) the right to be represented by an attorney and to have an attorney appointed if the person cannot afford one.

Source: New

COMMENT

Subsection (a) identifies the standard of review the judge applies to the application to determine whether to issue an order to appear. The judge must find there is probable cause to believe the facts set forth in the application are true.

Subsection (b) requires the Attorney General or a county prosecutor to serve a copy of the order and application upon the person named in the application. Service must take place at least 48 hours before the hearing. The order informs the person of the time and place of the hearing and of the right to counsel.

Section 3 Warrant for immediate arrest

a. If there is clear and convincing evidence that the person named in the application will not be available as a witness unless immediately arrested, the judge may issue an arrest warrant requiring that the person be brought before the court immediately after arrest. If the arrest does not take place during regular court hours, the person shall be brought to the emergency-duty Superior Court judge.

b. The judge shall inform the person: (1) of the reason for arrest, (2) of the time and place of the hearing to determine whether the person is a material witness, and (3) that the person has a right to an attorney and to have an attorney appointed if the person cannot afford one.

c. The judge shall set conditions for release, or if there is clear and convincing evidence that the person will not be available as a witness unless detained, the judge may order the person held until the material witness hearing which shall take place within 48 hours of the arrest.

Source: 2A:162-2

COMMENT

Subsection (a) identifies the standard of review the judge applies to an application for an arrest warrant. The judge must find by clear and convincing evidence that unless immediately arrested the person will not be available as a witness. The standard gives priority to the liberty rights of a person who is merely a witness and is not accused of any offense, over the state's interest in law enforcement.

Subsection (a) also directs that the person be brought before the court immediately after arrest. If the arrest takes place outside of regular court hours, the person must be brought before the emergency-duty Superior Court judge. The purpose of this requirement is to make certain that the arrested person has an immediate judicial review of the arrest.

Subsection (b) requires the judge at this first appearance to inform the arrested person of the time and place of the material witness hearing and the right to counsel.

Subsection (c) requires the judge to release the arrested person with appropriate conditions unless detention is the only method to secure the appearance of the witness. When the judge detains the person, the judge must hold the material witness hearing within 48 hours of the person's arrest.

Section 4 Material witness hearing

a. At the material witness hearing, the following rights shall be afforded to the person: (1) the right to be represented by an attorney and to have an attorney appointed if the person cannot afford one, (2) the right to be heard and to present witnesses and evidence (3) the right to have all of the evidence in support of the state's application and (4) the right to confront and cross-examine witnesses.

b. If there is clear and convincing evidence that the person possesses information material to the prosecution of a pending criminal action and is unlikely to respond to a subpoena, the judge shall: (1) set forth findings of fact on the record, and (2) set the conditions of release of the material witness.

Source: 2A:162-2

COMMENT

Subsection (a) establishes the rights afforded to the alleged material witness at the hearing. The alleged material witness has the full panoply of rights afforded to a person at an adversarial hearing.

Subsection (b) identifies the standard of review the judge follows to find that the person is a material witness. The clear and convincing standard is used to protect the constitutional rights of the person against the exercise of the power to detain. The judge who finds that a person is a material witness must set forth findings of fact on the record in support of the order and must establish the conditions of release.

Section 5 Conditions of release

a. Conditions of release for a material witness or for a person held on an application for a material witness order shall be the least restrictive to effectuate the order of the court. A judge may: (1) place the witness in the custody of a designated person or organization agreeing to supervise the person, (2) restrict the travel, association, or place of abode of the person during the period of detention or (3) set bail. A judge may order detention only when no alternative will secure the appearance of the person.

b. Any person detained shall be lodged in comfortable quarters shall not be held in a jail or prison. When the interests of justice require it, the court may order that a person detained receive payment not exceeding the actual financial loss resulting from to detention.

Source: 2A:162-3, 2A:162-4

COMMENT

Subsection (a) requires the judge to impose the least restrictive constraint upon the material witness. The judge must consider all non-custodial alternatives to secure the witness's appearance. Only when no non-custodial alternative is available to secure the appearance of the witness may the judge order the person held.

Subsection (b) identifies the conditions of detention. It is substantially identical to the requirements of N.J.S. 2A:162-3. Current law requires payment of $3 per day. N.J.S. 2A:162-4. In lieu of a daily payment fixed by statute, this subsection allows a court to order the amount of payment required by justice.

Section 6 Deposition

A material witness may apply to the Superior Court for an order directing that a deposition be taken to preserve the witness's testimony. When a deposition is taken, the judge shall vacate the material witness order.

Source: New

COMMENT

This section gives a material witness a statutory right to apply to the Superior Court for an order requiring the taking of a deposition of pursuant to court rules to preserve the testimony of the witness. See R. 3:13-2. The taking of a deposition to preserve testimony has the effect of vacating the material witness order.

Section 7 Orders appealable

A material witness order shall constitute a final order for purposes of appeal, but, on motion of the material witness, may be reconsidered at any time by the court which entered the order.

Source: New

COMMENT

This section makes a material witness order a final order for purposes of appeal entitling the material witness to file an appeal without leave of the Appellate Division. In the absence of the statute it would be unclear whether a material witness order is interlocutory or final. The Superior Court which entered the order retains jurisdiction when an appeal is taken to enable the witness to apply to the court for a modification of the original order.