[First Reprint]

ASSEMBLY, No. 2185

STATE OF NEW JERSEY

INTRODUCED JUNE 20, 1996

By Assemblymen ASSELTA and GIBSON

AN ACT concerning mental incompetents and amending N.J.S.3A:36-2, N.J.S.3B:1-1, P.L.1970, c.289, P.L.1985, c.133, P.L.1976, c.120, and P.L.1977, c.239, and amending and supplementing N.J.S.3B:1-2.

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey:*

1. N.J.S.3A:36-2 is amended to read as follows:

3A:36-2. A widow or widower entitled to dower or curtesy in real estate whereof her or his spouse died seized, an heir, devisee, or guardian of a minor or **[**mental incompetent**]** incapacitated person entitled to an estate in the real estate, or a purchaser thereof, may institute an action in the Superior Court for the assignment to the widow or widower of her or his dower or curtesy therein.

(cf: P.L.1991, c.91, s.149)

2. N.J.S.3B:1-1 is amended to read as follows:

3B:1-1. As used in this title, unless otherwise defined:

"Administrator" includes general administrators of an intestate and unless restricted by the subject or context, administrators with the will annexed, substituted administrators, substituted administrators with the will annexed, temporary administrators and administrators pendente lite.

"Beneficiary," as it relates to trust beneficiaries, includes a person who has any present or future interest, vested or contingent, and also includes the owner of an interest by assignment or other transfer and as it relates to a charitable trust, includes any person entitled to enforce the trust.

"Child" means any individual, including a natural or adopted child, entitled to take by intestate succession from the parent whose

EXPLANATION - Matter enclosed in bold-faced brackets [thus] in the above bill is not enacted and intended to be omitted in the law.

Matter underlined thus is new matter.
Matter enclosed in superscript numerals has been adopted as follows:
[1] Assembly ACO committee amendments adopted June 9, 1997.

relationship is involved and excludes any person who is only a stepchild, a foster child, a grandchild or any more remote descendant.

"Claims" include liabilities whether arising in contract, or in tort or otherwise, and liabilities of the estate which arise at or after the death of the decedent, including funeral expenses and expenses of administration, but does not include estate or inheritance taxes, demands or disputes regarding title to specific assets alleged to be included in the estate.

"Cofiduciary" means each of two or more fiduciaries jointly serving in a fiduciary capacity.

"Devise," when used as a noun, means a testamentary disposition of real or personal property and when used as a verb, means to dispose of real or personal property by will.

"Devisee" means any person designated in a will to receive a devise. In the case of a devise to an existing trust or trustee, or to a trustee on trust described by will, trust or trustee is the devisee and the beneficiaries are not devisees.

"Distributee" means any person who has received property of a decedent from his personal representative other than as a creditor or purchaser. A trustee is a distributee only to the extent of a distributed asset or increment thereto remaining in his hands. A beneficiary of a trust to whom the trustee has distributed property received from a personal representative is a distributee of the personal representative.

"Domiciliary foreign fiduciary" means any fiduciary who has received letters, or has been appointed, or is authorized to act as a fiduciary, in the jurisdiction in which the decedent was domiciled at the time of his death, in which the ward is domiciled or in which is located the principal place of the administration of a trust.

"Estate" means all of the property of a decedent, minor or **[**mental incompetent**]** <u>incapacitated person</u>, trust or other person whose affairs are subject to this title as the property is originally constituted and as it exists from time to time during administration.

"Fiduciary" includes executors, general administrators of an intestate, administrators with the will annexed, substituted administrators, substituted administrators with the will annexed, guardians, substituted guardians, trustees, substituted trustees and, unless restricted by the subject or context, temporary administrators, administrators pendente lite, administrators ad prosequendum, administrators ad litem and other limited fiduciaries.

"Guardian" means a person who has qualified as a guardian of the person or estate of a minor or **[**mental incompetent**]** <u>incapacitated person</u> pursuant to testamentary or court appointment, but excludes one who is merely a guardian ad litem.

"Heirs" means those persons, including the surviving spouse, who are entitled under the statutes of intestate succession to the property

of a decedent.
(cf: N.J.S.3B:1-1)

3. N.J.S.3B:1-2 is amended to read as follows:

3B:1-2. "Issue" of a person includes all of his lineal descendants, natural or adopted, of all generations, with the relationship of parent and child at each generation being determined by the definition of child and parent.

"Local administration" means administration by a personal representative appointed in this State.

"Local fiduciary" means any fiduciary who has received letters in this State and excludes foreign fiduciaries who acquire the power of local fiduciary pursuant to this title.

["Mental incompetent"**]** "Incapacitated person" means a person who is impaired by reason of mental illness or mental deficiency to the extent that he lacks sufficient capacity to govern himself and manage his affairs.

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

The terms **[**mental incompetency**]** incapacity and **[**"mental incompetent"**]** incapacitated person refer to the state or condition of **[**a "mental incompetent"**]** an incapacitated person as hereinbefore defined.

"Minor" means a person who is under 18 years of age.

"Nonresident decedent" means a decedent who was domiciled in another jurisdiction at the time of his death.

"Parent" means any person entitled to take or would be entitled to take if the child, natural or adopted, died without a will, by intestate succession from the child whose relationship is in question and excludes any person who is a stepparent, foster parent or grandparent.

"Personal representative" includes executor, administrator, successor personal representative, special administrator, and persons who perform substantially the same function under the law governing their status. "General personal representative" excludes special administrator.

"Resident creditor" means a person domiciled in, or doing business in this State, who is, or could be, a claimant against an estate.

"Security" includes any note, stock, treasury stock, bond, mortgage, financing statement, debenture, evidence of indebtedness, certificate of interest or participation in an oil, gas or mining title or lease or in payments out of production under the title or lease, collateral, trust certificate, transferable share, voting trust certificate or, in general, any interest or instrument commonly known as a security or as a

security interest or any certificate of interest or participation, any temporary or interim certificate, receipt or certificate of deposit for, or any warrant or right to subscribe to or purchase, any of the foregoing.

"Successor personal representative" means a personal representative, other than a special administrator, who is appointed to succeed a previously appointed personal representative.

"Successors" means those persons, other than creditors, who are entitled to real and personal property of a decedent under his will or the laws governing intestate succession.

"Testamentary trustee" means a trustee designated by will or appointed to exercise a trust created by will.

"Trust" includes any express trust, private or charitable, with additions thereto, wherever and however created. It also includes a trust created by judgment under which the trust is to be administered in the manner of an express trust. "Trust" excludes other constructive trusts, and it excludes resulting trusts, guardianships, personal representatives, trust accounts created under the "Multiple-party Deposit Account Act," P.L.1979, c.491 (C.17:161-1 et seq.), gifts to minors under the "New Jersey Uniform Gifts to Minors Act," P.L.1963, c.177 (C.46:38-13 et seq.), business trusts providing for certificates to be issued to beneficiaries, common trusts, security arrangements, liquidation trusts, and trusts for the primary purpose of paying debts, dividends, interest, salaries, wages, profits, pensions or employee benefits of any kind, and any arrangement under which a person is nominee or escrowee for another.

"Ward" means a person for whom a guardian is appointed or a person under the protection of the court.

"Will" means the last will and testament of a testator or testatrix and includes any codicil.

(cf: N.J.S.3B:1-2)

4. Section 1 of P.L.1970, c.289 (C.30:4-165.7) is amended to read as follows:

1. The commissioner or any parent, spouse, relative, or interested party, on behalf of an alleged **[**mental incompetent**]** incapacitated person who is receiving functional or other services and is over 18 years of age, may file a complaint upon notice to the alleged **[**mental incompetent**]**incapacitated person with the Superior Court in the county furnishing the services or in which such parent, spouse, relative, or interested party resides, for a judgment designating a guardian. The county of settlement shall be served with a copy of the moving papers, however, the county may waive service of the moving papers if it has no reason to oppose the action. If the county elects to oppose the action it shall do so within 30 days after being served with

a copy of the moving papers.
(cf: P.L.1995, c.155, s.25)

5. Section 2 of P.L.1970, c.289 (C.30:4-165.8) is amended to read as follows:

2. The moving papers shall include a verified complaint, an affidavit from a practicing physician or a psychologist licensed pursuant to P.L.1966, c.282 (C.45:14B-1 et seq.), and an affidavit from the chief executive officer, medical director or other officer having administrative control over the program from which the individual is receiving functional or other services provided by the Division of Mental Retardation. The affidavits shall set forth with particularity the facts supporting the affiant's belief that the alleged **[**mental incompetent**]** incapacitated person suffers from a significant chronic functional impairment to such a degree that the person either lacks the cognitive capacity to make decisions for himself or to communicate, in any way, decisions to others. For the purposes of this section, "significant chronic functional impairment" includes, but is not limited to, a lack of comprehension of concepts related to personal care, health care or medical treatment.
(cf: P.L.1990, c.50, s.1)

6. Section 5 of P.L.1970, c.289 (C.30:4-165.11) is amended to read as follows:

5. As used in P.L.1970, c.289 (C.30:4-165.7 et seq.) the term **[**"mental incompetent"**]**incapacitated person has the same meaning as defined in N.J.S.3B:1-2.
(cf: P.L.1985, c.133, s.6)

7. Section 8 of P.L.1985, c.133 (C.30:4-165.13) is amended to read as follows:

8. The commissioner shall review the case of every person who received guardianship services without prior judicial review before the effective date of P.L.1985, c.133 (C.30:4-165.4 et al.). If the need for a guardian appears to continue, the commissioner shall apply to the Superior Court upon notice to the alleged **[**mental incompetent**]** incapacitated person for the appointment of a guardian of the person in the same manner as provided in section 1 of P.L.1970, c.289 (C.30:4-165.7), unless another application is pending. If, as a result of the commissioner's review, it appears that the person is no longer in need of a guardian, the provision of guardianship services shall be discontinued, and this disposition shall be documented in the records of the Division of Developmental Disabilities. For those persons who received guardianship services without prior judicial review before the effective date of P.L.1985, c.133 (C.30:4-165.4 et al.), the division shall continue to provide these services until final disposition resulting

from the commissioner's review, either through a court determination regarding the commissioner's application for appointment of a guardian or an administrative termination of guardianship services; and this interim provision of services shall be equivalent to exercising the same responsibility and authority as a guardian of the person, in accordance with the provisions of section 1 of P.L.1985, c.133 (C.30:4-165.4).

Upon the receipt of a complaint for the appointment of a guardian, the court shall appoint an attorney where the alleged **[**mental incompetent**]** incapacitated person is not represented by an attorney. The attorney, after conducting an investigation into the matter, which shall include an interview with the alleged **[**mental incompetent**]** incapacitated person, an interview with the proposed guardian, and, if there is cause to question the alleged **[**incompetent's**]** incapacitated person's level of functioning and need for a guardian, the report of an independent expert professionally qualified to render an opinion on issues pertaining to **[**incompetency**]** incapacity, shall advise the court by way of a report in affidavit form whether there is cause to dispute either the contention of the commissioner that the appointment of a guardian is necessary or the commissioner's recommendation as to whom that guardian should be. If the alleged **[**mental incompetent**]** incapacitated person expresses an opinion on the subject, the attorney shall advise the court of that opinion. The facts contained in the report of the attorney shall be sworn to or verified in a manner as prescribed by the court.

If, after reviewing the report of the attorney, there appears to be no difference between the position of the commissioner and the findings of the attorney, the court may proceed in a summary fashion to appoint a guardian. A plenary hearing shall be held if requested by the alleged **[**mental incompetent**]** incapacitated person, his attorney, or anyone acting on his behalf.

(cf: P.L.1995, c.324, s.1)

8. Section 2 of P.L.1976, c.120 (C.30:13-2) is amended to read as follows:

2. For the purposes of this act:

a. "Administrator" means any individual who is charged with the general administration or supervision of a nursing home whether or not such individual has an ownership interest in such home and whether or not his function and duties are shared with one or more other individuals.

b. "Guardian" means a person, appointed by a court of competent jurisdiction, who shall have the right to manage the financial affairs and protect the rights of any nursing home resident who has been declared **[**a mental incompetent**]** an incapacitated person. In no case shall the guardian of a nursing home resident be affiliated with a

nursing home, its operations, its staff personnel or a nursing home administrator in any manner whatsoever.

c. "Nursing home" means any institution, whether operated for profit or not, which maintains and operates facilities for extended medical and nursing treatment or care for two or more nonrelated individuals who are suffering from acute or chronic illness or injury, or are crippled, convalescent or infirm and are in need of such treatment or care on a continuing basis. Infirm is construed to mean that an individual is in need of assistance in bathing, dressing or some type of supervision.

d. "Reasonable hour" means any time between the hours of 8 a. m. and 8 p. m. daily.

e. "Resident" means any individual receiving extended medical or nursing treatment or care at a nursing home.

(cf: P.L.1976, c.120, s.2)

9. Section 2 of P.L.1977, c.239 (C.52:27G-2) is amended to read as follows:

2. As used in this act, unless the context clearly indicates otherwise:

a. "Abuse" means the willful infliction of physical pain, injury or mental anguish; unreasonable confinement; or the willful deprivation of services which are necessary to maintain a person's physical and mental health. However, no person shall be deemed to be abused for the sole reason he is being furnished nonmedical remedial treatment by spiritual means through prayer alone, in accordance with a recognized religious method of healing, in lieu of medical treatment;

b. An "act" of any facility or government agency shall be deemed to include any failure or refusal to act by such facility or government agency;

c. "Administrator" means any person who is charged with the general administration or supervision of a facility, whether or not such person has an ownership interest in such facility, and whether or not such person's functions and duties are shared with one or more other persons;

d. "Caretaker" means a person employed by a facility to provide care or services to an elderly person, and includes, but is not limited to, the administrator of a facility;

e. "Exploitation" means the act or process of using a person or his resources for another person's profit or advantage without legal entitlement to do so;

f. "Facility" means any facility or institution, whether public or private, offering health or health related services for the institutionalized elderly, and which is subject to regulation, visitation, inspection, or supervision by any government agency. Facilities include, but are not limited to, nursing homes, skilled nursing homes,

intermediate care facilities, extended care facilities, convalescent homes, rehabilitation centers, residential health care facilities, special hospitals, veterans' hospitals, chronic disease hospitals, psychiatric hospitals, mental hospitals, mental retardation centers or facilities, day care facilities for the elderly and medical day care centers;

g. "Government agency" means any department, division, office, bureau, board, commission, authority, or any other agency or instrumentality created by the State or to which the State is a party, or by any county or municipality, which is responsible for the regulation, visitation, inspection or supervision of facilities, or which provides services to patients, residents or clients of facilities;

h. "Guardian" means any person with the legal right to manage the financial affairs and protect the rights of any patient, resident or client of a facility, who has been declared **[**a mental incompetent**]** an incapacitated person by a court of competent jurisdiction;

i. "Institutionalized elderly," "elderly" or "elderly person" means any person 60 years of age or older, who is a patient, resident or client of any facility;

j. "Office" means the Office of the Ombudsman for the Institutionalized Elderly established herein;

k. "Ombudsman" means the administrator and chief executive officer of the Office of the Ombudsman for the Institutionalized Elderly;

l. "Patient, resident or client" means any elderly person who is receiving treatment or care in any facility in all its aspects, including, but not limited to, admission, retention, confinement, commitment, period of residence, transfer, discharge and any instances directly related to such status.

(cf: P.L. l983, c. 43, s. 1)

[1]10. Section 3 of P.L.1968, c.185 (C.2A:84A-22.3) is amended to read as follows:

3. There is no privilege under this act as to any relevant communication between the patient and his physician (a) upon an issue of the patient's condition in an action to commit him or otherwise place him under the control of another or others because of alleged **[**mental incompetence**]** incapacity, or in an action in which the patient seeks to establish his competence or in an action to recover damages on account of conduct of the patient which constitutes a criminal offense other than a misdemeanor, or (b) upon an issue as to the validity of a document as a will of the patient, or (c) upon an issue between parties claiming by testate or intestate succession from a deceased patient.**[1]**

(cf: P.L.1968, c.185, s.3)

[1]11. Section 28 of P.L.1966, c.282 (C.45:14B-28) is amended to

read as follows:

28. The confidential relations and communications between and among a licensed practicing psychologist and individuals, couples, families or groups in the course of the practice of psychology are placed on the same basis as those provided between attorney and client, and nothing in this act shall be construed to require any such privileged communications to be disclosed by any such person.

There is no privilege under this section for any communication: (a) upon an issue of the client's condition in an action to commit the client or otherwise place the client under the control of another or others because of alleged **[**mental incompetence**]** incapacity, or in an action in which the client seeks to establish his competence or in an action to recover damages on account of conduct of the client which constitutes a crime; or (b) upon an issue as to the validity of a document as a will of the client; or (c) upon an issue between parties claiming by testate or intestate succession from a deceased client.[1]

(cf: P.L.1994, c.134, s.11)

[1]12. Section 11 of P.L.1967, c. 93 (C. 49:3-58) is amended to read as follows:

11. (a) The bureau chief may by order deny, suspend, or revoke any registration if he finds (1) that the order is in the public interest and (2) that the applicant or registrant or, in the case of a broker-dealer or investment advisor, any partner, officer, or director, any person occupying a similar status or performing similar functions, or any person directly or indirectly controlling the broker-dealer or investment advisor

(i) has filed an application for registration which as of its effective date, or as of any date after filing in the case of an order denying effectiveness, was incomplete in any material respect or contained any statement which was, in the light of the circumstances under which it was made, false or misleading with respect to any material fact;

(ii) has willfully violated or willfully failed to comply with any provision of this law or a predecessor law or any rule or order authorized by this law or a predecessor law;

(iii) has been convicted of any crime involving a security or any aspect of the security business or any crime involving moral turpitude; however, where the applicant can show by proof satisfactory to the bureau chief that during the 10-year period preceding the application he has conducted himself in such a manner as to warrant his registration consistent with all other provisions of this act, the conviction shall not be a bar to registration;

(iv) is permanently or temporarily enjoined by any court of competent jurisdiction from engaging in or continuing any conduct or practice involving any aspect of the securities business;

(v) is the subject of an effective order of the bureau chief denying,

suspending, or revoking registration as a broker-dealer, agent, or investment advisor;

(vi) is the subject of an order entered within the past 5 years by the securities administrator of any other State or by the Securities and Exchange Commission denying or revoking registration as a broker-dealer, agent, or investment advisor, or the substantial equivalent of those terms as defined in this act, or is the subject of an order of the Securities and Exchange Commission suspending or expelling him from a national securities exchange or national securities association registered under the Securities Exchange Act of 1934, or is the subject of a United States Post Office fraud order; but (A) the bureau chief may not institute a revocation or suspension proceeding under this clause (vi) more than 1 year from the date of the order relied on and (B) he may not enter an order under this clause (vi) on the basis of an order under another State act unless that order was based on facts which would currently constitute a ground for an order under this law;

(vii) has engaged in dishonest or unethical practices in the securities business;

(viii) is insolvent, either in the sense that his liabilities exceed his assets or in the sense that he cannot meet his obligations as they mature; but the bureau chief may not enter an order against a broker-dealer or investment advisor for insolvency without a finding of insolvency as to the broker-dealer investment advisor;

(ix) is not qualified on the basis of such factors as character, training, experience and knowledge of the security business, except as otherwise provided in paragraph (b);

(x) has failed to pass an examination under subdivision (b) of this section 11 if such an examination has been by rule provided for by the bureau chief;

(xi) has failed reasonably to supervise his agents if he is a broker-dealer or his employees who give investment advice if he is an investment advisor;

(xii) has failed to pay the proper fees, but the bureau chief shall vacate any such order when the deficiency has been corrected.

(b) The following provisions govern the application of paragraph (a)(2)(ix):

(1) The bureau chief may not enter an order against a broker-dealer on the basis of the lack of qualification of any person other than (i) the broker-dealer himself if he is an individual or (ii) an agent of the broker-dealer;

(2) The bureau chief may not enter an order against an investment advisor on the basis of the lack of qualification of any person other than (i) the investment advisor himself if he is an individual or (ii) any other person who represents the investment advisor in doing any of the acts which make him an investment advisor;

(3) The bureau chief may not enter an order solely on the basis of lack of experience if the applicant or registrant is qualified by training or knowledge or both;

(4) The bureau chief shall consider that an agent who will work under the supervision of a registered broker-dealer need not have the same qualifications as a broker-dealer;

(5) The bureau chief shall consider that an investment advisor is not necessarily qualified solely on the basis of experience as a broker-dealer or agent. When he finds that an applicant for initial or renewal registration as a broker-dealer is not qualified as an investment advisor, he may by order condition the applicant's registration as a broker-dealer upon his not transacting business in this State as an investment advisor.

(c)(1) When the bureau chief finds that an application for registration should be denied he may enter an order denying such registration; but he shall promptly notify the applicant, as well as the prospective employer if the applicant is an agent, that the order has been entered and of the reasons therefor and that the matter will be set down for hearing if a written request for such a hearing is filed with the bureau chief within 30 days after receipt of such notice by the applicant. If no hearing is requested the order shall remain in effect until modified or vacated. If a hearing is held the bureau chief shall affirm, vacate or modify the order in accord with the findings at the hearing.

(2) When the bureau chief finds that a registration should be suspended or revoked he may enter a proposed order to suspend or revoke such registration and he shall promptly notify the registrant, as well as the employer if the registrant is an agent, of the proposed order, of the reasons therefor and that the matter will be set down for hearing if a written request for such hearing is filed with the bureau chief within 10 days after receipt of such notice by the registrant. If no hearing is requested within the specified time the bureau chief shall enter the proposed order as a final order, which shall be effective when entered. If a hearing is held the bureau chief shall withdraw the proposed order or enter a final order in accord with the findings at the hearing, which order shall be effective when entered.

(d) If the bureau chief finds that any registrant or applicant for registration is no longer in existence or has ceased to do business as a broker-dealer, agent, or investment advisor, or is subject to an adjudication of **[**mental incompetence**]** <u>incapacity</u> or to the control of a committee, conservator, or guardian, or cannot be located after reasonable search, the bureau chief may by order revoke or deny the registration or application;

(e) Withdrawal from registration as a broker-dealer, agent, or investment advisor becomes effective 30 days after receipt of an application to withdraw or within such shorter period of time as the

bureau chief may determine by rule or order. The bureau chief may nevertheless institute a revocation or suspension proceeding under paragraph (a)(2)(ii) within 1 year after withdrawal becomes effective and enter a revocation or suspension order as of the last date on which registration was effective;

(f) No order may be entered under this section, except under paragraph (c)(1), without (i) appropriate prior notice to the applicant or registrant (as well as the employer or prospective employer if the applicant or registrant is an agent), (ii) opportunity for hearing, and (iii) written findings of fact and conclusions of law;

(g) Every hearing before an officer or employee of the bureau which this law requires to be held before any formal action may be taken by the bureau shall not be public without the written consent of all the respondents.[1]

(cf: P.L.1967, c.93, s.11)

[1][10]. 13[1] (New section) Whenever in any law, rule, regulation or document, reference is made to the term "mental incompetent," that term shall mean and refer to "incapacitated person" [1], except that nothing in this act shall affect the provisions of chapter 4 of Title 2C of the New Jersey Statutes[1].

[1][11.] 14.[1] This act shall take effect immediately.

Changes designation of "mental incompetent" to "incapacitated person."