State of New Jersey

New Jersey Law Revision Commission

ANNUAL REPORT

2009

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

(LRC 87-2009)
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I. MEMBERS AND STAFF OF THE COMMISSION IN 2009

The members of the Commission:

Vito A. Gagliardi, Jr., Chairman, Attorney-at-Law
Albert Burstein, Attorney-at-Law
Andrew O. Bunn, Attorney-at-Law
Hon. Sylvia Pressler, P.J.A.D., Retired
Paul A. Sarlo, Chairman, Senate Judiciary Committee, Ex officio
Linda R. Greenstein, Chairman, Assembly Judiciary Committee, Ex officio
Patrick Hobbs, Dean, Seton Hall Law School, Ex officio
Represented by Professor Ahmed I. Bulbulia
John J. Farmer, Jr., Dean, Rutgers Law School – Newark, Ex officio
Represented by Professor Bernard Bell
Rayman Solomon, Dean, Rutgers Law School - Camden, Ex officio,
Represented by Grace Bertone, Attorney-at-Law

The Staff of the Commission is:

John M. Cannel, Executive Director
Laura C. Tharney, Deputy Director
Marna L. Brown, Counsel
John J. A. Burke, Of Counsel
Jenene J. Hatchard, Administrative Assistant
*Steven Rappoport, Law Student Intern
*Ksenia Takhistova, Law Student Intern
Alexander Fineberg, Law Student Intern

* resigned
The New Jersey Law Revision Commission was saddened by the loss of Judge Sylvia B. Pressler in February 2010.

Judge Pressler served on the New Jersey Law Revision Commission beginning in 2004 after being appointed by the New Jersey Senate President. After her appointment, Judge Pressler gave generously of her time; undertaking detailed and incisive reviews of the Commission’s projects. Her years on the bench, combined with her innate appreciation of the practical impact of changes to the law, gave her a unique perspective that was extraordinarily valuable in guiding the work of the Commission.

Judge Pressler's contributions to the Commission are irreplaceable, and the Commission will long feel her loss.
II. HISTORY AND PURPOSE OF THE COMMISSION

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

In 1985, the Legislature enacted 1:12A-1 et seq., the effective date of which was January 21, 1986. Those sections of the statute transferred the functions of statutory revision and codification to a newly created New Jersey Law Revision Commission.² The Commission began work in 1987 and has, since that time, filed 78 Reports with the Legislature, 36 of which have been enacted into law.

The Commission’s statutory mandate is to simplify, clarify and modernize New Jersey statutes and, as a result, the Commission conducts an ongoing review of the statutes to identify areas of the law that require revision. The scope

¹ N.J.S. 52:11-61.
² The Law Revision Commission was created by L.1985, c.498, and charged with the duty to:
   a. Conduct a continuous examination of the general and permanent statutory law of this State and the judicial decisions construing it for the purpose of discovering defects and anachronisms therein, and to prepare and submit to the Legislature, from time to time, legislative bills designed to
      (1) Remedy the defects,
      (2) Reconcile conflicting provisions found in the law, and
      (3) Clarify confusing and excise redundant provisions found in the law.
   b. Carry on a continuous revision of the general and permanent statute law of the State, in a manner so as to maintain the general and permanent statute law in revised, consolidated and simplified form under the general plan and classification of the Revised Statutes and the New Jersey Statutes;
   c. Receive and consider suggestions and recommendations from the American Law Institute, the National Conference of Commissioners on Uniform State Laws, and other learned bodies and from judges, public officials, bar associations, members of the bar and from the public generally, for the improvement and modification of the general and permanent statutory law of the State, and to bring the law of this State, civil and criminal, and the administration thereof, into harmony with modern conceptions and conditions; and
   d. Act in cooperation with the Legislative Counsel in the Office of Legislative Services, to effect improvements and modifications in the general and permanent statutory law pursuant to its duties set forth in this section, and submit to the Legislative Counsel and the Division for their examination such drafts of legislative bills as the commission shall deem necessary to effectuate the purposes of this section.
of the revision performed by the Commission varies by project, and includes both modest changes like the correction or removal of inconsistent, obsolete or redundant language, as well as comprehensive modifications of select areas of the law.

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

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

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

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

Since it began work in 1987, the New Jersey Legislature has enacted 37 bills based upon the Final Reports and Recommendations of the New Jersey Law Revision Commission:

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

3 A total of 37 bills were enacted, implementing 34 reports. The Repealers project was divided into three reports.
• Uniform Commercial Code 2A – Leases (L.1994, c.114)
• Uniform Commercial Code 3 – Negotiable Instruments (L.1995, c.28)
• Uniform Commercial Code 4 – Bank Deposits (L.1995, c.28)
• Uniform Commercial Code 4A – Funds Transfers (L.1994, c.114)
• Uniform Commercial Code 5 – Letters of Credit (L.1997, c.114)
• Uniform Commercial Code 8 – Investment Securities (L.1997, c.252)
• Uniform Commercial Code 9 – Secured Transactions (L.2001, c.117)
• Uniform Electronic Transactions Act (L.2001, c.116)
• Uniform Mediation Act (L.2004 c.157)
• Uniform Prudent Management of Institutional Funds Act (L.2009, c.64)
IV. FINAL REPORTS AND RECOMMENDATIONS

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

In 2009, the New Jersey Law Revision Commission published five Final Reports and Recommendations to the Legislature.

A. Title 2A – Capias Writs

In 2009, the Commission began a comprehensive revision of Title 2A, which includes the capias writs. Capias ad respondendum allows a plaintiff to commence a civil action by putting a defendant in jail. Capias ad satisfaciendum enables a judgment creditor to cause the arrest and retention in custody of a judgment debtor until the judgment is paid or discharge is secured as an insolvent debtor.

After reviewing the writs, the Commission recommended that both be repealed. First, the writs raise grave constitutional problems related to due process and equal protection. Second, the writs needlessly duplicate powers given to the courts under the civil contempt statutes. Third, the law requires civil prisoners to be held separately from criminal prisoners but it has proved impractical to effect such a separation. Fourth, even if separation of civil and criminal prisoners were possible, it is not clear who would pay for the incarceration of a civil prisoner jailed under a writ of capias.

In 1997, the Law Revision Commission issued a report that called for the repeal of both writs. The Commission asserted that the statutes “consist of archaic terms of art” and that they are “poorly drafted and present due process problems.” Even if the statutes were modernized and protections for the due
process rights of debtors were added, the Commission remained troubled by the seemingly duplicative nature of the writs since civil contempt and other measures contained in the New Jersey Court Rules protected litigants’ rights at least as well as capias. Finally, the Commission was deeply concerned by ca. re.’s ability to jail a person neither charged with a crime nor in violation of a court order.

Having reviewed the writs anew in the context of the Title 2A revision, the Commission maintains that that they are constitutionally deficient, no longer necessary, and are too impractical and costly to be administered effectively.

A Final Report was issued in December 2009.

B. Construction Lien Law

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

The existing Construction Lien Law became effective in 1994, replacing the old Mechanic’s Lien Law, which, up until that time, had applied to non-public construction projects. The purpose of the statute is twofold: to enable private project contractors, subcontractors and suppliers to secure payment for their labor and materials by a straightforward lien filing process, and to protect property owners from exposure to double payment for work or materials for which they have already paid. Application of the law has been problematic, however, because key terms in the current law are not precisely defined, some provisions are difficult to understand and there are gaps in the law.

The Commission was fortunate to receive considerable informal comment during the pendency of the project from a wide variety of commenters, including
attorneys and organizations representing various participants in the construction process. As a result of the feedback from a number of sources, the project grew in scope, addressing ambiguities and unclear provisions in the existing law as well as the need for new sections to rectify practical problems.

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

The Final Report was released by the Commission in March 2009.

C. Title 44 - Poor Law

Two laws with confusingly similar names govern assistance to the needy in New Jersey.

One, the “Work First New Jersey” Act, 44:10-55 et seq., resulted from the federal “Personal Responsibility and Work Opportunity Reconciliation Act of 1996,” 42 U.S.C. section 601 et seq., which established a federal block grant for temporary assistance for needy families and enabled the states to design their own welfare programs. This Act replaced earlier programs including: aid to families with dependent children, general public assistance, emergency assistance for recipients, and the family development initiative. The two main relief programs established by this Act are Temporary Aid for Needy Families (“TANF”) and General Assistance (“GA”). TANF is the successor to the federally funded categorical programs; GA is the continuation of municipal general public
assistance for those people who do not fit within the categorical programs.

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

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

Commission Staff spent many days in consultation with welfare professionals to produce a draft of a modern, comprehensive, clear welfare law. The Commission drafted provisions that clearly establish the programs operating in New Jersey and remove the ambiguities and anachronisms of the current statutes.

A Final Report was published in February of 2009.

D. Title 22A - Costs and Fees

Title 22A contains the general fees pertaining to civil actions, probate actions and criminal actions as well as other fees and language concerning the disposition of those fees. The updating of the Title was inconsistent. Certain sections of the Title remained reasonably current, other sections were updated
intermittently and the remaining sections had not been updated since their enactment in 1953.

The largest single substantive change in the Title is the inclusion of a flat-fee mileage charge designed to replace the hundreds of different mileage fees currently assigned to individual municipalities throughout the State. Another substantive change is the adjustment of the filing fees to make them nearly uniform across the courts. In addition, the Report attempted to correct what appeared to be an error in the recently enacted 22A:4-17(b) (effective September 2009) as shown in Section 22B:9-2.

Ultimately, a number of statutory sections were proposed for removal as anachronistic or inconsistent with other sections of the Title. The remaining sections were consolidated and reorganized in an effort to develop a more orderly presentation of the information contained in the Title. Throughout the course of this project, Staff worked closely with the AOC, the County Clerks, the Surrogates and the Sheriffs and was able to achieve consensus on the vast majority of the provisions contained in the Final Report.


E. Uniform Environmental Covenants Act

The Commission considered adoption in New Jersey of the Uniform Environmental Covenants Act (“UECA”) as recommended NCCUSL. Intended to develop a system of recording environmental covenants for Brownfields, the UECA seeks to ensure that land use restrictions, environmental monitoring requirements and engineering controls for potential environmental risks of residual contamination are reflected on the land records and effectively enforced over time. Brownfields are defined as abandoned and environmentally contaminated properties, formerly used for commercial and industrial purposes, which are developed and reintroduced into the stream of commerce.
Although no New Jersey statute provides for an environmental covenant per se, New Jersey has enacted significant legislation regulating Brownfields and other contaminated properties, including the *Brownfield and Contaminated Site Remediation Act, N.J.S. 58:10B-1 et seq.*, which regulates contaminated sites once used for commercial and industrial purposes but currently abandoned or underused, and the *Site Remediation Reform Act, P.L. 2009, c. 60 (SRRA)*, which provides, in part, for the use of notice and institutional controls as part of the remediation of contaminated properties. The *Brownfield Act* also includes remediation standards, financial incentives, cleanup procedures and liability protection for innocent parties who clean up Brownfields.

As a result of the existing legislation and the strong enforcement record of New Jersey's Department of Environmental Protection (DEP), the Commission recommended that the deed notice required by the *Brownfield Act* and SRRA be amended to make it function like a restrictive covenant and to allow enforcement by any person who is injured, or, if the DEP fails to enforce the restrictions, by any person whether or not the person was a party to a restrictive covenant. The adoption of the UECA in its entirety, however, was not recommended.
V. TENTATIVE REPORTS

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

In 2009, the Commission published five Tentative Reports.

A. Custody

A Tentative Report on child custody was released in November 2009. This report revised material now contained in Chapter 2 of Title 9. The subject of the chapter is the standard to be applied when making decisions regarding the custody of a child if there is a dispute among parties. The standard is most commonly applied in cases of divorce. The law is related to that used for dispositional decisions after findings of child abuse since it uses a “best interests” standard but its application is different.

This report is closely based on existing law but with simplified and clarified language. It also incorporates decisional law limiting the use of the “best interests” standard when the custody dispute is between a parent and a non-parent or when the dispute is over the acceptance of an arbitration award of custody. The deviations from current statutes and the decisions that require them are indicated in the comment after each section.

B. Durable Power of Attorney Law

With the recent introduction of amendments to New York’s durable power of attorney law, the Commission determined that New Jersey’s current durable power of attorney laws might need revision.

New Jersey’s Revised Durable Power of Attorney Act (RDPAA) was enacted in 2000, replacing Sections 46:2B-8 and 46:2B-9, which had been enacted in 1971 as an Act concerning the effect of death, disability or incapacity
of a principal upon a power of attorney. Although only one modification had been made to the RDPAA since its enactment, pertaining to gratuitous transfers and gifts, the Commission learned that commenters believed some revisions to current law would be useful. New Jersey’s statute relating to banking transactions under a power of attorney, Title 46:2B-10 et seq., which was not intended to be superseded by the RDPAA, also needed at the very least to be integrated and made consistent with the RDPAA.

The Commission’s Tentative Report revising the RDPAA adopts concepts derived from the Uniform Power of Attorney Act, promulgated in 2006 by the National Conference of Commissioners on Uniform State Laws (NCCUSL), and follows suggestions advanced by members of the State Bar Association.

C. Juvenile Detention Facilities

A Tentative Report on Juvenile Detention Facilities was released in July 2009. This Report included the substance of what are now chapters 10 through 12A of Title 9. These statutes authorize counties to establish juvenile detention facilities and children’s shelters and provide for their operation.

The current statutes are antiquated in several ways. Most important, they fail to distinguish between secure institutions for the detention of children charged with, or convicted of criminal activity and institutions for other children needing shelter, such as dependent neglected children or children involved in “juvenile-family” cases. See 2A:4A-34, 2A:4A-37 and 2A:4A-46. In addition, the administrative structures provided by these laws are not those now used, and some of the terms used in these laws are now anachronistic. Most of the significant law on juvenile detention facilities and shelters is now found in Title 2A, Chapter 4A rather than in Title 9. Only a small part of what are now chapters 10 through 12A of Title 9 is of continuing importance. As a result, the recommended revision is much reduced in length but preserves the residual purpose of the chapters in Title 9, to authorize counties to establish and maintain these institutions.
D. Parentage

A Tentative Report on Parentage was released in May 2009. This was a revision covering the substance of what is now Chapter 17 of Title 9. The current statutes were written before the development of modern genetic tests that can determine whether a particular person is a genetic parent of a particular child with a level of accuracy that makes them practically irrefutable. As a result, the current law is written in terms of factual presumptions that are not now relevant. This Report gives a central role to genetic testing in litigated cases of disputed genetic parentage.

The majority of parentage cases that arise around the time of birth, however, do not involve a court determination. Most often, a man agrees that he is the father and signs a certificate of paternity. Federal statutes and regulations essentially require that states establish a system of voluntary acknowledgements of paternity that is as binding as a court determination. See, e.g. 42 U.S.C. §668 and 45 C.F.R. §303.5. Section 4 established such a system in the form of certificates of parentage. Unfortunately, some men who sign acknowledgments later come to question whether they were correct either because of the acquisition of new facts or a change of heart. The Commission considered requiring genetic testing in connection with a certificate of paternity but rejected the requirement because of the cost in money, time and invasion of privacy.

A small number of disputes over paternity do not follow the ordinary pattern of a known question around the time of birth. These disputes may arise when the relationship terminates between the persons who thought themselves to be father and mother, or in the context of divorce, or in the distribution of estates or trusts. There are not many of these cases, but they engender a great deal of difficulty. The Report deals with this problem, first, with the requirement of genetic testing. Whenever an issue of genetic parentage arises, the court is required to order testing. The Report also limits challenges to parentage by barring challenges to parentage when the questioned parent has lived with the
child for five years. This “statute of repose” treats the relationship as one of adoption whatever the genetic information may show.

The only provision on non-genetic parentage is one regarding sperm or egg donation, tracking a current provision on sperm donation. There are many other issues involving parentage that turn on matters other than genetics. Many of these issues are controversial, and all are fact sensitive. It seems better to leave these issues to case law determination.

E. Title 39 - Motor Vehicles and Traffic Regulation

The Commission has worked on this substantial project for several years and it was released as a Tentative Report at the end of 2007. After initially considering sections of Title 39 in response to requests, the Commission determined that the entire Title was an appropriate candidate for a comprehensive revision.

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

The scope of Title 39 is very broad. It includes registration and licensing requirements, motor vehicle equipment requirements, and numerous provisions regarding the regulation of traffic, including requirements pertaining to bicycles, roller skates, horses and horse-drawn vehicles, snowmobiles, all terrain vehicles, machinery and equipment of unusual size or weight, pedestrians, the law of the road and right-of-way, traffic signals, accidents and reports, parking, highway and traffic signs, and the powers of municipal, county and state officials. Title 39 also includes provisions regarding automobile insurance, vehicle inspections, the purchase, sale and transfer of vehicles, abandoned and unclaimed vehicles, junk yards, driving schools and auto body repair facilities.
As a result of its scope, Title 39 has a significant impact on a large number of residents of the State of New Jersey, and on those who drive on the many roadways in this State. The Commission focused its efforts on improving the language, the structure and the accessibility of Title 39 so that those who are impacted by various provisions of the law can more readily locate and understand the requirements, responsibilities and restrictions imposed upon them.

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

The project was released at the end of 2007 with a lengthy public comment period. The Commission was fortunate to receive informal comments during the pendency of the project and substantial additional commentary during the comment period following the issuance of the Tentative Report. Significantly, attorneys with the Motor Vehicle Commission conducted a line-by-line review of the project in preparation for the submission of detailed MVC comments on the project. As a result of competing demands for attorney time and resources, the MVC was able to submit the vast majority of its comments to Staff before the end of 2009 but did not have the opportunity to provide all of them. It is anticipated that those comments will be provided to the Commission in early 2010, enabling Staff to update the project for release in the spring of 2010.
F. UEVHPA – Uniform Emergency Volunteer Health Practitioners Act

UEVHPA was drafted by the National Conference of Commissioners on Uniform State Laws ("NCCUSL") in an expedited manner after hurricanes Katrina and Rita which struck within weeks of each other in 2005. Prior to that time, a number of states had enacted emergency management laws that permitted the waiver or modification, in emergencies, of licensure standards for health practitioners. The vast majority of the states had also enacted the Emergency Management Assistance Compact ("EMAC"). EMAC allows for the deployment of licensed health practitioners employed by state and local governments to jurisdictions in which they are not licensed and allows them to provide emergency services there.

The federal government supplemented state law provisions with language allowing licensed health practitioners that it employed on either a permanent or temporary basis to respond to disasters and emergencies without complying with the state professional licensing requirements in the locations where their services are utilized. In addition, federal law established two systems to facilitate the use of private sector health practitioners in response to emergencies, particularly those mobilized by charitable non-governmental organizations that are active in disasters. Unfortunately, neither of those federal programs necessarily results in interstate recognition of licenses issued to volunteer health practitioners.

The response efforts associated with hurricanes Katrina and Rita demonstrated that, in the absence of national standards, the federal and state systems available were inadequate and complicated that use of volunteer health practitioners for both the receiving and the deploying states.

The goal of the Commission is a law that facilitates the use of out-of-state health practitioners in New Jersey when they are needed here while providing appropriate protection to all parties. The Commission was fortunate to receive helpful comments from various individuals on an informal basis, and a Tentative Report was released in November 2009.
VI. WORK IN PROGRESS

A. Title 9-Child Abuse and Neglect

In response to a suggestion from a Legislator, the Commission began working on revision of parts of Title 9 in 2009. Because of the size and complexity of the material, the project was divided into a number of parts. Tentative reports have been completed on three of those parts, Parentage, Custody and Juvenile Detention Facilities. Chapter, 6, the remaining chapter to be addressed is the most difficult, since it deals with child abuse and neglect.

Thus far, several drafts have been prepared and Staff has engaged in extensive consultations with a wide range of interested parties. It is hoped that consensus can be reached and a Tentative Report issued during 2010.

B. Landlord Tenant

In 2009, the Commission began a major project to compile and revise all of the landlord-tenant law. The statutes pertaining to the landlord-tenant relationship, some of which date back to the 1870's, have not evolved in a coherent manner.

Many, but not all, of the landlord-tenant provisions are contained in Title 2A, but even those are not within the same chapter or even in sequence, and different aspects of the same topic are discussed in more than one statutory provision. The result is a scattered morass of overlapping, contradictory and inaccessible provisions.

Another large part of the law is now found in chapter 8 of Title 46. This chapter contains provisions pertaining to Leasehold Estates, the Truth-in-Renting Act, and the New Jersey Safe Housing Act. The remaining provisions of the landlord-tenant law are scattered throughout Titles 20, 38, 40, 52, 54 and 55.

The lack of organization makes the law difficult to find. The conflicts,
inconsistencies and anachronisms make it difficult to determine what the law is. In this area of the law, where parties frequently represent themselves, it is especially important that the statutes be consistent, understandable and easy to locate.

Accordingly, the Commission has undertaken a landlord-tenant revision project that, while preserving current legal concepts and causes of action, seeks to:

(1) consolidate in a single place all statutes pertaining to the legal relationship between the landlord and tenant;

(2) update all statutory language and remove anachronistic provisions; and

(3) make consistent the various statutory provisions, and cross reference them, as appropriate.

C. Title 2A – Causes of Action

As part of the broader revision of Title 2A, Staff has undertaken a revision of Subtitle 6 of Title 2A, which contains the civil causes of action established by the Legislature. Subtitle 6 is a collection of widely varying causes of action, some of which were drafted relatively recently, while others were drafted over a century ago. This goal of this revision is to modernize the statutes by eliminating language that is no longer viable and updating the remaining language.

The language pertaining to alcohol servers’ liability was not recommended for change, nor was the section pertaining to liability for damage to a fire alarm system.

The seven sections of the law known as the “heart balm” statutes were eliminated with the exception of a single sentence. The section pertaining to a change of name application was likewise proposed for elimination except for a single sentence that refers to the procedures for a name change set forth in the Rules of Court.
The two sections pertaining to injury or losses resulting from mob violence or riots are recommended for repeal in their entirety as are the sections pertaining to the recovery of money or property from a municipality or school district and the four sections pertaining to naturalization.

The language pertaining to debts or obligations fraudulently incurred was modified to clarify that, contrary to the interpretation of the federal courts, the New Jersey statutes permit a cause of action for either fraud in the inducement or fraud in the performance even if contractual remedies are also available.

The section pertaining to the arrest or detention of mentally incapacitated persons was modified to make it clear that its provisions did not apply to a commitment proceeding and the statutory language pertaining to proof of lost or destroyed instruments was modified slightly for clarity and to include the applicable standard of proof.

D. Property

The Commission began a project to revise Chapters 1 through 11 of Title 46. These chapters contain the basic law on real property. However, as the result of additions, they follow no particular order but have become a mixture of chapters on a variety of subjects. Some of the chapters are recent and stand alone. Others are anachronistic because they cover matters no longer relevant (see, Chapter 3A on proprietary surveys) and some of the chapters concern subjects of continuing importance but would be improved by modernization of language and approach (see Chapters 4 and 5 on the form of deeds).

E. UDMSA – Uniform Debt-Management Services Act

The Uniform Debt-Management Services Act ("UDMSA") was approved and recommended for enactment by the National Conference of Commissioners on Uniform State Laws in 2005, and was last revised and amended by NCCUSL in 2008. It provides the states with a comprehensive Act governing these services with the goal of national administration of debt counseling and
management in a fair and effective way. The Act became an essential part of the creditor and debtor law when the Bankruptcy Reform Act of 2005 took effect. The purpose of the Act is to “rein in the excesses while permitting credit-counseling agencies and debt-settlement companies to continue providing services that benefit consumers.”

Prior to 2005, the issue of whether to resort to debt counseling and management services was generally a voluntary decision on the part of an individual with credit problems. However, federal Bankruptcy Reform Act of 2005 changed the status quo. Under that law, to file for Chapter 7 bankruptcy, the individual in most cases has to show that consumer debt counseling/management has been sought and attempted. Greater transparency and accountability are needed to prevent excesses and abuses of the new powers of debt counseling and management services. Because the new bankruptcy rules are federal and apply in every state, it has been suggested that regulation of the counseling and management services in every state must be uniform in character in order for the new bankruptcy rules to be effective and for consumers to be adequately protected.

There will be a number of changes to the New Jersey law if UDMSA is enacted, but commenters have suggested that the current law is badly drafted and, at nearly 30 years old, not adequate to deal with the issues that arise today.
VII. Completed Projects

Completed projects are those on which the Commission has concluded its work without issuing a Final report.

A. Handicapped Parking

This project began early in the year when Staff was contacted by a concerned citizen who explained that there was a need to revise the language of the statute pertaining to handicapped parking in New Jersey. The citizen suggested that the New Jersey law regarding handicapped parking contains a “loophole” because it requires only that a handicapped person be in the vehicle, but does not require that person to enter or exit the vehicle while it is parked in the handicapped parking space.

Draft language requiring that the handicapped person enter or exit the vehicle while it is parked in a handicapped space, except in cases of an emergency, was provided to the Commission for consideration.

Input was obtained from: Legal Services of New Jersey, New Jersey’s Division of Disability Services (“DDS”); the individual in the Office of Disabilities Management, Department of Treasury, who is the statewide ADA Coordinator for the State of New Jersey; the New Jersey Division on Civil Rights (“DCR”); and the New Jersey Police Traffic Officers Association (“NJPTOA”).

There was some support for the proposed change to the law, but there were also strong arguments against such a change and the case law and the statutory and regulatory language do not clearly support or prohibit the change. In addition, it was recognized that the majority of the states do not impose the requirement of entering or exiting the vehicle. Further, there were problems posed by the requested change that are not readily cured by the emergency exception or other concisely drafted language and enforcement difficulties appear to be a legitimate concern. Ultimately, the Commission elected to take no position on this matter.
B. SLAPP

At the July meeting of the Commission, Professor Frank Askin of the Rutgers School of Law, Newark, and Renee Steinhagen, Executive Director of the New Jersey Appleseed Public Interest Law Center, appeared to present information in support of anti-SLAPP legislation. They provided a packet of information regarding SLAPP suits for review by the Commission.

During his presentation to the Commission in July, Professor Askin discussed the recent decision of the New Jersey Supreme Court in *LoBiondo v. Schwartz*, 199 N.J. 62 (2009), a case which was litigated for approximately 18 years, beginning in 1991. He expressed concern about the decision by our Supreme Court that protects SLAPP plaintiffs from SLAPP-back claims if they can find a lawyer to bring their claim, provided the lawyer is not “actuated by malice”. *LoBiondo v. Schwartz*, 199 N.J. at 113.

Information contained in the packet submitted by Professor Askin and Ms. Steinhagen indicates that SLAPP suit defendants prevail 91.6% of the time, that 2/3 of SLAPP suits are dismissed at the time of the first court appearance, and that the average lifespan of a SLAPP suit is between 32 and 40 months from filing through disposition. At last count, 30 of the states currently have anti-SLAPP legislation. *Free Speech State-by-State*, Federal Anti-SLAPP Project, [http://www.anti-slapp.org/?q=node/12](http://www.anti-slapp.org/?q=node/12) (last accessed September 8, 2009).

Although there are few reported cases in New Jersey in which the courts specifically refer to an action as a SLAPP suit, there are numerous opinions describing actions in which “apparently meritless complaints alleging defamation and various other intentional torts such as infliction of emotional distress and interference with business advantage were brought for the purpose of silencing citizen protest” particularly in the area of land use law. See, e.g., *LoBiondo v. Schwartz*, 323 N.J. Super. at 420. Having considered the materials supplied, the Commission members expressed concern that the proposed project was beyond the Commission’s statutory scope (N.J.S. 1:12A-8) and is more appropriate for consideration by the New Jersey Supreme Court’s Civil Practice Committee.
Final Report

Relating to

Title 2A – Capias Writs

December 2009

Laura Tharney, Esq., Deputy Director
NEW JERSEY LAW REVISION COMMISSION
153 Halsey Street, 7th Fl., Box 47016
Newark, New Jersey 07101
973-648-4575
(Fax) 973-648-3123
Email: lct@njlrc.org
Web site: http://www.njlrc.org
I. Introduction

In 2009, the Commission began a comprehensive revision of Title 2A, which includes the capias writs. The Commission recommends that the statutes establishing both capias ad respondendum and capias ad satisfaciendum be repealed. First, the writs raise grave constitutional problems related to due process and equal protection. Second, the writs needlessly duplicate powers given to the courts under the civil contempt statutes. Third, while the law requires civil prisoners to be held separately from criminal prisoners, it has proven impractical to effect such a separation. Fourth, even if separation of civil and criminal prisoners were possible, it is not clear who would pay for the incarceration of a civil prisoner jailed under a writ of capias.

II. Background

The writ of capias ad respondendum (ca. re.), part of New Jersey law since at least 1877, allows a plaintiff to commence a civil action by putting the defendant in jail. The writ begins the action and no judgment is entered before the incarceration. If the action is one in contract, the plaintiff must allege fraud. N.J.S.A. 2A:15-42. If the action is one in tort, the plaintiff must allege willful conduct. N.J.S.A. 2A:15-41; see also, Iaria v. Public Service Mutual Ins. Co., 31 N.J. 386, 389 (1960). The writ was designed to compel attendance at trial, but a defendant may be released upon depositing a cash bail or posting a bail bond. Iaria, 31 N.J. at 389.

The related writ of capias ad satisfaciendum (ca. sa.) has been recognized in New Jersey since at least 1898. It is a "body execution enabling a judgment creditor...to cause the arrest of the judgment debtor and his retention in custody until he either pays the judgment or secures his discharge as an insolvent debtor." Perlmutter v. DeRowe, 58 N.J. 5, 13 (1971). With ca. sa., unlike ca. re., a judgment precedes the incarceration. A writ of ca. sa. issues in tort for personal injury or property damage if the court finds willfulness or malice. N.J.S.A. 2A:17-79. The writ issues on a judgment in contract when ca. re. has already issued and not been quashed or when proof is made that ca. re. could have issued as first process. See id.

The practice of jailing debtors existed in New Jersey until the State Constitution of 1844 prohibited imprisonment "in any action, or on any judgment founded upon contract, unless in cases of fraud." N.J. Const. 1844, Art. I, par. 17. The present Constitution continues this prohibition. N.J. Const. 1947, Art. I, par. 13. The writ statutes determine what constitutes fraud in a contract case, and case law has indicated that a ca. sa. writ may be used in any case involving a tort judgment without violating the constitutional prohibition against imprisonment for debt. Duro v. Wishnevsky, 126 N.J.L. 7, 8 (Sup. Ct. 1940).

The validity of ca. re. was attacked by the defendant in Perlmutter v. DeRowe, 58 N.J. 5 (1971), who argued that imprisonment prior to a judicial determination of fraud violated the state prohibition against imprisonment for debt as well as his right to due process of law. The Court found that "civil arrest under a [capias ad respondendum] is substantially analogous to arrest under a criminal complaint and a defendant should have all the same procedural rights and protections as if he were arrested on a criminal charge for the same fraud upon which the civil action and the capias ad respondendum are based." 58 N.J. at 17-18, fn6. The Perlmutter Court
held that the Legislature had the constitutional authority to provide for civil arrest in cases of fraud, but recognized that the procedures followed in civil arrest must give the defendant the same protections that apply in a criminal arrest. See id.

After Perlmutter, the Supreme Court revised Rule 4:51, to provide some procedural protections. Upon arrest, a defendant is to be brought before a judge and advised of the rights: 1) to be released on bond and 2) to bring a motion attacking the basis for issuance of the writ, for which the plaintiff bears the burden of proof. The judge, at the initial appearance, will set the bail amount in accordance with R. 4:51-2(a) and (b). The judge may “fix bail in an amount less than that which plaintiff claims to be due, despite the provision of N.J.S.A. 2A:15-42” and the bond furnished is no longer required to be in the “anachronistic sum of double the amount of the bail fixed...despite the provision of N.J.S.A. 2A:15:43.” Perlmutter v. DeRowe, 58 N.J. at 17 n.6. Instead, as in criminal cases, a weighing of all circumstances should determine the amount of bail. Id.

In 1997, the Law Revision Commission issued a report that called for the repeal of both writs. See New Jersey Law Revision Comm., Final Report Relating To Civil Arrest Capias Ad Respondendum Et Satisfaciendum (1997) (“NJLRC Report”). The Commission asserted that the statutes “consist of archaic terms of art” and that they are “poorly drafted and present due process problems.” NJLRC Report, 3. Even if the statutes were modernized and protections for the due process rights of debtors were added, the Commission remained troubled by the seemingly duplicative nature of the writs since civil contempt and other measures present in the New Jersey Court Rules1 protected litigants’ rights at least as well as capias. Id. at 4. Finally, the Commission was deeply concerned by ca. re.’s ability to jail a person neither charged with a crime nor in violation of a court order. Id. The 1997 Report has not been acted on by the Legislature.

Several years later, the Appellate Division decided Marshall v. Matthei, 327 N.J.Super. 512 (App. Div. 2000). Marshall involved the jailing of an individual who, delinquent on post-marital support obligations, also refused to pay his lawyer for services rendered. The lawyer received a judgment against the client and sought a writ of ca. sa. The Appellate Division affirmed issuance of the writ and held that confinement was proper so long as its purpose was coercive and not punitive. Id. at 529-30. Because “the key to the jail is in the prisoner's pocket, that key being compliance with the order,” the court would uphold the incarceration as long as the debtor had the ability to pay the debt owed. Id. at 528. Once a debtor can demonstrate that he no longer has the ability to pay, however, incarceration has become punitive and may not be continued. Id.

Like the Perlmutter Court with ca. re., the Marshall court was troubled enough by post-deprivation due process concerns to create a framework of procedural protections for ca. sa. After Marshall, a person confined on a writ of ca. sa., like one confined on a civil contempt charge, has the right to a periodic review to determine whether circumstances have changed. Id.

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1 Court Rules provide that a judgment debtor may be compelled to disclose his assets and that a court may order use of those assets to pay the judgment. R. 4:59-1(e). A court may use the contempt power to compel compliance with these court orders. See R. 1:10.
at 527 (citing In re Acceturo, 242 N.J.Super. 281, 288-89 (App. Div. 1990)). The burden of proving the change of circumstances is upon the individual seeking release, with an evidentiary hearing being held no less frequently than (a) 18 months after the last hearing (the maximum term that may be imposed for criminal contempt under N.J.S.A. 2C:29-9a and 2C:43-6a(4)), or (b) sooner upon a prima facie showing by the party subject to the order that circumstances have changed. Marshall, 327 N.J.Super. at 529. Once it is apparent the defendant cannot pay the judgment against him, “‘legal justification for [incarceration] ends and further confinement cannot be tolerated.’” Id. at 527 (quoting Catena v. Seidl, 65 N.J. 257, 262 (1974)).

III. Why the Writs Should Be Repealed

A. Constitutional Problems

Both writs pose serious constitutional concerns. Capias ad respondendum, which allows imprisonment before any finding of civil liability, raises due process concerns not assuaged by the writ statutes or the post-Perlmutter revisions to R. 4:51.

While other provisional remedies, such as temporary restraining orders and preliminary injunctions, permit deprivations of liberty or property before a case is fully adjudicated, the standard for receiving such relief is high. See, e.g., B & S Ltd., Inc. v. Elephant & Castle Intern., Inc., 388 N.J.Super. 160, 167 (Ch. Div. 2006) (“(1) [A]n injunction is necessary to prevent imminent and irreparable harm; (2) the movant asserts a settled legal right supporting its claim; (3) the material facts are not controverted; and (4) in balancing the equities or hardships, if injunctive relief is denied then the hardship to the movant outweighs the hardship to the non-movant.”); Morris County Transfer Station, Inc. v. Frank's Sanitation Serv., Inc., 260 N.J.Super. 570, 574 (App.Div.1992) (citing Crowe v. DeGioia, 90 N.J. 126, 132-34 (1982)). The ca. re. statute, on the other hand, does not require that standard to be met. Instead, all a plaintiff must show is that a contract was founded on fraud, that defendant might remove property from the jurisdiction, or that one of a few kinds of torts was committed. See, N.J.S.A. 2A:15-41 and -42.

Ca. re. allows the jailing of a person neither charged with a crime nor in violation of a court order without a showing akin to that required for an injunction and, as a result, raises significant constitutional due process concerns. In addition, the writ is not necessary since the court may take other actions under its general powers to assure that the defendant’s assets will be available to pay a judgment if one is obtained.

Though two appellate cases have upheld the constitutionality of the capias writs in recent years, it does not appear that the writs would survive review by the United States Supreme Court or the lower federal courts. The United States Supreme Court’s procedural due process jurisprudence suggests that the writs would likely be found to violate the Due Process Clause of the Fourteenth Amendment. Since its 1969 decision in Sniadach v. Family Finance Corp. 395 U.S. 337 (1969), the U.S. Supreme Court has held even prejudgment remedies depriving civil defendants of property before trial or dispositive motion to be subject to stringent procedural due process restrictions. Connecticut v. Doehr, 501 U.S. 1 (1991); North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975); Fuentes v. Shevin, 407 U.S. 67 (1972) The deprivation of
liberty by incarceration clearly infringes upon a liberty interest protected under the Due Process Clause and would arguably be subject to procedural due process restrictions more stringent than those applied to deprivations of property.

The U.S. Supreme Court has made clear that in deciding “what process is due” in the context of prejudgment remedies, a modified version of the standard Mathews v. Eldridge, 424 U.S. 319 (1976) balancing test governs the inquiry. Connecticut v. Doehr, 501 U.S. 1 (1991). In Doehr, the Court explained that in such a case

the relevant inquiry requires, as in Mathews, first, consideration of the private interest that will be affected by the prejudgment measure; second, an examination of the risk of erroneous deprivation through the procedures under attack and the probable value of additional or alternative safeguards; and third, in contrast to Mathews, principal attention to the interest of the party seeking the prejudgment remedy, with, nonetheless, due regard for any ancillary interest the government may have in providing the procedure or forgoing the added burden of providing greater protections.

Id. at 11.

The first factor weighs heavily against the constitutionality of the capias procedure. The loss of liberty through incarceration to which civil defendants are exposed by the capias writs is one of the most serious deprivations that a person can suffer. None of the prejudgment remedy cases considered by the United States Supreme Court have involved so serious a deprivation since they concerned restraints on the use of property. Indeed, incarceration is such a serious deprivation of liberty that it is not a remedy in civil suits even after judgment (except for civil contempt orders to compel a person to obey a court order). Moreover, the harm resulting from wrongful incarceration is essentially irreparable.

Only the most compelling interest should outweigh a civil defendant’s liberty interest in freedom from incarceration. The State’s interest in providing civil plaintiffs pre-judgment remedies to ensure that they can collect upon a potential monetary judgment is far less substantial than the civil defendant’s interest in freedom from custody. Even the limited interest in affording the pre-judgment remedy must be discounted due to the existence of alternative means to ensure that the civil defendant will not be able to dispose of or disperse his or her assets prior to judgment, as explained below. Further, the capias writ does not require any showing that defendant “is about to transfer or encumber his real estate or take any other action during the pendency of the action that would render his [property] unavailable to satisfy a judgment”, which the U.S. Supreme Court has also deemed significant. Doehr, 501 U.S. at 16. Thus, the second factor does not change the balance so as to favor of the capias writ.

As to the third factor, there is clearly a substantial risk of error in deciding the merits of a claim before conducting a trial or considering a dispositive motion. The risk is great in deciding whether willful conduct was involved in a tort case or whether fraud was involved in a contract

In addition, the writ of capias ad satisfaciendum is unconstitutional because *N.J.S.A.* 2A:17-77 prohibits courts from issuing the writ against women. Thus, the statute contains a gender classification that has not been upheld by any court in the modern era, and which would almost certainly be invalidated. The U.S. Supreme Court has long held that statutes which treat the sexes differently “must serve important governmental objectives and must be substantially related to achievement of those objectives.” *Craig v. Boren*, 429 U.S. 190, 198-99 (1976). Gender classifications, whether invidious or benign, are subject to intermediate level scrutiny, which means they must serve important governmental objectives and that the gender classification must be substantially related to the achievement of those objectives. *U.S. v. Virginia*, 518 U.S. 515 (1996); *Miss. Univ. for Women v. Hogan*, 458 U.S. 718 (1982). More particularly, there must be an “exceedingly persuasive” justification for such a classification. *U.S. v. Virginia*, 518 U.S. at 531.

If the purpose of ca. sa. is to permit litigants to recover money owed after judgments entered in their favor, it is difficult to argue that precluding the issuance of the writ against women is substantially related to that purpose. A similar New Jersey statute prohibiting “the arrest or imprisonment of women by virtue of any mesne process or process of execution in any civil action” was repealed by the legislature in 1993. *See N.J.S.A.* 2A:15-40 (repealed). The immunity of women from incarceration is clearly based on outmoded stereotypes and originated in an era in which there were substantial gender inequalities. In the criminal context, women are subject to incarceration on the same terms as men. It is hard to envision a justification for subjecting men to incarceration, but not women.

**B. Unnecessary Duplication of Contempt Rules and Equitable Remedies**

Also troubling is the fact that the writs of ca. sa. and ca. re. needlessly duplicate remedies already available in the New Jersey Court Rules.

The writ of capias ad satisfaciendum duplicates the power of courts to enforce judgments through proceedings in aid of litigants’ rights. The Court Rules provide that a judgment debtor may be compelled to disclose its assets and that a court may order use of those assets to pay the judgment. *R. 4:59-1(e)*. A court may use the contempt power to compel compliance with these such orders. *See, R. 1:10*. Ca. sa. adds nothing to these powers and, to the extent that it is construed to allow incarceration for mere failure to pay a judgment, it amounts to imprisonment for debt. *See, e.g.*, N.J. CONST. art. I, par. 13.

The writ of capias ad respondendum allows a court to imprison the defendant in a civil action before the trial of a claim. This is no longer necessary in light of the general power of the courts to issue temporary restraints and interlocutory injunctions. *See R. 4:51 and 4:52*. Because *Rules* 4:52-1 and -2 allow the court to take substantial pre-judgment action when emergent circumstances exist or irreparable harm to the plaintiff will occur, the ca. re. accomplishes nothing that the equitable remedies of injunction and restraining order do not presently
accomplish. See, Solandz v. Kornmehl, 317 N.J.Super. 16, 20 (App. Div. 1998) Since ca. sa. and ca. re. do not provide benefits beyond those provided by civil contempt or injunctive relief, they are duplicative and should be repealed.

C. Inability of Jails to Keep Debtors and Criminals Separate

In addition to the foregoing, the writs place an unnecessary strain on the state’s jails and endanger the debtors imprisoned. The Legislature has commanded that imprisoned debtors shall not be jailed alongside criminals, N.J.S.A. 30:8-5, and those imprisoned on writs of capias are considered debtors for the purposes of this statute. See, Bona v. Wynn, 311 N.J.Super. 257, 266 (L. Div. 1997). In practice, this requirement has not been followed.

In Bona, an insolvent debtor who had defrauded Atlantic City investors out of millions of dollars was jailed on a writ of ca. sa. Imprisoned on the writ for nearly two years, Bona had to be hospitalized after he was attacked in his cell by a criminal prisoner. Id. at 261-2. The injuries sustained included a broken rib. Id. at 262 n.2. Bona sued for recovery under the Tort Claims Act, N.J.S.A. 59:9-1, alleging, inter alia, that the warden violated N.J.S.A. 30:8-5 by placing him with the general prison population. The Law Division held that “[t]o find a correctional official who did not separate debtors from other prisoners liable for an injury by one inmate to another, in violation of a statute that originated 120 years earlier when prison overcrowding was not the problem that it is today, would ignore the realities of prison overcrowding as well as the regulatory grant of discretion to separate inmates ‘insofar as space permits.’” Id. at 272. It was enough that the warden placed Bona in an area that housed inmates charged with minor offenses with no history of violence because “[c]orrectional officials may be unable, despite their best efforts, to properly care for the safety of prisoners while in custody.” Id. at 271-2.

Many prison wardens do not have the space or resources to house all of their criminal prisoners, let alone to house debtors in separate quarters. In response to the problem of prison overcrowding, which had reached “crisis dimensions” by the early 1980s, Governor Byrne’s Executive Order No. 106 declared state prison overcrowding to be an emergency under the Disaster Control Act. Worthington v. Fauver, 88 N.J. 183, 188-89 (1982). The Legislature ultimately passed the County Correctional Policy Act, which addressed the overcrowding by establishing a “long-term, financial assistance program to provide State grants to participating counties”. N.J.S.A. 30:8-16.5(a). In return, the Act permitted the Department of Corrections to house certain state prisoners in medium and minimum security county facilities. N.J.S.A. 30:8-16.5(b). Thus, in addition to housing relatively nonviolent criminals, county jails took in hundreds of prisoners from the larger, tougher state prisons that could no longer house them.

As of 2009, it is estimated that New Jersey’s prisons have 5,500 more inmates than they were designed for. Alexi Friedman, “New state initiative seeks to reduce prison overcrowding,” NJ.COM, May 10, 2009. Exacerbating the problem, 65% of New Jersey’s 14,000 annually-released inmates are back behind bars within five years. Id. Since the State’s prisons remain overcrowded, it is unreasonable to expect that wardens will be able to keep debtors separate from criminal prisoners. Moreover, Bona suggests that a warden need only try to follow the guidelines of N.J.S.A. 30:8-5. As a result, maintaining the capias writs not only adds to the overcrowding
problem, it endangers the welfare of jailed debtors.

D. Costs of Imprisonment

Further, the cost of jailing a debtor is high and it is not clear who is responsible for paying that cost. The average annual cost of incarceration for a prisoner in New Jersey is $38,700, which is roughly the average annual salary in New Jersey. Jonathan Tamari, “N.J. lawmakers want inmates to pay jail, monitoring costs,” PHILADELPHIA INQUIRER, May 14, 2009. So significant is the cost to the State that bills are presently being considered that would charge State prisoners for the cost of their incarceration. Id. The Camden County Correctional Facility assesses its prisoners a user fee of $5 per day for room and board and $10 per day for use of the infirmary. Id. It costs the state $106 a day to house each prisoner. It is no surprise, then, that the conceptualization of prison costs as the cost of a safer society, properly borne by taxpayers, is under attack in New Jersey and elsewhere. See, e.g., Robert Weisberg, Pay-to-Stay in California Jails and the Value of Systemic Self-Embarassment, 106 Mich. L. Rev. 55 (2007). Charging the taxpayers for the imprisonment of civil debtors is just as costly and likely to be even less popular than charging taxpayers for the costs of criminal imprisonment.

The costs of imprisoning those charged with civil contempt are currently paid by the taxpayers. It is not, however, clear who should bear the costs associated with the imprisonment of an individual as a result of a capias writ. There is no mechanism by which to impose that cost on the private litigant. If such a mechanism existed, the cost to the person seeking the writ would likely be so prohibitive as to make the writ a nullity. In the Marshall case, for example, the debtor was jailed in 1999 and remained in jail at least through 2005. See Marshall v. Matthei, 2005 WL 2447782 (App. Div. 2005) (denying, once again, debtor’s appeal for release). Six years’ imprisonment at a rate of $38,700 would be a cost to the taxpayer of $232,500. At such a rate, the fees charged to a plaintiff will eventually exceed the judgment amount sought from the debtor, negating any benefit from the writ. Thus, the capias writs are an unduly expensive proposition no matter how the cost is apportioned.

IV. Conclusion

In the absence of any countervailing constitutional rights, judicial doctrine sets the floor for constitutional rights, and legislatures can grant more robust rights. Recognition that incarceration of civil defendants as a pre-judgment remedy in a suit for monetary damages unduly infringes of such defendant’s liberty fully justifies exercising the power to set into law more robust due process rights than recognized by the Appellate Division in the very limited case law in this area.

The Commission believes the writs of capias ad respondendum et satisfaciendum are constitutionally deficient, no longer necessary, and are too impractical and costly to be administered effectively. For the foregoing reasons, the Commission recommends repeal of the writs of ca. sa. and ca. re.
Introduction

Title 2A:44A-1 through 38, known as the Construction Lien Law, became effective in 1994, replacing the old Mechanic’s Lien Law, which, up until that time, had applied to non-public construction projects. The purpose of the law is twofold: first, to enable private project contractors, subcontractors and suppliers to secure payment for their labor and materials by a lien filing process, and second, to protect property owners from exposure to double payment for work or materials for which they have already paid. Thus, the law outlines the procedures for filing and perfecting the lien claim, establishing the amount of the lien claim, and then enforcing the lien. Considered remedial in nature by the legislature, the Construction Lien Law has been construed by the courts so as to achieve its remedial purpose.

Since its enactment, the law has been the subject of litigation concerning the meaning and application of key concepts -- such as the lien fund and the lien claim -- especially where the contractor has ceased working on the project, having gone out of business or filed for bankruptcy prior to contract completion. Although court holdings have further clarified and enhanced the statute, court dicta underscore the need for additional clarity. Attorneys are troubled by what they perceive as contradictory interpretations of the statute by federal and state courts, particularly in the area of residential construction contracts.

As the project progressed, the Commission learned that at the time of the statute’s enactment, the initial drafters contemplated further revision would be necessary. The American Arbitration Association advised that construction industry claimants were confounded by the current law. The Commission further discovered that lower court judges, attempting to apply recent decisions of higher courts, wanted clarification. All seem to agree that revision is long overdue.

The proposed revision focuses on several areas. The concept of "residential construction" continues to be unclear. The term "residential construction"-- used interchangeably with the terms "residential housing construction" and "home construction" in current section 2A:44A-21 -- is not defined. Potential claimants providing work or services for multi-use and multi-dwelling properties are unsure whether to invoke the provisions that pertain to residential properties. If invoked, those provisions – 2A:44A-18, 2A:44A-19, 2A:44A-20 and 2A:44A-21 – do not guide claimants comfortably through the process of filing and perfecting residential construction contract lien claims for work on real property developments such as condominiums and cooperatives, especially work on common elements or commonly shared structures or areas. The role of community associations in the lien claim process is not specified. Lien claimants are uncertain against whom to file lien claims and how to serve them. The parameters of the arbitration proceeding and the obligations of the arbitrator are confusing. Thus, addressing concerns regarding the statute’s residential construction provisions is a primary focus of the revision.
Other important definitions are absent from the law. Although the term “claimant” is defined, the term “lien claim” is not. The term “lien fund”, though essential to application of the law, also is not defined. The definition of “contract” is inconsistent with current case law. Even the definition of “filing” is problematic. The current definition appears to intend that a document, in order to be “filed”, must be both lodged for record and indexed. But this definition is unsatisfactory to many attorneys because the date a document lodged for record is actually indexed is not within the filer’s control. As a result, section 2A:44A-2 (Definitions) also is a necessary part of the revision.

Some provisions of the statute are awkward and imprecise. Other provisions that would improve application of the statute are nonexistent. For example, the formula for calculating the “lien fund” in section 2A:44A-10 is densely worded and difficult to understand. A lien claimant’s successful application of the statute, however, is dependent upon proper use of this formula. At the same time, the method by which the “lien fund” is to be distributed to multiple lien claimants, on a pro rata basis, is not explained in the current statute. No provisions even attempt to address this important issue.

Other provisions conflict with construction industry practice and are not workable or desirable. The time requirements for filing a residential construction lien claim illustrate this problem.

Every construction lien claim, whether residential or nonresidential in nature, must be filed within 90 days after the last work, services, material or equipment is provided for which the payment is claimed. For claimants seeking to place liens on residential real estate, however, a potential claimant must first file a Notice of Unpaid Balance and Right to File Lien (“NUB”), which is a condition precedent to filing any lien arising under a residential construction contract. Unless the parties have agreed in writing to an alternative dispute resolution mechanism, the claimant must then also serve, simultaneously with the service of the NUB, a demand for arbitration, satisfy American Arbitration Association procedures for instituting an expedited proceeding before an arbitrator, and then arbitrate the claim. The arbitrator must then determine within 30 days whether the lien claim is valid. Unless the potential claimant in a residential construction context prevails in the arbitration or alternative dispute resolution, a lien claim may not be filed.

Filing the NUB, serving the Demand for Arbitration and obtaining an arbitrator’s determination regarding the validity of the lien claim all must be accomplished within the same 90-day time period afforded the nonresidential construction lien claimant. This creates obvious time constraints for the residential construction lien claimant that cannot easily be met. A potential claimant also may wait too long to file the NUB or serve the arbitration demand only to discover that the lien claim is time-barred. Thus, the current act does not set out realistic time limitations for each step in the process of filing a lien claim for residential construction.

Provisions adapted or carried over from the old Mechanics Lien Law are ambiguous or confusing in the context of the Construction Lien Law. For example,
sections 2A:44A-10 and 2A:44A-22 both discuss mortgage priority but neither refers to the other nor is one easily distinguishable from the other in application.

Finally, commenters express frustration with the current form of lien claim, the process for amending a lien claim, the inconsistency of arbitration awards, and the lack of a comprehensive mechanism to address failure to discharge the lien once the claim is paid or satisfied.

The Commission addresses these and other concerns by (a) clarifying and adding defined terms, especially pertaining to the meaning of “residential”; (b) clarifying (and in some cases rearranging) provisions for the filing and amending of the lien claim and for the calculation, distribution and enforcement of the lien fund (new sections 2A:44A-9.1, 2A:44A-23, and 2A:44A-24 for example, are also added); (c) amplifying provisions for discharging a satisfied lien claim; (d) adopting court pronouncements regarding the concepts of contract price, lien fund and lien claim; (e) further defining the arbitrator’s role, and (f) modifying and adding time limits for filing and perfecting residential construction contract lien claims. The Commission also revises some language simply to make it easier for participants in the construction industry to use the law. The changes enhance application of the act and make clearer the procedures to be followed in order to process and perfect a construction lien claim.

The most significant changes from the current law are set forth below:

1. 2A:44A-2. - Definitions. The terms “lien claim”, “lien fund” and “community association” are now defined for the first time. Rather than refer to the meaning of person “as defined in R.S. 1:1-2” (which appears in the current definition of “claimant”), “person” is now its own defined term. The meaning of residential construction has been clarified by (i) revision of the existing definitions of “residential construction contract” and “residential purchase agreement”, and (ii) addition of the following new defined terms: “dwelling”, “real property development”, “residential construction”, and “residential unit”.

The definition of “filing” has been modified to address practical concerns, distinguishing “lodging for record”, and making a distinction, in section 2A:44A-6, for purposes of enforcement of the lien claim between parties within the construction chain with notice of the claim and third parties outside the construction chain without notice of the claim. In addition, the definition of “contract” now provides for a signature “by the party against whom the lien claim has been asserted” and also includes delivery slips that refer to a specific site or project where the materials are delivered or used.

2. 2A:44A-3. – Entitlement to lien for work, services, material or equipment provided pursuant to contract. A distinction is now made between a lien for work and services provided as part of the common elements or common areas of a residential or nonresidential property development and a lien for work and services provided for the unit itself. The former lien attaches to the interest of the owner in the property being developed but not to the unit owner’s interest in the real property. A lien attaches to the
unit owner’s interest only for work and services provided within or as part of that unit. This section now also distinguishes liens filed against owners from those filed against community associations for work performed as part of the common elements of a real property development. The circumstances under which a landlord or other party with an interest in the property may be subject to a lien for improvements to the real property made by a tenant are now clarified. Finally, current 2A:44A-19 is now merged into this section.

3. **2A:44A-6. – Filing of lien claim; requirements.** This section is revised substantially to make the lien claim filing procedure easier to understand. The distinction between “filing” and “lodging for record” for purposes of enforceability of the lien is now part of this section. In order to provide sufficient time to comply with the procedures set forth in section 2A:44A-21, the time frame for the filing of residential construction contract lien claims also is extended to 120 days.

4. **2A:44A-7. – Mailing of lien claim; proof of services.** The procedure for serving the lien claim is now clearer and more consistent with industry practice.

5. **2A:44A-8. – Construction lien claim; form.** The proposed lien claim form is based on the form in current section 2A:44A-8, but designed to be easier to understand, more relevant to industry practice and more useful for its intended purpose.

6. **2A:44A-9.1. – Relationship to lien fund, maximum liability; impermissible reductions of lien fund.** This section is entirely new. In plain language, the section now incorporates the formula for calculating the lien fund (excised from current section 2A:44A-10) and adopts recent court determinations to explain what may be deducted from the lien fund. This section is intended to create a better understanding of the relationship between lien claims and the lien fund and how the lien fund is calculated.

7. **2A:44A-10. – Attachment of lien claim; priority of bona fide purchasers and other liens; maximum liability.** This section now deletes any reference to the lien fund calculation (that calculation has been excised, revised and incorporated into the new section 2A:44A-9.1), focusing instead on attachment of the lien and the priority of first recorded interests and liens affecting real property. Reference to section 2A:44A-22, which also pertains to mortgage priority, is also included. The modified language is consistent with actual construction lien practice.

8. **2A:44A-11. – Amendment of lien claim, form.** This section now illustrates those circumstances when a lien claim would be amended, clarifying that an amendment to cure a violation of section 2A:44A-15 is impermissible.

9. **2A:44A-13. – Construction lien book; construction lien index book; filing and notation fees.** Language is clarified and reference made to N.J.S. 22A:2-29 where fee amounts are already stated. Those fee amounts also have been updated.
10. **2A:44A-16 – Joinder of party defendants; defenses.** Most of this section is now incorporated into a new section 2A:44A-24. Hence, current section 2A:44A-16 has been deleted from the proposed revised statute.

11. **2A:44A-19. – Attachment of lien to interest of owner for work performed in a condominium or cooperative unit.** Subsection a., modified to comport with the new definition of “residential unit”, and subsection b. of this section are both now incorporated into the revised section 2A:44A-3. Hence, current section 2A:44A-19 has been deleted from the proposed revised statute.

12. **2A:44A-20. – Notice of unpaid balance; right to file lien; form.** This section now includes a form of NUB that comports with the changes made to section 2A:44A-8 and the form of lien claim. Other language is now consistent with proposed changes to section 2A:44A-10.

13. **2A:44A-21. – Legislative findings; additional requirements for filing of lien on residential construction.** Since the time frame for lodging for record residential lien claims now is extended to 120 days, the time frame for lodging for record the NUB has also changed; the NUB now must be lodged for record within 60 days from the last date of provision of work, services, material or equipment for which payment is claimed. This provision now describes the documents that are served along with service of the demand for arbitration and makes clear the time frame for completion of the arbitration. This section also modifies the types of determinations that the arbitrator must make and adds provisions that seek to avoid the problems associated with multiple, inconsistent arbitrations by (i) urging one arbitrator to determine all related claims and (ii) providing for the consolidation of multiple arbitrations into a single proceeding at the arbitrator’s discretion.

14. **2A:44A-22. – Priority of mortgages over liens.** This provision now distinguishes section 2A:44A-10, which applies to mortgages first recorded, from section 2A:44A-22, which applies to mortgages that are recorded after the lien claim is filed. The section also now applies to the advancement of funds required by mortgage loan closings, such as pre-paid taxes and interest.

15. **2A:44A-23. – Payment of lien claims; distribution of proceeds.** This proposed new section, a blend, in part, of the current sections 2A:44A-23 and 2A:44A-28, sets forth the process by which lien claims are paid out pro rata from the lien fund, not addressed in the current statute. As a result, section 2A:44A-28 is unnecessary and therefore deleted entirely from the statute.

16. **2A:44A-24 – Suit to enforce lien claim.** This proposed section is entirely new and replaces the current Judgment; filing and content of statement section. Sections 2A:44A-25, 2A:44A-26, 2A:44A-28 and 2A:44A-29 have been modified or eliminated accordingly. Section 2A:44A-16, pertaining to joinder, has also been incorporated into this section and consequently deleted entirely from the proposed revised statute.
17. **2A:44A-25. – Writs of execution; 2A:44A-26 – Special writs of execution; sale and conveyance of land; 2A:44A-28 – Proceeds of sale; distribution.** These existing sections are deleted in the revision because of the proposed changes to sections 2A:44A-23 and 2A:44A-24.

18. **2A:44A:30. – Filing of certificate to discharge lien claim of record.** This section now includes a summary proceeding for discharging a lien claim and imposes consequences for not canceling or discharging a lis pendens upon discharge of the claim. New proposed subsection d. also now enables an owner within thirteen months after the date of the lien claim, and upon the filing of an appropriate affidavit, to obtain a discharge of a lien claim that has been fully paid and satisfied.

19. **2A:44A-31.1. – Bond; form.** This section is entirely new and provides a form of bond to be used in order to discharge the construction lien.

20. **2A:44A-33. – Lien claim; discharge of record.** This section now enables the county clerk to discharge a fully paid and satisfied lien claim, under specific circumstances, upon receipt of the owner’s submission of the appropriate affidavit.

Modifications to section descriptors are also recommended throughout the statute as needed.

**2A:44A-1. Short title –**

This act shall be known and may be cited as the “Construction Lien Law.”

**COMMENT**

No changes have been made to this section of the current law.

**2A:44A-2. Definitions**

“Claimant” means a person, as defined in R.S. 1:1-2, having the right to file a lien claim on real property pursuant to the provisions of this act.

**COMMENT**

The current law does not define “person” but refers to it within the definition of “claimant.” Since the word “person” is used throughout the statute, it is now separately defined.

“Contract” means any agreement, or amendment thereto, in writing, signed by the party against whom the lien claim is asserted and evidencing the respective responsibilities of the contracting parties, including but not limited to price or other consideration to be paid, and a description of the benefit or improvement to the real property subject to lien, which, in the case of a supplier, “contract” shall include a delivery or order slip referring to the site or project to which materials have been delivered or where they were used and signed by the party against whom the lien claim is asserted or that party’s authorized agent, owner, contractor, or subcontractor having a direct contractual relation with a contractor, or an authorized agent of any of them. “The
party against whom the lien claim is asserted” is the party in direct privity of contract with the party asserting the lien claim. A writing that is “signed” bears a mark or symbol intended to authenticate it.

COMMENT

The new language adds formality to the definition of “contract” by requiring essential terms, such as price, or where appropriate, evidence of benefit or improvement to the property subject to lien. This is especially important since the statute affects property rights on a unilateral basis. The contract must be “signed” in accordance with the decision in Gallo v. Sphere Construction Corp., 293 N.J. Super. 558 (Ch. Div. 1996). The additional language regarding separate delivery slips incorporates comments by the court in Legge Industries v. Joseph Kushner Hebrew Academy, 333 N.J.Super. 537 (App.Div. 2000), consistent with construction industry practice, wherein deliveries are often “signed for” by authorized representatives of the parties in the construction chain and materials may be used at a construction site though delivered elsewhere.

“Contract price” means the amount specified in a contract for the provision of work, services, material or equipment.

COMMENT

No changes have been made to this section of the current law.

“Community association” means a condominium association, a homeowners’ association, a cooperative association, or any other entity created to administer or manage the common elements and facilities of a real property development that, directly or through an authorized agent, enters into a contract for improvement of the real property.

COMMENT

This definition is new. It has been added here because of modifications to section 2A:44A-3 which will now affect many other sections of the statute.

“Contractor” means any person in direct privity of contract with the owner of real property, or with a community association in accordance with section 2A:44A-3, for improvements thereto to the real property. A construction manager who enters into a single contract with an owner or community association for the performance of all construction work within the scope of a construction manager’s contract, a construction manager who enters into a subcontract, or a construction manager who is designated as an owner’s or community association’s agent without entering into a subcontract is also a “contractor” for purposes of this act. A licensed architect, engineer or land surveyor or certified landscape architect who is not a salaried employee of the contractor or the owner or community association, performing professional services related to the improvement of property in direct contract with the property owner shall be considered a “contractor” for the purposes of this act.

COMMENT

Reference to “community association” is added because of modifications to section 2A:44A-3.

“County clerk” means the clerk of the county in which real property to be improved is situated.

COMMENT

No changes have been made to this section of the current law.

“Day” means a calendar day unless otherwise designated.
This definition is new. It is included for clarification only and to accommodate concerns of the American Arbitration Association and attorneys.

“Dwelling” means a one-, two- or three-family residence that is freestanding or shares a party wall without common ownership interest in that party wall. A dwelling may be part of a real property development.

COMMENT
This definition is new. The term “dwelling” is not defined in current section 2A:44A-2 although referred to in the current definitions of “residential construction contract” and “residential purchase agreement.” This definition, along with the new definition of “residential unit”, (see later in this section) attempts to clarify what is included within the meaning of “residential”.

“Equipment” means any machinery or other apparatus, including rental equipment delivered to the site to be improved or used on the site to be improved, whether for incorporation in the improved real property or for use in the construction of the improvement of the real property but not incorporated therein. A lien for equipment shall arise only for equipment used on site for the improvement of real property, including equipment installed in the improved real property. In the case of rental equipment, the amount of any lien shall be limited to the rental rates as set forth in the rental contract.

COMMENT
No changes have been made to this section of the current law other than stylistic changes as noted.

“Filing” means the (i) lodging for record and (ii) the indexing of the documents authorized to be filed or recorded pursuant to this act in the office of the county clerk in the county where the property subject to the lien is located, or, in the case of real property located in more than one county, in the office of the county clerk of each such county. A document is “lodged for record” if it is delivered to the county clerk and the clerk marks the document with a date and time stamp or other mark indicating the date and time received.

COMMENT
The additional language clarifies that the lien claim form or any other document authorized to be filed by the statute is to be filed where the property subject to lien is located. The revision also defines the terms “lodged for record” so as to make clearer both the definition of “filing” and new section 2A:44A-6 which makes a distinction between “filing” and “lodging for record” for purposes of enforcement of the lien claim.

"Improvement" means any actual or proposed physical changes to real property by resulting from the provision of work, or services or material by a contractor, or subcontractor, or supplier pursuant to the terms of a contract, whether or not such physical change is undertaken, and includes the construction, reconstruction, alteration, repair, renovation, demolition or removal of any building or structure, any addition to a building or structure, or any construction or fixture necessary or appurtenant to a building or structure for use in conjunction therewith. “Improvement” includes excavation, digging, drilling, drainage, dredging, filling, irrigation, land clearance, grading or landscaping. “Improvement” shall not include the mining of minerals or removal of timber, gravel, soil, or sod which is not integral to or necessitated by the improvement to real property. “Improvement” shall not include public works or improvements to real
property contracted for and awarded by a public entity. Any work or services requiring a license for performance including, but not limited to, architectural, engineering, plumbing or electrical construction, shall not constitute an improvement unless performed by a licensed claimant.

COMMENT
The term “renovation” has been added to the definition of improvement. The current law was not consistent with the language in section 2A:44A-21, which speaks of “renovations” to residential property. Also the word “changes” was made singular and references to “material” and “suppliers” were added.

“Interest in real property” means any ownership, possessory security or other enforceable interest, including, but not limited to, fee title, easement rights, covenants or restrictions, leases and mortgages.

COMMENT
No changes have been made to this section of the current law.

“Lien” or “construction lien” means a lien on the owner’s interest in the real property arising pursuant to the provisions of this act.

COMMENT
No changes have been made to this section of the current law other than stylistic changes as noted.

"Lien claim" means a claim, by a claimant, for money for the value of work, services, material or equipment furnished in accordance with a contract and based upon the contract price and any amendments thereto, that has been secured by a lien pursuant to this act.

COMMENT
This definition is new. The current law does not define “lien claim” even though the word “claimant” is defined as a ‘person . . . having the right to file a lien claim on real property pursuant to the provisions of this act” and the term “lien claim” is used in many sections of the act.

“Lien fund” means the pool of money from which one or more lien claims may be paid. The amount of the lien fund shall not exceed the maximum amount for which an owner can be liable. The amount of the lien that attaches to the owner’s interest in the real property cannot exceed the lien fund.

COMMENT
This definition is new. The current law does not define “lien fund” even though the term is expressed or implied throughout the act.

“Material” means any goods delivered to, or used on the site to be improved, for incorporation in the improved real property, or for consumption as normal waste in construction operations; or for use on site in the construction or operation of equipment used in the improvement of the real property but not incorporated therein. The term “material” does not include fuel provided for use in motor vehicles or equipment delivered to or used on the site to be improved.

COMMENT
No changes have been made to this section of the current law.

“Mortgage” means a loan which is secured by a lien on real property.
“Owner” or “owner of real property” means any person, including a tenant, with an estate or interest in real property who personally or through an authorized agent enters into a contract for improvement of the real property. “Owner” or “owner of real property” shall not include a “community association” that holds record title to real property or has an interest in real property.

“Person” means an individual, corporation, company, association, society, firm, limited liability company, limited liability partnership, partnership, joint stock company or any other legal entity, unless restricted by the context to one or some of the above.

“Public entity” includes the State, and any county, municipality, district, public authority, public agency, and any other political subdivision or public body in the State.

“Real property development” means all forms of residential and non-residential real property development now existing or yet to be developed including but not limited to a condominium subject to P.L. 1969, c.257 (C. 46:8B-1 et seq.), a housing cooperative subject to P.L 1987, c.381 (C. 46:8D-1 et seq.), a fee simple townhouse development, a horizontal property regime as defined in section 2 of P.L. 1963, c. 168 (C.46:8A-2), and a planned unit development as defined in section 3.3 of P.L. 1975, c.291 (C.40:55D-6).
This definition is new. Notably, section 2A:44A-21 a. references three different sets of terms, all intended to have the same meaning: “construction of residential housing”, “home construction” and “residential construction”. The addition of this new definition along with the new definitions of “dwelling” and “residential unit” (and the revised definitions of “residential construction contract” and “residential purchase agreement”) together enhance the meaning and application of the residential construction provisions of the statute. All offsite and onsite infrastructure and sitework improvements are now included within the definition of “residential construction.”

"Residential construction contract" means any written contract for the construction of or improvement to a one- or two-family dwelling, or dwellings, or any portion thereof, of the dwelling, which shall include any or a residential unit, or units, or any portion thereof in a real property development, in a condominium subject to the provisions of P.L.1969, c.257 (C.46:8B-1 et seq.), any residential unit in a housing cooperative, any residential unit contained in a fee simple townhouse development, any residential unit contained in a horizontal property regime as defined in section 2 of P.L.1963, c.168 (C.46:8A-2), and any residential unit contained in a planned unit development as defined in section 3.3 of P.L.1975, c.291 (C.40:55D-6.)

"Residential purchase agreement" means a written contract between a buyer and a seller for the purchase of a one- or two-family dwelling or dwellings, or any residential unit or units in a real property development, in a condominium subject to the provisions of P.L.1969, c.257 (C.46:8B-1 et seq.), any residential unit in a housing cooperative, any residential unit contained in a fee simple townhouse development, any residential unit contained in a horizontal property regime as defined in section 2 of P.L.1963, c.168 (C.46:8A-2), and any residential unit contained in a planned unit development as defined in section 3.3 of P.L.1975, c.291 (C.40:55D-6.)

"Residential unit" means a unit in a real property development designed to be transferred or sold for use as a residence, and the design evidenced by a document, such as a master deed or declaration, recorded with the county clerk in the county where the real property is located, or a public offering statement filed with the Department of Community Affairs. "Residential unit" includes a unit designed to be transferred or sold for use as a residence that is part of a multi-use or "mixed use" development project. “Residential unit” does not include a unit designed for rental purposes or a unit designed to be transferred or sold for non-residential use.
COMMENT

This definition is new. The current law does not define “residential unit” even though the term is used elsewhere in the definitions and text of the statute. The above definition makes the touchstone for ascertaining whether a development of units is designed for residential use either the recording of a master deed or declaration with the county clerk or the filing of a public offering statement with the Department of Community Affairs. As a consequence, a party may be held to have had constructive notice that certain real property developments are residential in nature. A “dwelling” may be part of a real property development, as its definition indicates.

The definition also expressly excludes a residential unit designed for rental use such as a rental unit in an apartment building. The intent of these modifications is to make the definitions of “residential construction contract” and “residential construction” (set forth above) more concise.

“Services” - means professional services performed by a licensed architect, engineer, or land surveyor, or certified landscape architect, who is not a salaried employee of the contractor, a subcontractor or the owner and who is in direct privity of contract with the owner for the preparation of plans, documents, studies, or the provision of other services by a licensed architect, engineer or land surveyor prepared in connection with a proposed or an actual physical change improvement to real property, whether or not such physical change improvement is undertaken.

COMMENT

The term “improvement” replaces “proposed or an actual physical change” because that term is already defined in the statute to include proposed or actual physical change.

“State” means the State of New Jersey and any office, department, division, bureau, board, commission or agency of the State.

COMMENT

No changes have been made to this section of the current law.

“Subcontractor” means any person providing work or services in connection with the improvement of real property pursuant to a contract with a contractor or pursuant to a contract with a subcontractor in direct privity of contract with a contractor.

COMMENT

No changes have been made to this section of the current law.

“Supplier” means any supplier of material or equipment, including rental equipment, having a direct privity of contract with an owner, community association, contractor or subcontractor in direct privity of contract with a contractor. The term “supplier” shall not include a person who supplies fuel for use in motor vehicles or equipment delivered to or used on the site to be improved or a seller of personal property who has a security agreement providing a right to perfect either a security interest pursuant to Title 12A of the New Jersey Statutes or a lien against the motor vehicle pursuant to applicable law.

COMMENT

Reference to “community association” is added because of modifications to section 2A:44A-3.

“Work” means any activity, including but not limited to labor, performed in connection with the improvement of real property. The term “work” includes
architectural, engineering, or surveying services provided by salaried employees of a
contractor or subcontractor, as part of the work of the contractor or subcontractor,
provided, however, that the right to file a lien claim for those services shall be limited to
the contractor or subcontractor.

COMMENT

No changes have been made to this section of the current law except the addition of the words “but
not limited to” after the word “including”. The Commission, requested by a security guard services
provider to specifically include security guard services within the definition of “work” and “services”,
determined that such a request raised a policy issue best left to the Legislature. That issue is whether lien
rights should exist under the statute for work that does not involve or impact, directly, the design, planning
or construction stages of a project, but is collateral to the project, such as the services of security guards,
insurers, accountants, attorneys and other similar work. If the definition of “work” were broadened to
include those collateral work and service providers currently excluded from the protections of the statute,
such lien rights would exist for such collateral services.

2A:44A-3. Entitlement to lien for work, services, material or equipment provided
pursuant to contract

a. Any contractor, subcontractor or supplier who provides work, services, material
or equipment pursuant to a contract, shall be entitled to a lien for the value of the work or
services performed, or materials or equipment furnished in accordance with the contract
and based upon the contract price, subject to the provisions of sections 9 and 10 2A:44A-
6; 2A:44A-9, 2A:44A-9.1 and 2A:44A-10 of this act. The lien shall attach to the interest
of the owner or unit owner in the real property, or filed against the community
association, subject to in accordance with this section.

b. For purposes of this section, (i) “interest of the owner of the real property
development” includes interest in any residential or nonresidential units not yet sold or
transferred and the proportionate undivided interests in the common elements attributable
to those units; (ii) “unit owner” means an owner of an interest in a residential or
nonresidential unit who is not a developer of the property and acquires the unit after the
master deed or master declaration is recorded, or after the public offering statement is
filed with the Department of Community Affairs; and (iii) “interest of the unit owner”
includes the proportionate undivided interests in the common elements of the real
property development.

c. In the case of a condominium, notwithstanding the Condominium Act, or in the
case of any other real property development with common elements or common areas or
facilities, if the contract of improvement is (i) with the owner of the real property
development, then the lien shall attach to the interest of such owner, but if the contract of
improvement is (ii) with the community association, the lien claim shall be filed against
the community association but shall not attach to any real property. In either case, if the
work, services, material or equipment are performed or furnished as part of the common
elements or facilities of a real property development, the lien shall not attach to the
interest of the unit owner.

d. If the work, services, material or equipment are performed or furnished solely
within or as part of a residential or nonresidential unit, the lien shall attach only to the
interest of the unit owner.
e. If a tenant contracts for improvement of the real property, the lien shall attach to the leasehold estate of the tenant and to the interest in the property of any person who (i) has expressly authorized the contract for improvement has not been authorized in writing signed by the person against whom the lien claim is asserted, which writing provides that the person’s interest is subject to a lien for this improvement, by the owner of a fee simple interest in the improved real property, or (ii) has paid, or agreed in writing to pay, the majority of the cost of the improvement; or (iii) is a party to the lease or sublease that created the leasehold interest of the tenant and the lease or sublease provides that the person’s interest is subject to a lien for the improvement, the lien shall attach only to the leasehold interest of the tenant.

f. If an interest in real property is lawfully conveyed after work, services, material or equipment are performed or furnished but before a lien attaches, the lien shall attach only to the interest retained by the owner or unit owner or community association, as the case may be, who contracted for the work, services, material or equipment and not to the interest previously conveyed.

g. Nothing in this act shall be construed to limit the right of any claimant from pursuing any other remedy provided by law.

COMMENT

New subsection b. defines relevant terms now included within this section. New subsections c. and d. explain that the right to lien for the value of work performed for the common elements of any real property development cannot in any case attach to the individual unit owners’ interests once the development has been built and ownership of the residential or nonresidential units transferred to purchasers except to the extent that there is real property remaining in the hands of the original developer. In the case of work or services performed as part of the common elements of a real property development, the revised language provides that a lien may be filed against the owner of the real property development or against a community association depending upon who contracts for the work or services performed. A lien may attach to the interest of a residential or nonresidential unit owner, however, only for the value of work performed solely within or as part of that unit. Thus, subsection a. of current section 2A:44A-19 is incorporated into this new subsection d.

The revision to subsection e. attempts to counter the effect of the court holding in Cherry Hill Self Storage, LLC v. Racanelli Construction Company, Inc. WL 1756914 (App. Div. 2007), which required the landlord to authorize in writing a contract for improvement by a tenant to leasehold property even though the lease provided that the tenant was permitted to contract to have the work done, the landlord was required to contribute to the work to be done in the form of a rent credit, and the landlord had the right to compel the tenant to make certain modifications to the building plans. In practice, the lease may not provide that the landlord approve each and every improvement proposed by the tenant. The tenant’s ability to obtain written authorization for a proposed improvement in a timely fashion often may not be possible. The landlord, however, should not be obligated to bear the burden of the lien if the landlord has done nothing more than sign a lease that contemplates a tenant improvement. The proposed modification in subsection e. attempts to address those instances where the lien should attach to any other interest in addition to the leasehold interest.

New subsection f. incorporates language taken from current section 2A:44A-19 b., modified slightly, and incorporated here.
2A:44A-4. Attachment of liens for improvements

Liens for the following improvements shall attach to real property only in the manner herein prescribed. In the case of an improvement:

a. Involving a dock, wharf, pier, bulkhead, return, jetty, piling, groin, boardwalk or pipeline above, on or below lands under waters within the State’s jurisdiction, the lien shall be on the improvements together with the contracting owner’s interest in the lots of land in front of or upon which the improvements are constructed and any interest of the contracting owner of the land in the land or waters in front of the land;

b. Involving removal of a building or structure or part of a building or structure from its situs and its relocation on other land, the lien shall be on the contracting owner’s interest in the improved real property on which the building or structure has been relocated;

c. Involving excavation, drainage, dredging, landfill, irrigation work, construction of banks, making of channels, grading, filling, landscaping or the planting of any shrubs, trees or other nursery products, the lien shall be on the land to which the improvements are made, and shall not be upon the adjoining lands directly or indirectly benefited from the improvements.

COMMENT
No changes have been made to this section of the current law.

2A:44A-5. Prohibited liens and claims

No liens shall attach nor shall a lien claim be filed:

a. For materials that have been furnished or delivered subject to a security agreement which has been entered into pursuant to Chapter 9 of Title 12A of the New Jersey Statutes (N.J.S. 12A:9-101 et seq. et seq.);

b. For public works or improvements to real property contracted for and awarded by a public entity; provided, however, that nothing herein shall affect any right or remedy established pursuant to the “municipal mechanic’s lien law”, N.J.S. 2A:44-125 et seq. et seq.;

c. For work, services, material or equipment furnished pursuant to a residential construction contract unless there is strict compliance with sections 20 and 21 2A:44A-20 and 2A:44A-21 of this act.

COMMENT
The revision replaces references to sections of the act with references to the title and section numbers. It also italicizes references to the abbreviation for the Latin et sequens.

2A:44A-6. Filing of lien claim; requirements

a. A lien claim shall be signed, acknowledged and verified by oath of the claimant or, in the case of a partnership or corporation, a partner or duly authorized officer thereof, and filed with the county clerk not later than 90 days following the date the last work,
services, material or equipment was provided for which payment is claimed. No lien shall attach, or be enforceable under the provisions of this act and, in the case of a residential construction contract, compliance with sections 20 and 21 of this act, unless the lien claim is filed in the form, manner and within the time provided by this section and section 8 of this act, and a copy thereof served on the owner and, if any, the contractor and the subcontractor, against whom the claim is asserted, pursuant to section 7 of this act.

a. A contractor, subcontractor or supplier entitled to file a lien pursuant to section 2A:44A-3 shall do so as set forth in subsections (1) and (2).

(1). The lien claim form as prescribed by section 2A:44A-8 shall be signed acknowledged and verified by oath of the claimant setting forth (i) the specific work or services performed, or material or equipment provided pursuant to contract; and (ii). the claimant’s identity and contractual relationship with the owner or community association and other known parties in the construction chain.

(2). In all cases except those involving a residential construction contract, the lien claim form shall then be lodged for record within 90 days following the date the last work, services, material or equipment was provided for which payment is claimed. In the case of a residential construction contract, the lien claim form shall be lodged for record, as required by section 2A:44A-21 b.(8), not later than 10 days after receipt by the claimant of the arbitrator’s determination, and within 120 days following the date the last work, services, material or equipment was provided for which payment is claimed. If requested, at the time of lodging for record the clerk shall provide a copy of the lien claim form marked with a date and time received.

b. No lien shall attach, or be enforceable under this act unless the lien claim or other document permitted to be filed under this act is (i) filed in the manner and form provided by this section and section 2A:44A-8; and (ii) a copy thereof served in accordance with section 2A:44A-7, except that every document lodged for record that satisfies the requirements of this section, even if not yet filed, shall be enforceable against parties with notice of the document. A document must be first filed, however, in order to be enforceable against third parties without notice of the document, including but not limited to an owner, bona fide purchaser, mortgagee, or grantee of an easement, lessee or a grantee of any other interest in real estate.

c. In the case of a residential construction contract the lien claim must also comply with sections 2A:44A-20 and 2A:44A-21.

d. For purposes of this act, warranty or other service calls, or other work, materials or equipment provided after completion or termination of a claimant’s contract shall not be used to determine the last day that work, services, material or equipment was provided.

COMMENT

The revisions attempt to clarify the current law, incorporate recent court pronouncements, and accommodate the needs of residential construction contract claimants. These claimants need more time to file claims because of the requirements prior to filing the lien, i.e., the filing of a Notice of Unpaid Balance and Right to File Lien (NUB), the service of a demand for arbitration with the American Arbitration
Association, the arbitration procedure itself, and the determination by the arbitrator of whether the lien is valid.

The current law asks the reader to file a lien claim form with insufficient direction or explanation. New subsection a. attempts to provide such direction. New subsection b. also explains that the act of lodging a lien claim for record (or a NUB or amended lien claim) preserves the enforceability of the lien claim or other document as against parties with notice of the claim so long as the document satisfies the timeframe, form of lien claim and service requirements of the statute. However, a document must be filed (which includes indexing) in order for it to be effective as to third parties.

2A:44A-7. Mailing of lien claim; proof of service

a. Within 10 business days following the filing lodging for record of a lien claim, the claimant shall, by personal service or registered or certified mail, return receipt requested, postage prepaid, serve on the owner, or community association in accordance with section 2A:44A-3, and, if any, the contractor and subcontractor against whom the claim is asserted, or mail a copy of the completed and signed lien claim substantially in the form as prescribed in by section § 2A:44A-8 of the act and marked “received for filing” or a similar stamp with a date and time or other mark indicating the date and time received by the county clerk. Service shall be by personal service as prescribed by the Rules Governing the Courts of the State of New Jersey or by (i) simultaneous registered or certified mail or commercial courier whose regular business is delivery service and (ii) ordinary mail addressed to the last known business or residence address or place of residence of the owner or community association, and, if any, of the contractor and the or subcontractor, against whom the claim is asserted. Proof of timely mailing shall satisfy the requirement of service of the lien claim. A lien claim served upon a community association need not be served upon individual “unit owners” as defined in section 2A:44A-3.

b. The service of the lien claim provided for in this section shall be a condition precedent to enforcement of the lien; however, the service of the lien claim outside the prescribed time period shall not preclude enforceability unless the party not timely served proves by a preponderance of the evidence that the late service has materially prejudiced its position. Disbursement of funds by the owner, community association, a contractor or subcontractor who has not been properly served, or the creation or conveyance of an interest in real property by the an owner who has not been properly served, without actual knowledge of the filing of the lien claim, shall constitute prima facie evidence of material prejudice, that the party has been materially prejudiced.

COMMENT

By the addition of lettered subsections, the revision clarifies current law and emphasizes that service of the lien claim upon the owner, community association and possible contractors and subcontractors, by personal service, or simultaneous certified or registered mail or commercial courier and ordinary mail, is a condition precedent to enforcement of the lien. The section now also provides that the claimant shall serve a lien claim form that has been marked “received for filing” or a similar stamp by the county clerk. The revision also makes clear that disbursement without proper service (not actual knowledge) is the key to evidence of prejudice; since the statute provides for the option of service by certified mail, actual knowledge of the lien claim filing may not occur.

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2A:44A:8. Construction lien claim; form

The lien claim shall be filed in substantially the following form:

CONSTRUCTION LIEN CLAIM

TO THE CLERK, COUNTY OF __________;

In accordance with the terms and provisions of the "Construction Lien Law," P.L. 1993, c.318 (C.2A:44A-1 et al.), notice is hereby given that:

1. (Name of claimant) of (address of claimant) has on (date) claimed a construction lien against the below-stated real property of (owner against whose property the lien is claimed), in the amount of ($_____), for the value of the work, services, material or equipment provided in accordance with a contract with (name of contracting party with whom claimant has a contract) for the following work, services, materials or equipment:
   a.
   b.
   c. (etc.)

2. The amount due for work, services, materials or equipment delivery provided by claimant in connection with the improvement of the real property, and upon which this lien claim is based, is as follows:
   Total contract amount: ________________ $______
   Amendments to contract: $______
   Total contract amount and amendments to contract: ________________ $______
   Less: Agreed upon credits: __________________________ $______
   Contract amount paid to date: __________________________ $______
   Amendments to contract amount paid to date: __________________________ $______
   TOTAL REDUCTIONS FROM CONTRACT AMOUNT AND AMENDMENTS TO CONTRACT: __________________________ $______
   TOTAL LIEN CLAIM AMOUNT: __________________________ $______

Notice of Unpaid Balance and Right to File Lien (if any) was previously filed with the County Clerk of County on ______ as No. in Book ______ Page ______.

3. This construction lien is claimed against the interest of __________ (name) as (check one):
   Owner ______
   Lessee ______
   Other (describe): ______
   in that certain tract or parcel of land and premises described as Block ____, Lot ____, on the tax map of the ______ of ______, County of ______, State of New Jersey, for the improvement of which property the aforementioned work, services, materials or equipment was provided.

4. The work, services, materials or equipment was provided pursuant to the terms of a written contract (or, in the case of a supplier, a delivery or order slip signed by the owner, contractor, or subcontractor having a direct contractual relation with a contractor, or an authorized agent of any of them), dated , between (claimant) and (name of other contracting party) of (address).

5. The date of the provision of the last work, services, material or equipment for which payment is claimed is (date).

NOTICE TO OWNER OF REAL PROPERTY.
Your real estate may be subject to sale to satisfy the amount asserted by this claim. However, your real estate cannot be sold until the facts and issues which form the basis of this claim are decided in a legal proceeding before a court of law. The lien claimant is required by law to commence suit to enforce this claim.

The claimant filing this lien claim shall forfeit all rights to enforce the lien and shall be required to discharge the lien of record, if the claimant fails to bring an action in the Superior Court, in the county in which the real property is situated, to establish the lien claim.
1. Within one year of the date of the last provision of work, services, material or equipment, payment for which the lien claim was filed; or
2. Within 30 days following receipt of written notice, by personal service or certified mail, return receipt requested, from the owner requiring the claimant to commence an action to establish the lien claim.

You will be given proper notice of the proceeding and an opportunity to challenge this claim and set forth your position. If, after you (and/or your contractor or subcontractor) have had the opportunity to challenge this lien claim, the court of law enters a judgment against you and in favor of the claimant filing this lien claim, and thereafter you fail to pay that judgment, your real estate may then be sold to satisfy the judgment.

You may choose to avoid subjecting your real estate to sale by doing either of the following:
1. You (or your contractor or subcontractor) can pay the claimant and obtain a discharge of lien claim from the claimant; or
2. You (or your contractor or subcontractor) can cause the lien claim to be discharged by filing a surety bond or making a deposit of funds as provided for in section 31 of P.L.1993, c.318 (C.2A:44A-31).

If you (or your contractor or subcontractor) choose to pay the claimant under 1. above, you will lose your right to challenge this lien claim in a legal proceeding before a court of law.

If you (or your contractor or subcontractor) choose to discharge the lien claim by filing a surety bond or making a deposit of funds as provided in section 31 of P.L.1993, c.318 (C.2A:44A-31), you will retain your right to challenge this lien claim in a legal proceeding before a court of law.

NOTICE TO SUBCONTRACTOR OR CONTRACTOR:

This lien has been filed with the county clerk and served upon the owner of the real estate. This lien places the owner on notice that the real estate may be sold to satisfy this claim unless the owner pays the claimed sum to this claimant.

___________________________
Signed

___________________________
For __________________________ Individual, Firm or Corporation

Date:

CLAIMANT’S REPRESENTATION AND VERIFICATION

Claimant represents and verifies that:
1. The amount claimed herein is due and owing at the date of filing, pursuant to claimant’s contract described in the construction lien claim.
2. The work, services, material or equipment for which this lien claim is filed was provided exclusively in connection with the improvement of the real property which is the subject of this claim.
3. This claim has been filed within 90 days from the last date upon which the work, services, materials or equipment for which payment is claimed was provided.
4. The foregoing statements made by me are true, to the best of my knowledge. I am aware that if any of the foregoing statements made by me are false, this construction lien claim will be void and that I will be liable for damages to the owner or any other person injured as a consequence of the filing of this lien claim.

___________________________
Name of Claimant

___________________________
Signed

___________________________
Type or Print Name and Title

Date:

TO THE CLERK, COUNTY OF ____________________:

In accordance with the "Construction Lien Law," N.J.S.2A:44A-1 et seq., notice is hereby given that (only complete those sections that apply):

1. On (date), I, (name of claimant), individually, or as a partner of the claimant known as (name of partnership), or an officer/member of the claimant known as (name of corporation or LLC) (circle one and fill in name as applicable), located at (business address of claimant), claim a construction lien against the real property of (name of owner of property subject to lien), in that certain tract or parcel of land and premises described as Block _______.

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Lot ____, on the tax map of the (municipality) of _____, County of _____, State of New Jersey, (or if no Block and Lot is assigned, a metes and bounds or other description of the property) in the amount of $____, as calculated below for the value of the work, services, material or equipment provided. (If the claim is against a community association in accordance with section 2A:44A-3, set forth the name of the community association and the name and location of the property development.) The lien is claimed against the interest of the owner, unit owner, or against the community association in accordance with section 2A:44A-3, or other party (circle one: if “other”, describe: ________________________).

2. In accordance with a written contract for improvement of the above property, dated ______, with the property owner, community association, contractor, or subcontractor (circle one), named or known as (name of appropriate party), and located at (address of owner, unit owner, community association, contractor or subcontractor), this claimant performed the following work or provided the following services, material or equipment:
   a. ____________________________
   b. ____________________________
   c. ____________________________ etc.

3. The date of the provision of the last work, services, material or equipment for which payment is claimed is ______, 20__. 

4. The amount due for work, services, material or equipment delivery provided by claimant in connection with the improvement of the real property, and upon which this lien claim is based, is calculated as follows:
   A. Initial Contract Price: $________
   B. Executed Amendments to Contract Price/Change Orders: $________
   C. Total Contract Price (A + B) = $________
   D. If Contract Not Completed, Value Determined in Accordance with the Contract of Work Completed or Services, Material, Equipment Provided: _________
   E. Total from C or D (whichever is applicable): $________
   F. Agreed upon Credits: $________
   G. Amount Paid to Date: $________
   TOTAL LIEN CLAIM AMOUNT  E - [F + G] = $________

NOTICE OF UNPAID BALANCE AND ARBITRATION AWARD

This claim (check one) does [ ] does not [ ] arise from a Residential Construction Contract. If it does, complete 5 and 6 below; if it does not, complete 5 below only if applicable. If not residential and 5 is not applicable, skip to Claimant’s Representation and Verification.

5. A Notice of Unpaid Balance and Right to File Lien (if any) was previously filed with the County Clerk of ______ County on ______, 20__ as No._______, in Book ______ and Page ________.

6. An award of the arbitrator (if residential) was issued on ______ in the amount of $_______.

CLAIMANT’S REPRESENTATION AND VERIFICATION

Claimant represents and verifies under oath that:

1. I have authority to file this claim.

2. The claimant is entitled to the amount claimed at the date of lodging for record of the claim, pursuant to claimant's contract described above.

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3. The work, services, material or equipment for which this lien claim is filed was provided exclusively in connection with the improvement of the real property which is the subject of this claim.

4. This claim form has been lodged for record with the County Clerk where the property is located within 90 or, if residential construction, 120 days from the last date upon which the work, services, material or equipment for which payment is claimed was provided.

5. This claim form has been completed in its entirety to the best of my ability and I understand that if I do not complete this form in its entirety, the form may be deemed invalid by a court of law.

6. This claim form will be served as required by statute upon the owner or community association, and upon the contractor or subcontractor against whom this claim has been asserted, if any.

7. The foregoing statements made by me in this claim form are true, to the best of my knowledge. I am aware that if any of the foregoing statements made by me in this claim form are willfully false, this construction lien claim will be void and that I will be liable for damages to the owner or any other person injured as a consequence of the filing of this lien claim.

Name of Claimant ______________________
Signed __________________________
(Type or Print Name and Title)

SUGGESTED NOTARIAL FOR INDIVIDUAL CLAIMANT:

STATE OF NEW JERSEY
COUNTY OF [ ] ss:

On this ____ day of ____ 20___, before me, the subscriber, personally appeared [person signing on behalf of claimant(s)] who, I am satisfied, is/are the person(s) named in and who executed the within instrument, and thereupon acknowledged that claimant(s) signed, sealed and delivered the same as claimant’s (s’) act and deed, for the purposes therein expressed.

________________________
NOTARY PUBLIC

SUGGESTED NOTARIAL FOR CORPORATE OR LIMITED LIABILITY CLAIMANT:

STATE OF NEW JERSEY
COUNTY OF [ ] ss:

On this ____ day of ____ 20__, before me, the subscriber, personally appeared [person signing on behalf of claimant(s)] who, I am satisfied is the Secretary [or other officer/manager/agent] of the Corporation [partnership or limited liability company] named herein and who by me duly sworn/affirmed, asserted authority to act on behalf of the Corporation [partnership or limited liability company] and who, by virtue of its Bylaws, or Resolution of its Board of Directors [or partnership or operating agreement] executed the within instrument on its behalf, and thereupon acknowledged that claimant signed, sealed and delivered same as claimant’s act and deed, for the purposes herein expressed.

________________________
NOTARY PUBLIC

NOTICE TO OWNER OF REAL PROPERTY
NOTICE TO CONTRACTOR OR SUBCONTRACTOR, IF APPLICABLE

The owner’s real estate may be subject to sale to satisfy the amount asserted by this claim. However, the owner’s real estate cannot be sold until the facts and issues which form the basis of this claim are decided in a legal proceeding before a court of law. The lien claimant is required by law to commence suit to enforce this claim.
The claimant filing this lien claim shall forfeit all rights to enforce the lien claim and shall be required to discharge the lien claim of record, if the claimant fails to bring an action in the Superior Court, in the county in which the real property is situated, to establish the lien claim:

1. Within one year of the date of the last provision of work, services, material or equipment, payment for which the lien claim was filed; or

2. Within 30 days following receipt of written notice, by personal service or certified mail, return receipt requested, from the owner or community association, as appropriate, requiring the claimant to commence an action to establish the lien claim.

You will be given proper notice of the proceeding and an opportunity to challenge this claim and set forth your position. If, after the owner (and/or contractor or subcontractor) has had the opportunity to challenge this lien claim, the court of law enters a judgment against any of you and in favor of the claimant filing this lien claim, and thereafter judgment is not paid, the owner’s real estate may then be sold to satisfy the judgment. A judgment against a community association for a claim of work, services, material or equipment pursuant to a contract with that community association cannot be enforced by a sale of real estate.

The owner may choose to avoid subjecting the real estate to sale by the owner (or contractor) either:

1. paying the claimant and obtaining a discharge of lien claim from the claimant, by which the owner will lose the right to challenge this lien claim in a legal proceeding before a court of law; or

2. causing the lien claim to be discharged by filing a surety bond or making a deposit of funds as provided for in section 2A:44A-31, by which the owner will retain the right to challenge this lien claim in a legal proceeding before a court of law.

COMMENT

This is a new form of lien claim relying upon the original. The new lien claim form is intended to be easier to use and incorporates suggestions by construction lien law practitioners regarding the appropriate method of calculation of the lien claim amount, etc. This new form also incorporates the change in time limitations for filing residential construction lien claims now in section 2A:44A-6, replaces the “19 ” date year with a “20 ” date year, and provides suggested notarial language.

2A:44A-9. Amount of lien claim; limited to contract price or any unpaid portion thereof

a. The amount of a lien claim shall be limited to the unpaid portion of the contract price, or any unpaid portion thereof, whichever is less, of the claimant's contract for the work, services, material or equipment provided.

COMMENT

By the deletions and insertions noted, the revision attempts to make clearer and less ambiguous the current law.

2A:44A-9.1. Relationship to lien fund; maximum liability; impermissible reductions of lien fund

a. For purposes of the act, the “first tier lien claimant” means a contractor claimant; the “second tier lien claimant” means a claimant who is a subcontractor to the contractor or a supplier to the contractor; and the “third tier lien claimant” means a claimant who is a subcontractor to the second tier lien claimant or a supplier to the second tier lien claimant. No lien rights exist for lower than third tier lien claimants.
b. Except as set forth in sections 2A:44A-15 and 2A:44A-21, and subject to section 2A:44A-7 and subsection c. below, the lien fund shall not exceed:

(1) in the case of a first tier lien claimant or second tier lien claimant, the earned amount of the contract between the owner and the contractor minus any payments made prior to service of a copy of the lien claim; or

(2) in the case of a third tier lien claimant, the lesser of (i) the amount in (1) above, or (ii) the earned amount of the contract between the contractor and the subcontractor to the contractor, minus any payments made prior to service of a copy of the lien claim.

c. A lien fund regardless of tier shall not be reduced by payments by the owner, or community association in accordance with section 2A:44A-3, that do not discharge the obligations for the work performed or services, material or equipment provided, including but not limited to:

(1) payments not in accordance with written contract provisions; or

(2) payments yet to be earned upon lodging for record of the lien claim; or

(3) liquidated damages; or

(4) collusive payments; or

(5) use of retainage to make payments to a successor contractor after the lien claim is lodged for record; or

(6) setoffs or backcharges, absent written agreement by the claimant, except for any setoffs upheld by judgment that are first determined by (i) arbitration or alternate dispute resolution in a proceeding conducted in accordance with section 2A:44A-21 or (ii) any other alternate dispute resolution agreed to by the parties.

d. Subject to subsection c. above, no lien fund exists, if, at the time of service of a copy of the lien claim, the owner or community association has fully paid the contractor for the work performed or for services, material or equipment provided.

e. For purposes of a lien fund calculation, the “earned amount of the contract”, is the contract price unless the party obligated to perform has not completed the performance in which case the “earned amount of the contract” is the value, as determined in accordance with the contract, of the work performed and services, materials or equipment provided.

f. If more than one lien claimant will participate in a lien fund, the lien fund shall be established as of the date of the first of the participating lien claims lodged for record unless the earned amount of the contract increases, in which case the lien fund shall be calculated from the date of the increase.

COMMENT

The current law is confusing to the reader. It does not explain the relationship between the lien claim and the lien fund. It also separates discussion of the amount of the lien claim (section 2A:44A-9) from discussion of the maximum liability of the owner (a part of section 2A:44A-10). At the same time, a large portion of current section 2A:44A-10 addresses attachment of the lien and priority of bona fide purchasers and other liens. Maximum liability of the owner is a subject worthy of its own section. Thus, for clarity and coherence, the portion of current section 2A:44A-10 of the act pertaining to the maximum
liability of the owner for lien claims was deleted from section 2A:44A-10 and incorporated into a new

New section 2A:44A-9.1 attempts to make clearer the formula to be applied when calculating the
amount of the lien fund, replacing current section 2A:44A-10 a. and b. As the court explained in Sil-Kemp
claimant’s position in the chain of construction, there may be up to three tiers of lien fund in multiple lien
scenarios which must be compared to each other in order to determine the full extent of the owner’s
liability. These are the prime contractor, subcontractor/supplier and sub to the subcontractor. The present
confusion in applying section 2A:44A-10 a. and b. is also well illustrated in Riggs Distler & Co., Inc. v.
Valero Refining Company, et al., 2005 WL 2897483 (D.N.J. 2005) where the lien claimants argued that
application of current section 2A:44A-10 mandated that the only relevant contracts were the prime contract
and the contract between themselves and their subcontractor. The court in Riggs Distler disagreed,
concluding that the underlying policy of protecting both the interests of the contractors in getting paid and
the owners in paying just once for the same work can be fulfilled only if the entire construction chain is
considered and credit given to all payments that were earned and due even if not subsequently forwarded
down the chain.

New section 2A:44A-9.1 c. further adopts the conclusions of a series of recent court decisions
both before and after the New Jersey Supreme Court’s seminal opinion in Craft v. Stevenson Lumber, 179
N.J. 56 (2004). These decisions discuss those attempted reductions to the lien fund which are not
Div. 2005) (liquidated damages); Craft v. Stevenson, supra (advanced payments); Legge Industries v.
used for post-filing payments to a successor contractor). By the inclusion of subsection d., the new section
2A:44A-9.1 also adopts the Craft court’s determination that the lien fund will never include what the owner
has already legitimately paid; in other words, once the contract or the value of the work or materials has
been fully paid, there is no fund against which to measure an unpaid lien claimant’s entitlement because
nothing is owed. Subsection e. also adopts the Craft court’s reasoning that the contract price may be
“reformed” where the obligated party walks off the job before the work is completed, in which case the lien
fund should be calculated based on the total amount due at that time.

Finally, subsection f. was added for further clarification of the timing of the lien fund
determination, while acknowledging the distinction set forth by the court in Triple “R” Enterprises, Inc. v.
Pezotti, 344 N.J. Super. 31 (N.J. Super. 2001) where the first lien claimant had settled its claim, prior to the
time the plaintiff lien claimant had filed its lien claim, and the court held that the lien fund accrued from the
date of the plaintiff’s filing, not the date of the filing of the earlier settled lien claim. The terms “lodging
for record” are used here, rather than “filing”, because the date the document lodged for record is actually
filed is not within the control of the claimant as earlier discussed. Application of subsection f. is illustrated
as follows: Claimant A lodges for record a lien claim on April 1; Claimant B lodges for record a lien claim
on April 14. If neither claimant A nor B settles prior to lien claim enforcement, both will participate in the
lien fund and the lien fund will accrue as of April 1. If claimant A, however, settles its lien claim on April
13, the lien fund accrues on the date of the lodging for record of Claimant B’s claim, i.e., April 14. Claimant A,
having resolved its claim, is no longer a participant in the lien fund.

2A:44A-10. Attachment of lien claim; priority of bona fide purchasers and other
liens; maximum liability

Subject to the limitations of sections 6 2A:44A-3 and 2A:44A-6 of this act, the lien
claim shall attach to the interest of the owner from and after the time of filing of the lien
claim. Except as provided by section 20 2A:44A-20 of this act, no lien claim shall
attach to the estate or interest acquired by a bona fide purchaser as evidenced by a
recordable document recorded or lodged for record before the date of filing of the lien
claim. Nor shall a lien claim, except as provided by

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sections 2A:44A-20 and 2A:44A-22, enjoy have a priority over any mortgage, judgment or other lien or interest in real estate first recorded, lodged for record, filed or docketed. A lien claim filed under the provisions of this act shall be subject to the effect of a notice of settlement filed pursuant to P.L. 1979, c. 406 (C. 46:16A-1 et seq. et seq.)

Except as set forth in sections 15 and 21 of this act, the maximum amount for which an owner will be liable or an interest in real property subject to a lien under this act for one or more lien claims filed pursuant to this act shall not be greater than:

a. In the case of a lien claim filed by a contractor, the total amount of the contract price of the contract between the owner and the contractor less the amount of payments duly made, if any, prior to receipt of a copy of the lien claim pursuant to section 7 of this act, by the owner to the contractor or any other claimant who has filed a lien claim or a Notice of Unpaid Balance and Right to File Lien pursuant either to a contract with the contractor and any subcontractor or supplier, or a contract between a subcontractor of the contractor and any supplier or other subcontractor; or

b. In the case of lien claim filed by a subcontractor or supplier, the amount provided in subsection a. of this section, or the contract price of the contract between the contractor or subcontractor and the subcontractor or supplier, as applicable, pursuant to which the work, services, materials or equipment is provided by the subcontractor or supplier, less the amount of payments duly made, if any, prior to receipt of a copy of the lien claim pursuant to section 7 of this act, to the contractor or supplier or any other claimant who has filed a lien claim or a Notice of Unpaid Balance and Right to File Lien pursuant to a contract with such subcontractor or supplier, whichever is less.

COMMENT

The portion of current section 2A:44A-10 relating to the maximum liability of the owner was deleted and a new section 2A:44A-9.1 created in its place as noted in the Comment to section 2A:44A-9.1 above. The revision also clarifies language and replaces references to sections 6 and 20 of the act with references to the title and section numbers. Because the reference to the maximum liability of the owner is no longer a part of this section, the Commission also recommends modifying the descriptor as underlined.

2A: 44A-11. Amendment of lien claim, form

A lien claim may be amended for any appropriate reason, including but not limited to correcting inaccuracies or errors in the original lien claim form, or revising the amount claimed because of (i) additional work performed or services, material or equipment provided or (ii) the release of a proportionate share of an interest in real property from the lien in accordance with section 2A:44A-18 or (iii) the partial payment of the lien claim, by the filing of an amendment with the county clerk. A lien claim may not be amended to cure a violation of section 2A:44A-15. The amended lien claim, which shall be filed with the county clerk, shall comply with all the conditions and requirements for the filing of an original lien claim, including but not limited to the notice requirements of section 7 2A:44A-7 of this act, as well as the conditions and requirements of this section and shall be subject to the limitations of sections 10 2A:44A-9.1 and 2A:44A-10 of this act. That portion of the amended lien claim in excess of the amount previously claimed shall attach as of the date of filing of the amended original lien claim. That excess amount shall also be used to calculate the lien fund pursuant to section 2A:44-9.1 f.
The amended lien claim shall be filed in substantially the following form:

AMENDMENT TO CONSTRUCTION LIEN CLAIM

TO THE CLERK, COUNTY OF

1. On (date), the undersigned claimant, (name of claimant) of (address of claimant), filed a CONSTRUCTION LIEN CLAIM in the amount of ($ ) DOLLARS for the value of the work, services, material or equipment provided in accordance with the contract between claimant and (name) as of (date).

2. This construction lien claim was claimed against the interest of (name) as (check-circle one): owner, unit owner, community association Lessee or other (describe) party; (if "other" describe: ) in that certain tract or parcel of land and premises described as Block _____, Lot _____, on the tax map of the (municipality) of _____, County of ______, State of New Jersey, for the improvement of which property the aforementioned work, services, materials or equipment was provided. (If the claim was against a community association in accordance with section 2A:44A-3, set forth the name of the community association and the name and location of the property development.)

3. This amends a lien claim which was previously lodged for record on _____, 20___ and filed with the County Clerk of __________County on ________, 19____, 20____ and recorded on __________, 20__ as No._____ in Book No._____, Page ____. A Notice of Unpaid Balance and Right to File Lien (if any) was previously filed with the County Clerk of ________ on _______, 19____ as No.____ in Book No.____, Page ____.

4. Amendments to the original claim were recorded in the office of the County Clerk on _____, 19____ as No._____ in Book No.____, Page _____. (Complete if applicable.)

5. Effective the date of the filing lodging for record of this AMENDMENT TO CONSTRUCTION LIEN CLAIM, the value of the lien is claimed to be in the total amount of ($ ) DOLLARS, inclusive of all prior lien claims or amendments thereof.

6. The work, services, material or equipment provided upon which this Amendment is made are:
   a. _____________________________________________________________
   b. _____________________________________________________________
   c. _____________________________________________________________ (etc.)

7. The date of the provision of the last work, services, material or equipment for which payment is claimed is (date).

8. The reason for this amendment is:

CLAIMANT'S REPRESENTATION AND VERIFICATION
   (Same as for lien claim)

NOTICE TO OWNER OF REAL PROPERTY
   (Same as for lien claim)

NOTICE TO SUBCONTRACTOR OR CONTRACTOR
   (Same as for lien claim)

COMMENT

The revision replaces references to sections of the act with references to the title and section numbers and changes the year date from “19 ” to “20 ”. It also conforms this section to the revised section 2A:44A-8, pertaining to the form of the lien claim, making clear that an amendment to construction lien claim can be used for any appropriate purpose including but not limited to correcting inaccuracies and altering the amount of the lien claim. Line 8 is added to set forth the reason for the amendment. Reference to “community association” is added because of modifications to section 2A:44A-3. The language expressing what may be addressed by amendment also has been revised to clarify, but not limit, the
appropriate reasons for amending a lien claim. Language has also been added to clarify that a lien claim may not be amended to cure a violation of section 2A:44A-15.

2A:44A-12. Notice of lien claim; authorized withholding of amount claimed from contract price

Upon receipt of notice of a lien claim, the owner, or community association in accordance with section 2A:44A-3, shall be authorized to withhold and deduct the amount claimed from the unpaid part of the contract price that is or thereafter may be due and payable to the contractor or subcontractor, or both. The owner or community association may pay the amount of the lien claim to the claimant unless the contractor or subcontractor against whose account the lien is filed notifies the owner or community association and the lien claimant in writing within 20 days of service of the lien claim upon both the owner or community association and the contractor or subcontractor, that the claimant is not owed the monies claimed and the reasons therefor. Any such payment made by the owner or community association shall constitute a payment made on account of the contract price of the contract with the contractor or subcontractor, or both, against whose account the lien is filed.

COMMENT
Reference to “community association” is added because of modifications to section 2A:44A-3.


a. Each The county clerk shall provide a book designated as the “Construction Lien Book” in which each clerk shall be entered each Notice of Unpaid Balance and Right to File Lien, and Amended Notice of Unpaid Balance and Right to File Lien, and each lien claim and amended lien claim, and each discharge, subordination or release of a lien claim or Notice of Unpaid Balance and Right to File Lien presented for filing pursuant to the provisions of this act.

b. The county clerk shall cause marginal notations to be made upon each filed document filed pursuant to this act, as follows: (i) upon each Notice of Unpaid Balance and Right to File Lien or a discharge relative thereto the date an amendment to that Notice or discharge thereof, and related lien claim or amendment thereto is filed; (ii) upon each lien claim, the date whenever an amended lien claim relative thereto is filed; and the date a discharge, subordination or release thereof is filed, upon each Notice of Unpaid Balance and Right to File Lien whenever a lien claim or amended lien claim relative thereto is filed; upon each lien claim or amended lien claim whenever a discharge, subordination or release of a lien claim relative thereto is filed; and (iii) In addition, the clerk shall cause a notation of commencement of an action to enforce a lien claim to be made upon the affected lien claim or amended lien claim the date of the filing of the notice of lis pendens pertaining to the real property subject to the lien claim relative thereto.

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c. The failure of the clerk to cause a marginal notation to be made in accordance with subsection b. shall not affect the validity, priority or enforceability of any document filed pursuant to this act.

d. The county clerk shall provide and maintain on a daily basis an index book designated as the “Construction Lien Index Book”, setting forth therein in alphabetically order, and arranged by the owners’ or community associations’ names of the owners, and by the claimants’ names of the claimants, each Notice of Unpaid Balance and Right to File Lien, Amended Notice of Unpaid Balance and Right to File Lien, lien claim, amended lien claim, discharge, subordination and release of a lien claim or Notice of Unpaid Balance and Right to File Lien.

e. Each county clerk shall charge the following fees for the filing and marginal notations of the documents authorized to be filed by this act as set forth in N.J.S. 22A:2-29:

<table>
<thead>
<tr>
<th>Description</th>
<th>Fee</th>
</tr>
</thead>
<tbody>
<tr>
<td>Each Notice of Unpaid Balance and Right to File Lien or Amended Notice of Unpaid Balance and Right to File Lien</td>
<td>$4.50</td>
</tr>
<tr>
<td>Each lien claim or amended lien claim</td>
<td>$4.50</td>
</tr>
<tr>
<td>Each discharge, subordination or release of lien claim or release of Notice of Unpaid Balance and Right to File Lien</td>
<td>$2.00</td>
</tr>
<tr>
<td>Each marginal notation</td>
<td>$1.00</td>
</tr>
</tbody>
</table>

COMMENT

The revision clarifies language and refers to N.J.S. 22A:2-29 for the fee amounts, which increased in 2004. Reference to “community associations” is added because of modifications to section 2A:44A-3.

2A:44A-14. Failure to bring action; forfeiture of lien; liability for costs and expenses

a. A claimant filing a lien claim shall forfeit all rights to enforce the lien, and shall immediately discharge the lien of record in accordance with section 2A:44A-30, if the claimant fails to bring commence an action in the Superior Court, in the county in which the real property is situated, to establish enforce the lien claim; venue shall be laid in the county in which the real property is located:

1. Within one year of the date of the last provision of work, services, material or equipment, payment for which the lien claim was filed; or

2. Within 30 days following receipt of written notice, by personal service or certified mail, return receipt requested, from the owner, community association, contractor, or subcontractor against whose account a lien claim is filed, requiring the claimant to commence an action to establish enforce the lien claim.

b. Any lien claimant who forfeits a lien pursuant to subsection a. of this section and fails to discharge that lien of record in accordance with section 30 2A:44A-30 of this act, shall be liable for all court costs, and reasonable legal expenses, including but not limited to attorneys’ fees, incurred by the owner, community association, the contractor, or subcontractor, or the total costs and legal expenses of all or any combination of them, in defending or causing the discharge of the lien claim. The court may, in addition, enter judgment against the claimant who fails to discharge the lien for damages to any of the parties adversely affected by the lien claim.
e. Whenever any claimant shall commence an action in the Superior Court of New Jersey to enforce a lien claim as provided by this act, the claimant shall cause a Notice of Lis Pendens to be filed in the office of the county clerk or register pursuant to the provisions of N.J.S. 2A:15-6 et seq.

d. Any disputes arising out of the improvement which is the subject of a lien claim but which are unrelated to any action to enforce a lien claim may be brought in a separate action or in a separate count in the same action.

COMMENT
The revised language incorporates modifications suggested by construction lien law practitioners and makes additional reference to section 2A:44A-30, as appropriate. Current subsection c. is here deleted but incorporated into a new section 2A:44A-24. Reference to “community association” is added because of modifications to section 2A:44A-3.

2A:44A-15. Forfeiture of lien rights; improper filing

a. “Without basis” for purposes of this section means frivolous, false, unsupported by a contract, or made with malice or bad faith or for any improper purpose.

b. If a lien claim is without basis, the amount of the lien claim is willfully overstated, or the lien claim is not filed for record in substantially the form or in the manner or at a time not in accordance with the provisions of this act, the claimant shall forfeit all claimed lien rights and rights to file subsequent lien claims to the extent of the face amount claimed in the lien claim. The claimant shall also be liable for all court costs, and reasonable legal expenses, including but not limited to attorneys’ fees, incurred by the owner, community association in accordance with section 2A:44A-3, contractor or subcontractor, in defending or causing the discharge of the lien claim. The court shall, in addition, enter judgment against the claimant for damages to any of the parties adversely affected by the lien claim.

c. If a defense to a lien claim is without basis, the party maintaining the defense shall be liable for all court costs, and reasonable legal expenses, including but not limited to attorneys’ fees, incurred by any of the parties adversely affected by the defense to the lien claim. The court shall, in addition, enter judgment against the party maintaining the frivolous defense for damages to any of the parties adversely affected thereby.

d. If a lien claim is forfeited pursuant to this section, or section 2A:44A-14 of this act, nothing herein shall be construed to bar the filing of a subsequent lien claim, provided, however, any subsequent lien claim shall not include a claim for the work, services, equipment or material claimed within the forfeited lien claim.

COMMENT
The revised language attempts to give further meaning to the words “without basis” as they apply to both the claim and the defense thereto. Language mirrored in the court rules (R.1:4-8 pertaining to frivolous litigation) is incorporated where appropriate. Reference to “community association” is added because of modifications to section 2A:44A-3.
2A:44A-16. Party defendants joined by claimant, entitlement to defense [deleted and incorporated into section 2A:44A-24]

a. A claimant shall join as party defendants the contractor or subcontractor who is alleged to have failed to make the payments for which the lien claim has been filed and any other person having an interest in the real property that would be adversely affected by the judgment. A party required to be joined under this subsection shall be joined if feasible pursuant to R.4:28-1(a) of the Rules Governing the Courts of the State of New Jersey, unless prohibited by law.

b. Any party to an action to establish a lien shall be entitled to any defense available to any other party in contesting the amount for which a claimant seeks to have his lien reduced to judgment.

COMMENT

The revision to section 2A:44A-24 incorporates portions of this section. Thus, this section is deleted in its entirety.

2A:44A-17. Lien claims unabated by death of party in interest

No lien claim under this act or right thereto shall abate by reason of the death of any party in interest and the lien claim may be asserted by the personal representative of a deceased contractor, subcontractor, or supplier against the personal representative of a deceased owner, contractor or subcontractor.

COMMENT

No changes have been made to this section of the current law.

2A:44A-18. Residential construction contract; calculation of proportionate share

This section shall solely apply to work, services, material or equipment furnished under a residential construction contract. If a lien attaches to an interest in real property, the lien claimant shall release a proportionate share of the interest in real property from the lien upon receipt of payment for that proportionate share. This proportionate share shall be calculated in the following manner:

a. If there is a contract between the lien claimant and the owner or other writing signed by the parties which provides for an allocation by lot or tract, or otherwise, that allocation of the proportionate share shall be binding upon the lien claimant. Absent a contract between the lien claimant and the owner or other writing signed by the parties, any allocation made shall be proportionate to each lot if subdivision approval has been granted or to each tract if no subdivision approval is required or has been granted.

b. If the work performed by the lien claimant was for a condominium, in which a master deed is filed before the lien attaches, or for work performed for a cooperative in which a master declaration is filed before the lien attaches, then the proportionate share shall be allocated in an amount equal to the percentage of common elements attributable to each residential unit, subject to the limitations of section 2A:44A-3 b. and c.
c. If subsection a. or b. of this section does not apply, then the lien shall not be released as to any portion of the interest in real property unless the lien claimant and the owner otherwise agree in a writing signed by both parties.

d. If a lien claimant receives payment of its proportionate share but refuses to discharge its lien claim, then upon application to a court having jurisdiction thereof, the court shall order the discharge of the lien claim to the extent of that proportionate share. The lien claimant shall be further subject to the provisions of section 2A: 44A-30 of this act, and any amounts to be paid shall be paid from the amount due the claimant.

COMMENT
The revised language incorporates modifications suggested by construction lien law practitioners and makes additional reference to section 2A:44A-3, as appropriate.

2A:44A-19. Attachment of lien to interest of owner for work performed in a condominium or cooperative unit [deleted and incorporated into section 2A:44A-3]

a. For work performed solely within a unit in a condominium or cooperative, the lien shall only attach to the interest of the owner in the condominium or cooperative unit.

b. If an interest in real property is conveyed after work is performed but before a lien attaches to the property, then the lien shall attach to the real property retained by the owner, but shall not attach to the real property or interest previously conveyed.

COMMENT
The language of this section has been incorporated into section 2A:44A-3. Thus, this section is deleted in its entirety.

2A:44A-20. Notice of unpaid balance; right to file lien; form

a. All valid liens filed pursuant to this act shall attach to the interest of the owner from the time of filing of the lien claim in the office of the county clerk subject to this section and the provisions of sections 2A:44A-3, 2A: 44A-6 and 2A:44A-10 of this act.

ab. In the event of the creation, conveyance, lease or mortgage of an estate or interest in real property to which improvements have been made that are subject to the lien provisions of this act, a lien claim validly filed under this act shall have priority over any prior creation, conveyance, lease or mortgage of an estate or interest in real property to which improvements have been made, only if the claimant has filed with the county clerk prior to that creation, conveyance, lease or mortgage, a Notice of Unpaid Balance and Right to File Lien is filed before the recording or lodging for record of a recordable document evidencing that conveyance, lease or mortgage. The Notice of Unpaid Balance and Right to File Lien shall be filed in substantially the following form:

TO THE CLERK, COUNTY OF

In accordance with the terms and provisions of the "Construction Lien Law," P.L.1993, c.318 (C.2A:44A 1 et al.), notice is hereby given that:

1. (Name of claimant) of (address of claimant) has on (date) a potential construction lien against the below described property of (owner against whose property the lien will be claimed), in the amount of ($——), for the value of the work, services, material or equipment provided in accordance with a contract

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with (name of contracting party with whom claimant has a contract) for the following work, services, materials or equipment:

a. b. c. (etc.)

2. The amount due for work, services, materials or equipment provided by claimant in connection with the improvement of the real property, and upon which this lien claim is based is as follows:

Total contract amount: $  
Amendments to contract: $  
Total contract amount and amendments to contract: $  
Less: Agreed upon credits: $  
Contract amount paid to date: $  
Amendments to contract amount paid to date: $  
TOTAL REDUCTIONS FROM CONTRACT AMOUNT AND AMENDMENTS TO CONTRACT: $  
TOTAL LIEN CLAIM AMOUNT: $  

3. This construction lien is to be claimed against the interest of (name) as (check one):

- Owner  
- Lessee  
- Other (describe): in that certain tract or parcel of land and premises described as Block, Lot, on the tax map of the of, County of, State of New Jersey, for the improvement of which property the aforementioned work, services, materials or equipment was provided.

4. The work, services, materials or equipment was provided pursuant to the terms of a written contract (or, in the case of a supplier, a delivery or order slip signed by the owner, contractor, or subcontractor having a direct contractual relation with a contractor, or an authorized agent of any of them), dated, between (claimant) and (name of other contracting party) of (address).

5. The date of the provision of the last work, services, material or equipment for which payment is claimed is (date).

6. The written contract (is) (is not) (cross out inapplicable portion) a residential construction contract as defined in section 2 of this act.

7. This notification has been filed prior or subsequent to completion of the work, services, materials or equipment as described above. The purpose of this notification is to advise the owner and any other person who is attempting to encumber or take transfer of said property described above that a potential construction lien may be filed within the 90 day period following the date of the provision of the last work, services, materials or equipment as set forth in paragraph 5.

CLAIMANT’S REPRESENTATION AND VERIFICATION

Claimant represents and verifies that:

1. The amount claimed herein is due and owing at the date of filing, pursuant to claimant’s contract described in the Notice of Unpaid Balance and Right to File Lien.

2. The work, services, material or equipment for which this Notice of Unpaid Balance and Right to File Lien is filed was provided exclusively in connection with the improvement of the real property which is the subject of this Notice of Unpaid Balance and Right to File Lien.

3. The Notice of Unpaid Balance and Right to File Lien has been filed within 90 days from the last date upon which the work, services, materials or equipment for which payment is claimed was provided.
4. The foregoing statements made by me are true, to the best of my knowledge.

- Name of Claimant
- Signed
- Type or Print Name and Title
- Date:

b. In the event that the claimant elects to file a Notice of Unpaid Balance and Right to File Lien as described above, it shall not be necessary to serve a copy of said Notice of Unpaid Balance and Right to File Lien upon any interested party.

d. The Notice of Unpaid Balance and Right to File Lien shall be effective for 90 days from the date of the provision of the last work, services, materials or equipment delivery for which payment is claimed as set forth in paragraph 5 of the Notice of Unpaid Balance and Right to File Lien.

e. The filing of a Notice of Unpaid Balance and Right to File Lien shall not constitute the filing of a lien claim in accordance with this act, nor does it extend the time for the filing of a lien claim in accordance with the provisions of this act.

f. Failure to file a Notice of Unpaid Balance and Right to File Lien shall not affect the claimant's lien rights arising under the provisions of this act, to the extent that no creation, conveyance, lease or mortgage of an interest in real property has taken place prior to the filing of a Notice of Unpaid Balance and Right to File Lien or lien claim.

g. A Notice of Unpaid Balance and Right to File Lien may be amended by the filing of an Amended Notice of Unpaid Balance and Right to File Lien in accordance with the provisions of this section.

TO THE CLERK, COUNTY OF __________:

NOTICE OF UNPAID BALANCE AND RIGHT TO FILE LIEN

In accordance with the "Construction Lien Law," N.J.S. 2A:44A-1 et seq., notice is hereby given that:

1. (Name of claimant), individually or as a partner of the claimant known as (name of partnership), or an officer/member of the claimant known as (name of corporation or LLC) (please circle one and fill in name as applicable) located at (business address of claimant) has on (date) a potential construction lien against the real property of (name of owner of property subject to lien), in that certain tract or parcel of land and premises described as Block ____, Lot ____, on the tax map of the (municipality) of ____, County of ____, State of New Jersey, in the amount of ($_______), as calculated below for the value of the work, services, material or equipment provided. (If claim is against a community association in accordance with section 2A:44A-3, set forth the name of the community association and the name and location of the property development.) The lien is to be claimed against the interest of the owner, unit owner, or other party, or against the community association (circle one: if "other", describe: ____________).

2. The work, services, material or equipment was provided pursuant to the terms of a written contract (or, in the case of a supplier, a delivery or order slip signed by the owner, community association,
contractor, or subcontractor having a direct contractual relation with a contractor, or an authorized agent of any of them), dated __________, between (claimant) and owner, unit owner, community association, contractor or subcontractor (circle one), named or known as (name of other contracting party) and located at (address of other contracting party), in the total contract amount of ($____) together with (if applicable) amendments to the total contract amount aggregating ($____).

3. In accordance with the above contract, this claimant performed the following work or provided the following services, material or equipment:
   a. __________________
   b. __________________
   c. __________________ etc.

4. The date of the provision of the last work, services, material or equipment for which payment is claimed is (date.)

5. The amount due for work, services, material or equipment provided by claimant in connection with the improvement of the real property, and upon which this lien claim is based is calculated as follows:

   A. Initial Contract Price: $______________
   B. Executed Amendments to Contract Price/Change Orders: $______________
   C. Total Contract Price (A + B) = $______________
   D. If Contract Not Completed, Value Determined in Accordance with Contract of Work Completed or Services, Material or Equipment Provided _________
   E. Total from C or D (whichever is applicable): $______________
   F. Agreed upon Credits: $______________
   G. Amount Paid to Date: $______________
   TOTAL LIEN CLAIM AMOUNT E - [F + G] = $______________

6. The written contract (is) (is not) (cross out inapplicable portion) a residential construction contract as defined in section 2A:44A-2 of this act.

7. This notification has been lodged for record prior or subsequent to completion of the work, services, material or equipment as described above. The purpose of this notification is to advise the owner or community association and any other person who is attempting to encumber or take transfer of said property described above that a potential construction lien may be lodged for record within the 90-day period, or in the case of a residential construction contract within the 120-day period, following the date of the provision of the last work, services, material or equipment as set forth in paragraph 5.

CLAIMANT'S REPRESENTATION AND VERIFICATION

Claimant represents and verifies that:

1. I have authority to file this Notice of Unpaid Balance and Right to File Lien.

2. The claimant is entitled to the amount claimed herein at the date this Notice is lodged for record, pursuant to claimant's contract described in the Notice of Unpaid Balance and Right to File Lien.

3. The work, services, material or equipment for which this Notice of Unpaid Balance and Right to File Lien is filed was provided exclusively in connection with the improvement of the real property which is the subject of this Notice of Unpaid Balance and Right to File Lien.

4. The Notice of Unpaid Balance and Right to File Lien has been lodged for record within 90 days, or in the case of a residential construction contract within 60 days, from the last date upon which the work, services, material or equipment for which payment is claimed was provided.

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5. The foregoing statements made by me are true, to the best of my knowledge.

Name of Claimant
Signed
(Type or Print Name and Title)

SUGGESTED NOTARIAL FOR INDIVIDUAL CLAIMANT:

STATE OF NEW JERSEY
COUNTY OF [                     ] ss:

On this day of 20 , before me, the subscriber, personally appeared [person signing on behalf of claimant(s)] who, I am satisfied, is/are the person(s) named in and who executed the within instrument, and thereupon acknowledged that claimant(s) signed, sealed and delivered the same as claimant’s (s’) act and deed, for the purposes therein expressed.

________________________
NOTARY PUBLIC

SUGGESTED NOTARIAL FOR CORPORATE OR LIMITED LIABILITY CLAIMANT:

STATE OF NEW JERSEY
COUNTY OF [                     ] ss:

On this day of 20 , before me, the subscriber, personally appeared [person signing on behalf of claimant(s)] who, I am satisfied is the Secretary [or other officer/manager/agent] of the Corporation [partnership or limited liability company] named herein and who by me duly sworn/affirmed, asserted authority to act on behalf of the Corporation [partnership or limited liability company] and who, by virtue of its Bylaws, or Resolution of its Board of Directors [or partnership or operating agreement] executed the within instrument on its behalf, and thereupon acknowledged that claimant signed, sealed and delivered same as claimant’s act and deed, for the purposes herein expressed.

________________________
NOTARY PUBLIC

b. In the event that the claimant elects to file a Notice of Unpaid Balance and Right to File Lien as described above, it shall not be necessary to serve a copy of said Notice of Unpaid Balance and Right to File Lien upon any interested party.

c. After the filing of a Notice of Unpaid Balance and Right to File Lien, any person claiming title to or an estate or interest in or a lien upon the real property described in the Notice of Unpaid Balance and Right to File Lien, shall be deemed to have acquired said title, estate, interest or lien with knowledge of the anticipated filing of a lien claim, and shall be subject to the terms, conditions and provisions of that lien claim within the period provided by section 6 2A:44A-6 of this act and as set forth in the Notice of Unpaid Balance and Right to File Lien. A Notice of Unpaid Balance and Right to File Lien filed under the provisions of this act shall be subject to the effect of a notice of settlement filed pursuant to P.L.1979, c. 406 (C.46:16A-1 et seq.)

d. The Notice of Unpaid Balance and Right to File Lien shall be effective for 90 days or in the case of a residential construction contract claim for 120 days from the date of the provision of the last work, services, materials or equipment delivery for which

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payment is claimed as set forth in paragraph 5 of the Notice of Unpaid Balance and Right to File Lien.

e. f. The lodging for record or filing of a Notice of Unpaid Balance and Right to File Lien shall not constitute the lodging for record or filing of a lien claim in accordance with the provisions of this act, nor does it extend the time for the filing lodging for record of a lien claim in accordance with the provisions of this act.

f. g. Failure to file a Notice of Unpaid Balance and Right to File Lien shall not affect the claimant's lien rights arising under the provisions of this act, to the extent that no creation, conveyance, lease or mortgage of an interest in real property has taken place occurs prior to the filing of a Notice of Unpaid Balance and Right to File Lien or lien claim.

g. h. A Notice of Unpaid Balance and Right to File Lien may be amended by the filing of an Amended Notice of Unpaid Balance and Right to File Lien in accordance with the provisions of this section.

COMMENT

The revised language incorporates modifications suggested by construction lien law practitioners and the American Arbitration Association to make it easier to meet the time constraints for filing residential construction lien claims. It also incorporates changes required by the modification to the time limitations in section 2A:44A-6 and conforms to the changes made to sections 2A:44A-8 and 2A:44A-10. Reference to "community association" is added because of modifications to section 2A:44A-3. However, a lien against a community association does not attach to an interest in real property and real property cannot be sold in order to satisfy the lien.

2A:44A-21. Legislative findings; additional requirements for filing of lien on residential construction

a. The Legislature finds that the ability to sell and purchase residential housing is essential for the preservation and enhancement of the economy of the State of New Jersey and that while there exists a need to provide contractors, subcontractors and suppliers with statutory benefits to enhance the collection of money for goods, services and materials provided for the construction of residential housing in the State of New Jersey, the ability to have a stable marketplace in which families can acquire homes without undue delay and uncertainty and the corresponding need of lending institutions in the State of New Jersey to conduct their business in a stable environment and to lend money for the purchase or finance of home construction or renovations requires that certain statutory provisions as related to the lien benefits accorded to contractors, subcontractors and suppliers be modified. The Legislature further finds that the construction of residential housing generally involves numerous subcontractors and suppliers to complete one unit of housing and that the multiplicity of lien claims and potential for minor monetary disputes poses a serious impediment to the ability to transfer title to residential real estate expeditiously. The Legislature further finds that the purchase of a home is generally one of the largest expenditures that a family or person will make and that there are a multitude of other State and federal statutes and regulations, including but not limited to the "New Home Warranty and Builders' Registration Act", P.L.1977, c. 467 (C.46:3B-1 et seq. et seq.) and "The Planned Real Estate Development Full Disclosure Act", P.L.1977, c. 419 (C.45:22A-21 et seq. et seq.), which afford protection to
consumers in the purchase and finance of their homes, thereby necessitating a different treatment of residential real estate as it relates to the rights of contractors, suppliers and subcontractors to place liens on residential real estate. The Legislature declares that separate provisions concerning residential construction will provide a system for balancing the competing interests of protecting consumers in the purchase of homes and the contract rights of contractors, suppliers and subcontractors to obtain payment for goods and services provided.

b. The filing of a lien for work, services, material or equipment furnished pursuant to a residential construction contract shall be subject to the following additional requirements:

(1) As a condition precedent to the filing of any lien arising under a residential construction contract, a lien claimant shall first file a Notice of Unpaid Balance and Right to File Lien by lodging for record the Notice within 60 days following the last date that work, services, material or equipment were provided for which payment is claimed in accordance with the provisions of subsection a. of section 2A:44A-20 of this act, and comply with all other provisions of this section.

(2) Upon the filing of a Notice of Unpaid Balance and Right to File Lien, service of the Notice of Unpaid Balance and Right to File Lien shall be effected in accordance with the provisions of section 7 2A:44A-7 of this act.

(3) Unless the parties have otherwise agreed in writing to an alternative dispute resolution mechanism, simultaneously with the service under paragraph (2) of this subsection within 10 days from the date the Notice of Unpaid Balance and Right to File Lien is lodged for record, the lien claimant shall also serve a demand for arbitration and fulfill all the requirements and procedures of the American Arbitration Association to institute an expedited proceeding before a single arbitrator designated by the American Arbitration Association. The demand for arbitration may be served in accordance with the provisions for the service of lien claims in section 2A:44A-7 along with (i) a copy of the completed and signed Notice of Unpaid Balance and Right to File Lien and (ii) proof by affidavit that the Notice of Unpaid Balance and Right to File Lien has been lodged for record. If not yet provided at the time of the service of the demand for arbitration, a copy of the Notice of Unpaid Balance and Right to File Lien marked “filed” by the clerk’s office shall be provided by the claimant to the parties and the arbitrator, as a condition precedent to the issuance of an arbitrator’s determination.

(3.1) All arbitrations of Notices of Unpaid Balance and Right to File Lien pertaining to the same residential construction shall be determined by the same arbitrator, whenever possible. The claimant, owner, or any other party may also request consolidation in a single arbitration proceeding of the claimant’s Notice of Unpaid Balance and Right to File Lien with any other Notice of Unpaid Balance and Right to File Lien not yet arbitrated but lodged for record by a potential lien claimant whose name was provided in accordance with section 2A:44A-37. Such request shall be made in the demand for arbitration or, in the case of a request by a person other than the claimant, by letter to the arbitrator assigned to the arbitration or, if none has been assigned, to the appropriate arbitration administrator, within five days of when the demand for arbitration
is served. The arbitrator shall grant or deny a request for a consolidated arbitration proceeding at the arbitrator’s discretion.

(4) Upon the closing of all hearings in the arbitration, the arbitrator shall make the following determinations: (a) whether the Notice of Unpaid Balance and Right to File Lien was in compliance with section 20 2A:44A-20 of this act and whether service was proper under section 7 2A:44A-7 of this act; (b) the earned amount of the contract between the owner and the contractor in accordance with section 2A:44A-9.1; (bc) the validity and amount of any lien claim which may be filed pursuant to the Notice of Unpaid Balance and Right to File Lien; (d) the validity and amount of any liquidated or unliquidated setoffs or counterclaims to any lien claim which may be filed; and (d e) the allocation of costs of the arbitration among the parties. When making the above determinations, the arbitrator shall also consider all determinations made by that arbitrator in any earlier arbitration proceeding pertaining to the same residential construction.

(5) In the event if the amount of any setoffs or counterclaims presented in the arbitration are unliquidated and cannot be determined by the arbitrator in a liquidated amount, the arbitrator, as a condition precedent to the filing of the lien claim, shall order the lien claimant to post a bond, letter of credit or funds with an attorney-at-law of New Jersey, or other such person or entity as may be ordered by the arbitrator in such amount as the arbitrator shall determine to be 110% of the approximate fair and reasonable value of such setoffs or counterclaims, but in no event shall the bond, letter of credit or funds exceed greater than the amount of the lien claim which may be filed. This 110% limitation regarding for any bond, letter of credit or funds shall also apply to any alternative dispute resolution mechanism to which the parties may agree. When making the above determinations, the arbitrator shall consider all determinations made by that arbitrator in any earlier arbitration proceeding pertaining to the same residential construction.

(6) The arbitrator shall make such determinations set forth in paragraphs (4) and (5) of this subsection and the arbitration proceeding shall be completed within 30 days of receipt of the lien claimant's demand for arbitration by the American Arbitration Association unless no response is filed, in which case the arbitrator shall make such determinations and the arbitration proceeding shall be deemed completed within 7 days after the time within which to respond has expired. These time periods for completion of the arbitration shall not be extended unless otherwise agreed to by the parties and approved by the arbitrator. If an alternative dispute mechanism is alternatively agreed to between the parties, such determination shall be made as promptly as possible making due allowance for all time limits and procedures set forth in this act. The arbitrator shall resolve a dispute regarding the timeliness of the demand for arbitration.

(7) Any contractor, subcontractor or supplier whose interests are affected by the filing of a Notice of Unpaid Balance and Right to File Lien under section 10 of this act shall be permitted to join in such arbitration; but the arbitrator shall not determine the rights or obligations of any such parties except to the extent those rights or obligations are affected by the lien claimant's Notice of Unpaid Balance and Right to File Lien.
(8) Upon determination by the arbitrator that there is an amount which, pursuant to a valid lien shall attach to the improvement, the lien claimant shall, within 10 days of the lien claimant's receipt of the determination, file for record such lien claim in accordance with the provisions of section 2A:44A-8 of this act and furnish any bond, letter of credit or funds required by the arbitrator's decision. The failure to file for record such a lien claim, or furnish the bond, letter of credit or funds, within the 10-day period, shall cause any lien claim to be invalid.

(9) Except for the arbitrator's determination itself, any such determination shall not be considered final in any legal action or proceeding, and shall not be used for purposes of collateral estoppel, res judicata, or law of the case to the extent applicable. Any finding of the arbitrator pursuant to the provisions of this act shall not be admissible for any purpose in any other action or proceeding.

(10) If either the lien claimant or the owner or community association in accordance with section 2A:44A-3 is aggrieved by the arbitrator's determination, then either the aggrieved party may institute a summary action in the Superior Court, Law Division, for the vacation, modification or correction of the arbitrator's determination. The arbitrator's determination shall be confirmed unless it is vacated, modified or corrected by the court. The court shall render its decision after giving due regard to the time limits and procedures set forth in this act and shall set time limits for lodging for record the lien claim if it finds, contrary to the arbitrator’s determination, that the lien claim is valid or the 10-day requirement for lodging for record required by paragraph 8 of this subsection has expired.

(11) In the event a Notice of Unpaid Balance and Right to File Lien is filed and the owner conveys its interest in real property to another person before a lien claim is filed, then prior to or at the time of conveyance, the owner may make a deposit with the county clerk where the improvement is located, in an amount no less than the amount set forth in the Notice of Unpaid Balance and Right to File Lien. For any deposit made with the county clerk, the county clerk shall discharge the Notice of Unpaid Balance and Right to File Lien or any related lien claim against the real property for which the deposit has been made. After the issuance of the arbitrator's determination set forth in paragraphs (4) and (5) of this subsection, any amount in excess of that determined by the arbitrator to be the amount of a valid lien claim shall be returned forthwith to the owner who has made the deposit. The balance shall remain where deposited unless the lien claim has been otherwise paid, satisfied by the parties, forfeited by the claimant, invalidated pursuant to paragraph (8) of this subsection or discharged under section 2A:44A-33 of this act. Notice shall be given by the owner in writing to the lien claimant within five days of making the deposit.

(12) Solely for those lien claims arising from a residential construction contract, if a Notice of Unpaid Balance and Right to File Lien is determined to be without basis, the amount of the Notice of Unpaid Balance and Right to File Lien is significantly overstated, or the Notice of Unpaid Balance and Right to File Lien is not filed lodged for record in (i) substantially the form, or (ii) in the manner, or (iii) at a time, not in accordance with the provisions of this act, then the claimant shall be liable for all damages suffered by the owner or any other party adversely affected by the Notice of
Unpaid Balance and Right to File Lien, including but not limited to all court costs, reasonable attorneys' fees and legal expenses incurred.

(13) If the aggregate sum of all lien claims attaching to any real property that is the subject of a residential construction contract exceeds the amount due under a residential purchase agreement, less the amount due under any previously recorded mortgages or liens other than construction liens, then upon entry of judgment of all such lien claims, each lien claim shall be reduced pro rata. Each lien claimant's share then due shall be equal to the monetary amount of the lien claim multiplied by a fraction in which the denominator is the total monetary amount of all valid claims on the owner's interest in real property against which judgment has been entered, and the numerator is the amount of each particular lien claim for which judgment has been entered. The amount due under the residential purchase agreement shall be the net proceeds of the amount paid less previously recorded mortgages and liens other than construction liens and any required recording fees.

COMMENT

The revised language incorporates modifications suggested by construction lien law practitioners and the American Arbitration Association to set workable time limitations for each step of the residential construction claim process including conclusion of the arbitration itself. The new time frames for filing the NUB and serving the demand for arbitration are included to permit sufficient time for the demand for arbitration to be served and the arbitration to take place while still meeting the 120-day time frame for filing the lien claim. The revision also permits extension of the 120-day time frame if the court, upon review of the arbitrator’s determination in accordance with subsection (10) of this section, finds the arbitrator was in error and the lien claim is valid.

Subsections b. (3) and (6) have been further modified in order to avoid disputes between the parties about timeliness and to provide further guidance to the arbitrators. Subsections b. (4) and (5) have been modified, and subsection b. (3.1) added, to accommodate the concerns of the New Jersey Builder’s Association. The arbitrator has been given the authority to determine the earned amount of the contract between the owner and the contractor in order to effectuate a revised section 2A:44A-31, which allows for the capping of bonding requirements with regard to residential construction lien claims. New subsection b. (3.1) gives the arbitrator discretion, at the request of a party, to consolidate NUB arbitrations pertaining to the same residential construction and requires that, whenever possible, the same arbitrator determine all arbitrations of NUBs pertaining to the same residential construction. This revision hopefully will help eliminate inconsistent awards. Distinctions between “filing” and “lodging for record” also are noted.

2A:44A-22. Priority of mortgages over liens

Nothing in this act shall be deemed to supersede the mortgage priority provisions of P.L. 1985, c. 353 (C. 46:9-8).

a. Every mortgage recorded before the filing of a lien claim or the filing of a Notice of Unpaid Balance and Right to File Lien in accordance with section 2A:44A-20, shall have priority as to the land or other interest in real property described and any improvement wholly or partially erected or thereafter to be erected, constructed or completed thereon, over any lien established by virtue of this act, to the extent that

(1) the mortgage secures funds that have been advanced or the mortgagee is obligated to advance to or for the benefit of the mortgagor before the filing of the lien claim or Notice of Unpaid Balance and Right to File Lien in accordance with section 2A:44A-20; or
(2) the mortgage secures funds advanced after the filing of a lien claim or the filing of a Notice of Unpaid Balance and Right to File Lien in accordance with section 2A:44A-20, and the funds are applied in accordance with subsection (b) (1) through (7) inclusive of this section.

b. Every mortgage recorded after the filing of a lien claim or the filing of a Notice of Unpaid Balance and Right to File Lien in accordance with section 2A:44A-20, shall have priority as to the land or other interest in real property described and any improvement wholly or partially erected or thereafter to be erected, constructed or completed thereon, over any lien which may be established by virtue of this act to the extent that the mortgage secures funds which have been applied to:

a. (1) The payments of amounts due to any claimants who have filed a lien claim or a Notice of Unpaid Balance and Right to File Lien;

b. (2) The payment to, or the securing of payment by, the party against whose interest the lien claim is filed of all or part of the purchase price of the land covered thereby and any subsequent payment made for the improvements to the land, including but not limited to any advance payment of interest to the holder of the mortgage as required by the mortgagee as a condition of the loan;

c. (3) The payment of any valid lien or encumbrance which is, or can be established as, prior to a lien provided for by this act;

d. (4) The payment of any tax, assessment or other State or municipal lien or charge due or payable at the time of or within 60 days after such payment, as required by the mortgagee as a condition of the loan;

e. (5) The payment of any premium, counsel fee, consultant fee, interest or financing charges, or other cost related to the financing, any of which are required by the lender to be paid by the owner, provided that the total of same shall not be in excess of 10 percent of the principal amount of the mortgage securing the loan upon which they are based;

f. (6) The payment to the owner of that portion of the purchase price of the real property on which the improvements are made or to be made which have previously been paid by the owner, exclusive of any interest or any other carrying costs of such real property, provided, however, that at the time of the payment of such funds to the owner, the budget upon which the loan was made indicated that the amount of the loan is not less than the total of: (4a) the purchase price of the real property, (2b) the cost of constructing the improvements, and (3c) any cost listed in subsections b.3., d4. and e5. of this section; or

g. (7) An escrow in an amount not to exceed 150% of the amount necessary to secure payment of charges, described in subsections a. b. (1), c. (3), d. (4) and e. (5) of this section.

c. Nothing in this act shall be deemed to supersede the mortgage priority provisions of P.L. 1985, c. 353 (C. 46:9-8.1 et seq.) or diminish the effect of a notice of settlement filed pursuant to P.L. 1979, c. 406 (C.46:16A-1 et seq.).
COMMENT

For the most part, the revised language incorporates modifications suggested by construction lien law practitioners. A mortgage for advance of funds used for improvements to the property takes priority over other liens, including but not limited to any advance of mortgage interest or taxes collected at time of loan closing. However, in an attempt to reconcile section 2A:44A-10 with this section, which together posed a claimed ambiguity in Sovereign Bank v. Silverline Holdings Corp., 368 N.J. Super. 1 (App. Div. 2004), this section is now divided into three subsections. The first subsection explains the priority of a mortgage recorded before the filing of a lien claim (wherein priority is secured to the extent the funds have been advanced); the next subsection explains the priority of a mortgage recorded after the filing of a lien claim (wherein priority is secured to the extent the funds are applied as set out in the statute); and the last subsection retains the priority provisions of N.J.S. 46:9-8.1 et. seq. Since, as a general rule, a mortgage normally enjoys priority only to the extent it is funded, the proposed revision is more consistent with existing legal principles.

2A:44A-23. Payment of lien claims; distribution of proceeds

All lien claims established by judgment shall be concurrent and shall be paid pro rata out of the lien fund and the proceeds of the sale authorized by this act.

a. The amount due a lien claimant shall be paid only after the lien claim has been established by judgment, or, in the case of an execution sale, only to those lien claimants whose lien claims were filed before application was made to the court for distribution of the sale proceeds. All lien claims established by judgment are “valid claims” that shall be concurrent and shall be paid as provided in subsection (c) below.

b. The sheriff or other officer conducting an execution sale authorized by sections 2A:44A-24 shall pay the proceeds to the clerk of the Superior Court and the Superior Court shall provide proper disposition of sale proceeds to the persons entitled thereto under the act.

c. The Superior Court shall order the distribution of a lien fund, after its calculation in accordance with section 2A:44A-9.1, in the following manner:

(1) If there are first tier lien claimants, the lien fund shall be allocated in amounts equal to their valid claims. If the total of those claims would exceed the maximum liability of the owner (or community association) as provided by section 2A:44A-9.1, the allocations shall be reduced pro rata so as not to exceed that maximum liability;

(2) From the allocation to each first tier lien claimant, amounts shall be allocated equal to the valid claims of second tier lien claimants whose claims derive from contracts with that first tier lien claimant. If the total of the claims is less than the allocation to that first tier lien claimant, the first tier lien claimant shall be paid the balance. If the total of the claims exceeds the allocation to that first tier lien claimant, the second tier claimants’ allocations shall be reduced pro rata so as not to exceed that first tier lien claimant allocation.

(3) From the allocation to each second tier lien claimant, amounts shall be allocated equal to the valid claims of third tier lien claimants whose claims derive from contracts with that second tier lien claimant. If the total of the claims is less than the allocation to that second tier claimant, the second tier lien claimant shall be paid the balance. If the total of the claims exceeds the allocation to that second tier lien claimant,
the allocation to the third tier lien claimants shall be reduced pro rata so as not to exceed that second tier lien claimant allocation.

(4) If there are no first tier lien claimants, the lien fund for second tier lien claimants shall be allocated in amounts equal to that second tier’s valid claims. If the total of the claims of any group of second tier lien claimants exceeds the lien fund for that group of claimants as provided by section 2A:44A-9.1, the allocations shall be reduced pro rata so as not to exceed that lien fund.

(5) If there are no first or second tier lien claimants, the lien fund for third tier lien claimants shall be allocated in amounts equal to that third tier’s valid claims. If the total of the claims of any group of third tier lien claimants exceeds the lien fund for that group of claimants as provided by section 2A:44A-9.1, the allocations shall be reduced pro rata so as not to exceed that lien fund.

COMMENT

The section is new. It merges some of the current section 2A:44A-23 with current section 2A:44A-28. This provision attempts to set out the process by which lien claims are disbursed from the lien fund. Because of the merger of two sections within this section, the Commission also recommends modification of the descriptor as underlined. Reference to “community association” is added because of modifications to section 2A:44A-3.

2A:44A-24. Judgment; filing and content of statement Suit to enforce lien claim; entitlement to defense; joinder of party defendants; distribution of surplus funds

When judgment is obtained under this act there shall be filed in the office of the county clerk a statement signed and sealed by the clerk of the court, containing:

a. The name of the court;

b. The names of the parties;

c. Whether judgment is against the owner, contractor or subcontractor, or against the building and land only, or both; and

d. The amount and date of judgment.

There shall be filed with, or as part of, the statement, an oath of the claimant, his attorney or agent, stating the amount currently due thereon based on an updated statement of the amount owing on the judgment.

a. Subject to the further requirements of section 2A:44A-14, and in the case of lien claims arising from residential construction contracts the additional requirements of sections 2A:44A-20 and 2A:44A-21, a lien claim arising under this act shall be enforced by a suit commenced in the Superior Court within one year of the date of the last provision of work, services, material or equipment, payment for which the lien claim was filed. Venue shall be laid in the county in which the real property affected by the lien is located.

b. A lien claimant shall join as party defendants the owner (community association, if applicable in accordance with section 2A:44A-3), contractor or subcontractor alleged to have failed to make payments for which the lien claim has been
filed and any other person having an interest in the real property that would be adversely affected by the judgment. The court shall order joinder of necessary parties or determine if it is appropriate for the suit to proceed if party defendants are not joined.

c. The court shall stay the suit to the extent that the lien claimant’s contract or the contract of another party against whose account the lien claim is asserted provides that any disputes pertaining to the validity or amount of a lien claim are subject to arbitration or other dispute resolution mechanism.

d. Upon commencement of the suit, the lien claimant shall cause a notice of lis pendens to be filed in the office of the county clerk or register pursuant to N.J.S. 2A:15-6 et seq.

e. A party to a suit to enforce a lien claim shall be entitled to assert any defense available to any other party in contesting the amount for which a claimant seeks to have the lien reduced to judgment.

f. The judgment to be entered in a suit to enforce a lien claim shall (i) establish the amount due to the lien claimant; and (ii) direct the public sale by the sheriff or other such officer as the court may direct of the real property affected by the lien. The proceeds of the sale shall be distributed in accordance with section 2A:44A-23. If funds are realized at the sale in an amount greater than the lien fund, the surplus funds shall be distributed in accordance with law.

g. Nothing in this act shall bar recovery of money damages pursuant to a lien claim arising under this act.

h. A judgment obtained against a community association that is unpaid may be enforced by assessment against unit owners as they would be assessed for any other common expense, after reasonable notice, and in a manner directed by the court. In ordering assessments, the court shall be guided by the master deed, bylaws or other document governing the association. A judgment shall not be enforced by the sale of any common elements, common areas or common buildings or structures of a real property development.

i. Upon resolution of the suit other than by the entry of final judgment in favor of the plaintiff in accordance with subsection f., a cancellation or discharge of lis pendens should be filed, by the party who filed the enforcement action, in the office of the county clerk or register where the notice of lis pendens was filed.

COMMENT

This section is new. It sets out the parameters for enforcing a lien claim by a suit in the Superior Court and attempts to conform this section with section 2A:44A-25, both of which were taken from the old Mechanics’ Lien Law and inserted in the Construction Lien Law due to the hybrid nature of a proceeding to enforce a lien claim under the old statute. The requirement to file a notice of lis pendens has been inserted here. The current section 2A:44A-24 is eliminated and most of current section 2A:44A-16 is merged with this new section.

In merging current section 2A:44A-16 into this section, the new proposed language eliminates any distinction between an action to establish a lien and a suit to enforce a lien, and sets forth the procedure for joinder, notice, and enforcement of judgment. New subsection h. provides guidance with regard to a claimant’s failure to join dispensable parties. As a practical matter, if all lien claimants are not joined, the lien fund cannot be calculated and accurate pro rata distribution to lien claimants cannot be made. New
subsection d. sets out the procedure for enforcing judgments against community associations and clarifies that enforcement by the sale of common elements or common buildings or structures is against public policy and therefore prohibited.

The modification to subsection f. eliminates the need for section 2A:44A-29, and that section accordingly has been deleted. The addition of subsection i. clarifies that the notice of lis pendens should be discharged except where resolution of a suit is by the entry of final judgment in favor of the plaintiff in accordance with subsection f., in which case the sheriff’s sale will relate back to the notice of lis pendens just as in a mortgage foreclosure. The Commission also recommends modification of the descriptor as underlined.

2A:44A-25. Writs of execution

If judgment in an action to enforce a lien claim under this act is entered in favor of the lien claimant against the owner, contractor or subcontractor, a writ of execution may issue thereon, as in other cases, in accordance with the judgment, if against the improvements and land, a special writ of execution may issue to make the amount recovered therein by sale of the improvements and land.

If both general and special judgments are given, both writs of execution may issue, separately or combined in one writ, and one of such writs may issue after the return of the other for the whole amount recovered or the residue as the case may require.

COMMENT
The changes to section 2A:44A-24 make necessary the modifications to this section.

2A:44A-26. Special writs of execution; sale and conveyance of land [deleted]

When a special writ of execution has issued under this act, the sheriff or other officer shall advertise, sell and convey the improvement and land in the same manner as in the case of other execution sales.

COMMENT
The changes to sections 2A:44A-24 and 2A:44A-25 make this section unnecessary and it is therefore eliminated.

2A:44A-27. Interest in residential property, priority to all subsequent liens

The interests in real property set forth in section 2A:44A-21 of this act shall have priority to all subsequent liens under this act upon the land and upon the improvements thereon, except such as may be removable as between landlord and tenant, which may be sold and removed by virtue of any lien for the erection, construction or completion of the same, free from the prior encumbrances.

COMMENT
The revision replaces reference to section 21 of the act with reference to the title and section numbers.
2A:44A-28. Proceeds of sale; distribution [deleted and incorporated into section 2A:44A-23]

The sheriff or other officer conducting the sale authorized by this act shall pay the proceeds thereof to the clerk of the Superior Court, who shall distribute the proceeds among the lien claims filed under this act before an application for distribution thereof is made to the court. The Superior Court shall provide proper disposition of proceeds of any sale to the persons entitled thereto under this act. The amount due a lien claimant shall not be paid over to him until after his lien claim has been established by judgment.

COMMENT

The revision to section 2A:44A-23 incorporates portions of this section making this section unnecessary and it is therefore eliminated.

2A:44A-29. Surplus funds; distribution [deleted and incorporated into section 2A:44A-24]

If the proceeds of the sale of the improvements or land under any judgment obtained under this act shall be more than sufficient to pay the judgments of the claimants entitled to payment out of the proceeds of the sale under this act, any surplus shall be distributed by the court out of which the special writ of execution issued, to the defendants holding liens, subject to that of claimants, according to priority of their respective liens as determined in the judgment.

COMMENT

The changes to sections 2A:44A-24 and 2A:44A-25 incorporate portions of this section making this section unnecessary and it is therefore eliminated.

2A:44A-30. Filing of certificate to discharge lien claim of record; order to show cause

a. When a lien claim has been filed and the claim has been paid, satisfied or settled by the parties or forfeited by the claimant, the claimant or his claimant’s successor in interest or his attorney shall, within 30 days of payment, satisfaction or settlement, or within 7 days of demand by any interested party, file with the county clerk a certificate, duly acknowledged or proved, directing the county clerk to discharge the lien claim of record, which certificate shall contain:

1. The date of filing the lien claim;
2. The book and page number endorsed thereon;
3. The name of the owner of the land (or the community association, if applicable) named in the notice;
4. The location of the property; and
5. The name of the person for whom the work, services, equipment or materials was provided.

b. If the claimant shall fail or refuse to file the certificate, as set forth in subsection (a), then upon application by any party in interest may proceed in a summary
manner by filing an order to show cause in accordance with the Rules Governing the Courts of the State of New Jersey, upon notice to the claimant, to be served upon him in the same manner as provided by section 7 of this act, or upon satisfactory proof that the claimant cannot be served, any A judge of the Superior Court may, upon good cause being shown and absent receipt of written objections and grounds for same, order the lien claim discharged on the return date of the order to show cause. The county clerk shall thereupon attach the certificate or order to the original notice of lien claim on file and shall note on the record thereof "discharged by certificate" or "discharged by court order," as the case may be and any lien foreclosure action shall be dismissed with prejudice.

c. Any party in interest may proceed to discharge a lien claim on the ground that it is without factual basis by filing an order to show cause in the same manner as set forth in subsection b.

d. In those circumstances in which the lien claim has been paid in full, the lien claimant has failed to file a lien claim discharge pursuant to this section, and at least thirteen months have elapsed since the date of the lien claim, the owner or community association may, in accordance with section 2A:44A:33, submit for filing a duly acknowledged discharge certificate substantially in the form provided by subsection a, accompanied by an affidavit setting forth the circumstances of payment as set forth below:

OWNER (OR COMMUNITY ASSOCIATION) AFFIDAVIT OF PAYMENT TO DISCHARGE LIEN CLAIM

TO THE CLERK, COUNTY OF

The undersigned, being duly sworn upon the undersigned’s oath, avers as follows:

1. I am an owner of real property located at (address of property subject to lien), in that certain tract or parcel of land and premises described as Block ____, Lot ____, on the tax map of the (municipality) of ______, County of ________, State of New Jersey (In the case of a community association, I am an [officer/manager/agent] of the community association, [name of community association] for property located at [location of property development].)

2. On or about (date), I caused to be sent to (name of contractor or subcontractor to whom payment was made), located at (address designated for payment by the filed lien claim form), the final payment in the amount of ($_____) in full satisfaction of a certain lien claim dated (date) which was filed by (name of lien claimant) against the real property designated in paragraph 1, on (date) in the office of the county clerk of the County of (name of county) in Construction Lien Book ____, Page ____.

3. At least thirteen months have elapsed since the date of the lien claim and 90 days before filing this affidavit, I mailed or caused to be mailed by certified mail to the last known address of the lien claimant as set forth in the filed lien claim form written notice of my intention to file a discharge certificate with respect to the lien claim. To the best of my knowledge and belief, no written communication denying or disputing payment in full of the lien claim has been received from the lien claimant (name.)

4. Wherefore, the undersigned directs the county clerk of the County of (name of county) to cause to be filed the discharge certificate accompanying this affidavit, and further directs the county clerk to cause a notation of the discharge of the lien to be endorsed upon the margin of the record of the original lien claim, stating that the discharge is filed, and setting forth the date, book and page number of the filed discharge.

Construction Lien Law –Appendix B
NOTARIAL FOR INDIVIDUAL OWNER

STATE OF NEW JERSEY
COUNTY OF [ ] ss:

On this ____ day of ____, 20__, before me, the subscriber, personally appeared [name of owner/community association] who, I am satisfied, is/are the person(s) named in and who executed the within instrument, and thereupon acknowledged that the owner/community association signed, sealed and delivered the same as the owner’s/community association’s act and deed, for the purposes therein expressed.

____________________ ______________________
NOTARY PUBLIC

NOTARIAL FOR CORPORATE OR LIMITED LIABILITY OWNER/COMMUNITY ASSOCIATION:

STATE OF NEW JERSEY
COUNTY OF [ ] ss:

On this ____ day of ____, 20__, before me, the subscriber, personally appeared [person signing on behalf of owner/community association] who, I am satisfied is the Secretary [or other officer/manager/agent] of the Corporation [partnership or limited liability company] named herein and who by me duly sworn/affirmed, asserted authority to act on behalf of the Corporation [partnership or limited liability company] and who, by virtue of its Bylaws, or Resolution of its Board of Directors [or partnership or operating agreement] executed the within instrument on its behalf, and thereupon acknowledged that the owner/community association signed, sealed and delivered same as owner’s/community association’s act and deed, for the purposes herein expressed.

____________________ ______________________
NOTARY PUBLIC

e. Any lien claimant who fails to discharge a lien claim of record pursuant to this section shall be liable for all court costs, and reasonable legal expenses, including but not limited to attorneys' fees, incurred by the owner, community association, the contractor, or subcontractor, or any combination of owner, community association, contractor and subcontractor, as applicable, to discharge or obtain the discharge of the lien, and in addition thereto, the court may enter judgment against the claimant for damages to any or all of the parties adversely affected by the failure to discharge the lien.

f. Upon discharge of record in all cases, the party who filed the enforcement action shall cause the notice of lis pendens to be cancelled or discharged of record pursuant to N.J.S. 2A:15-6 et seq. Any party who filed the enforcement action who fails to cancel or discharge the lis pendens of record pursuant to this section shall be liable for all court costs, and reasonable legal expenses, including but not limited to attorneys' fees, incurred by the owner, community association, the contractor, or subcontractor, or any other interested party, or any combination thereof, as applicable, to obtain the cancellation or discharge of the lis pendens, and in addition thereto, the court shall enter judgment against the claimant for damages to any or all of the parties adversely affected by the failure to cancel or discharge the lis pendens.
COMMENT

The revision provides a summary disposition procedure for those lien claims that are paid, satisfied, settled or forfeited in the event the claimant fails or refuses to file a certificate discharging the lien and for those lien claims that are alleged to be without a factual basis, in accordance with Kvaerner Process, Inc. v. Barham-McBride Joint Venture, 368 N.J. Super 190, 198-200 (App. Div. 2004), where the court held a summary proceeding to discharge a construction lien, brought by the general contractor, was appropriate although not expressly provided by statute. Now the statute will provide the availability of such summary disposition by any interested party.

In addition, a new subsection d. is added to provide for the discharge of a lien by an owner’s discharge certificate in the event that a fully paid and satisfied lien claim is not discharged within 13 months of the date of the claim. A mechanism for cancelling the lis pendens is also included, with consequences imposed for failure to do so. Reference to “community association” is added because of modifications to section 2A:44A-3. The Commission also recommends the adoption of the underlined descriptor.

2A:44A-31. Bond in favor of lien claimant; surety; conditions

a. When a lien claim is filed against any improvement and land under this act, the owner, community association in accordance with section 2A:44A-3, contractor or subcontractor may execute and file with the proper county clerk a bond in favor of the lien claimant, with a surety company, duly authorized to transact business in this State, as surety thereon, in an amount equal to 110% of the amount claimed by the lien claimant and the amount of the bond shall be equal to 110% of the amount claimed by the lien claimant but in the case of a lien claim arising from a residential construction contract, no greater than the earned amount of the contract between the owner and the contractor as determined by the arbitrator in accordance with section 2A:44A-21b.(4). The bond shall be filed, in accordance with the language set forth in section 2A:44A-31.1, along with a payment in the amount of $25, conditioned upon the payment of any judgment and costs that may be recovered by the lien claimant under this claim. Any form of bond proffered in accordance with this statute containing language inconsistent with the language set forth in section 2A:44A-31.1, shall be the basis for a cause of action to strike such language from the form of bond.

b. As an alternative, the owner, community association, contractor or subcontractor may deposit with the clerk of the Superior Court of New Jersey, funds constituting an amount equal to 110% of the amount claimed by the lien claimant and the bond in favor of the lien claimant under this claim. The deposit may be made without the necessity of commencing any legal action. The written receipt provided by the court clerk for the deposit made may be filed with the county clerk as evidence of that deposit.

c. Any surety bond filed with the county clerk under this section shall be discharged, and any deposit with the clerk of the Superior Court shall be returned to the depositor, without court order, upon presentment by the owner, community association, contractor or subcontractor of any of the following:

(a) (1) a duly acknowledged certificate as provided in paragraphs (2) or (3) of subsection a. of section 2A:44A-33 of this act.
(b) (2) an order of discharge as provided in paragraph (34) of subsection a. of section 33 2A:44A-33 of this act;

(c) (3) a judgment of dismissal or other final judgment against the lien claimant; or

(d) (4) a true copy of a stipulation of dismissal, with prejudice, executed by the lien claimant or its representative in any action to foreclose the lien claim which is subject to the surety bond or deposit.

COMMENT

The revised language references section 2A:44A-31.1, a new provision suggested by construction lien law practitioners. Subsection letter designations are added to each paragraph. Revisions to subsection (1) and (2) replace references to section 2A:44A-33 with references to the appropriate title and section numbers. Reference to the arbitrator’s determination in accordance with section 2A:44A-21b.(4) has been added in order to cap the bonding requirements for residential construction lien claimants. Also reference to “community association” is added because of modifications to section 2A:44A-3.


The bond shall be filed in substantially the following form:

BOND DISCHARGING CONSTRUCTION LIEN

Bond No. ___________ Bound Amount $ _______

WHEREAS, on the th day of (month) (year), (name of claimant) (hereinafter “Lienor”) filed a construction lien claim for the sum of ($_______), in the Office of the Clerk of the County of (name of county where lien claim was filed), (hereinafter “Clerk”), against the real property of owner, (name of owner), or community association (name of community association) [and the tenancy interest of (if applicable, add name)] (address of property or name and location of the property development in the case of a community association), Lot ( #), Block ( #) on the Tax Map of the Township of (name of municipality), County of (name of county), State of New Jersey, as is more fully set forth in the notice of lien, a true copy of which is attached hereto, and which lien was filed on (date lien claim was filed) in book (#), at page (#).

WHEREAS, in accordance with the Construction Lien Law of New Jersey, N.J.S. Title 2A, Chapter 44A, Article 1 et seq., the Principal is permitted to file a bond for 110% of the lien amount, which would be a total bond penalty of ($_______) (hereinafter “Penal Sum”).

NOW THEREFORE, in consideration of the discharge of said lien by the Clerk, we, (name) as Principal, and (name of bond company), as Surety, having an office at (address of bond company) and authorized to do business in New Jersey as a surety, do hereby pursuant to the statute in such case made and provided, jointly and severally undertake and become bound to the Clerk in the Penal Sum of (Dollars and Cents) ($_______), conditioned for the payment of any and all judgments that may be rendered against said property in favor of the Lienor, its legal representatives or assigns, in any action or proceeding to enforce the alleged lien as described.
Sealed with our seal and dated the th day of (month), (year)

Witness: __________________________   (Name of principal)
By: (Signature)
Title: (Printed name and title of signatory)

Witness: __________________________   (Name of bond company)
By: (Signature)
Title: (Printed name and title of signatory)

COMMENT

Construction lien law practitioners suggested that a form of the bond be made part of the act for easier reference. The Commission recommends the adoption of the underlined descriptor. Reference to “community association” is added because of modifications to section 2A:44A-3.

2A:44A-32. Release, discharge from claim

When the bond, deposit or any combination thereof, authorized by section 31 of this act, is properly filed or deposited, the improvements and land described in the lien claim shall thereupon be released and discharged from the claim and no execution shall issue against the improvements and land. The words "released by bond" or "released by deposit of funds," as applicable, and a reference to the time and place of filing of the bond or deposit shall be entered by the county clerk upon the record of the lien claim.

COMMENT

The revision replaces reference to section 31 of the act with reference to the title and section numbers.

2A:44A-33. Discharge of record of lien claim

a. A lien claim may be discharged of record by the county clerk:

(1) Upon the execution and filing with the county clerk of a surety bond, or the deposit of funds with the clerk of the Superior Court of New Jersey, in favor of the claimant in an amount equal to 110% of the amount of the lien claim; or

(2) Upon receipt of a duly acknowledged certificate, discharging the lien claim from the claimant having filed the lien claim, or his claimant’s successor in interest, or his attorney; or

(3) Pursuant to the filing of an owner’s or community association’s discharge certificate in accordance with section 2A:44A-30, provided that 90 days prior to the filing of the affidavit, substantially in the form set forth below, the lien claimant is notified by certified mail at the lien claimant’s last known address of the owner’s or community association’s intent to file a discharge certificate and no written communication from the lien claimant denying or disputing payment in full of the lien claim is filed with the county clerk and served on the owner or community association; or

(34) Pursuant to an order of discharge by the court.
b. When judgment of dismissal or final other judgment against the lien claimant is entered in an action to enforce the lien claim under this act and no appeal is taken within the time allowed for an appeal, or if an appeal is taken within the time allowed for an appeal, or if an appeal is taken and finally determined against the lien claimant, the court before which the judgment was rendered, upon application and written notice to the lien claimant as the court shall direct, shall order the county clerk to enter a discharge of the lien claim.

c. If an appeal is taken by the claimant, the claim shall be discharged unless the claimant posts a bond, in an amount to be determined by the court, to protect the owner or community association from the reasonable costs, expenses and damages which may be incurred by virtue of the continuance of the lien claim encumbrance.

d. Upon discharge of record of the lien claim, unless the action for enforcement also involves claims, by way of counterclaim, cross claim or interpleader, arising out of or related to the improvements that are the subject of the lien claim in which the owner or community association is an interested party, the court shall also order that the owner or community association shall no longer be a party to an action to enforce the lien claim, and the surety issuing the bond shall be added as a necessary party.

e. Discharge of record of a lien claim will automatically discharge of record the Notice of Unpaid Balance and Right to File Lien filed in connection therewith.

COMMENT

The revision accommodates the concern of construction lien law practitioners that even if a bond has been posted, in those cases where enforcement of the action also involves claims by way of counterclaim or cross claim arising out of or related to the improvements that are the subject of the lien claim, the owner should remain involved in the proceeding. The county clerk may also now discharge a lien upon receipt of the owner’s submission of a discharge certificate under certain circumstances. References to gender have been eliminated. Finally, reference to “community association” is added because of modifications to section 2A:44A-3.

2A:44A-34. Filing of book and page number of original record of lien claim

A discharge, subordination or release of a lien claim or Notice or Unpaid Balance and Right to File Lien, a receipt of payment of a lien claim, or any order of the court discharging or releasing a lien claim, shall recite the book and page number of the original record of the lien claim, and a full description of the property discharged or released. The county clerk may refuse to discharge a lien claim unless the provisions of this section have been satisfied.

COMMENT

No changes have been made to this section of the current law other than stylistic changes as noted.

2A:44A-35. Discharge, subordination or release of claim, notice of unpaid balance and right to file; recording; acknowledgment and endorsement

A discharge, subordination or release of a lien claim or Notice of Unpaid Balance and Right to File Lien shall be duly acknowledged or proved, and recorded in a properly indexed book for that purpose. A notation of the record of the discharge of a lien claim or Notice of Unpaid Balance and Right to File Lien shall be endorsed upon the margin of
the record in the book where the original lien or Notice of Unpaid Balance and Right to File Lien is recorded stating that the discharge is filed and recorded, giving the date of filing and recording and setting forth the book and the page number where the discharge, or receipt of payment of the lien or order or owner’s or community association’s discharge certificate discharging the lien, is recorded.

COMMENT
The revision accommodates the submission of an owner’s or community association’s discharge certificate. Reference to “community association” is added because of modifications to section 2A:44A-3. References to “and recording” and “and recorded” are deleted because they are unnecessary. The revised definition of “filing” clearly includes lodging for record and indexing.

2A:44A-36. Liability for fraudulently depriving person of benefits of this act

A person who fraudulently deprives a person entitled to the benefits of this act shall be liable to that person for any damages resulting therefrom.

COMMENT
No changes have been made to this section of the current law.

2A:44A-37. Furnishing list of subcontractors and suppliers pursuant to contract or upon written request; penalties for failure to furnish

a. If required in a contract or upon written request from an owner or community association to a contractor, a subcontractor, or both, the contractor or subcontractor shall, within 10 days, provide the owner or community association with an accurate and full list of the names and addresses of each subcontractor and supplier who may have a right to file a lien pursuant to the provisions of this act.

b. If required in a contract or upon written request from a contractor to a subcontractor, the subcontractor shall, within 10 days, provide the contractor with an accurate and full list of the names and addresses of each subcontractor or supplier who may have a right to file a lien pursuant to the provisions of this act.

c. Any list provided pursuant to the provisions of subsection a. or b. of this section shall be verified under oath by the person providing it.

d. Reliance upon the verified list by the person requesting same or by the owner shall be prima facie evidence establishing the bona fides of payment made in reliance thereon and shall constitute an absolute defense to any claim that the party making such payment should have made additional inquiry to determine the identity of potential claimants.

e. Any person to whom a written request has been made pursuant to the provisions of subsections a. or b. of this section who does not provide a list in compliance with this section shall be directly liable in damages to (i) the party requesting the list or to (ii) the owner or community association, including, but not limited to, court costs and the reasonable legal expenses, including attorneys’ fees, incurred by said party or the owner.
or both, any or all of them, in defending or causing the discharge of a lien claim asserted by a party whose name has been omitted from the list.

COMMENT
Reference to “community association” is added because of modifications to section 2A:44A-3. Other stylistic changes have been made.

2A:44A-38. Waiver of construction lien rights unlawful and deemed void; exceptions

Waivers of construction lien rights are against public policy, unlawful, and void, unless given in consideration for payment for the work, services, materials or equipment provided or to be provided, and such waivers shall be effective only upon and to the extent that such payment is actually received.

COMMENT
No changes have been made to this section of the current law other than to make “material” singular as it is throughout the statute.
STATE OF NEW JERSEY

NEW JERSEY LAW REVISION COMMISSION

FINAL REPORT

Relating to

PUBLIC ASSISTANCE LAW

February 9, 2009

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

Many of the statutes in the earlier chapters of Title 44- The Poor Law were enacted in the nineteenth century. Others date from the 1920’s and before. They are archaic, in substance and in style, and do not reflect current reality and practice. Repealed and superseded terms and statutory citations exist in numerous sections. Also found in many sections are unconstitutional provisions for deporting people who lack legal “settlement” in New Jersey to other states. It appears that as times and welfare programs changed, very little of the old law was repealed. Thus, when categorical relief was established in the 1930’s, new chapters were added but the old statutes on indoor and outdoor relief were left in place. When poverty programs were established in the 1960’s, more material was added. With welfare reform in the 1990’s, more was added, but very little was repealed or amended to bring it up to date. The result is that most of Title 44 completely anachronistic. Very little of it is read or relied on by those who administer welfare programs. These parts of Title 44 should be revised or deleted. However, there are a few statutes that are of continuing importance buried among statutes that have no modern function. For example, sections in chapter 1 establish the basic duties of the counties and municipalities. Those must be retained.

The modern parts of Title 44 also need revision. Two main laws with confusingly similar names govern assistance to the needy in New Jersey. One, the “Work First New Jersey” act, N.J.S. 44:10-55 et seq., L. 1997, resulted from the federal “Personal Responsibility and Work Opportunity Reconciliation Act of 1996,” 42 U.S.C. Section 601, et seq., which established a federal block grant for temporary assistance for needy families and enabled the states to design their own welfare programs. This act replaced earlier programs including: aid to families with dependent children, general assistance, emergency assistance for recipients, and the Family Development Initiative. N.J.S. 44:10-58(b). The two main relief programs established by this act are Temporary Assistance for Needy Families (TANF) and General Assistance (GA). TANF is the successor to the federally funded categorical programs; GA is the continuation of the municipal general assistance for those people who do not fit within the categorical programs. The 21 county welfare agencies administer TANF using Federal and State funds.

The Work First New Jersey General Assistance Act, N.J.S. 44:8-107 et seq., L. 1997, the second main law, replaced the State’s General Assistance law of 1947. The relationship between the two “Work First” laws is obfuscated by their statutory language. The Work First New Jersey General Assistance Act seems to establish a general assistance program for “needy, single adults and couples without dependent children ....” N.J.S. 44:8-108. In fact, the act serves to provide for municipal governance of the General Assistance program established by the other “Work First” act. In 1995, most provisions were amended to allow either the municipality or the county, where appropriate, to run the program. County welfare agencies administer the majority of general assistance programs; however 103 of New Jersey’s 566 municipalities still maintain their own offices for local administration. The State funds general assistance.
This draft proposes that the entire Title be called “Public Assistance Law” and that the distinctions between Assistance (now Chapter 8) and Temporary Assistance for Needy Families (currently Chapter 10) be clarified to remove meaningless and unnecessary duplication. The substantive provisions explain who is eligible, what benefits one receives, and the work requirements. Administrative provisions comprise a separate chapter.
Chapter 1 – Legislative Findings; Definitions

1-1. Legislative findings

   a. The Legislature finds and declares that the law of New Jersey has always imposed a duty on the public entities to provide assistance to eligible persons. Nothing in this law, by enactment, or repeal, is intended to affect that basic duty. If the programs continued in this law do not provide all necessary assistance to eligible persons, additional assistance shall be provided by public entities as in the past.

   b. An eligible person shall be given appropriate assistance during the time an application for assistance is being considered.

   c. This act along with other law will implement all federal categorical public assistance programs and provide for those persons who need assistance and who are not eligible under federal categorical programs through the General Assistance Program.

Source: 44:8-120, New.

COMMENT

Subsections (a) and (c) are new and are intended to assure that recompilation of poor law dating back to the nineteenth century does not disturb the basic common law principle that there is a public duty to assist the needy. Subsection (b) derives from 44:8-120 and emphasizes that assistance is allowed to begin before the entire inquiry process initiated by an application concludes.

1-2. Definitions

   a. “Alternative work experience” means unpaid work and training only with a public, private nonprofit or private charitable employer to provide a recipient with the experience to adjust to, and learn how to function in, an employment setting and the opportunity to combine that experience with education and job training. An alternative work experience participant shall not be assigned to work for a private, for profit employer.

   b. “Commissioner”, unless otherwise specified, means the Commissioner of the Department of Human Services.

   c. “Community work experience” means unpaid work and training only with a public, private nonprofit or private charitable employer, provided to a recipient to enable the recipient to adjust to, and learn how to function in, an employment setting. Placements are directed toward groups directly involved in public service. A community work experience participant shall not be assigned to work for a private, for profit employer.

   d. “Department”, unless otherwise specified, means the Department of Human Services.

   e. “Dependent child” means a child:

      (1) under the age of 18;

      (2) under the age of 19 and a full-time student in a secondary school or an equivalent level of vocational or technical training, if, before the student attains age 19,
the student may reasonably be expected to complete the student’s program of secondary school or training; or

(3) under the age of 21 and enrolled in a special education program, who is living in New Jersey with the child’s natural or adoptive parent or legal guardian, or with a relative designated by the Commissioner in a place of residence maintained by the relative as the relative’s home.

f. “Eligible alien” means one of the following

(1) a qualified alien as defined by subsection (r) of this section, admitted to the United States prior to August 22, 1996, who is eligible for means-tested, federally funded public benefits pursuant to federal law;

(2) a refugee, asylee, victim of human trafficking, or person granted withholding of deportation under federal law for the person’s first five years after receiving that classification in the United States pursuant to federal law;

(3) a qualified as defined by subsection (r) of this section alien who is a veteran of, or on active duty in, the armed forces of the United States, or the spouse or dependent child of that person pursuant to federal law;

(4) a recipient of refugee and entrant assistance activities or a Refugee Resettlement entrant pursuant to federal law;

(5) a legal permanent resident alien who has worked 40 qualifying quarters of coverage as defined under Title II of the federal Social Security Act; except that for any period after December 31, 1996, a quarter during which an individual received means-tested, federally funded public benefits shall not count toward the total number of quarters;

(6) a qualified alien as defined by subsection (r) of this section admitted to the United States on or after August 22, 1996, who has lived in the United States for at least five years and is eligible for means-tested, federally funded public benefits pursuant to federal law; or

(7) a qualified alien as defined by subsection (r) of this section who has been battered or subjected to extreme cruelty in the United States by a spouse, parent or a member of the spouse or parent’s family residing in the same household as the alien, or a qualified alien whose child has been battered or subjected to extreme cruelty in the United States by a spouse or parent of the alien, without the active participation of the alien, or by a member of the spouse or parent’s family residing in the same household as the alien. In either case, the spouse or parent shall not have consented or acquiesced to the battery or cruelty and there shall be a substantial connection between the battery or cruelty and the need for benefits to be provided. This subsection shall not apply to an alien during any period in which the individual responsible for the battery or cruelty resides in the same household or eligible household as the individual subjected to the battery or cruelty. Benefits shall be provided to the extent and for the period of time that the alien or alien’s child is eligible for the program.

g. “Eligible household” or “assistance unit” means:
(1) a person or couple persons with one or more dependent children to whom they are legally or blood-related, or of whom they are one of them is legal guardian, and who live together as a household unit;

(2) a unit comprised of individuals living together and functioning as one economic unit and whose relationship is based upon a blood or legal relationship, i.e., one that is created through marriage, adoption or legal guardianship procedures;

(3) a single person without dependent children;

(4) a couple persons living together as a household unit without dependent children; and

(5) dependent children only.

h. “Employable person” means a person applying for or receiving assistance under this act title who is not prevented from working by physical or mental disability as defined in the Commissioner’s regulations.

i. “Full-time employment” means employment unsubsidized by any level of government in which a person is engaged for at least 35 hours a week.

j. “Full-time post-secondary student” means a student enrolled for a minimum of 12 credit hours in a post-secondary school.

k. “General assistance” means assistance provided to eligible single adults and couples without dependent children who are willing to work but cannot be employed because of physical or mental disability or inability to find employment.

k. “Income” includes commissions, salaries, self-employed earnings, child support and alimony payments, interest and dividend earnings, wages, receipts, unemployment compensation, any legal or equitable interest or entitlement owed that was acquired by a cause of action, suit, claim or counterclaim, insurance benefits, temporary disability claims, estate income, trusts, federal income tax refunds, State income tax refunds, homestead rebates, lottery prizes, casino and racetrack winnings, annuities, retirement benefits, veterans’ benefits, union benefits, or other sources that the Commissioner may define as income, except that if individual development accounts for recipients are established by regulation of the Commissioner, any interest or dividend earnings from such an account shall not be considered income.

l. “Income eligibility standard” means the income eligibility threshold based on eligible household size established by regulation of the Commissioner for benefits provided within the limit of funds appropriated by the Legislature.

m. “Legal guardian” means a person who exercises continuing control over the person or property, or both, of a child, including any specific right of control over an aspect of the child’s upbringing, whether or not pursuant to a court order.

n. “Marriage” includes domestic partnership and civil union. “Spouse” includes a party to a domestic partnership or civil union.

o. “Non-eligible caretaker” means a relative caring for a dependent child, or a legal guardian of a minor child who, in the absence of a natural or adoptive parent,
assumes parental responsibility and has income which exceeds the income eligibility standard.

p. “Poverty level” means the official poverty level based on family size, established and adjusted under Section 673(2) of Subtitle B of the “Community Services Block Grant Act,” Pub. L. 97-35 (42 U.S.C. sect. 9902(2)).

q. “Qualified alien” is defined according to section 431 of Title IV of Pub. L. 104-193, 8 U.S.C.A. § 1641.

r. “Residence” means the place where a person is present and declares an intent to remain.

s. “Services” means any Work First New Jersey benefits that are not provided in the form of cash assistance.

t. “Standard of need” means the minimum amount of income and in-kind benefits or services needed by families and single persons living in New Jersey in order to maintain a decent and healthy standard of living, as established by regulation of the Commissioner, and shall include necessary items such as housing, utilities, food, work-related transportation, clothing and personal and household essentials.

u. “State Board” means the State Welfare Board.

v. “Title IV-A” means the provisions of Title IV-A of the federal Social Security Act governing the program of aid to families with dependent children the State Plan to implement those provisions that were in effect until August 22, 1996, including income methodologies for determining eligibility under those provisions and plan.

w. “Title IV-D” means the provisions of Title IV-D of the federal Social Security Act governing paternity establishment and child and medical support enforcement activities and requirements.

x. “Work activity” means employment and employment related activities defined by regulation of the Commissioner. “Work activity,” however, shall include any activities included as work by federal regulations.


COMMENT

The draft combines all the definitions of the four source sections into one provision.

1-3. Construction in general

a. The provisions in this chapter shall not be construed to be exclusive.

b. A particular grant of power contained in this chapter shall be held construed to be in specification but not in limitation of general powers.


COMMENT

The Division of Family Development consultants asked that this be added.

Poor Law –Appendix D
Chapter 2 - Provisions Applicable to both Work First New Jersey Programs: General Assistance and Temporary Assistance for Needy Families

2-1. Work First New Jersey Programs

a. Two programs compose Work First New Jersey (WFNJ) the State’s assistance program:

1) General Assistance (GA) provides cash benefits and supportive services to persons who are not eligible for TANF such as single adults or families without children.

2) Temporary Assistance for Needy Families (TANF), the New Jersey implementation of the federal categorical program, provides temporary cash benefits and support to enable families to get and keep jobs.

b. To receive assistance from GA or TANF, a person must:

1) either work, look for work, participate in an approved work activity, or qualify for an exemption to work-related requirements; and

2) cooperate with paternity determination requirements, and with child support requirements if the person has dependent children.

3) cooperate with child support requirements if the person has dependent children.

c. A person may not simultaneously receive benefits from both TANF and GA.

Source: New

COMMENT

This concise description is partially based upon the Department of Human Services, Division of Family Development (NJDHS, DFD) bulletin New Jersey State Plan for Temporary Assistance for Needy Families, FFY 2006-FFY 2008, pp. 5, 7, 11. which explains New Jersey’s welfare reform program which followed the reforms of the federal “Personal Responsibility and Work Opportunity Reconciliation Act of 1996.”

2-2. Adult recipient required to seek work

a. Each adult recipient of a Work First New Jersey program shall continuously and actively seek employment, as defined by the Commissioner, in an effort to remove the recipient’s eligible household from the program. The Commissioner may assign a recipient to a work activity. The recipient shall sign an individual responsibility plan as provided in subsection (f) of this section, in order to participate in the program. The plan shall state the terms of the work activity requirements that the recipient must fulfill in order to receive benefits.

b. In accordance with Pub. L. 104-193, §407 (codified at 42 U.S.C.A. § 607), a recipient in an eligible household with dependent children shall begin a work activity, self-directed job search or other activities which the Commissioner determines, prior to having received 24 months of benefits; except that if the recipient is a full-time post-secondary student in a course of study related to employment as defined by regulation, the recipient shall be required to do another work activity for no more than 15 hours a
week, subject to the recipient satisfactorily progressing toward completion of the post-secondary course of study.

c. A recipient shall comply with work activity requirements in order to remain eligible for benefits. A recipient may be required to participate in one or more work activities for a maximum aggregate hourly total of 40 hours per week.

d. A recipient shall not be required to engage in a work activity if child care, including after-school child care for children over six years of age, is unavailable for the recipient’s dependent child.

e. The Commissioner may allow a recipient to be deferred temporarily from work activity requirements for periods less than 12 months if the recipient is:

   (1) a woman in the third trimester of pregnancy;

   (2) a person certified by an examining physician to be unable to engage in any gainful occupation because of a physical or mental defect, disease or impairment; or

   (3) the parent or relative of a child younger than 12 weeks who is providing care for that child, except that, the deferral may be extended for an appropriate period of time if medically necessary for the parent or child.

f. After being determined eligible for benefits, each adult recipient who is not deferred or exempted under this title shall be assessed for potential and readiness for work, including, but not limited to, skills, education, past work experience and any barriers to securing employment, and, as appropriate, a screening and assessment for substance abuse. For all recipients who are not deferred or exempt, the county or municipal welfare agency and the recipient jointly shall develop an annual individual responsibility plan specifying the steps that will be taken by each to assist the recipient to secure employment. The plan shall include specific goals for each adult member or minor parent in the eligible household, and may include specific goals for a dependent child member of the eligible household. The goals may include, but not be limited to, requirements for parental participation in a dependent child’s primary school program, immunizations for a dependent child, and regular school attendance by a dependent child. Recipients who are job ready shall be placed immediately in a self-directed job search. Within the limits of the amount of funds allocated by the Commissioner, other recipients shall be placed in appropriate work activities according to their individual assessments.

g. The county or municipal agency shall ensure necessary case management for recipients, appropriate to their degree of job readiness, according to regulations. The most intensive case management shall be directed provided to recipients facing the most serious barriers to employment.

h. A recipient:

   (1) shall not be placed in a position at a particular workplace if:

       (a) that the position was previously filled by a regular employee if that position, or if the position or a substantially similar position at that workplace, has been made vacant through a demotion, substantial reduction of hours or a layoff of a regular employee in the previous 12 months, or has been eliminated by the employer during the previous 12 months;

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(b) the position or its terms in a manner that infringes upon a wage rate or an employment benefit, or violates the contractual overtime provisions of a regular employee at that workplace;

(c) the position or its terms in a manner that violates an existing collective bargaining agreement or a statutory provision that applies to that workplace;

(d) the position in a manner that supplants or duplicates a position in an existing, approved apprenticeship program;

(e) the placement is made by or through an employment agency or temporary help service firm as a community work experience or alternative work experience worker;

(f) if there is a contractual or statutory recall right to that position at that workplace; or

(g) if there is an ongoing strike or lockout at that workplace.

(2) A person who believes him or herself to have been adversely affected by a violation of this subsection, or the organization duly authorized to represent the collective bargaining unit to which that person belongs, shall be given an opportunity to meet with a designee of the Commissioner of Labor or the Governor’s Office of Employee Relations. The designee shall attempt to resolve the complaint of the alleged violation within 30 days of the date of the request for the meeting. If the complaint is not resolved within the 30-day period, the complainant may appeal to the New Jersey State Board of Mediation in the Department of Labor for expedited binding arbitration in accordance with the rules of the Board. If the arbitrator finds that a violation has occurred, the arbitrator shall provide an appropriate remedy. Both parties to the dispute shall bear equally the cost of the arbitration.

(3) Nothing in this subsection shall prevent a collective bargaining agreement from containing additional protections for a regular employee.

i. The Commissioner of Labor, acting in conjunction with the Commissioners of Banking and Insurance, Commerce and Economic Development, Community Affairs, Education, Health and Senior Services, Human Services, Labor and Transportation, shall implement all elements of the program and establish initiatives to help move recipients toward self-sufficiency.

j. The Commissioner shall ensure that the program meets the requirements to qualify for the maximum amount of federal funds due to the State under Pub. L. 104-193. The rate of participation of recipients in work programs shall be calculated in accordance with federal requirements.

Source: 44:10-62.

COMMENT

The draft streamlines the language of the source and omits, as unnecessary because executed, requirements that were set for the years between 1997 and 2002 in subsection (c).
2-3. Determination of eligibility for benefits

a. Benefits under the Work First New Jersey program shall be determined according to standards of income and resources established by the Commissioner. These standards shall take into account, for the determination of eligibility and the provision of benefits, all income and resources of all persons in the eligible household of which the applicant or recipient is a member, except as provided by law governing the Work First New Jersey program and as prescribed by the Commissioner. The benefits to be granted shall be governed by standards established by regulation of the Commissioner. The Commissioner may set different income and resource eligibility and benefits standards that differ with respect to different types of eligible households.

b. Subject to good cause exception as defined by the Commissioner, a recipient, as a condition of eligibility for benefits, shall, subject to good cause exception as defined by the Commissioner, be required to:

(1) cooperate to establish the paternity of a child whose paternity is undetermined and to establish and participate in the enforcement of child and medical support obligations;

(2) cooperate with work requirements established by the Commissioner;

(3) make application for any other assistance for which members of the eligible household may qualify;

(4) be income and resource eligible as defined by the Commissioner, including the deeming of income and resources as appropriate;

(5) provide all necessary documentation which shall include the federal Social Security numbers (SSN) for all eligible household members, or make application for the SSN except for an eligible alien who cannot be assigned a SSN due to status, or make application for the SSN;

(6) sign an agreement to repay benefits in the event of receipt of income or resources; and

(7) comply with personal identification requirements as a condition of receiving benefits, which may employ the use of high technology processes for the detection of fraud.

c. An applicant shall not be eligible for benefits when the applicant’s eligibility is the result of a voluntary cessation of employment without good cause, as determined by the Commissioner, within 90 days prior to the date of application for benefits.

d. A voluntary assignment or transfer of income or resources within one year prior to the time of application for benefits for the purpose of qualifying therefore shall render the applicant and the applicant’s eligible household members ineligible for benefits for a period of time determined by regulation of the Commissioner.

e. Any income or resources that are exempted by federal law for purposes of eligibility for benefits shall not reduce the amount of benefits received by a recipient and shall not be subject to a lien or be available for repayment to the State or county agency for benefits received by the individual.
2-4. Disregards applied to earned income in computing cash assistance benefits

The commissioner shall promulgate regulations providing for disregards to the earned income of each person in the eligible household in the computation of a cash assistance benefit.

In computing the cash assistance benefit provided to recipients, disregards shall be applied to the earned income of each person in the eligible household as determined by regulations promulgated by the Commissioner.

Source: 44:10-37.

COMMENT

The draft provision is similar to the source but allows regulatory flexibility to allow the Commissioner to follow federal regulations.

2-5. Eligibility of citizens; eligible aliens

Only those persons who are United States citizens or eligible aliens shall be eligible for benefits under the Work First New Jersey program. Single adults or couples Persons without dependent children who are legal aliens who meet federal requirements and have applied for citizenship, shall not receive benefits for more than six months unless (1) they attain citizenship, or (2) they have passed the English language and civics components for citizenship, and are awaiting final determination of citizenship by the federal Immigration and Naturalization Service.


COMMENT

The draft provision is identical to the source subsection (a).

2-6. Persons ineligible for assistance, generally

The following persons shall not be eligible for assistance and shall not be considered to be members of an eligible household:

a. non-eligible caretakers, except that the eligibility of a dependent child shall not be affected by the income or resources of a non-eligible caretaker;

b. Supplemental Security Income recipients, except for the purposes of receiving emergency assistance benefits pursuant to section 2-9;

c. aliens who are not eligible aliens;

d. a person absent from the home who is incarcerated in a correctional facility, except as provided by regulation of the Commissioner;

e. a person who: is fleeing to avoid prosecution, custody or confinement after conviction, under the laws of the jurisdiction from which the person has fled, for a crime
or an attempt to commit a crime, which is a felony or a high misdemeanor under the laws of the jurisdiction from which the person has fled; or is violating a condition of probation or parole imposed under federal or state law;

f. a person admitted or committed to an institution other than a residential substance abuse treatment facility that provides for the needs of the person.


COMMENT

The draft provision is substantively identical to the source subsection (b) (1) through (6); subsection (g) has been added to reflect settled practice.

2-7. Persons ineligible for assistance due to controlled dangerous substance conviction

a. A person convicted on or after August 22, 1996 under federal or state law of any offense which is classified as a felony or crime under the laws of the jurisdiction involved and which has an element the possession, use, or distribution of a controlled substance as defined in the federal “Controlled Substances Act,” 21 U.S.C. sect. 802(6); except that a person convicted of any such offense which has as an element the possession or use only of such a controlled substance may be eligible for Work First New Jersey benefits, and food stamp benefits under the federal “Food Stamp Act of 1977,” 7 U.S.C. sect. 2011 et seq., if the person enrolls in or has completed a licensed residential drug treatment program. Eligibility for benefits shall commence upon the person’s enrollment in the drug treatment program, and shall continue during the person’s active participation in, and upon completion of, the drug treatment program, except that during the person’s active participation in a drug treatment program and the first 60 days after completion of a drug treatment program, the Commissioner shall provide for testing of the person to determine if the person is free of any controlled substance. If the person is not free of any controlled substance during the 60-day period, the person’s eligibility for benefits pursuant to this paragraph shall be terminated; except that this provision shall not apply to the use of methadone by a person who is actively participating in a drug treatment program as prescribed by the drug treatment program. The Commissioner, in consultation with the Commissioner of Health and Senior Services, shall adopt regulations to carry out the provisions of this paragraph, which shall include the criteria for determining active participation in and completion of a drug treatment program.

b. Cash benefits, less a personal needs allowance, for a person receiving benefits under the Work First New Jersey program who is enrolled in and actively participating in a licensed residential drug treatment program shall be issued directly to the drug treatment provider to offset the cost of treatment. Upon completion of the drug treatment program, the cash benefits then shall be issued to the person. In the case of a delay in issuing cash benefits to a person receiving Work First New Jersey benefits who has completed the drug treatment program, the drug treatment provider shall transmit to the person those funds received on behalf of that person after completion of the drug treatment program;


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2-8. Persons ineligible due to fraudulent misrepresentation

   a. A person found in a judicial or administrative proceeding to have fraudulently misrepresented residence in order to obtain public benefits in two or more states or jurisdictions, shall be ineligible for benefits for a period of 10 years.

   b. A person who intentionally makes a false or misleading statement or misrepresents, conceals or withholds facts for the purpose of receiving public benefits, shall be ineligible for benefits for a period of six months for the first violation, 12 months for the second violation, and permanently for the third violation.

   c. A person who purposely makes a false statement to qualify for public benefits and thereby receives benefits for which the person is not eligible shall be subject to prosecution for a crime as provided by the Criminal Code.


COMMENT
The draft provision is identical to source subsections (b)(8) and (9) and (c).

2-9. Emergency assistance; extension

   a. Emergency assistance shall be provided only to recipients of Work First New Jersey and persons receiving Supplemental Security Income in emergent situations, as the Commissioner determines, for up to 12 cumulative months, except that the Commissioner may provide for an extension of emergency assistance for up to six additional months to:

      (1) an eligible household with dependent children, if the Commissioner determines that a case of extreme hardship exists. The Commissioner shall review each case on a monthly basis during the six-month period and shall continue the emergency assistance only if the Commissioner determines that the extreme hardship continues to exist. If the extreme hardship continues to exist at the end of the six-month period, the Commissioner may provide an additional six months of emergency assistance to no more than 10% of those eligible households with dependent children which are receiving temporary rental assistance under the emergency assistance component of the program, based upon the most current data available; and

      (2) no more than 10% of single adults and couples without dependent children who are receiving temporary rental assistance under the emergency assistance component of the program, if the Commissioner determines that a case of extreme hardship exists. The Commissioner shall review each case on a monthly basis during the six-month period and shall continue the emergency assistance only if the Commissioner determines, based upon the monthly review that the extreme hardship continues to exist.

   b. Any form of emergency assistance provided pursuant to this section shall count toward the maximum period of emergency assistance allowed.

   c. A person receiving emergency assistance shall contribute from the person’s income toward the payment of all emergency shelter arrangements, including temporary
housing and temporary rental assistance, in accordance with regulations adopted by the Commissioner. As a condition of receipt of emergency assistance, a personal shall be required to take all reasonable steps to end the person’s dependency on emergency assistance and take all other actions which the Commissioner requires.

d. The Commissioner shall adopt regulations to establish classifications for hotel or motel per diem rates in accordance with the level of enhanced services provided at a participating hotel or motel.

e. The provisions of this section shall apply to a person who receives general assistance after the effective date of this act title and is subsequently transferred directly into the Work First New Jersey program.

Source: 44:10-51.

COMMENT

The draft provision is substantially like the source.

2-10. Repayment obligation; sanctions

a. A person shall be required to satisfy any sanction or repayment obligation incurred pursuant to any federal or State law governing assistance, including any repealed by this act, as a condition of eligibility for benefits.

b. When a parent or relative or legal guardian with whom a dependent child is living applies for or receives benefits for that child, and it appears that there is pending entitlement to a payment to the child or to the parent or relative, of funds arising from a claim or interest legally or equitably owned by the child or by the parents or relatives, other than that portion of a personal injury award which a court specifically awards to a child to make the child whole as a result of an injury, the county agency, as a condition of eligibility or continuation of eligibility for benefits, may require parents, or relatives, the recipient to execute a written promise to repay from anticipated funds, the amount of benefits to be granted from the date of entitlement to that payment. Upon refusal to repay in accordance with the written promise, including refusal by any person acting for or on behalf of parents or relatives, the county agency may take necessary action under State law to enforce the promise, for which the granting or continuing of benefits shall be due consideration. Any payments from the settlement of the claim or interest legally or equitably owned by the child or by parents or relatives made by any person acting for or on behalf of parents or relatives, after notice of claim by the county agency and before express written approval by the county agency shall cause that person to be liable to the county agency in the amount of the payment.

c. When any child for whom benefits have been paid pursuant to this act title or assistance paid pursuant to an act repealed by this act the enactment of this title, shall die prior to the child’s 21st birthday, and shall leave an estate, the total amount of benefits or assistance paid to that child shall be a valid and enforceable claim against that estate, with priority over all other unsecured claims except reasonable funeral expenses and terminal medical and hospital expenses, and the county agency shall take necessary action under State law to enforce that claim.
d. When a person applies for or receives benefits, and it appears that there is pending entitlement to a payment to the person of funds arising from a claim or interest legally or equitably owned by the person, the county or municipal agency, as a condition of eligibility or continuation of eligibility for benefits, may require the person to execute a written promise to repay from anticipated funds, the amount of benefits to be granted from the date of entitlement to that payment. Upon refusal to repay in accordance with the written promise, including refusal by any person acting for or on behalf of the person, the county or municipal agency may take necessary action under State law to enforce the promise, for which the granting or continuing of benefits shall be due consideration. Any payments from the settlement of the claim or interest legally or equitably owned by the person made by any person acting for or on behalf of the person, after notice of claim by the county or municipal agency and before express written approval by the county or municipal agency shall cause that person to be liable the county or municipal agency in the amount of the payment.

e. The county agency, with the consent of the Division of Family Development in the Department of Human Services, may compromise and settle any claim for repayment of benefits paid pursuant to this act or assistance paid pursuant to any act repealed by the enactment of this title.

Source: 44:10-64.

COMMENT
The draft provision deletes redundant language and reletters the subsections. Subsection (d) reflects settled practice allowing a welfare agency to be reimbursed for benefits paid to an adult while a claim is pending.

2-11. Primary responsibility for support; benefits eligibility

a. All adults persons, except as otherwise provided in the Work First New Jersey program, are charged with the primary responsibility of supporting and maintaining themselves and their dependents; the primary responsibility for the support and maintenance of minor children is that of the parents and family of those children; and benefits shall be provided only when other means of support and maintenance are not present to support the eligible household.

b. Benefits shall be temporary and serve the primary goal of fostering self-sufficiency.

c. Failure to cooperate with any of the program eligibility requirements without good cause, as determined by the Commissioner, shall result in ineligibility for benefits for some or all eligible household members.

d. If the county or municipal assistance agency determines from an applicant’s written statement signed under oath, that the applicant needs benefits immediately because the applicant’s available resources are insufficient, according to the Commissioner, to meet minimal current living expenses of the applicant’s household, pursuant according to regulations adopted by the Commissioner, of the applicant’s eligible household, the county or municipal agency shall issue cash assistance benefits or appropriate services to the applicant on the date of application, subject to the applicant’s meeting all other program eligibility requirements.

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e. The Commissioner shall establish by regulation, standards and procedures to screen and identify applicants and recipients with a history of being subjected to domestic violence and refer these recipients to counseling and supportive services. The Commissioner may waive program requirements, including, but not limited to, the time limit on benefits, residency requirements, child support cooperation requirements, and the limitation on increase of cash assistance benefits as a result of the birth of a child, in cases where compliance with such requirements would make it more difficult for a recipient to escape domestic violence or unfairly penalize the recipient who is or has been victimized by such violence, or who is at risk of further domestic violence.

Source: 44:10-59.

COMMENT

The draft is substantially like the source, but omits as unnecessary because already executed, subsection (e) which states that the Commissioner shall establish regulations.

2-12. Noncompliance to result in loss of certain cash benefits.

In an assistance unit with a single adult or couple without dependent children or a single adult or couple with dependent children, the failure of a recipient to actively cooperate with the Work First New Jersey program, established pursuant to P.L.1997, c.38 (C.44:10-55 et seq.), or participate in work activities under the program, without good cause as determined by the Commissioner, shall result in a loss of cash assistance benefits in accordance with the provisions of this section.

Prior to the imposition of a sanction, the county or municipal welfare agency shall determine whether good cause for noncompliance exists. Good cause shall include, but is not limited to, disability or other circumstances, as defined by the Commissioner, which effectively impair a recipient's ability to actively cooperate with the Work First New Jersey program or participate in work activities under the program.

a. Prior to the imposition of a sanction, the county or municipal welfare agency shall ensure that, in consultation with the recipient, an assessment has been given in accordance with subsection f. of section 8 of P.L.1997, c.38 (C.44:10-62), and a determination has been made that barriers do not exist which are likely to prevent the recipient from complying with the work requirements or other activities specified in the individual responsibility plan; provided that, this prerequisite to the imposition of a sanction shall not apply if the recipient, without good cause, has refused to cooperate with the conduct of the assessment.

The county or municipal welfare agency shall determine if a sanctionable offense has occurred and whether good cause exists by:

(1) reviewing the case record to determine whether a comprehensive assessment or other information in the file indicates that good cause for noncompliance exists, and

(2) outreaching to the recipient, to attempt, in consultation with the recipient, to determine the reason for noncompliance and whether it constitutes good cause.

If good cause requires that services be provided in order for the recipient to comply, then services shall be provided prior to any reassignment of work activities, as appropriate.
The recipient shall be provided with reasonable accommodations in work activities for identified disabilities and, when necessary given the condition, deferred from participation.

The recipient shall be advised of the right to contest the sanction if he disagrees with the agency determination to impose the sanction.

b. In an assistance unit with one adult, if the adult fails to actively cooperate with the program or participate in work activities without good cause, the cash assistance benefit provided to the assistance unit shall be reduced by the pro-rata share attributable to the noncompliant adult for one month.

(1) If the adult fails to actively cooperate with the program or participate in work activities by the end of the first-month pro-rata sanction, without good cause, the assistance unit's cash assistance case shall be suspended for one month. If the participant complies by the end of the suspension month, the suspension shall be lifted.

(2) If the adult fails to actively cooperate with the program or participate in work activities by the end of the suspension month, without good cause, the assistance unit's cash assistance case shall be closed for a minimum one-month period, and the assistance unit shall be required to reapply in order to receive further cash assistance benefits.

c. In an assistance unit with two adults, if one adult fails to actively cooperate with the program or participate in work activities without good cause, the cash assistance benefit provided to the assistance unit shall be reduced by the pro-rata share of the noncompliant adult for one month. If the adult fails to comply by the end of the sanction month, the pro-rata reduction shall continue until the recipient demonstrates an intent to comply.

If both adults fail to actively cooperate with the program or participate in work activities without good cause, the cash assistance benefit provided to the assistance unit shall be reduced by the pro-rata share of the noncompliant adults for one month. If both adults fail to actively cooperate with the program or participate in work activities by the end of the sanction month, without good cause, the assistance unit's cash assistance case shall be closed for a minimum one-month period, and the assistance unit shall be required to reapply in order to receive further cash assistance benefits.

d. If a dependent child 16 years of age or older fails to comply with the requirement for school attendance or other work activity participation, without good cause, the dependent child shall be subject to a pro-rata reduction of cash assistance benefits for one month. If the dependent child fails to comply by the end of the sanction month, the pro-rata reduction shall continue until the dependent child demonstrates an intent to comply.

e. If a cash assistance case is closed due to a sanction, and the recipient is receiving emergency assistance benefits, then the household shall continue to receive emergency assistance benefits for one month immediately following the case closure.

If the recipient comes into compliance and reapply for cash assistance benefits, the emergency assistance benefits shall be reinstated if the emergency still exists.
f. If a recipient who is less than 18 years of age is living in a Work First New Jersey-funded appropriate living arrangement because the recipient is unable to live with a parent, guardian, or other adult relative, funding for the living arrangement shall continue for one month immediately following the case closure.

g. An adult recipient who voluntarily quits a job without good cause, as defined by regulation of the Commissioner, shall render the entire assistance unit ineligible for cash assistance benefits for a period of two months from the date the county agency or municipal welfare agency, as appropriate, makes the determination that the recipient quit the job.

Source: 44:10-63.1.

COMMENT
The section is identical to the source.

2-13. Community, alternative work experience not employment; exceptions

a. A recipient’s participation in a community or alternative work experience provided by a sponsor pursuant to this act shall not be considered employment for any purpose, except that it shall be regarded as employment for the purposes of:

1) the “Law Against Discrimination,” N.J.S. 10:5-1 et seq., and the sponsor, not the program, shall be deemed the employer in any action brought under that act;

2) the “New Jersey Public Employees’ Occupational Safety and Health Act,” N.J.S. 34:6A-25 et seq., if the sponsor is a public employer subject to that act;

3) the “Conscientious Employee Protection Act,” N.J.S. 34:19-1 et seq., and the “Worker and Community Right to Know Act,” N.J.S. 34:5A-1 et seq.; and

4) 34:15-1 et seq., subject to the provisions of this act;

b. The recipient shall be entitled, to the same degree as any similarly-situated employee of the sponsor, to family leave pursuant to the “Family Leave Act,” N.J.S. 34:11B-1 et seq., and family and medical leave pursuant to federal law.

Source: 44:10-65.

COMMENT
The draft provision is substantially like the source.

2-14. Workers’ compensation status of recipient participating in community, alternative work

a. For the purposes of R.S. 34:15-1 et seq., a recipient who participates in a community or alternative work experience shall be regarded as an employee of the State and the sponsor. The State shall provide the recipient and the dependents of the recipient with all compensation required, and defenses and remedies available, except for:

1) compensation provided for temporary disability pursuant to subsection (a) of R.S. 34:15-12; and
(2) medical and hospital services provided pursuant to R.S. 34:15-15 unless the recipient becomes ineligible for medical assistance under the “New Jersey Medical Assistance and Health Services Act,” N.J.S. 30:4D-1 et seq.

If the recipient has been subject to an injury or illness producing a temporary disability, the program shall not provide compensation pursuant to subsection (a) of R.S. 34:15-12, but the recipient shall receive cash benefits from the program and shall be deferred from the work activity requirements. The recipient shall be exempted from the 60-month time limit for receipt of benefits during the first 90 days of each period of temporary disability subject to the provisions of this section.

b. The amount of compensation provided pursuant to R.S. 34:15-1 et seq. for other than temporary disability shall be calculated as if the recipient’s weekly wage was 60% of the statewide average weekly wages earned by all employees covered by the unemployment compensation law, R.S. 43:21-1 et seq. The program may provide this compensation by purchasing and serving as the master policyholder for any insurance, self-insurance, or an administrative services contract; or by other appropriate means.

c. Compensation which a recipient receives pursuant to R.S. 34:15-1 et seq. for a disability caused by an injury or illness arising out of the community or alternative work experience, and which is permanent in quality and partial or total in character, shall not be regarded as earned income for the purposes of section 2-4 and there shall not be a disregard for that amount in computing the cash assistance benefit provided to the recipient.

d. Compensation which a dependent of a recipient receives pursuant to R.S. 34:15-1 et seq. for the death of the recipient caused by an injury or illness which arises out of community or alternative work experience shall not be regarded as earned income for the purposes of section 2-4 and there shall not be a disregard for that amount in computing the cash assistance benefit provided to the dependent.

Source: 44:10-66.

COMMENT

The draft provision streamlines language of the source and breaks the single paragraph of the source into logical subsections.

2-15. Injury, illness, death arising from community, alternative work

a. Any recipient or dependent of a recipient participating in community or alternative work, or dependent of the recipient, who receives compensation, or benefits, or both, from the State pursuant to section 2-14 of this act title for an injury, illness or death arising out of community or alternative work experience shall surrender any other compensation or benefits from the sponsor or the State for that injury, illness or death. The sponsor of the recipient, the State and the employees of the sponsor shall not be liable for the injury, illness or death for which the recipient or dependent of the recipient receives the compensation, benefits, or both, except for an intentional wrong.

b. “Sponsor” means a private nonprofit employer, private charitable employer, or public employer that provides a community or alternative work experience to a recipient.

Source: 44:10-67.
COMMENT
The draft provision streamlines the language of the source.

2-16. Tort action against program; reimbursement

a. The sole recourse of a person, other than a recipient or a sponsor, who is injured as a result of an act or omission of a recipient arising out of the recipient’s community or alternative work experience, shall be to file an action in the Superior Court against the program.

b. The program shall have available all of the notice requirements and the defenses available to the State under the “New Jersey Tort Claims Act,” N.J.S. 59:1-1 et seq., except that the program shall not be entitled to the defense that the recipient is not a public employee.

c. The program shall reimburse the fund established pursuant to N.J.S. 59:12-1 for all costs incurred by the fund in connection with a recipient’s participation in community or alternative work experience.

Source: 44:10-68, 44:10-69.

COMMENT
The draft provision combines the two sources and streamlines their language.

2-17. Time limit on benefit eligibility; exemptions

a. A recipient's eligibility for benefits shall be limited to a total of 60 cumulative months, except as otherwise provided in this act, regardless of whether the recipient meets more than one assistance unit criteria during that 60-month period. Receipt of assistance from federal block grant funds for temporary assistance for needy families provided by another state or territory pursuant to the federal "Personal Responsibility and Work Opportunity Reconciliation Act of 1996," Pub.L.104-193, shall count towards the 60-month time limit. The provisions of this section shall apply to a person who receives general public assistance pursuant to P.L.1947, c.156 after the effective date of this act title and is subsequently transferred directly into the Work First New Jersey program. Receipt of benefits as a dependent child or minor parent shall not count towards the 60-month time limit in the event that the dependent child or minor parent becomes a head of household in the child's or parent's own right for the purposes of receiving benefits.

b. A recipient shall be exempted from the 60-month time limit established pursuant to subsection a. of this section if the recipient is:

(1) over 60 years of age;

(2) the parent or other relative of a disabled child or other disabled dependent who must provide full-time care for the disabled child or other disabled dependent;

(3) permanently disabled, including, but not limited to, a person eligible for disability insurance benefits under Title II of the federal Social Security Act (42 U.S.C.s.401 et seq.), as defined by regulation of the Commissioner; or

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(4) chronically unemployable as defined by regulation of the Commissioner.

c. A recipient may receive an extension of no more than 12 cumulative months beyond the 60-month time limit established pursuant to subsection a. of this section, to be granted in increments that shall not exceed six months, if the Commissioner determines that the recipient meets one of the following criteria:

(1) the recipient or the recipient's dependent child would be subject to extreme hardship or incapacity, as defined by regulation of the Commissioner, if benefits were terminated;

(2) the recipient is engaged in full-time employment but remains eligible for benefits due to earned income disregards provided for under section 4 of P.L.1997, c.13 (C.44:10-37);

(3) the recipient has not received an opportunity to engage in work activities as specified in the individual responsibility plan pursuant to subsection f. of section 8 of P.L.1997, c.38 (C.44:10-62); or

(4) the recipient was engaged in full-time employment and was income-ineligible for benefits but was terminated from the employment through no fault of the recipient.

Source: 44:10-72.

COMMENT

The draft provision is substantively like the source.

2-18. Supportive services

The program shall provide supportive services to a recipient as a last resort when no other source of support is available; however the recipient shall be required to seek continuously other sources of support. Supportive services shall include, but not be limited to, one or more of the following:

a. child care services, including after-school child care, for eligible dependent children, to be provided during the recipient’s program eligibility period and for 24 consecutive months following ineligibility for benefits as a result of receipt of earned income. An adult recipient who continues to be eligible to receive child care services following ineligibility for benefits, and an adult recipient who is employed but continues to receive benefits, shall pay a copay for child care services in accordance with a sliding fee scale established by the Commissioner, which shall be no greater than the child care co-payment schedule established pursuant to N.J.A.C. 10:81-14.18A;

b. transportation services to be provided directly by the program or through an allowance or other means of subsidy by which the recipient may purchase transportation; and

c. a limited allowance for each eligible household to cover work-related expenses necessary to engage in required work activities, as determined by the Commissioner.

Source: 44:10-38.

In an assistance unit with a single adult or couple without dependent children or a single adult or couple with dependent children, the failure of a recipient to actively cooperate with the Work First New Jersey program, established pursuant to P.L.1997, c.38 (C.44:10-55 et seq.), or participate in work activities under the program, without good cause as determined by the Commissioner, shall result in a loss of cash assistance benefits in accordance with the provisions of this section.

Prior to the imposition of a sanction, the county or municipal welfare agency shall determine whether good cause for noncompliance exists. Good cause shall include, but is not limited to, disability or other circumstances, as defined by the Commissioner, which effectively impair a recipient's ability to actively cooperate with the Work First New Jersey program or participate in work activities under the program.

a. Prior to the imposition of a sanction, the county or municipal welfare agency shall ensure that, in consultation with the recipient, an assessment has been given in accordance with subsection f. of section 8 of P.L.1997, c. 38 (C.44:10-62), and a determination has been made that barriers do not exist which are likely to prevent the recipient from complying with the work requirements or other activities specified in the individual responsibility plan; provided that, this prerequisite to the imposition of a sanction shall not apply if the recipient, without good cause, has refused to cooperate with the conduct of the assessment.

The county or municipal welfare agency shall determine if a sanctionable offense has occurred and whether good cause exists by:

(1) reviewing the case record to determine whether a comprehensive assessment or other information in the file indicates that good cause for noncompliance exists, and

(2) outreaching to the recipient, to attempt, in consultation with the recipient, to determine the reason for noncompliance and whether it constitutes good cause.

If good cause requires that services be provided in order for the recipient to comply, then services shall be provided prior to any reassignment of work activities, as appropriate.

The recipient shall be provided with reasonable accommodations in work activities for identified disabilities and, when necessary given the condition, deferred from participation.

The recipient shall be advised of the right to contest the sanction if he disagrees with the agency determination to impose the sanction.

b. In an assistance unit with one adult, if the adult fails to actively cooperate with the program or participate in work activities without good cause, the cash assistance
benefit provided to the assistance unit shall be reduced by the pro-rata share of the noncompliant adult for one month.

(1) If the adult fails to actively cooperate with the program or participate in work activities by the end of the first-month pro-rata sanction, without good cause, the assistance unit's cash assistance case shall be suspended for one month. If the participant complies by the end of the suspension month, the suspension shall be lifted.

(2) If the adult fails to actively cooperate with the program or participate in work activities by the end of the suspension month, without good cause, the assistance unit's cash assistance case shall be closed for a minimum one-month period, and the assistance unit shall be required to reapply in order to receive further cash assistance benefits.

c. In an assistance unit with two adults, if one adult fails to actively cooperate with the program or participate in work activities without good cause, the cash assistance benefit provided to the assistance unit shall be reduced by the pro-rata share of the noncompliant adult for one month. If the adult fails to comply by the end of the sanction month, the pro-rata reduction shall continue until the recipient demonstrates an intent to comply.

If both adults fail to actively cooperate with the program or participate in work activities without good cause, the cash assistance benefit provided to the assistance unit shall be reduced by the pro-rata share of the noncompliant adults for one month. If both adults fail to actively cooperate with the program or participate in work activities by the end of the sanction month, without good cause, the assistance unit's cash assistance case shall be closed for a minimum one-month period, and the assistance unit shall be required to reapply in order to receive further cash assistance benefits.

d. If a dependent child 16 years of age or older fails to comply with the requirement for school attendance or other work activity participation, without good cause, the dependent child shall be subject to a pro-rata reduction of cash assistance benefits for one month. If the dependent child fails to comply by the end of the sanction month, the pro-rata reduction shall continue until the dependent child demonstrates an intent to comply.

e. If a cash assistance case is closed due to a sanction, and the recipient is receiving emergency assistance benefits, then the household shall continue to receive emergency assistance benefits for one month immediately following the case closure. If the recipient comes into compliance and reapplies for cash assistance benefits, the emergency assistance benefits shall be reinstated if the emergency still exists.

f. If a recipient who is less than 18 years of age is living in a Work First New Jersey-funded appropriate living arrangement because the recipient is unable to live with a parent, guardian, or other adult relative, funding for the living arrangement shall continue for one month immediately following the case closure.

g. An adult recipient who voluntarily quits a job without good cause, as defined by regulation of the Commissioner, shall render the entire assistance unit ineligible for cash assistance benefits for a period of two months from the date the county agency or
municipal welfare agency, as appropriate, makes the determination that the recipient quit
the job.

Source: 44:10-63.1

COMMENT
This section is identical to its source which was enacted in 2007.

Chapter 3 – General Assistance Program

3-1. Income from other sources; deductions from assistance; exception

a. An applicant for assistance who receives or is entitled to receive income from
other sources or compensation may remain eligible to receive assistance if the income or
compensation is less than the program eligibility standards.

b. Other income or compensation as defined by the Commissioner shall be
deducted in the manner prescribed by law from the amount of assistance which the
applicant otherwise would be entitled to receive.

c. Any money received because of a settlement agreement or judgment in a
lawsuit brought against a manufacturer or distributor of “Agent Orange” for damage
resulting from exposure to “Agent Orange” shall not be subject to a lien or be available
for repayment to the State, county or municipality for public assistance the applicant
receives.

Source: 44:8-125.

COMMENT
This section is substantially similar to the source provision which was amended in 1995 to include
counties as well as municipalities.

3-2. Inquiry into eligibility; record

a. A person who applies for assistance shall submit an affidavit attesting to the
correctness of the application.

b. The agency administering assistance shall inquire into the facts and
circumstances of the case, including customary place of abode, family connections,
living conditions, resources, income, and causes of the person’s need, and other matters that
state regulations require.

c. A written record of the inquiry shall be made in the form prescribed by the
Commissioner.

Source: 44:8-119, 44:8-121, 44:8-122.

COMMENT
The draft combines the sources. In subsection (b), the phrase “family connections” condenses
provisions in earlier statutes (N.J.S. 44:1-87 and 44:4-82) that directed the “ overseer” to ascertain whether
family members existed who were “by law required and able to maintain” the needy person.

Poor Law – Appendix D
3-3. Type and extent of assistance; revocation; continuing duty

a. Assistance to eligible persons may be provided by:

   (1) cash assistance, or

   (2) any other method authorized by the agency administering general assistance in compliance with regulations.

b. The extent of individual grants shall be determined in accordance with standards and budgets which the Commissioner authorizes by regulation.

c. Assistance may shall be discontinued when the person receiving it is no longer eligible.

d. As provided by regulations, a recipient has a continuing duty to inform the agency providing assistance of changes in financial or personal situation which impact benefit eligibility.

Source: 44:8-123, 44:8-124, 44:8-127, New.

COMMENT
Draft provision Subsections (a)–(c) combine the three sources. Subsection (d) is new and imposes a responsibility upon the recipient to report changes that impact eligibility.

3-4. Employable persons to work; exemption; noncompliance

a. An employable person receiving assistance shall be required to comply with the work requirements of Section 2-2, except for good cause as determined by the Commissioner.

b. The Commissioner, by regulation, may determine to exempt a person from the work requirement for reasons of physical or mental impairment, age, illness, injury, caretaker responsibilities, employment or unsuitability.

c. Any person who without good cause does not comply with the work requirements, according to regulations, shall be subject to loss of cash and any other assistance benefits as provided by this Title.

Source: 44:8-114.

COMMENT
The draft streamlines the source.

3-5. Certain medical assistance allowed

a. Single adults and couples without dependent children shall not be eligible for medical assistance for inpatient or outpatient hospital care or long-term care under the program, except that medical assistance shall be provided for the following, in accordance with regulations adopted by the Commissioner:

   (1) inpatient hospitalization costs for a recipient of general assistance who is admitted to a hospital licensed by the Department of Health and Senior Services which is not eligible to receive a charity care subsidy from the Health Care Subsidy Fund.
established pursuant to N.J.S. 26:2H-18.51 et al, and to which payments were made prior to July 1, 1991, on behalf of patients receiving general assistance; and

(2) nursing home costs for an alien residing in a Medicaid certified nursing facility prior to the effective date of this act title who is not Medicaid-eligible under Pub. L. 104-193; which assistance shall continue until the person is no longer eligible for long-term care.

b. The provisions of this section shall not affect the eligibility of a single adult or a couple without dependent children for the New Jersey Family Care Health Coverage Program established pursuant to N.J.S. 30:4J-4.

Source: 44:10-40.

COMMENT
The draft is substantially like its source. Subsection (b) was added in 2000.

3-6. Immediate public assistance

Immediate public assistance shall be rendered promptly to any person who appears to be eligible for assistance. Immediate public assistance shall be the responsibility of the director of welfare where the person is found at the time of application except that persons residing in facilities providing residential therapeutic medical services are the responsibility of the municipality of their customary place of abode prior to placement in such facility.

Source: 44:8-120.

COMMENT
The draft streamlines the source provision.
Chapter 4 – Temporary Assistance for Needy Families (TANF)

4-1. Evaluation of caregiver’s eligibility for benefits

A person other than a parent or stepparent who is a caregiver to a dependent child who is that caregiver’s legal or blood relative or guardian, shall be evaluated to determine whether that person is eligible for benefits.

Source: 44:10-35.

COMMENT

The draft is substantively identical to the source.

4-2. Eligibility of parent for benefits

a. A parent who otherwise would be eligible for benefits, who is married to a person who is not the parent of one or more of the parent’s children, shall not be eligible for benefits if the household income exceeds the income eligibility standard.

b. The eligible parent’s children shall be eligible for benefits according to a sliding income scale established by the Commissioner which does not take into account the income of the eligible parent’s spouse.

c. The spouse of the eligible parent and the spouse’s child, if any, who is living with the family, who is not the eligible parent’s child, shall not be eligible for benefits.

Source: 44:10-36.

COMMENT

The draft provision is substantively identical to the source.

4-3. Eligibility of certain drug offenders for food stamps and medical services

a. A person convicted of any offense that has as an element the distribution of a controlled substance as defined in section 102(6) of the federal “Controlled Substances Act,” 21 U.S.C. sect. 802(6), who meets the eligibility criteria for Work First New Jersey General Assistance or Work First New Jersey Temporary Assistance to Needy Families benefits may receive food stamp benefits under the federal “Food Stamp Act of 1977,” 7 U.S.C. sect. 2011 et seq. The department shall determine eligibility for food stamps and the eligibility may continue upon completion of a licensed residential drug treatment program.

b. A person convicted of any offense that has as an element the distribution of a controlled substance as defined in section 102(6) of the federal “Controlled Substances Act,” 21 U.S.C. sec.802(6), who meets the eligibility criteria for Work First New Jersey General Assistance benefits may receive medical services only. The medical services shall not exceed benefits offered in the Work First New Jersey General Assistance program. Access to these medical services is limited to the time a person is receiving treatment in a licensed residential drug treatment program.

c. Eligibility for benefits under subsection (a) or (b) of this section shall commence upon the person’s enrollment in the drug treatment program, and shall
continue during the person’s active participation in, and upon completion of, the drug treatment program, except that during a person’s active participation in a drug treatment program and the first 60 days after completion of a drug treatment program, the Commissioner shall provide for testing of the person to determine if the person is free of any illegal controlled substance. If the person is not free of any illegal controlled substance during the 60-day period, the person’s eligibility for benefits pursuant to this section shall be terminated; this provision shall not apply to the use of methadone by a person who is actively participating in a drug treatment program, as prescribed by the drug treatment program.

d. The Commissioner of Human Services, in consultation with the Commissioner of Health and Senior Services, shall adopt regulations to implement this section, which shall include the criteria for determining active participation in and completion of a drug treatment program.


COMMENT

The draft is substantially like the source, but omits a concluding subsection which defines “WFNJ-GA” and “WFNJ-TANF”; the definition sections for both aspects of the Work First New Jersey program define “benefits” and “assistance unit.” No analogous provisions exist in the CFR.

4-4. Notification required when dependent child is absent from home

a. A dependent child who has been or is expected by a parent, legal guardian or caretaker relative to be absent from the home for a period of time established by regulation of the Commissioner, shall remain eligible for benefits during that period, except that, an absence for periods or for reasons other than those stated in the regulations adopted by the Commissioner shall be cause for denial or termination of benefits for that dependent child.

b. A parent, legal guardian or caretaker relative who does not report the absence of a dependent child to the county agency by the end of the five-day period beginning on the day that the parent, legal guardian or caretaker relative becomes aware that the child is absent, shall be ineligible for benefits pursuant to federal law for a period of time which the Commissioner decides.

Source: 44:10-50.

COMMENT

The draft provision is substantially like the source.

4-5. Medical services

a. Medical assistance shall be provided to an eligible household with dependent children pursuant to N.J.S. 30:4D-1 et seq.

b. In accordance with the provisions of N.J.S. 30:4D-6(c) which provides for a continuation of medical assistance for a period of 24 consecutive months after TANF benefits have been terminated due to:
(1) coverage solely of the adult head of an eligible household by an employer’s health insurance plan shall not preclude other members of the eligible household from receiving the additional 24 months of medical assistance; and

(2) an eligible household with dependent children which, using the limits and methodologies contained in Title IV-A, would not be eligible for cash assistance under Title IV-A as a result of the collection of child or spousal support under Title IV-D of the federal Social Security Act, 42 U.S.C. 651 et seq., shall receive an additional four consecutive months of medical assistance beginning with the first month of ineligibility under the provisions of Title IV-A.

Source: 44:10-38.

COMMENT
The draft provision is substantively identical to subsection (b) of the source.

4-6. Subsidy for campus-based child care

A public college which provides campus-based child care and any work activity to a recipient as part of that recipient’s individual responsibility plan pursuant to Section 2-2, shall receive a subsidy for the provision of child care from the Commissioner in accordance with regulations adopted by the Commissioner.


COMMENT
The draft provision is substantively identical to the source.

4-7. Signing application for benefits constitutes assignment of child support rights

a. The signing of an application for benefits under the Work First New Jersey program shall constitute an assignment of any child support rights pursuant to Title IV-D on behalf of individual eligible household members to the county agency. The assignment shall terminate with respect to current support rights when a determination is made by the county agency that the person in the eligible household is no longer eligible for benefits. The determination of the amount of repayment to the county agency and distribution of any unpaid support obligations that have accrued during the period of receipt of benefits shall be determined by regulation of the Commissioner in accordance with federal law.

b. An eligible household eligible for receiving benefits and in receipt of child support shall receive, in addition to its regular grant of cash assistance benefits, a monthly amount determined under regulations promulgated by the Commissioner in accordance with federal law and based on the amount of current child support received for that month.

Source: 44:10-49.

COMMENT
To the extent that the draft provision differs from its source, it reflects federal law and practice.

Poor Law – Appendix D
4-8. No increase in benefits due to birth of a child; exceptions

a. The level of cash assistance benefits payable to an eligible household with dependent children shall not increase as a result of the birth of a child during the period in which the eligible household is eligible for benefits, or during a temporary period in which the eligible household is ineligible for benefits pursuant to a penalty imposed by the Commissioner for failure to comply with benefit eligibility requirements, after which the eligible household is again eligible for benefits.

b. The provisions of subsection (a) shall not apply to medical assistance pursuant to N.J.S. 30:4D-1 et seq. or to food stamp benefits, pursuant to the federal “Food Stamp Act of 1977,” 7 U.S.C. sect. 2011 et seq.

c. For an eligible household with dependent children in which the adult or minor parent recipient gives birth to an additional child during the period in which the eligible household is eligible for benefits, or during a temporary penalty period of ineligibility for benefits after which the eligible household again becomes eligible for benefits, the Commissioner shall provide that in computing the amount of cash assistance benefits to be granted to the eligible household, the following shall be deducted from the monthly earned income of each employed person in the eligible household:

(1) earned income disregards; and

(2) after application of the earned income disregards, the total countable income shall be compared for eligibility purposes and subtracted for cash assistance benefit calculation purposes from the eligibility standard for the eligible household size, adjusted to include any person for whom cash assistance has not been received due to the application of subsection (a) provisions.

d. This section shall not apply to an eligible household with dependent children for a child born less than 10 months after applying for and receiving cash assistance benefits.

e. This section shall not apply to the birth of a child that occurs as a result of rape or incest.

Source: 44:10-61.

COMMENT

The draft provision is substantially like the source. Language has been simplified. One subsection has been deleted.

4-9. Benefits requirements, persons younger than 18 years with a dependent child

a. If an applicant or recipient person is younger than 18 years, has never been married, and is pregnant or is caring for a dependent child, the applicant or recipient person shall be required, as a condition of eligibility for benefits for the applicant or recipient person and the applicant’s or recipient’s person’s dependent child to:

(1) reside in a home maintained by, and have the benefits paid to, the applicant’s or recipient’s parent, legal guardian, or other adult relative; and
(2) attend school or engage in a work activity if the applicant or recipient has completed secondary education.

b. The Commissioner shall exempt from the provisions of paragraph (1) of subsection (a) of this section an applicant or recipient whom the Commissioner determines during the application or eligibility redetermination process to present evidence that the parent, legal guardian or other adult relative with whom the applicant or recipient would be required to reside in order to be eligible for benefits:

(1) refuses or is unable to allow the applicant or recipient, person or that person’s dependent child, to reside in that adult’s home;

(2) poses a threat to the emotional health or physical safety of the applicant or recipient or that person’s dependent child;

(3) has physically or sexually abused the applicant or recipient, person or the applicant’s or recipient’s person’s dependent child, or poses a risk of doing so; or

(4) has exhibited neglect with respect to the needs of the applicant or recipient or the applicant’s or recipient’s person’s dependent child.

c. In determining to exempt an applicant or recipient a person pursuant to this subsection (b), the Commissioner shall get information directly from that applicant or recipient person when there has been any known circumstance or incident of physical or sexual abuse, or upon the applicant’s or recipient’s person’s request.

d. For an applicant or recipient a person and the applicant’s or recipient’s dependent child who are is exempted from the requirements of subsection (a)(1), in accordance with subsection (b), the county agency, pursuant to the Commissioner’s guidelines, shall determine the most appropriate living arrangements in the best interest of the applicant or recipient person and the applicant’s or recipient’s person’s dependent child.

e. The Commissioner shall exempt from the educational provisions of subsection (a)(2) an applicant or recipient a person whom the Commissioner determines by assessing the person’s ability and aptitude, to lack a reasonable prospect of successfully completing the academic requirements of a high school or equivalency program of study.

f. The Commissioner also may exempt an applicant or recipient a person from the provisions of subsection (a) if the Commissioner determines the exemption to be in the best interest of the applicant or recipient person and the applicant’s or recipient’s person’s dependent child.

g. The Commissioner shall arrange an appropriate review mechanism for an applicant or recipient a person to present evidence that would provide the basis for an exemption.

Source: 44:10-60.

COMMENT

The draft provision streamlines the language of the source.
Chapter 5 – Administration

5-1. Reports on Work First New Jersey program

a. The Commissioner, in cooperation with other affected agencies of State government, shall report biennially to the Governor and the Legislature on the Work First New Jersey program including in the report any recommendations for changes in the law or regulations governing the program that the Commissioner deems necessary to further the goals of the program. The Commissioner shall determine the manner and terms of the reporting in accordance with the requirements of federal law.

b. The Commissioner shall issue a public report at least quarterly concerning the number of recipients: (1) in the program, (2) classified as exempt from time limits or deferred from work requirements, (3) classified as to the degree of employability as defined by the Commissioner, (4) who have obtained employment, (5) terminated from the program and the reasons for the terminations; and: (1) the average wages and benefits earned by recipients, (2) the types of employment obtained by recipients and whether the employment is in the public or private sector, (3) the average length of stay in their jobs by recipients who reapply for benefits, (4) and the number of former recipients who have re-entered the program after being terminated.

c. To the extent not provided by subsections (a) or (b), the Commissioner shall conduct research appropriate for evaluating the outcomes for recipients, and the benefits, costs and other effects of the program, and shall submit any report resulting from the research to the Governor and the Legislature, and make copies available to the public.

Source: 44:10-41.

COMMENT

The draft provision is substantially like the source except that it omits the final paragraph of the source, as unnecessary as executed (Studying the Michigan Civilian Conservation Corps program and submitting a report to the Governor and Legislature by January 1, 1998).

Federal law does not provide the guidelines for the State Commissioner reporting to state officials; requirements for reporting to the federal officials are provided in 45 C.F.R. § 265: Data Collection and Reporting Requirements. Specifically, § 265.3 deals with quarterly reports (TANF data report, TANF Financial Report, SSP-MOE Data Report), and § 265.9 deals with annual reports.

5-2. Updating standard of need

a. The Commissioner annually shall update the regulation establishing a standard of need.

b. The standard of need shall serve only as a benchmark against which the Legislature may decide on appropriations to fund cash assistance benefits to recipients.

Source: 44:10-42.

COMMENT

The draft is substantively identical to the source.
5-3. Disclosure of applicant’s information

a. Information concerning applicants or recipients shall not be disclosed except for purposes directly connected with the administration of the program, in accordance with regulations adopted by the Commissioner. Any person or entity under contract to provide services to the program shall comply with these regulations.

b. This section shall not prohibit the exchange of information among agencies, organizations or other entities as prescribed by the Commissioner or pursuant to federal requirements.

Source: 44:10-47.

COMMENT
The draft provision is substantially like the source.

5-4. Waiving compliance with Work First New Jersey program for certain projects

a. For an experimental, pilot or demonstration project that the Commissioner judges will likely assist in promoting the objectives of the Work First New Jersey program, or to promote the objectives of the Title IV-D child support enforcement program in the State, the Commissioner may waive compliance with the requirements of the Work First New Jersey program to the extent deemed necessary to carry out the project and for a period not exceeding three years, during which the Commissioner shall report the project’s progress to the Legislature at least every six months.

b. However, the Commissioner shall not waive compliance with the provisions of Section 2-2 or implement a pilot or demonstration project that circumvents or obstructs a collective bargaining agreement.

c. The Commissioner shall provide an opportunity for public comment prior to the project’s implementation.

d. The Commissioner shall establish any appropriate fiscal or evaluative terms and conditions for the project.

Source: 44:10-53.

COMMENT
The draft is substantively like the source, but streamlines and organizes the content.

5-5. County agency implementation of TANF program

The county agency shall be responsible for implementing the Temporary Assistance for Needy Families program in accordance with regulations adopted by the Commissioner and ensuring that all eligible persons residing in the county have access to benefits.

Source: 44:10-73.

COMMENT
The draft provision derives from Subsection (a) of the source provision.
5-6. Reimbursement for administrative costs

The State, in accordance with procedures established by the Commissioner, shall reimburse the county for 100% of the administrative costs incurred of providing cash assistance benefits to the eligible single adults and couples without dependent children residing in a municipality which has transferred its administration of general administration to the county, up to the maximum amount allocated for that county by the Commissioner and within the limits of funds available for that purpose.

Source: 44:10-73.

COMMENT
The draft provision derives from source Subsection (b).

5-7. Municipal administration of General Assistance Program

a. A municipality that now administers its General Assistance Program may continue to do so. By resolution, the municipality may end its administration of the Program and transfer responsibility for administration to the county. A copy of the resolution shall be provided to the Division of Family Development in the Department of Human Services within three days of its passage.

b. For a municipality that administers general assistance, the Commissioner may:

(1) allow issuance of cash assistance benefits, in accordance with regulations, by check, electronic benefit distribution, or other appropriate means; and

(2) require the municipality to report information necessary for proper administration of the program through electronic means, as prescribed by regulation.

c. The Division of Local Government Services in the Department of Community Affairs shall not include the municipality’s general assistance budget in its budget review and approval process.

d. A municipality that administers general assistance shall be responsible for all administrative costs of providing benefits to eligible single persons and couples without dependent children. The State shall reimburse the municipality for 100% of cash assistance benefits paid to recipients of general assistance.

e. If the Commissioner determines by financial or performance audit that a municipality has failed to administer benefits pursuant to this subsection in accordance with standards established by regulation of the Commissioner, the Commissioner may: take appropriate action pursuant to N.J.S. 30:1-12.2; recoup any funds identified by that audit, and require the transfer by the municipality of its administration of general assistance to the county. Prior to affecting the transfer, the Commissioner shall specify in writing to the municipality the financial or performance deficiencies determined by the audit and give the municipality a reasonable opportunity to correct those deficiencies, in accordance with regulations. If the municipality fails to correct the deficiencies, the Commissioner may proceed with the transfer.

Source: 44:10-73.

COMMENT

Poor Law –Appendix D
The draft provision omits two current subsections, (a)(6) and (d), as unnecessary as executed.

5-8. Allocation of federal funding; state reimbursement of counties

a. The Commissioner shall allocate among the counties the federal funding available for administrative costs from the federal block grant funds for temporary assistance for needy families provided to New Jersey under Pub. L. 104-193. The State shall reimburse the county agency for up to 50% of the total administrative costs of the TANF program, but no more than the maximum amount allocated for that county by the Commissioner and within the limits of available funds. The county shall fund the remaining administrative costs. The county’s share of cash assistance benefits to TANF recipients shall be 5% of total cash assistance benefits costs, and the remaining 95% shall be funded by the State from State and federal funds.

b. The State shall reimburse the county agency for 100% of cash General Assistance benefits.

c. The Commissioner of Labor in consultation with the Commissioner of Human Services shall allocate among the counties the funding available for work activities as defined in Section 1-2, and case management activities applicable to work activities, from State appropriations and federal block grant funds for temporary assistance for eligible households provided to the State. Costs incurred by the counties for work activities and case management shall be reimbursed up to the maximum amount allocated for the county by the Commissioner, and within the limits of available funds.

Source: 44:10-74.

COMMENT

The draft provision is substantially like the source.

5-9. State's share; additional payment

During the period July 1 through December 31 of each year the State shall pay to each county an amount equal to the county share of the total expenditures for the period January 1 through December 31 of that year. The State shall also pay to each county welfare board the full amount of any funds received by the State from the federal government as federal participation with respect to the costs of administration of the program of old age assistance by such county welfare board.

Source: 44:7-25.

COMMENT

The draft provision is identical to the second sentence of the source.

5-10. Payments by State to each county welfare board

The State shall pay to each county welfare board the full amount of any funds received by the State from the federal government as federal participation with respect to expenditures made by such county welfare board for assistance for the blind and assistance for the permanently and totally disabled, plus an additional amount of 75% of the balance of such expenditures after deducting the amount of such federal participation.
During the period July 1 through December 31 of each year the State shall pay to each county an amount equal to the county share of the total expenditures for the period January 1 through December 31 of that year.

The State shall also pay to each county welfare board the full amount of any funds received by the State from the federal government as federal participation with respect to the costs of administration of the program of assistance for the blind and assistance for the permanently and totally disabled by such county welfare board.

Source: 44:10-40.

COMMENT
The draft provision is substantively identical to the source provision. It also replaces 44:7-40 and 44:7-46

5-11. Implementation of electronic benefit distribution system

a. The department shall continue the electronic benefit distribution system in every county of the State.

b. All cash assistance and food stamp benefits shall be provided through the issuance of a single benefit card utilizing the electronic benefit distribution system. The Commissioner may include additional programs in this system.

c. No charge, including a fee imposed by a terminal owner, shall be imposed upon a person receiving cash assistance, food stamp or other benefits for participating in the electronic benefit transfer system, except as follows:

   (1) after three free cash automatic teller machine withdrawals in a month, the department may deduct a transaction fee from a recipient’s account for each subsequent withdrawal; and

   (2) a recipient shall be required to pay a fee for a replacement benefit card in an amount determined by the Commissioner, which may be deducted from the recipient’s account in accordance with federal law.

d. The Department of Human Services shall cycle the issuance of benefits over multiple dates throughout the month in a manner that best serves TANF and food stamp recipients within the framework of the electronic benefit distribution system in each county.

e. The Commissioner may determine the need for appropriate benefit card security measures, as well as whatever personal identification technology is included on the benefit card, to access cash assistance, food stamp or other benefits under the electronic benefit distribution system.

Source: 44:10-5.6, 44:10-75.

COMMENT
The draft omits the source subsection (c)(3) which explicitly states that it will expire two years after the “effective date of the single Statewide electronic benefits distribution contract that is let pursuant to P.L. 1997, c. 37 (C. 44:10-71 et al.). The draft substitutes a newer provision, 44:10-5.6 (1991), for the similar source subsection (c).
5-12. Social security number used as common identifier of individuals

The federal Social Security number shall be used as the common identifier of individuals for any record, license, certificate or other document identifying a person by name that is used by an agency of State government to the extent permitted by federal law. The Commissioner shall preserve the confidentiality of Social Security numbers and divulge them only as required by law.

Source: 44:10-76.

COMMENT

The draft omits the last sentence of the source which requires the agencies to implement the section by July 1, 1998. The second sentence is new but reflects established practice.

5-13. Establishment, implementation of technological investment

The Commissioner of Labor, in consultation with the Commissioner of Human Services, is authorized to establish and implement necessary technological investments appropriate to create a Statewide community-based electronic network designed to link federal, State and local government agencies, nonprofit entities and private business entities, for the effective exchange of information relating to, and management of, the Work First New Jersey program and other related programs.

Source: 44:10-77.

COMMENT

The draft provision is substantially like the source.

5-14. Municipal Agency; Local Assistance Board

a. Each municipality that administers a General Assistance program shall have an agency to conduct the program and to fulfill any other municipal duty of providing appropriate assistance to eligible persons.

b. Except as otherwise provided by law regarding municipal government, each municipality that administers a general assistance program shall have a Local Assistance Board of three or five members to supervise the program.

c. Unless the Local Assistance Board contracts for services of a municipal welfare director of an adjoining municipality, the Board shall appoint a Municipal Director of Welfare to hold office for five year terms. The municipal welfare director shall be a citizen of the State of New Jersey; be able to read and write the English language; be capable of keeping records as required by law; and demonstrate adequate knowledge of public assistance laws. The municipal director shall receive a salary set by the municipal governing body. In case of a vacancy, a temporary acting Director may be appointed to serve for up to ninety days.

d. The Board shall determine the staffing for its assistance program. All staff shall have the qualifications required by State regulations.

e. If a municipality ceases to administer its general assistance program, the duties of the municipal welfare director in regard to that program shall cease, and the county
director shall assume those functions. All duties of the municipality in regard to general assistance to the poor shall be transferred to the county.


COMMENT

Archaic provisions remain in Title 44 regarding appointment (44:1-73) and abolishment (44:1-73.1) of municipal overseers of the poor. The draft provision takes into account the 1995 law, 44:8-145.1, which allows a municipality in agreement with its county to transfer its financial and operational responsibility for the administration of the “Work First New Jersey Public Assistance Act” (WFNJ-PA) to the county agency. The municipal agency is then abolished.

Subsection (b) combines and streamlines 44:1-74, 44:8-117. It ignores 44:8-115, a 1947 provision that specifies that a “local assistance board shall be composed of three or five persons … and at least one of them shall be a woman.” Subsection (c) is derived from 44:8-117.1. The provision allows staffing for all public assistance functions performed by the agency. Subsection (e) clarifies the law, specifying that when a municipality gives control of the general assistance program to the county, the full responsibility of the municipality is transferred to the county.

5-15. County agency

a. Every county shall have an agency to administer state and federal assistance programs and other assistance.

b. Appropriations for assistance shall be subject to the approval of the county government.

c. The agency shall have a staff in accordance with regulations of the Commissioner.

d. The county director shall have subpoena power to compel attendance of an applicant and other persons in New Jersey and the production of pertinent documents in the State, and the power to administer oaths, and to reject an application for assistance if an applicant fails to obey a summons or subpoena or fails to testify, subject to agency approval. Failure to obey a summons or subpoena issued by the county director or failure to testify shall be punishable by the Superior Court as a civil contempt, but no commitment for contempt shall exceed 90 days.

e. The county agency shall have authority to establish wages, terms and conditions of employment for its employees through collective negotiation with an authorized employee organization, but all employees other than legal counsel shall be within the classified service.

(1) The agreement between an agency and an authorized employee organization is binding on both parties and not subject to approval by the Commissioner of Human Services.

(2) If the Commissioner of Human Services determines that a provision in an agreement between a county agency and an authorized employee organization does not comply with federal law and that it endangers continued receipt of federal funds, the Commissioner shall advise the county agency and authorized employee organization in writing, specifying the federal law and giving the reason for non-compliance.
(3) If the federal government notifies the Commissioner that the State’s administration of a federal assistance program does not comply with federal law because of a negotiated agreement between a county agency and an authorized employee organization, the Commissioner shall notify the county agency and authorized employee organization in writing.

(4) When the Commissioner notifies a county agency and an authorized employee organization, the Commissioner shall provide them with an opportunity to meet with the Commissioner to determine if the Commissioner’s finding is correct, and an opportunity to conform voluntarily to comply with federal law.

(5) If the Commissioner subsequently determines that the negotiated agreement does not comply with federal law, the Commissioner shall exercise only the authority over wages, terms and conditions of employment in the county agency necessary to ensure that the agreement complies with federal law.

(6) If the federal government acts or notifies the Commissioner of Human Services that it may act to affect wages or terms and conditions of employment in a county agency, the Commissioner shall consult with the county agency and authorized employee organization which may be affected by the Commissioner’s position on the federal action.


COMMENT

Counties have always had and continue to have duties in regard to provide public assistance. Numerous existing provisions mandate the public policy of the State: “[E]very needy person shall … be entitled to receive such public assistance as may be appropriate ….” (44:8-109), “The State shall provide … public assistance to the persons eligible therefore ….” (44:8-114), “Immediate public assistance shall be rendered promptly to any needed person ….” (44:8-120), et al.

Pursuant to the federal “Personal Responsibility and Work Opportunity Reconciliation Act of 1996,” 42 U.S.C. Sect. 601 et seq., New Jersey adopted its “Work First New Jersey Act” in 1997, which replaced earlier aid/assistance to dependent children laws. It provides that “The county agency shall be responsible for implementing the Work First New Jersey program in accordance with regulations adopted by the Commissioner and ensuring that all eligible persons residing in the county have access to benefits ….” N.J.S. 44:10-73(a). The Act further states, “The Commissioner shall allocate among the counties the federal funding available for administrative costs from the federal block grant funds for temporary assistance for needy families provided to New Jersey ….” N.J.S. 44:10-74(a). The draft provision states explicitly at the outset that the county level is responsible for administering federal and state funds. Subsection (a) also provides for additional assistance as needed.

Subsection (b) derives from 44:1-20. Subsections (d) and (e) streamline current law.

5-16. Establishment of Board to direct agency

a. In a county that has not undergone charter reform pursuant to N.J.S. 40:41A, the Board of Chosen Freeholders shall establish a County Board of Social Services to direct its agency’s program.

b. The county welfare board shall

(1) supervise the assistance program in its county.
(2) comply with the requirements of the Open Public Meetings and Open Public Records Act.

(3) certify all bills and accounts, including salaries and wages, and provide for their payment in accordance with the approved county budget.

(4) be a body corporate with power to sue and be sued, and to make bylaws.

(5) meet regularly once a month, and at other times as necessary or as regulations provide.

g. Attendance at any Board meeting by four members, at least two of whom are citizen members, shall constitute a quorum.

h. Members shall receive no compensation for their services, but shall be allowed their actual and necessary expenses.


COMMENT

Subsection (a) is new and reflects the decision in Am. Fed. State, Cty. Mun. Emp. v. Hudson Welfare Board, 141 N.J. Super. 25, 34 (Ch. Div. 1976): the Optional County Charter Act, N.J.S. 40:41A-1 et seq. authorizes a county to abolish and reorganize its welfare board as long as the replacement provides the same functions as before. Six of New Jersey’s 21 counties have undergone charter reform. The proposed provision substitutes “program” for “welfare-house” in source provision 44:1-10 and acknowledges the 1979 provisions, 44:1-10.1 and 44:1-10.2, which allow a name change for the board, and eliminate the need for stating that wherever one name appears it shall mean the other as well.

5-17. Membership of board

a. The Board of Chosen Freeholders shall appoint between five and seven persons who reside in the county to be members of the agency board. An agency board member may hold another office but may not be an employee of the board.

b. Two designated members of the County Board of Chosen Freeholders and the county adjuster shall be ex officio members of the agency board.


COMMENT

The draft streamlines the source provisions.

5-18. Officers; Employees

a. The board annually shall elect from among its members a chairperson, vice-chairman and secretary-treasurer, and shall appoint other officers, assistants and employees necessary to carry out the provisions of this chapter, subject to compliance with the personnel standards and regulations of the Merit System Board or State Division or both.

b. The director shall not be a member of the board.
c. The board may set the compensation of the director and other employees within the limits of the sums which the Board of Chosen Freeholders and the State provide.

d. The director, officers, assistants and other employees shall be subject to regulations made by the board and by the State division.

e. Regular employees may certify affidavits and acknowledgements and shall be vested with the powers and authority exercised by other persons authorized to do so.

f. Employees shall hold their office or employment during good behavior, and may be removed for just cause, if it is established upon written charges at a hearing held after due notice has been given by the board.

g. All paid officers and employees of a board operating under the Merit System Board, except an attorney serving as legal counsel, shall be classified in the competitive class of the classified service; all officers and employees of a board not operating under the Merit System Board shall be similarly classified under personnel standards established by the State division.

Source: 44:7-9.

COMMENT
The provision streamlines the language of the source.

5-19. Secretary-treasurer

a. The secretary-treasurer of a county board shall receive from the county treasurer and from the State its share for old age assistance and its administration, and shall place the sums in a special account or accounts for the board to disburse.

b. The secretary-treasurer shall furnish bond conditioned on faithful performance of duties, in an amount fixed by the board and approved by the County Board of Chosen Freeholders and by the State division.

Source: 44:4-23, 4:7-10.

COMMENT
The provision is substantively identical to its sources.

5-20. Term; vacancies; compensation and expenses

a. Members shall serve for five years.

b. Vacancies shall be filled for the unexpired term only.


COMMENT
This provision is substantively like the source provisions.

5-21. Funding; annual report

a. The budget of the board shall be subject to approval by the county government.
b. The agency board annually shall report to the county government. The report shall include, but need not be limited to, information about financial management, expenditures, other operations of the program, the number of persons the program serves, and recommendations.

Source: 44:1-20, 44:1-23.

COMMENT

Subsection (a) is substantially identical to its source, 44:1-20. Subsection (b) follows its source, 44:1-23, but allows inclusion of unenumerated information.

5-22. Director of County Assistance Program

a. The board shall appoint a director of its County Assistance Program. If qualified, the county adjuster may be appointed, but shall not serve as an ex-officio member of the board.

b. The director shall:

(1) be classified in the competitive class of the classified service of the Merit System Board, except that the working test period for the position of director of welfare shall be set by the Board at between six and twelve months; and

(2) be a citizen of New Jersey and of the United States;

(3) be capable of making and keeping required records and reports; and

(4) be expert in assistance service, with administrative experience.

Source: New, 4:4-33, 44:7-11.

COMMENT

The provision streamlines the sources.

5-23. Deputy Director

a. A county director may appoint a person to serve as deputy director for general assistance.

b. The deputy director shall have the same qualifications as a director, shall be under the director’s supervision, and shall be vested, on the board’s approval, with the same powers as the director.

c. The deputy director shall be classified in the competitive class of the classified service.

Source: 44:7-11, 44:8-145.2.

COMMENT

Subsection (a) is substantively like the 1995 source provision, 44:8-145.2. Subsections (b) and (c) streamline the other source provision.
5-24. Other employees

The county board shall appoint employees necessary to carry out the provisions of this chapter. All employees other than legal counsel shall be part of the classified service.

Source: 44:4-34, New.

COMMENT

The draft streamlines the source. The second sentence of the draft includes new language and reflects current practice.

5-25. Service and remuneration of transferred employees; services to municipal agency

a. The transfer of a person who was a full-time employee of a municipal assistance agency, or who worked on a full-time basis for municipal assistance agencies in two or more municipalities, on November 13, 1995, to the county assistance agency with the agreement of the county assistance agency shall not result in reduction of remuneration nor in the length of service credited to that employee.

b. A county and municipality may arrange by mutual agreement for one or more former municipal assistance agency employees employed by the county welfare agency to continue to provide services from a municipal building.

Source: 44:8-145.4.

COMMENT

The draft is substantively identical to the source provision. The phrase, “with the agreement of the county assistance agency” in subsection (a) reflects the provisions of 44:8-145.1

5-26. Duties of the director of Assistance Programs

The director of assistance of a municipality, or the county director shall:

a. Supervise review of the eligibility of every person receiving assistance;

b. Reconsider the amount and type of assistance given, and alter or suspend the assistance, as circumstances require;

c. Find ways to effect self-support for persons unable to maintain themselves, or find other persons or agencies able and willing to support those persons;

d. Keep records of investigation, supervision, assistance, rehabilitation, and certifications of persons for employment or benefits, and cancellations of them, in the forms required by the Commissioner;

Source: 44:7-11, 44:8-118.

COMMENT

Streamlines the language of the source. By amendment in 1995, the county director was added to the statute.

5-27. Public assistance trust fund account

Poor Law – Appendix D
a. Every payment for State aid for assistance made to a municipality or county shall be deposited in an assistance trust fund account and shall be used only for payment of the cost of assistance, exclusive of administrative costs, and in the year for which the State aid is granted.

b. Any balance remaining in the account after all payments have been made or provided for, shall be used for the same purpose and with the same limitation for the next year.

Source: 44:8-138.

COMMENT
The draft extends the provision to include the county.

5-28. Transfer of current budget appropriation for assistance

A municipality or county receiving State aid for relief for any year shall not transfer the current year’s budget appropriation for assistance to any other current budget appropriation without specific approval of the Commissioner.

Source: 44:8-139.

COMMENT
The draft extends the provision to include the county.

5-29. Exploitation of recipients prohibited

Municipal or county assistance agencies are prohibited from directly or indirectly exploiting or permitting to be exploited assistance recipients for political purposes.

Source: 44:8-126.

COMMENT
The draft adds county assistance agencies; the source mentions only the municipal ones.

5-30. Distribution of voter registration forms and instructions

The director or other chief administrative officer of each agency or officer administering assistance under the Work First New Jersey program shall:

a. Cause each assistance agency or office to provide copies of voter registration forms, instructions and declination forms to each person who applies in person for services or assistance, or to seek a recertification, renewal or change of address.

(1) An employee of the agency or office shall ask each person whether the person, if not already registered to vote from the place of present residence, wishes to be registered, and shall state that choosing to register or not to register will not affect eligibility for services or assistance.

(2) The employee shall review the forms to determine whether or not the person wishes to register to vote.
(a) If the person does not wish to register, the employee shall assist the person in completing the declination form and tell the person that the employee will retain the form.

(b) If the person wishes to register, the employee shall assist the person in completing the voter registration form; shall tell the applicant that the applicant may leave the completed form with the employee or may mail it to the Secretary of State; and if the applicant leaves the form, shall accept it, stamp or mark its lower right hand corner with the date received, and forward it to the Secretary of State. The employee shall give each applicant who registers to vote the same degree of assistance in completing the voter registration form as the agency or office provides for completion of its own forms, unless the applicant refuses that assistance;

b. Provide for a continuous supply of forms and instructions to every agency and office providing assistance under the Work First New Jersey program, 42 U.S.C. sect. 601 et seq., and the federal “Food Stamp Act of 1977;”

c. Provide the forms and instructions in both English and Spanish languages to agencies and offices located in counties in which bilingual sample ballots are required;

d. Provide for collection of completed voter registration forms by any employee of the agency or office for transmittal to the Secretary of State;

e. Provide that any person with a disability who receives services or assistance, shall have forms, instructions and assistance provided at home, by an employee of the agency or office;

f. Inform each employee of the agency or office who helps register a person to vote that the employee shall not:

   (1) seek to influence an applicant’s political preference or party allegiance;
   (2) display any political preference or party allegiance;
   (3) say anything to an applicant or do anything with the purpose or effect of discouraging the applicant from registering to vote; or
   (4) say anything to an applicant or do anything with the purpose or effect of leading the applicant to believe that deciding to register or not to register affects the availability of services or benefits; and

g. assure that no information about a person’s declining to register to vote is used for any purpose other than the voter registration.


COMMENT

The draft provision combines and states more clearly the two source provisions.

5-31. Administration and distribution of state aid for assistance

The Commissioner of Human Services shall administer state aid for assistance for municipalities and counties entitled under this act, from the Municipal Aid Fund and other funds appropriated from the State treasury.

Poor Law –Appendix D
**5-32. Commissioner’s duties**

The Commissioner shall:

a. be the State’s agent in negotiating and effecting any reciprocal interstate agreements about transportation of dependents;

b. negotiate with the Federal Government about present or future programs affecting public relief or assistance for which other State statutes make no provision, and administer the program in cooperation with the Federal Government;

c. keep necessary records for administration of State aid.

d. make and amend regulations necessary for administration of State aid which shall be binding upon municipalities or counties;

e. determine whether or not municipalities or counties are complying with all provisions of law regulating administration of State aid;

f. set and enforce standards for investigating and supervising grants for assistance, and forms and procedures necessary for their proper administration; and

g. exercise other powers necessary for administration of State aid.

**Source:** 44:8-110.3, 44:8-111(d).

**COMMENT**

The draft combines the sources, removes duplication of the Commissioner’s rule-making duty, and streamlines the language.

**5-33. Centralized registry; updating of information**

a. The centralized registry established by the Commissioner in the Division of Family Development in the Department of Human Services shall contain names, Social Security numbers and additional identifying information which the Commissioner requires, of recipients of benefits under TANF.

b. Each entity administering assistance shall provide information and assistance as requested by the Commissioner.

c. The Commissioner shall provide for periodic updating of the registry information.

**Source:** 44:8-111.1.

**COMMENT**

The draft changes the source language to reflect that the registry is already established, and makes the provision more concise.
5-34. Reciprocal provision of central registry information; comparison checks

a. The Commissioner shall make the centralized registry information available to other states and shall seek reciprocal provision of similar information from those states to the Division of Family Development.

b. The Commissioner shall provide use of the registry for comparison checks of assistance recipient records between entities administering assistance within the State.

Source: 44:8-111.2.

COMMENT
The draft streamlines the source.

5-35. Commissioner’s powers

The Commissioner may:

a. Prescribe the number and qualifications of personnel employed or to be employed in administering assistance in each municipality or county;

b. Require each municipality or county to keep records of, and make reports on, the administration of State aid within each municipality or county in the form and containing the information that the commission finds necessary, and investigate to verify the facts stated in the records and reports;

c. Investigate assistance administration within each municipality or county and determine the compliance or noncompliance of the municipality or county with the laws governing administration of State aid for relief and with the department’s standards and requirements;

d. Withhold State aid payment from any municipality or county that does not keep records or make reports or comply with laws governing State aid administration or the department’s standards and requirements;

e. Consult with and advise any municipal or county officials regarding assistance problems in their municipality or county;

f. Make regulations to implement this act.

Source: 44:8-112.

COMMENT
The draft streamlines the source. By amendment in 1995, county was added to all municipal references.

5-36. Commissioner’s powers over municipal and county administration

The Commissioner may, for each municipality or county in which assistance is administered by the Commissioner:

a. Directly distribute sums allotted as State aid as provided by this act; and
b. Use the municipal or county government organizations for administration of assistance to assist the Commissioner.

Source: 44:8-113.

COMMENT
The draft eliminates the first two subsections of the source as duplicative: their content is required in 4-2(d) and 4-2(c), (d), and 4-3(a). By amendment in 1995, county was added to all municipal references.

5-37. Determining amount of State aid; advance payments; deductions

The Commissioner may make payments from time to time to a municipality or county in advance based on the Commissioner’s estimates of the municipality’s or county’s assistance cost and may adjust later payments when the municipality’s or county’s actual cost is determined.


COMMENT
Though simplified in light of current practice, the section continues the substance of the source sections.

5-38. Rebates for pharmaceutical products; requirements

a. The Commissioner shall contract with manufacturers of pharmaceutical products to provide rebates for pharmaceutical products covered under this act title on the same basis as is required under the “Pharmaceutical Assistance to the Aged and Disabled” program (C. 30:4D-20 et seq.) and “Senior Gold Prescription Discount Program” (C. 30:4D-43 et seq.) and in section 1927(a) through (c) of the federal Social Security Act (42 U.S.C. sect. 1396r-8(a)-(c)).

b. A manufacturer who participates in the General Assistance program pursuant to this section shall provide to the Commissioner information the Commissioner requests that is necessary to carry out the purposes of this section.

Source: 44:8-159.

COMMENT
The draft deletes two sentences that are irrelevant after the 2005 date of enactment.

5-39. Opportunity for hearing

a. If an applicant’s or recipient’s claim for benefits is denied, reduced, suspended, terminated or not acted upon within a reasonable time, in accordance with regulations adopted by the Commissioner, the Commissioner shall insure that the applicant or recipient is afforded the opportunity for a hearing conducted by the Office of Administrative Law in accordance with the “Administrative Procedure Act,” N.J.S. 52:14B-1 et seq.

b. A recipient who requests a hearing within the timely notice period shall continue receiving current benefits pending the outcome of the hearing.

Source: 44:10-52.
COMMENT
This provision applies to both GA and TANF.

5-40. Disbursement of funds for legal services for successful appeals

a. The Division of Family Development in the Department of Human Services shall disburse funds from the Payments to Municipalities for Cost of General Assistance Fund for fees to an attorney or a legal entity providing legal services who represents a recipient of assistance in an appeal of a claim for federal Supplemental Security Income benefits pursuant to the federal Social Security Act, 42 U.S.C. 1381 et seq., if the appeal is decided in favor of the recipient. The fees to the attorney or legal entity providing legal services shall be a fixed amount set by the Commissioner of Human Services’ rules and regulations.

b. No disbursement shall be made unless the attorney or legal entity providing legal services submits a petition and a copy of the favorable decision to the Division of Family Development within 60 days of the date of receipt of the favorable appeal decision. The disbursement of fees to the attorney or to the legal entity providing legal services shall be made within 30 days of the required information’s submission by the attorney.

Source: 44:8-110.1.

COMMENT
The draft streamlines, and is substantially like, the 1996 source provision.

5-41. Reduction of amount of payments to municipalities for cost of general assistance funds

The Division of Family Development shall reduce the amount of payments to municipalities for cost of general assistance funds otherwise required to be paid to the municipal assistance department as reimbursement for the assistance provided while the Supplemental Security Income claim was appealed.

Source: 44:8-110.2.

Comment
The draft is substantially like the 1996 source provision.

Chapter 6 – Recipients’ Representatives

6-1. Definitions

As used in this chapter:

"Court" means the Superior Court in the county whose welfare board is responsible for making payments of public assistance to or for the benefit of the recipient or, in cases where a representative payee has been appointed pursuant to this act, the Superior Court having made such appointment.
"Functionally incompetent" means subject to a mental, physical or emotional condition which renders the individual incapable of receiving and utilizing payments of public assistance in a manner conducive to the health and well-being of himself and his dependents.

"Representative payee" means a person appointed by a court to act for a recipient to the extent of receiving and administering payments of public assistance.

"Public assistance" means "old age assistance" and "disability assistance" as authorized by Revised Statutes, Title 44, chapter 7; "blind assistance" as authorized by Revised Statutes, Title 30, chapter 6; "assistance for dependent children" as authorized by chapter 86, laws of 1959; together with amendments and supplements to any of the foregoing; and any other program administered through the county welfare boards, by whatever name now or hereafter known, which is authorized to provide financial assistance to needy persons in the form of money payments.

"Recipient" means a person who has been found eligible to receive payments of public assistance.

"Welfare board" means the county welfare board responsible for making payments of public assistance to or for the benefit of the recipient.

Source: 44:11-1.

COMMENT

The provisions of this chapter are identical to their sources except that the word “chapter” has been substituted for the word “act” in sections 6-1 and 6-8.

6-2. Appointment of representative payee; contents of complaint

Whenever it appears necessary to appoint a representative payee for a recipient who is functionally incompetent, a complaint seeking such appointment may be filed with the court by the welfare board. The complaint shall set forth the name, age and place of residence of the recipient; the name and place of residence of the nearest relative of the recipient, if known; and that the recipient has been found otherwise eligible to receive a grant of public assistance.

Source: 44:11-2.

6-3. Statement of incompetency by director of welfare board

A verified statement by the director of the welfare board, or his authorized representative, annexed to the complaint and setting forth that a review by the State Bureau of Assistance indicates that the recipient is functionally incompetent, shall be prima facie evidence of the necessity for the appointment.

Source: 44:11-3.

6-4. Hearing; evidence; appointment of representative

Upon the filing of a complaint and verified statement as provided by this act, the court shall proceed in a summary manner to hear testimony for the purpose of
determining whether the recipient is functionally incompetent. The written certification of two physicians who have been in the actual practice of medicine and surgery in this State for at least five years shall be sufficient, but not required, evidence to establish such condition of the recipient. If the court is satisfied that the recipient is functionally incompetent, such court shall appoint a fit and proper person as representative payee for such recipient.

Source: 44:11-4.

6-5. Powers and duties of representative

A representative payee appointed pursuant to this act shall be authorized and empowered to receive payments of public assistance made for and on behalf of the recipient, and to administer such payments for the sole benefit of such recipient, in accordance with the laws and regulations governing such payments. Nothing in this act shall authorize or empower such representative payee to receive, hold or administer any other property, real or personal, of the recipient nor to act as representative of the recipient in any other manner whatsoever.

Source: 44:11-5.

6-6. Responsibility for payments; statement of account; disposition of balance on death or discharge of representative

a. A representative payee appointed pursuant to this act shall be personally responsible for the proper expenditure of all payments of public assistance made on behalf of the recipient, but shall not be required to give bond, and shall not be entitled to compensation for any acts or services performed.

b. At least once each year following appointment as representative payee, or upon discharge from such office, or upon notice that payments of public assistance are being discontinued, such representative payee shall file with the court a statement of account under oath showing the total amount of moneys received, the amount disbursed on behalf of the recipient, and the balance, if any, remaining in the hands of the representative payee. No further action by the court shall be required if there is annexed to such statement an approval of the account signed by the director of the welfare board or his authorized representative.

c. Any balance of assistance payments remaining in the hands of a representative payee at the time of his discharge from office, or at the time of discontinuance of public assistance, shall be repaid to the welfare board by such representative payee.

d. Should any representative payee die while in office, his personal representative shall file a statement of account and make disposition of any balance of assistance payments as provided in this section.

Source: 44:11-6.
6-7. Discharge of representative

   a. When at a hearing held upon application of the recipient the court determines from the certification of two physicians, or other acceptable evidence, that the recipient is no longer functionally incompetent, the court may discharge the representative payee.

   b. Whenever it appears upon application and good cause shown by the representative payee or the welfare board that such representative payee should be relieved of his duties, the court may discharge such representative payee and, if the circumstances still require, appoint in his stead some other fit and proper person.

   Source: 44:11-7.

6-8. Liberal construction; costs

   This chapter shall be liberally construed to secure the beneficial intent and purpose hereof. All proceedings under this act chapter shall be without costs except witness fees as required.

   Source: 44:11-8.

Chapter 7 – Supplementary Assistance

7-1. Definitions

   As used in this act:

   a. "Basic payment" means any supplemental security income payment made to an aged, blind or disabled person by the government pursuant to the Federal Act.

   b. "Eligible person" means any person meeting the State or government eligibility requirements for receipt of a basic payment, or a State supplementary payment, or both.

   c. "Essential person" means any needy person residing with an eligible person who is recognized by State regulation to be essential to the well-being of the eligible person and whose needs are included in the determination of the needs of the eligible person.


   e. "Government" means the Federal Government of the United States of America and the agencies thereof.

   f. "Legally liable relative" means any person designated by any law of this State as having a duty to support an eligible person or a duty to contribute to the support of an eligible person.

   g. "Lien" means any legally perfected encumbrance or claim against the property or resources of an individual, authorized by this Act or Title 30 of the Revised Statutes.

   h. "Supplemental Security Income Program" means the program established pursuant to the Federal Act, which makes payments to eligible persons.
i. "Supplementary payment" means any supplementary assistance payment as defined in the Federal Act made to an aged, blind or disabled person under eligibility requirements of this State.

Source: 44:7-85.

COMMENT
The draft is similar to the source.

7-2. Eligibility; determination of amount

Any person whose income, including any basic payment, is below the assistance standard established by the Commissioner and the government pursuant to the Federal Act is eligible for supplementary payments. The existence of an essential person may be considered in determining the amount of any supplementary payment made to an eligible person.

Source: 44:7-86.

COMMENT
The draft is identical to the source provision.

7-3. Duties of the Commissioner

The Commissioner shall:

a. Enter into agreements with the government to secure the administration of supplementary payments by the government that the Commissioner deems appropriate.

b. Make and amend regulations:

(1) To implement the terms of the agreement with the government for the administration by the government of supplementary payments; and

(2) To secure social services for eligible persons and for such other aged, blind or disabled persons as the Commissioner may designate.

c. Transfer funds appropriated for the payment of supplementary payments, to the government in amounts and at times as the Commissioner shall deem appropriate in order to provide for supplementary payments to eligible persons in this State.

d. Pay to the government funds necessary to reimburse the government's expenses in collecting additional information needed for the State to make eligibility determinations for medical assistance under the "New Jersey Medical Assistance and Health Services Act," P.L.1968, c.413 (C.30:4D-1 to 30:4D-19).

e. Require welfare agencies to perform eligibility determinations that the Commissioner deems necessary for the continuation of the New Jersey Medical Assistance Program under the "New Jersey Medical Assistance and Health Services Act," P.L.1968, c.413. The Commissioner shall pay to the counties a reasonable amount to reimburse the welfare boards for their expenses in making eligibility determinations.

f. Take appropriate steps to secure maximum federal financial participation in providing assistance to eligible persons residing in residential health care facilities.

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g. Ensure that eligible persons residing in a residential health care facility have reserved to them a monthly amount, from payments received under the provisions of the act to which this act is a supplement or from any other income, as a personal needs allowance. The personal needs allowance may vary according to the type of facility in which an eligible person resides, but in no case shall be less than $25.00 per month.

h. Ensure that any eligible person who receives medical assistance under subparagraph (4)(a) of subsection a. or under paragraph (11), (13) or (14) of subsection b. of section 6 of P.L.1968, c.413 (C.30:4D-6) receives $10.00 per month, in addition to benefits received pursuant to 42 U.S.C. s. 1382(e)(1)(B). If the government cannot pay this $10.00 monthly increase, the Commissioner shall pay this increase and shall ensure that this increase is not considered income for Supplemental Security Income program purposes. However, if the government increases the benefit level under 42 U.S.C. s. 1382(e)(1)(B), the Commissioner shall allow the government to pay this increase and shall reduce its payment to an eligible recipient by an equal amount.

i. Assess welfare boards at the beginning of each fiscal year in the same proportion that the counties currently participate in the federal categorical assistance programs, in order to obtain the amount of each county's share of supplementary payments for eligible persons in this State, based upon the number of eligible persons in the county.

Source: 44:7-87.

COMMENT

The draft streamlines the source.

7-4. Duties and responsibilities of welfare boards

Welfare boards shall:

a. perform all the functions under the former federal categorical assistance programs that the government will not perform pursuant to the agreement between the State and the government.

b. Provide social services to persons designated to receive services pursuant to this Act.

Source: 44:7-88.

COMMENT

The draft streamlines the source.

7-5. Nonliability of recipient of supplementary payments or recipient’s legally liable relative for repayment;

a. Supplementary payments shall not be considered a loan by the State or by the welfare boards.

b. No requirement under this Act or Title 30 of the Revised Statutes relating to the pledging of property or to the reimbursement of assistance shall be imposed upon, and no liens shall be made or enforced against, a recipient of supplementary payments for

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the purpose of recouping payments. Recoupment shall be required for specific State
expenditures from lump sum retroactivity SSI payments.

c. No requirement of support, contribution, or legal liability therefor, may be
enforced against a legally liable relative of a person receiving supplementary payments or
other payments made by the welfare boards pursuant to this Act.

Source: 44:7-89.

COMMENT
The draft omits source references to programs which no longer exist.

7-6. Eligibility for medical assistance under New Jersey Medical Assistance and
Health Services Act

a. Any person eligible for basic payments under the Federal Act, any person
eligible for supplementary payments and any essential person, may be determined by
regulations of the Commissioner to be eligible for medical assistance under the New
Jersey Medical Assistance and Health Services Act, P.L.1968, c. 413.

b. Any person who would be financially eligible for basic payments or
supplementary payments, or both, who is in an institution and financially ineligible for
such payments by reason of the lower maximum income eligibility level under the
Federal Act for persons residing in institutions, shall be eligible for medical assistance
under the New Jersey Medical Assistance and Health Services Act, P.L.1968, c. 413.

Source: 44:7-90.

COMMENT
The draft is substantially like the source.

Chapter 8 - Responsibility for Burial Expenses


a. When a person dies who is receiving assistance under a Work First New Jersey
assistance program, the agency that was providing assistance shall be responsible for the
necessary and reasonable expenses of burial as determined by the Commissioner.

b. Except as provided by subsection (a), when a person dies without an
ascertainable estate sufficient to pay for burial expenses, the county of the decedent’s
residence shall be responsible for the necessary and reasonable expenses of burial beyond
those payable by the decedent's estate and by any government payment available for that
purpose.

c. When an unidentified or unclaimed dead body is found, the county in which it
is found shall be responsible for the necessary and reasonable expenses of burial.

Source: New.

COMMENT
This formulation reflects current practice. Earlier related statutes are: 30:4C-32, 40A:9-49.1,
44:1-157.1, 44:4-119, 4:7-13, 49:4-158.
Chapter 9 - Individual Development Accounts

9-1. Findings, declarations regarding individual development accounts

a. The Legislature finds and declares that:

   (1) Economic well-being does not come solely from income, spending and consumption, but also requires savings, investment and accumulation of assets, since assets can improve economic stability, connect people with a viable and hopeful future, stimulate development of human and other capital, yield personal and social dividends and enhance the welfare of offspring.

   (2) With the enactment of the "Work First New Jersey Act," P.L.1997, c.38 (C.44:10-55 et seq.) and companion legislation, emphasizing moving people off of public assistance and into employment, there is an urgent need to provide incentives for savings accounts that will complement and stabilize the movement of people from public assistance and into employment.

   (3) Income-based social policy should be complemented with asset-based social policy, because while income-based policies ensure that consumption needs, including food, child care, rent, clothing and health care are met, asset-based policies provide the means to achieve some degree of economic self-sufficiency.

   (4) The State of New Jersey should develop policies, such as individual development accounts, that promote higher rates of personal savings and net private domestic investment.

b. It is the intent of the Legislature, therefore, to provide for the establishment of individual development accounts which accounts are designed to:

   (1) provide individuals and families, especially those with limited means, an opportunity to accumulate assets;

   (2) facilitate and mobilize savings;

   (3) promote education, home ownership and micro enterprise development; and

   (4) stabilize families and build communities.

Source: 44:10-87

COMMENT

The provisions of this chapter are identical to their sources except that the word “chapter” has been substituted for the word “act” in section 9-2.

9-2. Definitions regarding individual development accounts

As used in this chapter:

"Account holder" means a person who is the owner of an individual development account.
"Commissioner" means the Commissioner of Community Affairs.

"Community-based organization" means a not-for-profit organization described in section 501(c)(3) of the Internal Revenue Code of 1986 (26 U.S.C. s.501(c)(3)) and exempt from taxation under section 501(a) of the Internal Revenue Code of 1986 (26 U.S.C. s.501 (a)), that is approved by the Commissioner to implement the New Jersey Individual Development Account Program established under this act.

"Department" means the Department of Community Affairs.

"Economic literacy" means a basic understanding of budgets and savings accounts, credit and interest and how to use financial services; and having a savings plan and using it to reach the account holder's savings goal for an individual development account.

"Eligible individual" means an adult with an annual household gross income up to a maximum of 200 percent of the official poverty level.

"Financial institution" means a state or federally chartered bank, savings bank, savings and loan association or credit union with an office in this State.

"Fund" means the Individual Development Account Fund established pursuant to 42 U.S.C. s.604(h) and 45 C.F.R. Part 263 (45 C.F.R. s.263.0 et seq.).

"Individual development account" means an account established pursuant to 42 U.S.C. s.604(h) and 45 C.F.R. Part 263 (45 C.F.R. s.263.0 et seq.) in trust for an eligible individual that is a trust account pursuant to the "Multiple-party Deposit Account Act," P.L.1979, c.491 (C.17:16I-1 et seq.).

"Program" means the New Jersey Individual Development Account Program established pursuant to the provisions of this act.

"Program contributor" means a person or entity who makes a contribution to an individual development account reserve fund, except that "program contributor" does not mean the account holder.

"Reserve fund" means the individual development account reserve fund created by a community-based organization for the purposes of: funding the costs incurred in the administration of the program; receiving matching funds from the State; and providing matching funds for individual development accounts pursuant to section 5 of this act.

Source: 44:10-88

9-3. New Jersey Individual Development Account Program

   a. The New Jersey Individual Development Account Program is hereby established within the Department of Community Affairs. The purpose of this program shall be to provide each eligible individual in this State with an opportunity to establish
an individual development account in a financial institution, to the extent funding will permit. The individual development account may be used for any of the purposes specified under subsection c. of section 5 of this act.

b. There is established in the department, the Individual Development Account Fund. This fund shall be used by the Commissioner to provide:

(1) grants to community-based organizations selected by the Commissioner to participate in the program; and

(2) a State match of one dollar for every one dollar of earned income deposited into an individual development account by the account holder, except that the maximum amount provided as a match per individual development account per calendar year shall be $1,500. The earned income deposited into an individual development account shall not be deposited on behalf of the account holder by a third party.

Community-based organizations may raise additional, non-federal or State funds to increase the State match rate and the State maximum annual match amount.

c. The Commissioner shall implement this program by entering into agreements with community-based organizations which the Commissioner shall select through a request for proposal process, pursuant to the provisions of P.L.1987, c.7 (C.52:14-34.4 et seq.).

d. In reviewing the proposals of community-based organizations, the Commissioner shall consider the following factors:

(1) the not-for-profit status of the organization;

(2) the fiscal accountability of the organization;

(3) the ability of the organization to provide its moneys or raise moneys from program contributors for matching contributions which are in addition to State matching funds;

(4) the plan of the organization for the development, implementation and management of an individual development account program;

(5) the capacity of the organization to provide economic literacy training, either directly or through another provider;

(6) the organization's history of working with low-income populations;

(7) the target population and the extent to which the organization plans to exceed the 33.3 percent minimum participation under this act by current or former Work First New Jersey recipients pursuant to P.L.1997, c.38 (C.44:10-55 et seq.), or Aid to Families with Dependent Children recipients or Temporary Assistance for Needy Families recipients pursuant to 42 U.S.C. s.601 et seq.; and

(8) the length of time, in months and years, of the operation of the program, taking into account the resources that are available to the organization.

e. (1) The Commissioner shall select community-based organizations and enter into a contract for services with each organization selected that requires the organization to establish and maintain an individual development account reserve fund.
and work with each eligible individual and any local financial institution to establish an individual development account, among other services to be provided for eligible individuals and their households, if any.

(2) The Commissioner shall have the discretion to disburse moneys from the fund in a manner and an amount the Commissioner deems appropriate and consistent with the community-based organization's contract for services and proposal selected pursuant to this subsection and subsections c., d. and f. of this section.

f. (1) No more than 10 percent of the federal Temporary Assistance for Needy Families funds under this act title may be used for administrative purposes by a community-based organization selected to participate in the program.

(2) No more than 10 percent of the federal Temporary Assistance for Needy Families funds under this act title may be used to provide economic literacy training and one-on-one financial counseling to account holders by an organization selected to participate in the program.

g. At all times, a minimum of 33.3 percent of the account holders participating in the program shall be current or former Work First New Jersey recipients pursuant to P.L.1997, c.38 (C.44:10-55 et seq.) or Aid to Families with Dependent Children recipients or Temporary Assistance for Needy Families recipients pursuant to 42 U.S.C. s.601 et seq., unless otherwise authorized by the Commissioner.

Source: 44:10-89

9-4. Opening an individual development account; conditions

a. An eligible individual may, in agreement with a community-based organization selected by the Commissioner pursuant to section 4 of this act, open an individual development account for the purpose of accumulating and withdrawing moneys for specified expenditures pursuant to this section. Upon satisfaction of the organization's requirements for economic literacy by an account holder, the organization shall certify to the Commissioner that the account holder may withdraw moneys from the account on the approval of the organization, without penalty, for any of the expenditures listed in subsection c. of this section.

b. The Commissioner shall establish by regulation:

(1) the minimum monthly deposit amount that each account holder shall be required to maintain and the maximum monthly deposit amount that each account holder shall be permitted to make, during their participation in the program;

(2) the minimum time period the account holder shall maintain an individual development account, pursuant to section 4 of this act, in order to be eligible to withdraw the moneys deposited and receive the State matching funds, pursuant to this subsection and subsections c., d. and e. of this section;

(3) the prior notice of the account holder's intent to, and purpose for, withdrawing individual development account funds and the minimum time period that an account holder shall give notice to the individual development account trustee community-based organization prior to an approved withdrawal in order to be eligible to
receive State matching funds pursuant to this subsection and subsections c., d. and e. of this section; and

(4) the maximum length of time an account holder may participate in the program.

c. Upon satisfaction of the provisions of subsections a. and b. of this section by the community-based organization:

(1) the account holder may, upon the approval of the community-based organization, withdraw moneys from the account holder's individual development account in the form of a joint check or transfer of funds made payable to the account holder and the payee of the approved withdrawal, pursuant to 45 C.F.R. s.263.22, for any of the following purposes:

(a) post-secondary educational expenses as defined in 42 U.S.C. s.604(h)(5) and 45 C.F.R. s.263.20;

(b) qualified acquisition costs of a primary residence as defined in 42 U.S.C. s.604(h)(5) and 45 C.F.R. s.263.20; and

(c) qualified business capitalization expenses, as defined in 42 U.S.C. s.604(h)(5) and 45 C.F.R. s.263.20.

(2) if the account holder withdraws any moneys from the account and uses those moneys, or any part of those moneys, for a purpose other than that permitted pursuant to this subsection, the account holder shall forfeit all matching funds associated with the unapproved withdrawal. The account holder shall receive only the moneys which the account holder has deposited into the account.

(3) the Commissioner, in consultation with the Commissioner of Human Services, shall establish procedures to ensure that funds held in an individual development account under this act are withdrawn for qualified purposes only, as defined in this subsection. Penalties for unapproved withdrawals may include taxing the withdrawal as income and, as applicable, including the withdrawal as income or resources in determining eligibility for federal and State public assistance pursuant to 45 C.F.R. s.263.23.

d. Community-based organizations approved by the department shall establish an individual development account in trust for an eligible individual in a financial institution as required pursuant to this act. Organizations may, with the approval of the Commissioner, employ methods to maximize the efficiency of multiple individual development accounts, such as pooling deposits into a single account held by the financial institution, with individual account information maintained by the organization. In addition, with the approval of the Commissioner, organizations shall develop an efficient means of providing the match portion of an individual development account, such as matching deposits at the time of approved withdrawal only. Organizations acting as trustees under this act shall, at all times, maintain current account information, without regard to the chosen method of administration, on all individual development accounts, which shall include: the individual development account balance, a time indexed record of deposits and withdrawals made by the account holder and the current match level. Community-based organizations under this act shall certify to the

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department that the accounts have been established pursuant to the provisions of this act in trust for the account holder in the manner approved by the Commissioner.

e. A community-based organization establishing an individual development account shall:

(1) sign an agreement with an eligible individual to the effect that the account shall be kept in the name of the eligible individual as the account holder and that the eligible individual shall have an officer of the organization as a trustee of the account;

(2) open and keep the account in the name of the eligible individual, with an officer of the organization as trustee;

(3) permit the account holder to deposit earned income, as defined in 42 U.S.C. s.604(h)(2)(C), into an individual development account which shall be matched by the organization when withdrawn for an approved expenditure, pursuant to subsection c. of this section;

(4) maintain the records of individual development accounts in a manner that enables the organization to determine the amounts deposited by the account holder and amounts paid by the organization as matching funds;

(5) require the individual development account to earn a rate of interest that reasonably reflects the prevailing market rate paid on like deposits by financial institutions in this State, which shall be credited to the account holder;

(6) permit the account holder, after obtaining the signature of the trustee, to withdraw moneys from the account for any of the purposes listed in subsection c. of this section;

(7) remit matching funds in the form of a joint check or transfer of funds made payable to the account holder and the payee of the approved withdrawal, pursuant to 45 C.F.R. s.263.22 at the time the account holder withdraws funds for a purpose permitted pursuant to subsection c. of this section;

(8) work with other community-based organizations and State agencies to coordinate the program with other private and public programs designed for asset accumulation and self-sufficiency, such as transportation, child care and health care services, New Jersey Housing and Mortgage Finance Agency programs, Federal National Mortgage Association (Fannie Mae) mortgage programs and other programs under the direction of the Department of Human Services, such as the Family Loan Pilot Program and Entrepreneur Development Services Pilot Program;

(9) provide financial counseling to account holders and assist them in establishing a secure, low-risk, effective savings opportunity, for the purposes of an individual development account, for income that is in excess of the individual development account maximum match of $1,500 per year or income that does not meet the definition of earned income, as defined in paragraph (3) of this subsection, such as federal and State earned income tax credits, homestead and property tax rebates, inheritance, monetary damages recovered in a legal proceeding and income from the sale of an asset. The account shall be tailored to each account holder's resources and financial goals and shall be held in a separate account from the individual development account.

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Accounts investigated may include money market accounts, individual retirement accounts, certificates of deposit and individual development accounts that do not include matching federal or State funds; and

(10) be deemed to have a fiduciary duty with respect to moneys in an individual development account or reserve fund. The Commissioner may require that an organization post and maintain a fidelity bond or other security with regard to the position of the organization as fiduciary for the moneys in an individual development account or reserve fund.

Source: 44:10-90

9-5. Transfer of account on death of holder

a. Notwithstanding the provisions of any other law to the contrary, in the event of the death of the account holder, the ownership of the individual development account shall be transferred to the ownership of a contingent beneficiary, which the account holder shall name at the time the account is established and may change at any time. If the beneficiary is deceased or otherwise cannot accept the transfer, the moneys in the individual development account derived from the account holder's earned income and any interest accrued thereon shall be transferred to the estate of the account holder.

b. If an individual development account is closed pursuant to subsection a. of this section or an account holder withdraws from the individual development account program or forfeits his State matching funds due to an unauthorized withdrawal, any moneys held for matching funds for that account may be retained in the reserve fund for reallocation to be used as matching funds for new individual development accounts.

Source: 44:10-91

9-6. Money in, interest on account not considered gross income

a. Money deposited into or withdrawn from an individual development account by an account holder pursuant to subsection c. of section 5 of this act chapter or matched by a community-based organization pursuant to paragraph (7) of subsection e. of section 5 of this act chapter shall not be considered gross income otherwise includable as income pursuant to subsections a., b., k., and p. of N.J.S.54A:5-1.

b. Interest earned by an individual development account shall not be considered gross income otherwise includable as income pursuant to subsection e. of N.J.S.54A:5-1.

c. Moneys deposited in an individual development account and the interest from an individual development account under this act chapter shall not be taken into account in determining eligibility or the amount of assistance under State and federal means-tested programs pursuant to 42 U.S.C s.604(h) and 45 C.F.R. s.263.20.

Source: 44:10-92
9-7. Regulations; consultation with Human Services

a. The Commissioner shall promulgate regulations pursuant to the "Administrative Procedure Act," P.L.1968, c.410 (C.52:14B-1 et seq.), necessary to effectuate the provisions of this act.

b. The Commissioner shall consult with the Commissioner of Human Services regarding the development, operation and administration of the program and ensuring compliance with 42 U.S.C. s.604(h) and 45 C.F.R. Part 263 (45 C.F.R. s.263.0 et seq.).

Source: 44:10-93

9-8. Report to Legislature

a. The Commissioner shall report to the Legislature annually on the effectiveness of the program in providing eligible individuals in this State with an opportunity to establish an individual development account and may include in the report recommendations for change, if any, to make the program more effective. This report shall be due within 30 days of the end of the anniversary of the effective date of this section for each year the program is in operation.

b. The Department of Community Affairs shall make available to the Departments of Labor and Human Services necessary individual development account statistical and program information in a usable format and in a timely manner, so that those departments may prepare federal and other reports.

Source: 44:10-94
Title 22A

Introduction

Title 22A contains the general fees pertaining to civil and probate actions. The Title also includes provisions regarding fees not paid to the courts and the disposition of various fees.

The updating of this Title has been inconsistent. While certain sections have remained reasonably current, others have been updated less frequently and some remain unchanged since their enactment in 1953. The New Jersey Law Revision Commission Staff has proposed certain sections of the Title for removal as anachronistic. Other sections have been consolidated and reorganized. The sections proposed for removal are listed below. Other proposed changes are explained in the Comment sections of the draft statute.

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

The draft also contains an adjustment of the costs for the copying of some documents to more closely align with the charges permitted by the Open Public Records Act (47:1A-5). OPRA provides for charges on a sliding scale, ranging from $0.75/per page to $0.25/per page. Since all other fees in this section were rounded to the nearest dollar, the copying fees in prior drafts were reduced to $1 in this Title. With regard to the copying of other documents in the Superior Court, including the Surrogates’ offices, reference is made to the fee schedule to be established by the Supreme Court pursuant to Court Rule 1:38 (specifically 1:38-9). References to self-service copy fees no longer include a per-page fee, and instead state that the charge for the copies shall be the actual cost associated with providing them in response to the available case law. NO final determination has been made regarding those costs since consolidated cases remain pending on appeal. Other copying costs, particularly those applicable to the Surrogates, have remained at their current statutory levels in order to avoid substantial negative budgetary consequences resulting from the hybrid nature of the Surrogates’ offices (they serve as parts of the Superior Court but their operations (facilities, salaries and benefits) are paid by the counties).

In addition to the foregoing, the draft attempts to correct what appears to be an error in the recently enacted 22A:4-17(b) [effective September 2009] as shown in 22B:9-2 below.

The non-substantive changes found in this report include rearranging, consolidating and updating of the sections. Since the draft represents a modification of
the entirety of the Title, the statutory sections have been renumbered as 22B. Sections proposed for removal from the Title are as follows:

1. 22A:1-5 was substantially eliminated since the dollar amounts listed were inconsistent with other provisions of the statute (that section includes, for example, a fee for serving a subpoena of $0.35 and mileage reimbursement of $0.04/mile).

2. 22A:1-6 was replaced, in the draft, with the section including the proposed flat-fee mileage calculation substitute.

3. 22A:2-2 includes costs in the Supreme Court such as counsellor’s fees of $10 and $20. This section was eliminated as not representative of actual costs (it sets the award for prevailing on a contested motion or application at $10, and for arguing a cause before the Supreme Court, $25). In this section and in similar sections mentioned below, it was of concern to Staff that the costs recovered were no longer meaningful and that the value of the time spent to prepare the application for costs would routinely and substantially exceed the costs received.

4. 22A:2-5 was eliminated by consolidating it with 22A:2-1. 22A:2-5 simply states that the fees in the Appellate Division are the same as those in the Supreme Court.

5. 22A:2-9 lists costs that may be awarded to a party in the Law Division, ranging from $10 to $50. The section was eliminated as not representative of actual costs (examples include costs awarded for an appeal to the Law Division, $10; for a voluntary dismissal, $20) [see 22A:2-2 above for a more detailed explanation of the reasoning].

6. 22A:2-10 lists costs that may be awarded to a party in Chancery Division, ranging from $10 to $125. While some of the amounts listed are higher than those found in other sections pertaining to costs, this section was also eliminated for reasons similar to those mentioned in 22A:2-2 above.

7. 22A:2-11 also addresses costs that might be awarded and provides that if the matter does not proceed to a final judgment, the attorney is allowed one-half of the amount normally allowable as costs. Like the costs sections discussed above, this one was eliminated.

8. 22A:2-14 was eliminated because Staff was advised that it is no longer relevant.

9. 22A:2-16 lists fees for recording documents and making copies in probate matters. This section was eliminated on the basis that it is inconsistent with other fees listed elsewhere in the Title and because the fees are calculated per folio.

10. 22A:2-17 addresses the issue of fees for proceedings begun prior to the effective date of the Title (1953). This section was eliminated with the expectation that no such actions remain.
11. 22A:2-25 lists fees for filing, entering or docketing papers with the Deputy Clerk of the Superior Court. This section was eliminated as apparently duplicative of, and inconsistent with, other listed fees.

12. 22A:2-26 lists a motion fee of $9 and was eliminated because that fee is inconsistent with other motion fees listed in the Title.

13. 22A:2-33 reduces fees for the auditing, stating or allowance of accounts under circumstances where the estate does not exceed $200 or $500. This section, too, was eliminated as no longer relevant because the dollar amounts have not been updated since 1953.

14. 22A:2-34 includes fees of $0.25 and $0.12 payable by the Surrogate to the Clerk of the Court for recording the name and other limited information about each testator or intestate. This section was eliminated as obsolete since the amounts to be paid have not been updated since 1953.

15. 22A:2-41 sets forth the amounts to be included in taxed costs for witnesses and appraisers and was eliminated for same reasons as similar provisions.

16. 22A:2-42 sets forth the amounts to be included as taxed costs for attorneys’ fees in Special Civil Part matters, replevin actions and matters in which a party has been adjudged in contempt.

17. 22A:3-6 provides for imprisonment for failure to pay costs assessed against a party at a rate of one day of imprisonment for each $1 of costs imposed and was eliminated for that reason.

18. 22A:4-2 includes fees of the surveyors general and was eliminated as no longer relevant.

19. 22A:4-6 provides for a fee of $3 to be paid to the County Clerk for attending sessions of the Law Division in the county and was eliminated as obsolete.

20. 22A:4-11 includes a mileage fee of $0.10/mile and was eliminated as inconsistent with other mileage fees established by the Title.

21. 22A:4-12 includes fees for searches performed by the Clerk of the Court or the County Clerks and Registers of Deeds and Mortgages and was eliminated on the basis that it no longer appeared to be relevant and, if it is still valid, it is inconsistent with other provisions of the Title.

22. 22A:4-14 includes fees for administering oaths, taking affidavits, taking proof of a deed and taking acknowledgements and was eliminated as no longer relevant.
22B:1-1. Payment or waiver of fees

a. Attorneys for the parties shall be responsible for the payment of all fees charged to their clients by the clerks of the Supreme Court and the Superior Court unless the court directs otherwise.

b. All fees allowed by law for the services of the Supreme Court, Superior Court, and any justice or judge thereof, whether such services are performed in open court or in chambers, shall be collected and accounted for by the clerks of the courts in the same manner as fees allowed to such clerks.

c. The clerk of a court shall not charge any New Jersey State officer conducting State business, or any State department, board, body or commission, for the filing of a paper or the rendering of a service for which a fee is normally charged.

d. Unless otherwise indicated, no service described in this Title shall be performed by a clerk, surrogate, officer or other individual from whom the service is sought unless the specified fee for that service is paid in advance or payment is waived.

e. The clerk of the court shall issue process, subpoenas, or any other order without requiring the payment of a fee by any duly authorized ethics committee.

f. The payment of fees to any New Jersey court or its clerk may be waived by the court if a party demonstrates indigency and seeks and obtains the appropriate relief.

g. The collection of any fee included in this Title may be waived in particular circumstances by order of the Supreme Court, or by an order of any court pursuant to authority granted by a court rule.

h. In any proceeding in which the papers filed with the clerk of the court are exceptionally numerous, or other work done by the clerk is exceptionally onerous, the clerk may apply for an order allowing a reasonable additional fee or the court may enter such an order on its own motion. Any such order shall direct how and by whom the fee shall be paid.

i. Unless otherwise directed by the clerk or the court, all fees payable to the court shall be payable to the Treasurer, State of New Jersey.


COMMENT

This section contains general provisions consolidated from various sections of the statute. The language in subsection: a. is 22A:2-21; b. is 22A:4-16; c. is 22A:2-22; d. is section 22A:2-37.1 (similar language appears in 22A:4-19 and 22A:5-1); e. is 22A:2-3; f. is 22A:1-7; g. is 22A:2-3 and 22A:2-23; h. is 22A:2-18; and i. is new.

Subsection e. was revised to remove references to ethics committees of a county or state bar association since comments suggested that all ethics matters are now handled by the Office of Attorney Ethics.
22B:1-2. Appeals and the Supreme Court and Superior Court, Appellate Division

a. The fees payable in matters on appeal to the Supreme Court and the Appellate Division of the Superior Court are as follows:

   (1) Filing a notice of appeal, notice of cross-appeal, notice of petition for certification, notice of cross-petition for certification or notice of petition for review, $250.

   (2) Filing a motion in a pending action, $30.

   (3) Filing an order to show cause, $45.

   (4) Filing the first paper on any motion, petition or application if not in a pending action or if made after dismissal or entry of judgment, other than withdrawal of money deposited in court, $30.

b. On appeals to the Law Division of the Superior Court from judgments of a municipal court and any agency whose final judgments are required by court rule to be appealed to the Law Division, for filing a notice of appeal, $75.

c. For the following services of the clerk of the Supreme Court or Appellate Division, in addition to copying costs, the fee shall be:

   (1) Affixing the seal of the Court, $10.

   (2) Exemplification, including the affixing of the seal of the Court, $25.

   (3) All other papers or services, $5.

   (4) Commissions on appeals accounts and deposits of security for costs: 2% on $100 or less; 1 1/2% on the excess of $100.

   (5) Withdrawal of money deposited in court where the sum to be withdrawn is:

         (A) less than $100, no fee;

         (B) $100 or more but less than $1,000, $5;

         (B) $1,000 or more, $10.

d. The first copy of any order, judgment, pleading or other paper, shall be certified by the Clerk of the Supreme Court or the Clerk of the Superior Court, Appellate Division, and supplied to the attorney or litigant, free of charge if a copy is furnished to the clerk for certification.

e. A court may award costs of suit to a prevailing party in accordance with Court Rule 2:11-5. Costs shall also include:

   (1) The statutory witness fee;

   (2) The costs of taking depositions, when taxable by order of the court;

   (3) The costs for publication where publication is required;

   (4) The costs paid for a certified copy of a document or a map, recorded or filed in any public office, obtained for use in a trial or any other proceeding;
(5) Sheriff's fees;
(6) All filing and docketing fees paid to the clerk of court;
(7) Other reasonable and necessary expenses taxable according to the course and practice of the court, or by express provision of law or rule of court.

Source: For subsection a.: 22A:2-1; 22A:2-20; 22A:2-27; for subsection b.: 22A:2-6; 22A:2-7; 22A:2-19; 22A:2-20; 22A:2-29; 22A:4-12; and for c. 22A:2-3 and 22A:2-8.

COMMENT

After being combined in an earlier draft, the provisions concerning appeals, the Supreme Court and the Appellate Division were separated from those pertaining to the Superior Court generally in this draft. Those provisions had been found in subsection d. in a former draft, and have been moved to subsection a. in this draft.

Now, in subsection a., the former Section 22A:2-1 and the former Section 22A:2-5 have been combined as a.(1) and (4). 22A:2-5 was deleted since it only referenced the former section and indicated that the same fees, costs and allowances applied to the Appellate Division. Subsection a.(2) is new. The language concerning orders to show cause was included as a.(3). The filing fee for an order to show cause is proposed at $45, even though that exceeds the fee for a standard motion, since it has been suggested that an order to show cause is more labor-intensive for the court personnel than a typical motion. The appeal language from Section 22A:2-27 was imported and inserted as a.(5), so that it was included with the other appeal language. The last sentence of that section indicating where the money was to be paid was removed as unnecessary after December 31, 1994. This subsection was modified to make the language more current and accurate. Subsection a.(6) was from 22A:2-20 and was deleted as no longer necessary.

All of subsection b. was deleted as pertaining only to the Superior Court, Law and Chancery Divisions with the exception of the order to show cause language which was inserted into subsection a. as explained above.

The language of subsection c. was modified to include a reference to the Supreme Court since the Clerk of that Court also affixes the seal of the Court and performs other actions set forth in that subsection. An attempt was made to eliminate all language that did not pertain to actions in the Supreme Court or Appellate Division. The former section 22A:2-19 was consolidated here as c.(11). The amount for pages in excess of five was raised from $0.75 to $1 per page to be consistent with other costs imposed in this Title. The section was otherwise substantively unchanged except for the clarification regarding papers provided at the disposition of the matter, and the elimination of the final sentence, which changes were proposed by the AOC.

Subsection e. was 22A:2-3 and 22A:2-8. It has been replaced with references to the Court Rules for the sake of simplicity and clarity. The language has been modified and consolidated. In g.(1), the phrase “statutory witness fee” replaces “legal fees of witnesses, including mileage for each attendance” and the reference to “masters, commissioners and other officers” was stricken.

22B:1-3. Civil Proceedings in Law and Chancery Division; Exceptions

a. The fee for filing the first paper in the Law and Chancery Divisions, excluding the Probate Part, Special Civil Part, and penalty enforcement actions, is as follows:

(1) By the plaintiff, $250.

(2) By any party filing an answer with a counterclaim or a third party claim, $250.
(3) By any party other than the plaintiff filing any other initial paper, $150.

b. Upon the filing, entering, docketing, or recording of the following papers or documents by any party to any action in the Law or Chancery Divisions of the Superior Court, excluding Special Civil Part, unless otherwise indicated the fee is as follows:

(1) Motion in a pending action, $30.

(2) First paper on any motion, petition or application, if not in a pending action or if made after dismissal or judgment entered, other than withdrawal of money deposited in court, $30.

(3) Order to show cause, other than an order to show cause constituting original process, $45.

(4) Transfer of action from Law Division to Special Civil Part, no charge.

(5) Transfer of an action from Special Civil Part to Law Division, $30 plus the difference in the filing fee.

(6) Issuing a subpoena, $5.

c. Upon the filing, entering, docketing, or recording of the following papers or documents by any party to any civil action in the Law or Chancery Divisions excluding Special Civil Part, the fee is as follows:

(1) Certification, recording assignment of judgment or release, issuing and recording executions, except as otherwise provided herein, $5.

(2) Affixing the seal of the Court, $10.

(3) Exemplification, including the affixing of the seal of the Court, $25.


(5) Recording of documents for which no fee is otherwise specified, and all other papers or services provided by the clerk, $5.

(6) Commissions on deposits for security for costs: 2% on $100 or less; 1 1/2% on the excess of $100.

(7) Commissions on paying out trust fund accounts, including all funds, moneys or other assets brought into and deposited in court: 2 1/2% on the first $100; 2% on the next $900; 1 1/2% on the excess of $1,000.

(8) Withdrawal of money deposited in court where the sum to be withdrawn is:

(A) less than $100, no fee;

(B) $100 or more but less than $1,000, $5;

(C) $1,000 or more, $10.

(9) Entering judgment on bond and warrant by attorney and issuance of one final process, or recording of judgment in the civil judgment and order docket, or satisfaction of judgment or other lien, $35.
(10) Docketing judgments or orders from other courts or divisions including the Special Civil Part, $35, but no fee shall be paid by any municipal court to docket a judgment of conviction and amount of assessment, restitution, fine, penalty or fee pursuant to 2C:46-1(a).

d. The first copy of any order, judgment, pleading or other paper, if provided at the disposition of the matter, shall be certified by the Clerk of the Superior Court, as the case may be, and supplied to the attorney or litigant, free of charge, if a copy is furnished to the clerk for certification.

e. The following fees shall be charged for bonds, bail and recognizances in civil actions only:

   (1) Recording all official bonds with acknowledgment and proof of their execution, $10;
   (2) Filing all papers related to recognizance, $30;
   (3) Filing discharge, attachment bond, $10;
   (4) Filing satisfaction of or order discharging filiation bond, $10;
   and
   (5) Recording or discharging sheriff’s bond, $10.

f. A court may award costs of suit to a prevailing party in accordance with Court Rule 4:42-8. Costs shall include those provided for by section 22B:1-2(e).

Source: For subsection a.:22A:2-6 and 22A:5-1; for subsection b(1) 22A:2-6; for subsection b.(2): 22A:2-7; for subsection b.(3): new; for subsection b.(4) 22A:2-7; for subsection b. (5) new; for subsection c.: 22A:2-6; 22A:2-7; 22A:2-19; 22A:2-20; 22A:2-29; 22A:4-12; for d.: 22A:2-1; 22A:2-20; 22A:2-27; for e. 22A:2-29; for f.: 22A:2-3 and 22A:2-8.

COMMENT

The word “proceeding” was eliminated in the first sentence of a. as redundant and potentially confusing. The language of the first sentence was modified since the original language, phrased in the negative, seemed to be a source of confusion.

The Chancery Division language from Sections 22A:2-12 and 22A:2-13 was consolidated in a. so that the Law Division and Chancery Division sections could be combined. It appears that continuing the practice of separate provisions for those two Divisions was more a historical artifact than a practical necessity, so they have been combined in this section. The fee for the filing of the first paper was raised to $250 for all first papers, not just divorce or dissolution of a civil union, to make the initial filing in most of the courts consistent. References to Special Civil Part and the Surrogate’s Court and the Tax Court were removed as they are dealt with in separate sections.

The filing fee for subsection a.(3) was raised at the suggestion of AOC and the language modified for clarity at AOC’s suggestion. The language from 22A:2-12 regarding the forwarding of $25 of the filing fee to the Clerk of the Superior Court was eliminated in this draft.

Subsection b.(2) was moved from the prior 22A:2-7 to this section on the recommendation of a reviewer. Subsection b.(3) is new. The filing fee for an order to show cause is proposed at $45, even though that exceeds the fee for a standard motion, since it has been suggested that an order to show cause is more labor-intensive for the court personnel than a typical motion. Subsection b.(4) is new. In subsection b.(5), the filing fee for the transfer of a matter from Special Civil Part to Law Division was proposed at $45. The fee is presently $15, and, since the litigant is required to pay the difference in the filing fee on transfer, it is not clear why $45 is required. In this draft, the fee was raised from $15 to $30 since it
involves a motion in the Law Division and the fee for motions is $30. It had been suggested that the fee for a
transfer should be applied in either case, although if the differential in the filing fee is not refunded to the
litigant upon transfer from the Law Division to the Special Civil Part, that would appear to be inequitable.
Subsection b.(5) includes the subpoena reference here, rather than in the later section dealing with fees for
actions generally taken post-disposition, which is where it previously appeared.

Subsections c.(1) – (5) are a reworking of the information initially included in subsections a. and
b. of the November 2008 draft at the recommendation of the AOC, which suggested that the fee structure
should more properly distinguish between those activities which do not involve the seal of the court or
bench time, and those that do.

22A:2-7(b) was eliminated as no longer necessary. In Subsection c.(9), the fee for entering a
judgment on the bond and warrant by an attorney was increased to match the fee set forth for what seems to
be the same thing in 22A:2-29 and to match the fee for docketing or recording of a judgment. The former
Section 22A:2-20 has been consolidated here as parts of subsections c.(7) – (10).

In subsections b. and c., Special Civil Part was expressly excluded to clarify that the provisions of
those sections, unless they specifically refer to Special Civil Part, do not apply to that Part.

Parts of the former 22A:4-12 were consolidated with this section and eliminated on the grounds
that it is no longer relevant. The original subsection d. was removed and relocated to the appellate section.

In subsection e., the initial sentence was changed to clarify that this applies only to civil
proceedings. The language pertaining to bonds, bail, and recognizances were formerly a part of Section
22A:2-29. This section was created as a part of the division of the former 2-29 into fees payable to the
Superior Court and fees payable to the County Clerk as a result of discussions with a sampling of County
Clerk’s offices. In this section, the fee for filing and entering a recognizance of civil bail was increased to
$30 to match the fee for filing and entering a recognizance set forth in Section 22A:2-29. The reference to
a filiation bond was removed as it was suggested by commenters that it was no longer used.

Subsection f. was 22A:2-3 and 22A:2-8. It has been replaced with reference to the Court Rules
and section 22B:1-2e. for the sake of simplicity and clarity.

22B:1-4. Fees in Special Civil Part of the Superior Court, Law Division and civil
actions in municipal court

a. In all civil actions and proceedings in the Special Civil Part of the Superior
Court, Law Division, the fees shall be:

(1) Filing of small claim or complaint in
tenancy, one defendant $25
Each additional defendant $5

(2) (A) Filing of complaint or other initial pleading
containing a counterclaim, cross-claim or third party
complaint in all other civil actions, whether commenced
without process or by summons, capias, replevin or
attachment where the amount
i) exceeds the small claims
monetary limit, one defendant $50
ii) does not exceed the small claims
monetary limit, one defendant $35
(B) Each additional defendant $5

Appendix D
(3) Filing of appearance or answer to a complaint or third party complaint in all matters except small claims $25

(4) Service of Process: The fees for service of shall be $7 or the rate set by the Administrative Director of the Courts, whichever is higher. The fee for service of process shall not exceed the postal rates for ordinary and certified mail, return receipt requested, and may include an administrative fee that shall not exceed $0.25 for each defendant served with process by mail. The total service of process fee shall be rounded upward to the nearest dollar. For the purposes of this paragraph, service of process shall be charged per defendant and means: (A) the simultaneous mailing by ordinary and certified mail, return receipt requested, to a defendant at the home address provided by the plaintiff; (B) the simultaneous mailing by ordinary and certified mail, return receipt requested, to a defendant at place of business or employment with postal instructions to deliver to addressee only; (C) the reservice of a defendant by mail; (D) the substituted service of process by the clerk upon the Chief Administrator of the New Jersey Motor Vehicle Commission in addition to the substituted service fee provided below; and (E) the service of a wage execution by mail to a federal agency.

(5) Reservice of summons or other original process by court officer, each defendant $20

(6) Substituted service of process by the clerk upon the Chief Administrator of the New Jersey Motor Vehicle Commission $20

(7) Jury of six persons $50

(8) Issuing warrant for possession in tenancy $15

(9) Issuing warrant to arrest, commitment or writ of capias ad respondendum, each defendant $15

(10) Issuing or filing writ of execution or an order in the nature of execution, writs of replevin and attachment issued subsequent to summons $15

(11) Advertising property under execution or any order $15

(12) Selling property under execution or any order $15

(13) Issuing exemplified copy of a document, including affixing the seal of the court:

(A) Two pages $25

(B) Each additional page $1

(14) Issuing a subpoena $5

b. Fees and costs for civil proceedings in municipal court shall be the same as those prescribed for similar services in the Special Civil Part.

Source: 22A:2-37.1; 22A:2-43; 22A:5-1.

COMMENT

Section 22A:2-43 and parts of section 22A:5-1 have been consolidated with this section. The distinction in the fee for the first defendant in an action and any subsequent defendant has been removed as unnecessary.

This section was modified to delete references to fees effective before and after five years from the effective date of amendments to the statute in 2003. The assumption is made that any changes to the statute as a result of this project would be effective after the time that the new fee structure was to be implemented,
so that language is included here as a.(4). Subsection a.(4) was modified again in 2009 to reflect the change in the law to address the problem of the sunsetting of the service by mail provisions and to reflect the fee of $7 in effect at the time of the draft of the final report. Subsection a.(13)(A) was increased to $25 at the recommendation of AOC since an exemplification involves bench time and, as a result, is a more costly process than a mere certification, in addition, the language was modified slightly so it tracks more closely the language applicable in the civil part generally. Subsection a.(14) was added since the general language applicable to the civil part now specifically excepts Special Civil Part and, unlike other items appearing in the civil part section, the subpoenas are issued by the Special Civil Part.

Mileage fees have been removed from the Title and replaced by a flat fee. Subsection c. was eliminated as inaccurate. Section 22A:4-12 and 22A:4-14 were eliminated as no longer applicable.

22B:1-5. Tax Court

a. The fees payable to the Tax Court are as follows:

(1) Unless otherwise herein provided, the filing fee for the first paper shall be $250 except for actions in the Small Claims Division. There is no filing fee charged for a counterclaim or responsive pleading filed by the taxing district.

(2) If a complaint or counterclaim in an action to review a real property tax assessment includes more than one separately assessed parcel of property in common ownership the first paper filing fee prescribed by subsection a.(1) shall be charged for the first separately assessed parcel of property included in the complaint and $50 shall be charged for each additional separately assessed parcel of property included in the complaint.

(3) If a complaint or counterclaim in an action to review a real property tax assessment includes more than one parcel of real property in common ownership separately assessed pursuant to the provisions of N.J.S. 46:8A-26 (Horizontal Property Act) or N.J.S. 46:8B-19 (Condominium Act), the filing fee for the first separately assessed parcel of property of the property owner shall be the first paper filing fee prescribed by subsection a.(1) and $50 for each additional separately assessed parcel of property of said property owner included in the complaint.

(4) If a complaint in an action to review a state tax, such as sales tax, gross income tax, corporation business tax or others includes more than one separate state tax, the filing fee shall be $200 for the first separate state tax and $50 for each additional state tax included in the complaint.

b. Proceedings in the Small Claims Division of the Tax Court:

(1) The fee for the filing of a complaint or counterclaim in the Small Claims Division is $35.

(2) If the court determines that the matter is not within the small claims jurisdiction or for other reasons should not be disposed of as a small claims case, the party filing the complaint shall be charged a fee in the amount of the difference between the fee for filing a first paper provided by subsection a.(1) and the small claims filing fee.
(3) If a complaint or counterclaim involves multiple causes of action and the matter is within the small claims jurisdiction the filing fee shall be $35 for the first state tax or separately assessed parcel of property and $10 for each additional state tax or separately assessed contiguous parcel of property having the same ownership included in the complaint.

(4) When properties are in the same ownership and part of the same master deed, if a complaint or counterclaim in an action to review a real property tax assessment includes more than one parcel of real property separately assessed pursuant to the provisions of N.J.S. 46:8A-26 (Horizontal Property Act) or N.J.S. 46:8B-19 (Condominium Act), the filing fee for the first separately assessed parcel of property of the property owner, if all of the parcels of the property owner are within the jurisdiction of the small claims division, shall be $35 for the first separately assessed parcel of property of the property owner and $10 for each additional separately assessed parcel of property of said property owner included in the complaint. When property has been assessed separately pursuant to the provisions of N.J.S. 46:8A-26 (Horizontal Property Act) or N.J.S. 46:8B-19 (Condominium Act), separately assessed properties that are not in common ownership may not be combined in one complaint or counterclaim.

(5) No fee shall be paid upon the filing of a complaint in the small claims jurisdiction in an action where the sole issue is eligibility for any homestead credit, rebate, or refund program administered by the Division of Taxation or a senior citizen's or veteran's exemption or deduction.

c. The filing fee for any papers not specified in this section shall be the same as that charged for filing that paper in the Law or Chancery Divisions of the Superior Court.

Source: Rule 8:12.

COMMENT
The language of this subsection was taken from the Court Rules and included here for the sake of consistency.

**Probate Proceedings**

**22B:2-1. Proceedings in the Probate Part of the Chancery Division**

The following fees shall be paid to the Surrogate of the county of venue for performing services in all probate proceedings in the Superior Court, Chancery Division, Probate Part, and to the Surrogate’s Court, as appropriate. Said fees shall constitute the entire fee from commencement to final disposition of the cause, unless provided otherwise in this section:

a. First paper:

   (1) Upon the filing of the first paper in a Probate Part action, the filing fee is the same as the initial filing by the plaintiff as prescribed by 22B:1-3a.

   (2) Upon the filing of an answer, answering affidavit or motion returnable on the return day, pursuant to Rule 4:67-4(a), the filing fee is the same as the initial filing for parties other than the plaintiff prescribed by 22B:1-3a; and
(3) Upon the filing of the first paper on an application for relief filed subsequent to the final judgment, $30.

b. Subsequent proceedings:
   (1) Adjournment or continuance $15
   (2) Issuing miscellaneous orders of Court, each page $5
   (3) Proceedings regarding appointment of guardian ad litem $25
   (4) Assignment of legacy or interest, per page plus $5 for county clerk certificate if necessary $10
   (5) Except for motions referenced in a.(2) above the fee for filing a motion is the same as prescribed for motions in the Law and Chancery Divisions of the Superior Court.
   (6) Services regarding assignment for benefit of creditors not including accounting $75
   (7) Minimum charge for all other papers in Chancery Division, Probate Part $5


COMMENT

Changes were made to the former 22A:2-30 based on comments received from individuals knowledgeable about the duties and responsibilities of Surrogates.

In subsection a., the fees were modified to make them equivalent to those paid in other Law or Chancery Division actions. The language has been revised since the earlier draft to replace the listed fee with language tying the fee to the fee imposed in the Law and Chancery Divisions. In subsection a.(1) a substantial block of the language was removed as unnecessary after discussions with several individuals from Surrogates Offices. In subsection a.(2) the language was modified at the request of the Surrogates so that it more closely reflected the practice and to make it less confusing. In subsections a.(1) and a.(2), the internal statutory reference was corrected to 22B:1-3a since it had incorrectly referred to another statutory section in the earlier draft.

The subsection b.(1) language charging a fee for an adjournment or continuance was first removed because several Surrogates Offices indicated that such a fee is not charged. That language has since been re-inserted at the request of COANJ. The Motion fee language was linked to the fee for motions in the Superior Court to insure that the fees remain consistent if the motion fee in the Superior Court changes. In subsection b.(4), the fee was changed from $5 to $10 to correct an error in the earlier draft. Subsection b.(5) was modified in an effort to avoid confusion.

22B:2-2. Proceedings in the Surrogate’s Court

The following fees are payable to the Surrogate for proceedings in the Surrogate’s court:

a. Accounting:

   (1) Auditing, stating, reporting and recording, microfilming or photostating, accounts of executors, administrators, guardians, trustees, assignees, but excluding advertising costs:

   (A) Up to and including $2,000 no additional fee
(B) From $2,001 to $10,000     $100
(C) From $10,001 to $30,000    $125
(D) From $30,001 to $65,000    $150
(E) From $65,001 to $200,000   3/10 of 1%,
but not less
than $300
(F) In estates exceeding $200,000 4/10 of 1%,
but not less
than $400

(2) For each page of accounting, in excess of one, $5

(3) In computing the amount of an estate to fix the fees of the surrogate for auditing and reporting the account, the balance from the prior account shall be excluded.

b. Letters of Administration:
   (1) General administration, including preparation of
application, bond, surety affidavits, necessary
recording, microfilming or photostatting, indexing, filing,
reporting to the Division of Taxation in the Department of the
Treasury and the Clerk of the Superior Court of original letters
including power of attorney, authorization to accept service of
process, and death certificate, $125
Other documents, per page $5
   (2) Exemplifying administration, $75
   (3) Certified copy of administration, $50
   (4) Affidavits of surviving spouse or next of kin where
the value of the real and personal assets of the estate does
not exceed $20,000 or $10,000, respectively, $5 per
$100 or
part; not
not in
excess of
$50

c. Administration ad prosequendum $50

d. Letters of Guardianship for a minor:
   (1) Granting letters of guardianship, acceptance of
guardianship and filing of power of attorney, $50
   (2) Filing affidavits of estates of minors where value of
real and personal estate does not exceed $5,000, per page, $5
   (3) Filing miscellaneous petitions and orders, per page, $5

e. Inventories: Filing, entering and recording, microfilming or
photostating, inventory, not exceeding one page, and affidavits of
appraisers and executor, $25
Each additional page, $5
For all services in appointment of appraisers $25

f. Payment of proceeds of judgment in favor of a minor: Fees payable on each withdrawal of proceeds of a judgment in favor of a minor that is on deposit with the surrogate, including petitions and orders provided and prepared by the surrogate, in lieu of bond, pursuant to 3B:15-16 and 3B:15-17 (in addition to fees payable under Letters of Guardianship):

(1) Up to and including $500, $10
(2) From $501 to and including $1,000, $20
(3) From $1,001 to and including $5,000, $30
(4) From $5,001 to and including $10,000, $40
(5) From $10,001 to and including $25,000, $50
(6) From $25,001 to and including $50,000, $60
(7) In excess of $50,000, $100

g. General Surrogate’s services: The fees for Surrogate’s services not otherwise provided for are as follows:

(1) Probate of a will of not more than two pages, with letters $100
Each additional page, $5
(2) Probate of a will of not more than two pages without letters, $50
Each additional page, $5
The services here exclude letters, surrogate's certificate and qualification of executor.
(3) Probate of each codicil, not exceeding one page, $25
Where codicil requires an additional witness, $5
(4) Reopening probate proceedings for qualification of executor or taking proof of extra witness, $25
(5) Admitting one witness in a probate proceedings, $0
Each additional witness, $5
(6) Recording and comparing, microfilming or photostatting, each additional page of will or codicil, $5
(7) Filing, entering, issuing and recording, microfilming or photostatting, proceedings in commission for deposition of foreign witness to a will or codicil, $35
(8) Producing plain extra copy of a will, per page, $3
(9) Producing certified extra copy of a will, per page, $5
(10) Producing certified copy of a will with proofs for New Jersey county, not exceeding two pages, including will and codicil, $50
Each additional page, $5
(11) Filing wills without probating (as where there are no assets), each page, $5
Cover letter stating no assets, $5
Death Certificate, $5
(12) Exemplifying a will for another state, not exceeding two pages, including will and codicil, plus cost of Certificate of
Secretary of State when required, $85
Each additional page, $5

(13) Recording, microfilming or photostatting, docketing, indexing, filing and reporting to the Division of Taxation in the Department of the Treasury an exemplified copy of will and probate proceedings from another state, per page, $5

(14) Recording, microfilming or photostatting, docketing, indexing and filing a certified copy of will with proofs from New Jersey, per page, $5

(15) Recording, microfilming or photostatting certified transcripts of wills admitted to probate and probate proceedings or letters of administration and administration proceedings granted by the Superior Court, per page, $5

(16) Acceptance of trustee and letters of trusteeship, including one certificate, $50

h. Miscellaneous Charges:

(1) Issuing or re-issuing short certificates, $5
(2) Issuing subpoenas, each, $5
(3) Authorization of process, $5
(4) Recording, microfilming or photostatting all papers not otherwise provided for, each page $5
(5) Making copies not otherwise provided for, each page $3
(6) Filing transcript of death certificate, $5
(7) Filing the power of attorney, per page $5

Plus cost of postage.

(8) Search fee, per estate $10
(9) Proceedings relative to appointment of a guardian ad litem, $25
(10) Renunciation, per person, filing, entering, and recording or photostatting, $5
(11) Caveat, filing or withdrawing, $25
(12) Combined refunding bond and release, per page, filing, entering, microfilming, and recording or photostatting, $5

Additional charge for county clerk's certificate, $5

(13) Release, per page $5

Additional charge for county clerk's certificate, $5

(14) Filing all papers not otherwise provided for, $5
(15) Photocopying of a two-page will, plain copy, $5

Each additional page, $3

(16) Service of Process by Surrogate under 3B:14-48 $25
(17) Processing a returned check, plus bank fee $20
(18) Duplicating or copying of information stored on such media as microfiches, digital tapes, high density disks, optically scanned and recorded materials or any other medium used to record or preserve records, shall be upon payment of the fee established by the Supreme Court pursuant to Court Rule 1:38-9.
i. When it appears that the estate of any testator, intestate, minor or ward, is less than $200, no fees shall be charged upon actions for probate of a will, granting administration or guardianship up to and including the letters issued and copies of such letters as well as the fees of filing and recording and with respect to an inventory.

j. When it appears by affidavit of persons applying for letters testamentary, of administration or of guardianship that the estate, real and personal, of any testator, intestate, minor or ward, who died while in the active military or naval service of the United States in time of war, or in time of emergency, or that such minor or ward is the child of a person who died while in the active military or naval service of the United States in time of war, or in time of emergency, no fees shall be charged upon actions for the probate of a will in those cases, where any part of the estate of the testator is bequeathed or devised to the surviving spouse, the father or mother, the brothers or sisters or any of the lineal descendants of the testator, granting of administration or guardianship up to and including the letters issued and copies of such letters.

k. All other fees not herein expressly prescribed payable to the Surrogate, other than for adoption, and all costs to a party in any action, motion or proceeding in the Probate Part shall be the same as allowed for similar services in the Law and Chancery Divisions of the Superior Court. All fees shall be used in the county in which they are collected.

l. Other papers or services: The minimum charge for all other papers or services not herein expressly prescribed by the surrogate, $5.


COMMENT

In subsection a.(1) the fees were initially modified in an effort to make them more consistent with other fees. Concerns were expressed regarding the level of New Jersey’s fees in this area, however, and there was not consensus on the propriety of modifying the fees, and they were returned to the levels reflected in the current statute. The inappropriately high fee in earlier drafts of subsection a.(1)(F) was simply the result of a math error. The reference to drawing judgment was removed as antiquated. Subsection a.(3) was originally modified to reference a prior “trust” account since the language of the existing language was not clear but individual commenters from Surrogates Offices advised that limiting it to trust accounts improperly excludes guardianships, executors, etc. so the word “trust” was removed. The original subsection a.(4) was removed because it was suggested that all accountings should pay the required fee and none of the individuals offering comments on this section had ever heard of a situation that was covered by this specific provision. Also in subsection a. the original reference to preparing notice of settlement of accounts and sending those notices to the newspaper was eliminated since it is no longer included in the Court Rules.

This Section previously contained language pertaining to commissions on deposits. After discussion with the Surrogates, that language was removed as no longer necessary. The basis for the subsection was no longer commonly known to the Surrogates and it appeared that it might date from the time when the Surrogates performed functions with regard to unclaimed property now performed by the State.

Limited changes have been made to subsection e. to this time to reflect informal comments received. Subsection d.(4) was changed to revert back to the current statutory language.
In subsections g., the fees pertaining to certification and exemplification of documents were returned to those reflected in the original statute. These fees differ from the fees imposed in the Law and Chancery Divisions for what appeared to be the same service and AOC recommended reducing them as disproportionately high. Additional information provided by the Surrogates, however, revealed that a certification or exemplification performed by a Surrogates office generally involves more lengthy documents and a more labor intensive process, including significant staff time, to locate and compile the pages (sometimes retained in different files and formats) to be certified or exemplified than are generally required in the Law or Chancery Divisions. Discussions with the Surrogates regarding the differences in the work required of the Surrogates offices from the work required of the Law and Chancery Divisions with regard to things like certification and exemplification resulted in a return of those fees to their current statutory levels. In addition, a discussion of the significant budgetary impacts associated with the reduction in copying fees, because of the hybrid nature of the Surrogates’ offices (they serve as parts of the Superior Court but their operations (facilities, salaries and benefits) are paid by the counties) led to the restoration of those fees to their original levels as well.

Changes were made to the fee schedule in subsection h. Subsection h.(1) was modified and h.(2) eliminated after discussion with individuals from Surrogates Offices. It was suggested that there should be no charge for validating short certificates since those certificates should be deemed valid. Subsection h.(3) was changed to significantly reduce the cost associated with the issuance of a subpoena to make that cost more in line with the cost imposed by the courts generally. It was suggested that the removal of original subsections (5), (6) and (8) was appropriate. Subsection h.(15) was revised to reflect a charge of $5 per renunciation since the renunciation by each individual requires the same amount of staff time and effort. Subsections h.(22) and (23) were reordered since the new subsection (23) is the only item without a specified cost. The existing language was initially modified to track OPRA and to incorporate language from Directives applicable to the surrogates that have been issued by the Administrative Director of the Courts. The OPRA statute was not specifically mentioned since it does not, by its terms, apply to the courts, but certain language was included since the goal of this revision was to rationalize the fees and achieve parity, where appropriate, with other similarly situated entities. Since there were objections to including the OPRA-type language, the subsection was again revised to reflect the change in the Court Rules which took effect on September 1, 2009 calling for the establishment of a fee schedule by our Supreme Court applicable to copies of records, including Surrogates’ records.

Subsection i. is new in this Revised Final Report. Initially removed as no longer relevant since the dollar amount had not been changed since 1953, this slightly revised language from 22A:2-31 has been reinserted in the Report. The Bergen County Surrogate’s Office advised that since January 1, 2009, the office acted in accordance with this statutory section in 30 estate matters. Staff was advised that a decedent who dies testate, regardless of the estate’s value, must have their will probated if necessary, at a minimum fee of $100. The issue also affects those who die intestate since a common situation involves cases in which there is no estate but the decedent’s medical records are being sought. Apparently, it is equally common to have a situation in which the decedent resided in a nursing home, or long term care facility and the facility maintained a personal needs account (PNA) for the individual while they were a resident patient. These accounts are used for such things as haircuts, toiletries and small incidentals. Generally, a PNA would not contain, nor would the facility want it to contain, a balance in excess of $100. Attempting to close this kind of an account becomes cost prohibitive if this statute is eliminated, causing many individuals to simply forfeit the remaining balance.

Subsection j. is new in this Revised Final Report. It is the current 22A:2-32, which had been removed as no longer relevant since the dollar amount had not been changed since 1953, but was reinserted with slightly revised language after comments from the Surrogates. The part of the language that represents more than a slight revision is the removal of the $1000 limit to qualify for free probate of the estate under the circumstances described in the subsection.

Section 22A:2-36 has also been consolidated with this section as l. Modest changes to some of the fees have been made simply to make the charges multiples of $5. Photocopying has been made $1 per page throughout. The fees for marking true copies and swearing of witnesses have been stricken as no longer commonly used.
22B:3-1. Fees in criminal, quasi-criminal and traffic proceedings.

a. In every criminal, quasi-criminal and traffic proceeding in municipal court, the court may impose a charge not exceeding $35 for court costs in any proceeding in the municipal courts. No charge, however, shall be made for the services of any salaried police officer of the State, County or Municipal Police.

b. In municipal court proceedings, the court shall impose court costs within the maximum limits authorized by this section, as follows:

(1) For every violation of any statute or ordinance $5
The court shall not suspend the collection of this court cost assessment. These court cost assessments shall be collected by the municipal court administrator for deposit into the Automated Traffic System Fund, created pursuant to 2B:12-30.

(2) For each fine, penalty and forfeiture imposed and collected under the authority of law for any violation of the provisions of Title 39 or any other motor vehicle or traffic violation in this State $1
The court shall not suspend the collection of this court cost assessment. These court cost assessments shall be collected by the municipal court administrator for deposit into the "Emergency Medical Technician Training Fund" established pursuant to 26:2K-54 et al.

(3) For every violation of any statute or ordinance, to fund the Statewide modernization of the Automated Traffic System $5
The court shall not suspend the collection of this court cost assessment. These court cost assessments shall be collected by the municipal court administrator for deposit into the Automated Traffic System Statewide Modernization Fund, established pursuant to 2B:12-30.1.

c. The first copy of any certificate of judgment, certified copy of a paper filed with the court, or copy of a public record filed with the court shall be provided at no additional charge to a party and shall be deemed included within the maximum allowable court costs authorized by subsection b. The provisions of this Title shall not prohibit the taxing of additional costs, when authorized by 39:5-39, for an additional:

(1) Certificate of judgment $5
(2) Certified copy of paper filed with the court as a public record, per page $5
Each additional page $1
(3) Copy of a public record filed with the court, each page $1

d. In addition to any fine imposed, when a supplemental notice is sent for failure to appear on a return date, the cost shall be $10 per notice, unless satisfactory evidence is presented to the court that the notice was not received.
e. The fees for any service provided by court officers shall be the same as that
paid to Special Civil Part officers for providing the service.

f. If defendant is found guilty of any offense, he shall pay the court costs, but if,
on appeal, the judgment is reversed, the costs shall be reimbursed to defendant. If
defendant is found not guilty, the costs shall be paid by the prosecutor, except when the
Chief Administrator of the New Jersey Motor Vehicle Commission, a peace officer, or a
police officer was the prosecutor.

g. Money received in accordance with this section by a municipal court or a court
with jurisdiction in one municipality shall, unless otherwise provided by law, be
accounted for by the court and paid to the municipal treasurer and to the officer
respectively within 30 days from its receipt.

Source: 22A:3-4; 2A:3-5.

COMMENT

These sections remain substantially unchanged. Modest changes to some of the fees have been
made simply to make the charges multiples of $5. The AOC has cautioned that even these modest changes
will have a significant impact as a result of the volume of cases heard in the municipal courts. The title was
changed to make it more accurate. Subsection a. was eliminated as covered by the Penalty Enforcement
Law.

Subsection b. was streamlined and some new language added at the recommendation of the AOC
to clarify that the court may, in the case of a nominal offense, impose court costs of less than $35. Subsection d. was modified to clarify the costs for documents. Subsection f. was eliminated as duplicative
of fees set forth elsewhere and a reference was included to those fees. Section 22A:3-5 has been
consolidated with this section.

Juror and witness fees

22B:4-1. Payment of juror fees

Every person serving as a grand or petit juror in a New Jersey court, other than a
person compensated pursuant to 2B:20-16, shall be paid $35 for each day's attendance at
the court.


COMMENT

Although this section of the statute was updated fairly recently, the current $5 per diem for jurors
would not even be sufficient to enable a juror to purchase a lunch for him or herself in or near most of the
courthouses in the State.

The changes in this section were made in response to Assembly bill 2125, which was introduced
in February of 2008 and which proposed an increase in compensation for jurors. This section also
addresses the problem posed by the fact that grand jurors serve on non-consecutive days (as do petit
jurors on trials that are carried) and thus would not qualify for increased compensation under the current
statutory scheme. $35 per day certainly represents a significant increase in the payment to jurors but it may
not make sense to pay a juror less for a day of jury service than is paid to a witness for an appearance.
A2125 increased the juror payment to $40 per day. This draft retains the $35/day already included in the
statute. A2125 also creates a conflict with 2B:20-16 that this draft avoids.
The report was revised after Union County Counsel brought to the attention of Staff a conflict between the language of the draft and N.J.S.A. 2B:10-3(c) which requires the State, not the County, to pay juror fees. Since the goal of the report language was simply to clarify, and not change, the source of the payment, the language regarding payment by the County was stricken to avoid unnecessary confusion.

Subsection b. was eliminated as inconsistent with the information contained in this Title and unnecessary since the Assignment Judges do not rely on this section of the statute for authority to act with regard to juror payment.

22B:4-2. Fees of witnesses

a. A witness required to attend or appear before: a court; a committee of the Legislature directed to conduct an investigation or inquiry; a commissioner or commissioners; a master; a referee; an arbitrator; an officer taking a deposition; or any proceeding issuing out of any court shall receive, from the party requiring the appearance:

(1) For attendance in the witness’s county of residence, $25 per day.

(2) For attendance in a county other than the witness’s county of residence, $45 per day.

b. The fees in subsection (a) shall not be paid either when the witness is attending the proceeding as a governmental agent and the hearing is before a legislative committee or a governmental agency is a party to the proceeding.


COMMENT

This section was initially proposed for elimination on relevance grounds. The reimbursement in the current statute is so low as to be nearly meaningless. The current per diem for witnesses would not likely even cover parking costs for the witness, let alone the cost of transportation to and from the facility at which they are required to appear. Informal comments, however, suggested that it is important to retain this section, but that the calculation of mileage for this purpose can be prohibitively complex, so the suggestion was made to incorporate a flat rate for witness compensation.

Subsection (b) is new. It replaces current statutory language which calls for the compensation of the secretary of State or a clerk who appears as a witness. The language was changed because it is not clear why an individual attending on behalf of the State, county or municipality who will be compensated by his or her department, should receive additional compensation from the party compelling attendance.

Court Officers

22B:5-1. Sheriff’s Officers and other officers; general fees

a. Sheriffs and other officers authorized to perform the following services shall receive the following:

(1) Serving every summons and complaint, attachment, or any other process issuing out of the Superior Court:

(A) For the first defendant or party on whom the process is served $40

(B) For every additional defendant, per person $35
(C) Spouses or civil union or domestic partners who are both named in process shall be considered one defendant, except when living separately.

(2) Serving capias ad respondendum, capias ad satisfaciendum, warrant of commitment, or writ of ne exeat $65
(3) Serving a single execution against goods or lands and making an inventory and return $65
A mileage fee of $15 may be charged for each additional levy on the same writ.
(4) Returning a writ to court $20
(5) Executing a writ of: possession and return; attachment; sequestration; or replevin issued out of any court $65
A mileage fee of $15 may be charged for each additional attempt on the same writ.
(6) Rescheduling the execution of a writ of possession $15
(7) All services of the sheriff or other officer pursuant to a claim of exemption on execution or other civil process for seizure of property, including the three appraisers who shall be public employees $20
(8) Special request charges, including requests for service of information subpoenas, service of documents at unusual hours, service of turn-over orders, and other items not listed elsewhere in this Title $15
(9) Miscellaneous charges:
   (A) Producing a plain copy, per page $1
   (B) Producing a certified copy, per page $5
   (C) Copies, per page, self service actual cost
   (D) Processing a returned check, plus bank fee $20
   (E) Service by certified mail, per item mailed, the fee shall be the same as the fee set by the Administrative Office of the Courts for the service of process in Special Civil Part.

b. If a sheriff’s officer makes three or more good faith attempts to serve a document and is unable to do so through no fault of the officer, the officer may charge a single $15 fee to offset the miles traveled during the attempts but may not retain the entire service fee and shall return the balance of the fee to the party who provided it. If a document is required to be re-served for any reason, the party seeking re-service shall again pay the entire service fee.

c. The sheriff shall be entitled to retain 5% out of the total amount of fees collected on a forfeited recognizance, whether before or after execution, or from amercements, or from fines and costs on conviction, on indictment or otherwise, whether these fees are payable to the State or to the County treasurer.

d. When a duly authorized ethics committee appointed by the Supreme Court, requires the service of a process or subpoena issued pursuant to 22A:2-4, no fee shall be required for making such service.
e. If more than one document involving the same case is served on the same individual at the same time, only one fee, namely the highest fee applicable to any of the documents, may be charged.

Source: 22A:4-8; 22A:4-9; 22A:4-10.

COMMENT

This section was originally the consolidation of several sections, which were then divided into two sections, a general section (this one) and a section pertaining to execution sales (below). The fees in this section have been modified, as in other sections, so that they are multiples of $5 or $10.

In addition to the rounding of the numbers, the certain of the dollar amounts were modified to include what would otherwise have been a separate mileage fee since the mileage section was deleted.

Even after sheriff’s officers agreed that imposing a flat fee for mileage was a reasonable option, there were outstanding issues and questions, including those pertaining to the costs for re-service, and for multiple attempts at service, etc. The determination was made that since the flat fee approach was akin to payment for providing a service, rather than simply driving a certain number of miles, the mileage fee would be added to the charge for providing each service that would otherwise require a payment for mileage, eliminating the need for a separate mileage section.

It was suggested by Sheriff’s officers that the language in the original a.(1)(A) regarding the service of a summons specifically referring to matrimonial/dissolution actions was confusing because it appeared to imply that the fee did not apply to all actions. The confusing language was removed.

Comments from Sheriff’s officers suggested the deletion of old subsections a.(3), (7), (8) and (9) as obsolete. Old subsection (10) was later removed from the draft as obsolete as well since the Sheriff’s questioned did not recall using the provision and it was not clear what it referred to. Subsection a.(4) had been modified to remove the reference to the inventory and return by sheriff’s officers since the process, and the provision of a dollar to each of three appraisers, is clearly a historic relic. There is not, however, any process that may be readily substituted for the requirement that the sheriff’s officers perform this function and, as a result, it has been retained. Subsection a.(7) has been returned to the statute for the same reason. New language was added to subsections a.(3) and a.(5) to address the fact that writs of execution are valid for two years and an attorney may, on a single writ, request that a sheriff’s officer perform a bank levy, a personal property levy, rents due, levy, etc. If that is the case, then the additional mileage fee was added to defray some of the expenses incurred by the sheriff’s officer. Similarly, sheriff’s officers are sometimes requested to levy on multiple banks located within the county, and the additional mileage fee is added to defray some of the expenses incurred during the travel from one location to the next. A new subsection a.(6) was added, similar to the language in the execution section pertaining to the rescheduling of an execution sale, to reflect the fact that when an eviction has to be rescheduled, the sheriff’s officer needs to set a new date, print new service orders, post the new sale information on the premises and send a confirming letter to the attorneys involved in the case. Subsections a.(8) and (9) were inserted at the request of preliminary informal comments received from Sheriff’s officers and a.(9) was modified after the last draft to include a provision regarding self-service copies. The language pertaining to self-service copies was revised to remove a charge of $0.25 per page and replace it with the language “actual cost” to reflect the case law determinations made in the Law Division which determinations are presently pending on appeal. Further revision may be appropriate after this issue has been finally determined by the Court since there are conflicting decisions arising out of cases throughout the State.

Subsection b. is new. It is included to address situations in which a sheriff’s officer acts in good faith in an effort to serve documents but is unable to do so through no fault of the officer and situations in which new attempts at service are requested by a party. The Sheriff’s objected to the language in the first sentence of subsection b., indicating that they routinely retain both the fee for service and the mileage fee whether the documents are served or not, noting that they sometimes do more work when the documents are not able to be served. The Commission considered the issue and declined to change the language contained in the report. Subsection e. is new, included after a review of some of the statutes in other states.
Increases of various fees were proposed as a result of the time since the last increase but such action was deemed beyond the scope of this project.

22B:5-2. Fees payable on execution sales

a. The sheriff shall be entitled to the following fees on execution sales:

   (1) the minimum fee for an execution sale $50
       (A) on all sums not exceeding $5,000 6%
       (B) on all sums exceeding $5,000 4% on excess

   (2) Making statement of execution, sales and execution fees $10
   (3) Advertising the property for sale $20
   (4) Posting property for sale $20
   (5) For the crier of the venue, when the sheriff proceeds to sell, per day the crier shall be actually employed in such sale $5
   (6) Every adjournment of a sale $30
   (7) Drawing and making each deed to a purchaser of real property $75
   (8) Drawing and making a bill of sale to the purchaser of personal property, when required or demanded $20
   (9) On an execution against wages, commissions, salaries and monies collected to satisfy the writ, including bank levies, the sheriff shall charge the same percentage fees on all sums collected as the percentage fees applicable in cases of execution sales.
   (10) When the execution is settled without actual sale, including cases in which the matter is resolved with the plaintiff, the officer shall receive one-half of the amount allowed in case of sale.

b. When more than one writ of execution is issued by the Superior Court on the same judgment, each sheriff to whom the execution is directed and delivered shall be entitled to collect and receive from the defendant named in the writ of execution the fees allowed by law for making a levy and return and statement thereon, or for such other services as may be actually performed by that sheriff. The sheriff who collects the amount named in the execution or any part thereof, shall be entitled to the legal percentage upon whatever amount may be so collected by that sheriff. If a judgment is settled between the parties and the amount due thereon is not collected by either sheriff, the percentage on the amount collected which would be due the sheriff if only one execution had been issued shall be equally divided among the several sheriffs who received executions.

c. The sheriff shall file a taxed bill of costs with the clerk of the court that issued the execution, within such time as the court shall direct, or forfeit all fees. If a sheriff charges for services not performed, or not allowed by law, or takes greater fees than is allowed by law, the sheriff shall be liable for the damages sustained by the aggrieved party, including a penalty of $30, which shall be recovered in a summary proceeding.

Source: 22A:4-8.
COMMENT

This section was originally the consolidation of several sections, which were then divided into two sections, a general section (above) and a section pertaining to execution sales (this section).

Comments from Sheriff’s officers indicated that there are no deputy sheriffs and that the term should be stricken from a.(3). The commenters also raised the issue of adjournments, indicating that while only one adjournment is permitted, the reality is that there are sometimes multiple adjournments (supported by at least one decision by the Court). Sheriff’s offices that currently charge for each adjournment would like to continue to do so. Subsections a.(9) and (10) were modified based on language proposed by COANJ.

22B:5-3. Compensation of Special Civil Part Officers

a. Unless otherwise specified, the serving officer shall receive $20 for service of any summons, notice, third party complaint, subpoena, writ or court order for each party on whom the document is served. The provisions of this section shall not apply to cases on behalf of the State where the officer serving the document is paid a salary or per diem.

b. If a judgment is vacated for any reason after a court officer has made a levy, and subsequently the judgment is reinstated or the case is settled, the fee for the court officer shall again be taxed in the costs and collected on payment of the judgment or settlement amount.

c. The Clerk of the Special Civil Part shall pay to the officers designated by the Assignment Judge to serve process as follows:

   (1) Warrant to arrest, capias, or commitment, for each defendant served $30
   (2) Serving writ and summons in replevin, taking bond and any inventory, one defendant $25
       Each additional defendant $20
   (3) Serving warrant for possession in tenancy $25

d. The Clerk of the Special Civil Part shall pay to officers designated by the Assignment Judge to serve wage executions on a federal agency an amount equal to the established fee for each wage execution served.

e. If a Special Civil Part Officer makes three or more good faith attempts to serve a document and is unable to do so through no fault of the officer, the officer may charge a single $15 fee to offset the miles traveled during the attempts but may not retain the entire service fee. If a document is required to be re-served, for any reason, the party seeking re-service is again required to pay the service fee.

f. If more than one document involving the same case is served on the same individual at the same time, only one fee (the highest fee applicable to the service of any of the documents) may be charged.
g. For each execution of a warrant for possession in tenancy, the plaintiff shall pay directly to the Special Civil Part Officer an all-inclusive fee of $65. No other fee shall be charged or collected by the officer.

h. The following fees for officers of the Special Civil Part shall be taxed in the costs and collected on execution, writ of attachment or any order amounting to an execution on a final judgment, or on a valid and subsisting levy of an execution or attachment that may be the effective cause in producing payment or settlement of a judgment or attachment:

(1) For advertising property under execution or any order $10
(2) For selling property under execution or any order $10
(3) On every dollar collected on execution, writ of attachment, or any order, $0.10


COMMENT

Subsection a. consolidates the original Section 22A:1-5 with 22A:1-6 since it was not clear why there should be a difference in the compensation for service of writs and subpoenas. In addition, the rate of compensation was changed from compensation by mile, to a flat fee compensation which fee was calculated based on a review of the statutory mileage award and the service fee (in the current statute, the mileage award is $0.04/mile and the service fee is $.035).

In addition to the rounding of the numbers, the certain of the dollar amounts were modified to include what would otherwise have been a separate mileage fee since the mileage section was deleted.

Subsections b.-d. are from 22A:2-37.2. Language duplicating that set forth in other sections of the statute was removed. Any service fees different from the $5 set forth in a. are included in this subsection.

The first sentence of subsection e. is new, and is included to match a similar provision was included in the section pertaining to fees that may be charged by sheriff’s officers. The second sentence is from 22A:2-37.2.

Subsection f. is new.

Subsection g. is new. It was proposed by AOC, which recommendation was supported by the Report of the Conference of Assignment Judges’ Subcommittee on Special Civil Part Officer Fee for Evictions. Currently, the statute imposes a fee of $15 plus mileage for a warrant of possession in a tenancy action and $10 plus mileage is paid to the Special Civil Part officer but Administrative Directive #12-80 allows the officers to charge additional amounts for additional services pertaining to eviction with the agreement of the landlord and subject to limits set by the Assignment Judge. This has resulted in a significant disparity in the amounts charged from county to county, ranging from $35 to $85. The new language adds a $50 fee, plus $15 to cover mileage under the initially proposed flat fee mileage rate, for a total of $65 that will be uniform throughout the State.

County and Municipal Clerk Fees

22B:6-1. Fees payable to the County Clerk

The following fees are payable to County clerks and registrars of deeds and mortgages:
a. Recording of documents pertaining to real property generally:

(1) For recording any instrument:
   (A) First page                      $30
   (B) Each additional page or its part $10
   (C) Each rider, insertion, addition, or any map, plat or sketch filed or recorded pursuant to 48: 3-17.3, section 2(c) $10

(2) For entering a marginal notation                        $10

(3) For filing a lis pendens in a foreclosure action:
   (A) First page                      $30
   (B) Each additional page or its part $10
   (C) Notation                        $10

(4) For preparing and transmitting to the assessor, collector, or other custodian of the assessment map of any taxing district, the abstract of an instrument evidencing title to realty                        $10

(5) For the cancellation of any mortgage or tax sale certificate
   (A) Each additional volume and page $20

(6) For filing and recording notice of federal tax lien or other federal lien or certificate discharging such lien                      $25

(7) For filing a notice of settlement                         $20

(8) For filing each map, plat, plan or chart (except when presented by the State or its agencies or filed pursuant to 48:3-17.3(c) $55

(9) For indexing any recorded instrument in excess of 5 parties, per each name in excess of 5                        $6

(10) For recording tax sale certificate, lien, deed, or related instrument by a municipality                        $10

(11) For disclaimers                          $15

(12) For reimbursement agreements               No fee

(13) Construction lien:
   (A) Filing construction lien                  $15
   (B) Filing notice of unpaid balance, discharge $15
   (C) Notation                                       $10
   (D) Bond                                           $25

(14) Physician or hospital liens:
   (A) Filing each notice of physician's lien                  $15
   (B) Entering upon the record the discharge of a physician's lien $15
   (C) Filing each hospital lien claim                      $15
   (D) Discharge of hospital lien                         $15

b. Recording of documents not pertaining to real property, generally:

(1) For recording veteran's discharge papers                      No fee

(2) Certified copy of veteran's discharge                      No fee

(3) Recording firefighter’s certificate                        No fee

(4) Registering physician                                      $25

(5) Nonbusiness corporation, recording:
   (A) Certificates of incorporation of churches,
religious societies and congregations $25
   (B) Amendments to certificates of incorporation
of churches, religious societies and congregations, $25
(6) Bank merger agreements, recording:
   (A) First page $25
   (B) Each additional page $5
   (C) Certificates, each $5
(7) Tradenames, firms, partnerships, filing:
   (A) Certificate of name, (see 56:1-1 et seq.) $50
   (B) Amendment $50
   (C) Certificate of dissolution of tradename
      (56:1-6 et seq.) $25
   (D) Partnership agreement (see 42:1-1 et seq.) $50
(8) Recording Inheritance Tax Waiver $15

c. Commissions and oaths:
   (1) Administering oaths to notaries public and
       commissioners of deeds $15
   (2) Issuing County Clerk’s certificate $5
   (3) Issuing certificate of the commission and qualification
       of notary public for filing with other county clerks $15
   (4) Filing certificate of the commission and qualification
       of notary public with County Clerk of county other than
       where notary has qualified $15

d. Miscellaneous charges:
   (1) Copies of all papers, per page, by Clerk $2
   (2) Copies, per page, self service actual cost
   (3) Certification any instrument $10
   (Plus $2 per page of instrument)
   (5) Processing returned check, $20 plus bank fee

Source: 22A:2-7; 22A:2-29; 22A:4-4.1.

COMMENT
The fee language from 22A:4-4.1 was consolidated. The fee language from Section 22A:2-29 was imported. In b., charges for comparing and making copies, typing and comparing photostats, and marking as a true copy were eliminated as obsolete. Parts of the former 22A:4-12 are included here.

A case recently decided by our Supreme Court, Burnett v. County of Bergen, --- N.J. ---, 2009 WL 1107899 (2009), acknowledged that there were aspect of the relevant law that favored the release of realty records without redaction of the Social Security numbers contained therein. The Court determined, however, that the records did not require SSNs and that the fact that SSNs may be available at the Clerk’s office does not eliminate a person’s expectation of privacy. The Court further determined that the relevant case law supported the redaction of SSNs from the realty records before provision of those records to the bulk requester, and that the cost of redaction of Social Security numbers could be imposed on the commercial bulk requester, which had sought eight million pages of records spanning 22 years. The Supreme Court specifically stated that the determination in Burnett was limited to “the unique facts” of that case. As a result, no language regarding the Court’s decision has been included in the statute.
Old Subsection a.(2) was eliminated as outdated after preliminary discussions with County Clerk’s Offices. Old Subsection a.(3) was modified since the charge for any marginal notation is $10 and it was suggested that listing some of the kinds of marginal notations increased the potential for confusion. Subsection a.(3) was revised to more accurately reflect the costs associated with a lis pendens in a foreclosure action and to clarify that the costs associated with a foreclosure lis pendens differ from that filed in a non-foreclosure action (in which the standard recording fee is charged). Other subsections in a. were removed as unnecessary since they referred specifically to kinds of marginal notation or recording that were sufficiently addressed by the general language pertaining to recording and marginal notations. (See, old a.(6), (7), (9), (13) and (16) for example). In subsection a.(5) the reference to tax sale certificates was added to reflect the practice although no such provision currently exists in the law. The reference to additional volumes and pages in subsection a.(5) was added to cover situations in which multiple mortgages were recorded and then must be cancelled. Subsection a.(9) was changed back to the amount listed in the current statute. Subsection a.(13) was modified to reflect the fact that the County Clerk’s Office does not issue a NUB, it files them and to update the change for a notation to match the charge for notations in all other circumstances. It was suggested that the provisions of old subsection a. (21) are obsolete and have been since the Construction Lien Law was enacted.

Old subsection b.(1) was eliminated as superfluous. Subsection b.(3) was changed to reflect the fact that the County Clerks do not exemplify documents, they certify them. And the per page fee was reinstated because, without it, an individual could obtain a certified document that was hundreds of pages long for the fee of $10 even though the County Clerk’s Office is required to provide the copies for certified documents. Subsections b.(3) and (5) were added to clarify fees currently charged.

Old subsection c.(1) was removed because it was suggested that since the County Clerks do not (except as otherwise stated) record documents that does not pertain to real property, a provision such as this one is confusing because it makes it appear as though the Clerk must record documents that individuals prepare relating to vehicles and other items/issues that do not involve not real property. Old subsections c.(9) through (18) were removed as apparently obsolete. The language of subsection c.(8) was streamlined.

The language in subsection d.(2) was revised as a result of preliminary discussions with representatives from County Clerk’s offices. The language pertaining to self-service copies was revised to remove a charge of $0.25 per page and replace it with the language “actual cost” to reflect the case law determinations made in the Law Division which determinations are presently pending on appeal. Further revision may be appropriate after this issue has been finally determined by the Court since there are conflicting decisions arising out of cases throughout the State. The miscellaneous charges were moved to the end of the section.

Modest changes to some of the fees have been made simply to make the charges multiples of $5. Photocopying has been made $1 per page throughout. The fees for marking true copies have been stricken as no longer commonly used. Some fees in this section were modified to make them more consistent with other fees in this and other sections of the statute. The changes are generally minor. Some limited language has been removed from this section based on the comments received from the County Clerks. Language calling for a fee of $3 per day for the County Clerk to attend Court sessions was proposed for removal as no longer relevant. Reference to making copies and comparing them was removed, as was the fee of $2 associated with that task. The fee associated with issuing a nonalcoholic beverage ID card was eliminated as it appears that these cards are no longer issued by the County Clerks.

22B:6-2. Fees payable to the municipal clerk for mechanic lien services

The following fees are payable to the Municipal clerk for mechanics lien services:

- a. Filing, indexing and recording mechanic's lien claim $10
- b. Recording, filing and noting on the record the discharge, release or satisfaction of a mechanic's lien claim $10
- c. Extension of lien claim $5
d. Filing statement in mechanic's lien proceeding $10

e. Filing, recording and indexing mechanic's notice of intention $5

f. Filing a court order to discharge notice of intention and noting the discharge on the record $15

g. Filing, recording and indexing stop notice $5

h. Filing a certificate discharging a stop notice and noting the discharge on the record $5

i. Filing a court order discharging a stop notice and noting the discharge on the record $10

j. Filing a certificate discharging mechanic's notice of intention and noting the discharge on the record $5

k. Filing certificate from court of commencement of suit $5

l. Filing a court order amending a mechanic's notice of intention and noting the discharge on the record $10

Source: 22A:2-29.

COMMENT

Part of the fee language from Section 22A:2-29 was imported and included here since the County Clerks advised that they no longer record these documents.

Fees of Certain State Officers

22B:7-1. Fees of State Treasurer

The fees for the enumerated services by the State Treasurer are as follows:

a. Filing an original business certificate for which no other fee is fixed by statute or regulation, $125.

b. Filing a change or amendment to a previously filed document for which no other fee is fixed by statute or regulation, $75.

c. Issuing a certificate or filing any other document for which no other fee is fixed by statute or regulation, $25. This subsection shall not apply to:

(1) Certificates of appointments for gubernatorial appointees;

(2) Documents filed by public bodies under the "Open Public Meetings Act," N.J.S. 10:4-6 et seq.;

(3) Financial disclosures filed by State officials;

(4) Oaths of office;

(5) Resignation of office holders;

(6) Documents filed by other State government entities indexed in the department's miscellaneous file.

d. Certifying or exemplifying a document on file, $25.

e. Certifying or exemplifying a signature on file, including the issuance of a certificate for proving a document outside the United States, also known as an apostille, $25.
f. Filing a certified copy of an order of change of name, $50.

  g. Producing a paper copy of any document on file, $1 per page. If a roll of microfilm images is requested, the State Treasurer shall collect a fee of $1 for each image on the microfilm roll. If a microfiche copy of a microfiche is requested, $5.

  h. Filing a proof of publication, $10.

Source: 22A:4-1a.

COMMENT

This section remains largely unchanged, although the language of subsection e. was modified to make the fee for all apostilles the same. No further change of the substance is contemplated. Subsection a. was renumbered for ease of reference. 22A:4-2 was removed as no longer relevant. The number identifying the statutory source section was corrected in this report.

22B:7-2. Commissioner of Banking and Insurance

  a. The fee payable to the Commissioner of Banking and Insurance is $5 for accepting service of process as the attorney for:

(1) a foreign insurance company or association;

(2) a banking, saving, trust, guaranty, safe deposit, indemnity, mortgage, investment, or building and loan corporation or association organized under the laws of any other State or of any foreign government;

(3) a foreign fraternal beneficiary association;

(4) any person, co-partnership, association or corporation engaged in the business of making small loans; and

(5) a foreign building and loan association.

  b. The plaintiff in an action shall be entitled to recover the amount of the service fee as part of the taxable costs if the plaintiff prevails in the action.

Source: 22A:4-3.

COMMENT

This section remains unchanged in substance but has been streamlined. Subsection lettering and numbering was added for ease of reference. If this section is still relevant, then it may be appropriate to update the fees.

Time of collection of fees

22B:8-1. Collection of fees in advance; deposits; accounts

  a. Surrogates, registers of deeds and mortgages, county clerks, clerks of courts, sheriffs and the Secretary of State may exact in advance the fees and costs for any service provided.

  b. For convenience, the officers listed above may receive reasonable deposits in advance to meet the fees and costs of persons who may desire such services, except that sheriffs and the Clerk of the Superior Court shall be required so to do. Such officers shall account to depositors at least once in 4 months for the sums deposited, except that the
Clerk of the Supreme Court, the Clerk of the Superior Court, sheriffs, and the Secretary of State shall so account at least annually.

c. The Secretary of State shall provide for the establishment of accounts for persons making application therefor, under such terms and conditions as may be fixed by the Secretary of State.

d. Whenever any surrogate, register of deeds and mortgages, county clerk or sheriff shall be requested by the State or any of its agencies to file, enter and docket, record, make a copy, search or perform any other service in their respective offices for which costs, fees or compensation is allowed, such officer shall perform the service requested without exacting payment in advance of the lawful fees but such officer shall render to the State, or the agency thereof making such request, a monthly statement of all such fees due and payable. No officer shall become personally liable to his or her county for the payment of such fees and costs until they shall have been actually paid to the officer.

e. The Secretary of State is authorized to establish reasonable fees for the specialized research, reference, and reproduction services provided by the State Archives, Division of Archives and Records Management in the Department of State, involving permanent historical documents in any format or medium. Such fees shall be established pursuant to the provisions of the Administrative Procedure Act, and shall reflect the actual costs of the services, including labor and overhead. All fees collected by the State Archives for such services shall be paid into the existing nonlapsing "Archives User Fees Account" administered by the Division of Archives and Records Management.


COMMENT

This section consolidates three former sections; all remain substantially unchanged, and no change of the substance is contemplated. Subsection lettering was added for ease of reference. Comments by Sheriff’s officers requested a modification in subsection b. to reflect that they are required to account to depositors only upon the depositor’s request.

Responsibility for Fees Collected

22B:9-1. Accounting for fees by Clerk of Supreme Court and Clerk of Superior Court

a. Except as otherwise provided by statute, fees, costs, allowances, percentages and other perquisites which the Clerk of the Supreme Court, the Clerk of the Superior Court, and their office assistants are allowed by law to charge and receive for official acts or services they may render, shall be for the sole use of the State as public money, to be regularly accounted for and paid over as hereinafter set forth.

b. The Clerk of the Supreme Court and the Clerk of the Superior Court shall render a full and itemized statement of account and return to the Director of the Division of Budget and Accounting of all such sums received by them or their assistants and of all sums which may have been charged or taxed, or which may have accrued or become payable for services during the month preceding the making of such statement. The
statement of account shall be made under oath in such form as the Director shall specify, and shall be filed in his office to be audited by him and kept as a public record.

c. All such fees, costs, allowances, percentages and other perquisites shall be paid to the State Treasurer on or before the tenth day of each month, and whether collected or not, such officers shall be personally liable for the payment.

d. The penalty for each day's neglect of any such officer in rendering his account or in paying over such money to the State Treasurer shall be $100, to be recovered in the name of the State in a civil action in the Superior Court, in the proceeding in lieu of prerogative writ against the clerks.


COMMENT

This section remains substantially unchanged. The language requiring that action be taken on the 10th of the month was suggested to be a holdover from the days before electronic transfers of funds and was eliminated on that basis. No change of the substance is contemplated. Subsections were numbered for ease of reference.

22B:9-2. Disposition of fees of county officers

a. All fees, costs, allowances, percentages and other perquisites of whatever kind which surrogates, county clerks in their several capacities, registers of deeds and mortgages, and sheriffs or persons employed in their offices are entitled to charge and receive for any official acts or services they may render shall be for the sole use of the county and shall be accounted for regularly to the county treasurer; however, such monies shall be utilized to increase the salaries of surrogates, county clerks, registers of deeds and mortgages and sheriffs, except as provided in 22A:4-8.1, 22A:4-17.1 and 22A:4-17.2.

b. Such accounting shall be made on or before the fifteenth day of each month on form blanks supplied by the county treasurer. The statement of account shall clearly set forth all sums charged or taxed or which shall have accrued or become payable during the preceding month. Such statements shall be made under oath and filed in the office of the county treasurer as public records.

c. Such statements when received by the county treasurer shall be forthwith audited by the county auditor or other proper officer.

d. On or before the twentieth day of each month surrogates, county clerks, registers of deeds and mortgages, and sheriffs shall pay over the amount of such fees and moneys to the county treasurer and such officers shall be personally liable to the county for such fees and moneys.

e. The penalty for each day's neglect to file the required statement of account or to pay over such moneys shall be $100 to be recovered in the name of the board of chosen freeholders of the county in a civil action in the Superior Court, and said officers may also be proceeded against by proceeding in lieu of prerogative writ.

f. (1) In addition to the fees authorized in N.J.S. 22A:4-4.1, and except as provided in paragraph (2) of this subsection, upon resolution or ordinance of the county governing body, as appropriate, a surcharge of three dollars shall be
charged for each document recorded, which will be in addition to any other charge allowed by law. The county treasurer shall deposit the surcharges so collected into a fund that shall be used by the county to accomplish the purposes of N.J.S. 52:27D-287a et al. This fund shall be known as the “Homelessness Housing Trust Fund.” Five percent of the fund may be used annually by the county for administrative costs related to administration of the fund and the grant program established pursuant to N.J.S. 52:27D-287a et al., and the remainder only for homelessness housing programs as described in N.J.S. 52:27D-287a et al.

(2) The surcharge imposed in this section does not apply to assignments or substitutions of previously recorded deeds of trust mortgages.

Source: 22A:4-17.

COMMENT

This section remains substantially unchanged, and no change of the substance is contemplated. Subsections were numbered for ease of reference.

The language was modified after the issuance of a Final Report to include subsection f., which reflects a change in the law enacted in September 2009 and makes a correction to that section. A commenter suggested that the words “substitutions” and “deeds of trust” were likely included in New Jersey’s current statute as a result of an oversight on the part of the Legislature since New Jersey does not have deeds of trust. This was confirmed by the County Clerks, who also indicated that including the term “substitutions” was unnecessarily confusing. As a result, the language was modified as shown with underlining and strikeout as shown above.

22B:9-3. County treasurer responsible for certain fees received by or deposited with the county sheriff

a. The county treasurer shall be responsible for all fees received by or deposited with the county sheriff pursuant to 22A:4-8. The county sheriff shall account to the county treasurer for all these fees.

b. The county treasurer shall deposit into a trust fund dedicated to the sheriff's office $2 of each fee over the amount of $3 received for a service enumerated in 22A:4-8. Such sums shall be deposited within 10 days of receipt by the county treasurer. Monies in the trust fund shall be used to upgrade and modernize the services provided by their offices. As used in this section, "to upgrade and modernize the services" shall not include the costs associated with employing personnel and shall not include offset of existing salary or new positions. The monies in the trust fund shall not be used for budgetary reduction by the counties.

c. Notwithstanding any provision of law to the contrary, monies received by a county sheriff attributable solely to the amount of fee increases for services enumerated in 22A:4-8 pursuant to the amendments set forth in section 5 of P.L.2001, c.370, that exceed in any year the amount by which the annual minimum salary of the sheriff, fixed pursuant to 40A:9-104, exceeds the amount of the county sheriff's salary in effect on November 1, 2000, shall be used for budgetary reduction by the county and shall be reflected as a county tax levy reduction.

COMMENT

This section remains unchanged, and no change of the substance is contemplated. The number identifying the statutory source section was corrected in this report.

22B:9-4. Return of portion of fees to surrogate, county clerk, or register of deeds and mortgages; use

a. The county treasurer shall return to the county clerk or the register of deeds and mortgages $2 of each fee received for the recording, filing or canceling of a document in the office of the county clerk or register of deeds and mortgages. Such sums shall be returned within 10 days of receipt of the fee by the county treasurer.

b. Monies received by the county clerks or registers of deeds and mortgages pursuant to the provisions of subsection a. shall be used to upgrade and modernize the services provided by their offices.

c. The provisions of subsection a. shall not apply to fees received from municipalities for recording, filing or canceling documents.

d. Notwithstanding any provision of law to the contrary, monies received by a county clerk attributable solely to the amount of fee increases for services enumerated in 22A:2-29 pursuant to the amendments set forth in section 2 of P.L.2001, c.370 and enumerated in 22A:4-4.1 pursuant to the amendments set forth in section 4 of P.L.2001, c.370, that exceed in any year the amount by which the annual minimum salary of the county clerk fixed pursuant to 40A:9-76 exceeds the amount of the county clerk's salary in effect on November 1, 2000, shall be used for budgetary reduction by the county and shall be reflected as a county tax levy reduction.

e. Notwithstanding any provision of law to the contrary, monies received by a register of deeds and mortgages attributable solely to the amount of fee increases for services enumerated in 22A:4- 4.1 pursuant to the amendments set forth in section 4 of P.L.2001, c. 370 that exceed in any year the amount by which the annual minimum salary of the register of deeds and mortgages fixed pursuant to 40A:9-92 exceeds the amount of the salary of the register of deeds and mortgages in effect on November 1, 2000, shall be used for budgetary reduction by the county and shall be reflected as a county tax levy reduction.

f. The county treasurer shall return to the county surrogate $2 of each fee received for the probate of a will; for the grant of general administration; for the grant of letters of guardianship; for the grant of letters of trusteeship for the filing of inventories; for the filing of accountings; and for any other proceeding filed, recorded or issued in the surrogate's court. Such sums shall be returned within 10 days of receipt by the county treasurer.

g. Monies received by the county surrogates pursuant to the provisions of subsection f. of this section shall be used to upgrade and modernize the services provided by their offices. These monies shall not be used for budgetary reduction by the counties.

h. Notwithstanding any provision of law to the contrary, monies received by a county surrogate attributable solely to the amount of fee increases for services enumerated in 22A:2-30 pursuant to the amendments set forth in 22A:2-30, that exceed in
any year the amount by which the annual minimum salary of the surrogate fixed pursuant to 2B:14-3 exceeds the amount of the surrogate’s salary in effect on November 1, 2000, shall be used for budgetary reduction by the county and shall be reflected as a county tax levy reduction.

Source: 22A:4-17.1; 22A:4-17.2.

COMMENT
This section remains substantially unchanged, and no change of the substance is presently contemplated. The language of subsection g. was changed in response to an error noted by COANJ.

Revenue

22B:10-1. Increased fees under P.L.1996, c.52, use; fund

a. An amount equal to 95% of the increase in fees collected pursuant to the provisions of 22A:2-51 shall be annually appropriated to the Department of Community Affairs for the provision to the poor of legal assistance in civil matters by Legal Services of New Jersey and to the Judiciary to fund 10 Superior Court judgeships, to supplement funds appropriated from other sources in a fiscal year for these purposes. An appropriation pursuant to this section shall not be used to replace appropriations from any other source for these purposes.

b. An amount equal to 5% of the increase in fees collected pursuant to the provisions of 22A:2-51 shall be annually appropriated to the Department of State, Higher Educational Services, to be allocated equally among Rutgers-Newark Law School, Rutgers-Camden Law School and Seton Hall Law School for clinical programs which provide free legal representation to the poor, to supplement funds appropriated from other sources in a fiscal year for these purposes. An appropriation pursuant to this section shall not be used to replace appropriations from any other source for these purposes.

c. A non-lapsing, revolving fund is created in the State Department of the Treasury, into which the Treasurer shall deposit annually an amount equal to the revenue derived from the increase in the fees collected pursuant to 22A:2-51. Interest and other income earned on moneys deposited into this fund shall be credited to the fund. Moneys in the fund shall be appropriated and distributed annually exclusively for the purposes set forth in subsections (a) and (b). The State Treasurer shall have performed an audit of this fund biennially following the effective date of 22A:2-51 and the results of the audit shall be included in the report required pursuant to subsection (d).

d. The State Treasurer shall submit annual report to the Legislature on the use of the fees collected pursuant to 22A:2-51 and deposited into the fund created pursuant to subsection (c). The report shall be submitted to the President of the Senate and Speaker of the General Assembly, and the Senate Budget and Appropriations Committee, Assembly Appropriations Committee, Senate Judiciary Committee, and Assembly Judiciary Committee or their successors.

Source: 22A:2-51.

COMMENT
This section remains substantially unchanged, and no change of the substance is contemplated.
22B:10-2. Dedicated check off fee revenues for upgrading and modernizing services, capital plan.

With regard to all increased check off fee charges, the revenues from which are dedicated to upgrading and modernizing the services provided by the offices of constitutional officers, pursuant to the provisions of 22A:4-8.1 or any other provision of law:

a. Each constitutional officer shall prepare and submit to the board of chosen freeholders, for its approval, a five-year capital plan setting forth the capital purposes to which the check off fee revenues are to be applied. These purposes shall include improving recording and election system when applicable;

b. Any dispute concerning the use of the check off fee revenues shall be submitted to and resolved by the assignment judge of the county, who shall be the final arbiter of such disputes;

c. Check off fee revenues shall not be used for budgetary reduction by the county and the Director of the Division of Local Government Services in the Department of Community Affairs shall require the amendment of any county budget that is not in compliance with the requirements of this subsection;

d. Interest earned on check off fee revenues held in a dedicated or trust account shall accrue to that account and shall be used only for the purposes of check off fee revenues.


COMMENT

This section remains substantially unchanged, and no change of the substance is contemplated.

22B:10-3. New Jersey Public Records Preservation Account

a. The "New Jersey Public Records Preservation Account," a dedicated account within the Department of the Treasury, is established. Notwithstanding any other provision of law to the contrary, monies received by a county clerk attributable solely to the amount of increases to the fees imposed pursuant to 22A:4-4 shall be paid by the county clerk to the Treasurer for deposit in the New Jersey Public Records Preservation Account, $2 of which shall be allocated for grants to counties and municipalities for the management, storage and preservation of public records and $3 of which shall be allocated to the Division of Archives and Records Management within the Department of State for the management, storage and preservation of public records.

b. The State Division of Archives and Records, in consultation with the State Records Committee, may, pursuant to the provisions of the Administrative Procedures Act, make, adopt, amend, or repeal such rules and regulations as the Division finds necessary to carry out the provisions of this section.

Source: 22A:4-4.2.

COMMENT

This section remains substantially unchanged, and no change of the substance is contemplated.

22A:4-4 was repealed in 1965 and replaced by 22A:4-4.1. The AOC has suggested that allocating $2 of the...
funds to the AOC for the management, storage and preservation of public records would be appropriate and useful.
STATE OF NEW JERSEY

NEW JERSEY LAW REVISION COMMISSION

Final Report

Relating to

Uniform Environmental Covenants Act

July 2009

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

Overview of the UECA

The National Conference of Commissioners on Uniform State Laws ("NCCUSL") drafted and approved UECA in 2003. It has now been enacted in 24 jurisdictions. UECA was enacted to develop a system of recording “environmental covenants” for contaminated real properties known as “Brownfields” (see footnote 1 below), when such properties are remediated to a level determined by their use but retain contamination in excess of the level that would permit unrestricted use of the property. The Uniform Law’s stated purpose is to ensure that land use restrictions, environmental monitoring requirements, and common engineering controls designed to control the potential environmental risk of residual contamination will be reflected on the land records and “effectively enforced over time as a valid real property servitude”, thereby facilitating the transfer of ownership and re-introduction into the stream of commerce of the contaminated sites.

UECA does not disrupt or supplant the clean-up standards or remediation methodologies imposed by regulatory agencies. Instead, it is an adjunct or complement to these regulatory tools. The drafters of UECA expressly intended the environmental covenant to be the “crucial end result” of the process of governmental environmental remediation. The Prefatory Note states that the covenant “may be used to ensure that the activity and use limitations imposed in the agency’s remedial decision process remain effective, and thus protect the public from contamination that remains, while also permitting re-use of the site in a timely and economically valuable way.” Thus, the Brownfield and Contaminated Site Remediation Act¹ ("the Brownfield Act"), as well as other state and federal environmental regulations still would set standards for such contaminated sites. UECA contemplates that covenants would be the main enforcement tool through which the engineering controls are monitored and protected from actions that compromise their integrity.

UECA also elevates the legal status of environmental covenants so that they will survive despite tax lien foreclosure, adverse possession, and marketable title statutes. Designed to protect interests commonly absent in existing state laws, UECA confers grantors of environmental covenants the right to enforce the covenants and requires their consent to any termination or modification. Also, following traditional real property principles, UECA validates the interests of lenders who hold a prior mortgage on the contaminated property, absent voluntary subordination.

¹ The Brownfield and Contaminated Site Remediation Act, N.J.S.58:10B-1 et seq., governs underused and abandoned properties that were formerly used for commercial and industrial purposes and are now contaminated with hazardous substances and pose a health risk to nearby residents and a threat to the environment. Regulations have been adopted pursuant to the Administrative Procedure Act (N.J.S. 52:14B-1 et seq.) that establish criteria for the submission, evaluation and approval of plans for remediation of these environmentally hazardous sites.
NCCUSL further recommends that in addition to fully integrating environmental covenants into the real property system by providing constructive notice of those covenants to the world through land recording, governments should also provide the mechanism for actual notice of the contaminated sites. Actual notice can be achieved by providing maps in recorders’ offices, by the use of on-site signage and monuments, or by making computer databases with relevant information accessible to the public. Actual notice mechanisms, however, are not part of UECA.

**Current New Jersey Law**

Although no New Jersey statute yet provides for an environmental covenant per se, New Jersey has enacted significant legislation regulating Brownfields and other contaminated properties that provides for the use of notice and institutional controls as part of the remediation of contaminated properties.

In 1993, New Jersey adopted the *Brownfield Act*, N.J.S. 58:10B-1 et seq., since amended in 1997 and 2002, which regulates contaminated sites once used for commercial and industrial purposes but currently abandoned or underused in order to ensure protection to the public and the environment while promoting the cost effective cleanups and reuse of such properties. The *Brownfield Act* includes remediation standards, financial incentives, cleanup procedures and liability protection for innocent parties who clean up Brownfields.

Specifically, section 58:10B-13(a)(2) requires, in part, that when real property is either remediated to a nonresidential soil remediation standard, or engineering or institutional controls\(^2\) are used in lieu of remediation to an unrestricted standard, the Department of Environmental Protection (“DEP”) shall, as a condition of the use of the standard or control, require the recording of a notice indicating that contamination exists on the property at a level that may statutorily restrict certain uses of or access to the property. The notice is recorded in the same manner as a deed and includes (i) delineation of the use restrictions; (ii) description of all specific engineering or institutional controls; and (iii) the property owner’s written consent to the notice. Section 58:10B-13(a)(3) requires that notice of the existence of contaminants be provided to the governing body of each municipality in which the property is located, and section 58:10B-13(a)(4) requires the posting of signs at any site where access is restricted or areas must be maintained in a prescribed manner.

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\(^2\) “Nonresidential soil remediation standards” are explained (in section 58:10B-12) as remediation standards set at levels or concentrations of contaminants “that recognize the lower likelihood of exposure to contamination on property that will not be used for residential or similar uses, which allow for the unrestricted use of that property for nonresidential purposes, and that can be met without the need of engineering controls.” “Institutional controls” are defined as “a mechanism used to limit human activities at or near a contaminated site, or to ensure the effectiveness of the remedial action over time, when contaminants remain at a contaminated site in levels or concentrations above the applicable remediation standard that would allow unrestricted use of that property. Institutional controls may include, without limitation, structure, land, and natural resource use restrictions, well restriction areas, and deed notices.” NCCUSL considers an environmental covenant to be a form of institutional control.
The thrust of the Brownfield Act is substantially different from that of UECA. While the Brownfield Act uses deed notices, its power is not based on the common law surrounding deed restrictions and covenants but on the police power to require any landowner to abate a situation inimical to the public welfare. Enforcement under the Brownfield Act is done by the DEP, and violations may result in criminal liability.

In addition, as part of the regulatory scheme, New Jersey’s Brownfields redevelopment and reuse efforts involve numerous agencies and focus groups.\(^3\) One such group, the New Jersey Brownfields Redevelopment Task Force, recommends Brownfields policy and statewide strategy for promoting Brownfields redevelopment while maintaining a Brownfields inventory.\(^4\) The Task Force maintains a New Jersey Brownfields Site Mart which is the official inventory database for all properties identified as Brownfields properties pursuant to N.J.S. 58:10B-23.

The recently enacted Site Remediation Reform Act, P.L. 2009, c. 60, ("SRRA") creates a site remediation professional licensing board that oversees licensing, continuing education, and professional conduct of site remediation professionals, known as LSPs. Although SRRA further enforces and regulates remediation of contaminated sites and the discharge of hazardous substances -- not just Brownfields -- approximately 40 pages of SRRA amend and strengthen portions of the Brownfield Act, while continuing the practice of requiring a deed notice in the form prescribed by the DEP.

The SRRA also requires the establishment of a database that is more extensive than the information presently included in the Brownfields Site Mart. This new database is required to provide information regarding remediated properties, including the status of the remediation, the contaminants of concern, and whether institution or engineering controls are in use at the site. Public access to reports from the database will be provided on the DEP’s website. This new database satisfies the recommendation by NCCUSL for a database or registry that provides information regarding engineering and institutional controls.

Commission Recommendation

The Commission finds no reason to replace the regulatory approach of the Brownfield Act with the covenant approach of UECA. Even if it were convinced that the UECA approach were preferable, at this time there is no constituency for any change of this kind in Brownfields regulation in New Jersey.

It has been suggested that UECA can be added to the New Jersey laws without displacing the Brownfield Act. However, the effect of such an enactment would be

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\(^3\) These agencies include the Department of Community Affairs, under which six separate groups operate regarding various aspects of the Brownfields redevelopment, the New Jersey Redevelopment Authority, the New Jersey Commerce Commission (Department of the Treasury), and the DEP.

\(^4\) The 13-member Task Force consists of seven representatives from State agencies and six public members appointed by the Governor with the advice and consent of the Senate.
limited. Under UECA, any covenant must be approved by the DEP. In any event, a covenant would not prevent the State from taking a stricter approach from that of other parties. The only additional effect of UECA is to empower the private parties that are parties to the covenant to enforce it. That is the key aspect of UECA, and the ability of parties other than the State to enforce environmental restrictions of Brownfields sites would be an improvement to the law of New Jersey. Notwithstanding the initial determination not to recommend UECA as a whole, the Commission supports incorporation of that basic principle. The best way to implement this change is to further amend the Brownfield Act.

The amendments below would make the deed notice required by the Brownfield Act function like a restrictive covenant and allow enforcement by any person who is injured, or if the DEP fails to enforce the restrictions, by any person. The amendments achieve the basic purpose of UECA, and they go further, in that any person may enforce a restriction whether or not the person was a party to a restrictive covenant. This additional aspect is derived from N.J.S. 2A:35A-4 which allows any person to commence an action in court to enforce any environmental law, regulation or ordinance. The proposed amendment follows 2A:35A-4 in providing that if the DEP is acting on the problem, a private citizen must defer.

Proposed New subsection (i) to 58:10B-13

i. The restrictions and affirmative obligations set forth in a recorded deed notice and required pursuant to this act run with the land and continue in perpetuity and may be enforced by any person who has suffered injury from their violation, and if the Department of Environmental Protection fails to enforce the restrictions and obligations, by any person acting as authorized by N.J.S. 2A:35A-1 et seq. The restrictions and affirmative obligations may be enforced against any person with an interest in the land however derived.

Proposed Amendment to subsection (a)(2)

The notice shall indicate at the head, with specificity and in conspicuous format, that restrictions and affirmative obligations on the property run with the land and continue in perpetuity and may be enforced by any person, and that any person who acquires an interest in this property accepts responsibility for compliance with both the restrictions and affirmative obligations imposed.
STATE OF NEW JERSEY

NEW JERSEY LAW REVISION COMMISSION

Tentative Report

Relating to

Title 9-Custody

November 2009

This tentative report is distributed to advise interested persons of the Commission's tentative recommendations and to notify them of the opportunity to submit comments. The Commission will consider these comments before making its final recommendations to the Legislature. The Commission often substantially revises tentative recommendations as a result of the comments it receives. If you approve of the draft tentative report, please inform the Commission so that your approval can be considered along with other comments.

COMMENTS SHOULD BE RECEIVED BY THE COMMISSION NOT LATER THAN FEBRUARY 1, 2010.

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

John M. Cannel, Esq., Executive Director
NEW JERSEY LAW REVISION COMMISSION
153 Halsey Street, 7th Fl., Box 47016
Newark, New Jersey 07101
973-648-4575
(Fax) 973-648-3123
Email: njlrc@njlrc.org
Web site: http://www.njlrc.org
The basic subject of the chapter is the standard for decisions as to custody of a child when there is a dispute among parties. The most common application is in cases of divorce. The law is related to that for dispositional decisions after findings of child abuse in the use of a “best interests” standard but its application is different. The current statutes are included in the memorandum distributed for that meeting.

This report is closely based on existing law but with simplified and clarified language. It also incorporates decisional law limiting the use of the “best interests” standard when the custody dispute is between a parent and a non-parent or when the dispute is over the acceptance of an arbitration award of custody. The deviations from current statutes and the decisions that require them are indicated in the comment after each section.

9:2A-1. Custody of child; rights of both parents considered.

a. It is in the public policy of this State to assure minor children of frequent and continuing contact with both parents whether the parents have separated or dissolved their marriage or have never been married and that it is in the public interest to encourage parents to share the rights and responsibilities of child rearing in order to implement this policy.

b. In any proceeding involving the custody of a minor child, the rights of both parents shall be equal and the court shall enter an order that may include:

   (1) Joint custody of a minor child to both parents, which is comprised of legal custody or physical custody which shall include: (1) provisions for residential arrangements so that a child shall reside either solely with one parent or alternatively with each parent in accordance with the needs of the parents and the child; and (2) provisions for consultation between the parents in making major decisions regarding the child's health, education and general welfare;

   (2) Sole custody to one parent with appropriate parenting time for the noncustodial parent; or

   (3) Any other custody arrangement that the court determines to be in the best interests of the child.

c. In making an award of custody, the court shall consider but not be limited to the following factors:

   (1) the parents' ability to agree, communicate and cooperate in matters relating to the child;

   (2) the parents' willingness to accept custody and any history of unwillingness to allow parenting time not based on substantiated abuse;

   (3) the interaction and relationship of the child with its parents and siblings;

   (4) the history of domestic violence, if any;

   custoAppendixF 2
(5) the safety of the child and the safety of either parent from physical abuse by the other parent;

(1) the preference of the child when of sufficient age and capacity to reason so as to form an intelligent decision;

(6) the needs of the child;

(7) the stability of the home environment offered; the quality and continuity of the child's education;

(8) the fitness of the parents; the geographical proximity of the parents' homes; the extent and quality of the time spent with the child prior to or subsequent to the separation;

(9) the parents' employment responsibilities; and

(10) the age and number of the children.

d. A parent shall not be deemed unfit unless the parents' conduct has a substantial adverse effect on the child.

e. The court, for good cause and upon its own motion, may appoint a guardian ad litem or an attorney or both to represent the minor child's interests. The court shall have the authority to award a counsel fee to the guardian ad litem and the attorney and to assess that cost between the parties to the litigation.

f. The court shall confirm an arbitration award of custody if arbitration was knowingly and voluntarily agreed to by both parents unless the award involves potential harm to the child.

g. In any case in which the parents cannot agree to a custody arrangement, the court may require each parent to submit a custody plan that the court shall consider in awarding custody. The court shall order a custody plan that is in the best interests of the child.

h. The court shall give deference to any custody arrangement that is knowingly and voluntarily agreed to by both parents. The court shall specifically place on the record the factors that require ordering a custody arrangement other than the one agreed to by both parents.

Source: 9:2-4

COMMENT

Subsection (a) has been expanded to deal with parents who have never been married. Subsection (b) has been reworded slightly but is substantively unchanged. The required considerations in subsection (c) are unchanged. Subsection (d) is the last sentence of subsection (c) of the source statute. Subsections (e) and (h) are substantively identical to subsections (d) and (g) of the source statute.

Subsection (f) is new. It incorporates the rule of Fawzy v. Fawzy, 199 N.J. 456, and, where the parents have agreed to arbitration of custody, allows the court to reject the arbitration award of custody only when necessary to prevent harm to the child.

Subsection (g) is substantively similar to 9:2-4(f). The last sentence is new. It continues the “best interest” standard in cases where there is no agreement between parents. That standard is well established in law and practice. See, e.g. Vannucchi v. Vannucchi, 113 N.J.Super. 40, 47 (App. Div. 1971), certif. den.
Subsection (h) is based of 9:2-4(e), but the source statute allowed a court to deviate from the plan agreed by both parents if that was in the “best interests” of the child. That standard has been refined in light of caselaw to require deference to an agreed plan.


a. In any proceeding involving the custody of a minor child, where the determination is to be made whether custody is to be given to a parent or to a person who is not a parent, there is a presumption that custody is to be given to the parent unless:

(1) the parent is found to be unfit, or

(2) extraordinary circumstances require custody to be given to the non-parent.

b. If the presumption in favor of custody by a parent is overcome, the court shall state the basis on the record and the decision as to custody shall be made on the basis of the best interests of the child.

Source: 9:2-5

COMMENT

While the section replaces 9:2-5, its substance is based on the decision in Watkins v. Nelson, 163 N.J. 237, 248-249 (2000). When there is only one surviving parent, the pure “best interests” approach of 9:2-4 is not taken. Instead, the surviving parent has a right to custody unless that parent is unfit or other extraordinary circumstances require a different result. The determination is these cases is more similar to the standard used in decisions as to the termination of parental rights. The parent is presumed to have a right to custody of the child. The presumption in favor of the surviving parent can be rebutted “by proof of gross misconduct, abandonment, unfitness, or the existence See, Watkins v. Nelson, 163 N.J. 237, 248-249 (2000). The presumption can also be overcome by extraordinary circumstances, most often that the parent has become the “psychological parent” of the child, and so the child would be harmed by giving custody to the parent, See, Guardianship of J.T., 269 N.J.Super. 172, 190 (App. Div. 1993) (finding transfer of child from foster mother, who acted as psychological parent, to biological mother was barred because overwhelming evidence existed that psychological harm to child would result). If the presumption in favor of the parent is overcome by a finding of unfitness or extraordinary circumstances, the standard of “best interests” is used. Watkins v. Nelson, 163 N.J. 253; Todd v. Sheridan, 268 N.J.Super. 387, 398 (App.Div.1993) (applying best interests standard in custody dispute between four year old's biological father and maternal grandparents, who lived with child and acted as psychological parents). Compare Zack v. Fiebert, 235 N.J.Super. 424, 433 (App.Div.1989) holding that maternal grandparents, who were not psychological parents, needed to prove biological father's unfitness to obtain custody, not simply that custody was in child’s best interests.


a. Notwithstanding any provision of law to the contrary, a person convicted of sexual assault under N.J.S.2C:14-2 shall not be awarded the custody or visitation rights to any minor child, including a minor child who was born as a result of or was the victim of the sexual assault, except upon a showing by clear and convincing evidence that it is in the best interest of the child for custody or visitation rights to be awarded. However, a court that awards such custody or visitation rights to a person convicted of sexual assault under N.J.S.2C:14-2 shall stay enforcement of the order or judgment for at least 10 days
in order to permit the appeal of the order or judgment and application for a stay in accordance with the Rules of Court.

b. Notwithstanding any provision of law to the contrary, a person convicted of sexual contact under N.J.S.2C:14-3 or endangering the welfare of a child under N.J.S.2C:24-4 shall not be awarded the custody of or visitation rights to any minor child, except upon a showing by clear and convincing evidence that it is in the best interest of the child for such custody or visitation rights to be awarded. However, a court that awards such custody or visitation rights to a person convicted of sexual contact under N.J.S.2C:14-3 or endangering the welfare of a child under N.J.S.2C:24-4 shall stay enforcement of the order or judgment for at least 10 days in order to permit the appeal of the order or judgment and application for a stay in accordance with the Rules of Court.

c. A denial of custody or visitation under this section shall not by itself terminate the parental rights of the person denied visitation or custody, nor shall it affect the obligation of the person to support the minor child.

d. In any proceeding for establishment or enforcement of such an obligation of support the victim shall not be required to appear in the presence of the obligor and the victim's and child's whereabouts shall be kept confidential.

Source: 9:2-4.1.

COMMENT
This section is identical to its source.


a. Every parent, except as prohibited by federal and State law, shall have access to records and information pertaining to his or her unemancipated child, including, but not limited to, medical, dental, insurance, child care and educational records, whether or not the child resides with the parent, unless that access is found by the court to be not in the best interest of the child or the access is found by the court to be sought for the purpose of causing detriment to the other parent.

b. The place of residence of either parent shall not appear on any records or information released pursuant to the provisions of this section.

c. A child's parent, guardian or legal custodian may petition the court to have a parent's access to the records limited. If the court, after a hearing, finds that the parent's access to the record is not in the best interest of the child or that the access sought is for the purpose of causing detriment to the other parent, the court may order that access to the records be limited.

Source: 9:2-4.2.

COMMENT
This section is identical to its source.
9:2A-5. Visitation rights for grandparents, siblings

a. A grandparent or any sibling of a child residing in this State may make application before the Superior Court, in accordance with the Rules of Court, for an order for visitation.

b. If either parent supports the application, it shall be the burden of the applicant to prove by a preponderance of the evidence that the granting of visitation is in the best interests of the child. Otherwise, it shall be the burden of the applicant to prove by a preponderance of the evidence that the granting of visitation is necessary to prevent potential harm to the child.

c. In making a determination on an application filed pursuant to this section, the court shall consider the following factors:

(1) The familial connection and the quality of the relationship between the child and the applicant;
(2) The familial connection and the quality of the relationship between each of the child's parents or the person with whom the child is residing and the applicant;
(3) The time that has elapsed since the child last had contact with the applicant;
(4) The effect that such visitation will have on the relationship between the child and the child's parents or the person with whom the child is residing;
(5) If the parents are divorced or separated, the time sharing arrangement which exists between the parents with regard to the child;
(6) The good faith of the applicant in filing the application;
(7) Any history of physical, emotional or sexual abuse or neglect by the applicant;
(8) The reason that the application is opposed; and
(9) Any other factor relevant to the best interests of the child.

d. With regard to any application made pursuant to this section, it shall be prima facie evidence that visitation is in the child's best interest if the applicant had, in the past, been a full-time caretaker for the child.

Source: 9:2-7.1.

COMMENT

This section is similar to its source, but the standard for granting an application over the opposition of parents has been changed. Troxel v. Granville, 530 U.S. 37, 120 S.Ct. 2054 (2000), holds specifically that parents have a constitutional right to deny access to grandparents, but does not set a standard for overriding the parental decision. Fawzy v. Fawzy, 199 N.J. 456, holds that the parental decision must be accepted by a court unless the decision may cause harm to the child.
STATE OF NEW JERSEY

NEW JERSEY LAW REVISION COMMISSION

Tentative Report

Relating to

General Durable Power of Attorney Act

December 2009

This tentative report is distributed to advise interested persons of the Commission's tentative recommendations and to notify them of the opportunity to submit comments. The Commission will consider these comments before making its final recommendations to the Legislature. The Commission often substantially revises tentative recommendations as a result of the comments it receives. If you approve of the tentative report, please inform the Commission so that your approval can be considered along with other comments.

COMMENTS SHOULD BE RECEIVED BY THE COMMISSION NOT LATER THAN MARCH 12, 2010.

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

Marna L. Brown, Counsel,
NEW JERSEY LAW REVISION COMMISSION
153 Halsey Street, 7th Fl., Box 47016
Newark, New Jersey 07101
973-648-4575
(Fax) 973-648-3123
Email: mlb@njlrc.org
Web site: http://www.njlrc.org
General Durable Power of Attorney Act

Introduction

Title 46:2B-8.1 through 46:2B-8.14, known as the Revised Durable Power of Attorney Act, (RDPAA) was enacted in 2000, replacing Title 46:2B-8 and 46:2B-9, which had been enacted in 1971 as an Act concerning the effect of death, disability or incapacity of a principal upon a power of attorney. The RDPAA was not intended to and did not supersede the provisions of Title 46:2B-10 et seq. relating to banking transactions under a power of attorney. Instead, it expressly complemented these provisions. Since its enactment, the RDPAA has not been modified except for the addition of section 46:2B-8.13a pertaining to gratuitous transfers and gifts.

In 2006, the National Conference of Commissioners on Uniform State Laws (NCCUSL) approved and recommended for enactment in all states, the Uniform Power of Attorney Act (UPOAA), in response to a national review of state power of attorney legislation. As stated in the Prefatory Note, NCCUSL’s review “revealed growing divergence among states’ statutory treatment of powers of attorney” on such topics as the authority of multiple agents and of a later-appointed fiduciary or guardian; the impact on the power of attorney of the dissolution or annulment of the principal’s marriage to the agent; the activation of contingent powers; the authority of the agent to make gifts; and the standards of conduct and liability for the agent. NCCUSL also discovered that more than seventy percent of the states surveyed agreed that a power of attorney statute should include provisions not in the then current uniform law. These provisions included, among other things: a requirement that gift making authority be expressly stated in the grant of authority; a default standard for fiduciary duties; protection of the reliance of other persons on a power of attorney; and provision for revoking a spouse-agent’s authority upon the dissolution or annulment of the marriage to the principal. The UPOAA addresses these concerns.

The enactment of the UPOAA, and the recent amendment to the New York durable power of attorney law, prompted this Commission to evaluate the need for revision to the current New Jersey power of attorney statutes. Attorneys proficient in trusts and estate law and elder and disability law were consulted for comment. The chairs

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1 This earlier act is noted as being similar to §5-501 of the Uniform Probate Code which provision is part of a series of provisions that were amended by NCCUSL in 1979 and enacted as part of the Uniform Durable Power of Attorney Act.

2 That section provides that a power shall not be construed to authorize gratuitous transfers of the principal’s property by an agent to that agent or others except to the extent expressly authorized by the principal, and that an authorization to perform all acts generally (or similar words) is not an express or specific authorization to make gifts.

3 The UPOAA replaced the original Uniform Durable Power of Attorney Act, which had been amended last in 1987, and had at one time been followed, according to NCCUSL, by all but a few jurisdictions. The UPOAA also superseded the Uniform Statutory Form Power of Attorney Act, and sections of the Uniform Probate Code.

4 New York’s Chapter 644, signed into law at the beginning of 2009 and effective September 1, 2009, was the result of eight years of study by the New York State Law Revision Commission. Chapter 644 amends New York’s General Obligations Law to provide significant reforms to the use of powers of attorney in New York.
of the New Jersey State Bar Association, Real Property, Trust and Estate Law Section, and the State Bar Elder and Disability Law Section, the legislative co-coordinators of the State Bar Elder and Disability Law Section, the President of the New Jersey Chapter of the National Academy of Elder Law Attorneys (NAELA), and individuals in the title and banking industries were solicited for their comment and review. The consensus was that certain aspects of the UPOAA would be useful in New Jersey although a statutory form of power of attorney similar to that provided in the New York statute would not be helpful.

The proposed revision focuses on several areas. Consistent with the UPOAA, a power of attorney is now durable unless otherwise expressly stated. Consistent with New York’s law, the UPOAA, and current 46:2B-10, a Definitions section has been added, defining key terms, including but not limited to “agent”, “financial institution”, “incapacity” and “principal.” The term “attorney in fact” has been replaced with the term “agent”, as used in the banking power of attorney provisions and consistent with the UPOAA. A majority of commenters agreed with the conclusion of NCCUSL, that use of the term “agent” helped eliminate any confusion in the lay public about the meaning of “attorney in fact.”

Unlike New York’s law and the UPOAA, no form of power of attorney is provided in the New Jersey statute. However, the proposed revision does set forth drafting guidelines for the contents of a form of power of attorney (46:2B-20.6) as well as a form of affidavit to be signed by an agent in support of the assertion that the power of attorney has not been revoked or terminated (46:2B-20.12). The standards for determining the validity of a power of attorney are expressly set forth at section 46:2B-20.5. The revised statute further clarifies that the provisions regarding the recordability of a power of attorney, as set forth in N.J.S. 46:15-1.1 are not altered by the revision.

New section 46:2B-20.7 sets forth the scope of the fiduciary duty and responsibility of the agent, incorporating current section 46:2B-8.13 and concepts from the UPOAA, as well as commenters’ suggestions. Guidelines for co-agents and successor agents are clarified in section 46:2B-20.14 and an agent is now required to disclose the agent’s relationship with the principal in any transaction where the agent acts pursuant to a power of attorney and the handwritten signature of the agent or principal is required (46:2B-20.17).

Proposed section 46:2B-20.11 merges current section 46:2B-13 of the banking power of attorney provisions with new language pertaining to the acceptance of powers of attorney by third parties generally. The proposed new section specifically provides that no third party, including a financial institution, may refuse to accept or rely on a power of attorney solely because it is not on a form prescribed by the third party to whom the power is presented. Nor may a third party, including a financial institution, refuse to accept or rely on a power of attorney solely because of a lapse of time since the execution of the power.
New proposed section 46:2B-20.13 provides for a summary action to compel a third party to accept a power of attorney and is modeled, in part, on a similar provision in the New York power of attorney law.

The mechanisms for revoking and terminating a power of attorney are set forth at section 46:2B-20.16. Liability of a third party acting in reliance on a power of attorney is now set forth in section 46:2B-20.23. Notably, the liability of an agent is not addressed in the current statute. Such liability is not proposed in the revision because the proposed revised statute expressly articulates the fiduciary obligation of the agent to the principal. As a result, commenters believe a liability provision for the agent is unnecessary.

The proposed revision sets forth the requirements for authorizing the agent to make gifts on behalf of the principal at section 46:2B-20.22. In addition, descriptions of each specific grant of authority that may be (and is customarily) given to the agent are set forth at sections 46:2B-20.26 through 46:2B-20.38. Finally, the proposed revision attempts to merge general durable power of attorney law with the provisions pertaining to power of attorneys for banking purposes, while also broadening the scope of the latter to apply to financial institutions generally.

The proposed revised statute commences at section 46:2B-20.1, to follow in sequence the most current existing provisions. Modifications to section descriptors are also recommended throughout the statute as needed. Enactment of the proposed revised statute would supersede current sections 46:2B-8.1 through 46:2B-8.14 and 46:2B-10 through 46:2B-19.

**46:2B-20.1. Short title**

This act shall be known and may be cited as the “General Durable Power of Attorney Act”.


**COMMENT**

The sole reason for a change in name of the act is to distinguish the current law from the proposed revised law. This new act combines elements of the current Revised Durable Power of Attorney Act with elements of the statutes pertaining to banking power of attorneys and adds new elements adopted from other sources as noted.

**46:2B-20.2. Definitions**

As used in this act:

“Account” means an agreement between a financial institution and its customer pursuant to which the institution accepts funds or property of the customer and agrees to repay or return the funds or property upon the terms and conditions specified in the agreement. The term “account” includes, but is not limited to, checking accounts, savings accounts, certificate of deposit and other types of time and demand accounts as institutions are authorized to enter into pursuant to applicable federal or State law. The
term “account” does not include an agreement pursuant to which a banking institution agrees to act as a fiduciary within the meaning of the Uniform Fiduciaries Law, N.J.S. 3B:14-52 et seq.

“Agent” means the person, at least 18 years of age, or a qualified bank within the meaning of N.J.S. 17:9A-28, authorized to act for a principal pursuant to a power of attorney. An agent may be referred to as an “attorney-in-fact” in the power of attorney. For purposes of this act, an agent includes the original agent, any co-agent or successor agent, and any person to whom an agent delegates authority. An agent acting under a power of attorney has a fiduciary relationship with the principal.

“Benefits from governmental programs or civil or military service” means any benefit, program or assistance provided under a statute or governmental regulation, including but not limited to Social Security, Medicare and Medicaid, subject to any limitations or requirements imposed by the statute or government regulation.

“Durable”, with respect to a power of attorney, means that the authority conferred is exercisable notwithstanding the principal’s subsequent incapacity.

“Execution” means the signing of the instrument by the principal, and acknowledgment of the principal’s signature in accordance with this act.

“Financial institution” means a financial entity, including, but not limited to a bank, credit union, federal credit union, federal mutual savings bank, federal mutual savings and loan association, federal savings and loan association, branch of a foreign banking corporation, insurance company, national bank, public pension fund, retirement system, savings bank, savings and loan association, securities broker, securities dealer, securities firm, trust company, whether chartered by the United States, this State or any other state or territory of the United States or a foreign country.

“General power of attorney” means a power of attorney that is intended for general use and not for a limited purpose.

“In good faith” means an act or failure to act that is done honestly, regardless of whether it is done negligently and in the absence of knowledge of facts, which, if known to an agent, would obligate the agent to take certain actions or refrain from taking certain actions on behalf of a principal.

“Incapacity of the agent” means the inability of the agent to exercise the authority conferred by the power of attorney.

“Incapacity of the principal” means impairment of the principal by reason of mental or physical illness, deficiency or disability, or the chronic use of drugs or chronic alcoholism or other cause (except minority) to the extent the principal lacks the ability to govern and manage the principal’s property and personal affairs. “Incapacity of the principal” may also mean a disability or physical or mental impairment of the principal which is expected to give rise to a need for specialized health, social, and other services, or which makes the principal dependent upon others for assistance to secure these services.

“Limited power of attorney” means a power of attorney intended for a limited purpose and not for general use.

“Notice” means written notification delivered by any means.

“Power of attorney” means a written instrument, signed and acknowledged by the principal, by which a principal with capacity authorizes an agent to act on the principal’s behalf.

“Principal” means an individual, at least 18 years of age, who authorizes an agent to act in a power of attorney.

“Safe deposit company” means a company operating pursuant to N.J.S. 17:14A-1 et seq.

“Signature” includes any mark made on a document with the intent by the signer to give legal effect to that document. A “signature” also includes any mark made on a document on behalf of a person, with that person’s authority and to effectuate that person’s intent.

“Third party” includes a financial institution.


COMMENT

The definitions section is new. Some of the definitions are adopted from current section 46:2B-10; some are extrapolated from current section 46:2B-8.2; some from New York’s new durable power of attorney law, Chapter 644 of the Laws of 2008, signed into law as Chapter 4 of the Laws of 2009, amending the General Obligations Law (Chapter 644) and some from the Uniform Power of Attorney Act (UPOAA) promulgated by NCCUSL in 2006. The definition of “durable” is derived in part from source section 46:2B-8.2, and the definition of “incapacity of the principal” is adopted from the definition of “incapacitated individual” in Title 3B. The term “incapacity” is no longer coupled with the term “disability” as in the current act because disability does not necessarily render someone incapable of property and business management. The term “disability”, however, is included within the definition of incapacity of the principal and its meaning is consistent with Title 3B.

The term “agent”, which is used in the current statute governing banking powers of attorney, is now used here to replace the term “attorney-in-fact” to avoid confusion by the public about the meaning of the term and the differences between an attorney-in-fact and an attorney-at-law. The term “account” is used in the current statute governing banking powers but has been modified to include financial institutions as well as banking institutions. The term “safety deposit company” is used in the current statute governing banking powers. The term “signature” is adopted from current N.J.S. 46:14-4.2.

46:2B-20.3. Existing powers of attorney not invalidated by this act

A power of attorney executed in this State before the effective date of this act:

a. is valid if at the time of its execution the power of attorney complied with the law of this State;

b. is not durable unless, at the time of its execution, the power of attorney complied with the requirements then in effect for making it a durable power of attorney; and
c. does not revoke any prior power of attorney unless, at the time of its execution, the revocation complied with the requirements then in effect for revoking a power of attorney.

Source: New.

COMMENT

This new provision recognizes the validity, enforceability and revocation of durable powers of attorney created prior to enactment of the proposed new law.

46:2B-20.4. Powers of attorney; durable unless otherwise stated

a. Every power of attorney is “durable” as defined in this act unless the power expressly provides that it terminates upon the incapacity of the principal. Notwithstanding the durability conferred by this section, a power intended by the principal to be durable may state that it is durable.

b. Unless the power of attorney expressly provides that it terminates upon the incapacity of the principal, all acts by an agent pursuant to the power, during any period of the principal’s incapacity, shall have the same effect and inure to the benefit of and bind the principal and the principal’s heirs, devisees, successors and personal representatives as if the principal were not incapacitated.

c. A power of attorney is exercisable notwithstanding the lapse of time since its execution, unless it states a time or event of termination.


COMMENT

The source sections are merged and modified in this new section. The term “durable”, and the term “incapacity” as that term is applied to both the principal and the agent, are now defined in proposed section 46:2B-20.2. Subsection a. is modeled on Section 104 of the UPOAA. Subsection b. is modeled on source provision N.J.S. 46:2B-8.3 and 46:2B-16 pertaining to banking institutions. The terms “heirs”, “devisees”, “successors” and “personal representatives” are used here as those terms are understood under Title 3B of the New Jersey statutes.

Unlike the current act -- which provides that in order to be durable, the power of attorney must recite certain language showing the principal’s intent to make it so -- the new act now provides that a power of attorney is durable unless otherwise stated. This is based on the belief -- as articulated in the comments to the UPOAA -- that most principals prefer that a power be durable to hedge against the need for guardianship. The second sentence of subsection a. is added because third parties, especially those unfamiliar with New Jersey law or those without access to our statutes, may not be aware of the durability (unless otherwise stated) conferred by the revised provision.

46:2B-20.5. Creation of a valid power of attorney; when effective

a. To be valid, a power of attorney shall be:

(1) typed, or printed using letters which are legible and easy to read;

(2) in compliance with section 46:2B-20.6a; and

(3) executed by a principal, with the capacity to do so, in the following manner:

(A) the principal, appearing before two witnesses (neither of whom is an agent) and a notary public or any other officer authorized to take acknowledgements as provided
in N.J.S. 46:14-6.1, signs and dates the power and acknowledges that the power was executed as the principal’s own act;

(B) the witnesses swear before the notary public or other qualifying officer that they witnessed the principal execute the power of attorney as the principal’s own act; and

(C) the officer taking the acknowledgment and proof does so in the manner prescribed for the acknowledgement and proof of a conveyance of real property in accordance with N.J.S. 46:14-2.1c. The signatures of the principal and the witnesses may be acknowledged in a single certificate by the notary public or other qualifying officer.

b. A power of attorney shall not be invalid solely because of (i) a lapse of time between the dates of acknowledgement of the signature of the principal and the date of its use; or (ii) the subsequent incapacity of the principal during any such lapse of time.

c. Unless a power of attorney states otherwise, the date on which the principal’s signature is acknowledged is the effective date of the power of attorney. A power of attorney may state that it takes effect upon the occurrence of a date or contingency specified in the instrument, in which case, once acknowledged by the principal, the power of attorney takes effect upon the date or occurrence of the contingency in the manner specified.

d. A signature on a power of attorney is presumed to be genuine if acknowledged in accordance with subsection a.(3) above;

e. If a power of attorney made pursuant to this act includes the power to “conduct real estate transactions” as described in N.J.S. 46:2B-20.27, the power of attorney shall be recorded prior to or simultaneously with the deed, mortgage or other document executed by the agent in connection with the real estate transaction. A power of attorney is in recordable form if it complies with N.J.S. 46:15-1.1;

f. If a power of attorney made pursuant to this act includes the power to “conduct health care billing, recordkeeping and payment” as described in N.J.S. 46:2B-20.35, the power of attorney shall be construed to mean that the principal authorizes the agent to act as the principal’s representative pursuant to the Health Insurance Portability and Accountability Act (HIPAA), sections 1171 through 1179 of the Social Security Act, 42 U.S.C. Section 1320d, and applicable regulations, in order to obtain access to the principal’s health-care information and communicate with the principal’s health-care provider. This authority shall not include authorization for the agent to make medical or health care decisions for the principal; such authority shall be authorized only by a separate advanced directive for health care, otherwise known as a living will, along with a health care proxy, otherwise known as a durable power of attorney for health care, in accordance with N.J.S. 26:2H-53 et seq. or N.J.S. 26:2H-103, et seq., or both, as applicable.

Source: New.

COMMENT

The proposed new section is substantially derived from the UPOAA and Chapter 644 and suggestions of commenters. New subsection a.(3) replaces current section 46:2B-8.9, requiring acknowledgement and proof of the principal’s signature before two witnesses, neither of which is the agent, as well as a notary public or other officer in accordance with N.J.S. 46:14-6.1. A signature in compliance with this provision is presumed to be genuine (as is the case in the UPOAA, Section 104.)
A provision has been added to clarify that powers of attorney that grant the authority to “conduct real estate transactions” must be recorded prior to or simultaneously with the document executed by the agent in connection with the real estate transaction. It is important to note that the standards for validity under this section and recordability under N.J.S. 46:15-1.1, are not the same, and so although a power of attorney which meets the requirements of N.J.S. 46:15-1.1 is recordable, recording does not in and of itself mean the power of attorney is otherwise valid within the meaning of the section.

A provision has also been added to make clear that powers of attorney that grant the authority to “conduct health care billing, recordkeeping and payment” also authorize the agent to act as the principal’s personal representative for purposes of HIPAA, though they cannot be used to authorize an agent to make medical or health care decisions for the principal. Separate health care proxies and durable powers of attorney for health care are provided for in another section of the law as noted.

46:2B-20.6. Power of attorney; guidelines for contents of form

a. Every power of attorney shall provide:

(1) designation of an agent including the agent’s name and mailing address, and if more than one agent, a statement of whether the agents must act together or independently;

(2) the grant of authority which the principal intends to give the agent;

(3) that the agent must follow the principal’s instructions, or if there are no instructions, act in the principal’s best interest;

(4) a statement which makes clear that the power of attorney does not authorize the agent to make health care decisions for the principal, but that the principal may sign a separate document that authorizes an agent to make health care decisions for the principal, in accordance with N.J.S. 26:2H-53 et seq. or N.J.S. 26:2H-103, et seq., as applicable if the principal so chooses;

(5) if the principal intends to grant the agent the authority to make major gifts or transfers, including gifts of the principal’s property to the agent, or to make, amend, alter or revoke the principal’s wills or codicils, or to designate, change or revoke the beneficiary designations in any life insurance, annuity, or similar contract, or account, employee benefit or plan or retirement benefit or plan, payable on death or transfer on death beneficiary designations, or to make, amend alter or revoke any inter vivos trust, registration of the principal’s securities in beneficiary form, or any provisions for nonprobate transfer at death; or to make transfers of property to any trust, or to disclaim property; or to open or close any account including an account naming the agent and the principal as joint owners, that the principal may not do so unless the power of attorney includes express specific authority, in accordance with section 46:2B-20.21, for the agent to make such gifts or transfers or to do such other act as described herein; and

(6) if the power is not intended to be durable, express language indicating that the power shall terminate upon the incapacity of the principal.

b. A power of attorney may also provide the following, for purposes of illustration and not limitation:

(1) that the principal does not lose authority to act even though similar authority has been given to the agent;
(2) that the principal may select more than one agent to act together or independently and one or more successor agents to act together or independently;

(3) that the law governing powers of attorney appears at N.J.S. 46:2B-20.1 et seq, and is available at a law library or online through the New Jersey Legislative website, www.njleg.state.nj.us/, along with the instruction that if there is anything about the power that the principal does not understand, the principal should contact an attorney of the principal’s own choosing before signing the power of attorney;

(4) that the power is effective upon execution in accordance with this act and shall not be affected by the principal’s incapacity, or by lapse of time, unless the principal has stated otherwise;

(5) the name and title of the person who prepared the power of attorney;

(6) specific delineation of each grant of authority the principal wishes to give to the agent, which may include, but is not limited to, as those subjects are defined in this act, the authority to conduct real estate transactions; goods and chattels or tangible personal property transactions; bond, share and commodity transactions; banking transactions; business operating transactions; insurance transactions; estate transactions; litigation and other legal proceedings; personal and family maintenance; health care billing, recordkeeping and payments (which shall be distinguished from a health care power of attorney); retirement benefit transactions; tax matters; the collection and disbursement of benefits from governmental programs or civil or military service; or any or all of the above;

(7) designation of a successor agent, including the agent’s name and mailing address, and if more than one successor agent, a statement of whether the successor agents must act together or independently;

(8) the telephone number, mailing address and e-mail address of each agent;

(9) that the agent may be compensated from the principal’s assets for reasonable expenses incurred on the principal’s behalf or services rendered on the principal’s behalf, or both. “Reasonable compensation” may be defined in the power of attorney;

(10) that the power of attorney continues until the principal revokes it in accordance with section 46:2B-20.16a. or it is terminated by the principal’s death or other event described in section 46:2B-20.16b.;

(11) special instructions or additional provisions, including but not limited to language to limit or supplement authority granted to the agent, which may be set forth on an addendum attached to the power of attorney that shall also be initialed by the principal;

(12) that the agent, in the exercise of reasonable care, skill and caution, may delegate to others any one, more, or all of the specific powers which have been conferred on the agent by the power of attorney unless otherwise provided in the power of attorney;

(13) authorization to make major gifts and transactions in accordance with the requirements of section 46:2B-20.22;
that if a power of attorney made pursuant to this act includes the power to “conduct real estate transactions” as described in N.J.S. 46:2B-20.27, the form of power of attorney shall be in a recordable form that complies with N.J.S. 46:15-1.1 and shall be recorded prior to or simultaneously with the deed, mortgage or other document executed by the agent in connection with the real estate;

(15) that if a power of attorney made pursuant to this act includes the power to “conduct health care billing, recordkeeping and payment” as described in N.J.S. 46:2B-20.35, the power of attorney shall be construed to mean that the principal authorizes the agent to act as the principal’s representative pursuant to the Health Insurance Portability and Accountability Act (HIPAA), sections 1171 through 1179 of the Social Security Act, 42 U.S.C. Section 1320d, and applicable regulations, in order to obtain access to the principal’s health-care information and communicate with the principal’s health-care provider; and

(16) any other provisions requested by the principal that are permitted by law.

Source: New.

COMMENT
The current act does not provide or suggest a form of power of attorney. Commenters have strongly suggested that guidelines would be useful. This section sets forth guidelines for the contents of a power of attorney. Subsection a. establishes required guidelines. Subsection b. sets forth illustrative guidelines. Both sets of guidelines are derived substantially from current practice, portions of the forms provided in Chapter 644 and the UPOAA that are deemed workable by commenters, and general commenters’ suggestions. Clarification is added regarding the requirement of recording those powers of attorney that grant the authority to conduct real estate transactions. Powers of attorney that grant an agent the authority to conduct health care billing, recordkeeping and payment also may authorize the agent to act as the personal representative of the principal for purposes of HIPAA.

46:2B-20.7. Fiduciary status and duties of agent

a. An agent acting under a power of attorney has a fiduciary duty to the principal, and if the principal is adjudicated an incapacitated person after the power is executed and the power of attorney is not terminated, to a guardian of the property of the principal, to act within the powers delegated by the power and solely for the benefit of the principal;

b. An agent shall also:

(1) act in accordance with instructions from the principal, or where no instructions have been given, in the best interest of the principal;

(2) act in good faith;

(3) keep the principal’s property separate and distinct from any other property owned or controlled by the agent, except for any property jointly owned by the principal and agent at the time of execution of the power of attorney, except where the agent is the principal’s spouse and keeping the principal’s property separate and distinct from the agent’s is not reasonable under the circumstances; and

(4) keep an accurate record of all receipts, disbursements, and transactions entered into by the agent on behalf of the principal and make the record and the power of attorney available, or render an accounting, at the request of:
(i) the principal;
(ii) a co-agent or successor agent acting under the power of attorney;
(iii) a guardian or conservator appointed for the principal;
(iv) the personal representative of the principal’s estate;
(v) a governmental agency or entity having regulatory authority to protect the welfare of the principal; or
(vi) the Superior Court upon application of any heir or other next friend of the principal, where the court is satisfied that the principal is incapacitated and there is concern whether the agent is either acting within the powers granted by the power or acting solely for the benefit of the principal.

c. An agent who fails to make the record and power of attorney available or to render an accounting under subsection b.(4) within a reasonable time period after a written request, not to exceed 15 days in the case of making the record and power of attorney available, and not to exceed 45 days in the case of rendering an accounting, may be compelled to do so by an order to show cause in accordance with the Rules Governing the Courts of the State of New Jersey.


COMMENT
The source statute is incorporated into this new section. Subsections b. and c. are derived, in part, from Section 114 of the UPOAA and commenters’ suggestions.

46:2B-20.8. Relation of agent to court-appointed fiduciary

a. If a conservator, guardian of the estate, or other fiduciary is appointed by a court to manage some or all of the principal’s property, after execution of a power of attorney, the agent shall be accountable to the fiduciary as well as to the principal, provided that the power of attorney is not revoked or terminated by court order appointing the fiduciary.

b. In a power of attorney, a principal may nominate a conservator, guardian of the principal’s estate, or guardian of the principal’s person, for consideration by the court if protective proceedings for the principal’s person or estate are commenced after the principal executes the power of attorney.


COMMENT
The source statute is incorporated into this new section with some modification in language based on the UPOAA. Subsection c. of the source statute has been moved to new provision 46:2B-20.16d.

46:2B-20.9. Good faith reliance by third party

a. Any third party may rely upon the authority granted in a power of attorney until the third party has received notice or has knowledge of:

(1) the revocation of the power of attorney;
(2) the termination or the suspension of the authority of the agent;

(3) the death of the principal; or

(4) if the power expressly provides that it terminates upon the incapacity of the principal, the incapacity of the principal.

b. A third party who has not received notice or does not have knowledge as provided under subsection a. may require that the agent execute an affidavit stating that the agent did not have at the time of exercise of the power knowledge or notice as provided in subsections (a)(1), (2), (3), or (4), which affidavit is conclusive proof of the power not having been revoked or terminated at that time. A form of affidavit is set forth at section 46:2B-20.12. If the exercise of the power of attorney requires execution and delivery of any instrument that is recordable, the affidavit when authenticated for recording is likewise recordable.

c. Subject to subsections a. and b., any third party to whom the power of attorney is presented may retain and rely upon a photocopy or a certified copy or electronically transmitted copy of the original signed document.

d. This section does not affect any provision in a power of attorney for its termination by expiration of time or occurrence of an event other than express revocation or a change in the principal’s capacity.


COMMENT

This new section is derived substantially from source section 46:2B-8.6 with some modifications in language. Subsection b. deviates from its source provision by the deletion of the word “actual” before the word “notice. Subsection c. is derived from source section 46:2B-8.11 but adds the option of electronic transmission of an original power, as provided in the UPOAA (Section 106 d.).

46:2B-20.10. Agent’s act without notice or knowledge of principal’s death or incapacity

a. Any agent who acts in good faith under a valid and enforceable power of attorney, without knowledge or notice of the principal’s death, binds the principal’s successors in interest.

b. Any agent who acts in good faith under a valid and enforceable power of attorney that terminates upon the incapacity of the principal, or upon the appointment by a court of a guardian, conservator or other fiduciary, without knowledge or notice of the principal’s incapacity, or without knowledge or notice of the appointment by a court of a guardian, conservator or other fiduciary, binds the principal and the principal’s successors in interest.

c. If the agent executes an affidavit, in accordance with section 46:2B-20.12., the agent’s act in accordance with the power shall be presumed valid, subject to challenge only by a clear and convincing showing of fraud, intentional misconduct, or gross neglect. Nevertheless, a subsequent determination of fraud, intentional misconduct or gross neglect shall not affect the interest of a party who dealt with the agent in good faith and in reliance upon the power of attorney and the affidavit.
COMMENT

This new section is derived substantially from source section 46:2B-8.5 with some modifications in language. Reference to “actual” knowledge” has been deleted. Notice, as defined in this act, or constructive knowledge is now sufficient.

46:2B-20.11. Third party to accept power of attorney; financial institutions

a. A third party shall accept a power of attorney, presented to the third party, that is valid in accordance with section 46:2B-20.5 or properly executed in accordance with the laws in effect at the time of execution. The third party shall rely upon the power subject to the requirements of section 46:2B-20.9. However, a third party that is a financial institution may also require compliance with the conditions set forth in subsection b. before accepting and relying on the power.

b. With respect to financial transactions, a third party financial institution may further condition acceptance of and reliance upon a power of attorney as follows:

(1) the institution may refuse to rely on or act pursuant to a power of attorney if the signature is not genuine in accordance with section 46:2B-20.5d., or the employee of the institution who receives or is required to act on the power receives notice or has knowledge of the death of the principal, or the principal’s incapacity at the time of execution of the power or that the power has been revoked;

(2) the institution is not obligated to rely on or act pursuant to a power of attorney and shall have a reasonable time under the circumstances within which to decide whether to do so, if it believes in good faith that the power does not appear to be genuine or that the principal is dead, or that the principal was incapacitated at the time of the execution of the power or that the power has been revoked;

(3) if an agent seeks, in accordance with a power of attorney, to withdraw or pay funds from a principal’s account at a financial institution, the institution may require the agent to provide evidence satisfactory to the institution of the agent’s identity and to execute a signature card in a form as required by that institution;

(4) if the form of power of attorney presented does not contain an actual original signature of the principal, and the institution requires that an actual original signature be provided, the institution may require the agent to provide an affidavit that such an original is not available to be presented. If such an affidavit is provided, the institution shall accept a photocopy of the power of attorney certified to be a true copy of the original by either (i) another financial institution or (ii) the county recording office of the county in which the original was recorded;

(5) if a power of attorney expressly provides that “it shall become effective upon the incapacity of the principal” or similar words, the institution is not obligated to rely on or act pursuant to the power of attorney unless the institution is provided by the agent with proof that the principal is then incapacitated as provided in the power of attorney.

c. No third party, including a financial institution, may refuse to accept or rely on a power of attorney solely because it is not on a form prescribed by the third party to whom the power is presented. Nor may a third party, including a financial institution,
refuse to accept and rely on a power of attorney solely because of a lapse of time since the execution of the power.

d. A financial institution that refuses to rely on or act pursuant to a power of attorney, for any reason, shall notify the agent in writing that the power of attorney has been rejected and the reason for the rejection provided that the agent or principal has given the mailing address of the agent to the institution in writing. Written notice of refusal to honor the power shall be sent by certified mail, return receipt requested, or registered mail to the mailing address given to the institution.

Source: 46:2B-13; new.

COMMENT
This section is derived substantially from its source and merges the banking provisions with the current act, with some modifications in language. Subsection c. is derived from Chapter 644.

46:2B-20.12. Affidavit of non-revocation or non-termination of power of attorney; language and model form

a. An affidavit of non-revocation or non-termination of a power of attorney, made in accordance with sections 46:2B-20.9b. or 46:2B-20.10c, shall state that the agent, at the time of exercise of the power, had no knowledge or notice of revocation or termination of the power of attorney, or of the principal’s death, or, if the power expressly states that it terminates upon the principal’s incapacity, knowledge or notice of the principal’s incapacity, or if the power expressly states that it terminates upon the appointment by a court of a guardian, conservator or other fiduciary, knowledge or notice of the appointment by a court of a guardian, conservator or other fiduciary.

b. The affidavit shall be prepared in substantially the following form:

State of New Jersey, County of [name of county], ss.:

[Name of agent], being of full age, and duly sworn according to law, deposes and says:

1. I am the Agent for [name of principal], hereinafter referred to as PRINCIPAL, by virtue of a certain Power of Attorney date [date of power of attorney], and recorded [date of recordation of power of attorney, if applicable] in the Office of the Clerk/Register of [name of county where recorded] County, in Deed Book [book number], page [page number], which Power of Attorney and vests me with the authority to act for PRINCIPAL for all purposes set forth therein, including, without limitation, the execution and delivery of the document to which this Affidavit is attached.

2. To the best of my knowledge and belief, the said Power of Attorney has not been revoked or terminated by an act of PRINCIPAL or by the death or incapacity of PRINCIPAL. PRINCIPAL either has not been judicially declared to be incapacitated or PRINCIPAL has been judicially declared to be incapacitated and the court has maintained the power of attorney for certain stated purposes.

3. This Affidavit is made pursuant to the provisions of the statute [citation].

____________________
[Signature of Agent]

Sworn and subscribed before me this___
day of ____________, 20___

____________________
[Signature of Notary]
c. If the transaction for which the affidavit is executed involves real estate or an interest therein, the affidavit shall be recorded as part of the deed, mortgage or other instrument executed by the agent.

Source: New.

COMMENT
This new section is derived from a form provided by Fidelity National Title Group that has been modified as a result of comments received. It has been suggested that such an affidavit is helpful to title companies and if incorporated into the text, might be better utilized.

46:2B-20.13. Action to compel third party to accept power

a An action may be commenced by a principal; agent, co-agent, or successor agent acting under the power of attorney; guardian or conservator appointed for the principal; spouse, domestic or civil union partner, child or parent of the principal; a governmental agency or entity having regulatory authority to protect the welfare of the principal; or the principal’s successor in interest, to compel a third party to honor or accept a power of attorney pursuant to section 46:2B-20.11.

b. An action under this section shall be a summary proceeding commenced in accordance with Rule 4:67 of the Rules Governing the Courts of the State of New Jersey, in the Superior Court, Law Division, Probate Part, at which time the only issue to be determined is whether the third party who is refusing to honor or accept a power of attorney pursuant to sections 46:2B-20.11 shall be ordered to do so.

c. If the form of power of attorney is valid and effective in accordance with section 46:2B-20.5, and there is no credible issue of fact regarding the capacity of the principal to have signed the power or the capacity of the agent to serve as agent, the court shall issue an order compelling the third party to honor or accept the power of attorney.

Source: New.

COMMENT
The current statute does not provide for a summary method to compel third party acceptance of a power of attorney, the form and execution of which complies with the statute. Commenters have noted that failure to accept such a power of attorney can be financially devastating to a principal. The proposed new section is derived from Chapter 644 (section 5-1510) and commenters’ suggestions.


a. A principal may designate two or more persons to act as co-agents, either jointly or separately; provided that:

(1) if the power of attorney does not expressly provide, the co-agents shall act jointly; provided that if a co-agent is unavailable because of absence, illness or other temporary incapacity, and prompt action is required to accomplish a purpose of the power or to avoid irreparable injury to the principal, any remaining agent may act for the principal if that agent demonstrates the co-agent’s unavailability and the reasons therefor by sworn affidavit; or

(2) if the power provides that an agent may act separately, or if the power provides joint action by co-agents, and an agent dies, resigns or becomes incapacitated,
the agent who may act separately, or any remaining co-agent, may act for the principal and exercise all powers granted.

b. A principal may designate one or more successor agents to serve. Unless the principal expressly provides otherwise in the power of attorney:

(1) a successor agent may act only if every initial or predecessor agent resigns in writing, dies, becomes incapacitated, is not qualified to serve or declines to serve;

(2) a successor has the same authority as that granted to an initial or predecessor agent; and

(3) a successor agent may appoint another successor if the successor agent must resign and no other agents are able to serve for the reasons set forth in subsection b.(1).

c. A co-agent or a successor agent acting under a power of attorney shall have the authority to request, receive and seek to compel a co-agent or predecessor agent to provide a record of all receipts, disbursements and transactions entered into by the agent on behalf of the principal.

d. Except as otherwise provided by this section or by the power of attorney, an agent that does not participate in or conceal a breach of fiduciary duty committed by another agent is not liable for the actions of the other agent.

Source: 46:2B-8.7.

COMMENT

The proposed new section is substantially derived from a combination of Chapter 644, and the UPOAA. Unlike the current statute and the UPOAA, but in keeping with New York’s statute, this proposed revised section presumes that the principal intends the co-agents to act jointly unless otherwise provided. Subsection d. is adopted from the UPOAA.

46:2B-20.15. Delegation by agent

If the power of attorney expressly provides, the agent, in the exercise of reasonable care, skill and caution, may delegate to other agents one or more or all of the powers which have been conferred on the agent in the power of attorney.


COMMENT

This section is derived substantially from its source with some modifications in language.

46:2B-20.16. Revocation and termination of power of attorney

a. A power of attorney is revoked when the principal:

(1) executes a subsequent power of attorney that expressly revokes the prior power of attorney;

(2) either causes all executed originals of the power of attorney to be physically destroyed, including any originals that have been filed with financial institutions, or executes a written instrument of revocation which is acknowledged in the same manner as the power of attorney in accordance with section 46:2B-20.5a.(3); or
(3) otherwise revokes the power of attorney in accordance with its terms.

b. A power of attorney terminates when:

(1) if the power is a limited power of attorney, the purpose of the power of attorney is accomplished;

(2) the principal dies, provided that if the agent, who without knowledge or notice of the principal’s death, acts in good faith under the power, any action so taken by the agent, unless otherwise invalid or unenforceable, binds the principal’s successors in interest;

(3) the principal becomes incapacitated and the power of attorney expressly provides that it terminates upon the incapacity of the principal, provided that if the agent, who without knowledge or notice of the principal’s incapacity, acts in good faith under the power, any action so taken by the agent, unless otherwise invalid or unenforceable, binds the principal and the principal’s successors in interest;

(4) the principal revokes the agent’s authority, in writing, and there is no co-agent or successor agent, or none who is willing or able to serve;

(5) the principal revokes the power of attorney in accordance with subsection a.;

(6) the agent dies, becomes incapacitated or resigns and there is no co-agent or successor agent or none who is willing or able to serve;

(7) a court order terminates the power of attorney; or

(8) the authority of the agent terminates and there is no co-agent or successor agent or none who is willing or able to serve. An agent’s authority terminates, unless the power of attorney expressly provides otherwise, when (i) the principal revokes the agent’s authority; (ii) the agent dies, becomes incapacitated or resigns; or (iii) the marriage, domestic partnership or civil union of an agent who is the spouse or domestic or civil union partner of the principal is terminated by divorce, annulment, dissolution or other proceeding.

c. Except upon a court order for good cause, no person other than the principal may revoke a durable power of attorney.

d. If a power of attorney that has been revoked was recorded, the principal shall also record a written revocation in the same manner.


COMMENT

The proposed new section incorporates elements of the source statutes and section 3B:3-13 pertaining to the revocation of wills, and adopts some language from a combination of Chapter 644 and the UPOAA.

46:2B-20.17. Agent to disclose relationship with principal

a. In any transaction where the agent is acting pursuant to a power of attorney and the handwritten signature of the agent or principal is required, the agent shall disclose the principal and agent relationship by:
(1) signing (name of agent) as agent for (name of principal); or
(2) signing (name of principal) by (name of agent) as agent; or
(3) any similar written disclosure of the principal and agent relationship.

b. When the agent engages in a transaction on behalf of the principal, the agent is attesting that at the time of the transaction:
   (1) the agent has actual authority to engage in the transaction;
   (2) the agent does not have knowledge or notice of the termination or revocation of the power of attorney, or knowledge or notice of any facts indicating that the power has been terminated or revoked;
   (3) if the power of attorney does not expressly provide that it terminates upon the incapacity of the principal, that the agent does not have knowledge or notice of the principal’s incapacity, or knowledge or notice of any facts indicating the principal’s incapacity; or
   (4) the agent does not have knowledge or notice that the power of attorney has been modified in any way that would affect the ability of the agent to engage in the transaction, or knowledge or notice of any facts indicating that the power has been so modified.

c. The attestation of the agent pursuant to subsection b. is not effective as to any third party with knowledge or notice that the power has terminated or been revoked prior to the transaction.

Source: New.

COMMENT
The proposed new section is substantially derived from Chapter 644 (section 5-1507) and the suggestions of commenters that the relationship of agent and principal be expressly stated when the agent signs on the principal’s behalf.

46:2B-20.18. Compensation of the agent

a. A principal may, in the power of attorney direct that an agent be compensated and provide for the method by which compensation shall be calculated and when compensation shall be paid. In the absence of any such direction, upon appropriate application, a court may award reasonable compensation to the agent.


COMMENT
The proposed section is substantially derived from the source statute with the modification that the direction regarding compensation be provided, if at all, in the power of attorney itself and not in a separate written document.


Unless otherwise provided for by the principal in the power of attorney, an agent who has signed a power of attorney may resign only by:
(1) giving written notice to the principal and, if applicable, a co-agent, successor agent, or the principal’s guardian; or,

(2) if no co-agent, successor agent, or guardian is known to the agent and the principal is incapacitated, or the agent has knowledge or notice of any facts indicating the principal’s incapacity, by petitioning the court to approve the resignation.

Source: New.

COMMENT
The proposed new section is substantially derived from a combination of Chapter 644 and the UPOAA.

46:2B-20.20. Agent authorized to act with respect to transactions in this or any other state

An agent may exercise all powers described in this act that are exercisable by the principal upon and after presentation of the power of attorney to the necessary person or financial institution with respect to any transaction permitted by this act, whether conducted in this or any other state or jurisdiction.

Source: 46:2B-12.

COMMENT
This new section is derived substantially from its source with some modifications.

46:2B-20.21. Powers of attorney executed in other jurisdictions; choice of law

a. A power of attorney executed in another state or jurisdiction in compliance with the law of that state or jurisdiction, or the law of this State, is valid in this State regardless of whether the principal is a domiciliary of this State.

b. The meaning and effect of a power of attorney is determined by the law of the jurisdiction indicated in the power, and if no governing jurisdiction is indicated in the power, by the law of the jurisdiction in which the power was executed.

Source: New.

COMMENT
The current statute does not address powers of attorney executed in other jurisdictions. Proposed new subsection a. is substantially derived from Chapter 644. Proposed new subsection b. is substantially derived from the UPOAA.

46:2B-20.22. Major gifts and other transfers; self-dealing

a. An authorization in a power of attorney to perform all acts which the principal could perform if personally present and capable of acting, or words of like effect or meaning, is not an express or specific authorization to make gifts.

b. If the principal intends to authorize the agent to make any gifts and transfers, the principal must expressly grant such authority in the power of attorney. A power of attorney shall not be construed to authorize the agent to gratuitously transfer property of the principal to the agent or to a co-agent or successor agent, or to any others except to the extent the power of attorney expressly and specifically so authorizes.
c. If the principal intends to authorize the agent to designate, change, or revoke any beneficiary of any contract of insurance on the life of the principal or annuity contract for the benefit of the principal, or any type of employment or retirement benefit or plan for the principal, or any other account or benefit, the principal must expressly grant such authority in the power of attorney.

d. If the principal intends to authorize the agent to create, amend, revoke or terminate an inter vivos trust, the principal must expressly grant such authority in the power of attorney.

e. If the principal intends to authorize the agent to open, modify or terminate a transfer on death account as described in N.J.S. 3B:30-6 through 3B:30-8 and designate or change any beneficiary of such account, or make, amend, alter or revoke and provisions for nonprobate transfer at death, the principal must expressly grant such authority in the power of attorney, except that a power of attorney may not be used to renounce appointment of an executor.

f. If the principal intends to authorize the agent to make, amend, alter or revoke the principal’s wills or codicils, or to make transfers of property to any trust, or to disclaim property, the principal must expressly grant such authority in the power of attorney.

g. If the principal intends to authorize the agent to open or close any accounts of the principal, including a joint account naming the agent and the principal as the joint owners, the principal must expressly grant such authority in the power of attorney.

h. Unless the power of attorney expressly provides otherwise, if after naming the spouse or domestic or civil union partner as a permissible recipient of gifting or other transfers, the principal is divorced, or the principal’s marriage is annulled or its nullity declared, or the marriage or domestic partnership or civil union is dissolved, the divorce, annulment, declaration of nullity or dissolution revokes the authority to gift or make other transfers to the former spouse or domestic or civil union partner. Remarriage or a new ceremony for a domestic partnership or civil union to the prior spouse or prior domestic or civil union partner shall revive the power.


COMMENT

The proposed section is substantially derived from the source statute but also adds elements from Chapter 644 and the UPOAA. Rather than create a form of major gift rider under our statute, as the revised New York statute provides, this section permits authority to make major gifts and other transfers by express provision in the power of attorney itself and sets out guidelines for doing so.

46:2B-20.23. Liability of person or institution acting in reliance on power of attorney

No person or institution acting in reliance on a power of attorney as set forth in this act, shall be held liable for injury for any act or omission if the act or omission is performed in good faith and within the scope of the duties of the institution or person, unless the act or omission constitutes a crime, actual fraud, actual malice or willful misconduct or the person or institution acting in reliance on the power of attorney has knowledge or notice that the principal lacked capacity to execute the power of attorney.
46:2B-20.24. Remedies not exclusive

The remedies set forth in this act are not exclusive and do not abrogate any right or remedy under any other law of this State.

Source: New.

COMMENT
This section is new and is self-explanatory. It is derived from the UPOAA.

46:2B-20.25. Authority of agent not to exceed principal

Nothing in this act shall be deemed to give an agent any greater authority or rights than the principal could exercise on the principal’s own behalf.


COMMENT
This new section is derived substantially from its source.


a. If any power of attorney contains language which confers authority on the agent to "conduct banking transactions as set forth in section 2 of P.L.1991, c.95 (C.46:2B-11)", or “conduct financial transactions” or words to that effect, the agent shall have the authority under the power of attorney to:

(1) continue, modify or terminate any account or other financial arrangement made by or on behalf of the principal prior to creation of the agency;

(2) open, either in the name of the agent alone, the principal alone or in both their names jointly, or otherwise, an account of any type in any financial institution selected by the agent; hire, remove the contents of or surrender a safe deposit box or vault space; and make other contracts for the procuring of other services made available by any financial institution or safe deposit company as the agent shall deem desirable;

(3) draw, sign and deliver checks or drafts for any purpose, withdraw by check, order, draft, wire transfer, electronic funds transfer or otherwise, any funds or property of the principal deposited with, or left in the custody of, any financial institution, wherever located, either prior or subsequent to the creation of the agency, and use any line of credit connected with any such accounts, apply for any automatic teller machine card or debit card or use any automatic teller machine card or debit card, including already existing cards, in connection with any such accounts and apply for and use any bank credit card issued in the name of the agent as an alternate user, but shall not use existing credit cards issued in the name of the principal, on existing bank credit card accounts of the principal;
(4) prepare periodic financial statements concerning the assets and liabilities or income and expenses of the principal, and to deliver statements so prepared to the financial institution or other person whom the agent believes to be reasonably entitled;

(5) receive statements, vouchers, notices or other documents from any financial institution and to act with respect to them;

(6) have free access during normal business hours to any safe deposit box or vault to which the principal would have access;

(7) borrow money by bank overdraft, loan agreement or promissory note of the principal given for a period or on demand and at an interest rate as the agent shall select; give any security out of the assets of the principal as the agent shall deem desirable or necessary for any borrowing; pay, renew or extend the time of payment of any agreement or note so given or given by or on behalf of the principal; and procure for the principal a loan from any financial institution by any other procedure made available by the financial institution;

(8) make, assign, endorse, discount, guaranty and negotiate for any purpose all promissory notes, checks, drafts or other negotiable or non-negotiable paper instruments of the principal or payable to the principal or to the principal's order; receive the cash or other proceeds of these transactions; and accept any draft drawn by any person upon the principal and pay it when due;

(9) receive for the principal and deal in or with any trust receipt, warehouse receipt or other negotiable or non-negotiable instrument in which the principal has or claims to have interest;

(10) apply for and receive letters of credit or traveler's checks from any institution selected by the agent, giving any related indemnity or other agreements as the agent shall deem appropriate;

(11) consent to an extension in the time of payment for any commercial paper or financial transaction in which the principal has an interest or by which the principal is, or might be, affected in any way;

(12) demand, receive, obtain by action, proceeding or otherwise any money or other thing of value to which the principal is, may become or may claim to be entitled to as the proceeds of any transaction conducted by the principal or by the agent in the execution of any of the powers described in this section, or partly by the principal and partly by the agent so acting; conserve, invest, disburse or utilize anything so received for the purposes enumerated in this section; and reimburse the agent for any expenditures properly made by the agent in the execution of the powers conferred upon the agent by the power of attorney pursuant to this section;

(13) execute, acknowledge, seal and deliver any instrument in the name of the principal or otherwise which the agent deems useful for the accomplishment of any purpose enumerated in this section;

(14) prosecute, defend, submit to arbitration, settle and propose or accept a compromise with respect to any claim existing in favor of or against the principal based
on or involving any financial transaction or intervene in any action or proceeding relating to the transaction;

(15) hire, discharge and compensate any attorney, accountant, expert witness or other assistant or assistants when the agent deems the action to be appropriate for the proper execution by the agent of any of the powers described in this section and for maintaining the necessary records; and

(16) in addition to the specific acts set forth in this section, do any other act which the principal may do through an agent concerning any transaction with a financial institution which affects the financial or other interests of the principal.

b. All powers described in subsection a. shall be exercisable equally with respect to any financial transaction which affects the financial or other interests of the principal, regardless of whether the transaction is (i) specifically identified at the time of the execution of the power of attorney or (ii) conducted in this State or elsewhere.


COMMENT
The proposed new section is substantially derived from the source provisions with some modifications to language and to expand the section’s application to financial institutions that may not be banking institutions. Subsection b. is adopted from Chapter 644.

46:2B-20.27. Real estate transactions; acts authorized

a. If a power of attorney contains language that confers authority on the agent to “conduct real estate transactions”, or words to that effect, unless the power of attorney otherwise provides, the agent shall have the authority under the power of attorney to:

(1) demand, buy, lease, receive, reject, accept as a gift or as security for an extension of credit, or otherwise acquire an interest in real property or a right incident to real property;

(2) sell, exchange, convey with or without covenants, representations or warranties, quitclaim, release, surrender, retain title for security, encumber, mortgage, partition, consent to partitioning, subject to an easement or covenant, subdivide, apply for zoning or other governmental permits; plat or consent to platting, develop, grant an option concerning, lease, sublease, contribute to an entity in exchange for an interest in that entity, or otherwise grant or dispose of an interest in real property or a right incident to real property;

(3) pledge or mortgage an interest in real property or right incident to real property as security to borrow money or pay, renew, or extend the time of payment of a debt of the principal or a debt guaranteed by the principal;

(4) release, assign, satisfy, or enforce by litigation or otherwise a mortgage, deed of trust, conditional sale contract, encumbrance, lien, or other claim to real property which exists or is asserted;

(5) manage or conserve an interest in real property or a right incident to real property owned or claimed to be owned by the principal, including insuring against liability or casualty or other loss; obtaining or regaining possession of or protecting the
interest or right by litigation or otherwise; paying, assessing, compromising or contesting taxes or assessments or applying for and receiving refunds in connection with them; and purchasing supplies, hiring assistance or labor, and making repairs or alterations to the real property;

(6) use, develop, alter, replace, remove, erect, or install structures or improvements upon real property in or incident to which the principal has, or claims to have, an interest or right;

(7) participate in a reorganization with respect to real property or an entity that owns an interest in or right incident to real property and receive, and hold, and act with respect to bonds and shares or other property received in a plan of reorganization, including selling or otherwise disposing of them, exercising or selling an option, right of conversion, or similar right with respect to them, and exercising any voting rights in person or by proxy;

(8) change the form of title of an interest in or right incident to real property;

(9) execute, acknowledge, seal and deliver any deed, affidavit of title and other closing documents, and to do any and all other act and things reasonably necessary to consummate the sale of premises or land generally, or specifically;

(10) execute, acknowledge, seal and deliver any revocation, declaration, mortgage, lease, notice, check or other instrument which the agent deems useful to accomplish any of the purposes enumerated in this section;

(11) dedicate to public use, with or without consideration, easements or other real property in which the principal has, or claims to have, an interest;

(12) demand, receive, obtain by action, proceeding or otherwise any money or other thing of value to which the principal is, may become or may claim to be entitled to as the proceeds of any real estate transaction conducted by the principal or by the agent in the execution of any of the powers described in this section, or partly by the principal and partly by the agent so acting; conserve, invest, disburse or utilize anything so received for the purposes enumerated in this section; and reimburse the agent for any expenditures properly made by the agent in the execution of the powers conferred upon the agent by the power of attorney pursuant to this section;

(13) execute, acknowledge, seal and deliver any instrument in the name of the principal or otherwise which the agent deems useful for the accomplishment of any purpose enumerated in this section;

(14) prosecute, defend, submit to arbitration, settle and propose or accept a compromise with respect to any claim existing in favor of or against the principal based on or involving any real estate transaction or intervene in any action or proceeding relating to the transaction;

(15) hire, discharge and compensate any attorney, accountant, expert witness or other assistant or assistants when the agent deems the action to be appropriate for the proper execution by the agent of any of the powers described in this section and for maintaining the necessary records; and
(16) in addition to the specific acts set forth in this section, do any other act which the principal can do through an agent concerning any real property that affects the financial or other interests of the principal.

b. All powers described in subsection a. shall be exercisable equally with respect to any real property in which the principal has an interest, regardless of whether the interest in real property is (i) specifically identified at the time of the execution of the power of attorney or (ii) located in this State or elsewhere.

Source: New.

COMMENT

The proposed new section is substantially derived from Chapter 644, but follows the format established by current section 46:2B-11 pertaining to banking powers.

46:2B-20.28. Goods and chattels transactions; acts authorized

a. If a power of attorney contains language that confers authority on the agent to “conduct goods and chattels transactions” or “conduct tangible personal property transactions”, or words to that effect, unless the power of attorney otherwise provides, the agent shall have the authority under the power of attorney to:

   (1) demand, buy, receive, reject, accept as a gift or as security for an extension of credit, or otherwise acquire ownership or possession of the goods and chattels or the tangible personal property or an interest in them;

   (2) sell, exchange, convey with or without covenants, representations, or warranties, quitclaim, release, surrender, create a security interest in, encumber, grant options concerning, lease, sublease, or, otherwise dispose of goods and chattels or tangible personal property or an interest in them;

   (3) grant a security interest in goods and chattels or tangible personal property, or an interest in them as security to borrow money or pay, renew, or extend the time of payment of a debt of the principal or a debt guaranteed by the principal;

   (4) release, assign, satisfy, or enforce by litigation or otherwise, a security interest, lien or other claim on behalf of the principal, with respect to goods and chattels or tangible personal property or an interest in them;

   (5) manage or conserve goods and chattel or tangible personal property or an interest in them;

   (6) demand, receive, obtain by action, proceeding or otherwise any money or other thing of value to which the principal is, may become or may claim to be entitled to as the proceeds of any chattel or goods or tangible personal property transaction conducted by the principal or by the agent in the execution of any of the powers described in this section, or partly by the principal and partly by the agent so acting; conserve, invest, disburse or utilize anything so received for the purposes enumerated in this section; and reimburse the agent for any expenditures properly made by the agent in the execution of the powers conferred upon the agent by the power of attorney pursuant to this section;
(7) execute, acknowledge, seal and deliver any instrument in the name of the principal or otherwise which the agent deems useful for the accomplishment of any purpose enumerated in this section;

(8) prosecute, defend, submit to arbitration, settle and propose or accept a compromise with respect to any claim existing in favor of or against the principal based on or involving any goods or chattel or tangible personal property transaction or intervene in any action or proceeding relating to the transaction;

(9) hire, discharge and compensate any attorney, accountant, expert witness or other assistant or assistants when the agent deems the action to be appropriate for the proper execution by the agent of any of the powers described in this section and for maintaining the necessary records; and

(10) in addition to the specific acts set forth in this section, do any other act which the principal can do through an agent concerning any chattel or goods or tangible personal property or interest in any chattel or goods or tangible personal property that affects the financial or other interests of the principal.

b. All powers described in subsection a. shall be exercisable equally with respect to any goods and chattel or tangible personal property owned by the principal, regardless of whether the goods and chattels or tangible personal property is (i) specifically identified at the time of the execution of the power of attorney or (ii) located in this State or elsewhere.

Source: New.

COMMENT
The proposed new section is substantially derived from Chapter 644, but follows the format established by current section 46:2B-11 pertaining to banking powers.

46:2B-20.29. Bond, share and commodity transactions; acts authorized

a. If a power of attorney contains language that confers authority on the agent to “conduct bond, share and commodity transactions”, or words to that effect, unless the power of attorney otherwise provides, the agent shall have the authority under the power of attorney to:

(1) sell, exchange, transfer either with or without a guaranty, release, surrender, hypothecate, pledge, grant options concerning, loan, trade in, or otherwise dispose of any bond, share, other instrument of similar character, commodity interest, or any instrument with respect to a commodity interest, together with the interest, dividends, proceeds or other distributions connected with them;

(2) receive certificates and other evidences of ownership with respect to a bond, share, other instrument of similar character, commodity interest, or any instrument with respect to a commodity interest;

(3) exercise voting rights with respect to a bond or share in person or by proxy, enter into voting trusts, and consent to limitations on the right to vote;

(4) manage or conserve any bond, share, instrument of similar character, commodity interest or any instrument with respect to a commodity;
(5) carry in the name of a nominee selected by the agent any evidence of the ownership of any bond, share, other instrument of similar character, commodity interest or instrument with respect to a commodity, belonging to the principal;

(6) demand, receive, obtain by action, proceeding or otherwise any money or other thing of value to which the principal is, may become or may claim to be entitled to as the proceeds of any bond, share or commodity transaction conducted by the principal or by the agent in the execution of any of the powers described in this section, or partly by the principal and partly by the agent so acting; conserve, invest, disburse or utilize anything so received for the purposes enumerated in this section; and reimburse the agent for any expenditures properly made by the agent in the execution of the powers conferred upon the agent by the power of attorney pursuant to this section;

(7) execute, acknowledge, seal and deliver any instrument in the name of the principal or otherwise which the agent deems useful for the accomplishment of any purpose enumerated in this section;

(8) prosecute, defend, submit to arbitration, settle and propose or accept a compromise with respect to any claim existing in favor of or against the principal based on or involving any bond, share or commodity transaction or intervene in any action or proceeding relating to the transaction;

(9) hire, discharge and compensate any attorney, accountant, expert witness or other assistant or assistants when the agent deems the action to be appropriate for the proper execution by the agent of any of the powers described in this section and for maintaining the necessary records; and

(10) in addition to the specific acts set forth in this section, do any other act which the principal may do through an agent concerning any transaction with respect to any interest in any bond, share or commodity interest that affects the financial or other interests of the principal.

b. All powers described in subsection a. shall be exercisable equally with respect to any interest in any bond, share or other instrument of similar character, commodity or instrument with respect to a commodity owned by the principal, regardless of whether the interest is (i) specifically identified at the time of the execution of the power of attorney or (ii) located in this State or elsewhere.

Source: New.

COMMENT

The proposed new section is substantially derived from Chapter 644 and the UPOAA, but follows the format established by current section 46:2B-11 pertaining to banking powers.

46:2B-20.30. Business operating transactions; acts authorized

a. Subject to the terms of a document or agreement governing an entity or an entity ownership interest, and unless the power of attorney otherwise provides, if a power of attorney contains language that confers authority on the agent to “conduct business operating transactions”, or words to that effect, unless the power of attorney otherwise provides, the agent shall have the authority under the power of attorney to:
(1) operate, buy, sell, enlarge, reduce, or terminate an ownership interest;

(2) perform a duty, discharge a liability and exercise in person or by proxy a right, power, privilege, or option that the principal has, may have, or claims to have;

(3) enforce the terms of an ownership agreement;

(4) with respect to an entity or business owned solely by the principal regardless of the form of organization of the business, provided that proof of the principal’s sole ownership is demonstrated:

   (a) continue, modify, renegotiate, extend and terminate any contractual arrangements made with any person, firm, association, corporation or other entity, by or on behalf of the principal prior to the creation of the agency;

   (b) determine: the location of the operation; nature and extent of the business; methods of manufacturing, selling, merchandising, financing, accounting, and advertising employed in operations; amounts and types of insurance carried; mode of engaging, compensating and dealing with employees, accountants, attorneys, or other advisors; and the name or form of organization;

   (c) change the name or form of organization under which the entity or business is operated and enter into an ownership agreement with other persons to take over all or part of the operation of the entity or business; and

   (d) demand and receive money due or claimed by the principal or on the principal’s behalf in the operation of the entity or business and control and disburse the money in the operation of the entity or business;

(5) collect and disburse accounts receivable; continue, modify, renegotiate, extend and terminate a contract made by or on behalf of the principal before execution of the power of attorney; inject additional capital in which the principal has an interest; join in a plan of reorganization, consolidation, conversion, domestication, or merger of the entity or business; sell or liquidate all or part of the entity or business; establish the value under a buy-out agreement to which the principal is a party; and prepare, sign, file and deliver reports, compilations, returns, or other documents with respect to the entity or business and make related payments; pay, compromise, or contest taxes, assessments, fines or penalties and perform any other act to protect the principal from illegal or unnecessary taxation, assessments, fines or penalties with respect to the entity or business;

(5) demand, receive, obtain by action, proceeding or otherwise any money or other thing of value to which the principal is, may become or may claim to be entitled to as the proceeds of any business operating transaction conducted by the principal or by the agent in the execution of any of the powers described in this section, or partly by the principal and partly by the agent so acting; engage in banking transactions the agent deems desirable for effectuating the execution of the powers described in this section; conserve, invest, disburse or utilize anything so received for the purposes enumerated in this section; and to reimburse the agent for any expenditures properly made by the agent in the execution of the powers conferred upon the agent by the power of attorney pursuant to this section;
execute, acknowledge, seal and deliver any instrument in the name of the principal or otherwise which the agent deems useful for the accomplishment of any purpose enumerated in this section;

(7) prosecute, defend, submit to arbitration, settle and propose or accept a compromise with respect to any claim existing in favor of or against the principal based on or involving any business operating transaction or intervene in any action or proceeding relating to the transaction;

(8) hire, discharge and compensate any attorney, accountant, expert witness or other assistant or assistants when the agent deems the action to be appropriate for the proper execution by the agent of any of the powers described in this section and for maintaining the necessary records; and

(9) in addition to the specific acts set forth in this section, do any other act which the principal may do through an agent concerning any business operating transaction that affects the financial or other interests of the principal.

b. All powers described in subsection a. shall be exercisable equally with respect to any business operating transaction in which the principal has an interest, regardless of whether the business operating transaction is (i) specifically identified at the time of the execution of the power of attorney or (ii) conducted in this State or elsewhere.

Source: New.

COMMENT
The proposed new section is substantially derived from Chapter 644 and the UPOAA, but follows the format established by current section 46:2B-11 pertaining to banking powers.

46:2B-20.31. Insurance transactions; acts authorized

a. If a power of attorney contains language that confers authority on the agent to “conduct insurance transactions”, or words to that effect, unless the power of attorney otherwise provides, the agent shall have the authority under the power of attorney to:

(1) continue, pay the premium or assessment or make a contribution on any contract of life, accident, health, disability or liability or any combination of such insurance procured by or on behalf of the principal which insures or provides an annuity to either the principal or another person, whether or not the principal is a beneficiary under the contract; provided that with respect to life insurance contracts existing at the time the power of attorney is executed, the authority granted by the power shall not include the authority to add, delete or otherwise change the beneficiary designation in effect for the contract, or modify, rescind, exchange, release or terminate such contract unless the specific authority to add, delete or otherwise change the beneficiary designation or to modify, rescind, exchange, release or terminate such contract is expressly conveyed in a power of attorney that is executed pursuant to this act;

(2) procure new, different or additional contracts of insurance or annuities protecting the principal; select the amount, type of insurance contract and the mode of payment under each policy; and pay the premium or assessment on, modify, rescind, exchange, release or terminate any contract procured by the agent;
(3) collect, sell, assign, hypothecate, borrow against, or pledge the interest of the principal in a contract of insurance or annuity;

(4) apply for and receive any available loan on the security of the contract of insurance, whether for the payment of a premium or for the procuring of cash; surrender and thereupon receive the cash surrender value; exercise an election as to the beneficiary or mode of payment, change the manner of premium payments; and change or convert the type of insurance contract with respect to any contract to which the principal has, or claims to have, any one or more of the powers described in this section; provided that the authority granted by the power shall not include the authority to add, delete or otherwise change the beneficiary designation in effect for the contract, unless the power to add, delete or change the beneficiary designation is expressly conveyed in a power of attorney executed pursuant to this act;

(5) demand, receive, obtain by action, proceeding or otherwise any money or other thing of value to which the principal is, may become or may claim to be entitled to as the proceeds of any business operating transaction conducted by the principal or by the agent in the execution of any of the powers described in this section, or partly by the principal and partly by the agent so acting; to conserve, invest, disburse or utilize anything so received for the purposes enumerated in this section; and reimburse the agent for any expenditures properly made by the agent in the execution of the powers conferred upon the agent by the power of attorney pursuant to this section;

(6) execute, acknowledge, seal and deliver any instrument in the name of the principal or otherwise which the agent deems useful for the accomplishment of any purpose enumerated in this section;

(7) prosecute, defend, submit to arbitration, settle and propose or accept a compromise with respect to any claim existing in favor of or against the principal based on or involving any business operating transaction or intervene in any action or proceeding relating to the transaction;

(8) hire, discharge and compensate any attorney, accountant, expert witness or other assistant or assistants when the agent deems the action to be appropriate for the proper execution by the agent of any of the powers described in this section and for maintaining the necessary records; and

(9) in addition to the specific acts set forth in this section, do any other act which the principal may do through an agent concerning the procuring, supervising, managing, modifying, enforcing, or terminating a contract of insurance or otherwise involving any insurance transaction in which the principal is insured or in any way interested.

b. All powers described in subsection a. shall be exercisable equally with respect to any contract of insurance in which the principal has an interest, regardless of whether the contract of insurance is (i) specifically identified at the time of the execution of the power of attorney or (ii) conducted in this State or elsewhere.

Source: New.

COMMENT

The proposed new section is substantially derived from Chapter 644 and the UPOAA, but follows the format established by current section 46:2B-11 pertaining to banking powers.
46:2B-20.32. Estate transactions; acts authorized

a. If a power of attorney contains language that confers authority on the agent to “conduct estate transactions”, or words to that effect, unless the power of attorney otherwise provides, the agent shall have the authority under the power of attorney to:

(1) accept, receive, receipt for, sell, assign, pledge, or exchange a share in or payment from an estate, trust or other beneficial interest;

(2) demand or obtain money or another thing of value to which the principal is, may become, or claims to be, entitled by reason of an estate, trust, or other beneficial interest, by litigation or otherwise;

(3) exercise for the benefit of the principal a presently exercisable general power of appointment held by the principal;

(4) conserve, invest, disburse or use anything received for an authorized purpose;

(5) transfer an interest of the principal in real property, bonds and shares, accounts with financial institutions or securities, intermediaries, insurance, annuities, and other property to the trustee of a revocable trust created by the principal as settler; and

(6) apply for and to procure, in the name of the principal, letters of administration, letters testamentary, letters of trusteeship, or any other type of judicial or administrative authority to act as a fiduciary;

(7) demand, receive, obtain by action, proceeding or otherwise any money or other thing of value to which the principal is, may become or may claim to be entitled to by reason of the death testate or intestate of any person or of any testamentary disposition or of any trust, or by reason of the administration of the estate of a decedent or absentee, or of the guardianship of a minor or intellectually incapacitated person, or the administration of any trust or other fund; initiate, participate in and oppose any proceeding for the ascertainment of the meaning, validity or effect of any deed, will, declaration of trust, or other transaction affecting the interest of the principal; initiate, participate in and oppose any proceeding for the removal, substitution or surcharge of a fiduciary; conserve, invest disburse or use anything so received for purposes enumerated in this section; and reimburse the agent for any expenditures properly made by the agent in the execution of the powers conferred upon the agent by the power of attorney pursuant to this section;

(8) execute, acknowledge, seal and deliver any instrument in the name of the principal or otherwise which the agent deems useful for the accomplishment of any purpose enumerated in this section;

(9) prosecute, defend, submit to arbitration, settle and propose or accept a compromise with respect to any claim which affects the estate of a decedent, absentee, minor or intellectually incapacitated, or the administration of a trust or other fund, in any one if which the principal has, or claims to have, an interest, and do any and all acts that the agent deems desirable or necessary in effectuating such compromise;

(10) hire, discharge and compensate any attorney, accountant, expert witness or other assistant or assistants when the agent deems the action to be appropriate for the
proper execution by the agent of any of the powers described in this section and for maintaining the necessary records; and

(11) in addition to the specific acts set forth in this section, do any other act which the principal may do through an agent concerning the estate of a decedent, absentee, minor or incapacitated individual as defined by N.J.S. 3B:1-2, or the administration of a trust or other fund, in any one of which the principal has, or claims to have, an interest or with respect to which the principal is a fiduciary; provided that with respect to beneficiary designations existing at the time the power of attorney is executed, or the power to reject, renounce, disclaim, release, or consent to a reduction in or modification of a share in or payment from an estate, trust or other beneficial interest, or the establishment of a trust or the transfer of property, money or other assets to a trust already established for the benefit of the principal or such people as the principal shall designate, the authority granted by the power shall not include the authority to change the designation of a beneficiary, or reject, renounce, disclaim, release, or consent to a reduction in or modification of a share in or payment from an estate, trust or other beneficial interest, or the establishment of a trust or the transfer of property, money or other assets to a trust already established for the benefit of the principal or such people as the principal shall designate, unless the authority to make such change is expressly conveyed in a power of attorney executed pursuant to this act. A power of attorney may not be used to renounce appointment of an executor.

b. All powers described in subsection a. shall be exercisable equally with respect to any estate of a decedent, absentee, minor or incapacitated individual, or the administration of any trust or other fund, in which the principal has an interest, regardless of whether the estate, trust or other fund is (i) specifically identified at the time of the execution of the power of attorney or (ii) located in this State or elsewhere.

Source: New.

COMMENT
The proposed new section is substantially derived from Chapter 644 and the UPOAA, but follows the format established by current section 46:2B-11 pertaining to banking powers.

46:2B-20.33. Litigation and other legal proceedings; acts authorized

a. If a power of attorney contains language that confers authority on the agent to “conduct litigation and other legal proceedings”, or words to that effect, unless the power of attorney otherwise provides, the agent shall have the authority under the power of attorney to:

(1) assert and maintain before a court, administrative agency, or other tribunal a claim, claim for relief, cause of action, counterclaim, offset, recoupment, or defense, including an action to recover property or other thing of value, recover damages sustained by the principal, eliminate or modify tax liability, or seek an injunction, specific performance or other relief;

(2) bring an action of interpleader or to determine adverse claims or intervene or interplead in any action or proceeding, and act in any litigation as amicus curiae;
(3) seek attachment, garnishment, order of arrest, replevin, distraint, or any other preliminary, provisional, or intermediate relief or effect or satisfy a judgment, lien, order or decree;

(4) submit to or propose and accept a compromise, offer of judgment, admission of any facts, submission of any controversy on an agreed statement of facts, consent to examination before trial, and generally bind the principal in the conduct of any litigation or controversy as the agent deems desirable;

(5) submit to alternative dispute resolution, mediation, arbitration, settlement, or propose and accept a compromise with respect to any claim existing in favor of or against the principal, or any litigation to which the principal is or may become designated a party;

(6) waive the issuance and service of process, accept service of process, appear for the principal, designate persons upon whom process directed to the principal may be served, execute and file or deliver stipulations on the principal’s behalf, verify pleadings, appeal to appellate tribunals, procure and give surety and indemnity bonds at such times and to such extent as the agent deems desirable or necessary, contract and pay for the preparation and printing of records and briefs, receive and execute, file or deliver any consent, waiver, release, confession of judgment, satisfaction of judgment, notice, agreement, or other instrument which the agent deems desirable or necessary in connection with the prosecution or defense of any litigation to which the principal is or may become or be designated a party;

(7) act for the principal with respect to bankruptcy or insolvency proceedings, or with respect to a reorganization, receivership, or application for the appointment of a receiver or trustee which affects an interest of the principal in any chattel, bond, share, commodity interest, chose in action or other thing of value;

(8) pay from funds in the agent’s control or for the account of the principal, any judgment, award, or order against the principal or to receive and conserve any money or other things of value paid in a settlement made in connection with a claim or litigation and to receive and endorse checks and to deposit them;

(9) hire, discharge and compensate any attorney, accountant, expert witness or other assistant or assistants when the agent deems the action to be appropriate for the proper execution by the agent of any of the powers described in this section and for maintaining the necessary records; and

(10) in addition to the specific acts set forth in this section, do any other act which the principal may do through an agent in connection with any claim by or against the principal or with litigation or proceeding to which the principal is or may become or be designated a party.

b. All powers described in subsection a. shall be exercisable equally with respect to any litigation or proceeding, regardless of whether the litigation or proceeding is (i) specifically identified at the time of the execution of the power of attorney or (ii) arising in this State or elsewhere.

Source: New.
The proposed new section is substantially derived from Chapter 644 and the UPOAA, but follows the format established by current section 46:2B-11 pertaining to banking powers.

46:2B-20.34. Personal and family maintenance; acts authorized

a. If a power of attorney contains language that confers authority on the agent to “conduct personal and family maintenance”, or words to that effect, unless the power of attorney otherwise provides, the agent shall have the authority under the power of attorney to:

(1) perform the acts necessary to maintain the customary standard of living, including but not limited to the costs of food, shelter, clothing, appropriate education (which may mean postgraduate or vocational education, or both), incidentals, usual vacations and travel expenses, domestic help, healthcare, and custodial care, of the principal, the principal’s spouse or domestic or civil union partner, the principal’s children, other individuals legally entitled to be supported by the principal, and any other individuals whom the principal has customarily supported or indicated an intent to support, regardless of whether living when the power of attorney is executed or later born;

(2) make periodic payments of child support and other family maintenance required by a court or governmental agency or an agreement to which the principal is a party;

(3) continue any provision made by the principal for automobiles or other means of transportation, including but not limited to registering, licensing, insuring, and replacement, for the individuals described in paragraph (1);

(4) maintain credit and debit accounts, and open new accounts, as appropriate, for the individuals described in paragraph (1);

(5) continue payments incidental to membership or affiliation of the principal in an religious institution, club, society, order or other organization or to continue contributions to those organizations;

(6) continue the discharge of any services or duties assumed by the principal, prior to the creation of the agency or thereafter, to any parent, relative or friend of the principal;

(7) act as the principal’s personal representative pursuant to the Health Insurance Portability and Accountability Act (HIPAA), sections 1171 through 1179 of the Social Security Act, 42 U.S.C. Section 1320d, and applicable regulations, in order to obtain access to the principal’s health-care information and communicate with the principal’s health-care provider; and

(8) demand, receive, obtain by action, proceeding or otherwise any money or other thing of value to which the principal is or may become or may claim to be entitled as a salary, wages, commission or other remuneration for services performed, or as a dividend or distribution upon any stock, or as interest or principal upon any indebtedness or periodic distribution of profits from any partnership or business in which the principal
has or claims an interest, and endorse, collect or otherwise realize upon any instrument for the payment so received;

(9) use any asset of the principal for the performance of the powers enumerated in this section, including but not limited to the power to draw money by check or otherwise from any bank deposit of the principal, to sell any land, real property, chattel, bond, share, commodity interest, chose in action or other asset of the principal, to borrow money and to pledge as security for such loan, any asset, including insurance, which belongs to the principal;

(10) execute, acknowledge, verify, seal, file and deliver any application, consent, petition, notice, release, waiver, agreement or other instrument that the agent deems desirable for the accomplishment of any of the purposes enumerated in this section;

(11) prosecute, defend, submit to arbitration, settle and propose or accept a compromise with respect to any claim existing in favor of or against the principal based on or involving any transaction enumerated in this section or to intervene in any action or proceeding relating to the transaction;

(12) hire, discharge and compensate any attorney, accountant, expert witness or other assistant or assistants when the agent deems the action to be appropriate for the proper execution by the agent of any of the powers described in this section and for maintaining the necessary records; and

(13) in addition to the specific acts set forth in this section, do any other act which the principal may do through an agent for the welfare of the spouse, domestic or civil union partner, children or dependents of the principal or for the preservation and maintenance of the other personal relationships of the principal to parents, relatives, friends and organizations.

b. All powers described in subsection a. shall be exercisable equally with respect to the welfare of the spouse, domestic or civil union partner, children or dependents of the principal or for the preservation and maintenance of the other personal relationships of the principal to parents, relatives, friends and organizations, regardless of whether the acts required for their execution are (i) specifically identified at the time of the execution of the power of attorney or (ii) conducted in this State or elsewhere.

Source: New.

COMMENT
The proposed new section is substantially derived from Chapter 644 and the UPOAA, but follows the format established by current section 46:2B-11 pertaining to banking powers.

46:2B-20.35. Health care billing, recordkeeping and payment; acts authorized

a. If a power of attorney contains language that confers authority on the agent to “conduct health care billing, recordkeeping and payment”, or words to that effect, unless the power of attorney otherwise provides, the agent shall have the authority under the power of attorney to:

(1) access records relating to the provision of health care and make decisions relating to the past, present or future payment for the provision of health care consented
to by or on behalf of the principal or the principal’s health care agent authorized under State law;

(2) keep records of all cash received and disbursed for or on account of the principal, of all credits and debits to the account of the principal, and of all transactions affecting in any way the assets and liabilities of the principal;

(3) prepare, execute and file all tax, social security, unemployment insurance and information returns, required by the laws of the United States, of any state or of any subdivision thereof or of any foreign government; and prepare, execute and file all other papers and instruments which the agent deems desirable for the safeguarding of the principal against excess or illegal taxation or against penalties imposed for a claimed violation of any law or other governmental regulation;

(4) prepare, execute and file any record, report, statement or other document to safeguard or promote the principal’s interest, under a statute or governmental regulation;

(5) hire, discharge and compensate any attorney, accountant, expert witness or other assistant or assistants when the agent deems the action to be appropriate for the proper execution by the agent of any of the powers described in this section and for maintaining the necessary records; and

(6) in addition to the specific acts set forth in this section, do any other act which the principal may do through an agent in connection with the preparation, execution, filing, storage or other utilization of any record, report, or statement of or concerning the principal’s affairs.

b. The authority granted under this section shall be construed to mean that the principal authorizes the agent to act as the principal’s representative pursuant to the Health Insurance Portability and Accountability Act (HIPAA), sections 1171 through 1179 of the Social Security Act, 42 U.S.C. Section 1320d, and applicable regulations, in order to obtain access to the principal’s health-care information and communicate with the principal’s health-care provider.

c. The authority granted under this section shall not include authorization for the agent to make other medical or health care decisions for the principal which only can be authorized by a separate advanced directive for health care, otherwise known as a living will, along with a health care proxy, otherwise known as a durable power of attorney for health care, in accordance with N.J.S. 26:2H-53 et seq. or N.J.S. 26:2H-103, et seq., or both, as applicable.

d. All powers described in subsection a. shall be exercisable equally with respect to any health care billing and payment matters, and records, reports or statements of or concerning the affairs of the principal regardless of whether (i) specifically identified at the time of the execution of the power of attorney or (ii) located in this State or elsewhere.

Source: New.

COMMENT

The proposed new section is substantially derived from Chapter 644 and the UPOAA, but follows the format established by current section 46:2B-11 pertaining to banking powers.
46:2B-20.36. Retirement benefit transactions; acts authorized

a. For purposes of this section “retirement benefits” means a plan or account created by an employer, the principal or another individual to provide retirement benefits or deferred compensation of which the principal is a participant, beneficiary or owner, including a plan or account under the Internal Revenue Code, as appropriate. If a power of attorney contains language that confers authority on the agent to “conduct retirement benefit transactions”, or words to that effect, unless the power of attorney otherwise provides, the agent shall have the authority under the power of attorney to:

(1) select the form and timing of payments under a retirement plan, and contribute to and withdraw benefits from the plan;

(2) make a rollover, including a direct trustee-to-trustee rollover, of benefits from one retirement plan to another, or make investment directions;

(3) establish a retirement plan in the principal’s name;

(4) exercise investment powers available under a retirement plan;

(5) borrow from, sell assets to, or purchase assets from a retirement plan;

(6) make investment directions, select and change payment options, and exercise any other election for the principal with regard to any retirement benefit or plan in which the principal has an interest, provided that the authority granted hereby shall not include the authority to add, delete or otherwise change the designation of the beneficiaries in effect for any such retirement benefit or plan, unless the authority to add, delete or otherwise change the designation of the beneficiaries is expressly provided in a power of attorney executed pursuant to this act.

(7) execute, acknowledge, verify, seal, file and deliver any application, consent, petition, notice, release, waiver, agreement or other instrument that the agent deems desirable for the accomplishment of any of the purposes enumerated in this section;

(8) prosecute, defend, submit to arbitration, settle and propose or accept a compromise with respect to any claim existing in favor of or against the principal based on or involving any retirement benefit or plan or intervene in any action or proceeding relating to the transaction;

(9) hire, discharge and compensate any attorney, accountant, expert witness or other assistant or assistants when the agent deems the action to be appropriate for the proper execution by the agent of any of the powers described in this section and for maintaining the necessary records; and

(10) in addition to the specific acts set forth in this section, do any other act which the principal may do through an agent with respect to any retirement benefit or plan maintained by the principal or in which the principal has an interest or may thereafter have an interest.

b. All powers described in subsection a. shall be exercisable equally with respect to any retirement benefits or plan, regardless of whether (i) specifically identified at the time of the execution of the power of attorney or (ii) located in this State or elsewhere.
The proposed new section is substantially derived from Chapter 644 and the UPOAA, but follows the format established by current section 46:2B-11 pertaining to banking powers.

46:2B-20.37. Tax matters; acts authorized

a. If a power of attorney contains language that confers authority on the agent to “conduct tax matters”, or words to that effect, unless the power of attorney otherwise provides, the agent shall have the authority under the power of attorney to:

(1) prepare, sign, and file federal, state, local and foreign income, gift, payroll, property, and any other tax returns, claims for refunds, requests for extension of time, petitions regarding tax matters, and any other tax-related documents;

(2) pay taxes due, collect refunds, post bonds, receive confidential information and contest deficiencies determined by the Internal Revenue Service or other taxing authority;

(3) exercise any election available to the principal under federal, state, local or foreign tax law; and

(4) act for the principal in all tax matters for all periods before the Internal Revenue Service, or other taxing authority;

(5) act for the principal in all tax matters in connection with any authority enumerated in sections 46:2B-20.25 through 46:2B-20.37 of this act.

(6) execute, acknowledge, verify, seal, file and deliver any application, consent, petition, notice, release, waiver, agreement or other instrument that the agent deems desirable for the accomplishment of any of the purposes enumerated in this section;

(7) prosecute, defend, submit to arbitration, settle and propose or accept a compromise with respect to any claim existing in favor of or against the principal based on or involving any tax matters or intervene in any action or proceeding relating to the transaction;

(8) hire, discharge and compensate any attorney, accountant, expert witness or other assistant or assistants when the agent deems the action to be appropriate for the proper execution by the agent of any of the powers described in this section and for maintaining the necessary records; and

(9) in addition to the specific acts set forth in this section, do any other act which the principal may do through an agent with respect to any tax matters involving the principal or in which the principal has an interest or may thereafter have an interest.

b. The powers explicitly authorized in this section shall not be construed to diminish any like powers authorized in any other section of this act.

Source: New.

COMMENT

The proposed new section is substantially derived from Chapter 644 and the UPOAA, but follows the format established by current section 46:2B-11 pertaining to banking powers.
46:2B-20.38. Collect and disburse benefits from governmental programs or civil or military service; acts authorized

a. If a power of attorney contains language that confers authority on the agent to “collect and disburse benefits from governmental programs or civil or military service”, or words to that effect, unless the power of attorney otherwise provides, the agent shall have the authority under the power of attorney to:

   (1) execute vouchers in the name of the principal for allowances and reimbursements payable by the United States or a foreign government or by a state or subdivision of a state, or by another jurisdiction, to the principal, including allowances and reimbursements for transportation of the individuals described in section 46:2B-20.33a.(1), and for shipment of their household effects;

   (2) take possession and order the removal and shipment of property of the principal from a post, warehouse, depot, dock, or other place of storage and safekeeping, either governmental or private, and execute and deliver a release, voucher, receipt, bill of lading, shipping ticket, certificate, or other instrument for that purpose;

   (3) enroll in, apply for, select, reject, change, amend, or discontinue a benefit or program on the principal’s behalf;

   (4) prepare, file and prosecute a claim of the principal to any benefit or assistance, financial or otherwise, to which the principal is, or claims to be, entitled under a statute or governmental regulation, including but not limited to any benefit or assistance arising from or based upon military service performed prior or subsequent to creation of the agency by the principal or by any person related by blood or by marriage to the principal, to execute any receipt or other instrument which the agent deems desirable or necessary for the enforcement or the collection of the claim;

   (5) receive the financial proceeds of any claim of the type described in this section, converse, invest, disburse or use anything so received for a lawful purpose;

   (6) communicate with any representative or employee of a government, governmental subdivision, agency, or instrumentality on behalf of the principal;

   (7) hire, discharge and compensate any attorney, accountant, expert witness or other assistant or assistants when the agent deems the action to be appropriate for the proper execution by the agent of any of the powers described in this section and for maintaining the necessary records; and

   (8) in addition to the specific acts set forth in this section, do any other act which the principal may do through an agent to assure the maximum possible benefit from governmental programs or from civil or military service performed prior to or after the creation of the agency.

b. All powers described in subsection a. shall be exercisable equally with respect to any benefits from governmental programs or civil or military service, regardless of whether (i) specifically identified at the time of the execution of the power of attorney or (ii) located in this State or elsewhere.

Source: New.
COMMENT

The proposed new section is substantially derived from Chapter 644 and the UPOAA, but follows the format established by current section 46:2B-11 pertaining to banking powers.

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This tentative report is distributed to advise interested persons of the Commission's tentative recommendations and to notify them of the opportunity to submit comments. The Commission will consider these comments before making its final recommendations to the Legislature. The Commission often substantially revises tentative recommendations as a result of the comments it receives. If you approve of the tentative report, please inform the Commission so that your approval can be considered along with other comments.

COMMENTS SHOULD BE RECEIVED BY THE COMMISSION NOT LATER THAN NOVEMBER 6, 2009.

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

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

Introduction

This is a draft of a chapter covering the substance of what is now chapters 10 through 12A of Title 9. These statutes authorize counties to establish juvenile detention facilities and children’s shelters and provide for their operation. The current statutes are antiquated in several ways. Most important, they fail to distinguish between secure institutions for the detention of children charged with, or convicted of criminal activity and institutions for other children needing shelter, such as dependent neglected children or children involved in “juvenile-family” cases. See 2A:4A-34, 2A:4A-37 and 2A:4A-46. In addition, the administrative structures provided by these laws are not those now used and some of the terms used in these laws are now anachronistic. Most of the significant law on juvenile detention facilities and shelters is now found in Title 2A, Chapter 4A. The recommended revision is much reduced in length but preserves the residual purpose of the chapters in Title 9, to authorize counties to establish and maintain these institutions.

1. Juvenile detention facility

A county may maintain a juvenile detention facility for delinquent children detained by order of the Family Part of the Superior Court.

The juvenile detention facility shall constitute a special school district in the county.

Source: 9:10-1.

COMMENT

The section is derived from portions of 9:10-1 that are of continuing importance. It has been modernized to reflect current juvenile delinquency law. References to use of the facility for dependent children and to management of the facility by the Juvenile and Domestic Relations Court have been deleted as anachronistic.

2. Superintendents of detention house or school in certain counties

A county of the second class, the third class or the fifth class, that has a juvenile detention facility may by resolution appoint a superintendent who in addition to duties as superintendent shall be an assistant county probation officer with all the powers and duties prescribed by law for an assistant probation officer. The Superintendent shall perform the duties fixed by the board or by statutes, and shall hold office during the pleasure of the board and his salary shall be fixed by the board.

Source: 9:10-4.

COMMENT

Although simplified in language, the section continues the substance of 9:10-4.
3. Appointment of trustees; number; term; other offices; vacancies

a. The governing body of counties of the first class may appoint a board of trustees of its juvenile detention facility. The trustees shall serve without compensation and shall hold office for a term of four years and until their successors are appointed. The holding of any other public office by any member of said board of trustees shall not be held to be incompatible with the office as member of such board of trustees. A vacancy caused by death, resignation or otherwise shall be filled by the governing body of the county for the unexpired term.

b. The board of trustees shall be a body corporate with power to sue and be sued. It shall annually choose from among its members a president, a vice-president, a secretary and a treasurer.

c. The board of trustees in its own name may enter into and execute all appropriate contracts for the purpose of managing the juvenile detention facility, including the lodging and victualing of its officers, agents and employees, and the care, keep and victualing of persons committed to the facility, and the purchase of supplies, furniture and equipment for the education of persons committed to the facility. Any contract for the doing of work or the furnishing of materials or supplies of any kind exceeding $1,000.00 in amount shall be awarded only after public advertisement as required by law and to the lowest responsible bidder.

d. The board of trustees may appoint employees of the juvenile detention facility and, with the approval of the county government, fix their compensation. Each appointee shall hold his office or position at the pleasure of the board of trustees. Each person appointed as a teacher shall hold a teacher's certificate equal or superior to a first grade county certificate.

e. The board of trustees shall make rules for the conduct and management of the juvenile detention facility and care of the inmates and shall prescribe the duties and powers of the employees.


COMMENT
Although simplified in language, the section continues the substance of 9:11-1, 9:11-2, 9:11-3 and 9:11-4.

4. Money provided annually

The money the county government determines is necessary for the management of a county juvenile detention facility and other expenses incident to it shall be provided each year by in the annual tax budget.


COMMENT
Although simplified in language, the section continues the substance of 9:11-8.
5. Establishment of children's shelter; management; funds

a. A county may maintain a children’s shelter for the temporary accommodation of children who are homeless or abandoned, abused, neglected or cruelly treated.

b. The governing body of the county may appoint a committee of seven citizens of the county, who together with the director of the governing body of the county as ex-officio shall constitute the board of trustees of the children's shelter. The board of trustees shall make the rules and regulations for the management of the children's shelter.

c. The governing body of the county may, by resolution, determine to operate and manage such children's shelter instead of appointing a board of trustees for such purpose, in which case the governing body of the county shall have and may exercise all the powers of a board of trustees as provided in this section.

Source: 9:12A-1.

COMMENT

The section is derived from portions of 9:12A-1 that are of continuing importance.
This draft tentative report is distributed to advise interested persons of the Commission's tentative recommendations and to notify them of the opportunity to submit comments. The Commission will consider these comments before making its final recommendations to the Legislature. The Commission often substantially revises tentative recommendations as a result of the comments it receives. If you approve of the draft tentative report, please inform the Commission so that your approval can be considered along with other comments.

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

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

Introduction

This is a draft of a chapter covering the substance of what is now Chapter 17 of Title 9. The current statutes were written before the development of modern genetic tests that can almost always determine whether a particular person is a genetic parent of a particular child with a level of accuracy that makes them practically irrefutable. As a result, current law is written in terms of factual presumptions that are not now relevant. This chapter gives a central role to genetic testing in litigated cases of disputed genetic parentage.

However, the majority of parentage cases that arise around the time of birth do not involve a court determination. Most often, a man agrees that he is the father and signs a certificate of paternity. Federal statutes and regulations essentially require that states establish a system of voluntary acknowledgements of paternity that is as binding as a court determination. See, e.g. 42 USC §668 and 45 C.F.R. §303.5. Section 4 establishes such a system in the form of certificates of parentage. Unfortunately, some men who sign acknowledgments later come to question whether they were correct either because of the acquisition of new facts or a change of heart. The Commission considered requiring genetic testing in connection with a certificate of paternity but rejected the requirement because of the cost in money, time and invasion of privacy.

A small number of disputes over paternity do not follow the ordinary pattern of a known question around the time of birth. These disputes may arise when the relationship terminates between the persons who thought themselves to be father and mother, or in the context of divorce, or in the distribution of estates or trusts. There are not many of these cases, but they engender a great deal of heat. The chapter deals with this problem, first, with the requirement of genetic testing. Whenever an issue of genetic parentage arises, the court is required to order testing. The draft also limits challenges to parentage by barring challenges to parenage when the questioned parent has lived with the child for five years. This “statute of repose” treats the relationship as one of adoption whatever the genetic information may show.

The only provision on non-genetic parentage is one on sperm or egg donation, tracking a current provision on sperm donation. There are many other issues involving parenage that turn on matters other than genetics. Many of these issues are controversial, and all are fact sensitive. It seems better to leave these issues to caselaw determination.
1. Short title

This chapter shall be known and may be cited as the "New Jersey Parentage Act."

Source: 9:17-38.

COMMENT

This section is substantively identical to its source.

2. Parent-child relationship defined

a. "Parent-child relationship" means the legal relationship existing between a child and the child's natural or adoptive parents, incident to which the law confers or imposes rights, privileges, duties, and obligations. It includes the mother and child relationship and the father and child relationship.

b. The parent and child relationship extends equally to every child and to every parent, regardless of the marital status of the parents or the basis of that relationship.


COMMENT

Subsection (a) is substantively identical to 9:17-39. Subsection (b) is similar to 9:17-40, but it has been broadened by the addition of the last phrase.

3. Certificates of paternity

a. A man who claims to be the genetic father of the child may sign a certificate of paternity with intent to establish his paternity.

b. A certificate of paternity shall:

(1) be signed, under penalty of perjury by the mother and by the man seeking to establish his paternity;

(2) identify the child whose paternity is being acknowledged:

(3) state that the signatories understand that the certificate is the equivalent of a judicial adjudication of paternity of the child and that a challenge to the certificate is permitted only under limited circumstances;

(4) state whether there has been genetic testing and, if there was testing, that the claim of paternity is consistent with the results of the testing.

c. A valid certificate of paternity filed with an appropriate state or county agency is equivalent to an adjudication of paternity of a child and confers upon the acknowledged father all of the rights and duties of a parent unless the certificate is rescinded or challenged in a parentage action as allowed by this act.

d. A signatory may rescind a certificate of paternity by commencing a proceeding to rescind before the earlier of:

(1) 60 days after the effective date of execution of the certificate; or
(2) the date of the first hearing, in a proceeding to which the signatory is a party, before a court to adjudicate an issue relating to the child, including a proceeding that establishes support.

e. In the best interests of the child or either parent, the court may, and upon the request of the person agreeing to furnish support shall, order the agreement to be kept in confidence and designate a person or agency to receive and disburse on behalf of the child all amounts paid in performance of the agreement.


COMMENT

This section is based primarily on provisions in a number of bills filed in the Legislature in the last few years. See, e.g. A809 (2009). Subsection (e) continues the substance of 9:17-58(b) which deals with support agreements and is otherwise superseded by this section

4. Closed court; confidentiality of records

Notwithstanding any other law concerning public hearings and records, any action or proceeding held under this chapter shall be held in closed court without admittance of any person other than those necessary to the action or proceeding. All papers and records and any information pertaining to an action or proceeding held under this chapter that may reveal the identity of any party in an action, other than the final judgment or the birth certificate, whether part of the permanent record of the court or of a file with any public agency, are confidential and are subject to inspection only on order of the court for compelling reason clearly and convincingly shown or with the consent of all parties to the action who are still living.

Source: 9:17-42.

COMMENT

This section is substantively identical to its source.

5. Action to determine existence of parent-child relationship.

a. An action for the purpose of determining the existence or nonexistence of the parent-child relationship may be brought by:

   (1) a child or a legal representative of the child;

   (2) a parent of the child or the estate or legal representative of the parent if the parent has died, is mentally incapacitated or is a minor;

   (3) a person alleging to be a parent or the estate or legal representative of the alleged parent if the alleged parent has died, is mentally incapacitated or is a minor;

   (4) the Division of Family Development in the Department of Human Services, or the county welfare agency; or

   (5) any person or any entity, that would be benefited or deprived of a benefit under a will, trust or the laws of intestacy by the existence or nonexistence of a parent and child relationship, or a trustee, executor or administrator of such a will, trust or intestate estate.
b. An action under this act is a civil action in the Superior Court governed by the Rules of Court. The trial shall be by the court without a jury. The Superior Court shall have jurisdiction over an action brought under this act. The action may be joined with an action for divorce, annulment, separate maintenance or support.

c. The courts of this State have jurisdiction over any action brought under this act with respect to a child who is resident in this State. Personal jurisdiction may be acquired over any defendant by service in accordance with the rules of the court or as otherwise provided by law.

d. The action may be brought in the county in which the child or the alleged parent resides or is found or, if deceased, in which proceedings for probate of the estate have been or could be commenced.


COMMENT

Though it is new in its form, subsection (a) is substantively identical to current law. Subsection (b) is substantively identical to 9:17-49 and subsection (a) of 9:17-46. Subsection (c) is based on subsection (b) of 9:17-46. This provision differs from the source subsection in that it bases jurisdiction on residency rather than the place of intercourse. This approach is consistent with the Child Custody Jurisdiction and Enforcement Act 2A:34-53, et seq. Subsection (d) is substantively identical to subsection (c) of 9:17-46.

6. Parties; guardian ad litem

   a. The child may be made a party to the action. If the child is a minor and is made a party, a guardian ad litem may be appointed by the court to represent the child. The child's mother or father may not represent the child as guardian or otherwise.

   b. Any person known to be the child’s parent, any person alleged to be the child’s parent, any person who has claimed to be the child’s parent, and any person who would be affected by the determination of parentage shall be made parties.

   c. If a party is not subject to the jurisdiction of the court, the party shall be given notice of the action in a manner prescribed by the court and an opportunity to be heard.

   Source: 9:17-47.

   COMMENT

   Section 9:17-47 assumes a known natural mother and defendant men who are fathers. It bases the requirement that a person be a party on presumptions of paternity. Since those presumptions are being abandoned, the section has been recast in more general terms.


   a. In any action to establish genetic parentage pursuant to the provisions of this chapter, or in any action where genetic parentage genetic parentage is at issue, the court, on its own motion, shall order the child, the mother, the alleged father and any other designated individuals to submit to genetic testing. The court shall direct that the tests be of a type generally acknowledged as reliable by an accredited body designated by the Secretary of the United States Department of Health and Human Services and be performed by a laboratory approved by such an accredited body.
c. The test results, together with the opinions and conclusions of the test laboratory, shall be filed with the court. Any objection to the test results shall be made in writing and must be filed with the court at least 10 days prior to the hearing. If no objection is filed, the test results shall be admitted into evidence without requiring any additional foundation testimony or proof of authenticity or accuracy of the paternity testing or results. A party may call an outside expert witness to refute or support the testing procedure or results, or the mathematical theory on which they are based. Upon the entry of the order for scientific testing, the court shall inform each person to be tested of the procedure and requirements for objecting to the test results and of the consequences of the failure to object.

g. The fees and costs for the tests shall be paid by the parties in proportions and at times determined by the court.

Source: New

COMMENT

This section is based primarily on provisions in a number of bills filed in the Legislature in the last few years. See, e.g. A809 (2009). A consensus developed on the best method to determine genetic parentage after the sources were drafted. In the overwhelming majority of cases, where all three relevant parties can be tested, the tests are so definitive that it is unlikely that their results would be questioned. As a result, it has been possible to simplify the section somewhat and to eliminate some other sections that deal with evidentiary issues.

8. Judgment, order of court, certificate of parentage; support.

a. The judgment or order of the court or a Certificate of Parentage determining the existence or nonexistence of the parent and child relationship is determinative for all purposes until that determination is superseded by new court judgment or order in a later action permitted by this chapter.

b. If the judgment or order of the court is at variance with the child's birth certificate, the court shall order that an amendment to the original birth record be made under section 22 of P.L.1983, c.17 (C.9:17-59).

c. The judgment or order may contain any other provision directed against the appropriate party to the proceeding concerning the duty of support, the custody and guardianship of the child, parenting time privileges with the child, the furnishing of bond or other security for the payment of the judgment, the repayment of any public assistance grant, or any other matter in the best interests of the child. The judgment or order may direct the father to pay the reasonable expenses of the mother's pregnancy and postpartum disability, including repayment to an agency that provided public assistance funds for those expenses. Bills for pregnancy, childbirth and blood or genetic testing are admissible as evidence without requiring third party foundation testimony, and shall constitute prima facie evidence of the amounts incurred for these services or for testing on behalf of the child.

d. Support judgments or orders ordinarily shall be for periodic payments, which may vary in amount. In the best interests of the child, the purchase of an annuity may be ordered in lieu of periodic payments of support. The court may limit a parent's liability
for past support of the child to the proportion of the expenses already incurred that the
court deems just.

e. In determining the amount to be paid by a parent for support of the child and the period during which the duty of support is owed, the court shall apply the child support guidelines as defined in section 3 of P.L.1998, c.1 (C.2A:17-56.52). In cases in which the court finds that a deviation from these guidelines is appropriate, the court shall consider all relevant facts when determining the amount of support, including the:

1. Needs of the child;
2. Standard of living and economic circumstances of each parent;
3. Income and assets of each parent, including any public assistance grant received by a parent;
4. Earning ability of each parent, including educational background, training, employment skills, work experience, custodial responsibility for children and the length of time and cost for each parent to obtain training or experience for appropriate employment;
5. Need and capacity of the child for education, including higher education;
6. Age and health of the child and each parent;
7. Income, assets and earning ability of the child;
8. Responsibility of the parents for the support of others; and
9. Debts and liabilities of each child and parent.

The factors set forth herein are not intended to be exhaustive. The court may consider such other factors as may be appropriate under the circumstances.

f. Upon a motion by a party, the court shall enter a temporary support order pending a judicial determination of parentage if there is clear and convincing evidence of paternity supported by blood or genetic test results or other evidence.

g. The court may order reasonable fees of counsel, experts, and the child's guardian ad litem, and other costs of the action and pre-trial proceedings, including genetic tests, to be paid by the parties in proportions and at times determined by the court.


COMMENT

With one exception, this section is substantively identical to its sources. Subsections (a) through (f) are derived from 9:17-53; subsection (g) from 9:17-54. The last phrase in subsection (a) is new. It refers to the fact that reexaminations of parentage are permitted in limited circumstances.


a. If a parent-child relationship is established under this chapter or under prior law, the obligation of the parent may be enforced in the same or other proceedings by the other parent, the child, the public agency that has furnished or may furnish the reasonable expenses of pregnancy, postpartum disability, education, support, medical expenses, or
burial, or by any other person, including a private agency, to the extent that the person, has furnished or is furnishing these expenses.

b. The court may order support payments to be made to a parent, the clerk of the court, the appropriate probation department, or a person, corporation, or agency designated to administer them for the benefit of the child, under the supervision of the court.

c. Willful failure to obey the judgment or order of the court is a civil contempt of the court.

d. The court has continuing jurisdiction to modify or revoke a judgment or order.


COMMENT
This section is substantively identical to its sources. Subsections (a) through (c) are derived from 9:17-55; subsection (d) from 9:17-56.

10. Amended birth record

a. Upon order of a court of this State or upon request of a court of another state, the local registrar of vital statistics shall prepare an amended birth record consistent with the findings of the court.

b. The fact that the parent-child relationship was declared after the child's birth shall not be ascertainable from the amended birth record, but the actual place and date of birth shall be shown.

c. The evidence upon which the amended birth record was made and the original birth certificate shall be kept in a sealed and confidential file and be subject to inspection only upon consent of the court and all interested persons, or in exceptional cases only upon an order of the court for compelling reasons clearly and convincingly shown.

Source: 9:17-59.

COMMENT
This section is substantively identical to 9:17-59.

11. Restrictions on Reexamination of Parent-Child Relationship

a. A party who has signed a certificate of paternity accompanied by the results of genetic testing may not challenge the certificate without new genetic evidence that clearly shows that the earlier determination was mistaken.

b. A party who has signed a certificate of paternity not accompanied by the results of genetic testing may not challenge the certificate unless the party’s agreement to the certificate was the result of fraud, duress or mistake of fact that could not reasonably have been known at a time when the certificate could have been rescinded.

c. No person may challenge a court determination of parentage based on genetic evidence without new genetic evidence that clearly shows that the earlier determination was mistaken.
d. No person, other than a child who was a minor at the time of the action, may challenge a court determination of parentage made in an action to which the person was a party.

e. No person other than the child may challenge the parent-child relationship of a person who has resided with the child for more than seven years:

(1) when that relationship was established by a court determination or by a certificate of paternity, or

(2) when the person was married to the child’s genetic parent.

f. This section does not extend the time within which a right of inheritance or a right to succession may be asserted beyond the time provided by law relating to distribution and closing of decedents' estates or to the determination of heirship, or otherwise, or limit any time period for the determination of any claims arising under the laws governing probate, including the construction of wills and trust instruments.

g. A judgment or order of a court reexamining a determination of the existence or nonexistence of a parent and child relationship under an earlier judgment or order of the court or a Certificate of Parentage shall not effect any obligation of support due before the entry of the judgment or order.


COMMENT

Most of this section is new. It regulates the controversial area of when, by whom, and under what circumstances a determination of parentage may be reconsidered. The rule limits most severely determinations based on genetic testing. These findings are normally definitive and there is no reason to reexamine them without new scientific reason. Other findings are binding on persons who were parties to them. A person who is a party, if aggrieved by the result, should appeal. A total statute of repose is created by subsection (e) when the parent lives with the child for five years. In such a case, the actual relationship creates a real parent-child relationship irrespective of genetics. In such a case, there is a de facto adoption, and the child is entitled to expect a permanent relationship.

Subsection (f) is substantively identical to 9:17-47(f). Subsection (g) is new. It provides that while there may be actions to reexamine whether a parent child relationship exists, determinations in those actions will be prospective as to support. If a person owed support under an old order, new support payments will be stopped, but the past support is still due.

12. Donation of egg or sperm

a. If, under the supervision of a licensed physician and with the consent of both parties to a marriage, civil union or domestic partnership, pregnancy is achieved with semen, an egg or both, donated by persons not parties to the marriage, the parties to the marriage shall be the parents of the resulting child irrespective of genetic parentage.

b. Unless the donor of the egg or semen and the parties to a marriage have entered into a written contract to the contrary, the donor shall not be treated in law as a parent of the resulting child and shall have no rights or duties stemming from the conception of a child.

c. The identity of the donor of the egg or semen shall be kept confidential and shall not be disclosed without the permission of the donor.
Source: 9:17-44.

COMMENT

Section 9:17-44 refers only to artificial insemination. This section has been broadened to include donations of both eggs and sperm.
STATE OF NEW JERSEY

NEW JERSEY LAW REVISION COMMISSION

TENTATIVE REPORT

Relating to

Title 39 - Motor Vehicles and Traffic Regulation

December 2008

This draft tentative report is distributed to advise interested persons of the Commission's tentative recommendations and to notify them of the opportunity to submit comments. The New Jersey Law Revision Commission (“NJLRC”) will consider these comments before making its final recommendations to the Legislature. The NJLRC often substantially revises tentative recommendations as a result of the comments it receives. If you approve of the tentative report, please inform the NJLRC so that your approval can be considered along with other comments. The NJLRC is awaiting comments from the organizations listed on pages 11-12 of this Introduction.

Comments should be received by the NJLRC not later than May 15, 2008.

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

Laura C. Tharney, Staff Attorney
NEW JERSEY LAW REVISION COMMISSION
153 Halsey Street, 7th Fl., Box 47016
Newark, New Jersey 07101
973-648-4575
fax: 973-648-3123
email: let@njlrc.org
web site: http://www.njlrc.org
Introduction

General Information

Title 39 includes Motor Vehicles and Traffic Regulation. The scope of the Title is broad. It contains provisions pertaining to the organization and structure of the Motor Vehicle Commission and the powers and duties of county and local entities with regard to traffic regulation. Title 39 includes the New Jersey requirements regarding licensing, registration, equipment, and the operation of vehicles. It also addresses traffic regulation, enforcement, interstate operation of vehicles, pedestrians, motor vehicle insurance, inspection, the transfer of vehicles, junk yards and driving schools.

In the years since the inception of the law, various sections of Title 39 have been revised and updated. There are, however, statutory sections presently in effect that were enacted in every decade since the 1920s.

The statutory text of Title 39, exclusive of comments and case law annotations, exceeds 500 pages. As a result of the size and scope of the Title, some of the changes to the law throughout the years have resulted in duplicative and inconsistent language. Additionally, as the body of law in this area has grown over time, it has become more difficult to determine where new sections should be added when the law is changed and where to look for new provisions once they have been enacted. Another problem that has arisen over time is that when the law is revised, it is more common to add language, rather than remove language that may no longer be accurate or appropriate. This has resulted in the retention of certain statutory requirements which no longer have practical application, or which have been superseded or rendered superfluous.

In its current form, Title 39 is less accessible than it should be. Widely applicable to a large number of the residents of New Jersey, and of other states, the impact of Title 39 can be very significant. As such, the statute should be clear and easily understood. The New Jersey Law Revision Commission (NJLRC) believes that Title 39 can be made more accessible without the need for a complete redraft of all of the language of the Title.

The focus of this draft revision of the Title was not substantive change, although some of the substance has, in fact, been changed. Instead, the focus of the revision was to consolidate the language, eliminate duplication and inconsistencies, and group related provisions together. Although some sections of the draft statute will look very different than they do in the current statute, the substance of the material is, in most cases, the same.

Throughout the draft, efforts were made to modify and streamline the language so that relevant sections are easier to find and to understand. Subsection lettering and numbering was added to lengthy sections of the statute and repetitive language was removed. Stylistic differences in the language reflecting the era in which various sections were drafted were modified in an effort to make the language more consistent. The
division of language into statutory sections was made more consistent for ease of location and review. Efforts were also made to remove potentially confusing language, like references to “the act” or “this act”, which may cause unnecessary confusion because a reader of the current statute cannot easily determine what provisions fall within the scope of a particular enactment. The language of the draft was modified to make it gender neutral and remove outdated references to titles and entities that no longer exist. The draft also modifies the manner in which the statute is cited, changing the statutory references within the text to include only the number of the statute rather than including references to “C.”, “R.S.” or “N.J.S.A.” Those references have historic, rather than practical, significance but the different citation forms may mislead a reader to believe otherwise.

As is explained below, some parts of the Title have been modified more than others. At all times, the goal has been to improve the clarity and usability of the statute. The source references and the comments following each section of the draft are used to explain and track the changes.

**Brief History of Motor Vehicle and Traffic Regulation in New Jersey**

By 1915, when it adopted the State Traffic Act, the New Jersey Legislature recognized that the traffic laws should be uniform throughout the State. Before the adoption of that Act, the Governor of New Jersey appointed a special commission to investigate existing traffic laws in New Jersey. That Commission issued a Report, analyzing existing traffic statutes and making recommendations for legislative action. The Commission found that the statutes affecting traffic are fragmentary, and in many cases cumbersome and unenforceable, and appear to have been a gradual accretion, commencing with the Act of 1813 and ending with the Motor Vehicle Act of 1906, with its supplements and amendments.

As each new condition arose, efforts were apparently made to meet the condition without very much reference to previous regulations.

In an adjustment of such a situation, there would appear to be no other solution possible except to repeal all existing traffic ordinances by a State law on the subject which will standardize traffic regulations by combining the local ordinances now existing and the traffic statutes now among our laws into one system.  

Among the Commission’s recommendations was a new statute to govern all traffic on New Jersey roads. The Commission stated that if the proposed statute be adopted the present motor vehicle act will not in any wise conflict with the traffic statute, thus providing under the two acts which co-ordinate for the regulation of traffic by State laws which will be

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2 Id. at 4, 6 (emphasis supplied).
uniform in their application throughout the whole State. New Jersey with this system will have the most complete and effective regulations of any State.³

That early Commission also suggested that enforcement of the proposed statute should be “placed in the hands not alone of the local authorities, but of the inspectors...[of] the Motor vehicle Department,” and “before a local ordinance is passed...it shall be submitted to the Department of Motor Vehicles for examination.”⁴ The Commission explained that this was “suggested in order that some central authority might be in a position to protect the provisions of this traffic act from the encroachments on the part of the local municipalities to which the motor vehicle act has been subjected in the past.”⁵

In 1918, the New Jersey Supreme Court observed that this statute “is founded on a wise public policy, viz. to promote a uniformity of regulating traffic throughout the state.”⁶ Less than ten years later, the same public policy was applied on the federal level to the relationship between traffic laws of different States.

An Act of the Legislature in 1921 defined motor vehicles and provided for their registration and the licensing of the drivers thereof; fixed rules regulating the use and speed of motor vehicles; fixed the amount of license and registration fees; prescribed and regulated process and the service thereof and proceedings for the violation of the provisions of the Act and penalties for those violations.⁷

At the federal level, a Committee on the Uniformity of Laws and Regulations was appointed in March 1925 to draft a Uniform Vehicle Act or Code to be adopted by all States.⁸ Congress passed the Federal Uniform Vehicle Code in July 1926, which consisted of four components: (1) a uniform motor vehicle registration act; (2) a uniform motor vehicle anti-theft act; (3) a uniform motor vehicle operators’ and chauffeurs’ license act; and (4) a uniform act regulating the operation of vehicles on highways.⁹ During the legislative session of 1927, New Jersey passed a supplementary bill to bring its laws into closer harmony with the Uniform Code, particularly the vehicle operation act.¹⁰

In 1928, the Legislature enacted provisions regulating vehicles, animals and pedestrians on all public roads and turnpikes. The law also addressed process and the service of process as well as proceedings and penalties for violations of the Act. At that

³ Id. at 59-60, (emphasis supplied).
⁴ Id. at 60.
⁵ Id.
⁶ Id. (emphasis supplied).
⁷ L. 1921, c. 208, p. 643.
⁹ Id. at 132.
¹⁰ Id.
time, authority was granted to various forms of municipalities to adopt ordinances regulating vehicles anddesignating the authorities to enforce certain provisions.\textsuperscript{11}

In 1937, for the first time, Title 39 contained all of the provisions concerning motor vehicles and traffic regulations in the State.\textsuperscript{12} The entire Title was just 71 pages long.

Since then, there have been numerous revisions to the Title, some broader in scope than others. There were more than 100 modifications to the Title in 1951, for example, including changes to: registration and licensing, bicycles and rollerskates, horses, vehicles of unusual size and weight, pedestrians, operation or acts affecting operation of vehicles, law of the road and right of way, speed, traffic signals, parking, highway and traffic signs, and purchase, sale and transfer of motor vehicles. Between 1951 and 1952, 55 pages of new statutes were added, including language concerning equipment, rules of the road, a DUI provision, financial responsibility provisions, and language pertaining to driving schools.\textsuperscript{13}

In 1955, Chapters 3 and 4 of Title 39 were revised, including the provisions dealing with traffic regulation and speed laws. Chapter 6, the financial responsibility provisions, and Chapter 10, dealing with sale and transfer of vehicles, were also revised. That same year, the inspection provisions, found in Chapter 8, were adopted.

Between 1962 and 1964, Chapter 2, pertaining to the DMV, was revised, as were sections of Chapters 3 and 4 concerning street cars and historic vehicles. Chapter 10A, dealing with abandoned vehicles, was adopted during that time period as well. An Act requiring seat safety belts on passenger automobiles was adopted in 1965\textsuperscript{14} as was a new Chapter 3B, regulating school buses. In 1966, the Legislature revised the DUI provisions and Chapter 5D, the Interstate Compact, was added.

During the 1970s, Chapter 3C, concerning snowmobiles, was added (1973), and in 1979, there were a number of amendments to the Title, including those pertaining to photo driver’s licenses and limousines.

There were many modifications to the Title in 1983 as well, including those pertaining to: motorized bicycles\textsuperscript{15}, child restraint systems\textsuperscript{16}, DUI\textsuperscript{17}, and commercial motor vehicles\textsuperscript{18}. During that same year, the law was changed to abolish certain positions in the Division of Motor Vehicles, transfer personnel in those positions, and to amend, supplement and repeal various parts of the law.\textsuperscript{19} The uniform traffic ticket was

\begin{itemize}
  \item \textsuperscript{11} L. 1928, c. 281, p. 721.
  \item \textsuperscript{13} R.S. Cum. Supp. 39:1-1 et seq. (1951-52).
  \item \textsuperscript{14} 1966, 39:3-76.2.
  \item \textsuperscript{15} L 1983, c. 105.
  \item \textsuperscript{16} L. 1983, c. 128.
  \item \textsuperscript{17} L. 1983, c. 129.
  \item \textsuperscript{18} L. 1983, c. 126, c. 349.
  \item \textsuperscript{19} L.1983, c. 403, eff. Dec. 23, 1983.
\end{itemize}
introduced in 1985. There were many modifications to the Title in 1989 as well, including those regarding: identification for non-drivers, parking privileges for handicapped individuals, and the requirement of a street address on registrations and driver’s licenses.

Between 1990 and 1992, there were a number of amendments to the Title, including those to: the CDL provisions (1990), the Act to combat theft (1990), handicapped parking privileges (1991), new bicycle helmet requirements (1991), school bus provisions (1992), and the adoption of a more strict under-age DUI law. In 1998, GDL provisions were adopted and in 1999 there were a number of changes, including those regarding the digitized signature on the driver’s license and the different licenses for persons under 21 as well as modifications to the DUI law.

In 2001, the law as it pertains to graduated driver licensing and driving schools was modified and in 2003 the Motor Vehicle Security and Customer Service Act, abolishing the DMV and creating the New Jersey Motor Vehicle Commission (MVC) ‘in but not of’ the DOT, was adopted. Prior to that time, the FIX DMV Commission, established by the Governor's Executive Order No. 19 of 2002, recommended that the DMV be "ripped up by its roots" and replaced with a [MVC]. Of particular importance in the study was the need to improve customer services. Some of this improvement is expected to come with the upgraded facilities, additional parking, computers and on-line technology...

The ending of privatized motor vehicle agencies, criminal history background checks for employees and certain specialized vehicle operators, such as those holding hazmat licensees, are recommended to ensure the integrity of the State's motor vehicle documents and data base and to protect the public safety.

Later, in 2005, there were many changes to the Title, including changes in pedestrian statutes with new penalties for failure to yield to pedestrians as well as

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21 L. 1989, c. 52.
22 L. 1989, c. 200, 201.
23 L. 1989, c. 326.
24 L. 1990, c. 103.
25 L. 1990, c. 98.
28 L. 1992, c. 72.
29 L. 1992, c. 189.
31 L. 1999, c. 28.
34 39:2A-1 to 39:2A-41 and scattered provisions. The legislative findings that led to enactment of this bill are included in 39:2A-2.
35 Committee statement to Assembly, No. 3058-L. 2003, c. 13.
36 L. 2005, c. 86, c. 158.
provisions pertaining to scooters\textsuperscript{37} and low speed vehicles\textsuperscript{38}. In 2006, the Fuel Efficiency Act\textsuperscript{39} was adopted.

The NJLRC has given, and will continue to give, careful consideration to the modifications of the law contained in this draft revision. It is the opinion of Commission Staff that this proposed revision to the statute is consistent with the recent efforts to significantly improve both the Title, and the relationship between the MVC and the citizens of this State.

**Summary of Current Revision**

**Volume I**

The definitions chapter of the Title has not been substantially changed but it is anticipated that it will be modified after the other revisions have been completed. The next chapters of the Title, pertaining to the Department of Motor Vehicles and the Motor Vehicle Commission, have been consolidated and require review and comment.

The licensing and registration sections of Title 39 have been heavily revised. In the existing Title, registration and licensing requirements are mixed together throughout approximately 120 sections of the statute and are no longer in any particular order. Provisions regarding Commercial Driver Licenses, touring privileges, tires and other matters are interspersed throughout the licensing and registration sections. An effort was made in this draft to reorganize the licensing provisions by consolidating them and ordering them. Additional modifications were made to include statutory language that sets forth current requirements, as practiced, not presently included in the statute. The current statute does not, for example, state in clear and direct terms the requirement of a license for driving in this State. The current statute also does not describe the two available types of driving permits. Sections were added to do so. A definitions section was also added to the licensing chapter to eliminate the need for the repetitive use of certain phrases.

The substance of the statutory sections pertaining to the commercial driver’s license was not changed since that language is tied to the federal Commercial Motor Vehicle Safety Act of 1986.

The license plates sections have also been heavily revised to consolidate numerous provisions with identical language. In the current statute, any new specialty funding license plate is added by way of one or several new statutory sections that include language duplicating existing provisions. One goal of consolidating the sections is to limit future modifications to a single section of the statute so that the requirements for any new plate are easy to locate.

\textsuperscript{37} L. 2005, c. 159.
\textsuperscript{38} L. 2005, c. 273.
\textsuperscript{39} L. 2006 c. 39.
Sections pertaining to touring privileges, documents and vehicles types were not substantially revised.

The equipment provisions of the statute, including those pertaining to lamps, reflectors, specialized lights, brakes, horns, mufflers, mirrors, window glass, safety belts, and tires, were preliminarily reviewed and those which appear to have been superseded by federal law were removed. The current State statutory language is not equivalent to the current standards imposed on equipment by federal regulation and, as a result, is arguably pre-empted. If, however, the federal regulations apply only to new vehicles, it may be necessary to retain provisions in the State statute that pertain to older vehicles still in operation. Failing to do so could lead to unintended gaps in the statutory coverage pertaining to equipment. Additional research is required to determine the most appropriate language for these chapters.

Sections pertaining to dimensions and weight of vehicles were divided into additional statutory sections for ease of review, but were not changes substantively. Likewise, no substantive changes were made to sections pertaining to specific vehicle types, including motorcycles, tow trucks, school buses, snowmobiles, all-terrain vehicles and limousines. These sections were streamlined, consolidated and rearranged where it seemed appropriate to do so.

The compressed or liquefied gaseous fuel and the motor vehicle theft sections also were not substantively changed. The general prohibitions section was changed to include references to the new penalty classification system described in detail in Volume II and some of the penalties for particular offenses were modified to bring those penalties more in line with penalties for comparable offenses and to address concerns raised by law enforcement officers.

Volume II

The initial sections in this volume, pertaining to the application of the Title, the powers and duties of the Commissioner of Transportation, and the powers of municipalities, counties and the Highway Commissioner remain substantively the same as the original language. The sections pertaining to highways owned by public or semi-public entities and traffic signs and signals also contain the substance of the original sections.

The accidents and reports chapter, the operation of a vehicle under the influence chapter, and the law of the road chapter are also largely unchanged in substance, although the penalty provisions in the accidents and reports chapter were modified to include references to the new penalty classification system.

The chapters pertaining to operation or acts affecting operation, and speed, were changed to include references to the new penalty classification system and some of the penalties for particular offenses were modified to bring those penalties more in line with
penalties for comparable offenses and/or to address concerns raised by law enforcement officers.

The changes to the general penalty chapter are the most significant changes in this volume of the Title. One of the difficulties associated with the penalties in the current statute is that, in certain instances, the penalty imposed appears to have more to do with the time at which the statute was enacted than with the current perceived severity of the offense for which the penalty is imposed. The NJLRC has, during the pendency of this project, received numerous requests to rationalize the penalties. An effort has been made to do so. The classifications included in the draft are based on the grouping of offenses by the fines currently assigned to them as modified to reflect comments of the NJLRC after review and comparison of the offenses in the various categories.

The classes included in the draft indicate the fine, jail time and community service associated with a particular category of offenses. No suggestion is made regarding whether or not points are assigned as a result of any class of offenses since points are handled by regulation, not statute (with the exception of 39:4-97.2, which refers to the imposition of points, but does not say how many).

To the extent that the fines have a rational basis and are reasonable in relation to the fines charged for other offenses, the same cannot be said about the imposition of jail time, or the intermittent references to community service, in the current statute. There are, for example, statutory sections that impose terms of imprisonment for an offense that carries a $25, $50 or $100 fine. There are other offenses that impose a fine up to $500 fine but make no mention of incarceration. In the present statute, the periods of incarceration called for do not appear to correspond to the fine imposed. In the draft statute, the new classification system calls for periods of jail time and community service time increasing in length with the perceived severity of the offense as indicated by the amount of the fine.

There are potential issues inherent in the proposed classification system. In an effort to limit the number of classes, the fines were divided into the following categories: up to $50 (Class E); between $50 and $100 (Class D); between $100 and $500 (Class C); between $500 and $1,000 (Class B); and between $1,000 and $10,000 (Class A). One of the issues presented by the classification system is found in Class C, which provides for fines between $100 and $500. Some offenses have, under the current law, stepped-up penalties for first, second and, in some cases, subsequent offenses. As a result, Class C interferes with the current statutory hierarchy by collapsing those provisions. 39:4-97.2 (operation of a vehicle in an unsafe manner likely to endanger a person or property), for example, currently calls for a fine of $50-$150 for a first offense, $100-$250 for a second offense, and $200-$500 plus motor vehicle penalty points for a subsequent offense. Under the current classification system, the penalties for a second offense and for a subsequent offense are both in Class C. Similarly, 39:4-129 calls for a fine of $200-$400 for a first offense and $400-$600 for a subsequent offense. Including those and other similar items in Class C opens the fines at each level (first, second, subsequent) to the
discretion of the individual judge and upsets the scheme created by the Legislature as set forth in the existing statute.

There are, however, benefits to a classification system. A Title like this one, which contains sections that are frequently revised, results in a system of irrational penalties by its nature. Since penalty provisions are modified individually, increasing the penalty for a single offense causes it to be disproportionate to penalties for offenses deemed to be of similar severity. A classification system for penalties may maintain proportionality and consistency. Since this approach is new, and significantly different than the current approach, the NJLRC would like to receive as much comment as possible on the proposed classification system before formally submitting this project to the Legislature.

The statutory sections pertaining to turns, signals, railroad tracks, and parking were largely unchanged in substance, although the penalty provisions were modified to include references to the new penalty classification system. Similarly, the statutory sections pertaining to street cars, bicycles, rollerskates, skateboards, motorized bicycles, electric personal assistive mobility devices and horses were largely unchanged in substance, although the penalty provisions were modified to include references to the new penalty classification system. The pedestrian sections of the statute are also largely unchanged in substance.

The sections pertaining to handicapped individuals as well as the sections concerning vehicles of unusual dimensions, loads, display of information on commercial vehicles and enforcement were largely unchanged in substance, although the penalty provisions were modified to include references to the new penalty classification system. The Interstate Compact and the Nonresident Violator Compact were also unchanged in substance.

Volume III

To this time, no substantive changes have been made to the chapters in Volume III, which includes: the motor vehicle security-responsibility law; the unsatisfied claim and judgment fund law; New Jersey automobile reparation reform; compulsory motor vehicle insurance; service of process on non-residents; inspections; hours of service; purchase, sale and transfer of vehicle; abandoned and unclaimed vehicles; motor vehicle component parts; junk yards; driving schools; and auto body repair facilities.

Participation of Various Individuals and Groups in Revision

In the earlier stages of this proposed revision, efforts were made to informally obtain information from individuals and entities who work with Title 39 on a daily basis, and to incorporate that information as appropriate before seeking comprehensive review and comments on the project from within the State government and from the general public.
Members of the New Jersey Police Traffic Officer’s Association graciously provided comments on various aspects of the project on an ongoing basis. A voluntary organization of traffic officers throughout the State, the TOA keeps officers apprised of the latest technology, training and legislation in the areas of traffic safety, and recommends and supports legislation consistent with the goals and purposes of the association and public safety. Organizationally, the State TOA is divided into seven regions. Comments were received from various regions within the State and from individual officers in those regions, many of whom have agreed to provide additional comments on the draft report. In addition, officers who are members of various County Traffic Officers’ Associations also provided comments and expressed a willingness to provide additional information.

Individuals representing departments within the State have also, informally, provided preliminary general comments and have expressed a willingness to provide more detailed information, as have individual members of private organizations with an interest in the Title.

Commitments for review of portions of project

Thus far, NJLRC Staff has been fortunate to receive commitments from various individuals, on behalf of organizations both State and private, to review portions of the Title 39 project once it is released for public comment. Some of the individuals and organizations that have, to this time, agreed to review sections of the draft and provide comments for NJLRC consideration include:

1. State of New Jersey Motor Vehicle Commission
2. State of New Jersey Department of Transportation
3. State of New Jersey Department of Law & Public Safety, Division of Highway Traffic Safety
4. State of New Jersey Department of Human Services, Division of Addiction Services, Intoxicated Driving Program
5. New Jersey Safe Passage Task Force
6. New Jersey State Safety Council
7. New Jersey Police Traffic Officers Association
8. Rutgers University Center for Advanced Infrastructure and Transportation (CAIT)
9. Rutgers University Edward J. Bloustein School of Planning and Public Policy, Alan M. Voorhees Transportation Center
10. State Police Officers
11. Municipal Police Officers

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40 Region 1 Bergen County
Region 2 Essex and Hudson County
Region 3 Morris, Passaic, Sussex, and Warren County
Region 4 Hunterdon, Mercer, Middlesex, Somerset, and Union County
Region 5 Monmouth and Ocean County
Region 6 Burlington, Camden, Gloucester and Salem County
Region 7 Atlantic, Cape May and Cumberland County
12. Municipal Prosecutors
13. County Prosecutors
14. Private motor vehicle inspection facilities and auto body repair facilities

Efforts will be made to achieve widespread distribution of this project and to obtain as much additional feedback as possible.

It is anticipated that other individuals and entities contacted during the pendency of the project and from whom comments have not yet been received will agree to review sections of the project and provide comments during the public comment period. It is hoped that those for whom time constraints precluded a detailed review during the more preliminary stages of the project will be willing and able to review at least the portions of this project with which they are most familiar. In addition to the entities listed above, there are other individuals and entities not contacted in the preliminary stages of this project from whom comments will be sought now that a preliminary draft of the project is available in its entirety.
This tentative report is distributed to advise interested persons of the Commission's tentative recommendations and to notify them of the opportunity to submit comments. The Commission will consider these comments before making its final recommendations to the Legislature. The Commission often substantially revises tentative recommendations as a result of the comments it receives. If you approve of the tentative report, please inform the Commission so that your approval can be considered along with other comments.

COMMENTS SHOULD BE RECEIVED BY THE COMMISSION NOT LATER THAN JANUARY 19, 2009.

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

Laura C. Tharney, Deputy Director
NEW JERSEY LAW REVISION COMMISSION
153 Halsey Street, 7th Fl., Box 47016
Newark, New Jersey 07101
973-648-4575
(Fax) 973-648-3123
Email: njlrc@njlrc.org
Web site: http://www.njlrc.org
NEW JERSEY EMERGENCY VOLUNTEER HEALTH PRACTITIONERS ACT

Introduction

UEVHPA was drafted by the National Conference of Commissioners on Uniform State Laws (“NCCUSL”) in an expedited manner after hurricanes Katrina and Rita which struck within weeks of each other in 2005. Prior to that time, a number of states had enacted emergency management laws that permitted the waiver or modification, in emergencies, of licensure standards for health practitioners. The vast majority of the states had also enacted the Emergency Management Assistance Compact (“EMAC”). EMAC allows for the deployment of licensed health practitioners employed by state and local governments to jurisdictions in which they are not licensed and allows them to provide emergency services there.

The federal government supplemented the state law provisions with language allowing licensed health practitioners that it employed on either a permanent or temporary basis to respond to disasters and emergencies without complying with the state professional licensing requirements in the locations where their services are utilized. 10 U.S.C. 1094(d)(1). In addition, federal law established two systems to facilitate the use of private sector health practitioners in response to emergencies, particularly those mobilized by charitable non-governmental organizations that are active in disasters. Those two systems are: (1) the formation of the Medical Reserve Corps to recruit, train and promote deployment of health practitioners in emergencies; and (2) the funding of state emergency advance registration systems designed to recruit and register health practitioners before an emergency occurred. Unfortunately, neither of those federal programs necessarily results in interstate recognition of licenses issued to volunteer health practitioners.

When hurricanes Katrina and Rita struck, the response to the resulting emergency conditions highlighted deficiencies in the federal and state systems designed to facilitate the interstate use of volunteer health practitioners. While federal and state law recognized the need for interstate licensure reciprocity, no comprehensive system existed to link the various public and private programs. The hurricanes, as other large-scale emergencies could, also caused a breakdown of communications, which lead to uncoordinated and ineffective response efforts. In addition, the deployment of many volunteer health practitioners was delayed by the absence of information regarding the operation of state declarations of emergency. Concerns regarding exposure to civil liability and the availability of workers’ compensation protection also inhibited the recruitment and deployment of volunteers.

An electronic report posted to the website of the Metropolitan Medical Response System program, part of the federal Department of Homeland Security (DHS), summarizes the types of issues that arose:

Volunteer physicians are pouring in to care for the sick, but red tape is keeping hundreds of others from caring for Hurricane Katrina survivors. The North Carolina mobile hospital waiting to help … offered impressive state-of-the-art medical care. It was developed with millions of tax dollars through the Office of Homeland Security after 9-11. With capacity for
113 beds, it is designed to handle disasters and mass casualties. It travels in a convoy that includes two 53-foot trailers, which on Sunday afternoon was parked on a gravel lot 70 miles north of New Orleans because Louisiana officials for several days would not let them deploy to the flooded city. ‘We have tried so hard to do the right thing. It took us 30 hours to get here,’ said one of the frustrated surgeons. That government officials can’t straighten out the mess and get them assigned to a relief effort now that they’re just a few miles away ‘is just mind-boggling,’ he said.


The response efforts associated with hurricanes Katrina and Rita demonstrated that, in the absence of national standards, the federal and state systems available were inadequate and complicated that use of volunteer health practitioners for both the receiving and the deploying states.

The NCCUSL Drafting Committee was advised by most of the national groups and organizations that helped deploy health practitioners during the hurricane relief efforts, as well as representatives of the National Emergency Management Association, the National Governors’ Association, the Association of State and Territorial Health Officials, the American Public Health Association, the Center for Law and the Public’s Health at Georgetown and Johns Hopkins Universities, and various sections and committees of the American Bar Association. The major policy objectives of the Committee were as follows:

- Make volunteer health practitioners available for rapid deployment in response to emergency declarations without awaiting affirmative actions on the part of host states, while allowing those host states control over the volunteer health practitioners within their borders.

- Protect public health and safety by requiring, before deployment, that volunteers register with public or private systems able to confirm that they are properly licensed and in good standing and to communicating this information to host states’ governments and entities utilizing the services of volunteers.

- Allow volunteers to register with proven governmental or private organization systems located throughout the country, rather than requiring registration in the affected host state, and facilitate the use of the various different registration systems developed and used by public and private agencies.

- Alleviate confusion about the types of services that may be provided by volunteer health practitioners, by requiring volunteers to (1) limit their practice to activities for which they are licensed, properly trained, and qualified to perform and (2) conform to scope-of-practice authorizations and restrictions imposed by the host states, disaster response agencies and organizations, and host entities.
- Regulate the activities of volunteer health practitioners by vesting authority over out-of-state volunteers in the licensing boards and agencies of host jurisdictions, while also requiring the reporting of unprofessional conduct by host states to licensing jurisdictions.

- Require host entities using volunteer health practitioners to coordinate their activities with local agencies to the extent and in the manner otherwise required by state law.

- Address whether and to what extent volunteer health practitioners and entities deploying, registering, and using them are responsible for civil claims based on a practitioner’s act or omission in providing health or veterinary services (Section 11).

- Determine whether and to what extent volunteer health practitioners should receive workers’ compensation benefits in the event of injury or death while providing such services (Section 12).

To this time, UEVHPA has been adopted, in one form or another, by six states (Colorado, Indiana, Kentucky, New Mexico, Tennessee, and Utah).

In New Jersey, there are a number of potentially interested parties who may wish to be heard on aspects of this project.

In the public sector, the following entities have been solicited for comments on this project: (1) Office of the Governor (since EMAC currently vests the Governor with considerable power that UEVHPA would delegate, in part, to the Board of Medical Examiners); (2) New Jersey Board of Medical Examiners; (3) New Jersey Dept. of Health and Senior Services; (4) New Jersey Board of Nursing; (5) New Jersey Department of Labor; (6) New Jersey Division of Workers’ Compensation; (7) New Jersey Board of Veterinary Medical Examiners; and (8) the Attorney General.

The following private sector individuals and entities were likewise solicited: (1) New Jersey Assoc. of Osteopathic Physicians and Surgeons; (2) New Jersey Nurses Association; (3) New Jersey Veterinary Medicine Association; (4) New Jersey Hospital Association; (5) New Jersey Physicians; (6) Association of Emergency Physicians; (7) College of Emergency Physicians; (8) American Medical Association; (9) American Nurses Association; and (10) American Veterinary Medical Association.

The text of the draft act and the comments thereto reflect comments received from these entities.

**Draft Act**

**Section 1. Short Title**

This Act may be cited as the New Jersey Emergency Volunteer Health Practitioners Act.
COMMENT

This section removes “Uniform” from the title of the act and replaces it with “New Jersey” as an indication that there may be changes from the text of the Uniform Act.

Section 2. Definitions

In this Act:

a. “Disaster relief organization” means an entity that provides emergency or disaster relief services that include health or veterinary services provided by volunteer health practitioners and that:

   (1) is designated or recognized as a provider of those services pursuant to a disaster response and recovery plan adopted by an agency of the federal government or the New Jersey Office of Emergency Management; or

   (2) regularly plans and conducts its activities in coordination with an agency of the federal government or the New Jersey Department of Health and Senior Services.

b. “Emergency” means an event or condition that is an emergency, disaster, or public health emergency under N.J.S.A. 26:13-2, the Emergency Health Powers Act.

c. “Emergency declaration” means a declaration of emergency issued by a person authorized to do so under the laws of this state, a political subdivision of this state, or a municipality or other local government within this state, or under the laws of the United States.


e. “Entity” means a person other than an individual.

f. “Health facility” means an entity licensed under the laws of this or another state to provide health or veterinary services.

g. “Health practitioner” means an individual licensed under the laws of this or another state to provide health or veterinary services.

h. “Health services” means the provision of treatment, care, advice or guidance, or other services, or supplies, related to the health or death of individuals or human populations, to the extent necessary to respond to an emergency, including:

   (1) the following, concerning the physical or mental condition or functional status of an individual or affecting the structure or function of the body:

      (A) preventive, diagnostic, therapeutic, rehabilitative, maintenance, or palliative care; and

      (B) counseling, assessment, procedures, or other services;

   (2) sale or dispensing of a drug, a device, equipment, or another item to an individual in accordance with a prescription; and

   (3) funeral, cremation, cemetery, or other mortuary services.
i. “Host entity” means an entity operating in New Jersey which uses volunteer health practitioners to respond to an emergency.

j. “License” means authorization by a state to engage in health or veterinary services that are unlawful without the authorization. The term includes authorization under the laws of New Jersey to an individual to provide health or veterinary services based upon a national certification issued by a public or private entity.

k. “Person” means an individual, corporation, business trust, trust, partnership, limited liability company, association, joint venture, public corporation, government or governmental subdivision, agency, or instrumentality, or any other legal or commercial entity.

l. “Scope of practice” means the extent of the authorization to provide health or veterinary services granted to a health practitioner by a license issued to the practitioner in the state in which the principal part of the practitioner’s services are rendered, including any conditions imposed by the licensing authority.

m. “State” means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States.

n. “Veterinary services” means the provision of treatment, care, advice or guidance, or other services, or supplies, related to the health or death of an animal or to animal populations, to the extent necessary to respond to an emergency, including:

   (1) diagnosis, treatment, or prevention of an animal disease, injury, or other physical or mental condition by the prescription, administration, or dispensing of vaccine, medicine, surgery, or therapy;

   (2) use of a procedure for reproductive management; and

   (3) monitoring and treatment of animal populations for diseases that have spread or demonstrate the potential to spread to humans.

o. “Volunteer health practitioner” means a health practitioner who provides health or veterinary services, whether or not the practitioner receives compensation for those services. The term does not include a practitioner who receives compensation pursuant to a preexisting employment relationship with a host entity or affiliate which requires the practitioner to provide health services in New Jersey, unless the practitioner is not a resident of New Jersey and is employed by a disaster relief organization providing services in New Jersey while an emergency declaration is in effect.

**COMMENT**

This section is substantially identical to Section 2 of the Uniform Act.

This section includes the code citation for the Emergency Management Assistance Compact (“EMAC”), which has been adopted in all 50 states, and cross-references N.J.S.A. 26:13-2, the Emergency Health Powers Act, for the definition of “emergency.” Under N.J.S.A. 26:13-2, a “public health emergency” means

an occurrence or imminent threat of an occurrence that:

a. is caused or is reasonably believed to be caused by any of the following: (1) bioterrorism or an accidental release of one or more biological agents; (2) the appearance of a novel or previously controlled or
eradicated biological agent; (3) a natural disaster; (4) a chemical attack or accidental release of toxic chemicals; or (5) a nuclear attack or nuclear accident; and
b. poses a high probability of any of the following harms: (1) a large number of deaths, illness or injury in the affected population; (2) a large number of serious or long-term impairments in the affected population; or (3) exposure to a biological agent or chemical that poses a significant risk of substantial future harm to a large number of people in the affected population.

This definition may need to be expanded to include disasters that do not clearly fall within the scope Emergency Health Powers Act’s definition, including pandemics of influenza and other diseases that are not necessarily the result of “biological agents.”

The Office of Emergency Management was inserted in subsection (a)(1), because that office, along with the Department of Health and Senior Services, included in subsection (a)(2), coordinates health emergencies in New Jersey. See N.J.S.A. 26:13-3.

The difference between an individual and an entity in the Act is that an individual is a volunteer health practitioner while an entity may include any public or private legally recognized type of person, but does not include an individual. Thus, the term entity does not include individuals so as to distinguish the term “health facility” from the term “health practitioner.”

The term “health services” is broadly defined, based on a similar definition of the term from the HIPAA Privacy Rule, 45 C.F.R. 160.103, to include those services provided by volunteer health practitioners that relate to the health or death of individuals or populations and that are necessary to respond to an emergency. They include direct patient health services, public health services, provision of pharmaceutical products, and mortuary services for the deceased. On an individual level, health services include transportation, diagnosis, treatment, and care for injuries, illness, diseases, or pain related to physical or mental impairments. On the population level, health services may include the identification of injuries and diseases, and an understanding of the etiology, prevalence, and incidence of diseases, for groups or members within the population. The term does not include services that do not provide direct health benefits to individuals or populations. For example, ancillary services (e.g., administrative tasks, medical record keeping, transportation of medical supplies) are not health services for purposes of this act.

The term “person” may not need to be defined here to the extent that the definition used in this section does not differ from the manner in which that term is defined elsewhere in the statutes.

The term “scope of practice” is used to define the extent of the authorization provided to a volunteer health practitioner to provide health or veterinary services during an emergency. Scope of practice may be established by laws, regulations or policies established by licensure boards or other regulatory agencies of the state in which a practitioner is licensed and primarily engages in practice. Scope of practice also includes any conditions that may be imposed on the practitioner’s authorization to practice, including instances where state law recognizes the existence of a license but declares practice privileges to be “inactive.” The term is defined by reference to the laws of the state in which the principal part of a practitioner’s services are provided to establish a single standard applicable to practitioners licensed to practice in multiple states. This act defers to relevant state laws to determine whether a practitioner with an inactive license may serve as a volunteer health practitioner. To the extent the law of the state in which an individual is licensed and primarily engages in practice allows a practitioner with an inactive license to practice, either generally, only during emergencies, or only in a volunteer capacity, such an individual may practice in a “host state” consistent with the requirements of this uniform law. On the other hand, if the law of the state in which an individual is licensed only allows an individual with an inactive license to practice if the license is renewed or reactivated (typically by satisfying continuing education requirements and paying additional registration fees), then the individual may only function as a volunteer health practitioner following the renewal or activation of the license.

A “volunteer health practitioner” is an individual who voluntarily provides health or veterinary services during a declared emergency. Unlike many existing federal and state legal definitions of volunteers that require the individual act without compensation, this definition and the Uniform Act contain no such requirement. The
volunteer status of a health practitioner is not compromised by compensation awarded to the practitioner prior to, during the course of, or subsequent to the declared emergency. Such compensation, however, must not arise from a preexisting employment relationship with a host entity or affiliate unless the practitioner does not reside in the state in which the emergency is declared and is employed by a disaster relief organization providing health or veterinary services in that state while an emergency declaration is in effect.

This definition differs from many legal definitions of “volunteer” that often characterize a volunteer as an individual who does not receive compensation for services. The federal Volunteer Protection Act (VPA) affords volunteers various protections (including from civil liability), but they cannot be compensated beyond reimbursement for expenses incurred or minimal compensation. See 42 U.S.C. § 14505(6). In Colorado, for example, a volunteer may not receive compensation other than reimbursement for actual expenses incurred. C.R.S. 13-21-115.5 (3)(c)(I). This characterization also holds in many states that afford civil liability protections for volunteers. In Delaware, for example, only “medical providers who provide their services without compensation” are entitled to liability protections as volunteer health practitioners. 10 Del. C. § 8135 (c)(1) (2006).

This definition recognizes, however, that the principal basis for defining a volunteer health practitioner is not whether the practitioner is compensated but whether the practitioner’s actions are volitional. In other words, compensation outside an employment relationship with a host entity is inconsequential in establishing whether an individual is or is not a volunteer. What matters is that the volunteer is acting freely in choosing to provide health or veterinary services in emergency circumstances. This definition thus expands the pool of potential volunteer health practitioners who may enjoy the protections of this act to those who may be compensated in some way.

Part of the justification for this more expansive view of voluntarism relates to the positive effects of compensation to support volunteers during emergencies. Many prospective volunteer health practitioners are licensed individuals working in existing health facilities. They may seek to volunteer knowing that their existing employers will continue to compensate them even while they are away. The volunteers may be able to use their sick or vacation days for this purpose, or their employers may simply allow them to volunteer without using these benefits. Some disaster relief organizations may provide some nominal sums to volunteer health practitioners to support their efforts. Compensation in these or other instances encourages certain individuals, who may not otherwise be able to act, to involve themselves in relief efforts.

For the purposes of protection from civil liability, the Commission preliminarily mentioned the possibility of distinguishing between uncompensated volunteers and those who are compensated. A determination will need to be made regarding this issue and the extent to which there should be a difference in the treatment of those two types of ‘volunteers’. Depending on the manner in which the Commission decides that issue, it may also be necessary to define what constitutes compensation.

Finally, a suggestion was made to the Commission that the definition explicitly state whether it applies to in-state or out-of-state volunteers. However, because the Act only applies to the temporary recognition of licensed out-of-state volunteers, that change seemed unnecessary. Thus, the term only refers to out-of-state volunteers unless otherwise stated.

Section 3. Applicability to Volunteer Health Practitioners

This Act applies to volunteer health practitioners registered with a registration system in the state in which they are licensed to practice that complies with Section 5 and who provide health or veterinary services in New Jersey for a host entity while an emergency declaration is in effect.
COMMENT

This section is generally similar to Section 3 of the Uniform Act. “New Jersey” was inserted to replace “this state” and the phrase “in the state in which they are licensed to practice” was added to eliminate any ambiguity about where such practitioners shall register.

Under existing state and local laws, an emergency is initiated with its declaration (as determined in accordance with existing state or local laws) and is terminated usually upon subsequent proclamation by an authorized state or local agency or official. The legal landscape for responding to natural disasters, public health threats, or other exigencies changes instantly with the declaration of a state of emergency. Accommodations must be made to ensure the efficient deployment and use of volunteer health practitioners to meet surge capacity in existing health facilities, emergency shelters, or other places where health or veterinary services are needed. This section authorizes volunteer health practitioners to provide health or veterinary services for the duration of the emergency and must be interpreted in pari materia with the other provisions of this act. As a result, this section only authorizes volunteer health practitioners to provide health or veterinary services in the state if all of the other requirements of the act are satisfied, such as registration, compliance with scope of practice limitations, and compliance with any modifications or restrictions imposed by the host state or host entity during an emergency.

This Act applies only during the declared emergency, and thus a state that wants to invoke its provisions in anticipation of an impending disaster so that volunteer health practitioners are more readily available when the disaster occurs must declare an emergency under laws of the state other than this act.

Section 4. Regulation of Services During Emergency

a. While an emergency declaration is in effect, the Department of Health and Senior Services, Board of Medical Examiners, Board of Nursing, Board of Veterinary Examiners, or, if the appropriate entity is not available, the Governor, may limit, restrict, or otherwise regulate:

   (1) the duration of practice by volunteer health practitioners;
   (2) the geographical areas in which volunteer health practitioners may practice;
   (3) the types of volunteer health practitioners who may practice; and
   (4) any other matters necessary to coordinate effectively the provision of health or veterinary services during the emergency.

b. An order issued pursuant to subsection a. may take effect immediately, without prior notice or comment, and is not a rule within the meaning of the New Jersey Administrative Code.

c. A host entity that uses volunteer health practitioners to provide health or veterinary services in this state shall:

   (1) consult and coordinate its activities with the Department of Health and Senior Services, and, as appropriate, the Board of Medical Examiners, the Board of Nursing, or the Board of Veterinary Examiners to the extent practicable to provide for the efficient and effective use of volunteer health practitioners; and

   (2) comply with any laws other than this act relating to the management of emergency health or veterinary services, including N.J.S.A. 26:13-2, the Emergency Health Powers Act, except as provided in Section 6c. below.
COMMENT

This section is substantially similar to Section 4 of the Uniform Act. The names of the main regulatory agencies of health practitioners were inserted as the agencies that would be coordinating the regulation of the volunteers. The phrase “or, if the appropriate entity is not available, the Governor” was added to subsection a. to permit the Governor, who has expanded powers during a state of emergency, to administer the Act if, due to a breakdown in communication or an extreme catastrophe, the other named entities are not able to do so.

The approach taken by this Act to authorize the use of volunteer health practitioners following any emergency declaration, unless otherwise ordered pursuant to Section 4a. or 8c., is intended to create a system that can function autonomously even when communications are disrupted or when public officials are forced to dedicate their time and attention to more pressing matters than coordinating volunteer health practitioners. This approach is consistent with many current disaster management plans which rely upon the deployment of resources by critical non-governmental organizations without a specific order, directive or request from government agencies. During the response to Hurricane Katrina, medical and public health professionals had to improvise and use their own initiative because efforts to deploy them from staging areas were extremely time-consuming and failed to adequately get them to areas where their services were most needed. The Federal Response to Hurricane Katrina: Lessons Learned 46 (The White House, February 2006).

The provisions of the Uniform Act presumptively allowing volunteer health practitioners to respond to emergencies unless directed otherwise are carefully balanced by the provisions of Section 4c. which (1) require volunteer health practitioners to work through local “host entities” and (2) mandate host entities to consult and coordinate their activities with the agency(ies) responsible for managing the emergency response to ensure that all volunteer health practitioners are being used in an efficient and effective manner. Subsection c.(1) is intended to encourage host entities to utilize the services of volunteer health practitioners in concert and to discourage host entities and the volunteers that provide care under them from acting pursuant to their own judgments where such judgments may conflict with the objectives as set forth by the appropriate government agency. Under subsection c.(2), host entities must adhere to all laws relating to the management of emergency health or veterinary services. This caveat builds upon subsection c.(1) by setting the initial parameters of conduct during the emergency response. Namely, the laws relating to the management of health or veterinary services in the host state shall govern unless they are modified or restricted by the appropriate state agency(ies) pursuant to Section 8. This act is not intended, however, to govern or control the extent to which host entities must utilize volunteer health practitioners under the direction and control of local emergency management agencies. Instead, it defers decisions regarding the extent with which emergency management services are coordinated and controlled to the other laws made applicable to host entities and volunteer health practitioners by subsection c.(2).

It is the understanding of Commission Staff that New Jersey is the only state in the nation to require criminal background checks for its health practitioners. This requirement would arguably, if unaddressed, impact the operation of the Act. Subsection c.(2) was modified from the Uniform Act to address this issue. Further revision of the language may be required.

Section 5. Volunteer Health Practitioner Registration Systems

a. To qualify as a volunteer health practitioner registration system, a system must:

(1) accept applications for the registration of volunteer health practitioners before or during an emergency;

(2) include information about the licensure and good standing of health practitioners which is accessible by authorized persons;

(3) be capable of confirming the accuracy of information concerning whether a health practitioner is licensed and in good standing before health services or veterinary services are provided under this Act; and
(4) meet one of the following conditions:

   (A) be an emergency system for advance registration of volunteer health-
       care practitioners established by a state and funded through the Department of
       Health and Human Services under Section 319I of the Public Health Services Act,
       42 U.S.C. 247d-7b;

   (B) be a local unit consisting of trained and equipped emergency response,
       public health, and medical personnel formed pursuant to Section 2801 of the
       Public Health Services Act, 42 U.S.C. 300hh;

   (C) be operated by a:

       (i) disaster relief organization;

       (ii) licensing board;

       (iii) national or regional association of licensing boards or health
           practitioners;

       (iv) health facility that provides comprehensive inpatient and
           outpatient health-care services, including a tertiary care and teaching
           hospital; or

       (v) governmental entity; or

   (D) be designated by the Department of Health and Senior Services as a
       registration system for purposes of this Act.

b. While an emergency declaration is in effect, the Department of Health and Senior
   Services, the Board of Medical Examiners, the Board of Nursing, or the Board of Veterinary
   Examiners, or a person authorized to act on their behalf, or any host entity, may confirm whether
   volunteer health practitioners utilized in this state are registered with a registration system that
   complies with subsection a. Confirmation is limited to obtaining identities of the practitioners
   from the system and determining whether the system indicates that the practitioners are licensed
   and in good standing.

c. Upon request of a person in this state authorized under subsection b., or a similarly
   authorized person in another state, a registration system located in this state shall notify the
   person of the identities of volunteer health practitioners and whether the practitioners are
   licensed and in good standing.

d. A host entity is not required to use the services of a volunteer health practitioner even
   if the practitioner is registered with a registration system that indicates that the practitioner is
   licensed and in good standing.

COMMENT

Section 5 authorizes the use of each of the various types of registration systems found to be effective in
responding to the Gulf Coast Hurricanes of 2005. These systems include not only federally sponsored local Medical
Reserve Corps, ESAR-VHP systems, and other systems expressly created under federal or state laws, but also
registration systems established by disaster relief organizations, such as Disaster Human Resources System of the
American Red Cross; systems established by associations of the state licensing boards, such as the Federation of
State Medical Licensing Boards, the National Council of State Boards of Nursing and the Association of State and
Provincial Psychology Licensing Boards; systems established by national associations of health professions, including the American Medical Association, the American Nurses Association, the American Psychology Association, the National Association of Social Workers, the American Counseling Association, the National Association of Chain Drug Stores, and the American Veterinary Medicine Association; and systems established by major tertiary care hospital systems. This act allows each of these various types of organizations to establish and operate registration systems without explicit governmental approval because they have demonstrated the resources, competence and reliability to review and communicate information regarding the professional qualifications of health practitioners. In addition, the act recognizes registration systems operated by state governments or by any other organization granted approval to establish a registration system by any state.

This Act does not require or authorize a state to designate or approve registration systems. The experience of the multiple entities that successfully recruited and verified the credentials following the Gulf Coast Hurricanes of 2005 showed that such a requirement is unnecessary and inefficient in deploying and utilizing volunteer health practitioners. Instead, this act empowers and legitimates the operations of numerous types of public and nongovernmental organizations that have consistently demonstrated their ability to properly recruit, train, deploy and verify the credentials of volunteer health practitioners.

This Section is substantially the same as Section 5 in the Uniform Act, except that, in subsection (b), “any” was substituted before “a” host entity, and the phrase “a person authorized to act on their behalf” was used to shorten the clause, which previously read “a person authorized to act on behalf of the Department of Health and Senior Services, the Board of Medical Examiners, the Board of Nursing, or the Board of Veterinary Examiners.”

This Section importantly preserves the ability of the Board of Medical Examiners and the other named entities to verify the information in the registration system, which is an important right that they should be able to maintain as the bodies which govern practicing physicians, nurses, etc., in New Jersey. See Valdes v. New Jersey State Bd. of Medical Examiners, 205 N.J. Super. 398, 404-406 (App. Div. 1985).

This section permits state agencies to use existing registry systems, including the Medical Reserve Corps (“MRC”) and the Emergency System of Advance Registration of Volunteer Health Professionals ("ESAR-VHP"), both of which are, in New Jersey, being integrated and managed by the Department of Health and Senior Services.

The MRC is designed to help identify and register individuals who are willing to serve within their local area, usually their county. Volunteers will be utilized through county and local health agencies as part of the emergency management system in that jurisdiction. Currently, the Department of Health and Senior Services is trying to identify individuals with special expertise who would be assigned to certain “response teams.”

The ESAR-VHP is a national network of state-based programs for managing health professional volunteers. The ESAR-VHP program has been developed according to the federal ESAR-VHP Technical Standards and Guidelines, so that credential and licensure information can be verified at the highest level and volunteers that are willing to be activated in a federal emergency can be identified and mobilized to effectively respond across state lines. Professionals included in the ESAR-VHP include physicians, nurses, pharmacists, dentists, veterinarians, clinical social workers, respiratory therapists, cardiovascular technologists, EMTs and Paramedics, and Medical and Clinical Laboratory Technologists.

Section 6. Recognition of Volunteer Health Practitioners Licensed in Other States

a. While an emergency declaration is in effect, a volunteer health practitioner, registered with a registration system that complies with Section 5 and licensed and in good standing in the state in which the practitioner’s registration is based, may practice in New Jersey to the extent authorized by this Act as if the practitioner were licensed in this state.
b. A volunteer health practitioner qualified under subsection a. is not entitled to the protections of this Act if any license of the practitioner in any state is suspended, revoked, or subject to an agency order limiting or restricting practice privileges, or has been voluntarily terminated under threat of sanction.

c. The Department of Health and Senior Services, the Board of Medical Examiners, the Board of Nursing, or the Board of Veterinary Examiners may, in their discretion, waive the requirement of N.J.S.A. 45:1-29 that each volunteer health practitioner undergo a criminal background check as a requirement of licensure when an emergency, as defined by Section 2 of this Act, exists. Agencies may only waive this requirement for health practitioners over whom they have jurisdiction.

d. The Department of Health and Senior Services, the Board of Medical Examiners, the Board of Nursing, or the Board of Veterinary Examiners shall have the authority to review the credentials of all volunteer health practitioners, and may revoke the permission granted under subsection a. if they find that those credentials are not consistent with the standards required for licensure in this State.

COMMENT

This Section addresses the need for licensure recognition of volunteer health practitioners who are licensed outside the state in which an emergency is declared. Out-of-state volunteers can be a critical resource to meet surge capacity in the host jurisdiction. In providing explicit authorization for out-of-state health practitioners to provide services within a state during an emergency, this act follows existing precedent established by EMAC and numerous other existing state laws.

Subsections (a) and (b) are substantively identical to Section 6 of the Uniform Act. They are generally consistent with N.J.S.A. 45:9-13, which regulates the licensing of physicians from out-of-state for practice in New Jersey. N.J.S.A. 45:9-13 grants out-of-state physicians licenses, in the Board of Examiners’ discretion, provided such physicians can prove they were “examined and licensed by the examining and licensing board of another State of the United States or by the National Board of Medical Examiners or by certificates of the National Board of Examiners for Osteopathic Physicians and Surgeons,” and that they “can fulfill the requirements demanded in the other sections of this article relating to applicants for admission by examination.”

Subsection (a) provides that a host state shall recognize the out-of-state license of a volunteer health practitioner as being of equivalent status to a license granted by the host state’s licensure board during an emergency. This is subject to all of the requirements of the act, including requirements that (1) the volunteer health practitioner be duly licensed in another state and in good standing; (2) that an emergency exist (as defined in Section 2(2)); (3) that the practitioner be registered with a registration system; and (4) that the practitioner comply with the scope of practice limitations imposed by the act, the laws of the host state, and any special modifications or restrictions to the normal scope of practice imposed by the host state or host entity pursuant to Section 8.

A suggestion was made that the “may” in subsection (a) be changed to “shall.” However, the Act only requires the state to recognize licensed, registered volunteers—it does not require that said volunteers actually practice in New Jersey when an emergency arises. A licensed and registered volunteer may still choose not to volunteer his or her services, even if they have been recognized by New Jersey.

Subsection (b) restricts this act’s protections from administrative sanction to volunteer health practitioners whose licenses are not subject to a suspension, revocation, or disciplinary restriction, or who have not voluntarily terminated their license under threat of sanction, in any state. This is consistent with the requirements underlying the provision of services in Section 8 such that practitioners who meet any of the aforementioned criteria have had their qualifications questioned as to their ability to adequately provide health services. The provisions of subsection (b) apply only to suspensions, revocations, restrictions and voluntary terminations that are disciplinary in nature and
arise due to actual or suspected provider misconduct. A decision by a practitioner to not renew a license in a particular jurisdiction or to accept a requirement that a license will not be active in a jurisdiction until certain continuing education or insurance requirements are satisfied because a practitioner is principally practicing in another jurisdiction, unrelated to findings or allegations of professional misconduct, will not disqualify an individual from practicing as a volunteer health practitioner under this act.

Subsection (c) was added to permit the various regulatory agencies to waive the requirement, found in N.J.S.A. 45:1-29, that a health practitioner undergo a successful criminal background check before that practitioner can be licensed. It could defeat or substantially impair the goal of this Act to create an efficient registration system for expedient recognition of out-of-state health practitioners if that recognition could be delayed—perhaps by weeks—for a criminal background check.

Subsection (d) was added, in part, to allow the agencies to conduct these background checks during the pendency of the emergency and to take action if a volunteer is found to have a problematic criminal background. Because the respective boards of examiners have been given significant regulatory discretion by the legislature, see, e.g., Valdes v. New Jersey State Bd. of Medical Examiners, 205 N.J. Super. 398, 404-406 (App. Div. 1985), subsection (d) also permits these boards the opportunity to deny temporary licensure to any physician, nurse, veterinarian, or other health practitioner who does not meet the standards that these boards have set forth for licensure.

The addition of this subsection is consistent with existing statutes and case law, both of which demonstrate the very heavily regulated nature of practicing health professions in New Jersey, and the exceedingly narrow ground on which out-of-state physicians, in particular, have been granted temporary licensure. For example, N.J.S.A. 45:9-21(c), states that “[a] physician or surgeon of another state of the United States and duly authorized under the laws thereof to practice medicine or surgery therein,” is exempted from the state’s prohibition on practice by persons not licensed in New Jersey “if such practitioner does not open an office or place for the practice of his profession in this State.” Courts have interpreted the setting up of an office or place for practice language broadly enough to encompass the mere practice of medicine in New Jersey (and, in fact, this applies whether or not the person even sets foot in New Jersey). See Allstate Ins. Co. v. Northfield Medical Center, P.C., 2001 WL 34779104 at *27 (Law. Div. 2001). Additionally, N.J.S.A. 45:9-21(l) provides a specific exemption for “[a] person while giving aid, assistance or relief in emergency or accident cases,” but only “pending the arrival of a regularly licensed physician, or surgeon or under the direction thereof.” Taken together, these provisions support a conclusion that a doctor from another state who operates on a disaster victim in a New Jersey hospital must be subject to exacting oversight by the Board of Medical Examiners.

Section 7. No Effect on Credentialing and Privileging

a. In this section:

(1) “Credentialing” means obtaining, verifying, and assessing the qualifications of a health practitioner to provide treatment, care, or services in or for a health facility.

(2) “Privileging” means the authorizing by an appropriate authority, such as a governing body, of a health practitioner to provide specific treatment, care, or services at a health facility subject to limits based on factors that include license, education, training, experience, competence, health status, and specialized skill.

b. This Act does not affect credentialing or privileging standards of a health facility and does not preclude a health facility from waiving or modifying those standards while an emergency declaration is in effect.
COMMENT

This provision is identical to Section 7 of the Uniform Act and gives health facilities and host entities the option of waiving their internal privileging and credentialing requirements and, presumably, also allows them to deny privileges to an out-of-state volunteer, even if that volunteer is duly licensed under the Uniform Act.

Credentialing and privileging standards can be an essential prerequisite to the actual delivery of health services in specific settings. The Joint Commission on Accreditation of Healthcare Organizations (JCAHO), for example, requires hospitals to be prepared to engage in rapid credentialing procedures as needed to respond to emergency events. In 2003, the Commission recommended the creation of a credentialing database to support a national emergency volunteer system for health practitioners. Health Care at the Crossroads: Strategies for Creating and Sustaining Community-wide Emergency Preparedness Systems 24, 36 (JCAHO White Paper, March 2003). This would provide rapid access to information on volunteer clinicians during the planning and implementation of an emergency response. Id. at 36. To date this database has not been established.

Section 8. Provision of Volunteer Health or Veterinary Services; Administrative Sanctions

a. Subject to subsections (b) and (c), a volunteer health practitioner shall adhere to the scope of practice for a similarly licensed practitioner established by the licensing provisions, practice acts, or other laws of this state.

b. Except as otherwise provided in subsection (c), this Act does not authorize a volunteer health practitioner to provide services that are outside the practitioner’s scope of practice, even if a practitioner similarly licensed by New Jersey would be permitted to provide the services.

c. The Department of Health and Senior Services, the Board of Medical Examiners, the Board of Nursing, the Board of Veterinary Examiners, or, if the appropriate entity is not available, the Governor, may modify or restrict the health or veterinary services that volunteer health practitioners may provide pursuant to this Act. An order under this subsection may take effect immediately, without prior notice or comment, and is not a rule within the meaning of the New Jersey Administrative Code.

d. A host entity may restrict the health or veterinary services that a volunteer health practitioner may provide pursuant to this Act.

e. A volunteer health practitioner does not engage in unauthorized practice unless the practitioner knows or has reason to know of any limitation, modification, or restriction under this section or that a similarly licensed practitioner in this state would not be permitted to provide the services. A volunteer health practitioner knows or has reason to know of a limitation, modification, or restriction or that a similarly licensed practitioner in this state would not be permitted to provide a service if:

   (1) the practitioner knows the limitation, modification, or restriction exists or that a similarly licensed practitioner in this state would not be permitted to provide the service; or

   (2) from all the facts and circumstances known to the practitioner at the relevant time, a reasonable person would conclude that the limitation, modification, or restriction exists or that a similarly licensed practitioner in this state would not be permitted to provide the service.
f. In addition to the authority granted by New Jersey law other than this Act to regulate the conduct of health practitioners, a licensing board or other disciplinary authority in this state:

(1) may impose administrative sanctions upon a health practitioner licensed in this state for conduct outside of this state in response to an out-of-state emergency;

(2) may impose administrative sanctions upon a practitioner not licensed in this state for conduct in this state in response to an in-state emergency; and

(3) shall report any administrative sanctions imposed upon a practitioner licensed in another state to the appropriate licensing board or other disciplinary authority in any other state in which the practitioner is known to be licensed.

g. In determining whether to impose administrative sanctions under subsection (f), a licensing board or other disciplinary authority shall consider the circumstances in which the conduct took place, including any exigent circumstances, and the practitioner’s scope of practice, education, training, experience, and specialized skill.

COMMENT
This section is essentially the same as Section 8 of the Uniform Act, with the names of the regulatory agencies included.

Subsection (a) provides that volunteer health practitioners may only render health services that would be within the scope of practice of a similarly situated practitioner in the host state. Outside this act, the term “scope of practice” may have different meanings depending on how it is used. In the health professions (e.g., medicine, nursing, etc.), the “scope of practice” typically refers to the standards that separate one health profession from another governed by state licensure laws unique to each profession. Idaho, for example, precludes a health practitioner providing charitable medical care from acting outside the scope of practice “authorized by the provider’s licensure, certification or registration.” Idaho Code § 39-7703 (2005). Therefore, nurses are restricted from performing physician services because such conduct would be outside the scope of practice for nurses.

Another interpretation of “scope of practice” refers to the general services being provided for a specific entity that a volunteer health practitioner is serving. Alabama, for example, requires all volunteers to act “within the scope of such volunteer’s official functions and duties for a nonprofit organization, … hospital, or a governmental entity.” Ala. Code §6-5-336(d)(1). Consequently, the scope of practice (i.e. functions and duties) would not stem exclusively from the explicit licensure requirements under state law. Rather, the types of services would stem from the privileging requirements set forth by the organization in which the volunteer is serving. This act, however, distinguishes between credentialing and privileging requirements and scope of practice limitations.

Under this act, “scope of practice” is defined in Section 2(12) to mean the extent of authorization to provide health or veterinary services established by the licensure boards of the state in which a practitioner is licensed and primarily engages in practice. This limits the types of services volunteer health practitioners can perform to those services unique to their profession. Nonetheless, the scope of practice may differ among individuals depending on the state(s) where they are principally licensed. The services a practitioner provides may be modified or restricted by a state licensing board or other agency pursuant to subsection c. or restricted by a host entity pursuant to subsection (d).

As indicated above, (a) requires that a volunteer health practitioner (whether in-state or out-of-state) must adhere to the applicable scope of practice for similarly situated practitioners in the host state during the emergency. For practitioners licensed in the host state before the emergency, they must, of course, adhere to the state’s scope of practice for their profession. For out-of-state practitioners who are not licensed in the host state before the emergency, the requirement to adhere to the host state’s scope of practice is consistent with the recognition pursuant to Section 6a. that out-of-state practitioners are to be viewed as licensed in the state for the duration of the
emergency. Through subsection a., the scope of practice requirements for similarly situated practitioners is coupled with their recognition of a temporary license as provided in Section 6a. This helps ensure uniformity in the scope of practice among various practitioners from other jurisdictions.

Subsection b. clarifies that this section (nor any other provisions of the act) does not authorize a volunteer health practitioner to provide services that are outside the practitioner’s own scope of practice even if a similarly situated practitioner in this state would be permitted to provide the services. This restriction, which principally applies to practitioners whose licensure during non-emergencies is out-of-state, helps ensure that they do not provide services during emergencies that they would not be entitled to provide in their usual course of business or activities. This is significant where a volunteer health practitioner is licensed in more than one state.

Subsection c. authorizes the state licensing board or other appropriate state agency (or agencies) to modify or restrict the type of services volunteer health practitioners may provide during an emergency. This provision must be considered *in pari materia* with the licensure laws and regulations of the host state. The rationale is to empower state agencies to adapt their emergency response plans to unforeseeable circumstances stemming from an emergency to meet patient needs or protect the public’s health. In some instances, this may require empowering volunteer health practitioners to provide services that are not typically allowed under existing state licensure laws. In New Jersey, for example, the Commissioner of Health and Senior Services may waive any rules and regulations concerning professional practice in the state during an emergency. *N.J.S.A 26:13-18b(2).* In other circumstances, a state may choose to limit volunteer health practitioners to only provide certain designated types of services not otherwise available because of the impact of a disaster. In either case, during an emergency there may be legitimate reasons for a state to modify or restrict the health services that a volunteer health practitioner may provide consistent with overriding public health objectives or patient needs. The phrase “or, if the appropriate entity is not available, the Governor,” was added to subsection c. to permit the Governor, who has expanded powers during a state of emergency, to administer the Act if, due to a breakdown in communication or an extreme catastrophe, the other named entities are not able to.

Subsection d. authorizes a host entity to restrict the services that volunteer health practitioners may provide. Host entities need to make decisions in real time to allow for an efficient and effective emergency response. This provision does not authorize a host entity to alter the scope of practice of a particular profession as defined by state licensure boards or other appropriate agencies. Therefore, a hospital acting as a host entity cannot authorize a nurse to provide services that only a physician may perform. However, the hospital may limit the types of services that a volunteer health practitioner is authorized to perform. A hospital, for example, may delegate different responsibilities among volunteer health practitioners that limit what the practitioners can do in the treatment of patients or provision of public health services during a non-emergency. This population-based approach to the delivery of health services is consistent with the underlying public health objective of this act to assure the health and well-being of affected members of the population.

**Section 9. Relation to Other Laws**

a. This Act does not limit rights, privileges, or immunities provided to volunteer health practitioners by laws other than this Act. Except as otherwise provided in subsection (b), this Act does not affect requirements for the use of health practitioners pursuant to the Emergency Management Assistance Compact.

b. The Department of Health and Senior Services, pursuant to the Emergency Management Assistance Compact, may incorporate into New Jersey’s emergency forces volunteer health practitioners who are not officers or employees of New Jersey, a political subdivision of New Jersey, or a municipality or other local government within New Jersey.
COMMENT
This section is substantively identical to Section 9 of the Uniform Act.

Subsection b. creates a statutory path to allow private sector volunteers to be incorporated into state forces for the limited purpose of facilitating their deployment and use during an emergency through EMAC or other state mutual aid compacts or agreements. During Hurricane Katrina, many states sought to deploy volunteers through EMAC to provide them greater protections and fulfill state responsibilities pursuant to this compact. In many states, this required the hasty execution of agreements or issuance of executive orders authorizing the volunteers to become temporary state agents. To avoid future delays, this provision authorizes the appropriate state agency to incorporate any private sector volunteers into state forces as needed to deploy them via EMAC or other interstate compacts or agreements.

Section 10. Regulatory Authority

The Department of Health and Senior Services may promulgate rules to implement this Act. In doing so, the Department of Health and Senior Services, shall consult with and consider the recommendations of the Office of Emergency Management and shall also consult with and consider rules promulgated by similarly empowered agencies in other states to promote uniformity of application of this Act and make the emergency response systems in the various states reasonably compatible.

COMMENT
This Section is substantially similar with Section 10 in the Uniform Act. The names of specific regulatory authorities were added at the beginning, while the Office of Emergency Management was inserted in place of “the entity established to coordinate the implementation of the Emergency Management Assistance Compact,” since that office coordinates health emergencies in New Jersey. See N.J.S. 26:13-3.

Section 11. Limitations on Civil Liability for Volunteer Health Practitioners; Vicarious Liability

a. Volunteer health practitioners, as defined in Section 2 of this Act, shall be afforded the same rights, protections, and limitations on liability as are provided by N.J.S. 2A:62A-1 et seq. of the “Good Samaritan Act.”

b. The rights, protections, and limitations on liability provided under N.J.S. 2A:62A-1 et seq. shall apply to health services performed pursuant to the declared emergency whether or not those health services are performed within a health facility.

c. The rights, protections, and limitations on liability provided under N.J.S. 2A:62A-1 et seq. shall apply to health services provided for the treatment of human or animal ailments, disease, pain, injury, deformity, mental or physical condition.
d. No person, including entities that send volunteers to New Jersey to assist during the declared emergencies, is vicariously liable for damages for an act or omission of a volunteer health practitioner if the practitioner is not liable for the damages under this section.

e. A person that, pursuant to this Act, operates, uses, or relies upon information provided by a volunteer health practitioner registration system is not liable for damages for an act or omission relating to that operation, use, or reliance unless the act or omission is an intentional tort or is willful misconduct or wanton, grossly negligent, reckless, or criminal conduct.

f. This section does not limit the liability of a volunteer health practitioner for:

1. Willful misconduct or wanton, grossly negligent, reckless, or criminal conduct;
2. Intentional tort;
3. Breach of contract;
4. A claim asserted by a host entity or an entity located in this or another state which employs or uses the services of the practitioner.

COMMENT

This section combines part of Section 11 of the Uniform Act with a reference to New Jersey’s Good Samaritan Act, N.J.S. 2A:62A-1 et seq. in order to afford the same limitation on liability provided under the GSA to the emergency volunteers. This Act does not change the provisions of the GSA, it simply incorporates them by reference.

Subsection (a) limits the liability of volunteer health practitioners, as defined in Section 2 of the Act, to that permissible pursuant to the Good Samaritan Act.

Subsection (b) broadens the scope of liability under this Act to match the Good Samaritan Act’s parameters for services rendered in a health facility, as defined in Section 2 of the Act. This is consistent with a broader protections and limitation of liability afforded volunteer health practitioners in the Emergency Health Powers Act, N.J.S. 26:13-6(d). This addition was necessary because the Good Samaritan Act has been interpreted by the state Supreme Court as inapplicable when the volunteer physician gives aid in a health facility. Velazquez ex rel. Velazquez v. Jiminez, 172 N.J. 240, 262 (2002).

The incorporation of the Good Samaritan Act’s provisions only applies to out-of-state volunteers. The definition of volunteer health practitioners does not include physicians licensed in New Jersey and acting within the scope of their employment during the emergency. The Good Samaritan Act does not apply to physicians licensed and working in New Jersey during emergencies when they work in a health facility and, as this is the status quo for these professionals, there was no compelling reason to broaden their immunity. However, in order to provide an incentive to have professionals from outside New Jersey volunteer to help in New Jersey during an emergency, the Act broadens immunity for these volunteers to include services performed inside a health facility.

Subsection (c) broadens the Act to immunize veterinarians. The Good Samaritan Act only immunizes those treating “human ailments, disease, pain, injury, deformity, mental or physical condition.” Because the Act applies to veterinarians in all other respects, this change was necessary to promote uniformity.

Subsections (d) and (e), taken largely from the Uniform Act, limit vicarious liability for host entities and also the entities from other states that may send volunteer health practitioners into New Jersey. The language of these subsections is consistent with N.J.S. 2A:53A-7(b) and (c), which provide immunity from civil actions for acts
or omissions committed by volunteers in the provision of aid to the “nonprofit corporation, society or association organized exclusively for hospital purposes,” except for “willful, wanton or grossly negligent act[s] of commission or omission, including sexual assault and other crimes of a sexual nature.” However, by using the term “host entity,” this language includes all health facilities used during the emergency, whether or not they are nonprofit facilities. This is a change from N.J.S. 2A:53A-7, which only applies to nonprofit facilities, and eliminates the searching inquiry about a facility’s status that courts engage in when litigating cases under N.J.S. 2A:53A-7. See, e.g., Abdallah v. Occupational Center of Hudson County, Inc., 351 N.J. Super. 280, 283-84 (App. Div. 2002) (noting that “neither non-profit status nor the performance of socially useful services, either independently or together, are dispositive of charitable status”) (quoting Parker v. St. Stephen's Urban Dev. Corp., 243 N.J. Super. 317, 324-325 (App. Div. 1990).

Subsection (f), taken from the Uniform Act, is meant to limit explicitly the acts or omissions covered by the expanded liability protections. While case law has ruled that the acts listed in subsection (f) are not covered by the Good Samaritan Act, they are listed here for completeness.

Section 12. Workers’ Compensation Coverage

a. In this section, “injury” means a physical or mental injury or disease for which an employee of this state who is injured or contracts the disease in the course of the employee’s employment would be entitled to benefits under the workers’ compensation law of this state.

b. A volunteer health practitioner who dies or is injured as the result of providing health or veterinary services pursuant to this Act is deemed to be an employee of this state for the purpose of receiving benefits for the death or injury under the workers’ compensation law of this state if the practitioner is not otherwise eligible for such benefits for the injury or death under the Workers’ Compensation laws of this state.

c. The Division of Workers’ Compensation shall adopt rules, enter into agreements with other states, or take other measures to facilitate the receipt of benefits for injury or death under the workers’ compensation law of this state by volunteer health practitioners who reside in other states, and may waive or modify requirements for filing, processing, and paying claims that unreasonably burden the volunteer health practitioners. To promote uniformity of application of this Act with other states that enact similar legislation, the Division of Workers’ Compensation shall consult with and consider the practices for filing, processing, and paying claims by agencies with similar authority in other states.

COMMENT

This section is substantively identical to Section 12 of the Uniform Act. The term “workers’ compensation” is used, consistent with the state government’s adoption of the gender neutral term for the Division of Workers’ Compensation.

This section is consistent with N.J.S. 34:15-75, which provides workers’ compensation for volunteer firemen, county fire marshals, volunteer first aid or rescue squad workers, volunteer ambulance drivers, forest fire wardens or firefighters, members of boards of education, and volunteer special reserve or auxiliary policemen. This section is needed because, otherwise, volunteers are not considered “employees” within the meaning of Title 34 and, therefore, are not entitled to workers’ compensation. See, e.g., Veit v. Courier Post Newspaper, 154 N.J. Super. 572 (App. Div. 1977) (“It is clear that one who volunteers his services and neither receives nor expects to receive payment is not an employee for workers' compensation purposes.”).
This section has only been adopted by half of the states to adopt the Model Act. New Mexico, in *N. M. S. A.* 1978, § 12-12A-12, did not make coverage as a state employee compulsory; rather, volunteers “may elect” to be treated as a state employee, so long as they are also “not otherwise eligible for benefits for injury or death under the workers' compensation law of this or another state.” *T. C. A.* § 58-2-812 makes the coverage compulsory, but limits it to “to those medical benefits provided to state employees under the laws of this state.” Utah, in *U.C.A.* 1953 § 26-49-601, makes the coverage compulsory, as well, and adds a section computing “the workers' compensation benefits for a volunteer health practitioner” as “the state's average weekly wage at the time of the emergency.”

The receipt of some compensation by volunteers—e.g., reimbursement of, or allowance for, reasonable expenses, or continuation of salary or other remuneration while on leave—should not destroy the right of a volunteer with no other workers’ compensation coverage from being covered. Some townships have paid small sums of money to volunteer firefighters—nothing like a regular salary—and these payments have not taken those firefighters outside the protection of *N.J.S.A.* 34:15-75.

**Section 13. Uniformity of Application and Construction**

In applying and construing this uniform act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

**COMMENT**

This section is identical to Section 13 of the Uniform Act.

**Section 14. Repeals**

[reserved]

**COMMENT**

No current statutory provisions would have to be repealed to effectuate this Act.

**Section 15. Effective Date**

This Act takes effect...