REPORT AND RECOMMENDATIONS RELATING TO RECORDATION OF TITLE DOCUMENTS

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

INTRODUCTION AND SUMMARY

The Commission began this project in response to a request from the County Officer's Association, the membership of which includes the county clerks and registers of deeds who are responsible for maintaining the recordation system. The Association expressed the concern of the recording officers that the many detailed requirements for recordation that have accreted over the years were imposing a significant burden on recording offices. The requirements increase the time necessary to check documents for compliance, and necessitate the rejection of a great many documents lodged for recordation. The problem is exacerbated by the substantial increase in the number of land transactions over the last decade.

The issues raised by the recording officers are important not merely for the obvious public interest in the smooth functioning of government. The orderly operation of our real estate and financial markets depends upon the efficient operation of the land title recordation system. For example, if a document is lodged for recordation but must be rejected for some technical reason, the interest based on that document may be subordinated to one created by a later document recorded before resubmission of the first document, thus frustrating the expectations of the parties. Documents lodged for recordation but not promptly indexed due to backlogs may be more difficult for title searchers to locate, a situation which undermines the most basic function of the recordation system. The proliferation of technical requirements for recordation has substantially increased the risk that some documents which do not satisfy the prerequisites will nevertheless be recorded. The status of these improperly recorded documents is questionable.[1]

---

[1] If an unacknowledged deed is recorded by mistake, the deed, even though it may otherwise be valid, will not have the standard constructive notice and evidentiary effects arising from the fact of recordation. E.g., R.S. 46:21-1 and -2; Turner & Seymour Mfg. Co. v. Acme Mfg. Co., 91 N.J.Eq. 348, 350 (Ch. 1920) and Fox v. Lambson, 8 N.J.L. 275, 280 (Sup. Ct. 1826).

If a subsequent purchaser, judgment creditor or mortgagee has actual notice of an unrecorded or improperly recorded instrument, however, that party's interest may nevertheless be subject to the unrecorded or improperly recorded instrument. R.S. 46:22-1 ("deed or instrument ... until duly recorded or lodged for record ... [is] void and of no effect against subsequent judgment creditors, without notice, and against all subsequent bona fide purchasers and mortgagees for valuable consideration, not having notice thereof")(emphasis added); Goldenstein v. Marlboro Construction Co., 7 N.J.Misc. 185 (Ch. 1929). In Goldenstein, a mortgage executed by a corporation but not properly proved was recorded. A subsequent judgment creditor attacked the priority of the mortgage in a foreclosure proceeding. The court upheld the priority of the improperly recorded mortgage because the subsequent judgment creditor had actual notice of the improperly recorded mortgage. The court, in construing the predecessor statute to R.S. 46:22-1, stated: "Our recording acts invalidate unrecorded, and, of course, improperly recorded mortgages only as to subsequent judgment creditors without actual notice. Comp. Stat., pp.1553, 3414; Brinton v. Scull, 55 N.J. Eq. 747; Majewski v. Greenberg, 5 N.J. Adv. R. 566." Id. (emphasis added).

While there are no cases concerning the effect of failure to meet the requirements for recordation other than acknowledgment, the legal effect of any improperly recorded document must be considered unclear.

As a preliminary matter, the Commission began by considering all of the current requirements for recordation contained in Title 46 of the Revised Statutes with the purpose of reducing these requirements to the minimum number that would serve the purposes of recordation and meet any other important public interests. The function of recordation is to give notice to subsequent purchasers and encumbrancers. N.J. Bank v. Azco Realty Co., 148 N.J.Super 159,166 (App. Div., 1977). That function is aided by requirements limiting recordation to documents meeting minimum formal standards. However, requirements must be clear and simple enough to allow expeditious recordation. A delay between the lodging of a document for recordation and its recording and indexing interferes with the notice function. Requirements may also derive from public purposes independent of the recording acts. See e.g. C. 46:15-6. However the proliferation of these requirements can also contribute to delay and interfere with the basic purpose of recordation. Inclusion of each requirement must be based on a judgment that its need outweighs its costs.

In codifying the requirements for recordation, the Commission found it appropriate to revise certain related statutes in Title 46, which, although they do not set forth requirements for recordation, are critical to the interpretation of the recordation requirements. The extent of necessary revision was dictated by the current condition of the statutory material. Most of the relevant sections derive from the 1898 revision of the Conveyancing Act, see, e.g., R.S. 46:14-6, and some sections are older, e.g., R.S. 46:14-5. The archaic style and language of these sections was largely preserved in the 1937 revision; in fact, some sections are taken verbatim from the antecedent laws. Some of the problems with Title 46 are organizational. Sections were added either to deal with specific problems or to supplement the statutory scheme during the first years of this century. Some additions are not fully integrated into the older material; often the older and supplementary sections must be read together to get a true picture of the resulting legal principles. See, e.g., R.S. 46:13-1 and 13-3. Also, over the years, provisions have been added to deal with specific, temporary problems. These provisions now serve only to distract. See, e.g., R.S. 46:18-7 (provision on alien property custodian).

It is in this context that the sections establishing prerequisites to recordation must be considered. While some of the problem of imperfect compliance with the requirements for recordation results from the number and complexity of the requirements, some results from the complexity of their statutory context and the relation of the requirements to it.

As a result, the Commission recommends the revision of Chapters 12, 13, and 14, and part of Chapters 15 and 18 of Title 46. In place of the thirty sections in the current law, the Commission proposes only six sections. The first section is the key section of the proposal. It gathers in one place all of the prerequisites for recordation of an instrument affecting real estate. It reduces the number of requirements for recordation and makes clear that a recording officer is obliged to record any document which appears to meet the requirements. It is understood, of course, that the recording officer is not certifying the validity of a document by accepting it for recordation. See, R.S. 46:2-2 and 25-1. Validity may turn on factors calling for legal judgments beyond the role of the recording officer. The second section outlines the requirements for cancellation of a mortgage. The current statutory material on this subject is now found in seven sections. The third, fourth and fifth sections together constitute a clearer statement of the methods for acknowledging or proving a document. At present, there is no such statement; the seven statutes dealing with this subject are neither complete nor consistent with each

other. The last defines "signature." While such a definition is not now found in the law, it was considered important to add it. The Commission also recommends amendments to two sections of existing law, lessening the requirements imposed by these sections without impairing the purpose of the sections.

SECTION I. Prerequisites to Recordation.

a. Any instrument affecting title to or interest in real estate or containing any agreement in relation to real estate in this State shall be recorded on presentation to the recording officer of any county in which all or part of the real estate is located, if it appears that:

(1) the instrument is in English or accompanied by a translation into English;

(2) the instrument bears a signature;

(3) the instrument is acknowledged or proved in the manner provided by this title;

(4) beneath the signatures of any parties to the instrument and the officer before whom it was acknowledged or proved, the names appear typed, printed or stamped;

(5) any required recordation fee is paid; and

(6) if the instrument is a deed conveying real property, (A) it fulfills the requirements of P.L. 1968, c.49, º2 (C. 46:15-6) and (B) it includes a reference to the lot and block number of the property conveyed as designated on the tax map of the municipality at the time of the conveyance or the account number of the property. If the property has been subdivided, the reference shall be preceded by the words "part of." If no lot and block or account number has been assigned to the property, the deed shall state that fact.

b. An instrument, whether made by an individual or by a corporation or other entity, need not be executed under seal, nor need the document contain words referring to execution under seal, to be entitled to recordation.

Source: 46:15-1, 46:15-2.1, 46:15-3

Comment

One of the problems in the current law establishing requirements for recordation is that the numerous requirements are scattered throughout several chapters of Title 46. The Commission recommends that the number of requirements for recordation be reduced and that the statutes contain a single section either defining or referring to each of the requirements so that a person attempting to file a document can easily discern what is necessary to meet the requirements. This purpose is expressed in subsection a. That subsection also expresses the intent of the section that the decision of the recording officer to record a document implies only that the officer has found that the statutory requirements appear to have been met. The officer is not called upon to make judgments concerning the accuracy of information supplied or the validity of documents. That is not a change from existing law. See, R.S. 46:2-2 and 25-1.

Under the Commission recommendation, the requirements for recordation would be as follows:

Subsection a.(1) -- English Language

That a document be written in the English language in order to be recorded is required by R.S. 47:1-2. The new provision would relax that requirement only to the extent that a foreign language document may be filed if accompanied by a translation. The Commission is not recommending that R.S. 47:1-2 be repealed, however, since that section deals with documents other than title documents.

Subsection a.(2) -- Signature

Title 46 does not contain a section explicitly requiring a signature on deeds or other instruments, either for the document to be valid or for it to be entitled to recordation. As a practical matter, however, a deed or other instrument must be signed in order to satisfy the Statute of Frauds, R.S. 25:1-1 to 1-9. In addition, the requirement that a deed or other instrument be proved or acknowledged to be recorded implicitly requires a signature. See R.S. 46:14-6 and 14-7. See the Comment to the proposed new section defining "signature" for a discussion of what constitutes a signature.

Subsection a.(3) -- Acknowledgment or Proof

R.S. 46:15-1 requires either acknowledgment or proof of execution of a deed or other instrument as a prerequisite to recordation. The provision states that "no deed or instrument ... shall be recorded ... unless the execution shall have been first acknowledged or proved ...." Acknowledgment is not, however, essential to the validity of a deed as between the parties to it. Van Solingen v. Town of Harrison, 39 N.J.L. 51, 52 (Sup. Ct. 1876); Campbell v. Hough, 73 N.J. Eq. 601, 606 (Ch. 1908); Moore v. Riddle, 82 N.J.Eq. 197, 203 (Ch. 1913).

Over the years, there have been many suggestions that the requirement of acknowledgment be abolished. See, e.g., Uniform Simplification of Land Transfers Act, º2-301(b). While the Commission is recommending some changes in the acknowledgment requirement, it is not recommending abolition of acknowledgment or proof of execution as a prerequisite to recordation. The requirement is continued as subsection a.(3) of the proposed section. Methods of acknowledgment and proof are set out in proposed Sections III and V.

Subsection a.(4) -- Typed or Printed Names

Currently, R.S. 46:15-3 requires a typed or printed name under every signature on a document. The Commission recommends the continuation of that requirement for the parties to a document and for the person taking the acknowledgment or proof. The requirement in regard to the names of witnesses would be eliminated. See subsection b.(4) of the proposed section.

Subsection a.(5) -- Fees

Two fees may be required for the filing of a title document. One fee is required for all documents by N.J.S. 22A:4-4.1, and a realty transfer fee is required only for certain deeds by C. 46:15-7. The reference to the payment of fees in the Commission's proposed section would alert a person seeking recordation to those current requirements, as well as to any other future fee, tax, or charge which may be made a prerequisite of recordation.

Subsection a.(6)(A) -- Statement of Consideration

A statement of consideration is required in certain deeds by C. 46:15-6. The Commission recommends change only in the detail of the requirement (see the Comment to the proposed amendments to C. 46:15-6 and C. 46:15-9 below). The reference in subsection a.(6)(A) is intended to alert a person seeking recordation to the requirement.

Subsection a.(6)(B) -- Lot and Block or Account Number

Under current law, R.S. 46:15-2 establishes a procedure for presenting deeds to city officials so that they may be mapped for tax purposes. With the completion of the mapping process, this section has lost its purpose and has largely been superseded by C. 46:15-2.1, which requires the placing of the lot and block or account number on the deed. As a result, the requirement of submission of the deed for mapping is obsolete. It is not now generally enforced. The Commission recommends its repeal.

The Commission recommends continuation of the requirement of C. 46:15-2.1 that lot and block numbers or tax account numbers appear on deeds. That requirement is continued in subsection a.(6)(B) of the proposed section on prerequisites to recordation.

Subsection b. -- Seal not Required

Despite the fact that Title 46 contains several sections defining what is acceptable as a seal, there is no express provision in this title or elsewhere in the statutes requiring that an instrument be executed under seal in order to be recorded. The absence of an express provision requiring sealing for recordation probably derives from the fact that execution under seal was a common law requirement for a valid conveyance of an interest in real property. See, e.g., Overseers of Poor of Hopewell v. Overseers of Poor of Amwell, 6 N.J.L. 169, 175 (Sup. Ct. 1822) ("An indenture in the language of the law, is a deed, that is, a writing sealed and delivered" (emphasis in original)); accord Moore v. Riddle, 82 N.J.Eq. at 202; M. Lieberman, "Abstracts and Titles," 13 New Jersey Practice º441 (3d ed. 1966). Thus, reference to execution under seal as a requirement for recordation may have been considered superfluous.

That execution under seal was presumed as to certain documents is also evidenced in the provisions in Title 46 concerning proof of deeds or other instruments to be recorded. The provision concerning proof of instruments executed by individuals, for example, specifies that the subscribing witness to an instrument must swear that the maker of the instrument being proved "signed, sealed and delivered" the instrument. R.S. 46:14-6 (emphasis added). Identical language was contained in prior versions of this section. E.g., L.1898, c.232, º22, p.678. R.S. 46:14-6 standing alone cannot, however, be read as requiring instruments to be sealed in order to be recorded. Such a construction of the statute was rejected by the court in Turner & Seymour Manufacturing Co. v. Acme Manufacturing Co., 91 N.J.Eq. 347, 350 (Ch. 1920), involving a challenge to the recordation of a conditional bill of sale which had been defectively acknowledged:

> Originally, the recording acts applied only to instruments which required a seal to be valid. As time went on other instruments were added, some of which were never required to be under seal. Notwithstanding this, the language of the sections with respect to acknowledgments and certificates remained, in some instances, as originally drafted.

It is unclear whether a New Jersey court today would hold that a seal is necessary for a conveyance of an interest in property to be valid as a matter of common law. In most states, the necessity for seals on deeds has been abolished by statute. P. Basye, Clearing Land Titles, º233 at 520-21 (2d ed. 1970). Many authorities still state that a seal is required on deeds in New Jersey, citing dicta in Moore v. Riddle, 82 N.J.Eq. 197, 202 (Ch. 1913). E.g., 13 M. Lieberman, "Abstracts and Titles," supra, º441. Nevertheless, there does not appear to be any case invalidating a conveyance for lack of a seal. Moreover, a deed without a seal is enforceable in equity. Cowdrey v. Cowdrey, 71 N.J.Eq. 353, 362 (Ch. 1906), modified on other grounds, 72 N.J. Eq. 951 (E. & A. 1907). With the abolition of the distinction between law and equity, enforceability in equity could be considered validity. See N.J. Const., Art. 6, º3, ¶4; Milmed, The New Jersey Constitution of 1947, N.J.S.A. Constitution, p.106-108.

Whether or not a seal is required for validity of a conveyance, the act of sealing does retain some effect. An executed conveyance under seal imports a solemn act which the courts will enforce even if there is no consideration for the conveyance. In re Kirschenbaum, 44 N.J. Super. 391, 400 (App. Div. 1957). A sealed document is considered a "speciality"; the seal imparts a presumption of consideration. Wanamaker v. Van Buskirk, 1 N.J. Eq. 685, 689 (Ch. 1832). Certain documents under seal also enjoy a longer period of limitations than unsealed documents of the same type. See N.J.S. 2A:14-4; Fidelity Union Trust Company v. Fitzpatrick, 134 N.J.L. 250, 251 (E. & A. 1946). But see N.J.S. 12A:2-203 (affixing a seal to a sales contract does not "constitute the writing a sealed instrument and the law with respect to sealed instruments does not apply....").

The Commission's recommendation is that it be made clear that neither execution under seal nor a reference to execution under seal is required for recordation of a document. Whether seals continue to be required for deeds to be considered valid would remain a matter of case law. Any desirable effects resulting from execution under seal, such as the applicability of certain presumptions, would also remain undisturbed.

SECTION II. Cancellation of mortgages.

A mortgage shall be cancelled of record by the recording officer of any county in which the mortgage was recorded if:

a. The original mortgage bearing on it the receipt given by the county recording officer at the time it was recorded is presented to the county recording officer with an endorsement on it authorizing its cancellation bearing the signature of the mortgagee or, if the mortgage has been assigned of record, of the last assignee of record of the mortgage. If the mortgagee or assignee of the mortgage is a corporation or other entity, the signature for the entity on the endorsement may be made by any person authorized by the entity to do so; or

b. An instrument constituting a satisfaction of mortgage meeting the requirements for recordation, including acknowledgment or proof, is filed with the county recording officer.

Source: 46:18-5, 46:18-6, 46:18-7, 46:18-8, 46:18-8.1

Comment

At present, there are seven sections dealing specifically with the cancellation of mortgages. Four of these sections deal with the requirements for cancellation of a mortgage by endorsement on the original of the mortgage: R.S. 46:18-5, as to mortgages held by individuals; R.S. 46:18-6, as to cancellation of mortgages held by corporations; R.S. 46:18-8, as to mortgages held by building and loan associations; and C.46:18-8.1 as to mortgages held by federal agencies. The four sections vary significantly in detail. The provision for individuals requires an acknowledgment, while the provisions for corporations, building and loan associations and federal agencies do not. However, the provisions dealing with corporations and building and loan associations require the signature of two particular officers and sealing with a corporate seal for cancellation of a mortgage. These requirements particularly present problems, especially when the mortgage is held by an out-of-state corporation which does not have the particular officers required or lacks a corporate seal.

The Commission recommends that cancellation of a mortgage by an endorsement on the mortgage require only the signature by the mortgage holder if that holder is an individual, or by any officer on behalf of the holder if the holder is a corporation. The requirement is that the endorsement be placed on the original mortgage bearing the receipt of the recording officer. This change would abolish the acknowledgment

requirement for individuals, the named officer and seal requirements for corporations, as well as an additional requirement for building and loan association mortgages -- that the Commissioner of Banking be informed in writing of each cancellation by the recording officer. The current statutes state only that the endorsement be placed on "the mortgage." See, e.g., R.S. 46:18-5. However, what is implied is that "the mortgage" is the original mortgage kept by the mortgagee. See William L. Black Implement Co. v. Blair, 104 N.J.L. 229, 231 (Sup. Ct. 1927). The purpose of the requirement which the Commission proposes, that the endorsed original mortgage be the original bearing the recording office receipt, is to assure that only the original retained by the mortgagee, not other signed copies, be cancellable by endorsement.

An alternative method for cancellation of a mortgage, the recordation of a satisfaction of mortgage meeting all of the normal requirements for recordable instruments, is established by R.S. 46:18-7, R.S. 46:18-6 (last paragraph) and R.S. 46:18-8 (last paragraph) That option would be continued by subsection b. of the Commission proposal.

Two remaining sections of Chapter 18 of the current law seem unnecessary. R.S. 46:18-11 deals with situations where the original mortgage falls into the hands of the mortgagor, allowing him to forge a cancellation. Other provisions of civil and criminal law deal with this situation adequately. R.S. 46:18-11.1 deals generally with discharges of mortgages; its subject matter is covered by the section proposed by the Commission.

SECTION III. Acknowledgment and proof.

a. To acknowledge a deed or other instrument the maker of the instrument shall appear before an officer specified in Section IV* and acknowledge that it was executed as the maker's own act. To acknowledge a deed or other instrument made on behalf of a corporation or other entity, the maker shall appear before an officer specified in Section IV* and state that the maker was authorized to execute the instrument on behalf of the entity and that the maker executed the instrument as the act of the entity.

b. To prove a deed or other instrument, a subscribing witness shall appear before an officer specified in Section IV* and swear that he or she witnessed the maker of the instrument execute the instrument as the maker's own act. To prove a deed or other instrument executed on behalf of a corporation or other entity, a subscribing witness shall appear before an officer specified in Section IV* and swear that the representative was authorized to execute the instrument on behalf of the entity, and that he or she witnessed the representative execute the instrument as the act of the entity.

c. The officer taking an acknowledgment or proof shall sign a certificate stating that acknowledgment or proof. The certificate shall also state:

(1) that the maker or the witness personally appeared before the officer;

(2) that the officer was satisfied that the person who made the acknowledgment or proof was the maker of or the witness to the instrument;

(3) the jurisdiction in which the acknowledgment or proof was taken;

(4) the officer's name and title;

*NOTE: Cross-references now to "Section IV" entitled "Officers authorized to take acknowledgments" should be changed to the technically appropriate cross-references when this proposal is put into bill form.

(5) the date on which the acknowledgment was taken.

d. The seal of the officer taking the acknowledgment or proof need not be affixed to the certificate stating that acknowledgment or proof.

Source: 46:14-2, 46:14-6

Comment

The only statutory source approaching a statement of what constitutes an individual acknowledgment is the first paragraph of R.S. 46:14-6. While that section requires the grantor to appear before the officer taking the acknowledgment and satisfy the officer that he is the grantor, it does not specify further what the grantor must state to acknowledge the instrument. The Commission recommendation is a redraft of this section so that it states clearly what acknowledgment involves. This section applies to the acknowledgment or proof of any kind of deed or instrument. As acknowledgment is most commonly used to satisfy the requirements of recordation, the instruments most commonly acknowledged will be those enumerated in R.S. 46:16-1.

R.S. 46:14-2 provides a form of acknowledgment for corporate instruments. The section specifies particular officers who may act for the corporation, requires the use of a corporate seal, and requires an acknowledgment that the instrument is the voluntary act of the corporation and by authority of its Board of Directors. As an alternative to acknowledgments executed pursuant to R.S. 46:14-2, there is case law authority for the use of acknowledgments like individual acknowledgments on corporate instruments. Hopper v. Lovejoy, 47 N.J. Eq. 573, 579 (E. & A. 1890); Turner & Seymour Mfg. Co. v. Acme Mfg. Co., 91 N.J. Eq. at 350; T. Usher, Textbook For Notaries Public and Commissioners of Deeds of N.J., 86-87 (1952). The Commission recommends simplification of the corporate acknowledgment provision to make corporate acknowledgment as similar to individual acknowledgment as possible. In addition, the Commission proposal, by use of the phrase "other legal entity" recognizes that entities other than corporations may transfer real property in their own names.

As an alternative to acknowledgment, a document may be proved by the oath of a subscribing witness asserting the facts that would be acknowledged by the grantor. R.S. 46:14-6.

The Commission's proposed section on acknowledgment attempts to state clearly what must be done by the maker of an instrument to acknowledge it (subsection a.), and what must be done by a witness to an instrument to prove it (subsection b.). These subsections omit any reference to seals, as the Commission's recommendation is that a seal not be required as a prerequisite to recordation. See the Comment below to Section I. entitled "Prerequisites to Recordation." The proposed section also specifies what must be done by the officer taking the acknowledgment or proof to certify that acknowledgment or proof (subsection c.).

Last, the section provides that the officer need not use an official seal in taking the acknowledgment or proof (subsection d.). At present, a seal is required for certain officers and not for others. Compare R.S. 46:14-7 b (3) with R.S. 46:14-7 b (6). Other provisions require a seal if the officer has one or if one is required in the officer's jurisdiction. See R.S. 46:14-7 b (7) and R.S. 46:14-8 (last paragraph). While the latter, flexible approach prevents problems where a jurisdiction does not provide for a seal for an officer, it makes it difficult to know when a seal must be on the certificate of acknowledgment. The Commission concluded that the requirement that certain officers use an official seal no longer serves any purpose.

SECTION IV. Officers authorized to take acknowledgments.

a. The officers of this State authorized to take acknowledgments or proofs in this State, or in any other United States or foreign jurisdiction, are:

(1) an attorney-at-law;
(2) a notary public;
(3) a county clerk or deputy county clerk;
(4) a register of deeds and mortgages or a deputy register;
(5) a surrogate or deputy surrogate.

b. The officers authorized to take acknowledgments or proofs, in addition to those listed in subsection a., are:

(1) any officer of the United States, of a state, territory or district of the United States, or of a foreign nation authorized at the time and place of the acknowledgment or proof by the laws of that jurisdiction to take acknowledgments or proofs. If the certificate of acknowledgment or proof does not designate the officer as a justice, judge or notary, the certificate of acknowledgment or proof, or an affidavit appended to it, shall contain a statement of the officer's authority to take acknowledgments or proofs;

(2) a foreign commissioner of deeds for New Jersey within the jurisdiction of his or her commission;

(3) a foreign service or consular officer or other representative of the United States to any foreign nation, within the territory of that nation.

Source: 46:14-6, 46:14-7, 46:14-8

Comment

At present, the officers authorized to take acknowledgments or proofs are specified in three sections, R.S. 46:14-6, 14-7 and 14-8. The proposed section synthesizes the three sections, simplifying and clarifying the language and reducing the number of categories. It eliminates references to certain categories of officers which no longer exist in this State (e.g., "counsellor-at-law" as distinguished from an "attorney-at-law," and county commissioner of deeds). Under the proposed section, all New Jersey officers authorized to take acknowledgments or proofs would be authorized to do so anywhere inside or outside of the State. At present, certain officers are authorized to take acknowledgments or proofs only within the State. See R.S. 46:14-6. The proposed section would also eliminate most specific references to certain officials authorized to take acknowledgments and proofs outside this State but within the United States or outside of the United States in favor of a general provision for officers authorized by the law of their own jurisdiction to take acknowledgments and proofs.

It should also be noted that while current law distinguishes among officers, and requires that some use an official seal, the Commission proposal would eliminate any seal requirement. See Comment to Section III, "Acknowledgment and proof."

SECTION V. Proof of instruments not acknowledged or proved.

If a deed or other instrument cannot be acknowledged or proved for any reason, the instrument may be proved in Superior Court by proof of handwriting or otherwise to the satisfaction of the court. Notice of the application in accordance with the Rules of Court shall be given to any party whose interests may be affected.

Source: 46:14-4, 46:14-5

Comment

Current statutes allow an instrument to be proved in court where no acknowledgment or proof of execution was made at the time the instrument was executed and the maker and witnesses are no longer available. See R.S. 46:14-4 (proof of instruments in general) and -5 (proof of assignments of mortgages). The two current statutes vary in many details, including the standard of proof, procedure for proof, notice to be given, and the like. The Commission proposal is a single, simplified section leaving most procedural matters to court rule and case law. On one issue, however, the proposed section differs from both current statutes. The proposed section reflects the modern view that publication is not likely to give actual notice and that where adverse parties are known to exist, notice should be given to them. See also Township of Montville v. Block 69, Lot 10, 74 N.J. 1, 10-11 (1977); Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 315 (1950).

SECTION VI. Signatures.

For purposes of this title, a signature includes any mark made on a document by a person who thereby intends to give legal effect to the 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.

Source: None.

Comment

The only section in Title 46 which pertains to signatures is R.S. 46:12-1. This section, which is in the nature of a validating act, provides that deeds or other instruments recorded as of March 1917 which have been signed by mark but which do not have the words "his mark" or "her mark" written near the mark, are to be considered valid. Thus, the only effect of this section is to relax the requirements of signature by mark for documents on record prior to 1917. The source of the assumed requirement of the words "his mark" or "her mark" is not clear. Nothing appears in the case law suggesting that such a requirement ever existed. See Mutual Benefit Insurance Co. v. Brown, 30 N.J.Eq. 193, 202-03 (Ch. 1878), aff'd, 32 N.J.Eq. 809 (E. & A. 1880). Whatever purpose the section may have had in the past is no longer necessary as part of the permanent law. The Commission recommends repeal of R.S. 46:12-1.

The Commission recommends the addition of a section defining the term "signature." The case law decided under the statute of frauds provides that:

> A person physically unable or too illiterate to write his name may sign by making a cross, a straight or crooked line, or dot or any other symbol. Simply making a mark by bringing the pen in contact with the paper is sufficient.

Mutual Benefit Insurance Co. v. Brown, 30 N.J.Eq. at 203. The new provision recommended by the Commission is intended to codify the definition set forth in Mutual

Benefit, which is broad enough to include any form of written signature, traditional signature by mark, and signatures made by stamp or mechanical device. The newly-drafted definition also includes signatures made on behalf of a person. Broad as the suggested definition is, however, it is narrower than the one used in the Commercial Code. See N.J.S. 12A:1-201. Under that section, letterhead is considered to be a sufficient "signature" for commercial transactions. Id., Uniform Commercial Code Comment A39. While this broad a definition is appropriate for contracts between commercial entities, it is not sufficiently formal for deeds and similar instruments. Compare N.J.S. 3B:3-2 which requires a witnessed signature on a will.

AMENDED SECTIONS

46:15-6. Additional prerequisites for recording.

In addition to other prerequisites for recording, no deed evidencing transfer of title to real property shall be recorded in the office of any county recording officer unless it satisfies one of the following requirements: [(a) the consideration therefor is recited therein and in the acknowledgment or proof of the execution thereof, or (b) an affidavit by one or more of the parties named therein or by their legal representatives declaring the consideration therefor is annexed thereto for recording with the deed.]

a. If the transfer is subject to the additional fee as provided in P.L. 1968, c.49, º3 (C. 46:15-7), a statement of the true consideration for the transfer is contained in (1) the deed, or (2) the acknowledgment, or (3) the proof of the execution, or (4) an appended affidavit by one of the parties to the deed or his or her legal representative.

b. If the transfer is exempt from the additional fee required by P.L. 1968, c.49, º3 (C. 46:15-7), an affidavit stating the basis for the exemption is appended to the deed.

46:15-9. Falsifying consideration; penalty.

Any person who [shall willfully falsify] knowingly falsifies the consideration recited in a deed or in the proof or acknowledgment of the execution of a deed or in an affidavit annexed to a deed declaring the consideration therefor or a declaration in an affidavit that a transfer is exempt from recording fee [annexed to a deed] shall be [adjudged a disorderly person] guilty of a crime of the fourth degree.

Comment

A statement of the consideration for the transfer of property is now required, both in the deed and in the acknowledgment or in a separate affidavit. C. 46:15-6. In addition, C. 46:15-9 provides that falsification of the statement of consideration in the deed or acknowledgment is a disorderly persons offense. While the purpose of the statement of consideration is to allow the assessment of a recording fee based on the consideration for the transfer, current law appears to require the statement even when, because of the circumstances of the transfer, no fee is due. In the opinion of the Commission, only a single statement of consideration should be required, either in the

deed, in the acknowledgment, or in an accompanying affidavit, and no statement of consideration should be required if the deed is accompanied by an affidavit stating the factual basis for an exemption from the additional recording fee.

The amendments to C. 46:15-6 recommended by the Commission provide that a single statement of consideration is sufficient, and authorize the submission of an affidavit if an exemption from the realty transfer tax is being claimed. The Commission also recommends a conforming amendment to C. 46:15-9, the corresponding penalty provision, to include falsification of a statement that a transfer is exempt. Last, the Commission recommends increase in the penalty by making falsification a crime of the fourth degree.

TABLE OF DISPOSITIONS

RECORDATION

Section	Disposition	Comment
Chapter 12		
46:12-1	deleted	See comment to proposed Section VI.
Chapter 13		
46:13-1	deleted	See comment on proposed Section Ib. and note on Seals below.
46:13-2	deleted	See comment on proposed Section Ib. and note on Seals below.
46:13-3	deleted	See comment on proposed Section Ib. and note on Seals below.
46:13-4	deleted	See comment on proposed Section Ib. and note on Seals below.
46:13-7	deleted	See comment on proposed Section Ib. and note on Seals below.
Chapter 14		
46:14-1	deleted	See note on Acknowledgment by a Married Woman below.
46:14-2	Proposed Section III	
46:14-3	deleted	See comment to proposed Section III.
46:14-4	Proposed Section V	
46:14-5	Proposed Section V	
46:14-6	Proposed Sections III, IV	
46:14-7	Proposed Section IV	
46:14-8	Proposed Section IV	
Chapter 15		
46:15-1	Proposed SectionIa(3)	
46:15-2	deleted	See comment to proposed Section Ia(6).
46:15-2.1	Proposed SectionIa(6)	
46:15-3	Proposed SectionIa(4)	
46:15-4	deleted	See note on Address of Mortgage Holder below.
46:15-4.1	deleted	See note on Address of Mortgage Holder below.

46:15-5 to 11	retained	See amendments proposed to 46:15-6 and 46:15-9.
46:15-12	deleted	See note on Requirements for Mortgages below.
46:15-13 to 14	deleted	See note on Preparer's Name below.

Chapter 18

46:18-1 to 18-4	Retained	
46:18-5	Proposed Section II	
46:18-6	Proposed Section II	
46:18-7	Proposed Section II	
46:18-8	Proposed Section II	
46:18-8.1	Proposed Section II	
46:18-11	deleted	See comment to proposed Section II.
46:18-11.1	deleted	See comment to proposed Section II.
46:18-11.2 to18-12	Retained	

NOTES

R.S. 46:13-1, 13-2, 13-3, 13-4, 13-7: Seals

The current provisions on seals in the New Jersey statutes are found in R.S. 46:13-1, 13-2, 13-3, 13-4 and 13-7, and R.S. 1:1-2.1. These provisions do not deal with the question of whether a seal is required for a document to be valid and enforceable or with whether a seal is required for a document to be entitled to recordation. They merely specify the words or devices which constitute a seal. For discussion on whether seals are required, see the comment to proposed Section Ib.

What suffices as execution under seal has eroded substantially over time. At common law, sealing meant that a wax impression was affixed to the document. M. Lieberman, "Abstracts and Titles," 13 New Jersey Practice, º441 (3d ed. 1966). R.S. 1:1-2.1, the antecedents of which were enacted as early as 1875 (see Rev. 1877, p.387, º52) and 1855 (see Rev. 1877, p.741, º1), provides that a wax seal is not required for documents which are "required or permitted by law" to be sealed. Under R.S. 1:1-2.1, an instrument "shall be deemed to be sealed when there is affixed thereto, or printed, impressed or marked thereon a scroll or other device by way of a seal...." In 1898, a separate section paralleling those applicable to instruments generally was added to the Conveyancing Act. L. 1898, c.232, º20, p.677, now codified at R.S. 46:13-1. In 1904, the requisites for a seal on certain title documents were further degraded by the addition of L.1904, c.89, now codified as R.S. 46:13-3. This section, applicable to instruments made by individuals, provides that an instrument shall not be "void for lack of a seal, if the attestation or testimonium clause, or the acknowledgment or proof, shall recite that [the instrument] was signed and sealed by the makers thereof...." Under this statute, the mere reference to sealing in a deed or other document entitled to recordation, even if only in the acknowledgment or proof of execution, constitutes the act of sealing for purposes of Title 46. Thus, less may be required to constitute a seal for deeds and other instruments under Title 46 than is required to constitute a seal on other documents. See, Fidelity Union Trust Co. v. Fitzpatrick, 134 N.J.L. 250, 251 (E. & A. 1946) (construing R.S. 1:1-2.1, the general definition section concerning seals, and N.J.S. 2A:14-4, the statute of limitations provision applicable to certain documents under seal, to require not only a "scroll or other device" in lieu of a seal, but also a reference to sealing in the body of the instrument); accord Beneficial Finance Co. v. Dixon, 130 N.J. Super. 508, 512 (Cty. Dist. Ct. 1974).

The requisites for sealing on a document made by a corporation have undergone a similar degradation, although the statutory provisions were added at a later time. In 1928, a section was adopted which provides that "a scroll of ink, or other device by way of a seal" is sufficient in lieu of a corporate seal. L. 1928, c.183, º1, p.351, now codified as R.S. 46:13-2. In 1932, what is now R.S. 46:13-4 was added to the statutes. This section, which is in the nature of a validating act, provides that corporate deeds made prior to June 1932 which were not sealed with the corporate seal shall be considered valid if the attestation clause or the acknowledgment or proof recites that the deed was sealed. Finally, C.46:13-7 was added in 1942, and provides that deeds or other instruments executed by or on behalf a corporation which is an instrumentality or entity of the United States, by an attorney-in-fact, are valid provided that the power of attorney sealed with the corporate seal is recorded in the county recording office.

The Commission recommends that these sections be repealed. To the extent that parties who execute recordable documents wish to avail themselves of the benefits, if any, of sealing, they may do so by complying with R.S. 1:1-2.1. While this provision may be somewhat more strict in its definition of the act of sealing (see the discussion above of Fidelity Union Trust Co. v. Fitzpatrick), it still provides an acceptably simple method for sealing a document.

R.S. 46:14-1: Acknowledgment by a Married Woman

R.S. 46:14-1 presently provides that a special form of acknowledgment is not needed for a valid deed by a married woman. Prior to 1916, a deed made by a married woman needed a special acknowledgment in order to be valid. Section 39 of "An act respecting conveyances," L. 1898, c.232, º39, p.685); see Chassman v. Wiese, 90 N.J. Eq. 108 (Ch. 1919). L. 1916, c. 157, º1, p. 321, now codified at R.S. 46:14-1, changed the form of the acknowledgment requirement for married women by eliminating the provision that a married woman be examined separately and acknowledge that she was free of any compulsion of her husband in executing the deed. Chassman held, however, that the change in the form of acknowledgment did not remove the requirement of section 39 that a married woman's deed be acknowledged in some form to be valid. Thus, R.S. 46:14-1 served some purpose until the enactment of L. 1934, c. 208, which repealed section 39 of "An act respecting conveyances." The repeal of section 39 removed entirely the requirement of acknowledgment for validity of a married woman's deed. With the repeal of section 39, R.S. 46:14-1, no longer has any function.

The Commission recommends that R.S. 46:14-1 be repealed. In making that recommendation, the Commission is aware that this provision may be relevant in assessing the validity of old documents. The section standing alone is deceptive, however, in that, for example, it does not give notice that some form of acknowledgment was still necessary for a valid married woman's deed until 1934. Many old principles of law are necessary in the interpretation of old documents. The current, permanent law is not and cannot be the place to find such provisions. See, e.g., the requirement of the use of the word "*heirs*" for a fee simple transfer before 1902. Cowdrey v. Cowdrey, 71 N.J.Eq. 353, 354 (Ch. 1906), modified on other grounds 72 N.J.Eq. 951 (E. & A. 1907).

C. 46:15-4, 15-4.1: Address of Mortgage Holder

The post office address of a mortgagee or of an assignee of a mortgage is required to be on the mortgage or assignment by C. 15-4 and 15-4.1. The purpose of the requirement appears to be that an address facilitates service of process on a mortgage holder when a court action is brought in relation to the property. If this is the purpose, a requirement that the address be on the recorded document seems unnecessary. There is no question that an address may be included in filings with the county recording officer. In addition, a mortgage holder may, but need not, file an address with the local taxing authorities. N.J.S. 54:5-104.48. If an address is recorded or is filed with the taxing authorities pursuant to N.J.S. 54:5-104.48, any service of process would need to include notice to that address. See Montville Township v. Block 69, et al., 74 N.J. 1 (1977); Court Rule 4:4-5. In the absence of such a filing, service of process may be by publication. Court Rule 4:4-5c. If a mortgage holder wishes to receive notice of actions affecting his interest in the property, it will serve his purpose to see that a current address is on file. However, there appears to be no public purpose which justifies a requirement of an address as a prerequisite of recordation. The Commission recommends its deletion.

C. 46:15-12: Requirements for Mortgages

C. 46:15-12 now requires that the word "mortgage" be printed in 10-point or larger type on mortgages presented for recordation and also requires that the mortgage be accompanied by an acknowledgment that the mortgagor has received a copy of the mortgage. This requirement appears to have been enacted as a form of consumer protection legislation. Presumably, the requirement that the word "mortgage" appear on the document ensures that a consumer will know that what he is signing is a mortgage. The requirement that the mortgagor receive a copy of the mortgage presumably guarantees that the mortgagor has been apprised of the terms of the mortgage. The significance of these requirements, however, has been reduced by the subsequent enactment of the federal truth-in-lending law, 15 U.S.C. º1601 et seq. (1982 and Supp. 1986) and regulations under that law, commonly referred to as "Regulation Z," 12 C.F.R. 226.1 to 226.30 (1988).

The requirements of federal law are greater than those of the New Jersey statute. A disclosure in writing in a form the consumer may keep is required before consummation of a loan or three days after receipt of a mortgage application, whichever is sooner. 12 C.F.R. 226.17(a) and 226.19(a) (1988). Among the things which must be disclosed is the retention of a security interest in real property. 12 C.F.R. 226.23(b) (1988). All of this is enforceable by civil actions for damages and penalties of twice the amount of the finance charge plus costs and attorneys' fees. 15 U.S.C. º1640 (1982). There also are criminal penalties for willful violations. 15 U.S.C. º1611 (1982).

It should be noted, however, that the federal law is applicable only to creditors who are in the business of lending money. 15 U.S.C. º1602(f) (1982). The regulations cover a lender if it makes 25 loans within a calendar year or five loans secured by a dwelling within a calendar year. 12 C.F.R. 226.2(17), n. 3. Given the purpose of the New Jersey law to protect consumers from unscrupulous creditors, this difference would seem of limited consequence. As a practical matter, it would appear that the federal law provides at least as much protection as the New Jersey prerequisite for recordation of mortgages. As a result, there does not seem to be a reason to continue the New Jersey restriction. Cf. C. 56:12-1 to -13 (imposing generalized "plain language" requirements in consumer transactions).

The Commission recommends the repeal of C. 46:15-12.

C. 46:15-13 to 14: Preparer's Name

C. 46:15-13 and 15-14, enacted in 1969, require the preparer's name be on all documents filed with the county recording officer. The actual requirement is found in C. 46:15-13; C. 46:15-14 states the effective date of the requirement and should probably not have been codified in the permanent law. An amendment in 1981 specified that the preparer's name be on the first page of the document.

The purpose of the requirement appears to have been to allow local taxing authorities to reach knowledgeable parties to facilitate the acquisition of information necessary to transfer tax accounts. Placing the name of the preparer on a deed does, in fact, serve that purpose. However, there appears to be no reason that the requirement applies to documents other than deeds. The problem caused by this requirement occurs when a person submitting a document for recordation does not comply with it, either by failing to include the name, or by putting the name in the wrong place on the document. That causes substantial inconvenience to recording officers who are forced to reject documents and return them for correction.

On balance, the Commission has determined that the burdens of the preparer's name requirement outweighs its benefits. The Commission recommends deletion of the requirement.