

2008 ANNUAL REPORT

NEW YORK STATE ASSEMBLY

COMMITTEE ON
JUDICIARY



Sheldon Silver, Speaker

Helene Weinstein, Chairperson

December 15, 2008

The Honorable Sheldon Silver
Speaker of the Assembly
Room 932, Legislative Office Building
Albany, New York 12248

Re: Annual Report of the Committee on Judiciary – 2008

Dear Speaker Silver:

As Chairperson of the Assembly Standing Committee on Judiciary, I am pleased to present to you the Annual Report for the 2008 Legislative Session.

The Annual Report reviews the work of the Committee on Judiciary and highlights many of its major initiatives. It also includes a brief overview of various budgetary matters that concern the courts of the state and other areas within the committee's purview.

I would like to acknowledge the hard work of the members of the Committee on Judiciary and all of the members of the Assembly for their continued commitment to its work and to progressive legislation. As always, your continued support is deeply appreciated.

Sincerely,

Helene Weinstein, Chairperson
Assembly Standing Committee on Judiciary

2008 ANNUAL REPORT

STANDING COMMITTEE ON JUDICIARY

Helene E. Weinstein, Chair

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Amy Maggs, Associate Counsel
Sarah Beaver, Committee Clerk

I. JURISDICTION

The Assembly Committee on Judiciary has jurisdiction over legislation affecting all aspects of both state and local courts. The state courts include the Court of Appeals, Appellate Divisions, Supreme Court, County Court, Family Court, City Court, and Surrogate's Court. The local Courts include the District Courts and the Justice Courts which encompass the Town and Village Courts. It has primary jurisdiction over amendments to the State Constitution, Domestic Relations Law, Civil Practice Law and Rules, Judiciary Law, the Family Court Act, all Uniform Court Acts, Estates Powers and Trusts Law, Uniform Commercial Code, Lien Law, Debtor-Creditor Law, General Obligations Law, Real Property Law, Real Property Actions and Proceedings Law, Civil Rights Law, Partnership Law, and the Eminent Domain Procedure Law. It shares budgetary oversight of the Office of Court Administration and the Department of Law with the Assembly Ways and Means Committee.

The Judiciary Committee works closely with other committees of the Assembly, including the Committees on Rules, Ways and Means, and Codes. All committees in the Legislature report proposed constitutional amendments to the Judiciary Committee.

II. NEW YORK STATE'S JUDICIARY BUDGET

In December 2007, the Office of Court Administration proposed a General Fund State Operations and Aid to Localities budget request for FY 2008-09 of \$2.27 billion, an increase of 9.5%. The All Funds budget totaled \$2.52 billion, an increase of \$115.9 million or 4.8%. Caseloads continued to increase last year with another new record for total filings. The vast majority of the Judiciary's budget is for non-discretionary costs.

The budget included increased funding for:

- * \$7 million to carry out the Chief Judge's Action Plan for the Justice Courts.
- * \$3.1 million in partial year funding for 139 public safety and family court staff positions
- * \$1.8 million to test new case management techniques in Family Court, including family service coordinators and family resource centers.
- * \$2 million to support court security measures.
- * \$5 million to support the anticipated impact of the law guardian caseload caps which were established by court rule as required by legislation we enacted last year.

III. LEGISLATIVE ACCOMPLISHMENTS

A. MAJOR LEGISLATION

1. Libel Terrorism (Chapter 66 of the Laws of 2008 - A.9652B [Lancman]/S.6687C [Skelos])

This law overrules the December 2007 Court of Appeals decision in Ehrenfeld v. Mahfouz, and protects New Yorkers and New York based publishers and media outlets from local enforcement of foreign defamation judgments designed to squelch their freedom of expression. Overseas jurisdictions that lack the free speech and free press protections guaranteed by the New York and United States constitutions may have libel laws which discourage and inhibit free expression. Those individuals or parties whose illegal activities have been exposed by American authors and news organizations have increasingly turned to such jurisdictions to obtain defamation verdicts not obtainable in an American court in order to harass and intimidate American authors and journalists. This law will prohibit enforcement of such unfair overseas defamation judgments in New York courts and give New Yorkers and New York based publishers and media outlets the ability to obtain a declaration in a New York Court to that effect.

2. Orders of Protection – Fair Access To Family Court (Chapter 26 of the Laws of 2008 – A.11707 [Weinstein]/S.8665 [Winner])

After more than 20 years of Assembly passage, this long overdue legislation, now law, was enacted that would allow *all* victims of domestic violence, whether related or not, the right to seek a civil order of protection in family court.

This law expands the full protection of New York's domestic violence laws to unrelated persons in dating and intimate relationships. Orders of protection are an essential tool to help protect victims from future violence. By allowing greater access to family court, the safety of domestic violence victims will be greatly enhanced.

Passage of this bill into law was widely hailed by advocates for the victims of domestic violence.

3. Disclaimer of Insurance Coverage (Chapter 388 of the Laws of 2008 - A.11541 [Weinstein]/ S.8610 [DeFrancisco])

This new law reforms and clarifies the manner in which an insurer may disclaim coverage when it has received a late notice of claim. Prior law had allowed an insurer to disclaim payment of claims even where notice had been given to it

mere days late. Under this important new law, an insurer will be able to disclaim responsibility only where it has suffered material prejudice in the investigation or defense of the claim as a result of the late notice.

In addition, the bill provides increased access to court for claimants affected by such late notice by broadening the availability of a declaratory judgment action in court in order to determine whether notice was indeed timely or untimely given. Overall, this bill provides greater fairness to small businesses, individuals, and others who wish to challenge an insurer's attempt to hide behind the technicality of late notice as concerns payment of otherwise valid and just claims.

4. **Exempt Income Protection** (Chapter 575 of the Laws of 2008 - A. 8527A [Weinstein]/S.6203B [Volker])

The Exempt Income Protection Act closes the loophole that allows credit card companies and debt collectors to use "restraining notices" to freeze bank accounts of the elderly and disabled, even when all of the money in the account is direct deposited Social Security, disability payments, pensions or public assistance and is exempt from collection. This new law creates a procedure to allow debtors to protect exempt funds from the execution of money judgments. Exempt funds include sources of income such as social security payments and veteran's disability benefits which are exempt under federal law. This legislation resulted from the joint hearing the Assembly's Judiciary and Consumer Protection Committees held in 2006 on debt collection practices. The problem with creditors seizing exempt funds has been well-publicized with prominent articles in the Wall Street Journal and Christian Science Monitor.

Before enactment, a creditor with a valid judgment could freeze a debtor's entire bank account including exempt income contained therein. If a debtor wished to assert that the account contained exempt income, he or she would have to commence a separate court proceeding which was often beyond the means of most debtors in trouble. In addition, poor service of process in the original debt collection action often resulted in the debtors bouncing checks due to the frozen account or having utilities cut off for lack of payment. All too frequently, the debtor would have the power shut off and would be in dire straits unaware that - for example - social security income is exempt from the execution of a money judgment. It is important that when judgment creditors attempt to seize assets, that they do not leave the elderly completely unable to care for their most basic needs.

Under this reform, a creditor's demand to freeze a bank account will commence a procedure which will offer debtors an opportunity to assert that all or a portion of their income is exempt. While a creditor will still be able to freeze the account, the first \$2,500 in the account will still be available for the debtor to write checks against in cases where the exempt income is electronically deposited. These

sources of income can be identified by the banking institution via a bar code. The law also creates a form which will alert debtors as to the various sources of income which are exempt under state or federal law. The procedure will have the creditor's demand to freeze the account forwarded to the debtor by the banking institution. The debtor will then be given an opportunity to assert that the sources of income in the account are exempt. The creditor, in turn, will then be permitted to contest that assertion thereby triggering a summary court proceeding to determine whether the income is exempt or not. Such a proceeding can be brought under the index number which led to the creditor's judgment which will spare the debtor any additional cost but continuing such a proceeding in bad faith could lead to the imposition of damages. This law will also make it easier for account holders whose funds have been unlawfully frozen to get a restraining notice lifted from their account.

5. Custody, Visitation Orders and State Registries (Chapter 595 of the Laws of 2008 - A.11657[Weinstein/S.8569-A [DeFrancisco])

This law requires judges to check the sex offender registry and the registry of orders of protection, family court warrants and to review related Family Court Article 10 orders and notify the respective parties before making child custody and visitation decisions. In addition, this law provides judges with a protocol to follow in the case where immediate action regarding custody or visitation is required to meet the best interests of the child.

Governor Paterson stated in his approval message: "I applaud the bill's sponsors for identifying this gap in existing law, and I commend the Legislature for passing this important piece of legislation. I have no doubt that the changes made by this bill will protect children from being harmed by persons who should not be given custody or unsupervised access to them."

In addition, this law also requires the Office of Children and Family Services in conjunction with the Office of Court Administration to study and report on the feasibility of making the Statewide Central Register of Child Abuse and Maltreatment available to judges via courtroom computers.

6. Power of Attorney (A.6421B [Weinstein]/A.4996B [Volker] – Delivered to Governor 12/30/08)

Working with the New York State Law Revision Commission, the Legislature has significantly rewritten New York's power of attorney law. Designed to curtail fraud against grantors of the power and to ensure a swift and successful prosecution of those who defraud, the Assembly is hopeful that this measure will finally become law. New York's Law Revision Commission commenced a

redrafting of the statute over six years ago, and the legislation has passed the Assembly several times over the years.

If enacted, the law will require agents who accept a power of attorney to sign the form and accept the limitations imposed by fiduciary duties. These duties are clearly expressed in the new form and place the agent on notice that they are bound by such duties.

Disputes over who legally holds such powers have frustrated prosecutions over the misuse of the power of attorney. The bill requires that in transactions on behalf of the principal where a handwritten signature is required, the signature of the agent must disclose his or her relationship to the principal. The bill also provides that in any transactions (including electronic transactions) where the agent is purporting to act on behalf of the principal, the agent is attesting that the agent is acting under a valid power of attorney and within the scope of the authority conveyed by the instrument. This will ensure a swift resolution of any disputes which concern any misuse of the power. The bill also provides that the principal may provide in the power of attorney that the agent receive reasonable compensation if principal so desires. Without this designation, the agent is not entitled to compensation. These requirements will ensure that any compensation is reasonable.

The bill also creates a new section to the statute which sets forth the manner in which the power of attorney can be revoked and provides a form to perform that task. In a necessary and major reform, it requires that the granting of authority to make major gifts and other asset transfers be witnessed in the same manner as a will, thus alerting the principal to the gravity of granting the agent this type of authority. The formality of this process will curtail the ability to conceal fraud.

The bill expands the definition of financial institution to include securities dealers and insurance companies. It would permit these third parties to refuse to accept the power providing there is reasonable cause which includes a failure to produce a copy of the form. It also permits financial institutions to inform, where appropriate, the local adult protective services unit. However, the financial institution must accept a validly executed power of attorney and cannot require a power of attorney on the institution's own form. The bill also creates a special proceeding to compel a third party to accept a power of attorney.

The bill amends the power of attorney statute to keep pace with changes to federal law with updates concerning the federal tax code and health care requirements under The Health Insurance Portability and Accountability Act of 1996.

B. OTHER SIGNIFICANT LEGISLATION

1. Chapter 576 of the Laws of 2008 - A.8722A [Ortiz]/A.5860A [Rath]

This law bars a court from issuing a permanent change in child custody while one of the parents is activated, deployed or temporarily assigned to military service. A temporary order may be issued by the court provided clear and convincing evidence is submitted which is in the best interest of the child. An attorney for the child will be appointed in such cases. Upon the parent's return, a hearing will be held and the court will determine whether there has been a change in circumstances which justifies a change, modification or amendment to the order or judgment.

2. Chapter 329 of the Laws of 2008 – A.2019A [Dinowitz]/S.2899 [Morahan]

This law mandates that New York State grant full faith and credit to adoption orders from foreign countries provided such orders comply with federal regulations. Foreign adoptions have grown, while many issues, such as portability of the initial order and proof of adoption, were not satisfactorily addressed in our statutes. Before enactment, to obtain New York recognition of a foreign adoption, a new parent was required to undergo New York State's adoption process and at a significant additional expense.

3. Chapter 87 of the Laws of 2008 - A.6645 [Koon]/S.3228 [Winner]

This law establishes a procedure whereby two or more contiguous towns may opt to permit a single town justice to preside over their town courts. To do so, the towns must conduct public hearings and submit a request for legislation pursuant to Municipal Home Rule Law.

4. Chapter 262 of the Laws of 2008 - A.10833 [Weisenberg]/S.7752 [Hannon]

This law establishes a procedure for mentally incompetent persons to have a surrogate decision-making committee appointed as guardian for purposes of making end-of-life decisions to withhold certain treatment. It addresses long-term institutional persons who lack a family member or other authorized person to speak on their behalf. It will permit these decisions to be made by the surrogate's court committee and all such persons will be subject to the restrictions in the current statute which includes judicial review.

5. Chapter 276 of the Laws of 2008 - A.11415 [Weinstein]/S.8311A [DeFrancisco]

This law ratifies a series of collective bargaining agreements entered into between the Office of Court Administration and its court employee unions. The

bill provides salary increases and other benefits for the period from 4/1/06 through 3/31/11.

6. Chapter 269 of the Laws of 2008 - A.11574 [Gordon]/A.7915C [Little]

This law clarifies the criteria to successfully obtain adverse possession permitting an occupant of real property to obtain title to the parcel provided certain statutory requirements are met. It addresses recent case law which permitted the adverse possession of real property despite the occupant's knowledge that the property belonged to another.

7. Chapter 529 of the Laws of 2008 - A.7007A [Lopez]/S.3825 [Padavan]

This law would make the appointment of an administrator under article 7-A of the Real Property Law grounds to accelerate the loan balance on the mortgage, thereby allowing the city the ability to take over the property. This avoids the property from deteriorating further thereby endangering the residents and public.

8. Chapter 94 of the Laws of 2008 - A.7371 [Lancman]/S.3564 [Volker]

This law requires that a defendant who asserts a mistake of fact in an action to enforce a money judgment make such assertion by order to show cause in Supreme Court on notice to the creditor in the same action in which the initial order or judgment seeking enforcement is entered. It thereby permits a debtor to avoid having to initiate a new action with associated additional costs.

9. Chapter 408 of the Laws of 2008 - A.9038 [Weinstein]/S.1268 [Defrancisco]

This law amends the unitrust statute by deleting language which has become unnecessary due to more specific IRS regulation; it amends the prohibition section on a trustee's power to adjust; makes clear that the power to adjust does not apply to charitable remainder unitrusts; clarifies that a trustee's power to adjust is not limited by an incidental effect on that trustee's commission; permits the governing instrument to override the prohibition section by explicit reference; makes clear that the decision to convert an existing trust to a unitrust can only be retrospective to the year of decision; implements a smoothing rule where the trustee elects to convert an existing trust to unitrust form; and curtails the retroactive correction of mistakes when calculating the unitrust amount without surrogate approval.

10. Chapter 300 of the Laws of 2008 - A.10869 [Bradley]/S.2382B [Leibell]

This law increases the small estate threshold from \$20,000 to \$30,000. Small estates are subject to a more simplified procedure and lower fees. The settling of an estate can be an expensive and difficult process. The simplified procedure

for small estates (also called voluntary administration) provides an expedited and less costly method for the settlement of an estate.

11. Chapter 436 of the Laws of 2008 – A.7519A [Gianaris]/S.4874 [Volker]

This law requires buyers of real property to deposit the real property broker's commission due upon the sale of the real property with the county clerk when the commission is not paid at closing.

C. OTHER CHANGES TO EXISTING LAW

1. Chapter 174 of the Laws of 2008 - A.8953 [Zebrowski]/S.4449 [Morahan]

This law permits the clerk of a town or village and the Department of Health to correct marriage certificates where the error was not an attempt to defraud and where satisfactory proof of the facts is presented.

2. Chapter 354 of the Laws of 2008 - A.9361A [Ortiz]/S.6431A [Lanza]

This law will permit towers to sell certain seized vehicles outside the formal auction process. Currently a vehicle must be worth less than \$100 to qualify. This bill will raise the threshold to \$500, requiring that the vehicle be scrapped and not re-titled. The increased amount will update the statute to account for inflation.

3. Chapter 538 of the Laws of 2008 - A07089A [Bing]/S.6201A [Duane]

This law amends the Domestic Relations Law by mandating that a good faith allegation of abuse cannot be held against the accuser in child custody proceedings. It also ensures that an accuser engaging in a good faith effort to protect or seek treatment for the child due to child abuse or neglect cannot have these actions used against him or her when determining custody or visitation.

4. Chapter 435 of the Laws of 2008 - A8986A [Scarborough]/S.4630C [Saland]

This law gives biological parents the option to consent to the receipt by the adoptee of such parents' identifying information. It provides biological parent(s) with two new options for registering consent to an adopted child's request for identifying information.

5. Chapter 305 of the Laws of 2008 - A.11413A [Weinstein]/S.5091B [Defrancisco]

This law changes the legal reference to mothers and fathers in the law by changing the phrase "natural" to "birth" when referencing mother, father or parents.

6. Chapter 532 of the Laws of 2008 - A.8855 [Rosenthal]/S.4541A [Kruger]

This law closes the loophole that allows domestic violence abusers to injure a victim's pet without punishment and expressly permits the Courts to issue an order of protection which includes the victim's pets.

7. A.11734 [Sweeney]/S.8658A [Little] – Delivered to the Secretary of State

This amendment to the Constitution authorizes the Legislature to settle title disputes between the state and private parties in Totten, Crossfield's Purchase and Township Forty in the town of Long Lake, Hamilton County. It must be passed again before it can appear on the ballot for a vote.

8. Chapter 288 of the Laws of 2008 – A.11762 [Lavine]/S.8713 [Johnson]

This law permits counties to enact a local law which would increase the recording fees for certain types of documents from \$5 to \$20 and from \$3 to \$5 dollars per page. If a cover page is required by the county clerk, it will be deemed an additional page. It also requires county clerks to make a good faith effort to redact personal identifying material from images of recorded documents which have been placed online to help prevent identity theft.

9. Chapter 160 of the Laws of 2008 – A.1942 [Robinson]/S.3158 [Montgomery]

This law permits the name of a deceased petitioner for adoption that died before the completion of the adoption, to be included on the new birth certificate as a parent.

10. Chapter 633 of the Laws of 2008 - A.9548 [Farrell]/S.8387 [Gonzalez]

This law authorizes certain retired city clerks to solemnize marriages.

11. Chapter 86 of the Laws of 2008 - A.9822 [Bradley]/S.6834 [Leibell]

This law is a chapter amendment to Chapter 104 of the Laws of 2007 and clarifies the effective date of that law to ensure it does not apply to previously filed cases which have been dismissed by a court before enactment.

12. Chapter 430 of the Laws of 2008 - A.1269 [Bing]/S.1531 [Fuschillo]

This law bars sex offenders from obtaining a license to sell real estate unless they obtain a certificate from release of disabilities.

13. Chapter 290 of the Laws of 2008 - A.8781 [John]/S.5938 [Nozzolio]

This law extends a pilot program that permits judicial hearing officers to determine an application for an order of protection in the seventh and eighth judicial districts.

14. Chapter 75 of the Laws of 2008 - A.8858 [Weinstein]/S.5966A [Defrancisco]

This law ensures that a divorce decree or annulment will cancel all revocable dispositions or appointments of property to a former spouse and any fiduciary appointments of a former spouse as a personal representative, executor, trustee, guardian, agent or attorney-in-fact.

15. Chapter 420 of the Laws of 2008 - A.11096 [Weinstein]/S.7997 [Defrancisco]

This law adds banking institutions among the parties that can serve as registering agents of transfer-on-death securities and also includes bank security accounts among the accounts in which such securities may be held.

16. Chapter 441 of the Laws of 2008 - A.9262A [Lopez]/S.6355 [Lanza]

This law clarifies the calculation of fees charged by marshals and sheriffs when executing upon property to satisfy a judgment.

17. Chapter 64 of the Laws of 2008 - A.9356A [Weinstein]/S.6398A [Defrancisco]

This law clarifies the retroactive effect of existing law to protect from unjust dismissals of claims against the state because of the technicality of asserting an ad damnum clause into the complaint.

18. Chapter 95 of the Laws of 2008 - A10362 [Schimminger]/S.7249 [Volker]

This law expands the Office of Court Administration's pilot program to allow litigation by electronic means in Erie County.

D. VETOES

1. A.8647C [Weinstein]/S.3166 [Volker] – Veto #6

This bill would have expanded the Civil Practice Law and Rules to provide judgment creditors and parties in whose favor a decision or verdict has been rendered, and who serve restraining notices that have been judicially endorsed as restraining orders, with the same priority rights afforded to orders of attachment and executions. This amendment would have filled a gap in existing priority rules which presently allows creditors who secure orders of attachment or issue executions subsequent to judgment creditors who have already restrained property or debts to take priority over the earlier restraint. The Governor acknowledged the existence of the problem but vetoed the bill due to a disagreement over provisional remedies.

2. A.11686A [Lavine]/ S.2879C [DeFrancisco] – Veto #155

This measure would have provided that certain renunciations were not necessarily qualified disclaimers for the purposes of the estate tax or the gift tax. In addition, this measure would have permitted a beneficiary of a disposition to renounce certain portions of an interest in joint property or a tenancy by the entirety and permit a renouncing party to file a copy of a renunciation and affidavit in the office of the clerk of the court having jurisdiction, and relates to who may make a renunciation. Renunciations can have certain tax benefits. The Governor vetoed this bill due to technical objections.

3. A.11715 [Weinstein]/S.8661 [DeFrancisco] – Veto #153

This bill would have clarified that the manner of juror selection in civil cases in the Supreme and County Courts would have been conducted in the manner provided by the rules of the Chief Administrator of the Courts; it would have required the Chief Administrative Judge to designate one or more Supervising Judges for Voir Dire for each Judicial District with authority to immediately review orders or determinations in relation to the conduct of jury selection in an action originating in the Supreme Court or County Court; and would have provided a limited right of further review to redress deliberate failure to apply a jury selection method promulgated pursuant to this act. The Governor vetoed the bill due to concerns that it would delay trials and inconvenience jurors.

APPENDIX

Summary of Action on all Bills Referred to the Committee on Judiciary

Committee Bills

Total bills in Committee 2007-2008	529
Total bills reported from Committee 2008	140
Total Judiciary Bills which Passed Assembly 2008	72
Total Judiciary Bills which became Law 2008	36