

Criminal Forfeiture Act

Model Legislation

August 2, 2017

100:1 Definitions. As used in this chapter, the terms defined in this section have the following meanings:

- I. “Abandoned property” means personal property left by an owner who intentionally relinquishes all rights to its control. Real property may not be abandoned.
- II. “Actual knowledge” means direct and clear awareness of information, a fact, or a condition.
- III. “Contraband” means goods that are unlawful to possess, including scheduled drugs without a valid prescription.
- IV. “Constructive knowledge” means knowledge that is imputed to family or household members of the defendant if, three or more times for the same or similar offense, as specified in statute, in the ten years prior to the alleged offense, the defendant admitted guilt or was adjudicated guilty.
- V. “Conveyance” means a device used for transportation and includes a motor vehicle, trailer, snowmobile, airplane, and vessel, and any equipment attached to it. The term does not include property that is stolen or taken in violation of the law.
- VI. “Instrumentality” means property otherwise lawful to possess that is used in the furtherance or commission of an offense of a law subject to forfeiture. An “instrumentality” includes land, buildings, a container, a conveyance, equipment, materials, products, a tool, a computer, computer software, a telecommunications device, a firearm or ammunition.
- VII. “Law enforcement agency” means any non-federal police force, or other local, county, or state agency that has the authority under state law to engage in seizure and forfeiture.
- VIII. “Law subject to forfeiture” means a state law that carries a felony penalty and that explicitly includes forfeiture as a punishment or sanction for the offense.
- IX. “Proceeds” means money, securities, negotiable instruments or other means of exchange obtained by the sale of property.

100:2 Purpose. This chapter’s purpose is to:

- I. Deter criminal activity by reducing its economic incentives;
- II. Increase the pecuniary loss from criminal activity;
- III. Protect against the wrongful forfeiture of property; and
- IV. Ensure that only criminal forfeiture is allowed in this state.

100:3 Criminal Forfeiture; Property Subject to Forfeiture. When a person is convicted of violating a law subject to forfeiture, the court, consistent with this chapter, may order the person to forfeit:

- I. Proceeds the person derived from the commission of the crime;
- II. Property directly traceable to proceeds derived from the commission of the crime; and
- III. Instrumentalities the person used in the commission of the crime.

100:4 Exemption. Homesteaded real property, a motor vehicle of less than \$10,000 in market value, and U.S. currency totaling \$500 or less are exempt from forfeiture.

100:5 Contraband. No property right exists in contraband. Contraband is subject to seizure and shall be disposed of according to state law. Contraband is not subject to forfeiture under this chapter.

100:6 Conviction Required; Standard of Proof.

I. Property may be forfeited if (a) the offense is of a state law felony subject to forfeiture, (b) the offense is established by proof of a criminal conviction, and (c) the state establishes that the property is forfeitable under sections 100:3 through 100:5 by clear and convincing evidence.

II. Nothing herein prevents property from being forfeited by plea agreement approved by the presiding criminal court.

III. The court may waive the conviction requirement if the prosecuting authority shows by clear and convincing evidence that the defendant (a) died, (b) was deported by the U.S. government, (c) is granted immunity or reduced punishment in exchange for testifying or assisting a law enforcement investigation or prosecution, (d) fled the jurisdiction after being arrested, charged with a crime that includes the forfeiture of property, and released on bail or (e) abandoned property.

IV. Notwithstanding the prosecuting authority's motion for a waiver, the property remains subject to claims by innocent owners, creditors and other third parties pursuant to this chapter.

V. Abandoned property shall be delivered to the state treasurer within 30 days without further forfeiture-related litigation. The state treasurer shall dispose of all non-currency property. The sale proceeds and currency shall be deposited into the state's general fund.

100:7 Substitution of Assets. Upon the state's motion following conviction, the court may order the forfeiture of substitute property owned by the defendant up to the value of unreachable property that is beyond the court's jurisdiction or cannot be located through due diligence only if the state proves by a preponderance of the evidence that the defendant intentionally transferred, sold, or deposited property with a third party to avoid forfeiture.

100:8 No Additional Remedies. The state may not seek personal money judgments or other remedies not provided for in this chapter.

100:9 No Joint-and-Severall Liability. A defendant is not jointly and severally liable for forfeiture awards owed by other defendants. When ownership is unclear, a court may order each defendant to forfeit property on a pro rata basis or by another means the court finds equitable.

100:10 Seizure of Personal Property with Process. At the request of the state at any time, a court may issue an ex parte preliminary order to attach, seize or secure personal property for which forfeiture is sought and to provide for its custody. Application, issuance, execution, and return are subject to state statute or court rules.

100:11 Seizure of Personal Property without Process. Personal property subject to forfeiture may be seized at any time without a court order if:

- I. The seizure of personal property is incident to a lawful arrest or a search lawfully conducted;
- II. The personal property subject to seizure has been the subject of a prior judgment in favor of the state; or
- III. The state has probable cause to believe that the delay occasioned by the necessity to obtain process would result in the removal or destruction of the personal property and that the personal property is forfeitable under this chapter.
- IV. Mere presence or possession of U.S. currency, debit cards or credit cards, without other indicia of a crime that includes the forfeiture of property, is insufficient probable cause for seizure of U.S. currency, debit cards or credit cards.

100:12 Seizure of Real Property with Process.

- I. Seizure of real property requires a court order. A court may issue an order to seize or secure real property for which forfeiture is sought only after proper notice to property owners and an opportunity for a contested hearing to determine the sufficiency of probable cause for the seizure.
- II. Nothing in this section prohibits the prosecuting authority from seeking a lis pendens or restraining order to hinder the sale or destruction of the real property.
- III. Application, issuance, execution, and return of any order are subject to state law.

100.13 Receipt. When property is seized, the law enforcement officer shall give an itemized receipt to the person possessing the property; or in the absence of any person, leave a receipt in the place where the property was found, if reasonably possible.

100:14 Title.

- I. Title to the property subject to forfeiture vests with the state when the court issues a forfeiture judgment and relates back to the time when the state seizes or restrains the property.
- II. Title to substitute assets vests when the court issues an order forfeiting substitute assets.

III. For either (I) or (II), however, title is subject to claims by third parties adjudicated under this chapter.

100:15 Pretrial Replevin Hearing.

I. Following the seizure of property, a defendant or third party (claimant) has a right to a pretrial hearing to determine the validity of the seizure.

II. The claimant may claim at any time prior to 60 days before trial of the related criminal offense the right to possession of property by motion to the court to issue a writ of replevin.

III. The claimant shall file a motion establishing the validity of the alleged interest in the property.

IV. The court shall hear the motion no more than 30 days after the motion is filed.

V. The state shall file an answer showing probable cause for the seizure, or cross motions at least 10 days before the hearing.

VI. Either party may, by agreement or for good cause, move the court for one extension of no more than 10 days. Any such motion may be supported by affidavits or other submissions.

VII. The court shall issue a writ of replevin if it finds that:

(a) It is likely the final judgment will be that the state must return the property to the claimant;

(b) the property is not reasonably required to be held for investigatory reasons; or

(c) The property is the only reasonable means for a defendant to pay for legal representation in the forfeiture or criminal proceeding. At the court's discretion under subparagraph (b), it may order the return of funds or property sufficient to obtain counsel of choice but less than the total amount seized.

VIII. In lieu of ordering the issuance of the writ, the court may order the state to give security or written assurance for satisfaction of any judgment, including damages, that may be rendered in the action, or order other relief as may be just.

100:16 Discovery. Discovery by the defendant is subject to the rules of criminal procedure. Discovery by an innocent owner claimant, lienholder or other third party is subject to the rules of civil procedure.

100:17 Trial Proceedings.

I. The litigation related to the forfeiture of property shall be held in a single proceeding following the trial of the related alleged offense. The litigation associated with the forfeiture of property of less than \$10,000 in value shall be held before only a judge.

II. Within ___ days of the seizure of property or simultaneously upon filing a related criminal indictment, the state shall file a forfeiture charge that shall include:

(a) a description of the property seized;

- (b) the date and place of seizure of the property;
- (c) the name and address of the law enforcement agency making the seizure;
- (d) the specific statutory and factual grounds for the seizure;
- (e) whether the property was seized pursuant to an order of seizure, and if the property was seized without an order of seizure, an affidavit from a law enforcement officer stating the legal and factual grounds why an order of seizure was not required; and
- (f) the names of persons known to the state who may claim an interest in the property and the basis for each person's alleged interest.

III. The charging document shall be served upon the person from whom the property was seized, the person's attorney of record and all persons known or reasonably believed to have an interest in the property.

100:18 Proportionality Hearing.

I. At any time following determination of forfeiture by the trier of fact, the defendant may petition the court to determine whether the forfeiture is unconstitutionally excessive under the state or federal constitution.

II. The defendant has the burden of establishing the forfeiture is grossly disproportional to the seriousness of the offense by a preponderance of the evidence at a hearing conducted by the court without a jury.

III. In determining whether the forfeiture of an instrumentality is unconstitutionally excessive, the court may consider all relevant factors, including, but not limited to:

- (a) The seriousness of the offense and its impact on the community, including the duration of the activity and the harm caused by the defendant;
- (b) The extent to which the defendant participated in the offense;
- (c) The extent to which the property was used in committing the offense;
- (d) The sentence imposed for committing the crime subject to forfeiture; and
- (e) Whether the offense was completed or attempted.

IV. In determining the value of the instrumentality subject to forfeiture, the court may consider all relevant factors, including, but not limited to:

- (a) The fair market value of the property;
- (b) The value of the property to the defendant including hardship to the defendant if the forfeiture is realized; and

(c) The hardship from the loss of a primary residence, motor vehicle or other property to the defendant's family members or others if the property is forfeited.

V. The court may not consider the value of the instrumentality to the state in determining whether the forfeiture of an instrumentality is constitutionally excessive.

100:19 Secured Interest.

I. Property encumbered by a bona fide security interest is not subject to forfeiture. A person claiming a security interest must establish by a preponderance of the evidence the validity of the interest perfected under state code section XXX, or a lease or rental agreement.

II. The prosecuting authority shall summarily return seized property to the person with a bona fide security interest, up to the value of the secured interest.

III. If the person alleges a valid security interest but the state seeks to proceed with the forfeiture against the property, the state shall prove by a preponderance of the evidence that the person had actual knowledge of the underlying crime giving rise to the forfeiture.

100:20 Third Party Claims (including those by Innocent Owners).

I. Any person, other than the defendant, asserting a legal interest in property which has been seized or restrained may, at any time, petition the court for a hearing to adjudicate the validity of the person's alleged interest in the property. The hearing shall be held before the court alone, without a jury.

II. The petition shall be signed by the petitioner under penalty of perjury and shall set forth the nature and extent of the petitioner's right, title, or interest in the property, the time and circumstances of the petitioner's acquisition of the right, title, or interest in the property, any additional facts supporting the petitioner's claim, and the relief sought.

III. The hearing on the petition shall, to the extent practicable and consistent with the interests of justice, be held within sixty days of the filing of the petition. The court may consolidate the hearing on the petition with a hearing on any other petition filed by a person other than the defendant under this subsection.

IV. At the hearing, the petitioner may testify and present evidence and witnesses on the petitioner's own behalf, and cross-examine witnesses who appear at the hearing. The state may present evidence and witnesses in rebuttal and in defense of its claim to the property and cross-examine witnesses who appear at the hearing.

V. The petitioner who has an ownership interest in property subject to forfeiture existing at the time the illegal conduct giving rise to forfeiture occurred and who claims to be an innocent owner bears the burden of proving by clear and convincing evidence that the person has a legal right, title, or interest in the property seized under this chapter.

VI. If paragraph V is satisfied and the state seeks to proceed with the forfeiture against the property, the state shall prove by clear and convincing evidence that the petitioner had actual or constructive knowledge of the underlying crime giving rise to the forfeiture.

VII. A petitioner who acquired an ownership interest in property subject to forfeiture after the commission of a crime giving rise to the forfeiture and who claims to be an innocent owner bears the burden of proving by clear and convincing evidence that the person has legal right, title, or interest in the property seized under this chapter.

VIII. If paragraph VII is satisfied and the state seeks to proceed with the forfeiture against the property, the state shall prove by clear and convincing evidence that at the time the petitioner acquired the property the person:

(a) had actual or constructive knowledge that the property was subject to forfeiture; or

(b) was not a bona fide purchaser without notice of any defect in title and for valuable consideration.

IX. If the state fails to meet its burden in paragraph VII or IX, the court shall find that the petitioner is an innocent owner and shall order the state to relinquish all claims of title to the property.

X. The defendant or convicted offender may invoke the right against self-incrimination or the marital privilege during the forfeiture-related stage of the prosecution. The trier of fact at the hearing may draw an adverse inference from the invocation of the right or privilege.

100:21 Appeal. A party to forfeiture litigation may appeal the district court's decision regarding the seizure, on an interlocutory basis, or forfeiture of property under this chapter.

100:22 Disposition of Property and Proceeds.

I. At any time when unclaimed property or contraband held for evidentiary purposes is no longer needed for that purpose, the court may order it be delivered to the state treasurer within 30 days, or, in the case of contraband, be destroyed within 30 days.

II. If the forfeiture is granted, the court may order the property be delivered to the state treasurer within 30 days.

III. Upon motion, the court may order that a portion of the currency seized or proceeds from the sale of forfeited property be used to pay reasonable non-personnel expenses for the seizure, storage, and maintenance of any forfeited property.

IV. The state treasurer shall dispose of all non-currency forfeited property. The sale proceeds and forfeited currency shall first be used to pay all outstanding recorded liens on the forfeited property, then to comply with an order of the court to pay reasonable non-personnel expenses, with all remaining funds to be deposited into the state's general fund.

100:23 Disposition of Property and Proceeds from Another Jurisdiction

I. Forfeited property or proceeds from the sale of forfeited property received from another jurisdiction, including the federal government, must be transferred to the state treasurer, sold by the state treasurer or designee, and deposited in the state's general fund.

II. If federal law prohibits compliance with paragraph I, state and local law enforcement agencies are prohibited from seeking or accepting forfeited property or proceeds from the federal government.

100:24 Prohibition on Retaining Property; Sale Restrictions. No law enforcement agency may retain forfeited or abandoned property it for its own use or sell it directly or indirectly to any employee of the agency, to a person related to an employee by blood or marriage, or to another law enforcement agency.

100:25 Reporting.

I. On an annual basis, each law enforcement agency shall report the following information about seizures and forfeitures completed by the agency under state forfeiture law and federal forfeiture law:

(1) The total number of seizures of currency;

(2) The total number of seizures and the number of items in each class of property seized including vehicles, houses, and other types of property seized.

(3) The market value of each class of property seized including currency, vehicles, houses, and other types of property seized.

(4) The total number of occurrences of each class of crime underlying the forfeitures including controlled substances, driving while intoxicated, and other crimes.

II. The department of justice may require that information not specified in this section also be reported. The department shall develop standard forms, processes, and deadlines for electronic data entry for annual submission of forfeiture data by law enforcement agencies.

III. Each law enforcement agency shall file with the department the report required under paragraph I for the law enforcement agency and the corresponding prosecuting authority. The law enforcement agency shall file separate reports for forfeitures completed under state forfeiture law and federal forfeiture law. A null report shall be filed by a law enforcement agency that did not engage in seizures or forfeitures during the reporting period. The department shall compile the submissions and issue an aggregate report of all forfeitures in the state.

IV. If a law enforcement agency fails to file a report within 30 days after it is due, the department may compel compliance by any means until the report is filed.

V. By April 1 of each year, the department shall make available on its website the reports submitted by law enforcement agencies and its aggregate report.

100:26 Return of Property, Damages, and Costs.

I. The law enforcement agency that holds the property shall return property to the owner or other prevailing claimant within a reasonable period of time not to exceed five days after judgment in favor that person.

II. The law enforcement agency that holds the property is responsible for any damages, storage fees and related costs applicable to property returned under paragraph I.

100:27 Adoption, Joint Taskforces and Receipt of Payment of Forfeiture Proceeds from the Federal Government.

I. A local, county or state law enforcement agency shall not refer, transfer or otherwise relinquish possession of property seized under state law to a federal agency by way of adoption of the seized property or other means by the federal agency for the purpose of the property's forfeiture under the federal Controlled Substances Act.

II. A local, county or state law enforcement agency or participant in a joint task force or other multijurisdictional collaboration with the federal government shall not accept payment of any kind or distribution of forfeiture proceeds resulting from a joint task force or other multijurisdictional collaboration unless the aggregate net equity value of the property and currency seized in a case exceeds \$100,000, excluding the value of contraband.

III. Nothing in paragraphs I or II shall be construed to restrict a local, county or state law enforcement agency from acting alone or collaborating with a federal agency or other agency to seize contraband or property a law enforcement agent has probable cause to believe is the proceeds or instruments of a crime that subjects property to forfeiture.

IV. Nothing in paragraphs I or II shall be construed to prohibit the federal government, acting without the involvement of a local, county or state law enforcement agency, from seizing property and seeking forfeiture under federal law.

100:28 Preemption. This chapter preempts laws by township, municipal, county and other governments in the state which regulate civil and criminal forfeiture.

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