

Criminal Forfeiture Act

Model Legislation

November 7, 2018

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 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, in themselves, are unlawful to possess, including scheduled drugs without a valid prescription. In this chapter, “contraband” does not include proceeds derived from an alleged crime or an instrumentality used in an alleged crime.

IV. “Conveyance” means a device used for transportation and includes a motor vehicle, trailer, snowmobile, airplane, vessel, or any equipment attached to one of these devices. The term does not include property that is stolen or taken in violation of the law.

V. “Instrumentality” means property otherwise lawful to possess that is used in the commission of an offense of a law authorizing 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.

VI. “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.

VII. “Law authorizing forfeiture of property” means a state law that includes forfeiture of property as a punishment or sanction for the offense.

VIII. “Proceeds” means money, securities, negotiable instruments or other means of exchange obtained by the sale of property.

100:2 Purpose. Forfeiture is disfavored. 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 property and due process rights of defendants and innocent owners; and

IV. Ensure that only criminal forfeiture is used in this state.

100:3 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.

100:4 Seizure of Personal Property without Process. Personal property subject to forfeiture may be seized without a court order if:

- I. The seizure of personal property is incident to a lawful arrest;
- II. The state has probable cause to believe the person committed an offense that authorizes the forfeiture of property and the search was lawfully conducted;
- 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 the personal property is forfeitable under this chapter; or
- IV. The personal property is the subject of a prior judgment in favor of the state; or
- V. Mere presence or possession of U.S. currency, without other indicia of an offense that authorizes forfeiture of property, is insufficient probable cause for seizure of U.S. currency.

100:5 Seizure or Restraint of Real Property with Process.

- I. Seizure or restraint 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. However, if the prosecuting attorney obtains a lis pendens or restraining order, then the prosecuting authority shall notify any party with an interest in any real property within thirty (30) days.
- III. Application, filing, issuance, execution, and return of any order are subject to state law.

100:6 Exemptions.

- I. Homesteaded real property is exempt from seizure and forfeiture.
- II. U.S. currency totaling \$500 or less is exempt from seizure and forfeiture.
- III. A motor vehicle of less than \$2,500 in market value is exempt from seizure and forfeiture.

100:7 Contraband. No property right exists in contraband. Contraband is subject to seizure and shall be disposed of according to state law.

100.8 Waiver Prohibition.

I. A police officer, sheriff or other member of law enforcement, other than the prosecutor responsible for the litigation of the forfeiture case, may not request, require or in any manner induce any person to execute a document purporting to waive, for purpose of forfeiture under this section, the person's interest in or rights to property seized, and provided.

II. Any such document purporting to waive a person's interest in or right to property seized under this chapter is null, void and inadmissible in court.

100.9 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.

100:10 Criminal Forfeiture; Property Subject to Forfeiture. When a person is convicted of violating an offense that authorizes the forfeiture of property, the court, consistent with this chapter, may order the person to forfeit:

I. Any property constituting, or derived from, any proceeds the person obtained directly as the result of the offense for which the person is convicted; or

II. Any of the person's property used in any manner or part, to commit, or to facilitate the commission of the offense for which the person is convicted.

100:11 Conviction Required; Standard of Proof.

I. There shall be no civil forfeiture.

II. Property may be forfeited if (a) the offense is of a state criminal law that authorizes the forfeiture of property, (b) the offense is established by proof of a criminal conviction, and (c) the state establishes that the property is subject to forfeiture under section 100:10 by clear and convincing evidence.

III. Nothing in this chapter prevents property from being forfeited by plea agreement approved by the presiding criminal court except the court shall not accept a plea agreement or other arrangement that prevents the claims of any person who filed a statement of interest or ownership pursuant to sections 100:18 and 100:19 from being adjudicated.

IV. The court may waive the conviction requirement if the prosecuting authority shows by clear and convincing evidence that, before conviction, 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, or (e) abandoned the property.

V. Property that either is seized from a person who flees the jurisdiction or is abandoned shall be delivered to the state treasurer within 30 days without further forfeiture-related litigation. The state treasurer shall sell all non-currency property. The sale proceeds and any currency seized from a person who flees the jurisdiction or abandons the currency shall be deposited into the state's general fund.

100:12-A Forfeiture Indictment.

I. In any case in which the state seeks forfeiture of property except through a complaint as provided below in section 100:12-B, the prosecuting authority shall file an indictment or information that includes:

(1) a criminal charge; and

(2) a charge for which forfeiture of property under this chapter may be ordered. This property-related charge shall identify the specific assets to be forfeited, if known, or the relevant forfeiture statutes, if specific assets to be forfeited are not known at the time of the prosecuting authority requests the issuance of the indictment.

II. Upon application of the prosecuting authority, the court may enter a restraining order or injunction, or take other action to preserve the availability of property only:

(1) upon the issuance of an indictment or information according to paragraph I; or

(2) prior to the issuance of such an indictment or information, if the court determines there is a substantial probability the state will prevail on the issue of criminal forfeiture and that failure to enter the order will result in property being destroyed, removed from the jurisdiction, or otherwise made unavailable for forfeiture.

III. Any order entered pursuant to subparagraph (2) shall be effective for not more than ninety days, unless extended by the court for good cause shown or unless an indictment or information described in subparagraph (1) has been issued subsequently.

IV. Notice must be provided as set forth in the complaint process provided below in paragraph 100:12-B(II) to all persons known to have an interest in the property who are not named in the indictment or information.

100:12-B Forfeiture Complaint; Service of Process.

I. In any case in which the state seeks forfeiture of property except when the state seeks forfeiture through indictment or information as provided above in section 100:12-A, the prosecuting authority shall file a criminal complaint that includes (a) criminal charges and (b) the information identified in paragraph II before the defendant's first appearance in court. Upon motion by the prosecuting authority, a court may permit the filing of an amended criminal complaint within seven days of the first appearance for good cause shown. Service of an amended criminal complaint on a represented party must be made on the attorney. Service on the attorney or party must be made in the manner provided by the rules of practice of the court, including by electronic means as authorized by the court. The court shall verify service at the defendant's next appearance.

II. A complaint in any case in which the state seeks forfeiture of property must include:

- (1) a description of the property seized;
- (2) the date and place of the seizure;
- (3) the name and address of the appropriate agency responsible for the seizure;
- (4) a statement of facts establishing probable cause to believe that the charged offense has been committed, that the defendant committed it, and that the seized property is an instrument or represents the proceeds of the underlying offense;
- (5) the name of any person known to the prosecuting authority to have an interest in the property, and the nature of that interest; and
- (6) references to the relevant statutory provisions required to show the property is the type of property that may be forfeited under Section 100:10

III. If notice is not filed in accordance with paragraphs I and II to all persons appearing to have an interest in the property and no time extension is granted or the extension period has expired, the appropriate agency shall, upon the owner's request, return the property to the person from whom the property was seized, if known. The agency shall not be required to return contraband.

IV. Unless otherwise specified in law, the prosecuting authority shall provide notice of the forfeiture proceeding to the registered owner of any vehicle and any other individual known to have an interest in any property subject to forfeiture under this section who is not charged with a crime in the complaint. Notice must be given within seven days of the filing of the complaint, pursuant to paragraph I or, if an interest was not known at the time of the filing, within seven days of discovery of an individual with an interest in the property and may be made by personal service if the owner is a resident of this state, or by certified mail if the person is the resident of another state.

V. The notice must be in writing and contain:

- (1) a description of the property seized;
- (2) the date of seizure; and
- (3) a copy of the complaint filed pursuant to subdivision 1.

VI. Substantially, the following language must appear conspicuously in the notice:

"WARNING: You may lose the right to be heard in court if you do not file a statement of interest or ownership within XXX days. You must file in district court. You do not have to pay a filing fee to file your notice."

100:13 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.

100:14 Pretrial Replevin Hearing.

- I. Following the seizure of property, a defendant has a right to a pretrial hearing to determine the validity of the seizure.
- II. The court will hold the hearing at the time of the defendant's first appearance in court.
- III. 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.
- IV. 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 defendant;
 - (b) the property is not reasonably required to be held for evidentiary reasons; or
 - (c) The property is the only reasonable means for the defendant to pay for legal representation and minimum living expenses in the forfeiture or criminal proceeding unless the prosecuting authority shows by clear and convincing evidence that the property is the instrument or proceeds of an offense for which the defendant is charged. At the court's discretion, it may order the return of funds or property sufficient to obtain counsel of choice but less than the total amount seized.

100:15 Discovery. Discovery is subject to the rules of criminal procedure.

100:16 Venue; Trial Proceedings.

- I. The district court with jurisdiction over the related criminal matter has jurisdiction over the forfeiture proceeding.
- II. 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.
- III. The court is not bound by the common law or statutory rules of evidence or technical or formal rules of pleading or procedure in the litigation related to the forfeiture of property.
- IV. If the defendant in the related criminal matter was represented by the public defender, the state public defender or chief public defender of the judicial district may authorize representation of the defendant in the forfeiture proceeding.

100:17 Proportionality Hearing.

- I. At any time during a hearing pursuant to section 100:14 or 100:16, 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 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:

- (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 authorizing 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:

- (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 if the forfeiture would deprive the property owner of the owner's livelihood; 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.

100:18 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 clear and convincing evidence the validity of the interest perfected under state statute section XXX, or a lease or rental agreement.

II. The prosecuting authority summarily shall 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 clear and convincing evidence that the person had actual knowledge of the underlying crime giving rise to the forfeiture.

100:19 Innocent Owner.

I. Any person, including an heir but excluding the defendant or a secured-interest holder, asserting a legal interest in property that has been seized or restrained may, at any time up until the court's entering judgment in the criminal prosecution, 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 petitioner shall file a simple statement of interest or ownership. The petitioner shall sign the petition 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 filing fee for the statement under this section is waived.

IV. The hearing on the petition shall, to the extent practicable and consistent with the interests of justice, be held within 30 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.

V. 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.

VI. The petitioner who has an ownership interest in property subject to forfeiture **at the time of the commission of the crime** 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.

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

VIII. A petitioner who acquired an ownership interest in property subject to forfeiture **after the commission of the 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.

IX. If paragraph VIII is satisfied and the state seeks to proceed with the forfeiture of 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 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.

X. 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.

XI. No information in the statement of interest or ownership filed pursuant to this section shall be used as evidence in the criminal matter. Nothing in this section prohibits the petitioner who has filed a statement of interest or ownership under this section from providing information to any prosecuting authority or defendant involved in the related criminal matter or their representatives, or from testifying in any criminal trial as to facts within the petitioner's knowledge.

XII. 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.

100:20 Judgment.

I. If the prosecuting authority fails to meet its burden as to any claimant, the court must enter judgment dismissing the forfeiture proceeding and delivering the property to the prevailing owner, unless the owner's possession of the property is illegal.

II. If the prosecuting authority meets its burden as to all claimants, the court shall enter judgment forfeiting the seized property.

III. A court may enter judgment following a hearing or pursuant to a stipulation or plea agreement.

100:21 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 (a) dissipated, (b) transferred, sold, or deposited property with a third party to avoid forfeiture, (c) diminished substantially the value of property, or (d) commingled property with other property which cannot be divided without difficulty.

100:22 No Additional Remedies. The state may not seek personal money judgments or other remedies not provided for in this chapter.

100:23 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.

100:24 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.

100:25 Attorney fees. In any proceeding in which a property owner's claims prevails by recovering at least half, by value, of the property or currency claimed, the seizing agency shall be liable for

- (a) reasonable attorney fees and other litigation costs reasonably incurred by the claimant;
- (b) post-judgment interest; and
- (c) in cases involving currency, other negotiable instruments, or the proceeds of an interlocutory sale, any interest actually paid from the date of seizure.

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

I. If the court orders return of property, the law enforcement agency that holds the property shall return the property to the owner or other prevailing claimant within a reasonable period of time not to exceed five days after entry of judgment.

II Any owner to whom property is returned shall not be subject to any charges for storage of the property or expenses incurred in the preservation of the property.

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

100:27 Disposition of Property and Proceeds.

I. At any time when contraband held for evidentiary purposes is no longer needed for that purpose, the court may order it be destroyed pursuant to state law.

II. At any time when abandoned property 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 of the order.

III. If forfeiture is granted and upon motion, the court may order that a portion of the currency seized or proceeds from the sale of forfeited property be used (a) to pay the victim of the crime for which the defendant is convicted, (b) to be remitted to a victim-crime fund run on a statewide basis, and (c) to pay reasonable non-personnel expenses for the seizure, storage, and maintenance of any forfeited property.

IV. If forfeiture is granted, the court shall order currency and all other property be delivered to the state treasurer within 30 days.

V. The state treasurer shall sell 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 and then to comply with an order of the court in paragraph III. The state treasurer shall deposit all remaining funds in the state's general fund.

100:28 Prohibition on Retaining Property; Sale Restrictions. No law enforcement agency may retain forfeited or abandoned property 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.

100:29 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 or other federal law.

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 \$50,000, 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.

100:30 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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