

PART ONE: INTRODUCTION

CHAPTER 1 INTRODUCTION

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A. The sources of law

Do you need to get a permit to make your own beer? Can you sue your own spouse for an injury? How closely related can a judge be to the attorney in a case without being disqualified? How close to your property line are you allowed to build a garage? How old do you need to be to vote? Can a homeless person register to vote? What is the largest denomination gaming chip allowed in casinos? Does the public have the right to examine the Governor's records on petitions for clemency?

These are all legal questions, but only one of them is directly answered by a "law," if we take that word in its usual sense, meaning an enactment of the Legislature. There are many sources of "law" in a broader sense, meaning rules enforced by government. In this chapter, we will consider what these various sources are, and how they relate to each other.

At the outset, we must note that there are two separate, though interacting, governments which make legal rules for the people of New Jersey: the state government and the United States federal government. In this book we are primarily concerned with state law sources, and that is all we will discuss in this chapter. But bear in mind that almost all of the kinds of sources of state law also exist for federal law. We will devote a chapter later in the book to a summary treatment of the federal law sources.

The basic source of law is that which sets up the system of government itself, the Constitution. This document does several things. It declares basic rights of persons, such as religious freedom, freedom of speech, and trial by jury. The Constitution distributes the powers of government among three branches, the legislative, executive, and judicial, and sets age and residence requirements for service as Governor, legislator, or judge. It prohibits the Legislature from passing certain kinds of laws--for example, bills of attainder, ex post facto laws, or laws granting divorces. It is in the Constitution that you would find how old you need to be to vote--among other provisions regarding elections and suffrage.

Laws passed by the Legislature are called statutes, or, collectively, legislation. Within the limits imposed by the Constitution, the Legislature has the power to enact statutes on practically any subject. The Legislature could decide at any time to enact a law explicitly answering almost any of the questions at the beginning of this chapter. However, since the Legislature has neither the time nor the expertise to enact all the rules that need to be made in our complex society, it often delegates to more specialized agencies of government the authority to make some of those rules. For example, in the Casino Control Act, the Legislature created a Casino Control Commission and gave it broad authority "to promulgate such regulations as in its judgment may be necessary to fulfill the policies of this act." Thus it happens to be the Casino Control Commission, not the Legislature, which has decided the maximum permissible denomination of gaming chip. Such rules made by departments and agencies of the government are usually referred to as administrative regulations.

The Legislature also delegates to local governments the authority to make legal rules regarding local affairs, such as zoning. This authority is exercised in the form of municipal ordinances. How close to your property line you can build is most likely found in your town's ordinances, not in the state statutes. Municipal ordinances and administrative regulations are sometimes referred to as "delegated legislation," or as "quasi-legislation."

Rules of legal effect are sometimes promulgated by the Governor, in the form of executive orders--sometimes under authority granted by the Legislature, sometimes under the Governor's inherent authority to control, to some extent, the functioning and organization of state government. For example, under legislative authority, the Governor can determine by executive order whether certain categories of government records are to be publicly accessible. Executive orders are frequently used to create special governmental task forces or study commissions.

Under the Constitution, the Supreme Court has the power to make court rules, governing the functioning of the court system, the procedures to be followed in court cases, and the qualifications and discipline of lawyers. Our question about a judge who is a relative of a lawyer would be answered in the court rules. Although court rules are not delegated legislation, we may think of them as quasi-legislation, because they are issued in a systematic, organized form, similar to the form of legislation.

Law-making is the primary purpose of all the sources of law we have mentioned so far. They therefore have in common a certain style and format. Usually, they say what the rules are to be, and don't say anything else by way of explanation or background.

There is another whole realm of law, very different from statute law. This is case law--the written opinions issued by courts when they decide particular cases. This kind of law is also known as "common law," because it dates from a time in English history when the King's courts developed a law "common" to the realm, as opposed to local, varying customary laws. (The

phrase "common law" is also used to characterize the countries which derived their legal systems from that of England, as opposed to the Continental "civil law" systems derived from the Roman *Corpus Juris Civilis*.)

We must distinguish two kinds of courts: trial courts and appellate courts. A trial court hearing a case essentially consists of one judge. Depending on the kind of case, there may or may not be a jury. The primary purpose of the trial is to find the facts. The judge may make rulings on points of law, such as admission of evidence, or whether one side or the other is entitled to summary judgment. A transcript is kept of all the proceedings of the trial, but the judge of the trial court usually does not issue a written opinion.

The party which loses a case at the trial court may appeal to an appellate court. The appellate court consists of two or more judges, and never has a jury, because it is not concerned with finding the facts, and does not hear testimony. Instead, the appellate court reviews the trial transcript and considers arguments from the lawyers on each side (in the form of written briefs, and sometimes also oral arguments), in order to decide whether the trial judge made any mistakes of law. When the appellate court reaches a decision, either affirming or reversing the decision of the trial court, the appellate court often issues a written opinion explaining the reasons for its decision. These opinions of appellate courts, gathered together in books known as court reports, constitute the body of case law.

Courts always try to base their decisions upon some authority. If there is a clear answer to the question in a statute, or in one of the other kinds of sources we discussed above, that will be the authority followed by the court. If there is not a statutory or quasi-statutory authority, the courts will attempt to follow the precedents set by earlier court decisions on the same or similar questions. In other words, if neither the Legislature nor some other part of the government has made a rule that says how a case should be decided, a court will try to decide the case the same way similar cases were decided by courts in the past. The general principle that precedents should be followed is known by the Latin phrase *stare decisis* ("let stand that which has been decided"). Its purpose is to make the law predictable and fair.

There are many legal questions for which the only answers are those which have been developed over the years by case law. This is true of most of the questions of tort law. (A tort is, roughly speaking, a civil wrong other than a breach of contract.) One such question is whether one may sue one's own spouse for an injury. The answer given by the common law was no for a long time, but in the 1970's the New Jersey Supreme Court decided that the reasons underlying this answer were no longer sound, and changed the answer to yes--which shows you that the principle of *stare decisis* is not absolute.

So one function of case law is to answer legal questions which have no statutory answer. More frequently, however, case law nowadays is involved in interpreting a statutory provision to clarify its application to the particular case. For example, the workers' compensation act relates to injuries incurred "in the course of employment." Does that cover you