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Provisional Remedies for Proceeds of Crime Act 2012

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AN ACT TO AMEND THE CIVIL PROCEDURE LAW TO PROVIDE PROVISIONAL REMEDIES FOR PROCEEDS OF CRIME

It is enacted by the Senate and House of Representatives of the Republic of Liberia in Legislature Assembled:

SECTION 1: The short title for this Act shall be the Provisional Remedies for Proceeds of Crime Act.

SECTION 2: Chapter 7 Provisional Remedies, Subchapter D Preliminary Injunctions of the Civil Procedure Code, Section 7.64 Temporary Restraining Order, Title I of the Liberian Code of Laws Revised is hereby amended to add a Section 5 Proceeds of Crime to read as follows:

CHAPTER 7. PROVISIONAL REMEDIES

SUBCHAPTER D. PRELIMINARY INJUNCTIONS

§7.64. Temporary Restraining Order

Section 5. Proceeds of Crime. Where a person is under prosecution in court for an offense or has been convicted of an offense including money laundering and/or terrorist financing, prior to sentencing, a motion for a preliminary injunction may be made by prosecution and a temporary restraining order granted by a court based on records against specified property believed to be the proceeds or instrumentalities of the offense or in which the defendant has an interest to secure property for the purpose of a Confiscation Order. The motion shall be supported by evidence indicating the grounds for belief that the property is proceeds of crime or an instrumentality. Notwithstanding the provisions of Section 7.64, Subsection 2, a temporary restraining order or writ of injunction issued upon granting of a motion for preliminary injunction shall terminate upon making of a Confiscation Order by a court. The Republic of Liberia shall not be required to post a bond or be liable for damages or costs arising directly or indirectly from the granting of such a temporary restraining order applied for in good faith. Pursuant to Subchapter E, Receivership of this chapter, a receiver may be appointed by the court to preserve such property and its value. A temporary restraining order or subsequent issuance of a writ of injunction upon granting of a motion for preliminary injunction may be subjected to the following exceptions by a court:

- (a) that provisions be made for reasonable living expenses and reasonable legal expenses of defendant, excluding tainted gifts;
- (b) that provisions be made for the purpose of enabling any person to carry on any trade, business, profession or occupation;

(c) where a person who holds realizable property is adjudged bankrupt, the property subject to a temporary restraining order or writ of injunction made before the order adjudging the person bankrupt and any proceeds of property realized in the hands of a receiver appointed by the court shall be excluded from the bankrupt's estate for the purpose of bankruptcy proceedings; and

(d) where realizable property is held by a corporation and an order for the winding up of the corporation has been made or a resolution has been passed by the corporation for the voluntary winding up of the corporation, the functions of the liquidator shall not be exercisable in relation to property subject to a temporary restraining order or writ of injunction previously made and any proceeds of property realized in the hands of a receiver appointed by a court.

SECTION 3: Chapter 7 Provisional Remedies of the Civil Procedure Law is hereby amended to add Sub-Chapter G Specific Orders, Section 7.120 Confiscation Order, Section 7.121 Benefit Recovery Order, and Section 7.122 Freezing Order to read as follows:

CHAPTER 7. PROVISIONAL REMEDIES

SUBCHAPTER G. SPECIFIC ORDERS

§7.120. Confiscation Order

§7.121. Benefit Recovery Order

§7.122. Freezing Order

§7.120. Confiscation Order

Section 1. Definition. A Confiscation Order is an order in rem, following conviction for an offense, to forfeit title to the Republic Liberia, or to a foreign State where mutual legal assistance is agreed upon, of property that is proceeds or instrumentalities of a criminal offense including money laundering and terrorist financing. Where the court makes a Confiscation Order against any property, title to the property vests in the Republic of Liberia, and documentation evidencing such title shall be probated and registered pursuant to procedures for probate and registration of property in the Republic of Liberia.

Section 2. Application. Where a person is convicted of an offense including money laundering and terrorist financing, prosecution prior to sentencing may apply for a Confiscation Order against property that is proceeds or instrumentalities of an offense within thirty (30) days from the date of the conviction. Such application may be made in respect of property into which original proceeds have been converted either by sale or otherwise. Property subject to a Confiscation Order shall include:

- (a) the assets laundered or terrorist property;
- (b) the proceeds, income and gains from such assets; (a) the assets intended to be laundered;
- (b) instrumentalities used or intended to be used in the commission of an offense of money laundering or terrorist financing; and
- (c) assets as relate to the commission of any offense.

Section 3. Granting of Order. The court in determining an application for a Confiscation Order shall have regard to any evidence on the records of the proceedings against the person convicted filed with the court as follows:

- (a) where the court is satisfied that the property is proceeds of crime in respect of an offense, the court shall order that it be confiscated. In considering whether to issue a Confiscation Order, the court may have regard to:

- (i.) the rights and interests of third parties in the property;
- (ii.) the gravity of the offense concerned;
- (iii.) the use that is ordinarily made of the property, or the use to which the property was intended to be put; and
- (iv.) where the property is money, the court shall decide the amount that it considers to be the value of the property at the time of the order.

(b) where the specified property, part thereof, or interest therein cannot be made subject to a Confiscation Order because it cannot be located, has been transferred to a third party in circumstances which do not give rise to a reasonable inference that the title or interest was transferred for the purpose of avoiding confiscation, or is located outside of Liberia, or has been substantially diminished in value or rendered worthless, or has been commingled with other property that cannot be divided without difficulty, the court may instead of ordering the property or part thereof or interest therein to be confiscated, order the person to pay to the Republic of Liberia an amount equal to twice the value of the property, part or interest; and

(c) where the property subject to confiscation has been commingled with property acquired legitimately or acquired using funds from legitimate sources, the court shall declare in the Confiscation Order the nature, extent and value of the property to be confiscated only in regard to property from the criminal conduct or money laundering or financing of terrorism.

Section 4. Exclusion from Confiscation Order. A person who is not a convicted defendant for the offense with respect to an application for a Confiscation Order, may apply to the court to exclude his interest from the order within thirty (30) days from the date the Confiscation Order is made by the court except where the person was served with notice of the application for a Confiscation Order. The court shall grant such application if satisfied that:

- (a) the property is not proceeds or instrumentalities of the offense;
- (b) the applicant did not know that the defendant would use, or intend to use the property in or in connection with the commission of an offense; and
- (c) the interest was acquired in circumstances which would not arouse a reasonable suspicion that the property was proceeds or an instrumentality of crime.

Section 5. Realization of property. With regard to a Confiscation Order, the court may appoint a receiver or trustee to take possession and control of realizable property pursuant to Subchapter E, Receivership of this chapter, to preserve the property and its value. The court may empower any such receiver to realize any realizable property in such manner as the court may direct. The court may also order any person holding an interest in realizable property to make such payment to the receiver in respect of any beneficial interest held by the defendant or, the recipient of a related gift to realize the value of the gift, and the court may, on the payment being made, transfer, grant or extinguish any interest in the property. The court shall allow any third party holding interest in the property to make representation to the court and be heard regarding that interest.

Section 6. Amount to be realized. The amount which may be realized at the time of the making of a Confiscation Order against a defendant shall be the amount equal to the sum of the values at that time of all realizable property held by the defendant and affected gifts made by the defendant less the sum of all obligations, if any, of the defendant which the court may recognize.

Section 7. Voidable Transfers. The court may, before making a Confiscation Order, set aside any conveyance or transfer of property that occurred during or after the commission of a criminal conduct or offense, unless the conveyance or transfer was made for sufficient consideration to a person acting in good faith and without notice.

Section 8. Confiscation where a person dies or absconds. A court may order property confiscated subject to the provisions of this section where the court is satisfied that a person who has died or absconded was charged or arrested for a criminal offense including money laundering and terrorist financing, or that the property is tainted in respect of the offense.

§7.121. Benefit Recovery Order

Section 1. Application. Where a person is convicted of an offense, prosecution may apply to the court for a Benefit Recovery Order against the person to pay an amount equal to the benefit derived from an offense or offenses of which the defendant has been convicted. If the court determines that a defendant has benefited from an offense or offenses it shall order payment to the Republic of Liberia of an amount equal to the value of the defendant's benefit from the offense or offenses. For the purpose of determining whether a defendant has derived a benefit it should be established that at a fixed date the defendant had no legitimate sources of income sufficient to justify the interests in any property that the defendant holds. The court shall assess the value of the benefit a person has derived from the commission of an offense or offenses.

Section 2. Determining the value of the benefit. The value of the benefit derived by a defendant from an offense may include, except property confiscated under this Subchapter:

- (a) any money received by a defendant, or by another person at the request or by the direction of the defendant, as a result of the commission of the offense;
- (b) the value of any property that was derived or realized, directly or indirectly, by the defendant or by another person at the request or by the direction of the defendant, as a result of the commission of the offense; and
- (c) the value of any service or financial advantage provided for the defendant or another person, at the request or by the direction of the defendant, as a result of the commission of the offense; or
- (d) unless the court is satisfied that the increase was due to causes unrelated to, the commission of the offense, any increase in the total value of property in which the defendant has an interest in the period beginning immediately before the commission of the offense and ending at some time after the commission of the offense.

Section 3. Statement relating to benefit. Where prosecution has applied to the court for a Benefit Recovery Order, it may provide to the court, and if so shall serve upon the defendant, a statement setting out an assessment of the value of the benefit obtained by the defendant. The court may, for the purposes of determining whether there was a benefit and the value of the benefit treat any acceptance by the defendant of the allegations set forth in a statement as conclusive of matters to which it relates.

Section 4 . Discharge of Benefit Recovery Order. A Benefit Recovery Order shall be discharged:

- (a) on the satisfaction of the order by payment of the amount due under the order;
- (b) if the conviction of the offense or offenses is in reliance on which the order was made is or is taken to be quashed and no conviction for the offense or offenses is substituted; or
- (c) if the order is quashed by the court in accordance with existing laws and procedural rules.

Section 5. Realization of property. The court may appoint a receiver or trustee to take possession and control of, and then to realize where a Benefit Recovery Order has been made pursuant to Subchapter E, Receivership of this chapter:

- (a) property in which the defendant has an interest; or

- (b) restrained property; or
- (c) specified items of property in which the defendant has an interest.

§7.122. Freezing Order

Section 1. Application. In making an application for a Freezing Order:

(a) where specified property is believed to be proceeds or instrumentalities of a crime or terrorist property, application shall be made by the Ministry of Justice or a competent authority under the law to the court for a property Freezing Order with respect to such property to preserve the specified property where it is indicating the grounds for belief that the property is proceeds or instrumentalities of crime or terrorist property;

(b) the filing of such an application shall ipso facto give the Ministry of Justice or other competent authority under the law the right to require a financial institution to impose restrictions on withdrawal of funds from an account for seven (7) days pending issuance of Freezing Order by the court which decision shall be made and delivered by the court within seven (7) days of the filing of the application.

Section 2. Notice. Within thirty (30) days of granting of a property Freezing Order or such other period as the court may direct, notice of the order shall be served on all persons known by the competent authority to have interest in the property affected by the order, and such other persons as the court may direct.

Section 3. Granting of order. The court may in its order mandate any of the following:

- (a) that the property or part thereof specified in the order be seized, and taken into possession;
- (b) that the property be placed under a receiver appointed pursuant to Subchapter E, Receivership of this Chapter; or
- (c) that the property or part thereof specified in the order be dealt with in any other particular manner pursuant to law.

Section 4. Exclusion from Freezing Order. The court may exclude from a property Freezing Order such amount as it considers appropriate for the payment of reasonable living expenses to any person whose property is subject of a property Freezing Order. The court in making such exclusion shall be satisfied that the person cannot meet such expenses out of property that is not subject to the Freezing Order and the court determines it is in the interest of justice to make such exclusion.

SECTION 4: This Act shall take effect immediately upon publication in Handbills by the Ministry of Foreign Affairs.

ANY LAW TO THE CONTRARY NOTWITHSTANDING

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