

MINUTES OF COMMISSION MEETING February 21, 2008

Present at the New Jersey Law Revision Commission meeting held at 153 Halsey Street, 7th Floor, Newark, New Jersey were Chairman Vito A. Gagliardi, Jr., Commissioner Albert Burstein, Commissioner Andrew O. Bunn, and Commissioner Sylvia Pressler. Grace C. Bertone of McElroy, Deutsch, Mulvaney & Carpenter, LLP attended on behalf of Commissioner Rayman Solomon and Professor William Garland of Seton Hall Law School attended on behalf of Commissioner Patrick Hobbs.

Also in attendance were Lawrence J. Fineberg, Esq. and Edward Eastman, Esq. of the New Jersey Land Title Association and Charles F. Kenny, Esq. of Peckar & Abramson, P.C.

Minutes

The Minutes of the January 17, 2008 Commission meeting were unanimously accepted on a motion by Commissioner Pressler and a second by Commissioner Burstein as submitted with the following changes: (1) the typographical error in the last line of the UPMIFA section on page three will be corrected to change the word to “motion”; (2) the word “constitution” in the third line of the “Mental Incapacity” section on page three will be capitalized; and (3) the Minutes will be modified to reflect the Commission’s authorization, at the last meeting, for Staff to review the issue of mental retardation.

Adverse Possession

Lawrence Fineberg and Edward Eastman thanked the Commission for its efforts, hospitality and courtesy during the course of this project. Mr. Fineberg explained that he thinks the final product of the Commission’s work is a very good statute, and noted that he and Mr. Eastman were pleased to be able to contribute. Chairman Gagliardi thanked the guests for their expertise and their willingness to share that expertise with the Commission. Commissioner Pressler moved that the project be released as a final report and Commissioner Burstein seconded the motion. The motion carried unanimously.

Construction Lien Law

Charles Kenny provided some preliminary comments on the Commission’s work on this project. He indicated that he had reviewed the Commission’s work to this time, and that he thought the Commission did a wonderful job in clarifying areas that needed to be clarified and incorporating case law from the Appellate Division and the New Jersey Supreme Court that was decided after the law was enacted. Mr. Kenny suggested, however, that there are other areas of the law that should be reviewed by the Commission. The 90-day filing period for residential construction and even the form of the lien prescribed in the statute would both benefit from consideration and modification.

Marna Brown indicated that she had the opportunity to speak with a representative from the American Arbitration Association who made certain recommendations based on the comments and questions of claimants. One of those recommendations pertained to the 90-day filing date mentioned by Mr. Kenny, which the AAA representative explained was problematic since people sometimes will wait until the very last minute to file a lien. This is especially difficult in the area of residential construction where a demand for arbitration also must be made before the expiration of the lien-filing period. If an individual waits until the 89th day to first demand arbitration, the arbitration cannot possibly be completed and a lien determination made within the 90-day time period set forth in the statute. The AAA representative also wanted clarification of the definition of “residential” because so many people were confused regarding its meaning. Ms. Brown advised that Staff will check with the AAA to see if the definition included in the draft addresses their concerns.

Commissioner Bunn asked Mr. Kenny what he was recommending with regard to the lien form. Mr. Kenny explained that while he would like to confer with colleagues before giving a final answer on this issue, a general statement of the problem is that the lien form requires the filer to list the amount of the contract. The case law, however, holds that you cannot lien for the full amount of a contract, only the work and services provided to date that have not been paid. Mr. Kenny explained that the form also is suitable, in its present version, only for a very simplistic construction project. The current form does not fit projects across-the-board and cannot generally be used without modification.

Commissioner Bunn asked if Staff had information regarding the procedures used in other states. Ms. Brown said that although Staff did not yet have that information, an attorney who represented subcontractors had contacted her and indicated that he has a 50-state survey of the law in this area and would have further comments. Staff will meet with this attorney and request information about what is being done in other states.

Commissioner Pressler suggested that the definition of “dwelling” should not be limited to one or two units, but should instead follow the Anti-Eviction Act, which defines the term with a limit of three units. Ms. Brown indicated that she agreed and Mr. Kenny said that the term becomes an issue when you are dealing with high-rise and multi-unit dwellings, so going from a limit of two to a limit of three units should not pose a problem in the industry.

Commissioner Bunn asked if the point of the statute was consumer protection. Kenny explained that the law arose against a backdrop of the desire of commercial contractors who wanted a workable lien law that did not include a pre-filing requirement since such a requirement immediately sours the relationship between the owner and the contractor. The current law resolved certain of the problems in the area, but it was also necessary to deal with the interests of banks and commercial lien holders and other parties. Concessions made to accommodate those groups during the process of passing the legislation did not necessarily protect consumers. Ms. Brown explained that the Legislative history indicates an effort to try to protect all of the interested parties.

With regard to the next draft, Mr. Kenny suggested that the lien form might be clearer if it included the “bottom line” figure. Commissioner Pressler requested that Staff take a look at the drafting of sections 6 and 9.1 and revise them as appropriate. Professor Garland said that section 14 should be reviewed, particularly the language dealing with the forfeiture of a claim and the requirement to bring an action and the way in which that language interacts with the requirement of completing arbitration. Chairman Gagliardi asked Staff to incorporate these comments into the next draft.

Pejorative Terms Concerning Mental Incapacity

Commissioner Pressler expressed her surprise at the scope and extent of the pejorative language in the statute. Professor Garland said that the inconsistent references to the age of majority as 18 and also as 21 in different sections of the statute are troubling, that references to coverture should be removed as it does not exist any longer, and that the word “infant” should be changed.

Commissioner Pressler suggested that, given the potential scope of the project, Staff should fully clean up any sections of the statute that the Commission is working on, but not do a global search at this time. That “clean up” should include making all sections gender neutral. She also pointed out that the language used in the draft regarding “regaining mental capacity” differs from the language used in the Rules of Court and the Probate Code, which refers to “regaining mental competency”. Commissioner Pressler also suggested that, on page 2, section 14-32 where it says “any person having right or title to real estate shall be”, that Staff should replace the word “shall be” with “is” or “has been”.

Commissioner Bunn suggested that statutory language referring to someone who is “without the United States” could be a problem for those serving a tour in the military. He also noted, however, that the Commission should proceed on a limited agenda at this time, focusing only on those changes necessitated by the change in the Constitution while noting sections that also require revision for other reasons for future reference.

Professor Garland pointed out that in section 2C:13-3, dealing with interference with custody, the statute talks about taking or detaining a minor child with the purpose of depriving the child’s other parent of custody or parenting time. He asked whether this should include a reference to “parent or guardian”. Mr. Cannel explained that this is a substantive issue and that the approach it takes is to impose a severe penalty on depriving a parent, specifically distinguishing that relationship from that of a foster parent or other guardian. Professor Garland suggested that the language remain in its present form, but that attention be called to it in the Comment.

Chairman Gagliardi requested that, for this project, Staff remove constitutionally objectionable terms, and retain references to areas of the statute in which further work is needed.

Chairman Gagliardi recommended that in section 41-1, the phrase “during the period of incapacity” be added to the end of the first sentence to clarify that the implication of the section is limited it to the period of incapacity.

With regard to references to “mental retardation” in the current statutes, there was considerable discussion regarding the use of the term “intellectually disabled” as a possible substitute for such references, including the issue of whether or not the term accurately reflected the intent of the voters. Staff made an effort to track the terminology used by groups who deal with individuals who fall into the categories addressed by the current statutory language. There was concern expressed that “intellectually disabled” is too inclusive. “Mentally disabled” was proposed, but the question was again raised as to whether that strays too far from the constitutional limitations on this particular project. Commissioner Pressler noted that if the Commission sticks strictly with the Constitution, the group in question is only those individuals who have been adjudicated and a large segment of the population in question has not been and will never be adjudicated. Mr. Cannel indicated that Staff would provide more information to the Commission on this issue.

Anatomical Gifts

Mr. Cannel explained to the Commission that it may not want to proceed any further with this project because the Anatomical Gifts Act was moving quickly through the Legislature. Significantly, the Senate Committee made it clear that provisions important in New Jersey had been incorporated into the uniform law, which suggests that the work done by the Commission eight years ago had an impact.

Uniform Trust Code

John Burke introduced the UTC as a NCCUSL project involving the first codification of the trust law in the United States that has been adopted in 20 states. It is generic in approach. It covers “express trusts” and those express trusts can be for a commercial purpose, an estate planning purpose, or other purpose. According to the UTC, the trust need not be tied to donative intent. The law is very broadly conceived. In the current draft, all provisions other than those in section 5 are optional, not mandatory. The settlor of the trust has design discretion, with the exception of the provisions in section 5. The memorandum to the Commission points out issues that received the most attention during the drafting process.

Mr. Burke explained that he looked preliminarily at New Jersey law and that there is nothing parallel to the UTC. Instead, New Jersey has, in many different places in different statutes, language pertaining to trusts. The language that deals with the administration of estates or wills and estate planning is quite different from the approach of the UTC. One of the things the UTC does, consistent with UPMIFA, is to take a completely commercial approach to trusts, to sever any kind of linkage with conservative trust law that historically governed the decisions of the trustee regarding things like the discretion concerning investments. The UTC cuts the trustee loose from the more

restrictive early rules. Novel features of this proposed law include the nonjudicial settlement of certain issues. Under the UTC, the beneficiaries and the trustee can determine how the trust is to be interpreted, and, if they agree unanimously, their determination is binding without any interference by a court. The UTC maximizes the flexibility and the opportunities available to the trustees and beneficiaries and the settlor, if still living. There is, however, a question about how far/wide agreement has to be before one can invoke the power to modify the trust.

Commissioner Burstein asked how the UTC fit with Title 3B. Mr. Burke said that the UTC is very well structured and that 3B and other areas of the statute are more scattered and not as well structured. The law would have to be analyzed on a provision by provision basis to determine if it superseded existing law. The benefit of this law would be that it simplifies and organizes the law of trusts. Commissioner Pressler agreed that the UTC was structurally cohesive, but asked if we want, in New Jersey, a trustee freed from constraints on investment powers. Commissioner Burstein asked what it meant for the Prudent Investor Act. Mr. Burke explained that the Uniform Prudent Investor Act, the old version of UPMIFA, the Uniform Principal and Income Act would all have to be reviewed to see if their provisions should be integrated or recodified. Mr. Burke noted that we do not currently have, in New Jersey, a statute that tells you how to create a trust and that the definitions section adds clarity. He suggested that a controversial area is the duty to inform beneficiaries by sending a document akin to an annual report, and the issue that poses for the settlor's privacy.

Mr. Burke said that, if the Commission undertook this project, it would be a big project and would require expertise. Chairman Gagliardi said that when the Commission last discussed the project, it was with the understanding that under our charter, it is our obligation to make recommendations to the Legislature. He suggested that Staff consult with probate section of the State Bar and any other interest groups that the Commission can think of before crafting a recommendation in order to satisfy our obligation.

Title 39

Laura Tharney advised that all of Title 39, approximately 567 pages, is on the Commission's website. On the website, the project is divided into sections of approximately 10-30 pages per section to make it easier for individuals to download and focus on only the particular section(s) of interest. Ms. Tharney explained that she is continuing her attendance at meetings, and is adding new meetings to her schedule in an effort to achieve the broadest awareness of the project and to encourage as much comment as possible. She explained her legislative outreach and that she and John Cannel will be testifying before Assembly Judiciary Committee next Thursday regarding Title 39 and other Commission projects, both completed and current. She explained that any Commission members who could be available were cordially invited to attend by the Committee.

Ms. Tharney explained her approach for continuing distribution and the manner in which she will present the materials to the Commission. She also indicated that various

individuals have agreed to appear and speak to the Commission about the project as the Commission wishes.

Title 22A

The newest draft is a rough draft that includes the entire Title. More information will be presented regarding this project at the next meeting.

Miscellaneous

A motion to adjourn was made by Professor Garland and seconded by Commissioner Bunn. The next meeting of the Commission is scheduled for Thursday, March 20, 2008.