

MINUTES OF COMMISSION MEETING
September 18, 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 Andrew Bunn, Commissioner Albert Burstein, and Commissioner Sylvia Pressler. Grace C. Bertone, Esq. of McElroy, Deutsch, Mulvaney & Carpenter, LLP, attended on behalf of Commissioner Rayman Solomon. Professor William Garland of Seton Hall School of Law attended on behalf of Commissioner Patrick Hobbs and Professor Bernard Bell of the Rutgers School of Law, Newark, attended on behalf of Commissioner Stuart Deutsch.

Also in attendance were Lawrence Fineberg, Esq. on behalf of the New Jersey Land Title Association and New Jersey State Bar Association; Alex Fineberg, Mr. Fineberg's assistant; Jeffrey J. Chludzinski of McRoberts Protective Agency, Inc.; Thomas J. Perry, Esq., Golub & Israel, P.C.; James A Louis, Office of the Law Guardian; Beatrix W. Shear and Gary Mitchell, Office of Parental Representation; Wendy C. Romano, Christian Science Committee on Publication for New Jersey; and Liza Kirschenbaum, CASA of New Jersey.

Minutes

The Minutes of the meeting of July 17, 2008 were accepted as submitted after motion by Commissioner Pressler which was seconded by Commissioner Bunn.

Construction Lien Law

After distributing revisions of sections 2A:44A-3; 2A:44A-7; 2A:44A-11 and 2A:44A-23 (all of which had been drafted after the submissions for the September meeting) Marna Brown explained that one of the key changes since the last submission was the definition of "filing". As a result of the differing views, and with the help of Larry Fineberg and David Gordon, Staff crafted a compromise definition. This new definition defines "filing" as both lodging for record and indexing, but also requires that the Clerk's Office (i) mark and date the document when received and (ii) provide a copy, so marked, to the claimant or person filing the document upon request. In most places in the draft, the term "filing" has been replaced with "lodged for record." Where the intention of the statute was clearly to refer to document available for public record, then "filing" was used in the draft. Otherwise, "lodging for record" were used. In response to a question posed by Professor Garland Ms. Brown explained that, in section 2A:44A-6, Staff added language to provide that for purposes of the participants in the chain of construction with notice of the lien claim, lodging for record was sufficient to make the lien claim (or other document) enforceable; however, with regard to third parties without any notice, actual indexing was required to make the lien claim (or other document) enforceable.

Judge Pressler asked whether liens are filed or recorded. Ms. Brown explained that they are filed and not recorded. Mr. Cannel advised that in an earlier compromise version of the definition, Staff had proposed that the Clerk's Office be required to index the document within two days of it being lodged for record. The two-day deadline had been incorporated from the Commission's title recordation project, which used the deadline that had previously been agreed to by the Clerks in a consent order resolving litigation. Ms. Brown explained that the two-day language was removed because of a concern that it would be impossible to enforce. Commissioner Pressler suggested that a slightly longer time period, five or seven days, may encourage more cooperation from the clerks.

Ms. Brown advised that section 2A:44A-3 was revised to address the concerns raised by Commissioner Burstein at the last meeting regarding the clarity of the tenant/leasehold interest provision in subsection (d). This section was revised to apply to both residential and nonresidential construction. Section 2A:44A-7 was revised to reflect a suggestion at the New Jersey Bar Association Construction Law Committee meeting that the service provision of the statute permit service by courier in addition to certified mail and personal service as is done in the Court Rules.

Commissioners Pressler and Bunn questioned the ten business day requirement from lodging of the document to service of it upon the appropriate parties, which is part of the current statute. Ms. Brown explained that practitioners in this area have advised that they tend not to use the 10 days and usually serve these documents as soon as they are stamped by the Clerk's Office. The consequence of not serving the document within the 10-day time frame is that the lien could not be perfected under the statute. Larry Fineberg explained that the purpose intended by the statute was to have some sort of personal service since the lien is ex parte and without personal service, the owner would not otherwise know about it in a timely fashion. Ms. Brown also explained that in a residential context, service of the document starts the chain of events required to perfect the residential construction lien, i.e., the demand for arbitration and the arbitration itself.

Commissioner Pressler suggested that the statute should perhaps include either 10 days or 7 business days for service under section 2A:44A-7. Commissioner Pressler also suggested that an un-served party should be relieved of the burden of the lien until served because of the possibility that the claimant simply could not locate the party it intended to serve the lien upon. The lien claim should be good as to those to whom it has been properly served and not good until re-filed as to any others not properly served.

Ms. Brown noted that section 2A:44A-11 had been revised in response to comments suggesting that rather than illustrate examples of circumstances when amendment of the lien was appropriate, the revision had limited the circumstances under which amendment was appropriate, which was not Staff's intention.

Mr. Cannel explained that 2A:44A-23, concerning distribution of the lien fund, had been revised because the earlier draft had been incorrect. Commissioner Bunn asked whether the language of the draft was derived from a court decision and Mr. Cannel explained that there is no court decision that fully addresses the issue and that parties are reluctant to take the issue to court because of the lack of statutory guidance.

Ms. Brown and Mr. Cannel discussed their presentation at the meeting of the Construction Law Section of the New Jersey Bar Association, which was attended by approximately 50 people. At this meeting, they had an opportunity to hear from attorneys who practice in this area of the law every day. Their comments will be reflected in the next draft. In addition, Ms. Brown and Mr. Cannel met, in August, with Assemblyman Patrick J. Diegnan, Jr., who had sponsored legislation in this area. Staff incorporated his proposed changes into sections 2A:44A-30 and 2A:44A-33 with some slight modifications. Staff will continue to work with him on this project.

Attorney Thomas Perry then spoke regarding an issue he had raised by letter: whether security services provided on a construction site should be made part of the definition of “services” subject to lien. Mr. Petty explained that he sought only the same benefits afforded to other contractors under the statute, including architects and engineers. Mr. Perry introduced his client, Jeffrey J. Chludzinski of McRoberts Protective Agency, Inc, who spoke about the nature of the security services his company provided and its long history and submitted a written statement to the Commission.

The Commissioners discussed at length the issue of what services should be included for protection under the Construction Lien Law. Chairman Gagliardi compared security services to those of a certified landscape architect (under the current law, the latter’s services are covered as those of a contractor.) Commissioner Pressler was concerned with the need to define “term or duration of construction.” Commissioner Bunn sought clarification that the security services in issue were not services that would be provided anyway but services that were particular to the construction project. Commissioner Pressler also expressed the view that such services would be covered only if related to construction.

Ms. Brown expressed her concern that extending the reach of the statute to security services might open up the statute to apply to a host of services not presently included. Commissioner Bunn asked what the rule was in other states on this issue. Mr. Perry said that other states he had looked at, including New York, Pennsylvania, and California, have language similar to that found in New Jersey’s statute. Commissioner Pressler noted that if a contractor puts a fence around the site, the cost of the fence would be covered in the cost of the contract. However, if the contractor has a security firm provide security services instead of a fence, the security services are not covered. She asked whether there are licensing or registration requirements for security services and Mr. Chludzinski said that security services were both

licensed and registered in New Jersey. Commissioner Gagliardi suggested that if the phrase “licensed security professionals or licensed security” is used, perhaps that would address some of the concern that had been expressed.

Commissioner Bunn asked how frequently security was provided on work sites. Mr. Perry noted that it was almost always provided. Commissioner Pressler asked how Mr. Chludzinski would feel if the Commission limited the statute to services pursuant to contracts between the security company and the contractor. Mr. Chludzinski responded that such limited protection would be better than none. Commissioner Bunn suggested that the parties to that contract would have to be in the line of privity with the owner. Commissioner Pressler added that the owner would not be liable for anything beyond the contract price.

Commissioner Gagliardi asked whether any of the Commissioners had an objection to Ms. Brown including language in the next draft to provide lien entitlement to a licensed security entity providing security services relating to construction during the period of the construction. No Commissioners objected but Commissioner Burstein said that there may be objections from those in the industry because, by doing this, the Commission will be expanding the statute to include another industry that will reduce the amount available to others.

Title 9

John Cannel explained that this project was in its second stage. He had so far incorporated sections from Title 30 into Title 9 and, while additional drafting was needed, the most pressing need at this time is for a meeting of the various parties with an interest in the project to work through some of the outstanding issues. Mr. Cannel explained that the first draft of the project was based on existing statutes and not on the manner in which these cases are really litigated. As a result, there may be some things missing which could be clarified by a roundtable discussion within the next month or two.

Gary Mitchell introduced himself as the Director of Litigation for Office of Parent Representation. He explained that his organization provided counsel for parents in cases involving child welfare in Title 9 and Title 30 abuse and neglect cases. He explained that Title 30 guardianship cases, for which his office provides counsel, terminate parental rights. Mr. Mitchell explained that the statutes did not currently reflect the fact that staff attorneys rather than pool attorneys handle termination of parental rights matters and the statutes should reflect this change in the practice. He also mentioned that the “right of counsel” language in the statute was an issue of concern and expressed an enthusiastic desire to have the opportunity to work with Commission Staff on this project. He said that the Commission’s approach makes sense and will likely provide a better and more predictable result for families as well.

James Louis explained that in 1974, New Jersey adopted a law that made children part of the case and gave them their own legal representative. He said that there are some 40 or 50

legislative enactments, layered over one another, some of which derive from enactments in the early 1900s. He made reference to the conceptual changes that have occurred over time dealing with the manner in which society protects its children. Ten years ago more than 80% of cases involving children never saw the inside of a court room because they were resolved by agreements. Now, substantially all of the cases are resolved by litigation. This underscores the need for clarity in the law, including the law pertaining to the entitlement to counsel.

Beatrix Shear said that it was her belief that the definition under section 30:4C-12 should fade away. She explained that the only way one can keep a child in the home and still have DYFS in control, is to proceed under Title 9. Only under Title 9, for example, is there a provision for ordering the parents into therapy. She said that mischief was taking place under section 30:4C-12 and applauds eliminating confusion relating to this provision. She cautioned, however, that there are other provisions under Title 30, section 30:4C-12.1 concerning contacting relatives, for example, that need to remain in the statute.

Liza Kirschenbaum from CASA, echoed some of the earlier comments and explained that she believes that DYFS, DAG and the Child Advocate needed to be involved in this discussion. She also wanted to point out that, under Title 30, children are being removed from their families with a law guardian representing them but no attorney representing the parents. Commissioner Pressler asked whether DYFS can remove a child without counsel when there is no emergency. Ms. Kirschenbaum said yes, although most often removal was with the consent of the parent taking care of the child, or with older children who cannot (or do not need to) be supervised. Mr. Mitchell added that there was no statutory right to counsel in New Jersey under such circumstances. Mr. Louis explained that the legal mechanism created to provide counsel on a routine basis does not permit any agency to participate in those cases. His office lacks the statutory jurisdiction to do so. This is a glitch or missing piece and it was assumed that legislation would fix the problem but it never has.

Again, Commissioner Pressler asked whether the court rules (in part 5) could be construed to cover this situation. Ms. Shear explained that before there were Office of Public Defender attorneys, pro bono attorneys were appointed from a list and this issue is only one part of the needed reform. Ms. Shear expressed her concern about the fact that the law in issue is only applied against poor people and poor families. She noted that there are considerable due process issues that only affect the indigent. She asked the Commission remain mindful of this as it revises the law.

Commissioner Bunn asked whether there is any state that, in this area of the law, really “gets it right”. Mr. Louis said that some states have simplified the process and that the Commission should look at states that have conflated their causes of action and rights to custody, such as California, Colorado and Vermont. He could not recommend any states that he thinks the Commission should use as examples.

Mr. Cannel will coordinate a roundtable discussion among all participants involved in the process of protecting children including DYFS, the Public Defender, the Office of Law Guardian, and CASA.

Title 22A

Ms. Tharney gave the Commission a brief status report on the Title 22A project. The most current draft presented to the Commissioners incorporates all of the comments received to this time including those of the Sheriffs and Special Civil Part Officers. Ms. Tharney explained that she has not yet received comments from the County Clerks or Surrogates. She indicated that she hoped to meet with COANJ representatives before the end of October. In the meantime, the project has been distributed to AOC, the Court Clerks, Special Civil Part Officers, Sheriff's Officers, Surrogates and the County Clerks.

Commissioner Pressler suggested that 22B:1-2 should be at the end, not at the beginning of the statute and should authorize the court system to require payment to the prevailing party. She further suggested that if 22B:1-7 speaks of a fee for attendance, then it should say so and that in 22B:1-8, the provisions pertaining to bail bonds should be removed, since they are not post disposition provisions, and a new section created for those items.

The Commission voted to release this project as a tentative report.

Trade Secrets

Ms. Brown noted that this project had now been well vetted by members of the legal community, including both professors and those practicing in this area of the law. Changes were made and compromises reached on the outstanding issues from the last Commission meeting. The Commission moved to release the Uniform Trade Secrets Act project, under the name New Jersey Trade Secrets Act, as a tentative report.

Pejorative Terms

Ms. Brown explained that there will be more revisions because of feedback she anticipated receiving from the Department of Veterans Affairs, those reviewing Title 30, the Clerks' Offices and others, it was agreed that this project would be considered at the next meeting.

Title 39

Ms. Tharney explained while she had been receiving comments from the MVC more slowly than she had hoped, the comments she had received made it clear that the MVC Staff attorneys were conducting a very careful, detailed review. Based on the comments she received so far, she had some questions about the comments made in the definitions section and there

were some other areas of the project in which she felt the draft would benefit from an opportunity to discuss the issues with knowledgeable MVC Staff. The interplay between the federal regulations and outdated state statutory language is one of those areas.

She explained that she had a meeting with MVC Staff attorneys scheduled for October 2nd and that she hoped to be able to address some of the outstanding issues at that time, as well as obtain some information about the status of the MVC review process and when additional comments might be made available. Commissioner Pressler noted that this was a lengthy, but necessary process because without the support of the MVC, the project would likely flounder.

Commissioner Burstein asked that Ms. Tharney let the Commission know if there was a point when she felt comfortable with the release of sections of the project rather than awaiting release of the project in its entirety.

Miscellaneous

Ms. Tharney advised that the NJLRC's new website had been launched. She also explained that Staff was engaged in additional legislative outreach efforts and were currently focusing on correspondence to committee chairs of various committees and distributing reports to the appropriate legislative members with copies to OLS.

The next meeting is scheduled for October 16, 2008.