

**MINUTES OF COMMISSION MEETING**  
**November 19, 2009**

Present at the New Jersey Law Revision Commission meeting held at 153 Halsey Street, 7<sup>th</sup> Floor, Newark, New Jersey were Chairman Vito A. Gagliardi, Jr., Commissioner Albert Burstein, Commissioner Andrew Bunn and Commissioner Sylvia Pressler. Professor Ahmed I. Bulbulia of Seton Hall Law School attended on behalf of Commissioner Patrick Hobbs, Professor Bernard Bell of Rutgers University School of Law attended on behalf of Commissioner John J. Farmer, Jr., and Grace C. Bertone, Esq. of McElroy, Deutsch, Mulvaney & Carpenter, LLP, attended on behalf of Commissioner Rayman Solomon.

Also in attendance were: Tracey Goldstein, Esq., of Feinstein, Raiss, Kelin & Booker, LLC on behalf of the New Jersey Apartment Association, Dan Rudd of Sure Deposit, Donald M. Legow, Legow Management Company, LLC; Lawrence J. Fineberg, Esq., on behalf of the NJ State Bar Association, Real Property, Trusts and Estate Law Section; Sharon Rivenson Mark, Esq., on behalf of the NJ State Bar Association, Elder and Disability Law Section, and Susan L. Goldring, Esq. on behalf of the NJ State Bar Association, Elder and Disability Law Section.

**Minutes**

The Minutes of the October meeting were approved upon motion by Commissioner Bunn, which was seconded by Commissioner Bertone.

**Title 9**

John Cannel explained that he made the changes he believed the Commission had requested at the last meeting and asked whether the Commission was satisfied with the document in its current tentative report form. At the October meeting, the Commission addressed the issue of the impact of parental agreement. The current draft indicates that if the parents agree to arbitration, the result of arbitration is binding; otherwise, the agreement as to custody is merely given weight (see 2(a)(1)). The report also reflects changes to the language of 9:2A-1(f), which now states that “the court shall confirm an arbitration award” and the language of 9:2A-1(h), which now reads “if the parents knowingly and voluntarily agree.” Commissioner Burstein moved to release the report as a draft tentative report, and the motion was seconded by Professor Bell and approved.

**UEVHPA**

Laura Tharney explained that changes had been made to Section 11 of the report to reflect the determinations made by the Commission at the October meeting. She indicated that she wanted to confirm that the Commission’s preference was to modify Section 11 to limit the liability of volunteers to the extent that it would be limited if New Jersey’s Good Samaritan Act applied to them, rather than making changes to the GSA itself. Chairman Gagliardi indicated

that the language contained in the draft report accurately reflected the Commission's preference. Ms. Tharney also advised the Commission that Arkansas has passed a version of the UEVHPA, that California, Texas and Florida have bills pending and that New York and Missouri are proposing legislation other than the UEVHPA that is designed to accomplish the same goals. Commissioner Bunn moved to release the project as a draft tentative report which motion was seconded by Commissioner Burstein and approved by the Commission.

### **Durable Power of Attorney**

Marna Brown explained that the draft tentative report before the Commission was the result of a meeting with Commissioner Burstein and others at his firm and acknowledged the written comments provided by Ms. Mark and Ms. Goldring in advance of the meeting. Ms. Brown advised that the requirement that the principal sign the power of attorney before two witnesses and a notary in order for the power of attorney to be valid had been questioned and that a commenter had suggested that the signature should be required to be witnessed or notarized but not both.

Larry Fineberg explained to the Commission that for purposes of recording documents, N.J.S. 46:15-1.1 requires that the signature be acknowledged, rather than witnessed. N.J.S. 46:15-1.1 was created and enacted as a result of the Commission's efforts in 1990, and Mr. Fineberg feared that the new proposed witness requirement in 46:2B-20.5 impliedly contradicted or impaired N.J.S. 46:15-1.1 and might necessitate a change to the recording provision. Ms. Brown said that in most cases a power of attorney is not recorded and there would only be a concern if the power of attorney was required to be recorded, as with a transfer of real property. Mr. Cannel distinguished the issue of validity from the issue of recordability, stating that Staff could clarify that the validity requirements, which impose a higher standard than the standard for drafting a deed, do not affect recordability. Commissioner Burstein observed that there is a reason for the higher standard in this situation and that the issue can be handled by drafting.

Another issue raised by Mr. Fineberg was whether the statute should provide that the power of attorney terminate upon the appointment by the court of a guardian or conservator. Commissioner Burstein stated that in his experience the termination of a power in this situation did not happen very often and that if the court was going to appoint a fiduciary, the court would address the issue at that time. Ms. Brown advised that representatives of the State Bar Association were present to provide comments and that she had also heard from Professor Tanya Hernandez of Fordham University School of Law. Ms. Mark explained that the comments she would provide had not yet been discussed by the full bar section.

Ms. Mark noted that the revision lacked a definition of "disability" or "disabled". She also said that in 46:2B-20.7(c), 15 days might be enough time within which to supply the power of attorney, but it was not enough time to conduct a full accounting. She suggested that the two

time periods could be separated or that language be inserted clarifying that only an informal accounting is required to be provided within the 15-day period. Ms. Mark explained that 46:2B-20.9(b), which pertains to notice to third parties, should refer to constructive, not actual, notice since actual notice could be impossible, particularly if dealing with a financial institution, where it can be difficult to even speak with a person, let alone get anything in writing. Such a solution does not, however, address an agent who continues to act knowing that a power of attorney has been revoked or any other “wayward agent”.

Ms. Mark expressed concern about the provisions of 46:2B-20.11 regarding third parties’ acceptance of the power of attorney in (b)(1) and the genuineness of the signature. She asked who would determine what is genuine and under what authority or guidelines, explaining that in her elder law experience, the signatures of elderly clients frequently don’t look like they used to and tellers or customer service representatives do not necessarily have any training or basis on which to determine if a signature is genuine. Ms. Brown pointed out that 46:2B-20.5(d) presumes a signature to be valid if “acknowledged in accordance with subsection a.(3).” Commissioner Burstein said that a cross-reference would eliminate any confusion.

Ms. Mark said that in 46:2B-20.11(b)(2), which concerns enforcement, some limitation on what is considered to be a “reasonable time” would be useful. Under current law, with guardianships or conservatorships, if someone is having trouble getting the power enforced, the power of attorney is simply made part of the guardianship or conservatorship proceeding and dealt with by the court. She questioned why the Commission had retained the 10-year limitation in 46:2B-20.11(c), suggesting that it penalizes those with longer term illnesses. Susan Goldring added that with long-term illnesses, such as Alzheimers, the power of attorney is good for 10 years while the illness may last for 20 years. In those cases, the agent executed the power of attorney when well and able to do so, but is no longer competent and will never be in a position to make the determination again. Commissioner Burstein asked whether they wanted the language excised from the statute. Ms. Mark responded that there is no reason for the 10 years. Ms. Brown said that this may have been a concession to the banking industry because this provision is only in the banking provisions. The Commission agreed unanimously that the 10-year time-frame should be removed from the statute.

Ms. Mark noted that in 46:2B-20.12, the term “incompetent” should be removed. She also said that the proposed language seems to assume automatic revocation of a power of attorney if the principal is declared incapacitated. Ms. Mark explained that is not always the case because courts sometimes maintain a power of attorney for certain purposes and suggested that language be added to say “unless the court has maintained the power of attorney for stated purposes” or similar language. She also noted that there were several other sections, including 46:2B-20.15 and 20.16, in which constructive notice would be superior to actual notice for the reasons already stated.

In response to the question of whether version A or B would apply in 46:2B-20.22, Ms. Brown explained that a majority of commenters had chosen version A. Ms. Goldring explained that she and Ms. Mark favored version B because of the burden that was put on the financial institutions in that section. Comments from attorneys suggest that representatives of larger financial institutions adopt the position that if no one told them specifically, they are not required to act even if another branch or another individual within the financial institution is in possession of the relevant information. Commissioner Burstein stated his belief that version A accommodates their concern, but the Commission will revisit the language.

Ms. Mark suggested that with regard to 46:2B-20.31(a)(11) an incapacitated person could be physically affected, not just incapacitated intellectually, and suggested adopting the Title 3B definition of “incapacitated”. Ms. Brown said that the issue of disability had not seemed relevant to Staff since incapacity, not disability, seemed to be the concern with regard to the power’s durability. Ms. Brown also said that a springing power of attorney could be used by a person who seeks to have a power be effective only if he or she becomes disabled. Ms. Mark said that this raised the problem of springing powers of attorney generally because they require a person to walk around with the power of attorney and several doctors’ notes in order to demonstrate when the “springing” event has occurred. This poses a host of problems and the bar generally disfavors springing powers as a result. Commissioner Burstein explained that another problem is presented by the fact that attorneys drafting the powers of attorney do not always explain the difference between the two different kinds of powers. Ms. Mark said she was not in favor of a form power of attorney appearing in the statute because it leads to the “push-button” approach to drafting. Commissioner Burstein explained that the revision tried to retain some of the flexibility that was inherent in durable powers of attorney while also making them more stable.

Finally, Ms. Mark noted that in section 46:2B-20.34(c), pertaining to health care billing and payment matters and records, it might be best to include a HIPAA reference. Several other commenters had suggested this and it will be included in the next version. A revised version of the Durable Power of Attorney Act will be prepared for the December meeting.

## **UDMSA**

Ksenia Takhistova provided a general explanation of the history and goals of NCCUSL’s Uniform Debt Management Services Act, indicating that approximately one-third of the states are considering or have adopted a version of the uniform Act. Ms. Tharney indicated that Staff had been contacted by the Department of Banking and Insurance and that the Department had expressed an interest in the project because New Jersey’s current law is old and could be improved. She explained that she was hoping that the Commission would authorize Staff to undertake this project. Commissioner Pressler made a motion to authorize Staff to begin work on this project, Commissioner Bunn seconded the motion and the Commission unanimously agreed.

## **Title 46 -Property**

Mr. Cannel asked the Commission to approve a project to revise the sections of Title 46 not previously addressed by the Commission. Chairman Gagliardi expressed concern about Staff's capacity to complete such a project in light of Staff's other commitments, especially Title 39. Mr. Cannel confirmed that Staff has the capacity, and the project was approved.

## **Landlord-Tenant**

Marna Brown explained Staff's view that Landlord Registration, Security Deposits, and Landlord Remedies were now ready to be set aside since they were substantially complete. Modifications to these chapters since the last version were included in the memorandum distributed at the meeting.

Nick Kikis, who could not attend the meeting, presented concerns in writing, which were distributed to the Commission. Staff discussed these concerns with Mr. Kikis, the Department of Community Affairs (DCA), and with Mr. Pascale in advance of the meeting. DCA suggested that Mr. Kikis' concerns regarding the definition of "building" in LT:3-1 could be addressed by removing the definition from the revised chapter. Mr. Kikis' concern regarding the combination of the initial certificate of registration filing and the 2007 amendment regarding lead paint (LT:3-3) will be addressed by separating those two items in the revised draft. DCA agreed and explained that although there is presently no separate registration form for the lead paint registration, DCA intends to provide such a form when funds are available. Commissioner Pressler suggested that a cross-reference between the two registrations be included.

Ms. Brown said that Staff did not recommend adopting Mr. Kikis' proposed changes to the contents of certificate itself (LT:3-4) since they were rejected by DCA for what appeared to be sound reasons. She indicated that Staff had just received DCA's comments in a recent e-mail, but that Staff would provide them to the Commission in advance of the next meeting.

Ms. Brown explained that Staff had addressed Mr. Kikis' two remaining concerns, regarding LT:3-7, which pertains to the requirement that copies of the filed registration certificate be provided to each tenant, and LT:3-11, which pertains to the application of the chapter to municipalities and DCA regulation, by revising the relevant language. Mr. Kikis' view is that it has become common practice to include in the lease itself the information required to be contained in the registration certificate and require acknowledgement of receipt at the lease signing. He felt that the landlord should not be required to provide the tenant with a copy of the filed registration unless the information was not in the lease. The tenant's position, as expressed by Mr. Pascale, is that the certificate should be filed and validated before providing it to the tenant and that the tenant should have a validated copy and not be provided the contents in the lease itself. Commissioner Pressler asked what happens if the registration certificate is not

validated and said that the only notice the tenant would need is one of non-validation since any change in the data would have to be supplied to the tenant anyway.

If there is an amendment to the existing information, such as a change in mortgage data, for example, the landlord has to re-file after each such amendment or change. Commissioner Pressler suggested, as a result, that there was no reason to serve the tenant with a validated copy. Matt Shapiro commented that leases are not read by tenants and that the information in the registration certificate was important to be available to a tenant. Mr. Cannel said that the most critical requirement was the posting of the information in the building, now a part of the statute. Tracy Goldstein, representing landlords, said that she recommended to her clients that they attach the actual registration statement to the lease and post it in a conspicuous place in the building. She also explained that when owners file the registration certificate with the DCA, it comes back stamped and landlords post that stamped copy. She said that the goal of the registration requirement is to make tenants aware of the landlord's identity and how to reach the landlord for repairs or an emergency situation, and not to require a landlord to send updated registration notices to all its tenants every time a building superintendent changes (which could be every year) or there is a change to the mortgage. Ms. Brown also pointed out that the tenant needs the information so he or she can identify the individual or entity to sue and needs the information about mortgage holders because that information may give the tenant more clout to pressure the landlord via the mortgage holder or servicer to make a repair that a landlord might otherwise ignore. Commissioner Pressler proposed a motion not to require service of a copy of the registration certificate if the information from the certificate is stated in the lease, but to require such service if the information is not in the lease or if the information is amended. Commissioner Bunn so moved, and Commissioner Burstein seconded the motion.

Ms. Brown noted that section LT:3-11 was redrafted in response to Mr. Kikis' concerns that municipalities were imposing additional registration requirements that were sometimes duplicative of the State's registration requirements. Commissioner Pressler asked why such duplicate registrations were not preempted. Mr. Cannel said Staff was attempting to do so in the draft but Commissioner Bunn stated that he was not certain Staff had been clear enough in this effort. Commissioners Pressler and Bunn suggested there should be complete preemption. Mr. Cannel explained that there are additional municipal registration requirements such as for rent control. Commissioner Pressler said that unless Staff or a commenter can think of anything other than rent control registration that DCA should not be monitoring, the statute should provide for complete preemption with the exception of rent control. Staff will redraft this section.

Mr. Legow expressed a concern about an issue not yet addressed in the statute: landlords having to pay interest to their tenants at a time later than the return or transfer of the initial security deposit because of the interest not being posted when a security deposit is returned or transferred. Commissioner Burstein asked Staff to draft language dealing with this problem for the December meeting. Mr. Cannel raised the issue of the need for a security deposit to be

turned over by the defaulting mortgagor at the time of a mortgage foreclosure, suggesting that the tenant should not be burdened by the transfer but that Staff was not entirely sure how to handle this in the statute. Commissioner Pressler said that it does not matter whether the new owner buys the property at a foreclosure or regular sale since the new owner is responsible for obtaining the security deposit either way and it should not be the tenant's problem, so the language does not need to be changed.

Mr. Rudd from SureDeposit expressed his view that no statutory cap on the cost of the premium for a surety bond should be required (LT:4-17 (b)(2)) since the Department of Banking and Insurance (DOBI) had to approve the premium. His firm had consistently imposed a rate of 17.5% rate for the past 10 years. Commissioner Pressler asked whether there was a schedule of rates. Mr. Rudd said that there was a schedule and an application to the DOBI is approved faster if the rate schedule is complied with, plus there is pressure inherent in the marketplace. Companies that have charged high premiums in the past have gone out of business. Since it appeared that companies could and had charged rates higher than those on the DOBI schedule, Commissioner Bunn requested more information on the extent to which the applications are reviewed by DOBI, and whether there is a basis on which one might be rejected. Commissioner Pressler recommended retaining the current language.

The final issue raised by Mr. Kikis was the penalty imposed by LT:4-17e., which he suggested was too draconian and should not apply to a landlord who deviated from the statute in a minor fashion or because of a technical error. Commissioner Burstein suggested the language should state that the landlord shall "substantially" comply. Commissioner Pressler noted that the real concern is that the landlord will extract more than one form of security and maybe the penalty should be limited to that sort of violation. Commissioner Bunn agreed, noting that an error in the font size or other technical mistake should not result in the same penalty. Ms. Brown said that a violation of LT:4-17c. (3)(C) should also incur the strict penalty. That section says the landlord is not permitted to sue a tenant for damage covered by a security deposit when the security deposit replacement fee is accepted as an alternative to a traditional security deposit. Mr. Rudd noted that no other states have restricted security deposits alternatives to one or the other option as we proposed here. Ms. Brown explained that Staff, though aware of the other statutes, had opted for simple statutory language that would not permit a combination of options as in other states.

Matt Shapiro said the tenants' association opposes replacement fees but not surety bonds. He suggested another alternative: payment of a security deposit in installments over a period of months, which could be done by agreement of the landlord and tenant. He noted that in a bad market, the landlord would likely agree to this option, but in a good market, he might not. Commissioner Burstein asked Staff to include the option of installment payments when redrafting.

Ms. Goldstein noted that in current LT:4-17c.(3)(C), rather than stating “may not commence a legal action . . .”, the language should read “may not obtain judgment . . .” Mr. Shapiro objected to LT 4-7c., which affords the landlord an opportunity to cure a typographical or clerical error in a notice of investment required by LT:4-6b. Ms. Brown said that Staff looked to several Appellate Division cases (one published) in which the court determined that as long as the landlord substantially complied with the statute, the tenant could not automatically apply a security deposit to rent but had to give the landlord the opportunity to correct typographical errors. Mr. Cannel noted that the drafted provision actually gives the tenant more protection than the current case law provides. Although he agreed with the concept, Commissioner Bunn suggested that the language is awkward and in need of revision. Mr. Shapiro noted that demonstrating whether an error is clerical or typographical is putting a burden on the tenant that is impossible to meet. Commissioner Pressler asked what should happen if the omission was willful. Commissioner Bunn agreed that Mr. Shapiro raised a good point that should be addressed. Commissioner Pressler also commented that a 30 day period to cure a technical violation was too long. Mr. Shapiro also stated that he was not certain whether the section applied to every notice requirement or just one when the ownership changes. Commissioner Pressler stated that “any information” was too broad.

Ms. Brown discussed concerns raised by David Gordon with regard to the Landlord Remedies Chapter. His first concern was with the use of the word “reasonable” in LT: 6-2.9(a)(1) dealing with distribution of proceeds. Commissioner Pressler noted that there is usually not a judicial approval of appraisal and sale fees and the word “reasonable” should remain. The Commission agreed. Mr. Gordon wished to include a remedy of attorneys’ fees for both LT:6-2.12 and LT:6-2.13, pertaining to willful conduct on the part of the tenant. The Commission determined that they would not be included. Mr. Gordon also wanted to include reference in LT:4-4 to the “rental premises or the real property containing the rental premises”. The Commission stated that the current reference to rental premises was not ambiguous and should remain as written. Mr. Gordon felt that LT:6-5.6a. should clarify that a landlord need not insure the tenant’s property, which the Commission felt was unnecessary.

Matt Shapiro objected to the updated “waste” provisions applying to residential premises. He said the original waste provisions are archaic, and since leases were given the status of enforceable contracts in *Marini* (1970), damaging property in violation of a lease clause should no longer be waste but just a violation of contract. Commissioner Pressler said that the Commission had eliminated treble damages, and the remaining language is very tenant protective, and the provisions should remain in the statute. Commissioner Bunn agreed, stating that the new “waste” provisions were well-crafted, moderate, tenant-protective proposals.

### **Miscellaneous**

The December Commission meeting is scheduled for December 17, 2009.