

MINUTES OF COMMISSION MEETING
February 17, 2011

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 O. Bunn and Commissioner Edward Kologi. Professor Bernard Bell of Rutgers University School of Law attended on behalf of Commissioner John J. Farmer, Jr. and Professor Ahmed I. Bulbulia of Seton Hall Law School attended on behalf of Commissioner Patrick Hobbs.

Also in attendance were: Rebecca Shore, Esq., on behalf of Legal Services of New Jersey, Anti-Predatory Lending Project, Sharon Rivenson-Mark, Esq., on behalf of NAELA and Phyllis Salowe-Kaye, Executive Director of New Jersey Citizen Action.

Minutes

The minutes of the January 20, 2011 meeting were approved unanimously. The April meeting was rescheduled to April 28th.

New Jersey Adult Guardianship and Protective Proceedings Jurisdiction Act

Marna Brown stated that no substantive changes had been made to this report since it was released in tentative form and that Staff now sought Commission release of the report in its final form with one change to the introduction to mention the eight additional states that had introduced bills in 2011 adopting this uniform law. Ms. Brown noted that she had received an email from the Delaware Valley Chapter of the Alzheimer's Association expressing thanks to the Commission for their work on this project. The final report, with the aforementioned amendment to the introduction, was released on the motion of Commissioner Bunn, seconded by Commissioner Kologi.

Uniform Partition of Heirs Property Act

Ms. Brown asked the Commission to release this report in final form with the change, suggested by commenters from the title insurance industry, reflecting the New Jersey Supreme Court cases regarding heir hunters and New Jersey's prohibition against their practices. Chairman Gagliardi remarked that the report recommends that no action be taken on this uniform law. The final report was released on the motion of Commissioner Bulbulia, seconded by Commissioner Bunn.

Elective Spousal Share

Alex Fineberg reported that he and John Cannel were invited to attend the Assembly Judiciary Committee meeting where they discussed the draft of the elective spousal share report. A number of individuals were in attendance at the meeting to discuss various aspects of family law.

Mr. Fineberg said that Staff revised this project in accordance with the direction provided by the Commission at the last meeting. The current draft includes a definition of a valid complaint and a revision to the intestacy statutes in an effort to preclude double recovery. The draft also includes references to the slayer statute as deemed appropriate by the Commission. As now drafted, anyone barred from inheriting before a valid complaint is filed will also be barred after the filing of a valid complaint. Also, based on the incorporation by reference of the slayer statute, a conviction for intentional homicide conclusively bars inheritance and, if there is no conviction, then a determination in a civil action by a preponderance of the evidence will likewise bar inheritance. The current draft explicitly refers to the slayer statute so that any changes in that statute will automatically be reflected in the revised statute.

Commissioner Bunn suggested that, at the end of the long paragraph on page 4, Staff change the language so that it says the court “may” rather than the court “will” because the court is not compelled to comply. Staff will make that change. The tentative report was released, subject to this amendment, on the motion of Professor Bulbulia, seconded by Commissioner Bunn.

Pejorative Terms

Ms. Brown advised the Commission that she is scheduled to meet on Feb 22nd with representatives from MHANJ and others in the mental health field. With the Commission’s permission, she hoped to follow the direction set out in the draft tentative Introduction submitted to the Commission and discuss at the meeting replacement language for each statutory section of the report with the understanding that the terms “mental incapacity” may not fit every category of provisions. The Commission approved Staff’s approach to the revised format to this earlier report. Ms. Brown stated she would report back to the Commission after her meeting and the Commission determined that it would be best to wait until after the meeting before release of the Introduction to the new report, even in tentative form.

UCC Article 9 Revisions

John Cannel explained that revisions to Article 9 of the Uniform Commercial Code were released by NCCUSL this summer. Some of the revisions were not of particular substantive importance, but changes regarding documentary support for the name of the debtor may be significant. Pursuant to the revised approach, the name used in a UCC filing is to be supported by a driver's license. Mr. Cannel noted that individuals sometimes use different names for different purposes, and that it was not clear how much support the project might have.

Commissioner Bunn stated that uniformity is important in this area because it is common for commercial transactions to cross state lines and said that he thought the Commission should approve the project, which was done on the motion of Commissioner Bunn, seconded by Commissioner Bell.

New Jersey Debt-Management Services Act

Laura Tharney explained that she hoped that the Commission would consider and resolve some of the outstanding issues regarding this project but would refrain from making any decision regarding fees since representatives of some of the commenters were unable to attend the meeting to be heard on that issue. Gail Hillebrand, of Consumer Union, sent a letter to Assemblyman Connors in December of 2010 recommending that New Jersey maintain the status quo of only non-profit debt-management in the State. That letter suggested that for-profit actors had a dismal record, that debt-settlement is not likely to be suitable for consumers in financial distress, that the industry is in a state of flux as a result of the FTC Rule change, and that if for-profit entities are to be allowed to conduct business in New Jersey, a strong fee cap should be tied to actual savings on completed settlements. David McMillin, of Legal Services, could not attend the meeting because of a scheduling conflict, but expressed concerns regarding the advance fee and fee cap provisions, indicating that these were a high priority for Legal Services. CareOne also wished to be heard on the fee issue, suggesting that a fee cap of 15% was not sustainable and advising that Staff check Illinois and Maine (two states with 15% fee caps) to see if any for-profit entities were providing services there. The one-page summary of services provided during debt-settlement was supplied in support of CareOne's position that debt-settlement is a more expensive service to provide than debt-management.

Ms. Tharney suggested that if the Commission wished to do so, it could resolve some of the issues and release the project as a tentative report for further comment. She explained that, in an effort to obtain additional information for the Commission, she had contacted the Bureau of Consumer Credit Protection in Maine. The representative with whom she spoke

indicated that several years ago, Maine decided to regulate the act, not the actor, and opened the state to the participation of for-profit entities. Maine imposes a fee cap of 15% but it is based on the amount of the debt at the time the debt is settled. If \$7,000 of debt is enrolled in a plan in Maine, and it grows to \$10,000 during the course of the plan, but is settled for \$5,000, the debt-settlement provider is permitted to take 15% of the \$5,000 “saved” rather than 15% of the \$2,000 difference between the amount initially enrolled and the amount paid. By the end of this year, Maine expects to have about six registered debt-settlement companies (they have a population of approximately 1.2 million people). As it was explained to Ms. Tharney, Maine already had (as New Jersey does) bad actor debt-settlement companies engaging in predatory business practices. By allowing for-profit entities to operate there legally, Maine offers consumers an option with the protection of the bond required to be posted.

Phyllis Salowe-Kaye asked whether action was being taken this evening, explaining that New Jersey Citizen Action considers this project an abomination and is glad that the Commission seems to be waiting before moving forward. Commissioner Bell explained that the Commission has had the opportunity to discuss the broad issues generally with David McMillin of Legal Services. He explained that the Commission considered that in New Jersey, currently, scofflaws essentially have a monopoly because there are no state-approved for-profit entities. He also explained that the Commission discussed whether the risk of spillover to people who do not need the services is worth it, and that it was the sense of the Commission that the matter should move forward.

Ms. Tharney added that she heard from the Maine representative that if entities register (in New Jersey, licensure would be required), the damage from bad actors can be limited because the state has a physical address, a bond, and other protections. Commissioner Bell suggested that Maine might be a good state to look at. Ms. Salowe-Kaye said that she did not know whether what the Commission was considering would make the situation any better and asked why the state did not just prosecute the bad actors. She expressed concern about that, with the seal of New Jersey, the proposed act would be identifying certain companies as “good guys”.

With regard to the 30 items listed for Commission consideration:

(a) No determination was made regarding the applicability of the Act to attorneys pending receipt of information from the State Bar, which Staff hopes to receive in late April (Items 1 and 6). Ms. Tharney clarified that in the current draft, attorneys are not subject to dual licensure but that attorneys engaging in a business that regularly provides debt-management services or with the principal purpose of providing debt-management services, the remainder of the provisions of the Act applies.

(b) The Commission did not object to the inclusion of certified counselors and certified debt specialists (Item 2), the modification of the definition of “plan” (Item 3), the removal of certain definitions (Item 4) or the inclusion of language authorizing the definition of other terms by regulation (Item 5).

(c) The Commission accepted the change from a registration scheme (as set forth in the UDMSA) to licensure to comport with New Jersey’s current statute (Item 7).

(d) The Commission did not object to the combining of UDMSA sections (Item 8) or the use of a two year license cycle (Item 9) but directed Staff to discuss with DOBI what is currently being done with the issue of “A” rated bonds (Items 10 and 16) since the Commission questioned whether it might be appropriate to establish a minimum standard.

(e) The Commission did not object to the incorporation of the fingerprint language from A1949 (Item 11).

(f) No objection was raised to including the bulk of the UDMSA provisions as default provisions in the statute (Item 12).

(g) With regard to the inclusion of a time period for a review and a determination by DOBI on licensing, Staff was directed to find out how quickly such matters proceed now (Item 13) and Staff will ask about the time period within which the administrator provides information after denying a license (Item 15). The Commission suggested that a deadline for action might be appropriate.

(h) The Commission did not object to permitting the use of a temporary license on renewal, but not on an initial application (Item 14) although Commissioner Bell expressed concerns about permitting the use of a temporary license generally.

(i) The Commission authorized the inclusion of additional consumer protection language in the prerequisites section of the Act (Items 17 and 18) and the effort to make the prerequisites for debt-management the same as those for debt-settlement (Item 19).

(j) No objection was raised to the change to the section pertaining to electronic communications (Item 20).

(k) No objection was raised to the language pertaining to a 10-day time period for disbursements (Item 21).

(l) As noted above, no determination was made about fees (Items 22 and 23).

(m) The Commission approved the modifications Staff made pursuant to the FTC Rule change (Item 24).

(n) No objection was made to the language pertaining to prohibited acts and practices (Item 25), the advertising and marketing information (Item 26) the powers of the administrator (Item 27), or the administrative remedies (Item 28).

(o) No determination was made regarding private enforcement (Item 29) or the language pertaining to a violation of the consumer protection statutes (Item 30).

Title 39 - Driving While Intoxicated

Commissioner Kologi conveyed Senator Scutari's interest in this project and Ms. Tharney said that interest in the project had also been shown by entities including MVC, MADD, NHTSA and some of New Jersey's ignition interlock providers.

Commissioner Gagliardi questioned how the Legislature or the law enforcement community would react and the effectiveness of the interlock system. Commissioner Kologi stated that there has always been a problem with enforcement in this area since families sometimes have multiple cars, and a person could have the ignition interlock device installed on one vehicle but simply not use that vehicle. He suggested that the interlock system is a punitive measure that costs an offender a lot of money. He also noted that he had never seen anyone penalized for violating the interlock. Ms. Tharney said that she has heard that offenders avoid the ignition interlock device by simply stating that they do not have a car.

Commissioner Kologi asked whether the draft proposes the requirement of an interlock immediately, rather than after a suspension period. Ms. Tharney explained that based on her review of the studies in this area, successful reductions in the amount of fatalities and injuries attributable to driving while intoxicated rely on increased use of ignition interlocks rather than on lengthy periods of "hard suspension" (during which the offender is not permitted to drive). Nationwide, there is approximately 10% interlock compliance. It appears that New Jersey may be in that same range. At this point, even MADD, an organization that had long supported hard suspensions, supports the increased use of interlocks rather than hard suspensions. Various entities are now of the view that by imposing lengthy hard suspensions all that is accomplished is teaching people that driving without a license can be almost cost free because the odds of being caught are small. Instead of being an effective tool, then, a punitive period of hard license suspension can backfire and deter people from ever reentering the licensing system in the state.

While it is not possible to stop everyone from drinking, it is at least possible to separate the drinking from the driving. Certain states are pursuing this course of action in an effort to improve safety. New Mexico is frequently held out as an example. When New Mexico's interlock compliance rate was 35%, it experienced a 32% reduction in alcohol-related crash injuries. Now, New Mexico is at approximately a 50% interlock compliance rate.

Ms. Tharney indicated that in an effort to obtain additional information in this area, she will be attending an ignition interlock institute jointly sponsored by NHTSA and MADD on March 9th and 10th.

Commissioner Kologi said that the way the law is now written, if you do not have access to a vehicle, there is no penalty. Ms. Tharney suggested that the draft includes other options, like an in-home monitoring device or a SCRAM (secure continuous remote alcohol monitoring) bracelet or anklet. Staff is continuing to review materials in this area to see what else is being recommended by the experts based on what works and what does not. Commissioner Kologi questioned whether entities like MADD deem the elimination of a suspension period acceptable and Mr. Cannel indicated that Ms. Tharney had been told that they did.

Commissioner Gagliardi suggested that the draft be revised to reflect the fact that the Commission had been asked to review this issue by various officials. Commissioner Kologi stated that the supplemental memorandum previously provided makes reference to the district court twice. Ms. Tharney explained that was a result of a transfer of the relevant language from another statute during drafting and indicated that Staff would make the appropriate correction.

With regard to the question of monitoring, Ms. Tharney explained that she had heard that there is no state entity clearly responsible for follow-up on interlock issues. No one reviews any documentation to make sure the interlock had been used as ordered by the court and while the devices provide a great deal of information, no one at the state looks at it. She said that she had heard that there is little monitoring of these matters when the period of suspension concludes.

Commissioner Kologi said that there are too many DWIs for the State to employ enough people to review the data. Mr. Cannel stated that the municipal courts are not equipped to handle it and the responsibility should rest with either probation or the MVC. Ms. Tharney explained that in New York, probation handles monitoring but in New York, as in a number of other states, certain DWI offenses are criminalized. Commissioner Kologi said that MVC should make evidence of installation one of the conditions of getting a license back. He pointed out that there is cooperation between MVC and the courts with other requirements, like IDRC, so clearly they can coordinate the division of responsibility. Commissioner Bell asked whether people driving drunk on a suspended license would not get caught anyway. Ms. Tharney said that statistics show a large number of them are not caught.

Commissioner Gagliardi suggested that between now and the next time this project is considered, Staff provide for the Commission information regarding how the draft is viewed by MVC and law enforcement. Ms. Tharney asked what was deemed a better deterrent – suspension or an interlock. Commissioner Kologi suggested that the interlock was not a deterrent because there were so many ways to get around it. Mr. Cannel said even if interlock is 100% effective, it does not seem as severe as the loss of a license.

Staff will continue to gather information and feedback and will provide that information to the Commission with the next draft.

Mortgage Recording

Mr. Cannel explained that New Jersey's current mortgage recording system is not working. The party that signs a mortgage satisfaction or discharge has no relation to the original owner. For some mortgages, the paper trails concerning transfers of the interest are adequate, for others they simply do not exist. Mr. Cannel suggested that a system that actually works should be developed, one that will provide a plaintiff who can speak for the holder of the note and identify a person to sign the satisfaction of the mortgage.

Ms. Rebecca Shore, of Legal Services of New Jersey stated that we can make the current system work. Mr. Cannel said that case law results under the current system are inconsistent. Ms. Shore explained that she and her team drafted a submission to the New Jersey Supreme Court regarding the problem of robo-signing. Based on their report, the Court took swift and tough enforcement action to put a stop to the practice. Legal Services represents a large number of homeowners who are victims of predatory lending. Legal Services feels strongly that tinkering with the public recording system, or creating a system involving private party recording, would be a disaster. Ms. Shore urged the Commission to consider more research before approving a project and said her team would be happy to provide a report explaining the problems with relying on a private system, like MERS, or a "straw" system, to record public documents.

Ms. Shore explained that MERS does not work and courts have found it to be unworkable and unlawful. Courts do not authorize MERS to foreclose. In addition, MERS is experiencing internal problems and is in the process of terminating officers. Ms. Shore stated that New Jersey needs a public recording system so that people know who owns what. She suggested that the current proposal addresses disputes between creditors but does not take into account homeowners and governments and the ability to enforce creditors' rights. She gave the example of a homeowner with a lien who thinks that the lien is recorded improperly. If the homeowner does not have, and cannot obtain, the name of the party who can remove the lien, the recording system is useless.

Mr. Cannel said that the issues raised can be addressed. Any system used would have to identify the real party in interest immediately and to anyone who asks. MERS does not do this now and it has brought foreclosure actions, even if it is not unauthorized to do so. The issues raised by Ms. Shore are valid issues and are the kinds of issues that Staff is focused on. For example, in a foreclosure situation, everyone needs to know who the true owner of

property is and be able to reach that party to negotiate. In addition, the UCC holder in due course principles should not be involved in this area.

Ms. Shore suggested that since the courts are finally cracking down and enforcing the recording statutes, now is not the time to interfere and tell courts to stop enforcing the recording statutes since bad behavior should not be encouraged. Privatizing the recording system runs the risk that if the system reaches a point where it is not economically viable, the private entity disappears, leaving problems for the transfer of title. She said that MERS was created to evade recording fees, which are used to maintain the land records and, as a result, are necessary. Ms. Shore asked that the Commission hold off on moving forward until at least the next meeting so that her team would have time to prepare and submit a written report.

Phyllis Salow-Kaye from New Jersey Citizen Action said that she is aware that this issue has raised its ugly head on the national level and that her group fully supports Ms. Shore and Legal Services' position. She explained that her group has a caseload in the thousands of cases and stressed the need to know who owns a mortgage at any given time. Mr. Cannel suggested that if a system could be implemented that requires recording, or says that the mortgage is invalid unless recorded, that would be an improvement.

Commissioner Gagliardi stated that it would be helpful if Legal Services wished to issue a written report and he also invited Ms. Shore and her team to take advantage of Mr. Cannel's invitation to work on changes. Ms. Shore replied, however, that all that is needed is enforcement of the current system. Mr. Cannel pointed out that there is no current requirement to record an assignment of mortgage and legislation is needed to address that because the courts cannot. Ms. Shore agreed that the mortgage follows the note and is an incident of the note; thus the right to enforce the note drives the right to foreclose on the mortgage. Commissioner Gagliardi recommended that Ms. Shore and her group discuss the issues with Mr. Cannel and expressed his appreciation for their input, which will inform the discussion.

Miscellaneous

Ms. Tharney advised that the Commission's ongoing monitoring of cases decided in the State revealed eight potential new projects and that Staff is preparing memoranda regarding those items for discussion at future meetings. The next meeting of the Commission is scheduled for March 17, 2011.