

## **MINUTES OF COMMISSION MEETING**

**September 15, 2011**

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, Grace C. Bertone, Esq. of Bertone Piccini LLP, attended on behalf of Commissioner Rayman Solomon, Professor Ahmed I. Bulbulia of Seton Hall Law School attended on behalf of Commissioner Patrick Hobbs and Professor Bernard Bell of Rutgers University School of Law attended on behalf of Commissioner John J. Farmer, Jr.

Also in attendance were Nicholas J. Kikis of the New Jersey Apartment Association; Donald M. Legow, Legow Management Company, LLC; and Jacy Lance, Coordinator, Advocacy Services, The ARC of New Jersey.

### **Minutes**

The minutes of the July 21, 2011 meeting were approved unanimously on motion by Professor Bulbulia, seconded by Professor Bell.

### **Landlord and Tenant Law**

Marna Brown said that in response to the Commission's October 2010 tentative report, so many comments had been received that Staff had prepared a revised tentative report. Most of the changes were rewording and clarifying language to make the provisions consistent with current landlord/tenant practice. There were, however, a few substantive changes requested by commenters that Ms. Brown wanted to highlight for the Commission.

First, the term "mobile home" is now defined for the entire title and the definition is consistent with the most recent comment by the New Jersey Manufactured Housing Association. Section 46A:4-7, relating to notifications of property in flood zones has been changed in accordance with the Commission's directions. Section 46A:4-4, pertaining to violations of chapter 4 and the truth-in-renting requirements, was modified. Current law provides for a fixed amount of money damages for a landlord's violation of the law, but recoverable only by the State. This was changed at the suggestion of Legal Services to provide that the tenant, and not the State, would have the right to recover money damages for a landlord violation. Legal Services wanted the change because they believed the State was not currently using the enforcement mechanism and it was more keeping with the intent of current law to permit tenant enforcement.

Professor Bell said that it made sense that both the State and the tenant should have the right to enforce the law. Ms. Brown responded that Staff would make this change.

In the first tentative report, section 46A:4-5 was changed to provide that a tenant could petition to strike a lease that including a provision violative of the legal rights of tenants. However, the AOC advised Staff that it thought the "petition to strike a lease" language permitted an action that was akin to a declaratory judgment action and therefore

might conflict with the Declaratory Judgment Act. The AOC asked for the deletion of that language. Accordingly, Staff deleted it but added language reinforcing a tenant's right to commence a declaratory judgment action on this issue.

Section 46A:5-2, pertaining to statements to be provided to senior citizen tenants in senior citizen housing projects, was changed in one regard. The New Jersey Chapter of NAOIP was concerned that with regard to condominiums and other planned real estate developments governed by boards or associations, one of the documents required to be provided by the board or association to senior citizen tenants is the public offering statement issued by the developer. NAOIP did not think that governing boards and associations would necessarily have the POS and that, even if they did, the POS may be irrelevant and stale. The statute further requires the governing board or body to provide the POS to those tenants who never received them which is difficult to determine. As a result, Staff modified the language of this provision to now state that the master deed, bylaws, etc. will be made available for inspection but not provided to the tenant. In addition, the governing board or body would be required to display a notice at the rental premises to advise the tenants that the master deed and bylaws, etc. may contain important guidelines of which the tenant should be aware.

Chapter 14 (general eviction) has been renumbered because, at the request of Legal Services, Staff added in the legislative findings section from the current Anti-Eviction Act as the new first section (new 46A:14-1). Section 46A:14-8, the provision regarding transfers of landlord tenant matters from Special Civil part to the Law Division of Superior court has been changed to add the Chancery Division as a Division of the court to which a case also may be transferred, if the requisites are met. Also added into this provision was a sentence requested by the New Jersey Manufactured Housing Association which permits a court to require that all rent due and not in dispute at the time of transfer must be provided prior to transfer.

Staff pointed out that section 46A:15-1 has been re-ordered to make that section easier to follow. Now all the grounds for which a notice to cease is required are together in subsection b., and all the grounds for which no notice to cease is required are together in subsection a. The new grounds for eviction already discussed by the Commission have been added.

Various changes to forms of notices set forth in Chapter 16, suggested by Judge Fast, have been incorporated. Most of these changes are clarifications of language reflecting practical concerns. Section 46A:16-5(e), however, was changed at the request of Legal Services. This is a "catch-all" provision when dealing with service of notices that cannot be served in the usual manner. This section has been changed to add the words "it is undisputed that" after the words "If a court finds" and before the words "a person receives a notice" . . .

In response to the request of the AOC, Staff has added provisions specifically addressing writs of possession – what they should contain, how they are issued and how they are executed. These new provisions appear in Chapter 17.

Finally, section 46A:33-2, which concerns the applicability of municipal rent control ordinances, was changed based on a bill that was recently passed by the Senate in June and just introduced into the Assembly. The bill clarifies that local rent control ordinances apply to dwelling units occupied by senior citizens and also lowers the age requirement for such housing from 62 to 55.

The Commission approved a revised tentative report on the motion of Professor Bell, which was seconded by Commissioner Burstein. The cut-off date for comments will be December 2, 2011, and a final report will be considered at the Commission's January 2012 meeting. Chairman Gagliardi asked the commenters present if there were any other comments they wished to make regarding only the changes to the landlord tenant report that Staff had just discussed. Nicholas Kikis responded that he would address his concerns in written comments.

### **Pejorative Terms**

Ms. Brown explained that an earlier final report on the replacement of pejorative terms had been issued by the Commission in 2008. However, since the recent enactment of P.L. 2010, c. 50, this project has been revived using P.L. 2010, c. 50 as a starting point. The project has the enthusiastic support of mental health organizations. Not too many changes were made from the 2008 report except that the language for replacing the pejorative terms has changed and the introduction has been revised to clarify that the Commission is expanding from the recent legislation to replace pejorative references to all who are mentally incapacitated.

Ms. Brown reminded the Commission that at the last meeting when this report was discussed, she had been asked by the Commission whether any of the proposed changes in this report would affect P.L. 2010, c. 50 in a substantive way. Since that meeting, she has learned that one of the proposed changes would alter section 54:5-84 in a substantive way in that the recent legislation had replaced the phrase "judicially adjudged a person of unsound mind" with the phrase "judicially adjudged a person in need of a guardian." Ms. Brown explained that commenters were concerned that this would be misleading, if not inaccurate, because there were many types of guardians in New Jersey and a guardian could be appointed even if a person was not of unsound mind. Staff had proposed that the replacement phrase be changed to "adjudicated mentally incapacitated." The Commission agreed with this proposed change.

Ms. Brown finally explained that she had discussed a number of provisions with Professor Bell the day before the meeting and that he had made suggestions to clarify language, mostly where gender-references had been eliminated or changed and the resulting language was confusing.

However, Professor Bell had raised issues pertaining to three other sections with more substantive changes. The first section is 37:1-9 pertaining to marriage license requirements. Professor Bell had asked why blood tests were conducted only for venereal diseases and not for other now common communicable diseases such as HIV. Staff soon learned that blood tests are no longer a requirement for a marriage license and recommended removal of this provision. However, Staff asked the Commission whether the provision should be deleted as part of this report because it is archaic or whether the provision should be the subject of a separate repealer. John Cannel explained that although Staff learned that blood tests are no longer done, it was unclear why or by whose decision. Chairman Gagliardi said that the provision should be deleted as part of this report and whether it should be taken out of other sections of the statutes could be the subject of a separate report after Staff does further research.

The second provision with a substantive issue is section 30:4-1 pertaining to state boards of trustees, and who may be appointed to them. Professor Bell raised the issue that this section requires at least two members of certain boards be women, which he suggested was unconstitutional. Staff did not know if the Commission should make a change at this stage. Mr. Cannel explained there are substantial requirements throughout the statutes that require women to be on boards and to do other things and that this might be a new project; the issue is more subtle than this one section. Commissioner Burstein suggested that this be made part of the comment to this section in anticipation that this issue is one that deserves a new project and further attention. Chairman Gagliardi agreed that the comment should recognize this as an issue.

Professor Bell had further advised that the word “child” appeared in other provisions and had not been replaced with the word “minor”. Ms. Brown explained that Staff had decided to leave the word “child” because these provisions were taken out of their entire context to address the pejorative term within them. Although the words “child” and “minor” may be interchangeable, Staff felt it might be confusing to take one section from a cluster of related sections and replace the word “child” only in the one section pertaining to the pejorative term while the remainder of the related provisions would continue to use that word. The Commission agreed. Ms. Brown requested release of the report as a final report. The report was released unanimously upon the motion of Professor Bell, seconded by Commissioner Burstein.

### **Books and Records**

Keith Ronan explained that he had received comments from Stuart Pachman, the author of Gann Law Books book on corporations, who shared the Commission’s concerns regarding the applicability of this report to foreign corporations. Mr. Pachman suggested deleting the second to last paragraph on page 6 of the tentative report, which expounded upon the concept of beneficial shareholders, but otherwise leaving the proposed amendment in its current state. Mr. Pachman explained that because one of the tenets of Title 14A as a whole is that a corporation should know with whom it must deal, *N.J.S. 14A:5-28* emphasizes not only beneficial shareholders but shareholders of record. After reviewing the section at issue, Staff found it immaterial to this project and explained that its elimination would not cause harm but would address Mr. Pachman’s concerns. The Commission approved Staff’s recommendation to delete the paragraph at issue. The Commission also approved the suggestion that Commissioner Bunn made at an earlier meeting, changing the word “its” to “the corporation’s”. Additionally, Professor Bell suggested that, in the second to the last paragraph on page 8, that the words, “inadvertently apply” should be changed to “incidentally apply”.

The Commission unanimously released the report in final form, subject to both of the above changes, on motion of Professor Bulbulia, seconded by Professor Bell.

### **Workers’ Compensation**

Mr. Ronan said that Staff’s ongoing search for cases in which the Court recommends that the Legislature review or modify statutory language recently brought a 2010 appellate case, *Quereshi v. Cintas Corp.*, 413 *N.J. Super.* 492 (App. Div. 2010) to

Staff's attention. That case addressed the issue of whether attorneys' fees are mandatory pursuant to *N.J.S.* 34:15-28 of the workers compensation statute. Subsection 28.1 concerns penalties for employers that unreasonably delay payment of workers compensation benefits. The statute provides that an employer shall be liable to the petitioner for an additional amount of 25% of the amount then due plus any reasonable legal fees. The court reasoned that the use of the word shall constitutes mandatory action and the use of plus subsequent to shall means increased by, thereby mandating attorneys' fees under Subsection 28.1. The issue addressed by the court is whether the fees are subject to the 20% "fee cap" found in *N.J.S.* 34:15-64a. After considering the statutory language and the legislative history, the Court determined that the legislature did not intend the fee cap to apply. Staff proposed that the statute be revised to incorporate the Court's determination into the statute.

Laura Tharney asked whether the Commission wished to take this up as a project. Professor Bell stated that he thought this was a good project. He explained that he did not find the language of the statute confusing, but since the Appellate Division felt otherwise, it makes sense to clarify the statute so that there is no uncertainty. Professor Bell said that if the Commission decided to go forward with the project, he had a question about particular language in the proposal, but would refrain from discussing that issue pending Commission approval of the project. Commissioner Burstein asked about the interplay between the statutory provisions in question and the Court Rule pertaining to attorneys' fees. Ms. Tharney said that Staff had not yet considered that issue, but would do so if the Commission elected to pursue this project.

Ms. Bertone agreed with Professor Bell, that while she did not think the current statute was particularly confusing, it made sense to clarify the language if there is any controversy. Chairman Gagliardi agreed with Commissioner Burstein and suggested that perhaps the Supreme Court's Civil Rules committee might have a position on this, or wish to address it. He suggested that before beginning this project, Staff check with the Civil Rules Committee to see if they are addressing this issue.

## **NJEVHPA**

Benjamin Hochberg said that the Commissioners' suggestions from the last meeting had been incorporated into a draft report. The revised draft report had then been sent to all prior commenters with a November 15<sup>th</sup> comment deadline date. Ms. Tharney mentioned and distributed a recent newspaper article which indicated that New Jersey does not have the staffing to handle a statewide crisis. Professor Bell asked whether the report had been sent to any trial lawyers associations for comment. Ms. Tharney stated that Staff had primarily focused on individuals and groups in the health care field, but would be happy to broaden the group of commenters.

## **Equine Act**

Mr. Hochberg explained that Staff's ongoing search for cases in which the Court recommends that the Legislature review or modify statutory language recently brought a 2010 New Jersey Supreme Court case to Staff's attention. In *Hubner v. Spring Valley Equestrian Center*, 203 N.J. 184 (2010), the New Jersey Supreme Court looked at the

Equine Act and the level of protection afforded to the operators of equine activities. The Equine Act grants civil liability protection to operators of equine activities, but specifies certain exceptions. The Appellate Division interpreted the statutory exceptions to the protection from liability broadly, while the Supreme Court, after reviewing the statutory provisions of the Roller Rink Act and the Ski Act, determined that imposing liability was not appropriate.

Ms. Tharney explained that in an effort to address what the Supreme Court characterized as a “latent ambiguity” in the statute, Staff had made changes to the structure of the statute, rather than its substance. These structural changes condensed certain sections of the act and made the overall format more analogous to the Ski Act. Ms. Tharney asked whether the Commission wished to take up this project and, if so, whether the direction taken by Staff was acceptable to the Commission. Professor Bell said that taking up the project makes sense and suggested that, as a part of the research in this area, Staff look at best practices concerning equine activities. These best practices would consider the minimum standards used by stables and other similar horse-riding activities, and will be used by Staff to understand standard safety practices. Professor Bell suggested that, if done well, the Commission’s report would complement the work done by the Supreme Court, since the Court, in rendering its opinion, cannot undertake that sort of detailed research possible for the Commission.

Mr. Cannel explained compiling a list of safety practices is not necessarily an easy or noncontroversial approach, but that such an approach had been incorporated in the Roller Rink Act. Chairman Gagliardi suggested that there are associations that are in a position to assist Staff on this project and that it was appropriate for the Commission to attempt to improve the law in this area.

### **Collateral Consequences of Conviction**

Alex Fineberg said that this project had broadened since its introduction at the April meeting, and now addressed the collateral consequences of convictions generally. With regard to the impetus behind this project, the forfeiture of public office, *In re D.H.*, 204 *N.J.* 7 (2010), rendered expungement an ineffective tool for obtaining relief from the permanent bar on public employment mandated by *N.J.S.* 2C:51-2. A rare executive pardon would be necessary.

Mr. Fineberg noted that collateral consequences of criminal convictions had become a subject of national concern. Pursuant to an act of Congress, the Criminal Justice Section of the American Bar association had compiled a list of collateral sanctions in every state and territory. The Uniform Law Commissioners had also released the Uniform Collateral Consequences of Conviction Act, suggesting procedures by which a convict could obtain provisional and permanent relief. The U.S. Supreme Court had ruled, in *Padilla v. Kentucky*, 130 *S. Ct.* 1473, 1483 (2010), that an attorney’s failure to inform a defendant of the collateral consequence of deportation for pleading guilty to particular drug conviction constituted ineffective assistance of counsel.

Mr. Fineberg said that the Commission would be fulfilling multiple objectives by proceeding with this project. First, compiling and organizing data on collateral sanctions would provide a useful resource to defendants contemplating a guilty plea. Second, Staff could investigate whether the Uniform Collateral Consequences of Conviction Act

provides an appropriate method of relief to aid convicts' reentry into society. Third, Staff might identify problem areas, such as the myriad disqualifications attendant convictions for crimes of "moral turpitude".

Mr. Cannel stated that there are many statutory provisions that forbid convicts from receiving licenses. Other statutes require affirmative findings of good moral character. Due to differing standards of criminality, this project will be difficult but important. Mr. Fineberg said that the mere act of compiling collateral consequences might serve a worthwhile purpose even before any enactment of a final project since it would provide defense attorneys with a database of criminal sanctions to consult, so as to better inform their clients. Professor Bell said that he would also not be surprised if, during the course of this project, Staff found some outdated, draconian statutes that the Commission might find appropriate for revision.

### **Recording of Mortgage Assignments**

Mr. Cannel stated that the primary reason he put this project on the agenda was to attract attention to the project and encourage comments from banks since the goal of this project is to create a new, simple, system for recording the assignment of mortgages. Chairman Gagliardi asked whether Staff wished to affirmatively reach out to banking associations and Mr. Cannel explained that he had distributed the report but had not received any comments to this time. Mr. Cannel said that if the Commission had any suggestions for distribution that he had not already pursued, he would be happy to have additional recipients. If the banking industry deems this project impractical, it would certainly be helpful to know that. Chairman Gagliardi stated that the approach taken by Mr. Cannel seemed to be a logical one.

Commissioner Burstein referred Staff to the recent court decisions requiring proof that the plaintiff in a foreclosure action is actually the holder of the mortgage and requiring that the notice to a mortgagor is specific. He asked whether this project should be broadened to encompass the manner in which foreclosures are handled. Mr. Cannel said that additional input would be needed before expanding the project in that manner, since doing so would be a much different and larger project, and Staff was really trying to focus on changing the current system so that the real holder of mortgage can be identified moving forward in an effort to eliminate some of the kinds of problems that are arising during foreclosure actions. Commissioner Burstein suggested that Staff focus on the narrower current issue and then, when additional research has been done and comments received, perhaps Staff could address some of the issues raised in recent court decisions. Mr. Cannel said that he would continue to pursue more information from banks and would broaden the group from which he was seeking comments. Ms. Tharney suggested that since no comments have been received, perhaps the Department of Banking and Insurance could recommend some additional contacts to him.

### **Miscellaneous**

Ms. Tharney said that Commission extern Chris Cavaiola will be making a trip to California to attend an international interlock symposium on the Commission's behalf.

The goal is to gather as much information as he can and provide it to Ms. Tharney upon his return.

With regard to the DMSANJ project, Ms. Tharney explained that the Commission asked Staff to obtain information from Illinois since that state had been used as a model for many of the consumer-protective provisions found in the Commission's draft statute. Ms. Tharney said that she was recently in Illinois and individuals from the Department of Financial and Professional Regulation graciously agreed to meet with her. During the nearly two hour meeting, she had the opportunity to discuss the statutory and regulatory scheme in Illinois and to obtain information regarding the development and implementation of their statute and any recommendations that they had for the state of New Jersey based on their experiences. Ms. Tharney said that the meeting was very helpful and that she had made some changes to the DMSA draft as a result. She noted that an area of Commission concern had been the fee cap imposed by Illinois on for-profit providers and she explained that based on the information she received, Illinois does not yet have any for-profit providers licensed in the state. Ms. Tharney explained that the Illinois does have an interesting feature that Staff had not previously focused on, a consumer protection fund set up to provide restitution to consumers injured by a debt-management provider in the absence of other available relief. Ms. Tharney explained that she had incorporated the fund provision into Staff's draft and wanted to ask the Commission for comment and approval before releasing the report for comment. She explained that the money for the fund comes from payments required to be made by providers found to be operating without a license in Illinois. The Commission approved the inclusion of the fund provision in the draft to be circulated for comment.

Mr. Cannel mentioned that the Trade Secrets Bill was up for a Senate Commerce Committee vote next Monday and that on Wednesday he was scheduled to appear before the Governor's Commission to Remove Red Tape.

The Commission was reminded that next month's meeting would again be in the morning, after which the meeting time would switch back to the 4:30 p.m. time slot for the remainder of the year.