

## **MINUTES OF COMMISSION MEETING**

**February 17, 2012**

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

Also in attendance was Peter J. Wolfson, Esq. of Porzio Bromberg & Newman P.C.

### **Minutes**

The Minutes of the January 19th meeting were approved on motion of Commissioner Burstein, seconded by Commissioner Bunn, subject to the addition of language to reflect that the minutes of the January meeting had been approved by the Commission.

### **Property**

John Cannel said that the scope of the project includes a revision of the basic law of property. He explained that it included changes to the older fundamental property concepts, not the new sections dealing with subjects like common interest ownership. The approach for this project involves two steps. The first is to assess whether the concepts included in the current draft are, in fact, proper statements of the law or whether there are subjects that need to be added or revised. The second is to ascertain which sections can be removed as anachronistic.

Commissioner Burstein said that one of his partners had suggested that the person in charge of leasing at their firm would be a good person to consult regarding this project. Mr. Cannel will contact him. Chairman Gagliardi then introduced Peter Wolfson, the head of the land use and real estate practice group at his firm. Mr. Wolfson explained that he has a bias against arcane and out-of-date concepts and that, in his 30 years of practice, the ancient property concepts still included in the law have not been relevant. He said that the most important issue is an orderly, objective system of land recording. Requiring deed transfers to be recorded is prudent. Mr. Wolfson suggested that the short form deed provision is unwise since it might encourage deed transfers that are not recorded.

Mr. Wolfson supports a provision in the law that includes all appurtenances on the land in a sale of real property since that is the intention of the parties in almost every transaction. He also said that the changes to 46:4-5 to recognize civil unions is appropriate. Mr. Wolfson described subsection i. as a codification of the common law rule which assumes that, when a transfer of property is to a husband and wife and a third party, the husband and wife receive a one-half interest and the third party receives the other one-half share. He suggested clarifying that one-half share received by the husband and wife is to be held as a tenancy by the entirety assuming that the requirements are met.

Mr. Wolfson said that section 46A:4-6b is ambiguous as to the distinction between a bargain and sale deed and a quitclaim deed. Section 46:A-5-2, which concerns deeds of confirmation, applies only to a narrow range of situations in which a corporation or association conveys an interest in real property but the deed conveying the interest contains errors and a corrective deed is required, but the business entity is no longer in existence. He explained that while the statute currently requires a summary action in the Superior Court, it might be better not to require a judicial process, especially if the correction is ministerial. Mr. Wolfson said that he had other recommendations that he would provide to Staff in writing.

Mr. Cannel asked Mr. Wolfson whether a change should be made to the common law rule regarding joint tenancies which currently holds that if one joint tenant transfers an interest to a third party, that third party holds as a tenant in common with the remaining person. He suggested that this is not anybody's expectation. Mr. Wolfson recommended retaining the common law rule; adding that, in his years of practice, he has never dealt with such a situation. Chairman Gagliardi thanked Mr. Wolfson for his input and said that the Commission would await further revisions from Staff.

### **Special Civil Part Attorneys' Fees**

Keith Ronan recommended a project modifying *N.J.S. 22A:2-42* (attorney's fees in Special Civil Part actions) to reflect the Appellate Division interpretation of the statute in *Chase Bank USA, N.A. v. Staffenberg*, 419 *N.J. Super.* 386 (App. Div. 2011). The Court held that attorney's fees are mandatory under *Quereshi v. Cintas Corp.*, 413 *N.J. Super.* 492 (App. Div. 2010). The Court also held that that *N.J.S. 17:16C-42(d)* and *N.J.S. 17:3B-40* do not preclude recovery of attorney's fees under *N.J.S. 22A:2-42* when a plaintiff is represented by in-house counsel. The Court described the limited attorney's fees available pursuant to *N.J.S. 22A:2-42* as akin to a tax cost of suit, meant to shift a nominal portion of the fees to prevailing party. Mr. Ronan asked for Commission guidance on the draft language.

Commissioner Bunn said that “nominal taxed costs” is unclear. Chairman Gagliardi asked whether that language was taken from another statute and Mr. Ronan said that he had replicated the language from the decision. Commissioner Bunn expressed his concern that it would not be beneficial to codify language that is difficult to understand. Ms. Tharney asked whether, as an initial matter, this project presents an issue worth addressing, and if so, Staff will formulate suitable language. Commissioner Bunn said that he thinks the project is worth pursuing because the Appellate Division decision will create litigation. Chairman Gagliardi said that if the Commission modifies the statute, it should replicate the language from another attorney’s fees statute. Commissioner Burstein recommended removing the phrase “shall constitute . . .” and replacing it with “award attorney’s fees under section . . .” Chairman Gagliardi said unless there are any objections to undertaking this project, Staff should consider the language that Commissioner Burstein suggested and recommend a modification to the statute.

Commissioner Burstein said that Staff should include language in the comments to explain Staff’s decision not to use the exact language found in the Court opinion. Mr. Ronan said that language was described by the Court as a “taxed cost” because the jurisdictional limit in Special Civil Part is \$15,000. According to the statutory calculation of attorney’s fees, the maximum amount of attorney’s fees one could recover is \$315. The statute is not intended to reimburse the actual attorney’s fees. Commissioner Bunn said this is not clear from the language the court used, so the language needs to be clearer. Commissioner Bell suggested that Staff develop a synonym for presumed attorney’s fees. Commissioner Bunn asked whether, if parties are entitled to a presumed attorney fee, a pro se should likewise be entitled to a presumed attorney fee. Chairman Gagliardi asked Staff to look at the statutory language and the Court Rules pertaining to a petition to the Supreme Court and use that language concerning costs as a model.

### **Statute of Limitations in DEP Actions**

Benjamin Hochberg said that Staff’s ongoing monitoring of case law brought the case of *New Jersey Department of Environmental Protection v. Exxon Mobil Corp.*, 420 *N. J. Super.* 395 (2011), to Staff’s attention. In that case, the Appellate Division found an ambiguity in *N.J.S.* 58:10B-17.1, which pertains to the limitations period for environmental actions initiated by the State. The Department of Environmental Protection (“DEP”) filed common law claims of nuisance, damage of natural resource, and trespass against Exxon Mobil Corp. (“Exxon”) and included a claim under the Spill Act. DEP subsequently moved to amend its pleading to include a claim of strict liability. Exxon opposed the motion, claiming the statute of limitations prevented such a modification. *N.J.S.* 58:10B-17.1 limits the time within which claims may be brought by

the State pursuant to a listing of current environmental statutes, which are explicitly listed therein, and it includes language referring to “*any other law or regulation by which state can compel person to remediate contaminated property.*” The Appellate Division determined that that *N.J.S. 58:10B-17.1* included actions for strict liability.

Commissioner Bunn asked whether this was because of the phrase “other law or regulation” and Mr. Hochberg said yes. Commissioner Bunn asked whether the Court’s holding applies to claims for money damages. Mr. Hochberg said that the holding refers only to strict liability.

Chairman Gagliardi asked whether the Commission would be inclined to engage in this project when the case on which it is based is not over since it could still go back to the Appellate Division or to Supreme Court. Commissioner Bunn said that in a garden variety case, he would not suggest taking up the project, but environmental cases can go on for decades. Chairman Gagliardi said that if the Commission is going to take up the project, it should bring clarity to the statute. Commissioner Bunn asked whether the Appellate Division had asked the Legislature to address this issue and Mr. Hochberg said no. Chairman Gagliardi said that under these circumstances, the Commission is free to revise and is not bound by any limitations inherent in the Court’s determination. Ms. Tharney said that the Commission can indicate that the drafting was done in response to the case without suggesting that the drafting is an attempt to codify the Court’s decision. Chairman Gagliardi said that the goal will be to clarify the issue generally.

Mr. Hochberg asked whether the revised statute of limitations should be broad enough to cover additional common law claims. Commissioner Burstein said that it should be broader than the opinion, but questioned the application of the statute of limitations to private contractual matters. He raised the issue of real estate transactions in which the contract of sale includes a reference to potential environmental contamination. Commissioner Burstein asked what statute of limitations would apply if, years after the real estate transaction, there is a claim by a successor in the chain of title that there has been contamination for a lengthy period of time.

Commissioner Bunn said there may be some guidance available in the statutes of limitations contained in other environmental statutes in New Jersey, and that the litigation pursuant to the Spill Act for private rights of actions may be of some assistance. He said that other developments in law might suggest useful terminology. Commissioner Bell said that it was potentially confusing to talk about this issue as pertaining to a statute of limitations since it is really based on an extension of a limitations provision.

## **Effect of Equitable Distribution on Mortgages Secured by the Marital Residence**

Alex Fineberg introduced a project for Commission consideration and explained that the problem Staff sought to solve was succinctly stated in *Eaton v. Grau*, 368 N.J. Super. 215, 221 (App. Div. 2004). In that case, a couple's marital residence was transferred to the husband during their divorce as a part of the equitable distribution of their marital property. Although the wife retained no property interest in the home, her name remained on the mortgage. Thus, although subsequent foreclosure proceedings should have affected only the husband, who owned the home, the wife's credit rating was adversely affected.

Mr. Fineberg said that if the Commission undertook a project in this area, any solution would have to be drawn so as not to unfairly prejudice the mortgagee's interests. Another obstacle is that any legislative solution that does not operate prospectively only would likely violate the United States Constitution, which forbids any state from passing a law "impairing the obligation of contracts". *U.S. Const.*, art. I, § 10, cl. 1. Commissioner Bell explained, however, that the level of judicial scrutiny in such cases was relatively low. As a practical matter, Staff is also concerned about removing an incentive to make mortgage payments as mandated by alimony orders.

Mr. Fineberg offered options for Commission consideration, including joining mortgagees in equitable distribution hearings or stipulating that, upon divorce, a non-resident spouse is to be treated as deceased. Commissioner Bertone noted that, technically, one spouse's transfer of the residence to the other, even if pursuant to an order of equitable distribution, triggers the acceleration clause found in most mortgages, requiring immediate payment to the lender. She explained that banks often do not pursue this right, but Commissioner Bunn suggested that a change to the statute might affect the banks' practice of forbearance.

Commissioner Bunn said that Commission action would likely be opposed by lenders. Commissioner Bell suggested the inclusion of a sunset provision or other language limiting the law's scope to periods when certain market conditions existed. Mr. Fineberg said that the statute could be drafted merely to supply Family Part judges with an option, rather than mandating that the non-resident's name be removed from the mortgage in every instance. Chairman Gagliardi acknowledged that deficiency actions against residential mortgagors were rare, but said that banks would not be pleased with a legislative change limiting their options for recovery. He said that this project would not be a wise investment of the Commission's resources. The Commission agreed and the project was not approved.

## **Uniform Certificate of Title for Vessels Act**

Laura Tharney explained that Staff was told that this was an important project, and Chairman Gagliardi noted that the Commission had a statutory obligation to consider acts released by the Uniform Law Commission.

Ms. Tharney said that all of the states and territories of the United States have certificate of title laws applicable to motor vehicles, but only 2/3 of states and territories have certificate of title laws for vessels. The existing statutes are inconsistent. They do not cover the same types of vessels. In addition, some statutes apply based on where the vessel is principally used, others on where the vessel is principally moored and still others on where the owner resides. The current patchwork of laws makes oversight and enforcement difficult for the U.S. Coast Guard and makes it easy to “wash” the title to a stolen or damaged vessel.

UCOTVA will: qualify as a state titling law approved of by the U.S. Coast Guard; facilitate the transfer of ownership; deter and impede the theft of vessels; accommodate existing financing arrangements for vessels; and protect consumers as a result of the Act’s “branding” initiative. “Branding” refers to the fact that the Act requires that if the hull of a vessel is damaged, even if it is subsequently repaired, the title will always reflect that it was damaged and that its seaworthiness might continue to be affected.

Ms. Tharney said that although she had received preliminary information from one commenter, she needed more input on the project to determine its significance. She asked if the Commission would approve proceeding with the project so that she could obtain additional information. Commissioner Bunn and Commissioner Bell asked how the law differed from current New Jersey law. Ms. Tharney said that the proposed act provides much more detail than current law, and applies to different vessels. In addition, New Jersey law is not based on the place of use of the vessel, but on the residence of the owner. Commissioner Burstein asked whether there are Coast Guard regulations that need to be examined. Ms. Tharney said that there are applicable federal regulations that she still needs to review and that she does not yet know the exact role of the Coast Guard. The Commission consensus was that Ms. Tharney should explore this issue and proceed further with the project.

## **Mortgage Assignment**

John Cannel said that he met with Michael Affuso of the New Jersey Bankers’ Association regarding this project and that so far, there are no major objections to the current proposal. The latest draft moved the responsibility for recording to the state rather

than to the counties. All commenters so far prefer this. Mr. Cannel explained that he needed to meet and discuss the relevant issues with MERS, large banks, and mortgage servicers.

Commissioner Bell asked about section 4b., on page 7, which states that a mortgagor may rely on the authority of a mortgage servicer whose appointment is recorded and asked how the mortgagor would know that. Mr. Cannel said that we hold everybody to know what's been recorded. Commissioner Bell asked whether it was an implicit obligation to check and Mr. Cannel said that when the servicer changes, the borrower should receive a termination letter from the old servicer and an introductory letter from the new one. Commissioner Bell asked whether someone should have an obligation to send the borrower evidence of recording and Mr. Cannel said he would review the RESPA requirements to see if they solve the problem. He said that he is concerned that there is currently no connection between the record holder of the mortgage and the party declaring it satisfied. Commissioner Burstein said that there is an existing statute which indicates that when the mortgagor is paying off a mortgage, the mortgagee must notify the county clerks. He asked whether that section would have to be revised. Mr. Cannel said that the Commission dealt with that issue some time ago but that rather than relying on knowing who the mortgagee is, it may be appropriate to include the Commission's earlier proposal in this project.

### **Annual Report 2011**

Chairman Gagliardi proposed elimination of the last paragraph on the bottom of page 35 and shortening the whole section. The annual report will be on the agenda for March.

### **Miscellaneous**

Mr. Cannel advised that the revised LLC bill is moving in the Legislature. Ms. Tharney said that Staff now has a contact at the New Jersey State Library, who will work with Staff to make sure that when a bill is enacted in response to a Commission report, the Commission report will be included in the legislative history of the bill.

Chairman Gagliardi reminded everyone that the March meeting would be at 4:30 p.m. and that all meetings would be at 4:30 p.m. until November. The meeting was adjourned on a motion by Commissioner Bunn seconded by Commissioner Bell.