

## **MINUTES OF COMMISSION MEETING**

**July 15, 2010**

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. and Commissioner Andrew Bunn. Grace C. Bertone, Esq. of McElroy, Deutsch, Mulvaney & Carpenter, 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 Donald M. Legow, Esq. of Legow Management, LLC, Bruce Gudin, Esq. of Levy, Ehrlich & Petriello, and Conor G. Fennessy of the New Jersey Apartment Association.

### **Minutes**

The Minutes of the June 17, 2010, meeting were approved on motion of Commissioner Bulbulia, seconded by Commissioner Bunn, with the addition of an inadvertently omitted reference to a vote.

### **Title 39**

Commissioner Gagliardi asked Ms. Tharney about the recent New Jersey Supreme Court decision regarding the revocation of a driver's license and whether that decision should be included in the Title 39 final report. Ms. Tharney said that she thought it would be appropriate for inclusion and, for September, she will prepare a memorandum including a discussion of the opinion, some draft statutory language and a recommendation for Commission action.

### **Elective spousal share**

Chairman Gagliardi said that the issue brought to Staff's attention by the Court's decision in *Kay v. Kay*, 200 N.J. 551 (2010), is the sort of project that the Commission generally undertakes and the Commission authorized work on the project.

Mr. Fineberg described possible approaches the Commission might employ to close the "black hole" between equitable distribution and the elective spousal share: 1) limit disqualification under the elective spousal share statute to final judgments of divorce, 2) stipulate that a cause of action for divorce does not abate at death, or 3) grant judicial authority to oversee a post-mortem equitable distribution of property.

With regard to the third option, Commissioner Bunn expressed concern over the use of judicial resources to adjudicate property disputes between surviving spouses and

the estates of decedents. Mr. Fineberg explained that, due to the lack of a statutory remedy, this was done in cases such as *Kay and Carr v. Carr*, 120, *N.J.* 336 (1990), through the use of constructive trusts. However, in the absence of cases involving the diversion of marital property, courts sometimes offered litigants no remedy.

Commissioner Bunn said that although revising the elective spousal share statute alone may be the simplest approach, it might not be the best. Mr. Fineberg agreed, noting that the elective spousal share merely awards the surviving spouse one-third of the augmented estate, instead of evaluating all of the equitable criteria under *N.J.S.* 2A:34-23.1. In contrast, the partnership theory of marriage suggests that the spouse is entitled to—and is the equitable owner of—roughly half of the marital property.

Mr. Cannel observed that, in certain circumstances, either an award of equitable distribution or the elective spousal share could be greater. Commissioner Bertone agreed, and explained that this was partly due to the convoluted definition of “augmented estate” under *N.J.S.* 3B:8-1. She suggested that, although it may be desirable to revise the probate code as well, Staff should begin by focusing on the equitable distribution statute. Commissioner Bertone made a motion directing Staff to proceed as agreed by the Commission, Commissioner Bunn seconded, and the motion was approved.

#### **Extension of service facilities**

Chairman Gagliardi reopened the discussion of the memorandum proposing a revision to *N.J.S.* 48:2-27, a statute concerning the authority of the BPU with regard to extensions of service. The Commission previously considered and commented on the proposal at the May meeting. Chairman Gagliardi pointed out that the options for the section included: leaving it as is; making the one word change; or, an alternate revision, which included additional language making a more extensive change. He then asked the Commission for any comments regarding the proposed revision and the options presented. Commissioner Bell concurred that the language of the revision could be left as the single word change to the statute.

Commissioner Bunn moved to approve the memorandum for presentation as a final report. Commissioner Bell seconded the motion. The Commission unanimously approved the motion and Chairman Gagliardi directed Staff to prepare the revision as a final report.

#### **Payment of tax pending appeal**

Alex Fineberg reported that Staff had, on Commissioner Kologi’s recommendation, consulted with Saul A. Wolfe, Tax Counsel for the League of

Municipalities, and was now reasonably convinced that no New Jersey municipality currently granted a discount for the prepayment of property taxes.

Mr. Fineberg also informed the Commission of Assembly Bill 120. Although the bill ostensibly only clarifies that payment due dates are satisfied by a timely postmark rather than a timely delivery, the synopsis reads, “Clarifies procedure for the determination of discount for prepayment and interest for delinquency on property taxes and municipal charges.” Mr. Cannel suggested that the bill was merely intended to alter the procedure for property tax collection in general. Commissioner Bunn agreed that this was likely, but directed Staff to confirm by consulting with Assemblyman Biondi, the bill’s sponsor, and the Office of Legislative Services (OLS). The issue was tabled until the September meeting.

#### **Powers of commissioner**

John Cannel explained that the Department of Community Affairs (DCA) had approached Staff regarding the correction of a typographical error that erroneously raised the penalty for failure to comply with a subpoena issued by the Commissioner of DCA from \$100 to \$100,000. OLS, during discussions with Mr. Cannel, explained that the issue could not now be handled as a clerical correction as a result of the number of years that has passed since the error. The Commission unanimously approved the one-page report.

#### **Landlord tenant**

Marna Brown raised four issues in the Eviction Chapter for Commission consideration. At Connie Pascale’s request, his email comments were distributed to the Commission because he was not able to attend the meeting. Ms. Brown explained that many of his suggestions were incorporated in the most recent draft.

The first issue for consideration pertained to the new ground for eviction, section LT:5.2-4. That section was revised as a result of the working session to eliminate inclusion of current sections 33:1-54 and 46:8-8, despite the Commission’s initial suggestion that those sections remain in the draft. Ms. Brown asked which of the three options contained in the draft the Commission preferred for new subsection b. Commissioner Bell recommended option 3, with the addition of the time limitations in option 2, but pointed out that option 3, as drafted, did not contain a reference to “material facts”, which Mr. Cannel acknowledged as an oversight. Bruce Gudin said that option 3 allows the landlord great leeway because it leaves as an open question what the landlord’s consistent policy is. Mr. Cannel agreed but said that, for example, a landlord could have a long-standing policy of declining to rent to students that the landlord would be able to prove in court in the event that a tenant was, unbeknownst to the landlord, a

student at the time the lease commenced. Mr. Gudín said that he would prefer a blend of options 1 and 2. Mr. Cannel said that the strength of option 1 is that it prevents a landlord from using illegal questions as the basis for a lease denial. It was suggested that the two issues addressed by option 1 are deemed by landlords to be the two most significant areas of concern about which they may rightfully question a tenant. Commissioner Bell said, with regard to creditworthiness, that a landlord will have specific policies which may not cover false identity. The court will ultimately decide whether a landlord has asked a question on an application that may be unlawful.

Commissioner Bunn asked whether a landlord could ask about sexual orientation in an application. Mr. Cannel replied that options 2 and 3 would allow that question but the Law Against Discrimination would not. Commissioner Bunn said the draft should make clear that the questions must be lawful. Mr. Cannel and Commissioner Bertone agreed that the insertion of the word “lawful” before the word “policy” should resolve this issue. Commissioner Bell summarized that the Commission directed Staff to redraft option 3 to add “omit material facts” and insert the word “lawful” before the word “policy”, while also adding the time limitations found in option 2. It was acknowledged that this leaves open the question of a false identity that does not affect creditworthiness; an example of which might be someone hiding from an abusive spouse.

Mr. Gudín questioned limiting the time to no later than one year after receipt of the application. Doing so would not cover the situation of a tenant who maintains an apartment for one year and then installs his child as the tenant, having waited one year to defraud the landlord while satisfying the time limitation of the statute. Commissioner Bertone said that most leases say that they are specific to a named person. Mr. Gudín replied that this issue is unclear because the lease might be poorly drafted or might specifically include a tenant’s children and questioned the purpose of the one-year limitation. Mr. Gudín noted that laches might apply in some cases.

Commissioner Bell clarified that the time limit is not intended to bar causes of action that are generally brought in equity rather than in landlord tenant court. Ms. Brown reiterated that the tenants objected to this section and feared that this new ground would be abused by some landlords. Commissioner Bunn suggested that there were safeguards in the provision to prevent landlord abuse. Mr. Gudín stated that landlords generally discover falsity of applications relatively quickly. Mr. Legow agreed with the provision but objected to the one-year time limitation. Commissioner Bell asked whether 18 months would be more acceptable. Commissioner Bunn noted that there still was an available action in Chancery. Mr. Gudín stated that if language was added that says that this ground does not bar an action in Chancery that would be sufficient and Staff agreed to include that language.

With regard to sections 33:1-54 and 46:8-8, pertaining to a violation of alcoholic beverage laws and the use of rental premises for prostitution, respectively, Ms. Brown explained that during the working sessions, all participants made clear that these provisions were no longer used as grounds to evict. The provisions still exist but were not made part of the Anti-Eviction Act. Mr. Cannel stated that, arguably, with the adoption of the Anti-Eviction Act, these sections had been superseded. Commissioner Bunn said that if landlords and tenants agree, the Commission will not oppose the removal of these provisions. Mr. Gudín said that if there is a crime of prostitution committed in an apartment, the landlord would proceed under a lease violation cause of action in the form of an ejectment action. Commissioner Bunn stated that these sections should be recommended for repeal. The Commission unanimously agreed.

Ms. Brown advised the Commission that during the working session the parties had also agreed on one additional ground for eviction based on aggravated assault, which now appears as section 5-2.1c.(1)(C). The current law provides for a ground for eviction based upon conviction for simple assault against a landlord or the landlord's family or employee. Landlords were complaining to Staff that it made no sense for stealing from another tenant to be a ground for eviction, while assaulting another tenant with a weapon was not. Mr. Cannel explained that aggravated assault covers more serious assaults, those involving weapons, injuries, etc. and Ms. Brown said that the statute now provides that the tenant must be convicted of the aggravated assault to support a ground for eviction. The tenant representatives insisted during the working session that there be a conviction in order to use aggravated assault as an additional ground to evict. With regard to a simple assault against the landlord, current law permits the conviction of the tenant *or* a finding, by a preponderance of the evidence, that the tenant is liable in a civil action for eviction based upon the simple assault. The tenant representatives argued that the "preponderance of the evidence standard" should not be used with regard to aggravated assault against another tenant because situations in which tenants argue with each other can end up in chaos. As a result, a landlord could use this ground to get rid of tenants when it was unclear who was really at fault.

Mr. Gudín explained that from the landlord's perspective, the situation becomes onerous where one tenant nearly kills another and all the landlord can do is serve the tenant with a warning notice. By requiring a conviction in order to use this ground, this puts a burden on the landlord to follow the criminal proceeding. Since landlords are not a party to that proceeding, and the prosecutor may not provide information to the landlords, they often do not have access to the necessary information. As with a theft, a landlord should be able to prove in a civil action that an assault took place rather than having to rely on a criminal conviction to rid a building of a thug.

Commissioner Bunn asked whether section LT:5-2.4a. included protection from this kind of conduct and Mr. Cannel said that it contemplates an ongoing danger and not a one-time fight. Commissioner Bunn asked whether the landlords had a problem with leaving the language as it is, i.e. requiring conviction for aggravated assault, but providing for the option of conviction or a preponderance of the evidence standard in a civil action for assault or terrorist threats against the landlord. Mr. Gudín replied that he was having a problem understanding how proposed section 5-2.4a. could be used as a “catch-all” section. Mr. Cannel explained that that section was initially geared toward hoarders and other similar situations and that although the drafting is certainly susceptible to the meaning proposed by Commissioner Bunn, Staff drafted to address a continuing course of conduct. The section might include someone continuously threatening other tenants, but not a single serious threat. Mr. Gudín asked whether a notice to cease was a requirement for this section. Ms. Brown stated that it had been drafted as not to require a notice to cease because the danger was imminent.

Mr. Legow asked why a landlord should have to wait for repeated serious threats from someone who gets drunk and goes through a building threatening other tenants before the landlord could evict. Commissioner Bunn replied that that situation would be dealt with by another section of the statute, 5-2.1c.(1)(B). Ms. Brown explained that tenant representatives were concerned that disputes between tenants were too complicated and ascertaining which tenant was at fault was too difficult. Mr. Legow said that we should not be afraid to rely on the discretion of Superior Court judges who are primarily focused on preserving tenancies. Commissioner Bunn asked how common the issue is of assault by one tenant on another. Mr. Gudín said that this was a very common problem and that there would be a serious delay caused by the need to wait for a conviction. Commissioner Bunn suggested that a “clear and convincing” burden could be added for the aggravated assault ground. Mr. Gudín agreed that this would be helpful.

Ms. Brown next raised the issue of the model forms of notices. She explained that since the Commission had directed Staff to prepare model forms to be included in the statute, Staff had prepared model forms of a “notice to cease”, a “notice to vacate and demand for possession”, a “notice to increase rent” and a “notice to change lease provisions other than rent”, along with descriptive language setting forth what should be in each of these notices. Connie Pascale recently suggested that rather than include the model forms in the statute, the statute should require that DCA prepare and promulgate the forms since DCA had the ability to do so under its regulatory power and regulations are more readily modifiable than statutory language. Nick Kikis opposed this suggestion and other commenters expressed mixed views. Staff proposed statutory language that permitted, but did not require, DCA to prepare these forms. DCA since has suggested that

model forms should come from the court or this Commission and not from DCA, although DCA would be willing to put the notices on its website.

Staff suggested that one option would be to provide in the statute that any form of notice meeting the requirements of the statute could be used, but that use of the model forms would raise a statutory presumption that the requirements of the statute have been met. Commissioner Bell asked whether there were things that will happen in the future that the Commission has not anticipated that would make it more helpful if the forms could be readily revised. Commissioner Bunn stated that if clarity could be provided immediately, by including model forms in the statute, that was preferable and the way Staff has proposed it is the most user-friendly way to include the forms. The Commission agreed. Mr. Gudin explained that for years, people have been crafting their own forms by simply tracking the statutory language because forms could not be accessed easily. He stated that it is helpful to have a form if it is a suggested form.

Ms. Brown explained that section 5-5.4, suggested by Judge Fast and pertaining to orderly removals, was derived from court rules and addressed dire circumstances when stays are granted. Connie Pascale suggested that the stay provided by this section not be limited to seven days, but that the time frame for the stay should be subject to the court's discretion. Staff had been advised that the Special Civil Part Judges had not agreed to change the time frame, and had left the time frame to no more than seven days as provided in the rule. Ms. Brown also reminded the Commission that the tenant is not paying rent during this time period.

Commissioner Bunn asked whether, since the seven days is taken from the court rules, weekends and holidays will be included when calculating the seven days. Mr. Cannel stated that Staff may have to redraft this language to import the counting requirements in the court rules. Title 1 has some language regarding counting requirements which Staff will review. Ms. Brown confirmed that the specific court rule stated no more than seven days. The Commission directed Staff to incorporate current court rules.

Ms. Brown explained that the last issue for the Eviction Chapter, which pertains to relocation of tenants in illegal occupancies, is comprised of two separate issues. One part concerns the time frame for providing notice to tenants in illegal occupancy before commencing an eviction action. The current statute provides for a three-month notice. Judge Fast believes that this time frame defeats the public policy against illegal occupancy and that the law should encourage the relocation of tenants out of the illegal tenancies. Staff proposed a three-day notice based on Judge Fast's objection, but felt that three days was too short a period in light of Connie Pascale's concern that a tenant needs

more time to find a new place to live. Connie Pascale advised Staff that he wanted the current three-month notice provision to remain in the statute. Staff suggests a thirty-day or one month notice because it would be consistent with other types of notices.

Mr. Cannel explained that a tenant may not easily find another comparable but legal apartment. Mr. Gudín suggested that instead of building in additional time periods, the courts have up to six months to issue hardship stays of removal; thus it actually could be three months in addition to the six months before the tenant has to leave the rental premises. Connie Pascale had indicated that if there is a health or safety issue, the code enforcement officer could remove the tenant immediately.

Commissioner Bertone stated that usually when a zoning officer states that an apartment is illegal, there is no safety or health issue. Mr. Gudín confirmed that this is a technical illegality, and not a safety issue, for which the tenant is presently given three-months notice. Ms. Brown also clarified that the tenant may not be paying rent during this time but relocation expenses must be paid to the tenant either from the landlord directly or, if there is a municipal ordinance, by the municipality. This leads to the other issue, which derives from the *Miah* case in which the Supreme Court stated that relocation expenses due from the landlord cannot be offset by the amount of rent due and owing to the landlord. The court stated that the public policy of relocating tenants efficiently and not perpetuating illegal occupancies outweighs the landlord's interest in getting paid by offset. In addition, the landlord may still be able to bring an action for the rent in a separate proceeding. Commissioner Bunn said that the longer the tenant stays in the apartment, and the longer the notice period, the longer the landlord continues to be punished. Commissioner Bertone added that the landlord also may be subjected to continuing daily fines for each day the tenant remains in the property. Bruce Gudín suggested that a one-month notice for the tenant to vacate would be satisfactory.

With regard to offsets for rent, Commissioner Bunn suggested that either the tenant pays the rent during the waiting period or an offset should be permitted. Commissioner Bell noted that one issue is whether the offset will defeat the tenant's ability to find a new apartment. Mr. Cannel explained that the relocation amount is equal to six months of rent so it is likely that even if some of the rent is offset, the tenant will still have enough left over to relocate.

Commissioner Bell asked whether there are cases in which this issue comes up and the tenant has not been paying rent. Mr. Gudín said yes. Ms. Brown explained that the lease cannot be voided simply because a landlord did not obtain a certificate of occupancy if the tenant has been occupying the premises for some time. Mr. Gudín noted an anomaly when a tenant is in an illegal apartment and the apartment has not been

registered. In order to have a judgment of possession entered, the landlord must prove that the apartment has been registered. Staff can draft an exception in the statute to accommodate this problem and will reduce the notice period in the next draft from three months to one month.

Mr. Cannel suggested that the offset be limited to no more than half of the total relocation assistance. Ms. Brown explained that part of the court's rationale is that the relocation expense was intended to be somewhat punitive to the landlord because usually the landlord is aware of the illegal nature of the occupancy. Commissioner Bunn stated that even with this limitation, the relocation expense requirement is still punitive to the landlord. The Commission agreed to the limitation of 50%.

Ms. Brown then noted three issues for resolution in the Landlord Tenant Relationship Chapter. The first concerns the five-day grace period given to senior citizen tenants. Judge Fast had proposed the five days be added to any existing grace period while Nick Kikis suggested that the five days commence after the date that rent would normally be due but before any other grace period. Commissioner Bunn asked whether the five days is a floor. Ms. Brown said yes. Mr. Cannel explained that the policy existed because of a time when social security checks might not have arrived in time for seniors to pay their rent. Mr. Gudín explained that in current practice, most leases provide for a five or ten day grace period already. The Commission consensus was to leave current law as it is.

The next issue pertained to the distribution of the Truth-in-Renting Statement, which currently does not need to be distributed to tenants in leases for less than one month or to tenants in owner-occupied dwellings or premises with less than three dwelling units. Ms. Brown expressed concern that because of the importance of the Truth-in-Renting statement, landlords should be required to provide this valuable document to all tenants of more than one month duration. Mr. Gudín said that landlords in owner-occupied rental premises will be fined if they do not comply. Ms. Brown reminded the Commission that the document is now available on the internet and the landlord, under the revisions already proposed by the Commission, only need notify the tenant about the booklet. The statute now provides an option to be exercised by the tenant of either accepting the online version or asking the landlord for a printed copy. The Commission agreed that the tenants of owner-occupied and rental premises of less than three dwelling units should also be informed by the landlord of the Truth-in-Renting statement or provided with the statement if that is the tenant's option.

Finally, Ms. Brown referred to Staff's most recent definition of "disability" for section LT:2-6.2, which had been requested by the Commission at the last meeting.

Commissioner Bunn asked whether there is any provision in the statute to also tie termination to loss of income. Ms. Brown stated that the tenant must show that the disability caused a loss of income. The Commission agreed that the additional option for the “disability” definition proposed in Staff’s memo was not needed as the first definition served the Commission’s purpose.

Mr. Gudin further suggested that section LT 2-9.4, which pertained to circumstances where senior citizens were allowed to have pets, was not taken into account in the Eviction Section. If the goal was to create an all-inclusive way to evict, this one issue was an outlier. Ms. Brown said that she would cross-reference the section to the Eviction Chapter and add an additional ground for eviction where the tenant did not comply with this statute, resulting in the tenant’s lease lawfully not being renewed. Commissioner Bell noted that it was important to preserve the distinction in current law between the landlord’s refusal to renew and the landlord’s right to evict. Ms. Brown noted that in effect by refusing to renew, the tenancy would terminate and the landlord would then have the right to evict at the end of the lease term only.

Mr. Gudin also requested that in section 2-1.1(b) the word “contractual” be inserted before the word “rights”. Mr. Legow and Mr. Gudin also remarked that in section 5-3.3(b)(3), the word “unreasonable” be changed to “not unconscionable” because that is the standard by which an increase in rent is measured. Ms. Brown stated that she would confirm this and redraft accordingly.

Commissioner Bunn asked for a motion for all of the Commission modifications to the landlord tenant statutes discussed at this meeting. Commissioner Bulbulia made the motion, which was seconded by Commissioner Bell and accepted unanimously.

#### **Title 46**

Since Staff is prepared to proceed without Commission guidance, the Property project was carried in its entirety to the September meeting.

#### **Miscellaneous**

A motion to adjourn was made by Commissioner Bell and seconded by Commissioner Bertone. The next meeting of the Commission is scheduled for September 16, 2010.