

MINUTES OF COMMISSION MEETING

October 18, 2012

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

Also in attendance were: Lorraine Senerchia, Hudson County Deputy Register, Office of the Register of Deeds and Mortgages; Andrea M. Gardner, Special Deputy, Hudson County Office of the Register of Deeds and Mortgages; Virga Webb, Administrative Assistant to the Register, Hudson County Office of the Register of Deeds and Mortgages; Rosemarie D. Peters, Surrogate, Monmouth County, Office of the Surrogate and President of the Constitutional Officers Association of New Jersey (COANJ); Rita Marie Fulginiti, County Clerk, Cape May County; Kristin M. Corrado, Passaic County Clerk; Joanne Rajoppi, County Clerk, Union County; Allen Weston, New Jersey Association of Counties; Marc H. Pfeiffer, on behalf of COANJ; Ed Eastman, on behalf of the New Jersey Land Title Association; David Ewan, on behalf of the New Jersey Land Title Association; and Lawrence J. Fineberg, on behalf of the New Jersey Land Title Association.

Chairman Gagliardi said that the Commission wished to honor John Cannel as the retiring Executive Director and Ms. Tharney explained that both the Commissioners and Staff appreciated Mr. Cannel's service, guidance and vision for the Commission. Ms. Tharney said that, at Commissioner Burstein's suggestion, she contacted the Legislature regarding Mr. Cannel's many years of service to the State of New Jersey, and the Legislature responded with a Joint Legislative Resolution paying tribute to Mr. Cannel. Ms. Tharney also explained that a donation had been made in Mr. Cannel's honor to the New Jersey State Library for the purpose of expanding the Library's collection of legal materials. Bookplates bearing Mr. Cannel's name will identify materials purchased with the donated funds and a plaque recognizing Mr. Cannel's service to the State will be placed in the library.

Chairman Gagliardi said that, as Executive Director, Mr. Cannel had done an excellent job of developing a good working relationship with the Legislature and encouraged Ms. Tharney to maintain that positive and productive relationship in her own

tenure as Executive Director.

Minutes

Chairman Gagliardi and Commissioner Bell proposed changes to the Minutes of the September meeting. In the final paragraph on page 3, Chairman Gagliardi said that the word “they” should be changed to “it” for consistency. He added that the second-to-last paragraph under the heading “Miscellaneous” also should be modified to more accurately reflect that: the purpose of the Commission’s Executive Session was to discuss certain personnel matters; with regard to the substance of the Executive Session, the Commissioners “wished” (not “agreed”) to take the actions described; and that the motions regarding personnel matters were approved unanimously by the Commission. Commissioner Bell’s proposed changes were included in a written document submitted to the Commission at the meeting for review and approval. After the Commission considered the proposed changes, the Minutes of the September meeting were unanimously approved, as amended by Chairman Gagliardi and Commissioner Bell, on motion of Commissioner Bunn, seconded by Commissioner Bulbulia.

Mortgage Assignments

John Cannel explained that in developing a report proposing a new statutory framework for the recording of mortgage assignments, Staff’s goal has been to make the proposal acceptable to as many interest groups as possible. Mr. Cannel said that county clerks do not support the proposal in its current form. The title insurance representatives expressed support but had requested changes to the draft. Mr. Cannel said that greater consensus regarding how best to address the problem was necessary, but would take more time to achieve.

Chairman Gagliardi said that no action would be taken at this meeting with regard to the Draft Tentative Report for this project, and he opened the floor for comments from members of the public. He asked that one representative speak on behalf of each group, so that there would be time for all groups present to be heard. Chairman Gagliardi also asked that speakers be constructive with their comments and focus on solving the problem.

Rita Marie Fulginiti, County Clerk for Cape May County, and Chair of the Title 46 Revision Committee, said that county clerks understand that change will likely happen in this area, and were glad to have been invited to participate in the discussion. She noted that the clerks submitted written comments. Ms. Fulginiti said that the clerks are opposed to any statewide recording of assignments of mortgages because mortgages are linked to

a number of documents in county clerks' offices. Removing assignments, an important land record, from clerks' offices would make it difficult for county clerks to do their job with regard to the discharge of mortgages and in other key areas. If there is different information maintained in different offices, the integrity of the records will be compromised and it will be difficult to research the land records.

Ms. Fulginiti said that the Draft Tentative Report reflects certain incorrect assumptions. The report indicates that mortgage assignments are rarely recorded when, in fact, mortgage assignments are one of the most commonly recorded documents. The Report's assumption that the technology employed by county offices is not up to speed is also incorrect. With regard to electronic recording, Ms. Fulginiti said that 17 county recording offices currently accept mortgage documents electronically, and soon, as a result of P.L. 2012, c. 217, all counties will accept e-recorded documents. Ms. Fulginiti also said that there is no need for a statewide recording system for assignments of mortgages because the county recorders already process these documents and citizens come to the county clerks for this type of information. She asked that the Commission consider the written comments submitted on behalf of the clerks, noting that the clerks recognize the problem with foreclosures but wish to see the solutions that they propose incorporated into this project.

Ms. Fulginiti said that the county clerks would like to see the filing of the mortgage servicer agreement as proposed in the report because there is a separation between the servicer and the lender. There is no legal authority to take action with regard to the mortgage without a proper power of attorney in place and recording mortgage servicer agreements with the county clerks would help address that problem. In sum, county clerks see potential value in this project, but they strongly believe that mortgage assignment recording should stay at the county level.

Rosemary Peters, the Monmouth County Surrogate and President of the Constitutional Officers Association of New Jersey (COANJ), said that although she is not an expert on the subject matter under discussion, she could offer a different perspective because of her role as part of the judiciary. She noted that there were a number of actions taken by the New Jersey Supreme Court to address the foreclosure problem and the issue of standing. She expressed dismay that banks seemed to think that they did not have to comply with state laws. Ms. Peters said that banks have been asked to show state regulators exactly what procedure they follow for foreclosures, and that the banks are still in the process of doing so. Ed Dauber, Special Counsel appointed by the courts, has asked the banks to make a prima facie showing regarding foreclosure procedures. Ms. Peters said that it might be best for the Commission to consider waiting for the courts and the regulators before proceeding with this project.

Joanne Rajoppi, the County Clerk of Union County is also the President of the International Association of Clerks, Recorders, Election Officials and Treasurers (IACREOT), an organization which represents clerks and recorders in all 50 states and in other countries, including Africa and Australia. Ms. Rajoppi said that her organization had created subcommittees to study this issue addressed by this project and noted that legal action had been taken in an effort to force servicers to record mortgage assignments. She explained that most participants in the process agree that assignments must be linked to the mortgages. Even if electronic filing is used, assignments need to be noted on the original mortgage.

Ms. Rajoppi said that she saw in minutes from an earlier meeting that another speaker, Rebecca Shore from Legal Services of New Jersey, said that (quoting from the February 17, 2011 Minutes of this Commission) “tinkering with the public recording system, or creating a system involving private party recording, would be a disaster” and that instead, enforcement needs to be strengthened. Ms. Rajoppi added that “robo-signing” is a big problem and that making the filing of mortgage servicer agreements mandatory is a good idea but that the assignment should be linked to the mortgage.

Chairman Gagliardi asked whether Ms. Rajoppi had shared with Staff details regarding what other states are doing. She said that she had not, because she had only recently become aware of the project. Chairman Gagliardi said the Commission would be grateful if she shared those details and she said she would be happy to do so.

Allen Weston, Legislative Director of the New Jersey Association of Counties, submitted written comments from a county perspective to the Commission. He said that the fifth paragraph on page 3 of the Draft Tentative Report contained inaccurate assumptions. In the first three-quarters of 2012, over 83,000 assignments of mortgages were recorded in the offices of the clerks and that number is expected to reach 110,000 by the end of the year, with revenues from such recording expected to reach \$3.3 million dollars. Although the draft report indicates that its proposal would not burden counties, there would be a substantial negative impact on county revenue streams if recording is shifted to the state level and, as a result, he respectfully opposes the report’s recommendation.

David Ewan, from the New Jersey Land Title Association, said that he had gone through several drafts working with John Cannel and he feels that all parties agree there is a problem in need of a solution. Addressing the issue of foreclosure and standing are important. Nationwide, there are a substantial number of assignments of mortgages that are recorded, but there are many more that are not. The lack of recording explains the

existence of the MERS system. Mr. Ewan said that more than 80% of all mortgages are securitized and a trustee holds the mortgage; these mortgages are sold on the secondary market. The remaining 20% of mortgages are assigned and this is partially why MERS was created. He explained that the issue of securitization is related to the assignment issue. Mr. Ewan said that it is necessary to have a solution that is transparent; one that allows the public and the courts to know who owns or holds a mortgage. The recording of mortgage servicer agreements is also important since documents pertaining to a mortgage will sometimes identify the servicer, rather than the bank holding the mortgage, which is a source of confusion.

Mr. Ewan noted that the draft report made the system voluntary and that if it were made mandatory, the lending community would oppose it. Even if the system is voluntary, lenders will want to know the costs and the requirements of the system. The latter is the more significant issue, since costs will simply be passed through to customers. Mr. Ewan said there are two models that the Commission could work with: a servicers-only tracking system or a note-holder/servicers tracking system. With the latter, the lenders might be willing to support a change since lenders are interested in certainty associated with mortgage notes and do not want these transactions to be subject to UCC requirements.

Commissioner Bunn asked how electronic recording systems work and whether there are 17 different filing systems for which a lender must have a separate identification and log-in in order to use. Ms. Fulginiti said that a bank can go on a website and send documents to every jurisdiction for recording. The current system allows for transparent uploading of electronic documents. The fees are paid through ACH transactions, and the documents are sent directly to the inboxes of the county recorders, at which point they are reviewed for statutory compliance and for errors. If there is an error, the document can be submitted again. New Jersey has 21 county recorders using different systems but they interface seamlessly with electronic recording. Ms. Fulginiti added that electronic recording is efficient, requiring about 70% less time that is required to process paper documents.

Commissioner Burstein said that when he last looked at the opinions regarding foreclosure standing and the enforceability of foreclosure procedures, it seemed that the Supreme Court had partially resolved concerns raised by the Appellate Division on these issues. He suggested that it is important to find out where this matter stands from the perspective of the courts. Commissioner Burstein asked whether it was necessary for foreclosure procedures to change. Mr. Cannel said no, explaining that the Administrative Office of the Courts currently takes the view that a foreclosing party has to prove a full chain of title, but courts have held that having possession of the mortgage note is enough.

Mr. Cannel recognized the efforts being made to prevent robo-signing and false affidavits, but noted the continuing problem of determining who holds the mortgage and who has the right to enforce it. Since the underlying documents do not always disclose the relevant parties, identifying the party authorized to bring a foreclosure action would be helpful. Mr. Cannel noted that the current expansion of electronic recording resulted from a Commission report.

Chairman Gagliardi assured the commenters that the Commission is still in the early stages of the process of developing a recommendation to the Legislature and that there will be many opportunities for commenters to share their thoughts before any such recommendation is made. He added that there is general agreement about the fact that there is a problem, and he thanked the commenters for taking the time and effort to provide input regarding a possible solution.

Uniform Determination of Death Act

Marna Brown said that at the last Commission meeting, it was suggested that the NJDDA be modified to eliminate the power of the Board of Medical Examiners to regulate medical standards for determining when death occurs. Such a change would be consistent with the UDDA. After that meeting, Ms. Brown spoke with Stephen Flanzman, Deputy Attorney General. Mr. Flanzman said that the Board agrees that the regulation process lags behind medical advances, and is not the best way to deal with changes in medical standards. If the responsibility is taken away from the Board, however, Mr. Flanzman does not believe that the standards set forth by the American Academy of Neurology should be adopted as a guideline. He explained that those standards are not uniformly accepted in the medical community and that some medical facilities lack the sophisticated equipment to make end of life determinations in accordance with those standards. Mr. Flanzman said that the Board had no opinion regarding whether it should continue to be responsible for regulating medical standards for the determination of death in New Jersey, but if that responsibility were eliminated, the standards could be based on the judgment of hospitals and individual physicians within various communities, consistent with current medical standards.

Ms. Brown said that she was in the process of conducting research regarding what other states are doing in this area, and hoped to speak directly with the Director of the Board of Medical Examiners. The Commission agreed to await a final report pending Ms. Brown's completion of her research.

Pejorative Terms (Physical Disabilities)

Ms. Brown identified more than 400 references to “handicapped” in New Jersey’s statutes, and had determined that less than half of those references would actually be part of the project. Unlike the earlier pejorative terms project (which is the basis for identical bills introduced in the Senate and the Assembly), this project may involve a larger number of provisions but will be more limited in scope, with a focus on making the language “person-first”.

Ms. Brown contacted representatives from the New Jersey Division of the Deaf and Hard of Hearing, the Commission for the Blind and Visually Impaired in the Department of Human Services, the Director of the Division of Disability Services, and Joe Young of Disability Rights New Jersey, all of whom expressed their willingness to be involved in the project.

Ms. Brown said that she recently learned of a bill that proposes changes to the procedures for applying for and renewing disability identification cards and placards. The sponsors of the bill also propose changes to pejorative language found in N.J.S. 39:4-204 through 39:4-207.9 by removing the word “handicapped.” These proposed changes may also impact the signs used to identify handicapped parking, which might result in a fiscal impact. A letter was sent to the sponsors of the bill identifying other statutes that might be affected by the changes recommended in the bill and the potential fiscal ramifications.

Chairman Gagliardi said he knew that the first pejorative terms project had been a worthy cause, in part because of the attention it was given in the media, and suggested that many groups will likely find this project helpful as well.

Property

John Cannel said that the Draft Final Report reflected changes that were suggested by Lawrence J. Fineberg. Mr. Cannel said the changes are appropriate, and he recommends them for adoption. He said that Staff had not received any other comment on the Draft Final Report. The Draft Final Report as amended was unanimously approved for release as a Final Report on motion by Commissioner Bell, seconded by Commissioner Long.

Special Civil Part - Attorney's Fees

Laura Tharney said that this project had been released as a Tentative Report approximately six months ago and that no comment had been received after the standard distribution. The project recommends a modification to the statute to clarify, pursuant to the Court's determination in *Chase Bank USA, N.A. v. Staffenberg*, 419 N.J. Super. 386 (App. Div. 2011), that in-house counsel is not precluded from collecting attorney's fees pursuant to N.J.S. 22A:2-42. The Tentative Report was unanimously approved for release as a Final Report on motion of Commissioner Burstein, seconded by Commissioner Bulbulia.

Miscellaneous

The Commission agreed to 4:30 p.m. meetings for both November and December and then 10:00 a.m. meetings for January and February. The meeting was adjourned on motion of Commissioner Long, seconded by Commissioner Bell.