MEMORANDUM

To: New Jersey Law Revision Commission
From: Staff
Re: Property (second and still rough)
Date: February 8, 2010

We have included only the redrafted sections. They are in the order that they are in the current law. We have not yet rearranged them in a more logical order. The most important section is the one on "Covenants." That has been redrafted to reflect the Commission's reactions at the January meeting.

Revised Sections

Boundary certificates

A certificate establishing the true boundary between adjoining lands executed by the owners of the lands and acknowledged by them shall be as conclusive and binding as though the boundary had been fixed by them by deed or otherwise. The certificate, when meeting the requirements for recording, may be recorded in the office of the county recording officer.

COMMENT

This section is substantively identical to 46:3A-5.

Requirements for an effective deed

a. A deed or other instrument intended to convey an interest in real estate, shall be effective to convey that interest if it:

(1) identifies the parties to the transaction;

(2) identifies the property and the interest to be conveyed;

(3) evidences an intention to convey the interest through the deed or other instrument;

(4) is signed and delivered by the party conveying the interest in property; and

(5) is accepted by the party to whom the interest in property is conveyed.

b. Notwithstanding subsection (a), a deed or other conveyance of an interest in real estate shall be of no effect against subsequent judgment creditors without notice, and against subsequent bona fide purchasers and mortgagees for valuable consideration without notice and whose conveyance or mortgage is recorded, unless that conveyance is evidenced by a document that is first recorded.

COMMENT

Subsection (a) establishes the requirements for a deed that is effective to transfer an interest in land between the parties. It should be noted that this effectiveness is limited. To be fully effective, a deed

must be recorded (see subsection (b) of this section), and to be recorded, a deed must meet the formal requirements of the recording statutes. See 46:15-1.1

The requirements for validity are taken in part from 46:4-1 and, in part from case law. Some provisions are so basic, such as the requirement that a deed identify the parties to the transaction, that no case appears to have voiced the requirement. On other matters there are many cases. While there must be a description of the property sufficient to identify it, that description need not be formal. Chidester v. City of Newark, 58 F.Supp. 787 (DCNJ 1945). For the requirement of delivery of the deed by the transferor and its acceptance by the transferee see, e.g. In re Lillis' estate 123 N.J.Super 280 (App.Div. 1979). The proposed section does not require consideration. Under case law there need be no economic consideration; love and affection will suffice. Cockrell v, McKenna, 103 N.J.L. 166 (1926). Moreover, even if there is no consideration, a deed is valid absent fraud or other circumstances suggesting undue influence. Den. ex Dem. Chews v. Sparks, 1 N.J.L. 56, (Sup.Ct. 1791).

Subsection (b) is based on 46:22-1. It embodies one of the basic principles underlying the recording statutes, that an unrecorded document is ineffective against later claimants who have no notice of it. See, e.g. *Cox v. RKA Corp*., 164 *N.J*. 487, 496 (2000). However, case law is not consistent on this point. One reported case, *Michalski v. U.S.*, 49 *N.J. Super*. 104 (Ch. Div. 1958), held that a conveyance, which was unwritten and so could not be recorded, is effective against a creditor without notice. *See also*, *In re L.D. Patella Construction Co*., 114 *B.R*. 53, 58-59 (Bankr. D.N.J. 1990). Subsection (b) reverses that rule. If a party makes a conveyance in a form that does not permit it to be recorded, then a subsequent bona fide purchaser, mortgagee or creditor who could not learn of the conveyance from the land records is not bound by the conveyance absent notice of it at the time he acquired the interest for value or docketed the judgment. This principle is in accord with the statute of frauds, 25:1-11, which makes unwritten conveyances enforceable as conveyances only in some cases where possession is transferred. Transfer of possession frequently is notice to prospective purchasers or mortgagees.

-2. Covenants

a. A deed intended to convey an interest in real estate that is designated a "quitclaim deed" shall not imply any covenants regarding title.

b. A deed intended to convey an interest in real estate that is not designated a "quitclaim deed" or a "warranty deed" shall not imply any covenants regarding title other than that the grantor, to the best of knowledge and information, owns the property and has the right to convey it.

c. A deed intended to convey an interest in real estate that is designated a "warranty deed" shall imply a covenant that the grantor owns the property absolutely in fee simple and has the right to convey the property to the grantee.

d. A deed or other instrument intended to convey an interest in real estate, however designated may include covenants as to warrantees made by the grantor, including a covenant that:

(1) the grantor owns the property absolutely in fee simple;

(2) the grantor has the right to convey the property to the grantee

(3) the grantee will have quiet possession of the property;

(4) the grantor has done no act to encumber the property;

(5) the grantor warrants the property generally and will defend the grantee's right to the property against the claims of others;

(6) A covenant that the grantor will provide any further assurances reasonably requested by the grantee to assure the property more perfectly and absolutely to the grantee.

COMMENT

Subsections (a) through (c) are new. They set out the covenants implied by three common kinds of deed. Under current case law, a quitclaim deed and a bargain and sale deed are legally equivalent. *Wildwood Crest v. Smith*, 210 N.J. Super. 127 (App.Div. 1986) certif.. den. 107 N.J. 51. However, most practitioners expect that a bargain and sale deed implies some kind of warranty. Because of the discrepancy between case law and practice, the term "bargain and sale deed" is not used. Instead, the three kinds of deed are described: a quitclaim deed, a warranty deed, and a deed with no particular designation. The provisions of quitclaim deeds and warranty deeds are in accord with both law and practice. The undesignated deed presents some problem. In this draft, that deed is held to imply only a covenant based on the grantor's knowledge and information. A deed that purported to convey property and did not imply that much might be considered fraudulent. In addition, and affidavit of title is required in most transactions. It seems sensible to assume that a similar claim survives as part of the deed.

Subsection (d) gathers most of the covenants in current law. Some of the subsections may not be necessary at all. However, (4) which is the standard "covenant against grantor's acts" is common and important.

Conveyances under powers of attorney not recorded

Whenever any deed to or conveyance of real estate in this state purports to have been executed by virtue of a power of attorney, the recital in the deed or conveyance that it was made pursuant to a power of attorney shall be prima facie proof of the existence of the power of attorney, notwithstanding the power of attorney was not recorded, provided:

a. the deed or conveyance has been properly acknowledged and recorded, and has been recorded for at least ten years, and

b. the person claiming under the deed or conveyance takes and subscribes an oath that he or she has seen the power of attorney so recited, and submits the oath for recording in the office of the county recording officer of the county where the real estate is located.

Source: 46:6-3

COMMENT

This section is substantively identical to its source. It has the effect of making a deed executed by an attorney valid after ten years have elapsed even though the power of attorney was not recorded. . However, to use this provision, the grantee must record an oath that he has seen the power of attorney. The grantee whose title is otherwise questionable is the one who takes the oath. We have doubts as to whether this section should be retained.

Powers of attorney considered unrevoked until revoked by recorded instrument or death of principal

A power of attorney for transfer of an interest in real estate that is recorded in the office of the county recording officer of the county where the real estate is located shall be considered as unrevoked and as remaining in full force and effect in accordance with its terms until:

a. the power of attorney is revoked by the principal by an instrument executed and recorded, or

b. the death of the principal.

Source: 46:6-6

COMMENT

This section is substantively identical to its source. It is consistent with law on powers of attorney. As a result, it may not be necessary.

Support of party or other walls adjacent to excavations

Whenever excavations that are intended to be carried to a depth of more than eight feet below the curb or grade of the street are made on a plot of land, and there is a wall, standing on or near the boundary lines of the plot of land, the person causing the excavation to be made, shall preserve the wall from injury at all times from the commencement until the completion of the excavations at his or her own expense, and support the wall by a proper foundation so that it remains as stable as before the excavations were commenced. The person who causes the excavation to be made need not preserve and support the wall if that cannot be done without entering the adjoining land, and the owner of that land denies entry.

Source: 46:10-1.

COMMENT

While simplified in language, there is no substantive change from the source.