To: Commission
From: Staff
Re: Property – Chapter 3
Date: July 7, 2010

M E M O R A N D U M

This memorandum contains a first pass through Chapter 3 of Title 46 pertaining to property. The language of this draft is rough and preliminary in form. Much of the language in this chapter predates 1898, and is recommended for repeal or substantial modification as indicated below.

Research regarding the issues raised by this Chapter is ongoing, however, and it is anticipated that there will be further additions and deletions as supported by the results of that research.

46A:3-1. Historic landholdings and transfers of interest in real estate

a. The feudal tenure estates and incidents thereof remain abolished.

b. Tenures of honors, manors, lands, tenements, or hereditaments, or of estates of inheritance at the common law declared by Rev. 1877, p. 166, Sec. 70 to be holdings by free and common socage shall continue to be so held.

c. All transfers of manors, lands, tenements or hereditaments, made prior to July 4, 1776 are deemed to be held in free and common socage.

d. This Title does not take away or discharge any rights or liabilities incident to tenure in common socage created prior to July 4, 1776, now due or to grow due.

e. The rule of the common law, known as the Rule in Shelley's Case, shall not be applicable to any interest in property created by any instrument to take effect after 1934.

Source: 46:3-1; 46:3-2; 46:3-3; 46:3-4; 46:3-14;

COMMENT

This section contains streamlined and consolidated language from the source sections as follows: a. is taken from 46:3-1; b. is taken from 46:3-2; c. is taken from 46:3-3; d. is taken from 46:3-4; and e. is taken from 46:3-14.

It is not clear whether or not the following terms need to be retained or defined in this chapter (all references to the appearance of these terms in cases are based on searches of the Westlaw New Jersey database):

1. allodial – (land that is absolute property of the owner; not subject to any rent, service or acknowledgement to a superior) Allodial is mentioned in 13 cases, the most recent case was in 1953 and the earliest is a US Supreme Court case from 1810. The two most recent New Jersey cases (1953 and 1950) included on the list cited the same 1884 language stating that in personal estates, which are allodial by law, the King is the last heir where there is no kin (the cases involved property escheated to the State).

The United States Supreme Court explained that "[a]s to the character of the tenure of land in this country since the Revolution, it has been said that it has become allodial. That is all true, but it must be remembered that at the date of the commencement of these tenures all land in Maryland was held as essentially feudal." *Shoemaker v. U.S.*, 147 *U.S.* 282, 296 (1893).

The Encyclopaedia Britannica explains that, following the French Revolution (1789), all land in France became allodial but in England, although land is not referred to as allodial, an estate in fee simple corresponds in practice to absolute ownership. In *Encyclopaedia Britannica*. Retrieved July 1, 2010, from Encyclopaedia Britannica Online: http://www.britannica.com/EBchecked/ topic/16507/allodium

A preliminary review of old New Jersey cases seems to suggest that allodial title is different in nature from feudal title as follows:

it is a fundamental principle of the common law, that *all lands,* even those of private men, are held of the king. Where there is no private owner, therefore, all persons *must* claim title through him. 2 *Black. Com.* 49, 50. In respect to the old settled and granted lands in England this may be a fiction of law, but it is truth and history here. It was a newly discovered wilderness, conquered by the king of England; it was his from necessity, and belonged to him solely, substantially, and beneficially. Thus, being the lord and owner of the land, shores, rivers, bays, and waters, he conveys to the duke of York as fully and amply as he held them, except only that *his* title *was* ***allodial****, the duke's feudal,* in free and common soccage.

Arnold v. Mundy, 6 *N.J.L.* 1, 35 (N.J. 1821). Staff will complete the research on this issue to clarify the usage of the term in New Jersey, but based on Staff research to this time, the term does not appear to be in current usage.

2. attornment – (consent by tenant to alienation of estate to receive new lord or superior)

3. conveyance – (a means or way of conveying)

4. devise – (give real estate by will)

5. distresses – (something distrained; a seizure and detention of goods as a pledge or to obtain satisfaction)

6. hereditaments – (heritable property; any property corporeal or incorporeal, real, personal or mixed, that may descend to an heir)

7. socage – (tenure of land held by a tenant in performance of specified services or by payment of rent, not requiring military service) Socage is mentioned in 32 cases, the most recent case was in 1949, and the earliest provided was a US Supreme Court case from 1785. *In re Rollins*, 65 *A2d* 667 (N.J. Co. 1949) includes a brief reference to socage tenure in its discussion of guardianship proceedings for an incompetent. *Graham v. Houghtalin*, 79 *N.J.L.* 342 (N.J. Err. & App. 1863) contains a brief discussion of guardians in socage in the contest of an ejectment action. Based on Staff research to this time, the term does not appear to be in current usage.

8. tenure – act, right, manner or term of holding something

Staff will continue its review of the history and most recent usage of the terms in New Jersey in order to assess the need to include these terms in the revision of the statute. It appears that if the reference to the Rule in Shelley's Case will be retained, it is more helpful to include a brief description of what the Rule is, rather than simply referring to it by name.

46A:3-2. Transfer of interest in property

a. Any individual who holds an interest in real estate in fee simple may transfer any part of the interest he or she holds at any time and the recipient shall hold the real estate free of any tenure or service to the transferor.

b. A transfer of any estate of inheritance by the State, the legislature or other lawful and competent authority under the state shall be allodial.

c. Every transfer of real estate or of the rent derived therefrom shall be valid without the consent of the tenant, but a tenant who paid the rent to the grantor before notice of the transfer shall not suffer any damage by that payment.

Source: 46:3-5; 46:3-6; 46:3-8;

COMMENT

This section contains streamlined and consolidated language from the source sections as follows: a. is taken from 46:3-5; b. is taken from 46:3-6; c. is taken from 46:3-8.

Subsection a. may require revision to state that a transfer of fee simple allows restrictions and limitations as permitted by law (including the constitutions, statutes and case law). It is not clear what perpetual restrictions may be placed on a deed. The language may be revised to state simply that one who has an interest in land may transfer that interest, or any piece of it, however one wants.

Subsection b. sounds like it is referring to nothing more than fee simple – that will be determined by Staff and a determination will be made regarding the reference to an "estate of inheritance". Old case law language suggested that the two were not identical as follows: "determine whether the grants by the state to the United Companies conferred an estate that is properly to be called a 'fee simple,' or whether such estate is free from any semblance of feudal tenure, so as more properly to be called 'allodial.'" *Jersey City v. State Board of Assessors*, 75 *N.J.L.* 571, 572-573 (N.J.Err. & App. 1908); *See, also, Kapiolani Estate v. Atcherley*, 238 *U.S.* 119, 127 (U.S. 1915) (characterizes a transfer of title to land in fee simple as "a freehold estate less than allodial"). It is not yet clear whether an easement renders the character of the interest "not allodial".

Subsection c. may be appropriate for removal from this chapter as covered by the Landlord Tenant law, which is currently the subject of a project being prepared by the Commission. The relevant language is now located at section LT:2-2.1 of that project, which draws from the language currently found in 46:3-8; 46:8-2; 46:8-3. The subsection will remain in this section pending completion of the Landlord Tenant project.

46A:3-3. Fee simple

a. A deed conveying an interest in real estate shall, unless clearly stated otherwise, be construed to include all the estate in fee simple if the grantor had such an estate.

b. A deed conveying lands to fiduciaries, in which the granting clause runs to the "successors and assigns", shall, unless other words of limitation are used, be construed as conveying a fee simple interest in real estate, if the grantor had such an estate, as if the words "heirs and assigns" had been used.

c. If, in any suit to reform a deed of conveyance of lands, the estate is conveyed to the grantee, and either the grantee's successors and assigns forever, or the grantee's legal representatives and assigns forever, the conveyance shall be considered ~~presumptively~~ an estate in fee simple absent clear language to the contrary.

d. Whenever a written instrument conveys an interest in any real estate that would have been held an estate in fee tail, such instrument shall vest an estate in fee simple.

e. Every person to whom the use of any real estate within this state has been legally transferred, and his or her heirs and assigns, shall be held to be in full legal possession of such real estate.

Source: 46:3-9; 46:3-13; 46:3-15;

COMMENT

This section contains streamlined and consolidated language from the source sections as follows: a., b. and c. are taken from 46:3-13; d. is taken from 46:3-15 and e. is taken from 46:3-9. Staff will research this section further to determine whether subsections b. and c. are necessary. It does not appear that subsection b. is helpful to

the reader since it was pointed out that habendum clauses and "successor and assign" language are not necessary any longer. Subsection c. was proposed for elimination as also unnecessary.

46A:3-4. Fines and common recoveries abolished

No fine or judgment entered in any court of record of this state shall be construed to be a conveyance of real estate, or in any way bar any lawful interest or claim in the property.

Source: 46:3-10.

COMMENT

This section contains streamlined and consolidated language from 46:3-10. It is necessary to determine the meaning of "common recovery" since the substitution of "judgment" for that term is not an appropriate one. It is clear that judgments of divorce, partition and in a variety of other cases do convey real estate, so additional work on this section is needed.

46A:3-5. Warranties

a. A warranty made by a tenant for life of real estate shall be inoperative and void against all persons to whom such real estate shall descend or come in reversion or remainder.

b. A collateral warranty of real estate by an ancestor, who, at the time of making it, has no estate of inheritance in possession therein, shall be inoperative and void against his heirs.

Source: 46:3-11; 46:3-12.

COMMENT

This section contains streamlined and consolidated language from 46:3-11 and 46:3-12. It is necessary to determine the definition of the term "warranty" so that Staff understands the issue and the reason for the focus on warrantees in this context.

46A:3-6. Buildings and other things included in deeds to land

Every deed conveying land shall, unless otherwise stated in the deed, be construed to include any buildings, improvements, ways, woods, waters, watercourses, rights, liberties, privileges, hereditaments and appurtenances pertaining to the land; and any reversions, remainders, rents, issues and profits thereof.

Source: 46:3-16.

COMMENT

This section contains streamlined and consolidated language from 46:3-16. The language requires further revision to address things like fixtures and common driveways.

46:3-7. Tenants in common; joint tenants; tenancy by the entireties

a. Unless otherwise stated, the transfer of an estate in land to more than one grantee shall be construed to transfer the estate to the grantees as tenants in common.

b. No estate shall be deemed an estate in joint tenancy, unless expressly set forth in the grant or devise creating such estate that it was or is the intention of the parties to create an estate in joint tenancy and not an estate of tenancy in common.

c. Any conveyance of real estate, by the grantor, to the grantor and another or others, as grantees and joint tenants shall, if otherwise valid, be fully effective to vest an estate in joint tenancy in such real estate in the grantees, including the grantor.

d. A tenancy by entirety shall be created when:

1. A husband and wife together take title to an interest in real property ~~or personal~~ property under a written instrument designating both of their names as husband and wife; or

2. A husband and wife become the lessees of real property ~~or personal~~ property under a written instrument containing an option to purchase designating both of their names as husband and wife; or

3. An owner spouse conveys or transfers an interest in real property ~~or personal~~ property to the non-owner spouse and the owner spouse jointly under written instrument designating both of their names as husband and wife.

e. Language which states "..... and ....., his wife" or "..... and ....., her husband" shall be deemed to create a tenancy by the entirety.

f. No instrument creating a property interest on the part of a husband and wife shall be construed to create a tenancy in common or a joint tenancy unless it is expressed therein or manifestly appears from the tenor of the instrument that it was intended to create such a tenancy.

g. Neither spouse may sever, alienate, or otherwise affect their interest in the tenancy by entirety during the marriage or upon separation without the written consent of both spouses.

h. Upon the death of either spouse, the surviving spouse shall be deemed to have owned the whole of all rights under the original instrument of purchase, conveyance, or transfer from its inception.

Source: 46:3-17; 46:3-17.1; 46:3-17.2; 46:3-17.3; 46:3-17.4.

COMMENT

This section contains streamlined and consolidated language from the source sections as follows: a. is taken from 46:3-17;b. is taken from 46:3-17.1; c. and d. are taken from 46:3-17.2; e. is taken from 46:3-17.3; and f. is taken from 46:3-17.4. The language of this section needs to be modified to reflect the impact of the statutory changes pertaining to civil unions and domestic partnerships.

Staff will confirm that subsection a. accurately states the default provision in New Jersey and will determine if it is necessary to explain that, in a transfer to a husband, wife and a third party, the husband and wife receive a ½ share of the property and the third party receives a ½ share in the transfer.

It has been suggested that subsection c. needs to be made broader to clarify that one with an interest in land may convey to him or herself or use the mechanism of conveyance to alter the nature of the holdings or the percentage of ownership. In subsection d. the references to personal property are removed as unnecessary in this chapter and in practical terms despite the older case in which the proceeds of a fire insurance policy were deemed held in the entireties form until used to purchase a new home.

Subsection f. may be modified to reflect the default position that if a deed or other document of transfer uses the terms "husband and wife", "domestic partners" or "civil union" the result is a tenancy by the entireties unless otherwise specified.

46:3-8. Aliens; "alien friend" defined; right to acquire, hold and transfer real estate

A foreign citizen, legally present in this state, shall have the same rights, and be subject to the same liabilities and restrictions in respect of real estate situate in this State as citizens.

Source: 46:3-18.

COMMENT

This section contains streamlined and consolidated language from 46:3-18. The language pertaining to entitling aliens to be elected to office and the language pertaining to the ability of the State and the federal government to sequester, seize or dispose of real estate has been removed.

~~**46:3-19. Estates, rights and interests in areas above surface of ground**~~

~~a. Estates, rights and interests in areas above the surface of the ground, whether or not contiguous thereto, may be validly created in persons or corporations other than the owner or owners of the land below such areas, and shall be deemed to be estates, rights and interests in lands. Estates, rights and interests in such areas shall be, in all respects, treated as estates, rights and interests in land.~~

~~b. All of the rights, liabilities and restrictions pertaining to estates, rights and interests in land shall be applicable to such estates, rights and interests in areas above the surface of the ground.~~

~~c. The provisions of this Title and of any other law of this State, shall be applicable to estates, rights and interests created in areas above the surface of the ground and to instruments affecting such estates, rights and interests, wherever such provisions would be applicable to estates, rights and interests in land.~~

Source: 46:3-19.

COMMENT

This section has been proposed for removal in its entirety as no longer necessary.

46:3-9. Transferability of estates of expectancy

a. Any person may transfer any contingent or executory interest, or future interest in expectancy, as he or she may at any time be entitled to, or presumptively be entitled to, in any real estate, or any part of such interest. Such transfer may be made even if the contingency on which such interest is to vest may not have happened. Every person to whom any such interest shall have been transferred, shall, on the happening of such contingency, be entitled to stand in the place of the person by whom the interest shall have been or transferred, and to have the same interest, actions and remedies.

b. This section shall not be construed to empower any person to dispose of any expectancy which he or she may have as heir of a living person, or any contingent estate or expectancy, where the contingency is as to the person in whom, or in whose heirs, the same may

vest, or any estate, right or interest to which he or she may become entitled under any deed thereafter executed, or under the will of any living person.

c. This section shall not be construed to render any contingent estate or other estate or expectancy herein mentioned liable to be levied upon and sold by virtue of an execution.

Source: 46:3-7.

COMMENT

This section is still under review and only limited modifications have been made to this time. Staff will confirm that all changes made retain the necessary components of the language.

46:3-10. Restrictions upon transfer or use of realty because of race, creed, color, national origin, ancestry, marital status, or sex

a. Any promise, covenant or restriction in a contract, mortgage, lease, deed or conveyance or in any other agreement affecting real property, which limits, restrains, prohibits or otherwise precludes the sale, grant, gift, transfer, assignment, conveyance, ownership, lease, rental, use or occupancy of real property to or by any person because of race, creed, color, national origin, ancestry, marital status or sex is void as against public policy, wholly unenforceable, and shall not constitute a defense in any action, suit or proceeding. No such promise, covenant or restriction shall be included in public notices concerning such property. The invalidity of any such promise, covenant or restriction shall not affect the validity of any other provision in an instrument or agreement, but no reverter shall occur, no possessory estate shall result, nor any right of entry or right to a penalty or forfeiture shall accrue by reason of the disregard of such promise, covenant or restriction.

b. This section shall not apply to conveyances or devises to religious associations or corporations for religious purposes, but, such promise, covenant or restriction shall cease to be enforceable and shall otherwise become subject to the provisions of this section when the real property affected shall cease to be used for such purpose.

c. Nothing contained in this section shall be construed to bar any person from refusing to sell, rent, lease, assign, or sublease any room, apartment or flat in a dwelling or residential facility which is planned exclusively for or occupied exclusively for individuals of one sex to any individual of the opposite sex on the basis of sex. Nothing in this section shall be construed to bar any place of public accommodation which is in its nature reasonably restricted exclusively to individuals of one sex, which shall include but not be limited to any summer camp, day camp, bathhouse, dressing room, and comfort station, from refusing, withholding from, or denying to any individual of the opposite sex any of the accommodations, advantages, facilities, or privileges thereof on the basis of sex.

Source: 46:3-23.

COMMENT

This section is still under review and no modifications have been made as yet. It is not clear whether it has been superseded by the LAD, or other law, or whether it is still necessary to retain this language. If the language will be retained, it will be modified as appropriate.

The following sections are proposed for inclusion in a separate chapter of the property project: 46:3-24. Solar easements

a. This act shall be known and may be cited as the "Solar Easements Act."

b. Any easement obtained for the purpose of exposure of a solar energy device shall be in writing and shall be subject to the same conveyancing and instrument recording requirements as other easements.

c. Any instrument creating a solar easement shall include:

1. The vertical and horizontal angles, expressed in degrees, at which the solar easement extends over the real property subject to the solar easement.

2. Any terms or conditions under which the solar easement is granted or will be terminated.

3. Any provisions for compensation of the owner of the property benefiting from the solar easement in the event of interference with the enjoyment of the solar easement or compensation of the owner of the property subject to the solar easement for maintaining the solar easement.

46:3-27. Conveyance or reservation of mineral rights; exclusion of water rights

Every deed or other instrument which conveys or reserves mineral rights in any land shall, unless otherwise expressly provided therein, be construed to exclude any and all water rights or consideration thereof from any conveyance or reservation of mineral rights.