

## **MINUTES OF COMMISSION MEETING**

**January 18, 2018**

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 Virginia Long (via telephone); Commissioner Andrew O. Bunn; Professor Bernard W. Bell, of Rutgers Law School, attending on behalf of Commissioner Ronald K. Chen; and Grace C. Bertone, Esq., of Bertone Piccini LLP, attending on behalf of Commissioner Michael T. Cahill.

### **Miscellaneous**

Chairman Gagliardi advised the Commission, and Staff, that he was in receipt of a letter of resignation from Commissioner Anthony R. Suarez. The Commission extended its thanks to Commissioner Suarez for his service to the Commission.

### **Minutes**

The Minutes of the December 21, 2017, Commission meeting were unanimously approved on the motion of Commissioner Bunn, seconded by Commissioner Bell.

### **Suspended License**

During the December 21, 2017, meeting of the Commission, Staff was asked to review N.J.S. 2C:40-26 and to provide the Commission with proposed language that would ensure that a person who was arrested for driving after the end of their determinate sentence but before reinstatement of their driving privileges would not be charged under this statute.

Samuel Silver prepared a Draft Tentative Report proposing a modification to the language of N.J.S. 2C:40-26(b). The suggested language makes it clear that an individual who operates a motor vehicle beyond the determinate sentenced term of suspension, but before reinstatement, is to be charged with N.J.S. 39:3-40 and not N.J.S. 2C:40-25(b).

Commissioner Long asked whether the charge of “driving while suspended,” charged under N.J.S. 39:3-40, is the appropriate citation under the circumstances set forth in *State v. Torella*. Mr. Silver advised the Commission that he would speak with a municipal court practitioner concerning the scenario presented in *Torella* to ensure that the appropriate section is referenced in the Report.

As an update to the Report, Mr. Silver advised the Commission that Senate Bill 666 had recently been pre-filed by Senator Bateman for consideration during the 2018-2019 legislative

session. The bill makes it a crime of the fourth degree for an individual to operate a motor vehicle during the period of license suspension until the driver restored their driving privileges with the Motor Vehicle Commission. Preliminary outreach was conducted by Staff in an attempt to speak with a representative from Senator Bateman's office.

The consensus of the Commission was to have Staff confirm the statutory references contained in the report and conduct additional outreach to Senator Bateman's office. The Commission will consider revisions and updates to the Draft Tentative Report during the February Commission meeting.

### **Partnership Trade Name Certificates**

Mr. Silver discussed a Draft Tentative Report proposing modifications which would modernize the statutory provisions set forth in the New Jersey Partnership Trade Name Statutes. He began by noting that with the guidance and direction provided by the Commission during the December 21, 2017, meeting, what began as an examination of an anachronistic reference in a statute evolved into an examination of Title 56.

Mr. Silver noted that under the current statutes, an individual or entity must file the required documents with the appropriate County Clerk. The Clerk of each county must not only keep a registry of each partnership, or trade name, but must also file a copy of these documents with the Division of Commercial Recording. During his preliminary outreach, Mr. Silver had the opportunity to speak with Clerks from several different counties. During these discussions, none of the Clerks interposed an objection to having the filing of the partnership and trade names effectuated exclusively with the Division of Commercial Recording. Mr. Silver indicated that modification of the current statutory scheme would eliminate the duplicative filing of documents in both county and State offices.

The current statutes require non-residents to appoint the County Clerk in each county in which they conduct business as their "attorney-in-fact" for purposes of accepting service of process. Mr. Silver advised the Commission that the use of each County Clerk's Office could be eliminated from the partnership statutes by using the limited liability partnership statutes as a guide. Under the modified statute, an agent of a firm or partnership would be an individual who is a resident of New Jersey or a person authorized to do business in this State. This modification would align the partnership statutes with the limited liability partnership statutes and eliminate the necessity of the Clerk's offices effectuating service of process.

Currently, the partnership statutes make it a misdemeanor for a partnership or entity to transact business in New Jersey without the statutory filings described above. The punitive aspect of the statute, according to Mr. Silver, does not reflect the State's current view of business

associations adopted in 2000 – the entity theory. In addition, he explained that the imposition of the criminal penalties set forth in the statute are not found in any reported New Jersey case. According to Mr. Silver, updating the partnership trade name statutes to withhold liability protection from non-compliant business entities would be consistent with New Jersey’s current approach to business associations and parallel the limited liability partnership statutes.

Mr. Silver recommended modifying the statutes in this chapter and provided recommended language to ameliorate the aforementioned problems and align the statute with the requirements imposed upon similar business associations. He concluded that updating the partnership statutes would not have a deleterious effect upon the purpose of the statute – the protection of creditors.

Commissioner Bunn indicated that Revised Draft Tentative Report appeared to be a dramatic departure from the direction in which the project was previously progressing. He commented that the current focus of the project, revising the entire chapter, would clarify and streamline the chapter and make it easier to use. Chairman Gagliardi concurred and commented that lack of resistance experienced by Staff during outreach was encouraging. Laura Tharney noted that the current direction of the project is consistent with modern practice in other types of businesses.

Chairman Gagliardi made recommendations regarding the formatting of the Report and asked for a motion to release the Tentative Report. On the motion of Commissioner Long, seconded by Commissioner Bunn, the Commission unanimously voted to release the project as a Tentative Report.

### **Anachronistic Statutes**

Timothy Prol summarized a Draft Tentative Report which proposed the potential repeal of a group of anachronistic statutes. The statutes under consideration for repeal include: the definition of “present war”; transportation of the “poor”; sleigh bells on horses attached to a sleigh; required bicycle bells; and the taking and sale of “bittersweet.”

There are still eight New Jersey statutes, according to Mr. Prol, that refer to the “present war” – defined as World War II. The phrase “present war emergency” appeared in five statutes, however, N.J.S. 1:1-2a is the only one which remains in effect. The statutes that reference “present war”, appear to be ripe for outreach to determine whether the Legislature should repeal these statutes.

Chairman Gagliardi commented that there is often a lengthy period of transition in ideas and in the use of phrases contained in each statute. He continued that caution should be taken in

removing words from statutes that may impact other statutes or practices. Commissioner Bunn agreed with the Chairman's observation. By way of example, Commissioner Bunn proffered the example of "rent control" in New York. Originally enacted as an emergency measure, he continued, this concept is engrained in the state's statutory structure.

One of the other issues identified in the Report was the requirement for audible signals on bicycles. Mr. Prol noted that in the latter part of the 19<sup>th</sup> Century, the increased popularity and use of the bicycle compelled many municipalities to enact ordinances to govern this mode of transportation. Growing animosity between bicyclists and pedestrians led to the 1869 passage of N.J.S. 39:4-11 entitled, "Audible Signal." Since that time, bodies of regulations and laws have developed to address safety issues relating to various modes of transportation. As a result, the function of this statute may no longer comport with the purposes for which it was initially enacted.

Chairman Bunn inquired whether cities are currently being forced to deal with the issue of bicycle bells and audible signals. He stated that this inquiry should be part of Staff's outreach in this subject area. Commissioner Bell mentioned that the statute could be amended to place the onus on the bicyclist to warn pedestrians of their presence. In response, Commissioner Bunn remarked that perhaps this issue should be dealt with at the local level.

On the motion of Commissioner Long, seconded by Commissioner Bell, the Commission voted unanimously to release the Tentative Report and authorized Staff to conduct outreach on each of the subjects contained therein.

### **Revised Uniform Unclaimed Property Act**

John Cannel discussed his Memorandum regarding the Revised Uniform Unclaimed Property Act (RUUPA) to provide additional detail to the Commission in the area of gift cards, inactivity fees, and safe deposit boxes.

Mr. Cannel noted that four states have enacted RUUPA or have used parts of it in revising an older version of the Act. He indicated that New Jersey includes gift cards in the current Unclaimed Property Act; however, inclusion was a relatively recent addition to the statute. Mr. Cannel explained the difference between gift cards and stored value cards, as well as the requirements the law places on issuers of such cards when they are presumed to be unclaimed by the consumer. Mr. Cannel also discussed issues and requirements pertaining to inactivity fees on stored value cards and travelers checks.

Commissioner Long indicated that the gift card provisions currently in place in New Jersey have a logical basis. Mr. Cannel agreed and indicated that gift cards are distinguished

from stored value cards. He noted that because gift cards are not redeemable for cash, the issuer may recover 60% of the card's value when it is presumed abandoned or inactive. Mr. Cannel indicated that these provisions, as they currently appear in New Jersey law, should remain in effect in any draft of the RUUPA that the Commission recommends.

Mr. Cannel also addressed the issue of safe deposit boxes that have been abandoned by their owners. He indicated that the current statute provides that banks may sell any property of value located within the safe deposit box. Thereafter, they must forward the balance, along with the remaining property regardless of value, to the Unclaimed Property Administrator. Mr. Cannel stated that a small addition to the Unclaimed Property Act could eliminate the requirement of having the Unclaimed Property Administrator process large amounts of valueless items.

Commissioner Bunn indicated that the provisions pertaining to gift cards, stored value cards, and safe deposit boxes should be incorporated into any version of the RUUPA that the Commission ultimately recommends to the Legislature.

The Commission authorized Staff to prepare a Draft Tentative Report setting forth proposed language on these sections for presentation to the Commissioners at the February meeting.

### **Inheritance from a Deceased Child**

Christian Weisenbacher, a Legislative Law Clerk with the Commission, discussed his Memorandum examining the Appellate Division decision in *In re Estate of Fisher*. In *Fisher* the trial Court examined, in a case of first impression, the circumstances under which a parent may be precluded from inheriting from their deceased child and determined that the father of the child was precluded from inheriting from his deceased child's estate.

In reversing the decision of the trial court, the Appellate Division concentrated on the terms "abandoned" and "willfully forsaken." According to Mr. Weisenbacher, the Court found that a determination of "abandoned" turns upon an interpretation of N.J.S. 3B:5-14.1(b)(1). In an attempt to interpret these terms, the Court examined case law interpreting N.J.S. 9:6-1.

Commissioner Long suggested that the decision of the Appellate Division was correct and added that the Court did not have to use N.J.S. 9:6-1 to arrive at its decision. Commissioner Long noted that N.J.S. 9:6-1 sets a particularly high standard to be met in order to bar parents from inheriting from their child's estate. In the present case, she continued, the facts did not seem to show that the defendant had willfully forsaken his child; rather, he experienced "hard times." Commissioner Long was not certain what additional work was required from the

Commission on this subject matter. She was not, however, opposed to ascertaining the manner in which other states address this issue.

Commissioner Bell observed, and Commissioner Bertone concurred, that in these types of cases the opinions are extremely fact-sensitive. He also agreed with Commissioner Long's assertion that the Court did not have to engage in a N.J.S. 9:6-1 analysis in addressing the abandonment issue. Commissioner Bunn remarked that because the trial court decision was incorrect the Appellate Division enunciated a new standard so that future litigants would be clear about how the statute would be interpreted by the Court.

Although these cases may affect a small portion of the population, Commissioner Bell noted that they touch upon the dignity of being recognized as a parent who has not abandoned their child. Commissioners Bertone and Bunn agreed.

Unanimously, the Commission authorized Staff to conduct further research and outreach concerning this project.

### **Theft of Immovable Property**

Mr. Weisenbacher discussed his Memorandum concerning the definition of the word "transfer" in N.J.S. 2C: 20-3(b) as it pertains to the theft of immovable property. This issue came to the Commission's attention after a review of the holding in *State v. Kosch*. The facts in that case detail the behavior of a defendant who conveyed fraudulent documents during the course of several real estate transactions and was convicted of the theft of immovable property and trafficking in personal identifying information.

The central issue on appeal was the definition of the word "transfer" under N.J.S. 2C:20-3(b). Mr. Weisenbacher advised the Commission that the New Jersey Criminal Code does not define the word "transfer." In the absence of a statutory definition, the Appellate Division examined a variety of sources including general rules of construction, Black's Law Dictionary, and the Statutes of Frauds in an attempt to discern the proper definition of the term.

Mr. Weisenbacher requested authorization to conduct additional research and outreach to determine whether the court's interpretation is consistent with common practice. In addition, authorization was sought to determine whether modifying N.J.S. 2C:20-3(b) to clarify its scope as well as the meaning of "transfer" would aid in interpreting the provision and potentially remove the need for additional litigation regarding this issue.

Commissioner Bell commented that there is a difference between the behavior of a squatter and the behavior of the defendant in *State v. Kosch*. Commissioner Bertone concurred,

noting the difference between possession and fraudulent behavior. She also indicated that the forgery in *Kosch* essentially effectuated a transfer within the meaning of N.J.S. 2C:20-3(b). Commissioner Bell continued that the defendant's actions in *Kosch* fall within the language of N.J.S. 2C:20-3(b).

Mr. Weisenbacher indicated that there was some concern that broadening the interpretation of what constituted a "transfer" within the meaning of the statute could ensnare individuals whose conduct was not initially contemplated by the Legislature to result in criminal liability. Commissioner Bell responded that this case also raises the question whether a transfer includes all property interests or only a smaller cross-section of interests. He stated that in the event that only some interests are covered by the statute then there is a need to define what culpable conduct is criminalized by the statute.

Commissioner Bunn stated that the defendant in *Kosch*, committed a theft, fraud and trespass because he never had an ownership interest in the properties that involved in these transactions. Mr. Cannel indicated that most common law frauds overlap with other criminal statutes. Commissioner Bunn opined that the rule of lenity could have prevented defendant from being charged under N.J.S. 2C:20-3(b) because of the apparent ambiguity within the statute.

The Commission authorized Staff to continue to conduct further research and outreach on this issue.

### **Communications Data Warrants and Electronic Communications**

Mr. Weisenbacher also prepared a Memorandum that was presented to the Commission by Laura Tharney in which the Commission was asked consider a project that would examine whether the audio portions of a video camera or video tape falls within the "Wiretapping and Electronic Surveillance Control Act." Ms. Tharney noted that this was the issue presented to the Appellate Division in the case of *In the Matter of the Application of the State of New Jersey for Communications Data Warrants to Obtain the Contents of Stored Communications from Twitter, Inc.*

Ms. Tharney noted that in this case of first impression, there is no clear legislation in this area. At the time that the wiretapping statutes were enacted, they could not have contemplated what is commonly referred to as "social media." The question that arises is whether communication sent through social media is to be considered a communication. Commissioner Bunn stated that this area of law becomes more complex when you consider the wide array of social media that is currently available to the public. Citing the warrant that had to be obtained by the government in order to "crack" an iPhone, Commissioner Bunn noted that frequently allies in this area may become adversaries. In undertaking this type of project, he maintained that

it would be necessary to not just look at what other states are doing; rather, an inquiry would have to be made to see how other countries – such as Canada and Australia – are addressing this issue.

Chairman Gagliardi observed that this is a huge issue for the law enforcement community. Commissioner Bell commented that this is an extremely difficult and complex area of law due to frequent technological advancements and changes. He cautioned that before delving too deeply into this area, it would be important to consider the amount of resources that the Commission wishes to devote to this task. He remarked that this area of law involved: criminal law experts, prosecutors, criminal law professors, privacy law attorneys.

In moving forward with a project of this magnitude, Chairman Gagliardi asked Staff to include, in a future report, the resources that Staff believed would be necessary to complete the Commission's analysis. Laura Tharney advised that with a project of this size, Staff would reach out to New Jersey's law schools, including both the faculty and clinics, in an attempt to minimize duplicative efforts and maximize the Commission's resources. Commissioner Bunn suggested that there may be Congressional or other federal resources that Staff may be able to utilize in examining this subject matter. With those considerations in mind, approval for continued research and outreach in this area was given to Staff.

### **Annual Report 2017**

Laura Tharney advised the Commission that the 2017 Annual Report was in the process of being finally reviewed by Staff and that additions or corrections could be made during the course of the following week. Based upon their review, the Commissioners did not recommend any changes to the draft. Ms. Tharney stated that, in keeping with the Commission's statutory mandate, the Annual Report would be filed with the Legislature on or before February 01, 2018.

On the motion of Commissioner Bell, which was seconded by Commissioner Bunn, the meeting was adjourned.