

**MINUTES OF COMMISSION MEETING**  
**April 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., Commissioner Andrew Bunn, Commissioner Albert Burstein and Commissioner Edward J. Kologi. Professor Ahmed I. Bulbulia of Seton Hall Law School attended on behalf of Commissioner Patrick Hobbs, Professor Bernard Bell of Rutgers University School of Law attended on behalf of Commissioner John J. Farmer, Jr., and Grace C. Bertone, Esq. of McElroy, Deutsch, Mulvaney & Carpenter, LLP, attended on behalf of Commissioner Rayman Solomon.

Also in attendance were Sharon Rivenson Mark, Esq., on behalf of the National Academy of Elder Law Attorneys (NAELA) and the Elder and Disability Law Section of the State Bar Association and William P. Isele, Esq., of Archer & Greiner, also on behalf of the Elder and Disability Law Section of the State Bar Association.

**Minutes**

The Minutes of the March 2010 meeting were approved on motion of Commissioner Bunn, seconded by Commissioner Burstein.

**Durable Power of Attorney**

Marna Brown explained that the project was largely in final form but that there were several outstanding issues requiring Commission resolution.

First, the Elder and Disability Law Section of the State Bar had suggested including a provision in section 46:2B-20.13 calling for the award of attorney fees to a prevailing party in an action filed under this section to compel acceptance of a power of attorney. Staff proposed three options in the draft submitted to the Commission and expressed a preference for option B. Sharon Rivenson Mark and William Isele stated that option B was acceptable. Commissioner Burstein moved that option B be adopted, and the motion was seconded by Commissioner Bertone. Commissioner Bunn said that the language did not appear to require either a refusal to honor the power of attorney or a failure to respond before a summary action could be filed. Commissioner Bunn indicated that he was concerned that, as a result, an institution would not have necessarily done anything wrong before an action was filed and attorney's fees awarded. Chairman Gagliardi said that refusal to honor the power should be a prerequisite to commencing the action.

Ms. Mark said that there would not be an action unless the power had been refused or declined. Commissioner Bertone stated that, as a practical matter, an action

would not be instituted unless the power had been refused, and Mr. Isele stated that in 35 years of practice, he had not seen a matter in which there had not been a refusal before any action to compel acceptance of a power. Commissioner Burstein said that the denial of the power of attorney appeared to be inherent in the language of subsection c., but he did not object to the inclusion of express language that made denial or refusal to honor the power a prerequisite to the institution of the action. The Commission unanimously approved the adoption of option B with inclusion of the express condition of denial or refusal to honor the power. Ms. Mark suggested that the best place to insert this condition was at the beginning of subsection a.: “In the event that a power of attorney has been declined or refused to be honored by a third party...” The Commission will review the revised section in May.

Ms. Brown stated that the provision regarding resignation of an agent had been removed from the last version, but was reinserted in a modified form in the current draft. Since a successor agent needs to know when to proceed, such a provision creates a clear line of demarcation between agent and successor agent.

Ms. Mark and Mr. Isele explained that there are four governmental agencies that might, depending on the circumstances in a given case, need to receive notice. They are: Adult Protective Services, the Division of Developmental Disabilities for anyone under their jurisdiction, the Bureau of Guardianship Services, and, if the principal is 60 years or older the Ombudsman for the Institutionalized Elderly (the Ombudsman had jurisdiction over all facilities that care for the elderly). Ms. Mark said that the Commission may wish to specify where and how the notices should be sent. Mr. Isele added that in most cases in which the court appoints a guardian, the court will, in the same order, invalidate existing powers of attorney so there is only one person speaking on behalf of the affected individual. The Court Rules require the inclusion of language in the pleadings indicating whether someone has power of attorney so that the court knows early in the proceeding if any powers exist. Ms. Mark noted that the only powers that are retained, generally, are health care powers of attorney.

Commissioner Burstein asked whether any provision in the law allowed a summary proceeding for the resignation of a power of attorney. Mr. Isele said that such a provision would be good, but both he and Ms. Mark agreed that such a proceeding would not happen. Mr. Isele pointed out that simply giving notice to the appropriate agency would be adequate. Commissioner Bunn asked whether there were circumstances where the agent wished to resign because the agent felt too old to assume the responsibilities of an agent. Ms. Mark replied that, generally, when powers are drafted, a successor agent is included, and the successor would be notified. In the rare case in which someone cannot supply the name of a successor agent, the only option is a court action.

Chairman Gagliardi directed Staff to redraft the resignation provision to include

the actual names of the relevant governmental agencies for Commission consideration at the May meeting. Mr. Isele said that it was generally clear which agency covered a particular individual. Ms. Mark suggested that the language refer to “a” rather than “the” governmental agency. Commissioner Bunn said that the language should be sufficiently clear that the agent could be charged with neglect for failing to notify the proper governmental agency. Ms. Mark also suggested that the notice should be sent “by certified and regular mail” and that the language should provide notice to the principal “and” (not “or”) “one of the following...”

At the request of the Elder Law and Disability Section of the State Bar, Staff removed the subsection in section 20.7 on page 10, that allowed a power of attorney to make changes to a will or codicil of the principal because changing a will or codicil is a private right reserved specifically to the principal and not appropriate for delegation. Staff also considered whether there were other things that cannot be delegated to an agent. Nothing in the current statute distinguishes what authority may or may not be given to an agent by way of a power of attorney. As a part of the draft, Staff prepared a series of provisions indicating the kinds of authority a principal may grant to an agent. Ms. Brown explained that the uniform act included similar provisions and Commissioner Burstein suggested including a catch-all provision, but with exclusionary clauses. Mr. Isele said that, historically, powers of attorney were used only for financial transactions, but recommended that no action be taken that would stifle the creative use of a power of attorney in the future.

Ms. Mark also noted that most attorneys in private practice deal with cases where the agent has acted improperly or excessively. The granting of all authority to do anything a principal can do eliminates the delineation between permissible and impermissible actions. Preparers of powers generally refer to the statutory language and adjust to remove powers or to add additional powers as necessary since the power of attorney is not a “one-size-fits-all” document. She urged that the Commission not include language as broad as “anything and everything a principle can do”.

Commissioner Bell asked whether law existed that indicates what is delegable and what is not. Ms Brown was not aware of any such law. Commissioner Bell suggested that to the extent that there are reasons not to delegate certain powers to the agent, the applicable substantive law should be allowed to address the concern. Mr. Cannel said that Staff could leave the language as it is, with a list of things which may or may not be exclusive, permitting further development. Commissioner Burstein cautioned that the Commission has already provided enough modification to current law to cover issues of general concern to those choosing a power of attorney. Commissioner Bunn asked whether Staff should include language indicating that the provisions do not create an exclusive list, to clarify that this is not a drafting error. Ms. Mark and Mr. Isele stated they had not read the provisions to be an exclusive list. Ms. Brown noted that neither the

uniform law nor the New York law addressed this issue.

Commissioner Burstein suggested correcting awkward language in section 20.7a. Ms. Brown will revise the language of this entire section and will include a provision that an agent cannot renounce a principal's designation as a fiduciary for a third party without an express provision permitting such renunciation in the power. This language had been requested by the Trusts, Estates and Real Property Section of the State Bar Association.

Ms. Brown thanked the guests and the other numerous commenters for their feedback. Ms. Mark and Mr. Isele thanked the Commission for hearing and incorporating the comments of the Elder and Disability Law Section. Chairman Galgiardi asked Staff to circulate the revised sections to commenters and obtain comments early so that they can be reviewed and incorporated as appropriate and the report issued as a final report at the next meeting.

### **Title 39**

Laura Tharney said that unless the Commissioners had questions or comments on the revised language contained in the memorandum dated April 6<sup>th</sup>, she would focus on the issues on which she required Commission input.

Draft language making reference to applicable federal regulations was included at the top of page three of the memorandum. The MVC suggested that there was no need to specifically refer to the federal regulations, but since the State standards did not match the federal standards, and the federal standards controlled, Ms. Tharney wanted to alert those reading the statute to the existence of the federal regulations. She explained that the language had been revised since the distribution of the memorandum and now read: "The requirements for lamps, reflective devices and associated equipment are governed by federal law and are found in Federal Motor Vehicle Safety Standard Number 108 at 49 C.F.R. 571.108 as amended or modified. To the extent that they are not preempted by federal law, the following additional requirements apply." Commissioner Bunn suggested that the first sentence, as revised, was fine but that the second was problematic because, in its present form, it required the reader to engage in preemption analysis. He asked if the New Jersey statute included additional requirements or if it contradicted federal law. Ms. Tharney explained that the current statutes contained both types of provisions, some that covered the same ground as the federal law, and some that pertained to different items. She added that the MVC had stressed that the state law requirements could not simply be removed from the statute even if inconsistent with federal law. Mr. Cannel noted that even though it is not likely, the state statutes do create a floor if the federal standards were all removed tomorrow.

Commissioner Bunn asked if there was any guidance in the federal law about the type or extent of the preemption. Commissioner Kologi asked if the specific regulations

referred to in the draft address the preemption issue. Ms. Tharney indicated that the regulations referred to do not contain language pertaining to preemption, but that there may very well be general language that addresses preemption and indicated that she will research the issue for the next meeting. Commissioner Bunn recommended changing the word “preempted” to “addressed” if that is an accurate statement of the interplay between federal and state law in this area. Commissioner Bell suggested that Ms. Tharney speak with someone from NHTSA to obtain additional information regarding the preemption issue if possible.

At the suggestion of Chairman Gagliardi, the first sentence of the proposed comment language in that same section was revised to say: “A detailed review of the federal standards was beyond the scope of the MVC review of this project where those federal standards are not currently included in the source law.”

The next section addressed by the Commission was the section pertaining to Accidents and Reports, in which Staff had been asked to remove the dollar limits (currently \$250 and \$500) and replace them with substitute language. Ms. Tharney said that she and Mr. Cannel had revised the language earlier in the day and the proposed new language reads: “There is a permissive inference that the driver of a motor vehicle involved in an accident resulting in injury or death to a person or significant and visible damage to a vehicle or property knew that he or she was involved in the accident and that the injury, death or property damage occurred.”

Commissioner Kologi asked about a situation in which the transmission or other mechanical part is damaged or destroyed, but the damage is not visible. Ms. Tharney said that the proposed “significant and visible” language did not cover such a situation. Commissioner Kologi asked if the language could allow the MVC to change the dollar amount every two years. Mr. Cannel said the statute could provide for an amount to be set by regulation. Chairman Gagliardi added that a number is still problematic because the statute should not depend on the nature of the car, and whether it has sensors or other upscale parts that increase the value of the damage beyond that of an average car.

Commissioner Bell suggested that it was difficult to imagine a situation in which a mechanical part, like the transmission, was damaged to the point of not functioning without visible damage to the car. Commissioner Kologi said that the use of the word “significant” is troublesome because what is significant to one municipal court judge may not be significant to another. Commissioner Bell said that the lack of precision is even more problematic since it controls whether an individual is found to have improperly left the scene of an accident. He said that while a dollar amount is precise, an ordinary individual is not able to tell whether their situation meets the standard or not. Commissioner Kologi asked if there was any guidance from other states. Ms. Tharney said that while she has looked at the laws of other states on various issues pertaining to

this Title, she had not done so with regard to this issue, but will do so for the next meeting. Commissioner Kologi explained that with the monetary threshold, even if ordinary citizens cannot realistically know if they are in compliance with the statute, there is no litigation on this issue. Commissioner Bunn asked why it was necessary to codify a permissive inference, noting that it was very difficult to do so in a way that is not circular. The Commission members questioned whether the intention of the statute was to deal with something along the lines of disabling damage or simply to address a claim that the individual did not know that they were in an accident.

Chairman Gagliardi indicated that the Commission was not happy with the current approach and Ms. Tharney said that she would review the statutes of other states and speak with police officers and municipal court judges about this issue in advance of the next meeting.

With regard to the definition of bicycles, Ms. Tharney explained that she recommended using the definition proposed by the Bicycle and Pedestrian Advisory Council. She indicated that she had looked at the definitions of “bicycle” used in other states and that many of the states, even if they do not contain a definition identical to that used by NHTSA, use something similar. The proposed definition is like those used in other states. Professor Bell asked about mopeds and Ms. Tharney explained that they are addressed in a different section of the statute, but she could add language specifically stating that the definition shall not include a motorized bicycle. Commissioner Kologi suggested that, in the definition of “skateboard” the definition stop after the word “ride,” and Staff will make that change.

The Commission remained unsatisfied with the language pertaining to unhitching a horse that was contained in the draft. Chairman Gagliardi said that staff should find out what the problem is that the statute is trying to prevent and revise the language accordingly. In addition, Staff was asked to find out if there is another statutory provision elsewhere that deals with runaway horses and, if so, eliminate this section. If the section is to be retained, Commissioner Bell recommended that it begin “When a vehicle, harness or other equipment is attached to a horse, before removing any part...”

Finally, with regard to the applicability of Title 39 on non-public property, Ms. Tharney explained that she presented the issue to police officers at the request of the Commission and there were a number of suggestions for sections of the statute that should apply on quasi-public property. She also noted that there was a list of statutory sections that are presently, but not uniformly, enforced on quasi-public property and that the Commission may wish to include some of these in any list that is created for the sake of clarity and uniformity. She explained that Staff would narrow the list and distinguish sections that seem essential from any that don’t and prepare that information for the next meeting. Commissioner Bunn asked that a definition of quasi-public property be

prepared for the next meeting as well.

### **Title 9 – Parentage**

John Cannel explained that on page nine, in subsection e., he had originally proposed a period of five years as the period within which parentage may be challenged. This period was increased to seven years at the request of the Commission. The Department of Human Services, however, wanted the time period reduced to two years because once a decision has been made as to parentage, disturbing it creates problems for the duty to support the child and the expectations of the child. Mr. Cannel explained that such a decision cannot be made as binding as the Human Services commenters would like as a constitutional matter, because issues can arise after the two year period. He said, however, that after a certain period of accepting parentage and living with a child as a parent, the result is a de facto adoption. The party in the position of the parent has formed a relationship with that child regardless of what the facts were in the beginning.

Chairman Gagliardi asked what the current statute provided on this issue and Mr. Cannel said that the current statute does not address the issue. The theory of including a time period is that it points out that the objection to parentage should occur before a relationship is formed with the child. Once an individual's rights are established, that person has only a limited amount of time to find a lawyer and go to court.

Commissioner Bell asked if someone could challenge a parentage determination if they find out relevant information 20 years after the fact – if they could proceed despite the general statute of limitations set forth in subsection e. Mr. Cannel said that such a person could not proceed; that subsection e. only shortens a statute of limitations, and does not extend it and that collateral relatives are bound by it. The Commission considered the fact that the impact of the length of time depended, to some extent, on the age of the child. The Commission ultimately determined that since this limitation deals with an established parent-child relationship and runs from birth, a five year period might be too long. The consensus of the Commission is that the period should be set at three years.

Mr. Cannel said that the remaining issues are fairly straightforward and that the project was ready to be released as a final report with that change. A motion to release the project as a final report was made by Commissioner Kologi and seconded by Commissioner Bell.

### **Title 2A – Causes of Action**

Laura Tharney directed the attention of the Commission to two items in this report. First, on pages three and four of the report, she explained that Staff had been asked to look at what other states have done in the area of alcohol beverage servers'

liability. The research in this area had been underway but not completed at the time of the March meeting. The research has since been completed and Staff's findings have been added to the comment.

Chairman Gagliardi explained that, on page three, he is aware that the language shown is the current statutory language but suggested that even if no substantive change is recommended at this time, a small change, the removal of the word "negligent" from the first line of 2A:22A-5, would improve the phrasing of the negligence standard. Staff will make that change.

With regard to the section pertaining to remedies for persons defrauded (2A:32-1), beginning on page 6, Ms. Tharney said that this section had been substantially revised as a result of information discovered by Staff during research conducted in response to inquiries by Commissioner Bunn. She explained that Staff's initial interpretation of the statutory language was affected by the point at which the case law research began. Case law from the early nineteen fifties indicated that the language of the source statute, which begins, "[w]henver there is fraud in the execution or consideration of a contract", referred to both fraud in the inducement and fraud in the performance. Earlier case law, however, suggested that where the statutory language reads "fraud in the execution or consideration of a contract" that language refers only to "fraud in the inducement of a contract". As a result of the additional research, the language of the statute and the language of the accompanying comment were revised to reflect this more limited view.

Ms. Tharney said that the Commission's law student interns worked diligently on the two issues reflected in this latest draft and that their research formed the basis of the revisions. Commissioner Bunn noted the thoroughness of the comment to section 2A:32-1 and Ms. Tharney explained that the statutory language now tracks more closely with the original language and all available case law and that the comment reflects the changes made by the Commission during the course of drafting.

The project was released as a tentative report after a motion by Commissioner Bunn, seconded by Professor Bell.

### **Miscellaneous**

The next Commission meeting is scheduled for May 13, 2010.

Mr. Cannel informed the Commission that he had been officially nominated as a deputy law commissioner to NCCUSL.

Ms. Brown stated that the bill on Construction Lien Law, based on the Commission's final report, now also has Senate sponsors and that the bill on Title Recordation also had sponsors in both the Senate and the Assembly.