MINUTES OF COMMISSION MEETING

April 20, 2023

Present at the meeting of the New Jersey Law Revision Commission, held remotely, were: Chairman Vito A. Gagliardi, Jr.; Commissioner Virginia Long; Commissioner Louis N. Rainone; Professor Edward Hartnett, attending on behalf of Interim Dean John Kip Cornwell; and Grace Bertone, of Bertone Piccini, LLP, attending on behalf of Dean Kimberly Mutcherson.

Minutes

The Minutes of the March 16, 2023, Commission Meeting were unanimously approved on the motion of Commissioner Long, seconded by Commissioner Rainone.

Mandatory Attorney Review Provision

Samuel M. Silver discussed with the Commission a Draft Tentative Report proposing the elimination of the mandatory attorney review provision in the New Jersey Statute of Frauds, N.J.S. 25:1-5, governing non-marital personal relationship support provisions.

In New Jersey, an action for palimony requires a promise by one party to a non-marital personal relationship to provide support to the other during the relationship or after its termination. In 2010, the Legislature amended the Statute of Frauds to require that such arrangements be reduced to writing and signed by the promisor. The statute also states that the arrangement is not binding upon the parties "unless it was made with the independent advice of counsel for both parties."

In *Moynihan v. Lynch*, 250 N.J. 60 (2022) the New Jersey Supreme Court was asked to determine the validity of the mandatory attorney review requirement for palimony agreements. In *Moynihan*, the parties lived in a marital, family-style relationship for eighteen years and, during the course of their relationship, they entered into a handwritten prospective property settlement agreement executed before a notary. Neither party consulted with an attorney before signing the agreement.

The Appellate Division determined that the agreement was a palimony agreement and found it unenforceable because it did not comply with the mandatory attorney review provision in the statute.

The New Jersey Supreme Court examined the legislative history of the palimony statute and concluded that the attorney-review requirement was an arbitrary government restriction that contravenes the plaintiff's substantive due process rights. The Court determined that the 2010 amendment to the statute represented a decision by the Legislature to abrogate New Jersey's common law regarding palimony.

The Court noted that, unlike any other provision in the Statute of Frauds, subsection (h) mandates that each party to the palimony agreement secures the independent advice of counsel. No other law in this State conditions the enforceability of an agreement between private parties on

attorney review. In New Jersey, the constitutional right to individual autonomy provides individuals with the "right to determine how best to pursue [their] personal and financial affairs" without the interference of an attorney.

Mr. Silver stated that the Court determined that the attorney-review requirement directly infringes on the right of the parties to enter a palimony agreement without retaining an attorney. The Court was unable to ascertain the "public need" for the attorney-review requirement given the lack of such a requirement in other contexts and the absence of legislative history regarding the need for it in this context. The Court struck down the attorney review requirement in N.J.S. 25:1-5(h). The palimony agreement between the parties was therefore enforced as written.

Mr. Silver explained that consistent with the Supreme Court's holding in *Moynihan*, Staff recommends the removal of the unconstitutional language from N.J.S. 25:1-5.

Commissioner Hartnett proposed that the language in the first sentence of the "Analysis" section in the Report be changed from "Historically, under common law…" to "Beginning in 1979, under common law…" to clarify the time frame. The other Commissioners agreed with this change.

On the motion of Commissioner Bertone, seconded by Commissioner Long, the report was unanimously released as a Tentative Report.

Joint Motions to Vacate Parole Ineligibility

Samuel M. Silver discussed with the Commission a Draft Tentative Report proposing the modification of the statute concerning joint motions to vacate parole ineligibility, N.J.S. 2C:35-12, as discussed in *State v. Arroyo-Nunez*, 470 N.J. Super. 351 (App. Div. 2022).

In the forty years that followed New Jersey's enactment of the Comprehensive Drug Reform Act (CDRA) of 1987, and in reaction to constitutional challenges to the Act, the Attorney General promulgated a number of Directives to promote uniformity and avoid arbitrary or abusive exercises of discretionary power. The Attorney General's actions, combined with judicial oversight, was supposed to protect defendants from arbitrary and capricious prosecutorial decisions. In *State v. Brimage*, 153 N.J. 1 (1998), the Supreme Court held that plea guidelines for NJS 2C:35-12 must be consistent throughout the State to be constitutional.

The Attorney General Directive issued in 2021 instructed prosecutors statewide to end imposition of mandatory parole ineligibility for non-violent crimes. The waiver of minimum sentences would occur in four contexts: (1) during plea negotiations; (2) after conviction at trial; (3) following violations of probation, and (4) in connection with a joint application to modify sentences of inmates currently incarcerated. Also, pursuant to the Directive, prosecutors were to use statutory authority or the Court Rules to correct injustices of mandatory minimum drug sentences already imposed.

In *State v. Arroyo-Nunez*, 470 N.J. Super. 351 (App. Div. 2022), the Court considered joint applications to modify the defendant's sentence and whether N.J.S. 2C:35-12 permits a court to vacate the mandatory parole ineligibility of a defendant sentenced to state prison pursuant to a

guilty plea to a CDRA offense. It also considered whether the Attorney General's Directive that permits joint motions to vacate a mandatory period of parole ineligibility for non-violent drug offenses invalidated the statute and violated the separation of powers doctrine.

The Court noted that Section 12 could be read to preclude post-conviction agreements for defendants who plead guilty rather than proceeding to trial. Limiting post-conviction agreements to only those defendants who went to trial was described as "patently inequitable and unfair."

In its current form, N.J.S. 2C:35-12 is a three sentence block paragraph that is 193 words long. The proposed modifications divide the statute language into subsections to improve accessibility. In subsection (a), the first sentence requires a court to impose mandatory sentences and penalties in the CDRA and sets forth the circumstances under which such penalties need not be imposed. To make the sentence easier to read and understand, the sentence has been divided into subsections (a) and (b).

In subsection (a), the proposed language sets forth the sentences and penalties a court must impose when a defendant is convicted. It contains a proposed internal cross-reference to the statutory exceptions in subsection (b).

Mr. Silver stated that pursuant to subsection (b)(1), a defendant may avoid the imposition of a mandatory sentence, period of parole ineligibility, or anti-drug profiteering penalty in one of two ways. First, the defendant may enter into a negotiated plea agreement that provides for a reduction in any of the mandatory penalties. In addition, the defendant may enter into a post-conviction agreement to reduce or eliminate the mandatory penalties set forth in the CDRA.

The proposed modifications eliminate from the statute the ambiguous language that could be read as prohibiting individuals who plead guilty from entering into post-conviction agreements with the State. The suggested language provides that the defendant and the prosecution may enter into a negotiated plea or post-conviction agreement and it incorporates the existing statutory language identifying the five subjects that may be addressed in such agreements.

The language in the newly created subsection (b)(2) incorporates the *Arroyo-Nunez* Court's requirement that, when a trial court considers a joint motion filed pursuant to a Directive of the Attorney General and the New Jersey Rules of Court, the judge make individualized determinations about whether good cause exists for the requested relief. Mr. Silver asked for the Commission's guidance as to whether to include a specific reference to R. 3:21-10(b)(3) or a generic reference to the New Jersey Rules of Court.

Finally, Mr. Silver stated the language of subsection (c) is unaltered, with the exception of the internal cross-reference to subsection (b).

To this time, there are no bills pending that address the issue raised herein.

Commissioner Long asked whether the language in subsection (b)(1)(A), "within the range of ordinary or extended sentences authorized by law," should limited to subsection (A) or if it applies to (B) – (D) as well. If an individual can have a negotiated plea or post-conviction agreement that provides for a sentence other than that which is mandated by the statute, and it must

be within the range of ordinary or extended sentencing, then the "within the range of…" language should be shifted up to subsection (b)(1) so that it applies to all of the relevant provisions. Mr. Silver responded that the language in this subsection was taken directly from the original statute. Chairman Gagliardi recommended that when Staff conducts outreach, they should seek comments on Commissioner Long's question.

Commissioner Harnett stated that he was not sure why the language in section (b)(2) contains a reference to motions filed pursuant to an Attorney General's Directive. He also mentioned that the reference to good cause is contained in the Court Rule itself, so it can be omitted here.

Mr. Silver indicated that joint motions may be filed based upon an agreement between the Attorney Geneal and the defendant. He added that in *Arroyo-Nunez*, the defendant was one of 600 applicants who filed for relief pursuant to the newly promulgated Directive of the Attorney General. The individuals filed their motions after they had entered a plea agreement and been sentenced by the trial court. He explained that, because of that background, it may be appropriate to reference the Attorney General's directives in this statute.

Chairman Gagliardi suggested releasing the Tentative Report as is to see what feedback the Commission receives from individuals who specialize in this area of law. Commissioner Bertone and Commissioner Rainone both agreed with Chairman Gagliardi.

On the motion of Commissioner Bertone, seconded by Commissioner Rainone, the report was unanimously released as a Tentative Report.

Mail-in Ballots

Whitney Schlimbach presented an Update Memorandum regarding the impact of the Vote-By-Mail Law on an election contest claim pursuant to N.J.S. 19:29-1. In New Jersey, an election may be contested by asserting that the number of legal votes rejected was sufficient to change the result of an election: N.J.S. 19:29-1(e). The Vote-By-Mail Law, however, directs that an election "shall not" be held invalid due to irregularities or failures in the preparation or forwarding of mail-in ballots in N.J.S. 19:63-26.

In the case of *In re Election for Atlantic County Freeholder District 3 2020 General Election*, 468 N.J. Super. 341 (App. Div. 2021), the unsuccessful candidate brought an election contest claim based on defective mail-in ballots. The Appellate Division considered the impact of N.J.S. 19:63-26 on a vote-by-mail election contested pursuant to N.J.S. 19:29-1.

Ms. Schlimbach explained that the *Atlantic County* case involved Nov 2020 election for Third District Commissioner in which many voters received mail-in ballots that did not include the Third District Commissioner election when they should have. The election winner argued that N.J.S. 19:63-26 does not permit an election to be invalidated due to irregular mail-in ballots, superseding N.J.S. 19:29-1.

The Appellate Division noted that election laws are liberally construed and determined that defective ballots were "rejected votes" within the meaning of subsection (e) of N.J.S 19:29-1. The Court then addressed whether N.J.S. 19:63-26 barred a claim under N.J.S. 19:29-1 when the election is vote-by-mail. The Court in *Atlantic County* determined the Legislature did not intend to eliminate the ability to contest an election merely because the vote occurred by mail. It held that N.J.S. 19:63-26 establishes a presumption of validity that may be rebutted by asserting one of the grounds in N.J.S. 19:29-1 as a basis to invalidate the election.

Ms. Schlimbach indicated that a Tentative Report was released in October 2022 with modifications to both N.J.S. 19:29-1 and N.J.S. 19:63-26 that reflected the holding of *Atlantic County Election*. Outreach was conducted to knowledgeable and interested organizations and individuals and a response was received from Scott Salmon, Esq.

Mr. Salmon opined that N.J.S. 19:63-26 should simply be repealed, and that language should be added to N.J.S. 19:29-1 clarifying that the basis for an election contest must be found in that statute. With respect to N.J.S. 19:29-1, Mr. Salmon opposed the modification changing language from "the voters of this State" to "any eligible voter of this State" given the signature requirements for filing a petition, which are set forth in N.J.S. 19:29-2. He also proposed adding that "candidates to said election" are among the entities that may contest the election.

Mr. Salmon further proposed adding language to the catch-all provision in subsection (g) to include public questions, and restructuring the statute to group the grounds for contesting an election according to whether they are: (1) offenses that are sufficient on their own to overturn the results; or (2) that require a demonstration sufficient to overturn the results.

Finally, Mr. Salmon added that modifications to subsection (h) should reflect that the formation of the New Jersey Election Law Enforcement Commission ("ELEC") has limited the extent to which claims arising under the Campaign Contributions and Expenditures Reporting Act may be heard pursuant to N.J.S. 19:29-1. Mr. Salmon provided Staff with three decisions addressing this issue, all of which involved election contest claims based on violations of the Reporting Act. In all three decisions, the claims were brought to the court pursuant to N.J.S. 19:29-1(h) and the court determined that they should have been heard by the ELEC.

Ms. Schlimbach noted there are no pending bills addressing either N.J.S. 19:29-1 or N.J.S. 19:63-26. She requested guidance from the Commission regarding the direction of the Commission's work in this area given the response to outreach, including the alternative proposed language and objections to some of the modifications in the October 2022 Tentative Report.

Commissioner Rainone indicated that this is an area of law that would benefit from clarification. He suggested that Staff examine the new election law involving jurisdiction. He asked that staff analyze this statute to determine whether the statutory modifications changed the way in which vote by mail ballots are handled. Commissioner Harnett suggested that Staff examine the Election Transparency Act. He noted that the passage of this Act precipitated the resignation

of three Election Commissioners. Commissioner Bertone and Commissioner Long both agreed that this is a worthy project.

The Commission unanimously authorized Staff to engage in further research and outreach on this project.

Minor, Definition for Megan's Law

Samuel Silver presented a Memorandum concerning the definition of the term "minor" in New Jersey's Megan's Law. To protect children from the dangers posed by persons who commit sexual offenses, the New Jersey Legislature enacted a registration system for sex offenders known as Megan's Law. The law was designed to provide law enforcement officials with the information necessary to prevent, or resolve, sexual abuse cases. A person convicted of a sex offense against a minor must register with the designated registering agency. The term "minor," however, is not defined by the Act.

In *State v. Farkas*, 2022 WL 803466 (App. Div. 2022), the Appellate Division considered whether the seventeen year old victim of criminal sexual contact was considered a minor, requiring the defendant to comply with the requirements of Megan's Law. The Court examined the definition of "minor" found in secondary sources; the definition of "adult" in Title 9; and the definitions of "emancipated" and "unemancipated minor" before determining that, in New Jersey, a minor is a person under the age of eighteen.

After a review of the *Farkas* opinion, Staff noted that the Court did not address the two conflicting definitions of the term "minor" found in Title 2C – the New Jersey Code of Criminal Justice ("Code"). The term minor is defined twice, albeit inconsistently, in the Code. In the Human Trafficking statute, N.J.S. 2C:13-10(e), the term minor is defined as "a person who is under the age of 18 years of age." In the statutory sections concerning licensing and other provisions relating to firearms, the term minor is defined as "a person under the age of 16."

Mr. Silver advised the Commission that there were no bills pending that seek to amend the language of N.J.S. 2C:7-2(b)(2) and sought authorization to conduct additional research and outreach regarding the use of the term "minor" in N.J.S. 2C:7-(2), to determine whether the statute would benefit from modification.

Commissioner Hartnett indicated that while he had no objection to moving forward with this project, he was not troubled that the law defines the term "minor" differently in different contexts. Therefore, he proposed that the most useful thing in this situation might be to provide a default definition of the term that applies unless otherwise specified.

Chairman Gagliardi agreed and the Commission unanimously authorized further research and outreach on this project.

Tort Claims Act Immunity for Claims of Sexual Misconduct

Whitney Schlimbach discussed with the Commission a Memorandum proposing a project to address the Tort Claims Act ("TCA") immunity pursuant to N.J.S. 59:2-1.3, N.J. S. 59:2-10, and N.J.S. 59:9-2.

In New Jersey, the TCA provides public entities with immunity from civil liability except in certain circumstances, including when a claim is based on sexual misconduct "caused by a willful, wanton or grossly negligent act," as set forth in N.J.S. 59:2-1.3 The TCA also provides that public entities are not liable for the acts or omissions of an employee that constitute a crime, and that no damages shall be awarded against a public entity or employee for pain and suffering except in limited circumstances.

Ms. Schlimbach explained that *EC by DC v. Inglima-Donaldson,* 470 N.J. Super. 41 (App. Div. 2021) addressed whether a public entity, in this case the Board of Education (Board), loses its TCA immunity when a public employee, in this case a teacher, sexually assaults students, and how that loss of immunity affects the applicability of N.J.S. 59:2-10 and N.J.S. 59:9-2.

In *EC by DC*, a teacher sexually assaulted three students. The parents of one student filed an action for damages against the Board that hired the teacher. In addition, the parents claimed that the Board was vicariously liable. The trial court held that the teacher's conduct triggered a loss of immunity for the Board pursuant to N.J.S. 59:2-1.3, and that the Board was not entitled to immunities pursuant to N.J.S. 59:2-10 and N.J.S. 59:9-2

The Appellate Division considered whether the teacher's willful, wanton or grossly negligent conduct triggered the Board's loss of immunity in N.J.S. 59:2-1.3. The Board maintained that if a public employee's conduct triggers loss of immunity, then the "willful, wanton, grossly negligent language" in the statute is superfluous because the statute also requires the commission of a sex crime which carries a similar or more egregious state of mind. Therefore, the Board argued that both the public entity and the public employee must act willfully, wantonly, in a grossly negligent manner.

The Court reasoned that accepting Board's argument effectively replaces the statute's "or" with "and." The Court determined that the Legislature meant what it said when it used the word "or" in the statute. Although the phrase "willful, wanton or grossly negligent" may be unnecessary under the facts of *EC by DC*, the Court explained that the language is not superfluous when there is no public employee involved.

Ms. Schlimbach stated that, as originally enacted, the statute was in an "abbreviated" form that the Legislature intended to "correct" by clarifying that public entities should be held to the same standard of care as religious and non-profit organizations.

The Court noted that in subsection (2), related to a public entity's hiring, supervising etc., of an employee, the standard of care is "simple negligence," indicating that Legislature did not intend to impose the high standard advocated by the Board.

Regarding the applicability of N.J.S. 59:2-10 and N.J.S 59:9-2, the Court distinguished between an "immunity" and a "limitation on liability." Because N.J.S. 59:2-10 exempts a public entity from liability when an employee commits a crime, it is no longer available when the public

entity has lost immunity pursuant to N.J.S. 59:2-1.3. Since N.J.S. 59:9-2 only limits a public entity's liability, it applies even if a public entity loses TCA immunity. The Court observed that N.J.S. 59:2-1.3 "could have been drawn with greater precision" and if Legislature intended something other than the Court's interpretation, it has power to clarify its intent.

Ms. Schlimbach stated that there are no pending bills that address the issue raised with respect to N.J.S. 59:2-1.3. She noted that there is one bill that addresses N.J.S. 59:2-10 and two bills that address N.J.S. 59:9-2 but none involve the issues raised by the court in *EC by DC*.

Commissioner Long said that this is a difficult area of the law. She commended Ms. Schlimbach for her work on the memorandum. Chairman Gagliardi concurred with Commissioner Long's comments. Chairman Gagliardi stated that it is almost impossible to separate the conduct of the school from the conduct of the employee.

Commissioner Rainone said that the intentional tort of the employee is considered to be outside the scope of the employment. The question then becomes whether the employer was negligent in the supervision of the employee. He noted that the complications in this area of law arise because of the public policy involved regarding the spread risk among the taxpayers. He suggested that any comments that the Commission receives will likely involve policy. Chairman Gagliardi concurred with Commissioner Rainone's assessment of possible comments.

Commissioner Long suggested that the Commission forge ahead at this point, and review the comments of the interested parties. Commissioner Bertone agreed with Commissioner Long and added that the public comments will likely provide the answer to the Commission's question about whether to proceed with this project. Commissioner Rainone suggested that Staff include the Municipal Employment Fund and numerous school board groups during the outreach process.

The Commission unanimously authorized Staff to conduct further research and outreach on this project.

Miscellaneous

Laura Tharney advised the Commission that she has made progress in securing an updated internet connection for the Commission's office. Ms. Tharney sought, and received, Commission authorization to pursue the acquisition of more reliable equipment to provide internet access to the Commission Staff. She noted that based on the information provided to her, the equipment and the service would be faster, less costly, and more reliable than the current equipment which has required replacement roughly every two years.

Ms. Tharney also let the Commission know that Staff completed final edits on an article for the Seton Hall University Law School's Legislative Journal. The focus of the submission was the Commission's work in the area of tax law. She said that once the article has been printed, she will provide copies to each Commissioner.

Ms. Tharney announced that the Commission has hired two legislative law clerks for the summer. They are expected to begin their work after Memorial Day. Ms. Tharney is hopeful that each clerk will have the opportunity to appear before the Commission during their tenure.

During the March 2023 Commission meeting, the Commission asked Staff to ascertain whether New Jersey enacts the comments to the Uniform Commercial Code. Ms. Tharney contacted the Office of Legislative Services and spoke with Christian Wiesenbacher. He confirmed that New Jersey does not enact the comments to the Uniform Commercial Code. The Commission thanked Ms. Tharney for providing this information.

Finally, Ms. Tharney advised the Commission that she is to take part in a panel discussion in early May. Other panel members include New Jersey's Insurance Fraud Prosecutor and a member of the New Jersey Ratings and Inspection Bureau.

Adjournment

The meeting was adjourned on the motion of Commissioner Long, seconded by Commissioner Bertone.

The next meeting of the Commission is scheduled for May 08, 2023, at 4:30 p.m., at the Commission office located at 153 Halsey Street, 7th Floor, Newark, New Jersey 07102.