

## **MINUTES OF COMMISSION MEETING**

**May 21, 2020**

Present at the New Jersey Law Revision Commission meeting, held via video conference, were: Chairman Vito A. Gagliardi, Jr.; Commissioner Andrew O. Bunn; Commissioner Virginia Long; Commissioner Louis N. Rainone; Professor John K. Cornwell, of Seton Hall University School of Law, attending on behalf of Commissioner Kathleen M. Boozang; and, Grace Bertone, of Bertone Piccini, LLP, attending on behalf of Commissioner Kimberly Mutcherson.

### **Preliminary Matters**

Chairman Gagliardi began the meeting by extending the condolences of all of the Commissioners and Staff to Commissioner Grace Bertone on the passing of her sister.

### **Minutes**

On the motion of Commissioner Bunn, which was seconded by Commissioner Long, the Minutes from the April 16, 2020, meeting were unanimously approved by the Commission.

### **Confinement (Definition of)**

Mark Ygarza discussed a Draft Final Report proposing modifications to the language of N.J.S. 2C:44-3(a), clarifying the definition of “confinement”, as discussed in *State v. Clarity*, 454 N.J. Super. 603 (App. Div. 2018). This project was authorized by the Commission on January 23, 2020, and the document under consideration incorporated the previous discussions and comments along with new commentary received by Staff.

In *State v. Clarity*, the Appellate Division considered whether a probationary term for a defendant’s last prior crime was the equivalent of “confinement” for purposes of sentencing him to an extended term as a persistent offender. The Court noted that N.J.S. 2C:44-3(a) does not define the term “confinement.” The absence of a definition “[generates] potential uncertainty about its scope when the State seeks a persistent-offender extended term.”

Staff transmitted the Tentative Report on this matter to numerous stakeholders, including: the County Prosecutors Association of New Jersey (CPANJ); the New Jersey Attorney General’s Office; the New Jersey Office of the Public Defender; Legal Services of New Jersey; and, several private practitioners.

The County Prosecutors Association of New Jersey (“CPANJ”) provided Staff with comments that focused on sections (a)(1), (a)(1)(ii), (a)(2) of the statute. The CPANJ suggested that the word “person” replace the word “individual” in order to maintain consistency with the section’s introductory paragraph. In addition, the CPANJ recommended the removal of the word “and” from the end of the paragraph and the addition of the word “and” at the end of paragraph

(a)(1)(i). Further, the CPANJ requested the restoration of the word “if” at the beginning of paragraph (a)(1)(iii), in order to clarify the paragraphs and provide “criteria that must be met regarding the person in question, while paragraph (iii) provides a criterion that must be met regarding that person’s most recent crime or period of confinement.” Finally, the words “penal facility or institution,” in the draft language would also be replaced with the terms “penal or correctional facility or institution.” The CPANJ noted that, the “change is recommended to clarify that ‘confinement’ includes time spent in the custody of the Adult Diagnostic and Treatment Center (ADTC) pursuant to N.J.S. 2C:47-3 or a similar treatment center for sex offenders.”

Commissioner Rainone asked how house arrest would be treated under the statute. Mr. Ygarza responded that the Court in *State v. Clarity* did not view house-arrest, probation, or parole as confinement. Commissioner Bunn noted that there are occasions where a court determines that an individual is not fit to stand trial and is subsequently committed to a psychiatric hospital. He questioned whether that would be considered confinement for purposes of this statute. John Cannel mentioned they type of commitment discussed by Commissioner Bunn is considered a civil commitment and is not contemplated by the statute. Commissioner Rainone stated that section b. limits confinement to certain types of confinement, but does not include others. He suggested eliminating section b. in order to clarify the statute.

Commissioner Cornwell questioned whether section b. captures the concept of the indefinite civil commitment that can emanate from a criminal conviction. Commissioner Long suggested that it is important to examine the purpose of the statute. The statute, she continued, contemplates all of the time that a person is confined weather civilly or criminally. Commissioner Cornwell stated that a situation in which a person is found not guilty by reason of insanity and is committed to a psychiatric facility as a result of their criminal case is not clearly captured in this statute.

Commissioner Long questioned whether in section c. the word “if” should be replaced with the word “and”. Ms. Tharney responded that since it appeared that Staff would be continuing work in this area, including further research and outreach, that issue would be reviewed as well.

Chairman Gagliardi directed that Staff continue further research and outreach on the topics discussed, including an examination of the impact of Covid-19 on the issue of confinement.

### **Probation – Clarification of “Satisfactory Completion”**

Arshiya Fyazi presented a Draft Final Report focused on the meaning of the term “satisfactory completion” of probation in the context of New Jersey’s expungement statute, N.J.S. 2C:52-2. In the case that gave rise to the project, *In the Matter of E.C.*, 454 N.J. Super. 48 (App. Div. 2018), After E.C. was discharged from her probation and paid all of the related fines, the trial court denied her petition for expungement because she failed to meet the “satisfactory” standard set forth in the statute because she had been discharged from probation “without improvement.” The Appellate Division noted that “satisfactory” is not defined in the statute, so the Court

considered the legislative intent. Ultimately, the Court determined that an individual who has been discharged from probation, even with an imperfect record, and has paid all fines, has satisfactorily completed probation as contemplated by the statute.

Ms. Fyazi then discussed the results of a fifty-state survey. She stated that only California provides a definition for the term “satisfactory” in the context of expungement.

In connection with this Report, Staff sought comments from several knowledgeable individuals and organizations. These included: The Office of the Attorney General; the Administrative Office of the Courts; the New Jersey State Municipal Prosecutor’s Association; the Association of Criminal Defense Lawyers; the leadership of the Criminal Practice Section of the New Jersey State Bar Association; the Office of the Public Defender; each of the twenty-one County Prosecutor; several criminal defense attorneys; the New Jersey League of Municipalities; the New Jersey Association of Counties; the New Jersey State Association of Chiefs of Police; the New Jersey County Prosecutor Association; and the Probation Association of New Jersey. In addition, members of the public were invited to view this report on the NLRC website. During the comment period, no objections were received to the modifications proposed by the Commission.

Appendix II, Ms. Fyazi explained, reflects the modifications as approved by the Commission and does not contain any substantive changes but was only restructured and reordered to make the statute more accessible.

Commissioner Long commented that the payment of a fine as provided for in Appendix I, section (4)(b) should be omitted because it undermines the provisions contemplated by the project. Commissioner Gagliardi and Commissioner Bunn both agreed.

With the modification recommended by Commissioner Long and on the motion of Commissioner Long and seconded by Commissioner Bunn, the Commission voted to release the report as a Final Report.

### **Magistrate**

Samuel Silver discussed a Draft Tentative Report proposing the elimination of the term “magistrate” from the New Jersey statutes. He explained that this project resulted from Staff’s review of the term “misdemeanor” in the New Jersey Statutes. During the course of that earlier project, Staff noted that a non-Code statute requires a police officer to bring an individual who has been arrested before a “municipal magistrate.”

An examination of the New Jersey Statutes confirmed the current use of the anachronistic term “magistrate”, the historical origins of which date back to shortly after the Revolutionary War. Since the New Jersey Constitution, in 1947, granted the Legislature the authority to create such inferior courts as it deemed necessary, the term “magistrate” has become anachronistic.

Within the 88 statutes that use the word “magistrate”, six distinct types of magistrates are referenced, including: committing magistrate; issuing magistrate; police magistrate; municipal magistrate; chief magistrate; and the neighboring magistrate. None of these terms are defined.

Staff proposed modifications seek to eliminate the term magistrate where warranted. The proposed modifications are derived from the language and context of references contained in similar statutes and the New Jersey Rules of Court.

On the motion of Commissioner Bunn, which was seconded by Commissioner Bertone, the Commission unanimously moved to release the work as a Tentative Report.

### **Local Lands and Building Law – Bidding**

Samuel Silver presented a Revised Draft Tentative Report proposing modification to N.J.S. 40A:12-5(a)(3), to clarify when the acquisition, construction, or repair of a capital improvement as a condition of the acquisition of real property is subject to the Local Public Contracts Law (N.J.S. 40A:11-1 et seq.).

Mr. Silver discussed the intersection of the Local Lands and Building Law (LLBL) and Local Public Contracts Law (LPCL), noting that the LLBL permits a governing body to acquire property in a variety of ways. It can require the seller, or lessor, to construct or repair a capital improvement as a condition of acquisition. The goal of LPCL is to protect against chicanery and fraud in public office. It fosters openness in local government activity and secure competition.

This project was brought to Staff’s attention by practitioners who work in the field of both the LLBL and LPCL and the question raised by those practitioners was whether a public body that is acquiring real property by lease, purchase, installment agreement; or, exchange and who requires the construction or repair of any capital improvement must adhere to the public bidding requirement of the LPCL.

Staff drafted a modification to the Local Land and Building Law and the Tentative Report was released for comments from stakeholders. Comments on the proposed language in the Tentative Report were sought from knowledgeable individuals and organizations, including: the New Jersey League of Municipalities; New Jersey Association of Counties; New Jersey State Bar Association (Land Use Section); New Jersey Institute of Local Government Attorneys; each of the twenty-one County Counsels; the New Brunswick Municipal Attorney; and several private practitioners.

To the extent that the proposed modification would clarify in the Local Lands Buildings Law, the Cumberland County Counsel had no objection to the proposed modifications. Although he understood the goal of the proposed modification, the Atlantic County Counsel was not in favor of the statutory modification proposed in the Report. Additional modification to the language proposed by the Commission was suggested by a third stakeholder, who said that the LPCL should only apply where an number of generic, real property locations would meet the governmental

entity's needs and would not apply to construction or repair when the acquisition involves a unique parcel of real property. The basis for exemption rests in the location, proximity, history, aesthetics, or utility of the real property in interest which would be memorialized in either a resolution or an ordinance.

Commissioner Rainone noted that all property is "unique" and asked whether the statute would require compliance with the LPCL if the municipality required the repair of a boiler or a roof of a property that was being acquired by a local government. Chairman Gagliardi stated that the aim of the project was to prevent those who sought to circumvent the LPCL. Commissioner Rainone suggested that Staff examine the Prevailing Wage Act and its potential use to address the concerns underlying this project because ultimately the acquired property will be owned, or leased, by a public entity.

The Commission asked Staff to conduct additional research concerning the intersection of the Prevailing Wage Act on this project and report back to the Commission concerning the results of this investigation.

### **Aggravated Assault**

John Cannel discussed a Revised Draft Tentative Report concerning the throwing of bodily fluids in violation of N.J.S. 2C:12-13, as discussed in *State v. Majewski*, 450 N.J. Super. 353 (App. Div. 2017), and in light of recent events. In *State v. Majewski*, the Appellate Division considered whether N.J.S. 2C:12-13, which prohibits the throwing of bodily fluids at law enforcement officers, required the State to prove that the defendant intended to hit the officer with bodily fluid, or if intent was irrelevant under the doctrine of transferred intent. The Court decided that both aspects of the statute, including throwing bodily fluids at law enforcement and causing contact of bodily fluid with an officer, call for purposeful conduct in order for a defendant to be considered guilty of aggravated assault.

Mr. Cannel noted that while the Report contains two parts, the same *mens rea*, "purposefully," applied to both. As written, the purpose of the statute is to provide protection for law enforcement officers. In light of recent events involving individuals coughing on police officers and claiming to have COVID-19, Mr. Cannel added a proposed statute that would address this type of behavior. The penalty would parallel the penalty for throwing bodily fluids at a law enforcement officer.

Commissioner Long pointed out that intending to put a person in fear of infection through contact with bodily fluid and intending to put a person in fear of infection through other physical contact are two different concepts. Mr. Cannel responded by stating that there are many ways to scare someone about contact with a possible infectious disease and that contact with bodily fluids is just one of those ways.

On the motion of Commissioner Bunn, seconded by Commissioner Rainone, the Commission voted to release the Report as a Tentative Report.

## **Parentage**

John Cannel discussed a Memorandum proposing a substantive revision to the Commission's previously released project pertaining to Parentage in Chapter 17 of Title 9. Mr. Cannel stated that in 2010, the New Jersey Law Revision Commission published a Report recommending revision the law regarding parentage in Chapter 17 of Title 9. That Report was not acted upon by the Legislature. Since the release of the Report, the changes in both scientific knowledge and societal norms require that the Report be substantially revised.

Current statutes on parentage were written before the development of modern genetic tests that can almost always determine whether a particular person is the genetic parent of a child. This level of accuracy makes the results of these tests virtually irrefutable. As a result, current law written in terms of factual presumptions, is considered to be anachronistic. The 2010 Report gave a central role to genetic testing in litigated cases of disputed genetic parentage. This Report continues that approach.

The majority of biological parentage cases that arise around the time of birth do not involve a court determination. Most often, a man agrees that he is the father and signs a certificate of paternity. Federal statutes and regulations essentially require that states establish a system of voluntary acknowledgements of paternity that is as binding as a court determination.

Mr. Cannel advised the Commission that law regarding when a non-biological party may be considered the parent of a child is ambiguous. The current draft also limits challenges to parentage by barring challenges to parentage after five years except when the child is the plaintiff, irrespective of biological determinacy. Mr. Cannel also suggested that the issue may be addressed by using experts in determining biological parentage.

Commissioner Cornwell advised the Commission that he has a colleague who is a Family Law Expert and who has worked in this area with the American Law Institute. He recommended that Staff contact her to determine whether the Commission should delve into this area of law. Commissioner Bunn added that may have already addressed these issues and should be consulted in order to determine how they addressed issues of parentage.

Staff was authorized to proceed with additional research and outreach, and directed to reach out to Commissioner Cornwell's colleague to seek input regarding the scope and potential utility of revising this project at this time.

## **Workers' Compensation – Statute of Limitations**

Samuel Silver discussed a Memorandum containing the results of preliminary outreach regarding the clarification of the statute of limitations in the Workers' Compensation Statutes, N.J.S. 34:15-51 and N.J.S. 34:15-15, and as discussed in *Plastic Surgery Center, P.A. v. Malouf Chevrolet-Cadillac, Inc.*, 2020 WL 521659 (2020).

In *Plastic Surgery Center*, several medical providers filed petitions for payment for services to employees. The petitions were filed more than two years after the accident, but less than six years from accrual. The Compensation Judge determined that the two-year statute of limitations in the Workers Compensation Act applied and that, as a result, the petitions of the medical providers were untimely. The Appellate Division disagreed, indicating that “claimant” referred to an employee, and that “compensation” did not include reimbursement for medical services provided to an injured worker. The Court also indicated that if the statute of limitations applicable to the claims of medical providers was going to be changed from six years to two years, it would have been done explicitly.

The New Jersey Supreme Court concurred with Appellate Division and held that the 2012 amendment to the Workers Compensation Act (§15) governing medical providers did not change the statute of limitations from six years to two years. Additionally, the proposition that the triggering date of medical-provider claims should be the date of service to the employee and not the date of the accident is not plainly set forth in the statute. The New Jersey Supreme Court stated that the Legislature is free to make such a change in the future.

In response to preliminary outreach, Richard Rubenstein, Esq., of Rothenberg Rubenstein Berliner & Shinrod, LLC, a certified workers compensation attorney, author of the Practice Guide to New Jersey Workers Compensation, and the principal drafter of the revisions to N.J.S. 34:15-15, indicated that statute of limitations should be covered by the language of the Workers Compensation Act. He further noted that the statute of limitations should not be left to the decisions of prior case law or judicial edict in *Plastic Surgery Center* because every other statute of limitation period in worker compensation is explicitly set forth in the statute. In addition, Mr. Rubenstein opined that medical claim petitions created by the statute under §15 should be codified as well.

Staff was authorized by the Commission to proceed with this project, and Commissioner Rainone asked staff to examine the term of years that should apply to the medical provider claims in workers compensation actions.

## PLIGAA

Jennifer Weitz discussed a Memorandum which provided the Commission with an update on research regarding the offset provision contained in the New Jersey Property-Liability Insurance Guaranty Association Act, N.J.S. 17:30A-1 et seq., as discussed in *Oyola v. Xing Lan Liu*, 431 N.J. Super. 493 (App. Div. 2013).

In *Oyola v. Xing Lan Liu*, the Appellate Division considered how to interpret the statutory language of N.J.S. 17:30A-5. The Court examined the statute, which states that “[t]he amount of a covered claim payable by the association shall be reduced by the amount of any applicable credits.” Ultimately, the Court determined that workers’ compensation and other payments should be offset only against the insured’s total damages in calculating the New Jersey Property-Liability Guaranty Association’s obligation to pay a claim.

In *Oyola*, the Appellate Division largely relied on the New Jersey Supreme Court's decision in *Thomsen v. Mercer-Charles* in reaching its decision. The Supreme Court described the issue in *Thomsen* as: "whether the setoff applies to the entire amount payable on the person's loss... or whether the solvent insurer's payment is applied directly to the statutory maximum that the Association may pay on a 'covered claim.'" The Supreme Court further stated that, "under the latter interpretation, the amount of the claimant's damages claim is only relevant to the extent it is less than the \$300,000 statutory cap. Thus, the latter interpretation substantially minimizes tort victims' ability to recover their damages."

The Legislature amended PLIGAA in 2004, but since the incident in *Thomsen* occurred prior to the amendment, it was the pre-2004 statute that controlled. The 2004 amendments moved the phrase at issue in *Oyola*, and *Thomsen* from N.J.S. 17:30A-12 to 17:30A-5, and revised the phrase from "[a]n amount payable on a covered claim" to "the amount of a covered claim payable." The Court determined that "[t]he two phrases are virtually indistinguishable, and the language in the amendment in no way indicates that it was intended to overrule *Thomsen*." Both the Appellate Division and the Supreme Court rejected PLIGAA's argument to the contrary.

Ms. Weitz advised that not every state has case law construing the setoff provision of their guaranty association acts. Of the states that have considered this provision, a number of them ruled as New Jersey courts have, and applied any offset to the insured's total amount of damages. A larger number of states has interpreted their statutory provisions in the opposite fashion, finding that any amounts recovered by an insured are applied against that state's guaranty association's liability.

Ms. Weitz asked the Commission for guidance concerning whether Staff should proceed with this project to clarify the law. Commissioner Bunn agreed that the language currently in the statute is ambiguous and should be clarified. Commissioners Rainone and Bertone concurred with Commissioner Bunn's recommendation.

Staff was authorized to conduct additional research to determine how best to clarify N.J.S. 17:30A-5.

### **Miscellaneous**

Laura Tharney advised the Commission that a bill regarding Common Interest Ownership, which is based on the work of the Commission, is scheduled for a committee hearing on Thursday, May 28, 2020. On behalf of the Commission, and pursuant to its usual practice, Staff will submit a written document in support of the bill, and John Cannel will appear before the committee via video conference.

Ms. Tharney also indicated that Staff's latest revision to the Standard Form Contracts project was released to stakeholders earlier in the month for their review and consideration. Staff will review any comments received and update the Commission at a future meeting.



In addition, Ms. Tharney explained that legislative law clerk offers had previously been extended to law students for the summer, in keeping with Commission practice. As a result of the impact of COVID-19, and the limitations imposed by the State's budgetary constraints, the students were advised that the NJLRC had not received authorization to proceed with its summer program, and that the Commission would certainly understand if the students wished to pursue other opportunities for the summer. One student has already done so, and the other is expected to do so.

### **Adjournment**

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

The next Commission meeting is scheduled to be held on June 18, 2020, at 4:30 p.m.