

MINUTES OF COMMISSION MEETING

June 19, 2014

Present at the New Jersey Law Revision Commission meeting held at 153 Halsey Street, 7th Floor, Newark, New Jersey, were Commissioner Andrew Bunn and Commissioner Albert Burstein. Professor Bernard Bell, of Rutgers School of Law - Newark, attended on behalf of Commissioner John J. Farmer, Jr. and Grace C. Bertone, of Bertone Piccini LLP, attended on behalf of Commissioner Rayman Solomon.

Guadalupe Casillas, Esq. of the Office of Law Guardian, Jey Rajaraman, Esq. of Legal Services of New Jersey, and Professor Jessica Miles of Seton Hall University School of Law were also in attendance.

Minutes

The Minutes of the May meeting were unanimously approved on motion of Commissioner Burstein, seconded by Commissioner Bertone.

Title 9 – Children; Abused, Neglected and Dependent Children

John Cannel began the discussion of the Draft Final Report by indicating that, while human trafficking had been removed from the statutory provisions defining child abuse or neglect, it was not removed from provision concerning the termination of parental rights. He said also that there is now no private action to terminate parental rights, although there is at least one constituency in support of such private action.

Mr. Cannel then raised the issue of a change in name for the Law Guardian program, noting that because the term “law guardian” has many meanings, the Law Guardian program favors a statutory name change.

Guadalupe Casillas, Esq., of the Office of Law Guardian, proposed “attorney for the child” as an appropriate substitute term for “law guardian,” saying the new title would not change the attorney’s role. She also said it would make sense to change the title given the scope of their role, which is essentially to act as an attorney for the child, within Title 9 parameters. Commissioner Burstein noted the different connotation of “guardian” and “attorney”, and asked whether a change would add to any existing confusion regarding the agency’s role. Ms. Casillas indicated that the role was limited to that of an attorney, and no other functions were performed by the Law Guardian, and she added that the Family Practice Division has no objection to the substitution. There followed a discussion regarding the representation of twins, multiple siblings, or other parties in a single case whose interests may conflict and the potential confusion that might arise as a result of the name “attorney for the child” in cases where there is more than one attorney. Ms. Casillas explained that they do represent sibling groups but use “pool attorneys” in cases of conflict such as adverse interest and sibling abuse.

Commissioner Bunn asked whether there should be a more “governmental” sound to the new title in order to make clear that the attorney is appointed by the State, in contrast to an attorney who may be privately retained in certain cases in order to represent the interests of a child. Ms. Casillas noted that the attorneys are currently appointed by law and are a part of the Office of the Public Defender. Commissioner Bunn suggested “Office of Children’s Counsel” as a potential new title. Ms. Casillas informed the Commission that she would take up the proposed title with her agency, which formerly held the title “Office of Parental Representation.” Commissioner Bunn asked that Ms. Casillas let Mr. Cannel know of the agency’s decision in time for the July meeting.

Mr. Cannel next informed the Commission that Legal Services had expressed a preference that the word “imminent” should be restored to 9:27-1 subsection a.(1) to modify “injury”. Jey Rajaraman, Esq., of Legal Services of New Jersey, asserted that “imminent” added a temporal element, describing timing in the context of assessing injury and mentioned one dictionary definition of “imminent”: “ready to take place, hanging over one’s head.” She said also that past issues, concerns or behaviors do not necessarily relate to a future risk of harm and, without “imminent,” anyone with a record of past questionable conduct could be characterized as meeting the neglect and abuse criteria. Discussion followed regarding the words “ongoing” and “current” as possible alternatives. Commissioner Bell pointed out that someone with a past problem might cause injury to a child, although there was not necessarily imminence or certainty. Ms. Rajaraman responded that the terms “ongoing” and “current” are different. For example, in a situation where someone convicted of drug use is not an addict, experts would have to conduct an evaluation as to whether there is an imminent or current risk since the injury is not continuous, as the term “ongoing” suggests. She referred to a case that arose in Atlantic City in which the court found that cocaine use during pregnancy constituted abuse and neglect. Ms. Casillas expressed two concerns with the court’s finding, noting that drug use during pregnancy could trigger abuse and neglect, and asking how far we are to look into the future. Laura Tharney expressed a concern regarding the inclusion of “ongoing” because it fails to address potentially serious incidents that are isolated in nature, giving the example of dangling a child momentarily off of a balcony. Mr. Cannel suggested that even one incident means a risk is created. Commissioner Burstein said that 9:27-1 subsection a.(2) covers the issue and does not require “ongoing.” The Commission unanimously decided not to add either “ongoing” or “imminent” to the draft.

Mr. Cannel suggested, and Ms. Rajaraman agreed, that subsection a.(4) of 9:27-1, which regarding “continuing risk of injury” is not necessary and should be removed. He said that the newly created category of “child in need of services”, provides that a child can receive services without a finding of neglect or abuse. The Commission unanimously agreed to remove 9:27-1 subsection a.(4).

The Commission discussed the language of specific phrasing of provision 9:27-1 subsection b.(3), “adequate food, clothing, shelter, education, or medical care,” and determined

that the same language should also be included in 9-27-1 subsection c. in lieu of “other essentials”. Commissioner Burstein pointed out that 9:27-1 subsection c. is not in the same format as subsections a., b., and d. Mr. Cannel will move the current subsection c. to the last position in the section, and will divide it into sub-subsections in the same manner as the other provisions. The Report will be presented again at the July meeting with the changes discussed in order to allow Commissioners absent from this meeting to provide comment and vote on its release.

Prevention of Domestic Violence Act

Frank Ricigliani requested authorization to informally distribute the Draft Tentative Report relating to the Prevention of Domestic Violence Act (PDVA) in an effort to elicit comment regarding the Commission’s proposed approach to statutory modification. The Report is based on the court’s consideration of the PDVA in *S.P. v. Newark Police Dept.*, 428 N.J. Super 210 (App. Div. 2012). Mr. Ricigliani explained that the proposed draft language seeks to incorporate recent court decisions into the statute, clarifying the threshold definitions of the PDVA through structural revisions to the existing statute. In response to Commissioner Bunn’s inquiry, Ms. Tharney stated that Staff would like to obtain informal comment from those with experience and expertise in this area, including government and private practitioners, government agencies, and law school professors.

Commissioner Bell said that since the *S.P.* decision, as with most cases, is “sui generis”, codifying this fact-specific ruling may not go far enough to address the inconsistent application of the PDVA. He suggested that the language in the Maryland alternative remedy statute more effectively addresses the issues presented, particularly in cases in which an underlying relationship does not exist between the victim and the defendant. Commissioner Bell added that the Maryland statute provides clear and discernible procedures for law enforcement officers to execute. Under the Maryland statute, the victim does not have to demonstrate a dating or family relationship to obtain a “peace order”, and law enforcement officers may immediately enforce the order once it is issued.

Mr. Ricigliani explained that the factor-based approach included in the Report was based on the law in other states and includes a “catch-all” provision that extends beyond the factors identified in *S.P.* Ms. Tharney explained that Staff was concerned about the elimination of all specific factors from the statute since the statutory provisions in this area serve as a basis for the creation of Attorney General guidelines that are used in the training of police officers, so some guidance in the statute may be of use. Commissioner Bell stated that informal distribution of the Report would be most beneficial if commenters are asked to comment on: (1) whether the inclusion factors in the statute is an appropriate direction for the Commission drafting; (2) whether the statutory criteria should be broad rather than specific; and (3) whether changes to the statute would be useful for the purpose of Attorney General guidelines/police training.

Professor Jessica Miles, a Seton Hall clinical law professor specializing in family law and domestic violence, agreed with Commissioner Bell that extending the scope of the revisions would best address the issues presented when an underlying relationship does not exist between the defendant and the domestic violence victim. Professor Miles added that it is not realistic, as the court recognized in *S.P.*, to expect law enforcement officers during the course of their duties to respond like Appellate Division judges and apply a six-factor test.

Professor Miles stated that she is pleased that bills involving the PDVA are pending in the New Jersey Legislature because it demonstrates that the Legislature recognizes the need to clarify the threshold terms in the PDVA. She noted, however, that the bills pending in the Legislature, A1650 and S659, do not fully address the issue. They offer the issuance of restraining orders when domestic violence statutes are inapplicable because the victim lacks a prior relationship with the offender but do not prohibit the application for such relief where the petitioner meets the definition of “victim of domestic violence” in the PDVA. The bills also do not provide for an interim form of injunctive relief, like the interim peace order available under the Maryland statute.

Professor Miles maintained that there is a need for after-hours relief for domestic violence victims to allow for effective and expeditious enforcement of restraining orders. She said that she suspected that this was an oversight because the Legislature has included alternative remedy language permitting temporary restraining orders in other contexts.

Professor Miles applauded the work of the Commission and stated that she hopes the scope of the project will expand to more closely resemble the Maryland alternative remedy statute. Professor Miles expressed her continuing support of the Report and her willingness to continue working with the NJLRC Staff on this project. The Commission voted unanimously to informally distribute the Draft Tentative Report.

Juvenile Sentencing

Laura Tharney explained that the New Jersey Supreme Court, in the case of *In the Interest of K.O.*, considered the imposition of an extended-term incarceration for a juvenile offender. The Court held that pursuant to N.J.S. 2A:4A-44, the imposition of an extended-term incarceration is only appropriate if the juvenile has been adjudicated delinquent on at least two prior occasions.

The proposed statutory modification adds just a single word (“previously”) to clarify the statute and codify the Court’s interpretation of N.J.S. 2A:4A-44 subsection d.(3). Ms. Tharney asked that the Commission consider releasing the Tentative Report given the limited scope of the change. Commissioner Bunn recalled that the Commission had previously discussed this particular modification and the Commissioners were in agreement and voted affirmatively to release the Report as a Tentative Report on motion of Commissioner Bell, seconded by Commissioner Bertone.

Title 2C – Sexual Offenses

Susan Thatch proposed a minor and discrete expansion of the Commission's ongoing Title 2C - Sexual Offenses project.

Ms. Thatch noted that the New Jersey Supreme Court, in the case of *State v. Drury*, addressed the issue of whether carjacking is a predicate offense for a finding of aggravated sexual assault pursuant to N.J.S. 2C:14-2 subsection a.(3). She explained that while robbery is an enumerated aggravating offense, carjacking is not one of the specifically enumerated aggravating offenses. She added that carjacking is enumerated as a triggering offense in other criminal statutes.

Ms. Thatch requested the Commission's guidance as to whether it is appropriate to propose such a revision for specific consideration by the Legislature in conjunction with the Commission's other proposed modifications. The Commissioners unanimously agreed that this is an appropriate addition to the Commission's Sexual Offenses project.

Underground Facility Protection Act

Jayne Johnson requested that the Draft Final Report include the statutory language proposed in the Memorandum before the Commission. Ms. Johnson explained that the language was drafted after informal distribution of the Tentative Report to utility companies subject to the Underground Facility Protection Act (UFPA), N.J.S. 48:2-73, *et seq.*

The proposed language seeks to address the issue raised by utility company commenters that the alternative dispute resolution provided by the DSO for claims under \$15,000 is not more efficient or cost-effective than the established court procedures in the Superior Court. The companies suggested that the New Jersey Superior Court, Special Civil Part and Small Claims court provide efficient and cost-effective resolution of those claims. The companies emphasized that the litigation process in those courts is typically completed in about 60 days, from the filing of the complaint to the entry of judgment, and said that submitting claims under \$15,000 to alternative dispute resolution does not produce a similarly efficient and timely judgment.

Ms. Tharney stated that the new language changes the statute by bifurcating the process, but does so in an effort to address the opposition expressed by each of the responding companies to the current structure of claims resolution pursuant to the UFPA. Commissioner Bertone asked whether the companies reported the volume of claims that arise under the UFPA, particularly the number of claims under \$15,000. Ms. Johnson said that the statistics detailing the number and type of claims subject to alternative dispute resolution pursuant to the UFPA were requested from each of the companies that provided formal comment. Ms. Johnson added that while she has not yet received these numbers, she hopes that they will be available for the Final Report. The Commission unanimously agreed to include the proposed draft language in the Draft Final Report.

Sales and Use Tax Act

Susan Thatch asked whether the Commission wished Staff to conduct further research regarding the Legislative intent behind the Sale and Use Tax Act in response to the 2013 Appellate Division decision *Air Brook Limousine, Inc. v. Director, Division of Taxation*. The legal issue presented in *Air Brook* was whether sedans and/or limousines may be properly classified as a “bus” pursuant to *N.J.S. 54:32(b)-8.28*, thus qualifying them for tax immunity. Air Brook Limousine was charged with \$500,000 in back taxes after neglecting to include the receipt from the sale of sedans and limousines in their taxes, claiming they were under the assumption the sales were immune from the Sale and Use Tax Act (SUTA).

Commissioner Bunn asked whether the vehicles utilized by Air Brook maintained a license-plate specifically for omnibuses, and Ms. Thatch replied Air Brooks’ vehicles did have these license plates. Commissioner Bunn then commented on the possible scope of the vague statute, observing that owners of town cars or party buses may consider themselves exempt from taxation under SUTA. Commissioner Bell suggested the Staff of the New Jersey Law Revision Commission perform legislative intent research through community outreach in an attempt to determine the community’s understanding of SUTA’s application. Laura Tharney added that the definition of “bus” differed across New Jersey several titles of the New Jersey statutes, and mentioned that the Appellate Division had declined to apply an *in pari* material reading of the three statutes that it considered, a result that seemed unusual and might add to the confusion in this area. Further research and community outreach would enable the Staff to determine whether statutory drafting could clarify this issue. The Appellate Division did note in the case that in light of the risk of impinging on the Legislature’s role, it would wait for correction from the Legislature in this area.

Commissioner Bell raised a concern that this could have possible negative impact on New Jersey. For example, should vehicle owners not consider themselves exempt from SUTA and later discover they are, in fact, exempt, the state would lose tax revenue. Commissioner Bunn concurred, wondering what the ramifications might be with regard to requested repayments of taxes. Ms. Thatch noted that Air Brook was implicated through an anonymous tip and that it was more likely companies were under-reporting, not over-reporting.

Commissioner Bertone asked what the definition of bus was and should be. Commissioner Bell suggested relying on the dictionary definition, while Commissioner Bunn commented this could lead to confusion. For example, charter buses do not have a “regular route,” yet they are still considered a bus. Commissioner Bell stated that limousines were subject to their own set of regulations and rules, and Commissioner Burstein observed that this could be a hot button issue.

Commissioner Bunn stated that it seemed anomalous that some fleets of vehicles would be exempt from taxation under the statute while others would not and that it was unclear what

the Legislature had in mind. Ms. Tharney asked whether the Commission would like Staff to conduct further research and community outreach, and Commissioner Bell suggested this was an important issue that should be looked into further. The Commission unanimously agreed that Staff should undertake a project in this area given the importance of the unresolved issue.

Miscellaneous

The Commission meeting was adjourned on the motion of Commissioner Bell, seconded by Commissioner Burstein.