

## MINUTES OF COMMISSION MEETING

July 18, 2013

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 Virginia Long, Commissioner Andrew Bunn, Commissioner Albert Burstein, Professor Bernard Bell of Rutgers School of Law attended on behalf of Commissioner John J. Farmer, Jr., Professor Ahmed I. Bulbulia of Seton Hall Law School attended on behalf of Commissioner Patrick Hobbs, and Grace C. Bertone, of Bertone Piccini LLP, attended on behalf of Commissioner Rayman Solomon.

Valerie Brown, Esq., an independent lobbyist, also attended.

### Minutes

The Minutes of the June meeting were unanimously approved on motion of Commissioner Long, seconded by Commissioner Bunn.

### Child Abuse and Neglect

John Cannel presented changes to the Tentative Report by explaining that a recent Supreme Court decision, *N.J. Dep't of Children & Families v. I.S.*, 214 N.J. 8 (2013), established that it is possible to provide services to a child without a finding of neglect or abuse. As a result, the proposed Report will allow for a narrower view of neglect and abuse, while also serving the children who need it.

The Commission directed a number of changes to the definition sections. Commissioners suggested that the key definition, child abuse or neglect, be in a separate section, and that subsections (b) and (c) of *N.J.S. 9:27-1* become subparts of subsection (a). The Commission accepted the suggestion of the Office of Law Guardian that the definition of "child" be expanded to include individuals over the age of 18 who were still receiving services from the Division. Chairman Gagliardi also commented that, as currently drafted, *N.J.S. 9:27-1(b)(3)* makes it seem as though a child is not considered deprived unless all five elements are met. Mr. Cannel stated that this is not the intent of the statute. Commissioner Bunn suggested that the proposed language needs to replace the "and" with an "or" to clarify this point.

Commissioner Bunn stated that the phrase at the end of *N.J.S. 9:27-1(f)* "that the child's custodian is unable to supply" could cause problems because the fact that a custodian can supply services does not mean that they will. Commissioner Burstein stated that this phrase may be an unnecessary layer. Commissioner Bunn said that the standard, "imminent danger," presents a sufficiently high hurdle, and agreed that the final phrase should be taken out of the proposed statute.

The Commission held the matter for further consideration in September.

### **Uniform Certificate of Title for Vessels Act**

Jayne Johnson presented the Draft Final Report of the New Jersey Certificate of Title for Vessels Act. She noted the significance of the Act on the East Coast in the wake of Hurricane Sandy and reported that strong endorsements were received from the Marine Trade Association of New Jersey and the National Marine Manufacturers Association. Both entities support adoption of the UCOTVA in New Jersey as the recreational boating industry tries to rebuild after the storm. Ms. Johnson stated that the UCOTVA provides a comprehensive system of ownership certification for watercraft. The principal objectives of the Act are to: (i) provide consumer protection; (ii) deter and impede theft; (iii) improve vessel recovery; and (iv) facilitate ownership transfers and financing. Ms. Johnson also noted that the most significant provision of the Act is the branding provision which protects buyers and others acquiring an interest in an undocumented vessel by requiring that the title for the vessel be branded if a casualty or sinking has caused significant damage to the vessel's hull integrity.

Ms. Johnson reported that to date, the UCOTVA has been enacted in Virginia and introduced in Connecticut. She also noted that under the New Jersey Boat Ownership Certificate Act (BOCA), New Jersey has not applied with the United States Coast Guard for certification of its title system. Officer Michael Goad, Esq., Office of the Judge Advocate General and Chief Counsel United States Coast Guard (USCG), Washington, D.C. Headquarters, informed Ms. Johnson that the USCG worked closely with the Uniform Law Commission in drafting the UCOTVA and strongly endorses the uniform law. Officer Goad added that the USCG is currently reviewing its certification procedures to align them with the UCOTVA. In addition, Officer Goad indicated to Ms. Johnson that states adopting the UCOTVA were more likely to receive USCG certification than those who do not, presenting an additional advantage for adopting the UCOTVA in New Jersey. The proposed New Jersey Certificate of Title for Vessels Act (NJCOTVA) combines provisions from the UCOTVA with existing New Jersey law, including provisions from the current New Jersey Boat Ownership Certificate Act (BOCA), particularly administrative and enforcement provisions that were not provided for in the Uniform Act.

Commissioner Bunn questioned one of the exceptions to the "vessel" definition in Section 2a.31(I) - vessels used exclusively for racing. Ms. Johnson responded that this was a BOCA exception and the language was taken directly from existing New Jersey law. Ms. Johnson also made note of the changes to the "state of principal use" definition in Section 2a.28 and explained that the existing BOCA definition was layered into the uniform definition to ensure that as many vessels as possible are included in the Act.

The release of the Final Report was unanimously approved on motion of Commissioner Bunn, seconded by Commissioner Long.

### **Judgments and Their Enforcements**

John Cannel presented the Draft Tentative Report concerning Judgments and Their Enforcements, which revises and updates an earlier Commission report, and requested that it be approved for release as a Tentative Report. Mr. Cannel said that he anticipated written comments from the New Jersey Office of Legal Services (NJLS). In his discussions with the NJLS, NJLS raised concerns about the level of exemptions provided to debtors and the method of evaluating personal property. Mr. Cannel said that comments from the NJLS and other entities could be considered in response to the Tentative Report, and any necessary adjustments would be made accordingly. He suggested that the anticipated comments should not delay release of the Tentative Report.

Commissioner Burstein made the motion to release the Tentative Report regarding Judgments and Their Enforcements, and the motion was seconded by Commissioner Bulbulia and approved unanimously.

### **New Jersey Family Collaborative Law Act**

Laura Tharney explained that the Collaborative Law Act was recommended for enactment by the Uniform Law Commission in 2009, and that it was subsequently revised and re-titled the Uniform Collaborative Law Rules/Act in 2010. To date, it has been enacted in seven states and D.C. and introduced in five states in 2013. The New Jersey Supreme Court Advisory Committee on Professional Ethics determined in 2005, in the context of Opinion 699, that a lawyer could participate in collaborative law without violating the Rules of Professional Conduct.

The Commission began work on this project in October 2011, and the project has since undergone a number of revisions in an effort to tailor the act for New Jersey and to accommodate concerns expressed by the Administrative Office of the Courts and other commenters. As a result of one such change, the current draft deals only with the use of collaborative law in the family law context.

The Commission has heard from the following in support of the Report: New Jersey Council of Collaborative Practice Groups; other collaborative professionals; New Jersey's Uniform Law Commissioners; the International Association of Collaborative Professionals; Uniform Law Commissioners and members of the International Association of Collaborative Professionals from other states; and the New Jersey State Bar Association (the Board of Trustees, the Legislative Committee, the Family Law Section and the Dispute Resolution Section).

In addition, the AOC, which had expressed significant reservations about the project in its earlier stages, recently indicated that the Report had been generally favorably received and information was provided to Ms. Tharney informally suggesting that the Family Conference did not have an adverse reaction to the Report after considering it at its June meeting.

Since the Commission had considered the Report on previous occasions, the Commissioners focused on specific language that was of concern in the most recent draft.

Commissioner Bunn raised concern about Section 2, subsection d. where the definition of lawyers who practice collaborative law referred to them as an attorney “who has been trained in the collaborative law process.” Ms. Tharney said that this language had been included at the request of the NJSBA. Commissioner Bunn expressed concern about the nature, source and extent of the training required and Chairman Gagliardi said that potential *Winberry* issues might result from the inclusion of such a requirement in the statute because the provision might infringe on the Supreme Court’s power to control the practice of law. The Commission recommended modifying Section 2, subsection d. by removing the phrase “who has been trained in the collaborative law process.”

The Commission next focused on Section 6 and the impact of the limitation of representation by collaborative lawyers. Commissioner Burstein asked whether the provisions of the Act, as drafted, would pertain to situations arising after the collaborative law process has concluded, when one or both of the parties experienced changed circumstances. The Commission discussed whether the terms of the Act would preclude post-judgment motions. Valerie Brown spoke on behalf of the New Jersey Council of Collaborative Practice Groups and said that parties to a collaborative method of dispute resolution learn new ways of interacting and that these may prove to be of assistance to them moving forward if additional issues arise. If an issue arises after the initial collaborative resolution of the matter, the parties are free to once again engage in a collaborative process but, as in other family law matters in which a party may experience a change in circumstances after a judgment is entered, post-judgment motions are available to modify the terms of the order and are not precluded by the Act.

The Commission then addressed the issues regarding representation of a party to a collaborative law process after that process concludes. Commissioner Bunn raised concerns about whether collaborative lawyers must represent to their client that they will not serve as counsel in any subsequent proceedings. Commissioner Bunn said that case law had indicated that an attorney who agreed, as a part of a settlement, to disqualify himself from further representation of a client was in violation of the Rules of Professional Conduct. He said that it was important to be sure that the ability of an attorney to limit the scope of his or her representation of a client pursuant to RPC 1.2(c)

did not run afoul of other RPC provisions. Staff was directed to confirm that this did not present a problem.

Commissioner Bunn said that as a result of the importance of this issue, Section 6, subsection e., should be revised to make sure that the provision reflected the guidance provided by New Jersey law, New Jersey Court Rules and the Rules of Professional Conduct. Commissioner Bunn and Commissioner Bell recommended modifications to that subsection so that it includes the following provisions: “In the event the collaborative process does not resolve the family law dispute *resulting in a judgment* and the dispute is, instead, submitted to a tribunal *for adjudication* the collaborative lawyer will not continue to represent the party *in that family law dispute*.”

In view of its concerns about this provision of the Act, the Commission requested that the Comment to this Section be modified to include language that explains the following:

- This provision was drawn from the ULC Act, and revised for inclusion in this Act.
- The Commission endeavored to incorporate the case law, the Court Rules and the Rules of Professional Conduct in to the Act.
- It does not appear that the issue of a collaborative lawyer’s later representation of a collaborative law client in subsequent litigation has been a significant one to this time. Instead, the information available suggests that lawyers who practice collaborative law are unlikely to engage in such representation.
- Because the disqualification provision contained in subsection e. is contingent on the failure of the process, if the process yields a judgment it is arguably not a failure and the disqualification would not apply to subsequent representation.
- The Commission is not taking a position on whether subsequent representation of a client by a collaborative lawyer is a good idea or not, but is simply pointing out that, according to a fair reading of the language contained in the Report, it can be done.

The Commission also directed that Staff include in the Comment the result of the research regarding the RPC issue.

The Commission considered whether or not to release the Report at this meeting, and Ms. Brown, on behalf of the New Jersey Council of Collaborative Practice Groups, stressed the importance to the Council and its members of releasing the Report at this time. Ms. Brown emphasized that the project was supported by the Family Law and Dispute Resolution Sections of the New Jersey State Bar Association. She urged the

Commission to release the Report because delay could impede its momentum. Ms. Brown explained that outreach had begun, more outreach was anticipated, and that there had been legislative interest in this project and she hoped that the Commission would not delay the release of the Report until September even though the work of the Legislature slows during the summer months. She requested that the Commission release the Report with the changes made in accordance with recommendations provided by the Commission during the meeting.

The Commission determined that it would release the Final Report, with the changes discussed, on motion of Commissioner Bunn, seconded by Commissioner Burstein. With the exception of Commissioner Long, the Commissioners in attendance voted in favor of the release.

### **Uniform Principal and Income**

Ms. Tharney advised that in the early stages of this project, she received general support from the New Jersey State Bar Association for the incorporation of the Uniform Law Commission amendments to the Uniform Principal and Income Act (UPIA). She did not, however, receive detailed information in response to her inquiries. Ms. Tharney explained that when the Final Report was released in February, there were two areas of the statute about which she had hoped to receive substantive comments to provide guidance for the Commission. Ultimately, however, as a result of the efforts of the Chairman, Ms. Tharney did receive comments that recommended changes to the Report. These comments were incorporated in a Revised Final Report and Ms. Tharney sought approval to release the Revised Final Report. The Commission voted unanimously to do so, on motion of Commissioner Bunn, seconded by Commissioner Burstein.

### **Uniform Electronic Recordation of Custodial Interrogations Act**

Vito Petitti proposed the release of a Final Report recommending that no action be taken on the Uniform Electronic Recordation of Custodial Interrogations Act (UERCIA). Mr. Petitti said that New Jersey's existing law successfully addresses the matters covered by the Uniform Act. He also explained that since the Uniform Act called for states to make various adjustments to its provisions, this was not an area in which uniformity was likely to be accomplished, or particularly desirable. Since enactment would not likely lead to nationwide uniformity, and since the substance of the Act presented a potential *Winberry* issue, Mr. Petitti recommended that the Commission not recommend adoption of the Act.

Commissioner Bunn stated that there did not seem to be a strong benefit of nationwide uniformity in this area of the law, and a motion to release a Final Report recommending no legislative action was made by Commissioner Long, seconded by Commissioner Bell, and unanimously approved.

## **Uniform Commercial Code – Articles 3 and 4**

John Cannel briefly explained that Articles 3 (Negotiable Instruments) and 4 (Bank Deposits) of the Uniform Commercial Code were extensively revised and amended in 1990 and 1991. At that time, Article 3 was fully revised and Article 4 was updated by amendments. In 2002, the Permanent Editorial Board of the Uniform Commercial Code approved changes to Article 3 and Article 4. These amendments have been adopted in only 10 states and the District of Columbia. The only “commercial” state to have adopted them is Texas. Mr. Cannel said that banking interests have never endorsed them, and there has been declining interest in their enactment over the years. He added that the enactment of these changes is no longer a priority for the Uniform Law Commission. In addition, there is some concern that certain changes initially intended to deal with new technology may now be problematic because of subsequent changes to that technology.

The Commission determined that the effects of the passage of time militate against consideration of these amendments and a motion was made by Commissioner Burstein and seconded by Commissioner Long to release a Final Report recommending no action by the Legislature regarding the amendments to UCC Articles 3 and 4, and the Commission unanimously approved the motion.

### **Miscellaneous**

The meeting was adjourned after a motion by Commissioner Long, seconded by Commissioner Bell.