

## **MINUTES OF COMMISSION MEETING**

**July 19th, 2012**

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 Albert Burstein, and Commissioner Virginia Long. Professor Bernard Bell of Rutgers University School of Law attended on behalf of Commissioner John J. Farmer, Jr.

Also in attendance was Cindy Fine, Esq., of the Education Law Center.

### **Minutes**

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

### **Pejorative Terms**

Marna Brown said that this proposed project calls for a second look at pejorative terms, this time as those terms are used to describe or refer to people with physical rather than intellectual or mental disabilities. Cindy Fine, Esq., on behalf of the New Jersey Special Education Practitioners (“NJSEP”), proposed the project in a letter which has been distributed to the Commission. Terms such as “crippled,” “handicapped,” “afflicted with,” or “suffering from” the disability, “birth defect” and other similar terms were described as demeaning to persons with physical disabilities. At first, NJSEP had focused on the use of this language by the courts, but then noted that the statutes also included such terms.

Ms. Fine explained that after practicing law for about 15 years, she became the primary caregiver of her daughter who has physical and mental disabilities. Ms. Fine now volunteers at the Education Law Center (“ELC”) where she has been mentored by Ruth Lowenkron, who advocates for people with disabilities. The ELC gathered together a group of over 100 attorneys and non-attorney advocates for persons with special needs. The ELC was contacted last fall by a person who uses a wheelchair and did not want a Superior Court judge to refer to him as “wheelchair bound” or “confined to wheelchair.” He wanted instead to be referred to as someone who uses a wheelchair. Ms. Fine explained that terms appearing in the New Jersey statutes, such as “confined to a wheelchair” and “handicapped,” were demeaning and suggested that it would be easy to delete pejorative references. The ELC and NJSEP have attorneys who are willing to help with the process. The Essex County Bar Association Committee on the Rights of Persons with Disabilities also is willing to help. Ms. Fine said she hopes that the Commission can dedicate time to at least look at the problem and make changes that can be accomplished naturally without confusion, circularity, or a circumvention of the definitions in existing law.

Ms. Fine said that she asked two people with physical disabilities specific questions about the terms in issue. One of the individuals told Ms. Fine that she feels offended by the use of the

term “afflicted with cerebral palsy” because people who have made a successful life notwithstanding their physical disability are not “afflicted”. Ms. Fine also spoke with a veteran without the ability to walk who later became a teacher and said that he finds the word “crippled” difficult to hear. Ms. Fine said that we all have encountered people in our lives that have inspired us despite obstacles and that out of respect for those people, she hoped this project would go forward.

Commissioner Burstein said that, to put this in context, he had chaired the Special Education Study Commission in the early 1980s, and that the verbiage objected to now was commonly accepted at that time. He said that this is a very worthy project that the Commission should pursue. Commissioner Burstein added that he believes that the Commission will need a lot of help because finding the replacement language for certain terms is not going to be easy since many of the issues are idiosyncratic with facets that require a great deal of consideration. Chairman Gagliardi agreed that the difficulty is not so much in identifying the language to be changed, which Staff can easily do, but that replacing pejorative terms with language that is not equally problematic is the challenge. He added that the Commission will need help finding language that is acceptable and appreciated the willingness of Ms. Fine’s colleagues to assist with that process. The Commission approved proceeding with the project.

### **Uniform Determination of Death Act**

Chairman Gagliardi asked Ms. Brown to identify for the Commission the process by which this project came up for consideration now. Ms. Brown said that she and Ms. Tharney had discussed Uniform Law Commission Acts that had not yet been considered by the Commission. Ms. Tharney explained that Staff periodically reviews those Acts and that this project was one that had been enacted by a number of other states, but had not been addressed in New Jersey. Chairman Gagliardi asked about the contacts between Staff and the Uniform Law Commission on projects. Ms. Tharney replied that Staff is periodically in contact with ULC staff and that, every year, the ULC identifies projects that it considers “targets” for the year as well as those that are “targets to complete” (projects that have been enacted in a majority of the states). Staff discusses those projects with ULC staff and, in addition, John Cannel is generally familiar with the projects as a result of his attendance at ULC annual meetings.

Ms. Brown explained that, in this case, New Jersey’s existing law is better than the uniform law, which has been adopted in nearly every other state. Ms. Brown said that, to her knowledge, every state uses a “brain death” definition of death. New Jersey is unusual because, unlike every state but New York, it has a “religious” or “conscience” exception to the declaration of death based upon neurological criteria. This exception exists because Governor Kean had conditionally vetoed the bill adopting New Jersey’s uniform death act and suggested an amendment which incorporates the exception. The exception gives an individual the right to claim an exemption from the application of neurological criteria for determining death if such a declaration would violate that person’s personal religious beliefs. As a result, in New Jersey, if the physician making the death declaration has reason to believe on the basis of information in

the individual's available medical records or provided by the family (or both) that the person's religious beliefs would be violated by the declaration of death, then the death of the individual will not be declared upon the basis of neurological criteria but rather solely upon the basis of cardio-respiratory criteria. This exception has not been the subject of any litigation and the only reference to the exception that Ms. Brown found was in a single footnote in a case which was tangentially related to the subject matter of the case. In Ms. Brown's view, the best course would be to retain the current law without modification since it contains provisions better suited to New Jersey than the uniform law.

For example, in New Jersey, a licensed physician must make the declaration of death. The Department of Health, along with the Board of Medical Examiners, must adopt and periodically revise regulations regarding physicians who are authorized to declare death as well as the accepted medical standards for death declarations. New Jersey law protects against conflicts of interest by preventing a physician who is responsible for organ transplant from making the declaration of death determination. In New Jersey, the hospital and physicians who conduct themselves in accordance with the law are protected from liability, and insurance coverage cannot be denied to someone based on their religious views about death. Also, a specific commission had been established to study and deliberate the issues involved.

Chairman Gagliardi asked what process the Commission customarily uses to report to the Legislature when it reaches a view that nothing further needs to be done concerning a uniform law. Ms. Tharney explained that the Commission's practice has been to prepare a Final Report recommending to the Legislature that no action be taken in response to the uniform law. Chairman Gagliardi asked whether there is a distribution of reports to different heads of committees. Ms. Tharney said that there is a distribution list that is updated on an ongoing basis, per request or as needed, and that Commission reports are regularly forwarded to various individuals. Mr. Cannel said that the recipients of Commission reports include the Office of Legislative Services, a public information officer, and others. Chairman Gagliardi suggested that the distribution list should include the majority leaders of both houses of the Legislature.

Commissioner Burstein said that, in this case, the religious exception found in the statute is also embedded in the law practice. The living will forms that attorneys use for their clients incorporate the language used in the New Jersey Declaration of Death Act. He added that New Jersey's current law seems to be uniformly accepted, and that the acceptance and the lack of case law on the subject are testaments to the success of the law. Commissioner Burstein said that this point should be noted in the report, as should an explanation of the late timing of the Commission's consideration of this uniform law.

The Commission directed Ms. Brown to prepare a Final Report for release by the Commission at its next meeting.

### **Uniform Interstate Deposition and Discovery Act**

Ms. Brown stated that at the direction of the Commission, she prepared a report on this uniform law, suggesting the implementation of the uniform law by the judiciary rather than recommending its adoption to the Legislature. Mr. Brown asked whether the Commission wanted her to include the suggested rule changes that were prepared.

Chairman Gagliardi asked Commissioners Burstein and Long for their views. Commissioner Long said that she did not believe the court would be upset by the suggested rule changes, but that she could not remember any outside organizations submitting proposed rule changes. Commissioner Burstein agreed that this was a case of first impression. Chairman Gagliardi said that the judiciary was certainly free to ignore the proposal, but he did not want to forward it if doing so would have a negative impact.

Ms. Brown suggested that since the proposed rule change includes information regarding actions taken by other states, it might be of assistance to the judiciary in considering the issue and assessing how easy it would be to change our own court rules. There are things other states are doing that are helpful that have been incorporated into the revised version of the proposed rule changes. For example, the rule suggests identifying an application under the new rule 4:11-6 with the rule designation in the caption. This is done currently with petitions in aid of foreign litigation under rule 4:11-4. Commissioner Long said that she favored adding the proposed rule changes to the report and Commissioner Burstein agreed.

Ms. Brown said that she would make one correction regarding Pennsylvania's proposed rule, which had been promulgated but not yet fully approved by the Legislature (as required in Pennsylvania). The Tentative Report was unanimously approved for release on motion of Commissioner Long, seconded by Commissioner Burstein.

### **Uniform Principal and Income Act**

Laura Tharney explained that she hoped to obtain feedback on this project to determine whether the modifications proposed by the latest uniform act are appropriate for adoption in New Jersey and whether the changes to the current law that were proposed by the State Bar Association in 2008 should be included in the Final Report. Mr. Cannel said that this uniform law is a high priority for the Uniform Law Commission because of its uncontroversial nature. Ms. Tharney added that the law has been adopted in 33 states.

Chairman Gagliardi asked why so many states with populations similar to New Jersey's have not adopted the law. Mr. Cannel explained that there is no opposition to the law, but that state legislatures have been confronted with many pressing issues and this law is not perceived as a high priority. Ms. Tharney said she hoped to obtain a response from the Bar Association and

that the release of a Tentative Report might encourage the comments that the Commission needs to bring this project to a conclusion.

The Tentative Report was unanimously approved for release on motion of Commissioner Long, seconded by Commissioner Burstein.

### **Collateral Consequences**

Ms. Tharney explained that the Memorandum provided to the Commission was the first part of a three-part project. This first part involves a revision of the Rehabilitated Convicted Offenders Act (“RCOA”) to reconcile a bifurcation in the statute and resolve issues of duplication and inconsistency in the language. Although Staff has already proposed some modifications, Ms. Tharney anticipates further revisions to the language the next time that this project is considered.

Ms. Tharney said that the second part of the project addresses the current New Jersey statutes dealing with bars to employment, licensure, etc., of convicted offenders. There are a large number of these statutes and Staff has begun the process of categorizing them in an effort to better align the types of employment or licensure with the types convictions that would appropriately disqualify someone from holding those jobs or licenses. Staff has created approximately 20 categories and may be able to further shorten the list. Another goal of this second part of the project is to propose alternatives to the current statutory use of vague and undefined terms such as “good moral character” and “moral turpitude” to describe an individual’s qualifications or disqualifications.

The third part of this project is a review of the statutory provisions pertaining to the forfeiture of public office. Based on a preliminary review of statutory language and case law so far, it appears as though it may be useful to differentiate among various types of public officials and public employment.

As the project moves forward, Ms. Tharney explained that Staff will review the Equal Employment Opportunity Commission’s new guidelines regarding the consideration of criminal records in employment decisions to see how they might impact this project. In addition, Staff will review the Uniform Collateral Consequences of Conviction Act to see if it contains material that may be useful.

Mr. Cannel suggested that it might be appropriate to divide the project into several reports. Commissioner Burstein said that this project involves issues worthy of consideration and agreed with the suggestion of separate reports. Commissioner Long asked what the subheadings of the reports would be. Mr. Cannel replied that the titles are yet to be determined, but that the first report would deal with the RCOA revision, the second would deal with bars to employment and licensure, and the third would deal with distinctions between various kinds of public offices for purposes of disqualification. He added that the project will not be simple but it is important.

Commissioner Long said that, historically, “moral turpitude” was undefined but was treated uniformly in various contexts. She said that some crimes were considered so serious that they should forever bar someone from employment and licensure. Mr. Cannel said that in considering a statutory definition of “moral turpitude,” the moral standards applicable to a person seeking to adopt a child are very different from the moral standards applicable to someone whose job it is to test butterfat. Commissioner Long suggested that statutes like the one regarding butterfat testing should be repealed. Commissioner Bell said that when categorizing the statutes dealing with bars to employment and licensure, there is no need to reduce the number of categories if the existing categories are all legitimately distinct. He added that it is more important to have clearer, more meaningful categories than to have fewer categories.

The Commission commended Staff on the work done to this time and directed Staff to move forward with the project and to follow Commissioner Bell’s recommendation that the number of categories not be reduced at the expense of clarity and usefulness.

### **Property**

The Commission began its consideration of this project with the proposed new subsection g. of section 2. There were no objections to this addition.

The Commission next considered two versions of section 8. Mr. Cannel said he was not sure he saw a difference between the two and reminded the Commission that the additional detail in the second version was proposed by Larry Fineberg of the New Jersey Land Title Association, who felt that the added detail would be helpful. Commissioner Burstein said the first version is more readable and is comprehensive enough for legislative interpretation, but suggested adding language to the comment section to address the concerns reflected in the second version. The Commission agreed.

The Commission then discussed section 19. Mr. Cannel said he does not believe section 19 is necessary but that, at the last Commission meeting, Mr. Fineberg suggested that a residual statute of limitations for property law would be useful. Commissioner Bell asked if there is a general residual statute of limitations. Mr. Cannel replied that there is not, and added that for certain property actions, the statute of limitations is very long. For certain property issues, such as failure to comply with conditions, Mr. Cannel said that the contract limitation period is appropriate. Commissioner Burstein said it becomes very difficult when one tries to generalize different circumstances. Mr. Cannel expressed his concern that the proposed section 19 has the capacity to confuse the issue and could cause problems regarding adverse possession. Commissioner Bell said that he was apprehensive about making a change to the law without a clear understanding of the circumstances under which it would be applied. Ms. Tharney asked Commissioner Long what a court would do without section 19 and Commissioner Long said that the court would have to look for another statute of limitations and try to analogize. Chairman Gagliardi confirmed the Commission’s consensus that section 19 should be removed.

The Tentative Report, with comments added to section 8 and section 19 removed, was unanimously approved for release on motion of Commissioner Burstein, seconded by Commissioner Long.

### **Miscellaneous**

Ms. Brown requested an extension of the deadline for comments on the Uniform Collaborate Law Act tentative report from August 20<sup>th</sup> to October 1<sup>st</sup>. She explained that commenters had requested this because some meetings to discuss the report were not scheduled until September. Chairman Gagliardi asked how that would affect the project, and Ms. Brown said that it would have no real affect. The extension was granted.

Regarding NJDMSA, Ms. Tharney said that she has continued her outreach efforts on this project and that she is on her way to Washington, D.C. after the meeting since she was asked to make a presentation on NJDMSA at a conference. Although New Jersey has not yet taken legislative action on this issue, it is considered a leading state in the area of legislation.

The meeting was adjourned on motion of Chairman Gagliardi, seconded by Commissioner Bell.