

## **MINUTES OF COMMISSION MEETING**

**September 19, 2019**

Present at the New Jersey Law Revision Commission meeting held in the Baker Courtroom at the Rutgers Law School, 123 Washington Street, Newark, New Jersey 07102, were: Chairman Vito A. Gagliardi Jr.; Commissioner Virginia Long; Commissioner Andrew O. Bunn; Professor Bernard W. Bell, of Rutgers Law School, attending on behalf of Commissioner David Lopez; and Professor John K. Cornwell, of Seton Hall University School of Law, attending on behalf of Commissioner Kathleen M. Boozang.

### **Preliminary Matters**

Chairman Gagliardi thanked Dean David Lopez for inviting the Commission to the Rutgers Law School and allowing the Baker Courtroom to serve as the forum for the September 2019 meeting. In addition, the Chairman thanked the Dean for choosing Commissioner Bernard Bell to serve as his designee on the Commission and for the invaluable contributions that Commissioner Bell has made during his tenure.

For the benefit of the members of the public in attendance, Chairman Gagliardi briefly explained how the members of the Commission come to serve on the Commission.

Chairman Gagliardi also acknowledged the recent passing of long-serving Commission member, Hugo Pfaltz. The Chairman observed that Commissioner Pfaltz served on the New Jersey Law Revision Commission for twenty years. Commissioner Long added that Commissioner Pfaltz was the epitome of a gentlemen. Chairman Gagliardi acknowledged Commissioner Pfaltz's contributions to the laws of the State of New Jersey in the New Jersey Assembly and then as a member of the New Jersey Law Revision Commission. The Commission then observed a moment of silence.

### **Minutes**

Commissioner Bunn asked that in the second sentence of the first paragraph of the Minutes pertaining to "Standard Form Contract" that word "action" be inserted between the words "no" and "is". In addition, he asked that the word "she" be added to the first sentence of the third paragraph in between the words "that" and "serves."

Commissioner Bell asked that his remarks on the subject of "Juvenile Megan's Law Offenders" set forth in the third sentence of the sixth paragraph of the Minutes be clarified. He

asked that this sentence be revised to reflect that "...the Commission has an obligation to propose something to the Legislature to allow the statute to have effect."

With the additions proposed by Commissioner Bunn, and the clarification requested by Commissioner Bell, the Minutes of the July 18, 2019, Commission meeting were unanimously approved on the motion of Commissioner Cornwell, which was seconded by Commissioner Long.

### **Hearsay**

John Cannel discussed with the Commission a Draft Final Report proposing the modification of a statute to clarify whether hearsay evidence permitted in Title 9 proceedings should be similarly admitted in Title 30 matters involving the termination of parental rights. The use of hearsay evidence, in the context of Title 30 matters, was considered by the Appellate Division in *New Jersey Division of Child Protection and Permanency v. T.U.B.*, 450 N.J. Super. 210 (App. Div. 2017).

Mr. Cannel informed the Commission that Staff's distribution of the Report to stakeholders resulted in two responses. The first was received from Harvey Weissbard, author of a treatise on the New Jersey Rules of Evidence. Mr. Weissbard opined that he could think of no reason to disagree with the position taken by Staff in the Report. Staff also received comments from Gary Mitchell of the Office of Parental Representation. Mr. Mitchell agreed with the change proposed to the current law. He disagreed, however, with the changed provision in the Commission's Report on Child Abuse and Neglect because it would extend the hearsay rule to the new category of "child in need of services."

Commissioner Long observed that there are two distinct titles that were contemplated by the Appellate Division in *New Jersey Division of Child Protection and Permanency v. T.U.B.* – Title 9 and Title 30. One statute, Title 9, may result in the termination of an individual's parental rights. The second permits a parent to voluntarily seek help. Commissioner Bunn expressed concern about the use of hearsay in both proceedings. He questioned whether lowering the burden of proof was appropriate and whether anyone has complained about the hearsay standard. Commissioner Cornwell added that hearsay may be acceptable in abuse and neglect proceedings. He continued that a distinction may be appropriate for proceedings involving children in need of services.

Chairman Gagliardi inquired whether input had been solicited from a wide array of stakeholders. Mr. Cannel advised the Commission that input was sought from the Office of Parental Responsibility, the Law Guardian and the Department of Child Protection and Permanency. Commissioner Long inquired whether Legal Services was provided with a copy of this Report, noting that the American Civil Liberties Union and Legal Services always appear in court on cases involving the "burden of proof." She expressed surprise that they did not comment on this Report.

Commissioner Bell stated that in non-criminal proceedings that involve consequences of this magnitude the Rules of Evidence are generally relaxed. The primary concern is allowing hearsay in proceedings in which an individual's rights can be terminated. The focus in such proceedings is to protect parents from the use of hearsay when the consequence could be the termination of their parental rights.

Chairman Gagliardi noted that there were three possible paths that this project can follow. First, the Commission could accept the Report as drafted and release it as a final report. Next, the Commission could request that Staff modify the Report. Further, the Commission could ask Staff to seek input from stakeholders who may not have noticed the change contemplated in the Report.

In response to the options set forth by the Chairman, Commissioner Cornwell stated that he is not comfortable allowing the use of hearsay in proceedings that are centered around "children in need of services." He feared that the finding in such cases could be used as a basis for abuse and neglect proceedings against the parents. He did, however, indicate that he would not be opposed to additional research of this subject matter.

Commissioner Bell questioned why there should be an evidentiary distinction between child abuse and neglect cases and those involving children in need of assistance. Commissioner Bunn stated a preference to eliminate the hearsay in these proceedings. He continued that a more conservative approach would be to allow the use of hearsay, but only in abuse and neglect proceedings. Chairman Gagliardi expressed support for the position set forth by Commissioner Bunn. He added that additional research and input from stakeholders would be appropriate at this juncture.

Staff was instructed to contact stakeholders and solicit their position regarding the modifications set forth in this project and report back to the Commission.

### **"Residence" for Sex Offender Registration**

John Cannel presented a Draft Final Report proposing the modification of N.J.S. 2C:7-2 to deal with the registration of secondary addresses for sex offenders, and an additional change to the statutes, in response to the determination of the New Jersey Supreme Court in *State in the Interest of C.K.*, 2018 WL 1915104 (2018).

Mr. Cannel discussed that the Court in *Halloran* held that an offender required to register under N.J.S. 2C:7-2 must register a secondary residence in order to remain compliant with the statute. Since the requirement to register a secondary address is not explicitly contained in the statute, clarification of the statutory language may be of use to those who seek guidance. The draft language suggests a number of days, either consecutively or in the aggregate over a calendar year, during which an offender could reside at a secondary residence before he or she would be required to register that address. The draft language also defines the term "secondary address" as used in N.J.S. 2C:7-2(a).

Mr. Cannel explained a change was also added that would remove language referring to adjudication of delinquency from N.J.S. 2C:7-2(g) consistent with the New Jersey Supreme Court's holding in *State In the interest of C.K.*, 2018 WL 1915104 (2018).

On the motion of Commissioner Bunn, which was seconded by Commissioner Long, the Commission unanimously voted to release the Report as a Final Report of the Commission on this subject.

### **Voided Election**

Samuel Silver presented a Draft Final Report proposing modification to N.J.S. 18A:9-1 *et. seq.* to clarify the effect of voided elections on future ballot initiatives, as discussed in *City of Orange Twp. Bd. Of Educ. v. City of Orange Twp.*, 451 N.J. Super. 310 (Ch. Div. 2017). N.J.S. 18A:9-4 and 18A:9-6 both allow for a Type I school district (in which school board members are appointed by mayor) to become a Type II school district (school board members are elected) via referendum, a public question, and an interpretive statement. In 2003 the statute was amended, so that a proposed reclassification could not be placed before voters within four years after an election, pursuant to any resolution adopted or petition filed pursuant to the statute.

In 2016, the Orange City Council put on its November 2016 ballot a referendum to change from a Type I (appointed) school district to a Type II (elected) school district. After more than three-quarters of voters opted to switch, a special school board election took place in March 2017. Plaintiff Orange Board of Education argued that the City's public question and interpretive statement were misleading and that the referendum was improper, and it sought injunctive relief. The Court granted the injunctive relief and voided the 2016 election results. The Board of Education then sought to restrain the Orange Executive Board from certifying the results of the March 2017 special election, arguing that a plain reading of the statute indicated that the same initiative could only be voted on once every four years. The Court refused to adopt this interpretation, even as it acknowledged that the statute does not specifically contemplate the ramifications of a voided election. In the absence of statutory guidance, the Court held the term "void" was meaningless and equivalent to "not actually held."

Mr. Silver pointed out that the statute's current construction has one block paragraph containing two ideas: referendum requirements, and the prohibition. His draft language would divide the paragraph into subsections, so that 18A:9-4(a) would not alter the substance of the reclassification requirements, (b) would not alter the substantive language regarding prohibition, and only (c) would add the following new language: "for purposes of this section, if a court determines the results of the election to be void, that election shall not be considered to have been held." Similarly, language would be added to 18A:9-5 to parallel the void exception in 18A:9-4, and to 18A:9-6 so that it mirrors 18A:9-4.

Mr. Silver noted that outreach to the New Jersey Education Association resulted in their positive reaction to the project. He then requested the Commission's authorization to release the Draft Final Report.

On the motion of Commissioner Bunn, which was seconded by Commissioner Long, the Commission unanimously voted to release the Report as a Final Report of the Commission on this subject.

### **Definition of "Marital Status"**

Samuel Silver discussed a Revised Draft Tentative Report proposing modifications to the language of N.J.S. 10:5-5 and 10:5-2.1 to reflect the treatment of the term "marital status" by the New Jersey Supreme Court in *Smith v. Millville Rescue Squad*, 225 N.J. 373 (2016) and in response to comments received by stakeholders.

He explained that in *Smith v. Millville Rescue Squad*, the New Jersey Supreme Court examined the meaning of the phrase "marital status" in the context of New Jersey's Law Against Discrimination (LAD), N.J.S. 10:5 *et seq.* The Supreme Court held that the phrase included those who are single or married and those who are in transition from one state to another.

Mr. Silver explained that prior to the release of a Tentative Report, Staff received authorization to conduct research and limited outreach concerning the definition of "marital status" and whether this term should be explicitly defined in the LAD. Staff conducted preliminary outreach to various individuals, including practicing attorneys and academic faculty, to obtain comment regarding whether to codify the New Jersey Supreme Court's definition of "marital status."

Professor Stacy Hawkins, Associate Professor at the Rutgers University School of Law, noted that the New Jersey Supreme Court reached a decision which was in line with the purpose behind the New Jersey Legislature's enactment of the LAD. She indicated that the definition of "marital status" as laid out by the Court is currently the law in New Jersey. Codification of that definition in the statute would not change that, but could result in more consistent interpretations of the term moving forward. Professor Hawkins also noted that incorporating the definition in the statute could make the law more accessible to pro se litigants, or individuals who might not have ready access to the case law.

Representatives of the Labor and Employment Law Section of the New Jersey State Bar Association (LAELS) indicated that the LAELS considers the *Smith* decision clear and recommended against codification of this term.

Mr. Silver noted that initial outreach did not result in a consensus regarding the codification of the definition of "marital status" in the LAD. Staff conducted subsequent outreach, with proposed language to stakeholders for their consideration.

Professor Katie Eyer, Professor of Law at the Rutgers University School of Law, concurred with Professor Hawkins' perspective that "codification would be useful." In addition, Professor Eyer opined that "if the state is going to codify a definition, it should expand the definition to include civil unions and domestic partnerships." The addition of these arrangements would eliminate any ambiguity as to whether they are covered by the proposed definition.

The Division on Civil Rights (DCR) "agrees substantively that the definition of marital status proposed by the Commission is the appropriate way in which to define the term." Preliminarily, the DCR observed, "[w]hile the proposed definition provides more examples of marital states, it does not substantively change the definition set out by the Court in *Smith*." The DCR cautioned the Commission that there was a potential danger in codifying the definition of marital status. The DCR feared that a definition that included transitioning might result in a court inferring that this concept applied only to marital status.

In response to the comments from the Director of the DCR, Staff drafted amendments to N.J.S. 10:5-2.1 to avoid the unintended negative consequences that may result from including a definition of marital status that included those transitioning from one marital state to another. The proposed amendment would adapt the Law Against Discrimination to the present social needs and secure the better administration of justice. In addition, the modifications discussed with the Director of the DCR would ensure that the broad protections of the LAD are extended to members of every protected class, those transitioning among and between every protected status and those associated or perceived to be a part of a protected class.

Commissioner Cornwell questioned whether the definition of marital status in Appendix I is referenced again in the proposed modifications to N.J.S. 10:5-2.1(h), set forth in Appendix II. Mr. Silver noted that the marital transition language was drafted in concert with the Attorney General to ensure that it covered the definition of marital status, which was the object of this Report.

Commissioner Bunn questioned whether the term "marital status" was defined in the Law Against Discrimination. Mr. Silver stated that the term "marital status" is not currently defined in the statutes that comprise the Law Against Discrimination. As a follow-up to his question, Commissioner Bunn inquired whether the term "protected class" is defined in the Law Against Discrimination. Mr. Silver advised the Commission that he was unsure whether "protected class" was a defined term. He continued that he would be happy to research this question and provide a supplemental response to the Commission on this topic.

Commissioner Bell observed that in Appendix II (h) the phrase "and who is:" should be amended to read "or who is:". This modification, he continued, would serve to protect the members of the protected classes named therein from the type of discrimination set forth in the Law Against Discrimination. Commissioner Long concurred with Commissioner Bell's proposed modification.

With the changes recommended by Commissioner Bell, on the motion of Commissioner Bell, which was seconded by Commissioner Long, the Commission unanimously voted to release the Report as a Revised Tentative Report.

### **Evidentiary Standard for a Final Restraining Order Under the Sexual Assault Survivor Protection Act**

Jennifer Weitz updated the Commission on Staff's ongoing work concerning the Sexual Assault Survivor Protection Act of 2015 (SASPA). This project was brought to Staff's attention by the Appellate Division's decision in *B.C. v. V.C.*, 2017 WL 2705443 (App. Div. 2017). The Court found that there was no clear expression of legislative intent that SASPA should be applied retroactively. Staff has been actively engaged in the outreach process since authorized to work on this project in order to determine whether the applicable statute required clarification.

Ms. Weitz noted that the Department of Children and Families (DCF), and specifically the Division of Women, oppose any change to the statute. According to DCF, any allegations made in an application for a protective order are thoroughly investigated by the Department. As a result, DCF opined that given the vetting process of each allegation a more demanding standard was unnecessary. In addition, DCF characterized the decision in *B.C. v. V.C.* as an outlier.

The Hudson County Prosecutor's office declined to comment on this project. They did note, however, that protective orders of this sort are granted using the preponderance of the evidence standard. Commissioner Cornwell concurred that the preponderance of the evidence standard is the appropriate standard for these types of matters. He added that he does not believe that the Commission should disturb the current standard of proof.

Ms. Weitz advised the Commission that outreach was sent to matrimonial and criminal defense attorneys. She also informed the Commission that these stakeholders had not returned any comments to Staff regarding this project.

The Commission unanimously agreed that no further action shall be taken by the Commission in this area of law.

### **Local Lands and Building Laws - Bidding**

Samuel Silver discussed a Memorandum to clarify whether the Local Public Contracts Law (N.J.S. 40A: 11-1 *et seq.*) applies to the acquisition of real property, capital improvement, or personal property by a County or municipality, pursuant to the Local Lands and Building Laws (N.J.S. 40A:12-5(a)(3)).

This issue was brought to Staff's attention by an attorney whose practice involves both the Local Land and Building Law and Local Public Contracts Law. The issue presented to Staff was whether a public body that is acquiring real property by lease, purchase, installment agreement or

exchange, and that requires the construction or repair of any capital improvement, must adhere to the public bidding requirements of the Local Public Contracts Law.

The purpose of the Local Public Contracts Law (LPCL) is to foster openness in local government activities. In addition, the public bidding portion of the LPCL is designed to secure competition for public contracts. Ultimately, the LPCL was enacted to protect the public against chicanery and fraud in public office.

Pursuant to N.J.S. 40A:11-4(a) every contract awarded by the contracting agent for the provision or the performance of any goods or services shall be awarded only by resolution of the governing body to the lowest responsible bidder after public advertising for bids and bidding thereof. The exceptions to the LPCL do not require public bidding when a governmental entity enters into a contract with the federal government; or, a state, county or municipal government. The LLBL does not explicitly require a governmental entity to seek public bids on the acquisition of real property although the LPCL may require it.

Mr. Silver then discussed with the Commission a hypothetical in which a governmental entity wishes to purchase land from a private person and as a condition precedent the seller must construct a capital improvement – such as a library. The question is whether a contract, awarded by the contracting agent, requiring the construction of a capital improvement implicates the LPCL's bidding requirements or whether N.J.S. 40A:12-5(a)(3) serves as an exception to the LPCL. It is unclear from the plain language of N.J.S. 40A:12-5(a)(3) whether a governmental unit must solicit public bidding, pursuant to the LPCL, when it requires the seller, or lessor, to construct or repair a capital improvement as a condition of acquisition.

Commissioner Cornwell observed that the LPCL was enacted to reduce graft by public officials. Instances such as the one set forth in the hypothetical should be the subject of public bidding. Chairman Gagliardi stated that as an attorney who practices in this area of the law, he was surprised to see such a gap in a statute. He added that he believed that this was a worthwhile project.

Commissioner Long asked whether improvements that are a condition of the acquisition require the private owner of the property to bid out any of the improvements. Chairman Gagliardi stated that where the improvements are a precondition for the sale, it does not imply that someone must effectuate these changes. Commissioner Bell observed that the market price of the property that is for sale generally affects the bidding process. Commissioner Bunn opined that if public money is involved and if there is a division between private property and government purchase then it would be a good thing to implement a change to the statute. Chairman Gagliardi suggested that Staff look for guidance on this issue in other states.

Staff was authorized by the Commission to engage in additional research and outreach to determine whether clarity could be brought to the statute.



## **Completion of Probation and N.J.S. 2C:52-2(a)**

Arshiya Fyazi presented a Memorandum proposing a clarification to N.J.S. 2C:52-2(a) regarding use of the phrase “satisfactory completion” in reference to probation, as discussed in *Matter of E.C.*, 454 N.J. Super. 48 (App. Div. 2018). N.J.S. 2C:52-2(a) allows for expungement of a criminal record if the applicant meets certain criteria.

In *Matter of E.C.*, the defendant was arrested and convicted in 2002; she was sentenced to three years of probation, contingent on her serving six days in jail and paying a fine. In 2005, E.C. pled guilty to violating her probation. She ultimately was discharged from probation “without improvement” and paid all fines. In 2015 E.C. filed an expungement petition under the “early pathway” section of N.J.S. 2C:52-2(a), indicating that despite graduating from college with a 4.0 GPA, her arrest record was an impediment to her finding employment. The trial court denied her petition, holding that she failed to “satisfactorily complete” her probation within the meaning of the statute because she was discharged from probation “without improvement.” In 2016 E.C.’s petition was denied again.

Ms. Fyazi noted that the Appellate Court found the term “satisfactory” was not defined in the statute, so it referenced the Oxford English Dictionary for the ordinary definition of the term. After the Court also examined the statute’s purpose and the legislature’s intent in enacting the statute, it held that E.C. satisfactorily completed her probation.

In 2017, the statute was amended to decrease the length of time an ex-offender must wait before submitting a petition for expungement, and to increase the number of offenses eligible for expungement. However, the phrase “satisfactory completion” remains undefined. Ms. Fyazi requested authorization from the Commission to conduct additional research on the topic.

Commissioner Cornwell approved of the project, and Commissioner Long agreed. Commissioner Bunn felt that the Appellate Division’s opinion provided adequate clarity on the subject. Chairman Gagliardi noted that the Appellate Division’s holding may provide the basis for clarifying the statute. Commissioner Bunn then observed that to the extent that this statute is used by *pro se* litigants, the project is of some benefit.

Staff was authorized by the Commission to engage in additional research and outreach to determine whether clarity could be brought to the statute.

## **Confinement**

Mark Ygarza presented a Memorandum proposing a project to clarify the meaning of the term “confinement” as used in N.J.S.2C:44-3(a). The ambiguity created by the lack of a definition for this term was discussed by the New Jersey Appellate Division in the matter of *State v. Clarity*, 454 N.J. Super. 603 (App. Div. 2018), in the context of whether an individual could be deemed a persistent offender for purposes of sentencing.

On July 26, 2003, the defendant in *State v. Clarity* committed a criminal act in the state of Florida. In 2004, he entered a guilty plea to his participation in the alleged criminal activity and was sentenced to probation. In August 2013, while in New Jersey, Clarity engaged in conduct that led to his arrest for child endangerment. Subsequently, in August of 2016, he pled guilty to third-degree child endangerment. The commission of these two crimes took place ten years and three weeks apart.

For purposes of determining whether the defendant was eligible for an extended term, the trial court considered the defendant's probationary term as "confinement," and his date of conviction as the date the crime took place. Using these dates, the trial court concluded that the two crimes occurred less than ten years apart. The defendant appealed his sentence and claimed that he was not subject to New Jersey's persistent offender statute.

Mr. Ygarza explained that the Appellate Division noted the absence of a definition for the term confinement in New Jersey's Code of Criminal Justice. As a result, the Appellate Division examined secondary sources, consulting two legal dictionaries to ascertain the generally accepted meaning of "confinement." In addition, the Court examined the definition of confinement as it is used in three other states.

Ultimately, the Court determined that the trial court erroneously utilized the date of the defendant's initial conviction when it performed the extended term eligibility calculation. The trial court also erroneously interpreted Clarity's probation in Florida as "confinement." Mr. Ygarza stated that the Appellate Division determined that "confinement" entailed the imprisonment or restraint of an individual. The Court concluded that the absence of a definition may lead to future confusion on this subject matter.

Mr. Ygarza explained to the Commission that Staff checked whether there was currently any pending legislation on this issue. S313 seeks to "[impose] a mandatory term of life imprisonment without eligibility for parole on persons who commit particularly brutal sexual assaults", but it does not address the definition of the "confinement" discussed in *State v. Clarity*.

Chairman Gagliardi requested that staff conduct research to determine how other jurisdictions address the issue of confinement in the context of their extended term statutes. Commissioners Long and Cornwell concurred with the recommendation of the Chairman. Subject to the directions of the Commission, Staff was authorized to engage in additional research and outreach to determine whether clarity could be brought to the statute.

### **Adjournment**

The meeting was adjourned on the motion of Commissioner Long, seconded by Commissioner Cornwell. The next Commission meeting is scheduled to be held in the Commission office on October 17, 2019, at 10:00 a.m.