

MINUTES OF COMMISSION MEETING

November 21, 2013

Present at the New Jersey Law Revision Commission meeting held at 153 Halsey Street, 7th Floor, Newark, New Jersey, were Chairman Vito A. Gagliardi, Jr., Commissioner Andrew Bunn, Commissioner Albert Burstein, and Commissioner Virginia Long. Professor Bernard Bell, of Rutgers School of Law - Newark, attended on behalf of Commissioner John J. Farmer, Jr.; Grace C. Bertone, of Bertone Piccini LLP, attended on behalf of Commissioner Rayman Solomon; and Professor Ahmed I. Bulbulia, of Seton Hall Law School, attended on behalf of Commissioner Patrick Hobbs.

Professor Reid Kress Weisbord, Esq. from Rutgers Law School-Newark, Mary M. McManus-Smith, Esq., of Legal Services of New Jersey, Edward Eastman, Esq., Executive Director of the New Jersey Land Title Association, and David Ewan, Esq., of the New Jersey Land Title Association were also in attendance.

Minutes

The Minutes were unanimously approved and the actions taken at the October meeting ratified on motion of Commissioner Long, seconded by Commissioner Bunn.

Wills

Jordan Goldberg explained that this new potential project arose as a result of Executive Director Laura Tharney's outreach to the law schools and subsequent consultation with law school faculty members. The potential project was inspired by a law review article written by Professor Reid Weisbord, Vice Dean and Associate Professor of Law at Rutgers School of Law - Newark, who was present at the meeting.

Ms. Goldberg presented a short summary of the project, describing it as an attempt to address the serious issue of mass intestacy. Ms. Goldberg explained that most people want to create wills but do not. Without a will, an individual's wishes for the distribution of his or her assets after death cannot be determined or followed. The law of intestacy, which governs the distribution of assets without a will, may be completely or partly inconsistent with what the individual would have desired. Further, current family structures and relationships are often not accounted for in the rules of intestacy, making such inconsistency very likely in some situations. Intestacy – dying without a will – imposes a host of costs on both individuals and on society generally. For individuals, dying without a will means that the individual has no ability to ensure that those he or she wishes to pass wealth or possessions to ultimately receive those gifts. These costs can be significant both financially and emotionally, as where there are minor children and the court must appoint a guardian. Intestacy also imposes costs on courts and the legal

system and there is a recognized public interest in the orderly disposition of property at death.

Many countries and states have tried to address intestacy in various ways, but have not met with much success. Ms. Goldberg explained that Professor Weisbord has drafted a model bill, much like the other model bills we review from uniform committees and other sources. His novel approach is to essentially put the will creation process into the normal flow of people's daily lives by making it part of the process of filing tax returns. His proposal would allow an individual to voluntarily append a will to a tax return, and file it with the state in the same manner as a tax return.

Ms. Goldberg noted that New Jersey has liberalized its law regarding wills in recent years, suggesting that the Legislature is inclined to recognize the wishes of decedents however expressed. Although New Jersey has not adopted a form will or statutory will, it has adopted other policy changes intended to broaden recognition of wills. Most recently, in 2004, the legislature broadened the recognition of holographic, or unwitnessed, handwritten wills, and expanded courts' authority to recognize a range of 'improperly' drafted wills so long as they are consistent with the testator's intent to create a will.

Ms. Goldberg requested authorization from the Commission's to engage in preliminary research and outreach to stakeholders in the State to explore the options presented by Professor Weisbord and to determine whether all or part of his idea can be developed into a report to recommend to the legislature. Ms. Goldberg told the Commission that if the project was approved, Staff would initially reach out to the Will Registry office within the Secretary of State's Office, the Department of the Treasury, the relevant New Jersey Bar sections, the Administrative Office of the Courts, and the Surrogate's Office to determine their respective levels of interest and potential support for this type of project, and also to solicit information about the level of the intestacy problem in New Jersey specifically and whether other options exist for addressing it.

The Chairman then recognized Professor Weisbord, who introduced himself and provided an overview of his article, and then responded to questions from the Commission. Professor Weisbord explained that there are two major concerns relating to will creation that are implicated by his proposal: (1) whether it would jeopardize testators' understanding of the serious nature of drafting a will, which is typically considered to be conveyed by the process of finding an attorney, writing the will, and gathering witnesses to sign it, and (2) the need to verify the identity of the testator and prevent fraud, which is typically resolved by requiring two witnesses. Professor Weisbord suggested that: the gravity with which individuals approach the making of their will is akin to the seriousness with which individuals approach their tax returns; the information needed to consider making one's will is very similar to the information

needed to complete one's tax returns; and the mechanisms that exist for ensuring that individuals file correct tax returns are sufficiently personal and verifiable to stand in for the previously required attestation by witnesses.

Commissioner Burstein pointed out that the Commission makes recommendations to the Legislature regarding changes to the law that are in the public interest, but there is a need for quantifiable information to support a change. He said it would be useful to know the number of New Jersey residents who die intestate. Commissioner Burstein said also that there are many avenues now in use outside the will, e.g., insurance and joint accounts, so it would be a help to determine the scope of the problem. He suggested that a good start would be to contact surrogate courts or offices around the state to find out how many letters of administration there are. Professor Weisbord agreed that this was a good idea, and explained that he had preliminarily contacted a sample of the Surrogates, but not all of them.

The Chairman also expressed an interest in additional analysis regarding the number of cases that are resolved in part as a result of the testimony of witnesses to the signing of a will that would not be available here. He pointed out the possibility of actually increasing litigation because witness testimony is not available. Professor Weisbord replied that based on information and cases reviewed during the course of his research, it appeared that the witnesses whose testimony tended to be persuasive in such cases were those who knew the decedent personally and who could speak to the person's apparent capacity at or about the time of the signing of the will. Generally speaking, these were not witnesses to the signing of the will.

Commissioner Bunn suggested that since a substantial number of people rely on tax preparers for the preparation of their annual tax filing, he was concerned about the fact that those individuals – who might not be lawyers - would now potentially be called upon to give advice regarding wills and estate planning as well as to be the attesting witness. He asked about the implications for tax preparers and the Chairman suggested outreach to CPAs and other tax preparers as a result.

With regard to the issue of whether the new proposal would help change behavior, Commissioner Long pointed out studies proving that, if you alert people and remind them to take certain steps, a certain number of people will actually be triggered to comply. She also suggested that it did not seem as though this proposal would steer people away from consulting a lawyer about estate planning, since it was directed to those individuals who do not appear to be inclined to seek legal help.

In keeping with the subject matter of this project, Commissioner Burstein suggested a clarification of the intestacy provisions contained in Title 3B, expressing concern that the statute is now somewhat opaque; adoption of the most recent uniform

law in that area having muddied the waters. Professor Weisbord suggested that he would be happy to assist in any way with a project in that area if doing so would be of use to the Commission.

When asked by Commissioner Bell about how this project would affect other arrangements and alternatives for the types of non-will transfers mentioned by Commissioner Burstein, Professor Weisbord responded that those other transfers would not be affected. Commissioner Bertone pointed out that any instructions provided to individuals who might wish to participate in the filing of a will at the time of the filing of their taxes would have to be carefully crafted. She noted the difficulty that people frequently have understanding that just because something is non-probate, does not mean it is not taxable. She said that it would be a challenge to craft instructions detailed and clear enough to inform people of the significance of their actions, without making them so complex that they functioned as a deterrent. Commissioner Bell suggested that, for the sake of accuracy, Professor Weisbord's proposal really shouldn't be described as a tax proposal. He also recommended that outreach to AARP as a potential commenter might be very useful.

Chairman Gagliardi concluded the discussion by recognizing a consensus on the part of the Commission to see this project proceed. He asked whether the Commission also wanted to try to improve the statutory rules dealing with intestacy after an analysis of the troublesome areas and the Commission agreed to do so. The Chairman pointed out that this project would have an impact on a number of different stakeholders and asked Ms. Goldberg to ensure that she reached out to them during the course of developing the project. The Chairman asked Ms. Goldberg whether she had sufficient guidance to move forward on both projects, to which she replied in the affirmative.

Title 9 – Child Abuse and Neglect

John Cannel presented a Memorandum from the Legal Services of New Jersey (LSNJ) with comments on the Revised Tentative Report dated October 7, 2013. Mr. Cannel stated that the comments from the LSNJ improved the Report, and with few exceptions, he agreed with their recommendations. Ms. Mary McManus-Smith, Esq., of the LSNJ, was in attendance to discuss the recommendations proposed by her office.

Ms. McManus-Smith raised concerns about the “child abuse and neglect” definition in N.J.S. 9:27-1b.3 and recommended striking the language after the first use of the word “punishment” so that only the phrase “infliction of excessive corporal punishment” remained. Ms. McManus-Smith stated that the language in question unduly limits a parents' role in guiding and disciplining their children.

Commissioner Bell suggested that the concern Ms. McManus-Smith raised could be addressed if the statutory language was extended to the second use of the word

“punishment” to include the phrase “infliction of excessive corporal punishment or using excessive physical restraint or punishment.” Commissioner Bunn agreed and asserted that physical punishment includes corporal punishment. Commissioner Bunn proposed that the term “physical” should be used instead of “corporal” in this subsection. Ms. McManus-Smith identified the working definition of “excessive corporal punishment” established by the New Jersey Supreme Court in *Div. of Youth & Fam. Servs. v. K.A.*, 413 N.J. 504 (2010). Chairman Gagliardi stated that use of the term “excessive physical punishment” is intended to include “excessive corporal punishment.” Chairman Gagliardi stated that the comments in the Report for this section should note that the Commission’s recommendation of the term “excessive physical punishment” is intended to include but is not limited to the definition of “excessive corporal punishment” as adopted in case law and that the Commission is adopting the Court’s determination in the case cited above and expanding it to include excessive physical punishment. The Commissioners recommended that subsection b.3 should read as follows: “infliction of excessive physical restraint or punishment; and...”

Ms. McManus-Smith then addressed the next section in the definition, N.J.S. 9:26-1b.4. which states that the definition of child abuse or neglect includes “[f]ailing to supply the child with adequate food, clothing, shelter, education, or medical care though able to do so.” The LSNJ recommends drafting a separate subsection c. which defines what is not included in the “child abuse or neglect” definition. One of the two proposed subsections would include the “inability to provide housing or other essentials due to a lack of financial means.” Ms. McManus-Smith cited to case law distinctions including the New Jersey Supreme Court decision in *Div. of Youth & Fam. Servs. v. A.W.* 103 N.J. 591 (1986) that she believed should be incorporated into the statutory language. Ms. McManus-Smith emphasized that the case law reflects that poverty alone is not reason to remove a child from a home. She suggested commented that language to this effect should be included in the proposal because this issue has been litigated many times in the past, and this issue will continue to be re-litigated because the law is still unclear. Commissioner Long expressed concern that the current wording of the draft Report targets people who are only poor. Commissioner Bell questioned whether a parent who fails to obtain assistance that is available is included in the definition of the draft Report. Chairman Gagliardi acknowledged that the Commissioners expressed enough discomfort with the language in this subsection to warrant rewording. Chairman Gagliardi requested a revised draft of this subsection at the December Commission meeting and Mr. Cannel said that he would try to find a mid-ground for drafting.

Mr. Cannel then stated that the LSNJ objects to the definition created in the Report for “child in need of services” in N.J.S. 9:27-2. The LSNJ recommends retaining the current statutory scheme as provided in N.J.S. 30:4C-11 to 12. Ms. McManus-Smith acknowledges that while the proposed definition is adapted from the New Jersey

Supreme Court decision in *Div. of Youth & Fam. Servs. v. I.S.*, 214 N.J. 8 (2013), the draft Report include a possible third-party action that was not contemplated by the Court. Ms. McManus-Smith fears that this statute will be misused in child custody cases and other family law matters. Commissioner Bunn stated that the concern for mischief and abuse seems legitimate and questioned that if not outweighed the section should not be included.

Mr. Cannel stated that the Advocates for Children of New Jersey requested that the provision should be included to ensure that if there is a concern of child abuse or neglect that DCCP would be included in the action. Commissioner Bunn questioned at what stage of the drafting was the request made. Commissioner Bell proposed statutory language that provides for a 90 day waiting period to allow for exhaustion of resources before DCCP can be included as a party.

Chairman Gagliardi questioned why a third-party cause of action is needed. He asked whether the action was included to provide for circumstances where other services were not responsive, for example, where a neighbor or educator identifies a problem but services are not focused on or responding to the identified issue. Commissioner Bunn followed with an inquiry about the consequences of a third-party cause of action. Mr. Cannel responded that once the action is filed, DCCP is obligated to investigate the matter. Commissioner Bunn expressed reservation about the phrasing in the Report of a “private cause of action.” He found the term to be misleading because the mechanism functions more as a petition than a cause of action. Chairman Gagliardi added that the mechanism is designed to compel action when DCCP has not taken action. Commissioner Bell stated that a party should have a remedy if there is an inadequate DCCP investigation. Commissioner Long agreed that the cause of action was needed. Chairman Gagliardi agreed that this is a legitimate problem and called for a vote of the Commissioners whether the draft should include a third-party cause of action. Five Commissioners voted that the “third party cause of action” provision should be included for child abuse and neglect cases and that the Department of Children and Families should be made a party, but that a third-party cause of action should not be permitted in cases of a child in need of services.

Mr. Cannel highlighted a new proposed section in the Report, N.J.S. 9:27-36b. that provides the following:

In cases where, in the opinion of the court, a parent or guardian of a child found to be in need of services appears to be in need of therapeutic services, the court may order the Division to offer to the parent or guardian services or evaluation for such services, including, but not limited to, homemaker services, functional education, group self-help programs, and professional therapy.

The Commission determined that provision appropriate for inclusion in the Report.

Ms. McManus-Smith then addressed concerns with the recommended definition of “[r]easonable efforts” in N.J.S. 9:26-1. She maintained that the definition in subsection 1. does not include the responsibilities placed on DCCP to act prior to removal and placement pursuant to the Adoption and Safe Families Act (ASFA). Likewise in the revisions to N.J.S. 9:26-2b.2, the draft does not include the language provided in the Child Placement Bill of Rights that:

a child shall have the right [t]o placement outside his home only after the applicable department has made every reasonable effort, including the provision or arrangement of financial or other assistance and services as necessary, to enable the child to remain in his home.

The language from the Child Placement Bill of Rights will be incorporated as will clarification of the temporary nature of financial assistance pursuant to Commissioner Bell’s suggestion. Chairman Gagliardi asked Mr. Cannel to revisit this section and N.J.S. 9:27-4, along with the discovery issues the LSNJ raised and Ms. McManus-Smith’s concern with section N.J.S. 9:30-1 which she suggested may be addressed through changes to syntax. Although no changes regarding record access had yet been made in this draft, Mr. Cannel said that he agreed that the right of discovery should be parallel whether a parent was involved in a proceeding in the courts, or an administrative proceeding. Mr. Cannel indicated that he was not in agreement with LSNJ’s position regarding an abandoned child, and added that more input might be provided with regard to this issue after the release of a Tentative Report. Chairman Gagliardi requested that the Report considered at the December meeting.

Revised Uniform Law on Notarial Acts/N.J. Notaries Public Act

Jayne Johnson presented a Revised Tentative Report based on the Revised Uniform Law on Notarial Acts (RULONA) which provides minimum standards for notarial practice; and governs the notarization of tangible and electronic records. The Report adopts most provisions of RULONA but incorporates and tailors select provisions to preserve standards that are integral to New Jersey practice.

Ms. Johnson explained that her outreach efforts have been increasingly fruitful. She received responses from the following commenters: the newly elected New Jersey Notary Association President, Alice Tulecki; the County Clerks and County Surrogates sections of the Constitutional Officers Association of New Jersey (COANJ); the New Jersey Land Title Association (NJLTA); and other experienced notaries public who submitted formal comments to the Commission. Ms. Johnson stated that she was grateful for the contributions of the NJLTA and was pleased that two representatives of the organization were present to comment on the Report.

Edward Eastman, Esq., Executive Director of the NJLTA and David Ewan, Esq., a member of the NJLTA were in attendance to provide comment. Mr. Ewan introduced

himself as an American Bar Association (ABA) advisor and President of Property Records Industry Association (PRIA), a national organization.

Mr. Ewan began by applauding the Commission's Report for its comprehensive approach to addressing a longstanding need in New Jersey for the revision of the law governing notaries public. Mr. Ewan stated that the Report was well received by individuals in his area of practice who are deal with business and legal affairs involving notarized documents.

Mr. Ewan identified a few substantive recommendations for the consideration of the Commission. The first was to the proposed N.J.S. 52:7A-6 which he said should prohibit use of the term "notario publico" by notaries public who are not licensed attorneys because the term is the Spanish equivalent to "attorney at law" and thus infers that the individual is licensed to practice law. The Commissioners suggested that adding a mandatory disclosure requirement stating that the notary is not an attorney will address the concern. Commissioner Long stated that this is a requirement of civil law and there must be disclosure, along with any advertising by individual as a notary public.

Mr. Ewan next raised concerns regarding the provisions pertaining to the manual contained in proposed N.J.S. 52:7A-9 because arguably the manual would become obsolete, if notaries public are kept abreast of the rules and regulations governing New Jersey notaries public through the new proposed educational requirements. Mr. Ewan said that the manual on the State Treasurer's webpage has not been revised for approximately 10 years and is considered to be outdated. He added that the statutes and regulations governing notaries public should be included in the curriculum of the training and continuing education courses. He also noted that the New Jersey Administrative Code should incorporate rules and regulations promulgated by the State Treasurer that govern notaries public. Ms. Johnson explained that based on the information available to her, many notaries public rely on the manual during the course of their activities as notaries, and suggested that the elimination of the manual may be disruptive to longstanding notaries. Chairman Gagliardi recommended that Ms. Johnson consult with the office of the State Treasurer to determine the best course of action.

Mr. Ewan then suggested that the manual stamping requirement in N.J.S. 52:7A-12 c. is obsolete because the signature and stamp at issue are now available in electronic form. Mr. Ewan considered the requirement for the maintenance of a database of current and former notaries that is proposed in N.J.S. 52:7A-24 a great idea, but said that a time limit should be incorporated. Mr. Ewan recommended retaining information going back ten years, which is twice the commissioned term of a notary.

Mr. Ewan was pleased with the inclusion of a journal requirement in the Report but expressed concern about proposed N.J.S. 7A-26 e. and f. and the costs associated

with this aspect of the journal requirement. Mr. Ewan asked what the journal retention period should be and whether journals kept in digital format must be provided in digital and/or hardcopy form to the State Treasurer.

The Commission requested that the Report incorporate the recommendations of the NJLTA before the Revised Tentative Report is released.

Equine Activities Liability Act

Mr. Petitti presented a draft of a Revised Tentative Report and explained that, in light of the period of time since the release of the Tentative Report, Staff thought it appropriate to take another look at the Report before resuming outreach to the equine community. Mr. Petitti directed the Commission's attention to the revised sections and pointed out that the Commission might prefer to wait for feedback from prospective commenters before making changes to the Report. Ms. Tharney clarified that the project was approved for release in 2012 but that outreach had not been completed before Mr. Petitti assumed responsibility for the project.

The Commission then engaged in a lengthy discussion regarding whether, on page six of the report, in 5:15-3 a.(3), it was reasonable to include the word "equestrians" as one of the inherent risks in horse-related activity or whether that word should be replaced with the word "persons" to cover the activities of anyone near a participant or spectator of horse-related activities who could pose a risk to the rider or spectator. Examples were discussed, such as a person walking along a road shared by equestrians who suddenly takes off a brightly colored jacket, potentially startling a horse. The Commission also discussed whether the term "or other persons" should be incorporated into 5:15-3 a.(5) following the word "participant" in the first line of the subsection, which deals with the potential of participants to act negligently in a manner that may contribute to injury to participants or others. The Commission ultimately agreed to replace the word "equestrians" with the word "persons" in 5:15-3 a.(3) and add "or other persons" to 5:15-3 a.(5).

Commissioner Bell asked whether 5:15-9(a) should contain an additional subsection (7) to ensure that owners would be held accountable if they failed to take steps to prevent sudden noises or other similar occurrences. There was discussion as to whether 5:15-9 a.(5) was already broad enough to address this concern and could be interpreted by a court to encompass any such negligence. Mr. Petitti pointed out that the court in the *Hubner v. Spring Valley Equestrian Center*, 203 N.J. 184 (2010) case identified the "negligent disregard" language in subsection (5) as a source of conflict. Commissioner Bunn suggested that subsection (5) could be amended to refer back to all of the risks identified in the earlier section in order to be responsive to the *Hubner* court's concern.

Due to the passage of time since the Commissions' release of the Tentative Report Commissioner Bunn suggested holding the report over for another meeting to allow Commissioners the opportunity to review the case again and reconsider their reasoning with regard to proposed changes to the statutory language. The Chairman directed Mr. Petitti to prepare a Memorandum summarizing the *Hubner* case and the Minutes of prior meetings at which this project was discussed.

Fee Discrepancies

Ms. O'Connor's explained that this Final Report had come to her attention during a routine review and updating of previously released Commission Reports. The Report proposed three modest changes to the statutes containing references to N.J.S. 22A:2-29. Ms. O'Connor noted that one of the issues had been resolved by a revision to the statute, but that two of the changes proposed in the Report would still address a known problem. She recommended, however, that instead of including language in those two statutes saying "the fee provided by law" it might assist someone reading the statute if the reference instead said "the fee provided in N.J.S. 22A:2-29. Chairman Gagliardi asked and found that no Commissioner had any objection to the changes. A motion was made Commissioner Bunn and seconded by Commissioner Bell and the Commission voted unanimously to release the Revised Final Report.

Uniform Real Property Electronic Recording Act

John Cannel presented a Draft Final Report concerning the Uniform Real Property Recording Act to the Commission for consideration. Mr. Cannel recommended that no action be taken with regard to this Uniform Act. Commissioner Bell made a motion to release the Final Report, which was seconded by Commissioner Bunn, and unanimously approved.

Miscellaneous

The meeting was adjourned after a motion by Commissioner Long, seconded by Commissioner Bell. The next meeting of the Commission is scheduled for Wednesday, December 18, 2013 at 4:30 pm.