

## **MINUTES OF COMMISSION MEETING**

**December 16, 2010**

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., and Commissioner Andrew O. Bunn. Grace C. Bertone, Esq. of McElroy, Deutsch, Mulvaney & Carpenter, LLP, attended on behalf of Commissioner Rayman Solomon, and Professor Bernard Bell of Rutgers University School of Law attended on behalf of Commissioner John J. Farmer, Jr. Also in attendance was Sharon Rivenson Mark, Esq. on behalf of NAELA.

### **Minutes**

The minutes of the November 18, 2010 meeting were approved unanimously.

### **Door-to-Door Sales**

Richard Angelo explained that this project concerns a revision to the statutory cooling-off period for door-to-door sales contracts contained in the Door to Door Retail Installment Sales Act in order to make it consistent with federal regulations. Existing case law indicates that, in its current form, the state statute is preempted by federal regulations. The proposed modifications change the timeframe for the cooling-off period from 5 p.m. of the third day to midnight of the third day. The option of using electronic communications was also added to reflect currently available technology. Staff sought guidance on whether the reference to telegrams should continue to be included in the statute.

Commissioner Bunn suggested that the provision allowing telegrams should remain in the statute in order to avoid preemption issues and attacks on the viability of the statute. Commissioner Bunn also asked whether “a place other than a place of business”, which appears in section 17:16C-61.5, subsection a., could be interpreted to include sales over the internet. Chairman Gagliardi thought that despite the “door-to-door sales” language in the name of the statute, such an interpretation is possible and that it would be advisable to add language to the comment indicating that, in modifying the statute, the Commission is not straying from the federal model. Staff will add clarifying language to the Comment.

Commissioner Bunn noted that section 17:16C-61.6, subsection a.(1) should be revised to include the retail seller's fax number and email address along with the retail seller's name and place of business. Commissioner Bunn also suggested that the phrase "or any other law" should be added to the end of subsection c. where the statute reads “No receipt required to be delivered to the retail buyer shall contain . . . provisions by which the retail buyer waives his rights under this act,” so the consumer’s rights under other protective laws, e.g., the Consumer Frauds Act, will not be waived.

The tentative report, as amended by the Commission, was released on the motion of Commissioner Bunn, seconded by Professor Bell.

### **Uniform Adult Guardianship Act**

Marna Brown advised the Commission that the comments provided by Sharon Rivenson Mark, Esq., and her colleagues had been incorporated into the draft and that Staff believed the draft was now ready for release as a tentative report with the approval of the Commission. Notably, changes were made to the definition of “conservator” to make it consistent with New Jersey law and conservatorships are now subject to the act. In addition, the definition of “protective order” had been broadened to include “vulnerable adults”. It was also determined that only one section posed a possible *Winberry* issue. Ms. Mark stated her approval of the report and recognized the work of her colleagues. Chairman Gagliardi thanked her and her colleagues for their time and effort. The tentative report was released without further comment on the motion of Commissioner Bunn, seconded by Professor Bell.

### **Effect of Abstentions**

John Cannel brought to the Commission’s attention that a change was made in the municipal subsection. Chairman Gagliardi indicated that Staff was going to mention in comments that this statute now prevails over Robert’s Rules and Mr. Cannel said he would include that information in the relevant comment. The tentative report, as amended by the Commission and subject to minor correction to punctuation, was released on the motion of Professor Bell, seconded by Commissioner Bunn.

### **Elective Spousal Share**

Alex Fineberg made reference to two possible errors in the draft tentative report that Staff noticed after filing day. He suggested that the language disqualifying a person from receiving equitable distribution for the murder of a spouse should track the language of the state’s slayer’s statute, *N.J.S. 3B:7-1.1*. Mr. Fineberg added that reference to civil unions had also been unintentionally omitted from revisions to the elective spousal share statute. Staff will address both of these errors.

Mr. Fineberg raised one substantive issue for which Staff needed Commission guidance. Staff had considered the addition of the qualifier “valid” before “complaint for”, to clarify that a frivolous complaint does not warrant equitable distribution. Staff relied on case law, which treats only “the day a valid complaint for divorce is filed that commences a proceeding culminating in a final judgment of divorce” as the determinative date that marks the end of the period in which marital property can be acquired. *Portner v. Portner*, 93 N.J. 215, 225 (1983).

Commissioner Bunn asked what was meant by an “invalid” complaint. Mr. Fineberg explained that, in *Portner*, the basis for calling the complaint “valid” was that the proceeding culminated in a judgment of divorce. Mr. Cannel added that addition of

the word, “valid” might cause a problem, as the Commission’s “bright-line” rule—the filing of a complaint—would be abrogated by the suggestion that the plaintiff must prove elements that are normally borne out over the course of an entire trial.

Commissioner Bunn expressed concern that Staff’s revisions do not clearly express the results of equitable distribution when the decedent spouse is intestate. A portion of the decedent’s equitable distribution share must not then pass to the surviving spouse via intestacy. Mr. Cannel pointed out that, with the filing of the complaint, the parties would no longer be married, and the spouse’s claim under intestacy would probably not apply. However, Staff will verify.

Chairman Gagliardi, Commissioner Bunn, Mr. Cannel and Mr. Fineberg discussed whether the qualifier “valid”, “good faith”, or an alternative should be included. Commissioner Bunn noted that requiring a complaint to be in “good faith” would not address procedural deficiencies, like a lack of jurisdiction. Mr. Cannel stated that Staff will make changes and a revised draft will be provided for the January meeting.

### **Title 39 – *State v. Moran***

Laura Tharney explained that Commissioner Bell expressed concerns about the draft language after the last meeting, and that, as a result, three language alternatives were proposed for Commission consideration. The first option requires the Chief Administrator or a judge to consider the penalties imposed in similar cases. The second option provides that an adjudicator may disregard penalties inconsistent with governing caselaw as long as the basis for deviation is explained. The third option does not require that the adjudicator consider the penalties imposed in other cases, but requires that the suspensions authorized for specific offenses may be considered as a basis for comparison and proportionality.

Commissioner Bunn expressed concerns with proportionality and indicated that he favored the second alternative. Ms. Tharney asked if the Commission had concerns about judicial discretion and Commissioner Bell said that he would limit the requirement of consistency to the administrative context. He noted that *Moran* did not address the issue of administrative consistency because the case arose in municipal court and the Court’s determination relied on its supervisory power over lower State courts. Commissioner Bell also pointed out that while the Court did not mandate proportionality, it did express concerns about the uniformity of sentences and the need to avoid disparate sentencing. Commissioner Bunn suggested that structured sentencing, like sentencing guidelines, can be a mistake.

Commissioner Bell said that the language in the second alternative is an attempt to try to have the MVC consider and justify penalties based on those applied in similar cases and Commissioner Bunn said that it does so while permitting flexibility. Commissioner Bell said that he favored the second alternative, but noted Ms. Tharney’s concern that the standard should be the same for administrative and court proceedings. Commissioner Bunn asked whether attempting to do so created a *Winberry* problem. Ms.

Tharney pointed out that there was also a practical difficulty posed by the fact that the results of cases decided in municipal courts throughout the state are not readily and consistently available to other courts. Commissioner Bunn proposed that an attempt should be made to treat the two types of proceedings uniformly and the Commission agreed that the language in the second alternative should be used in its present form.

### **New Jersey Debt Management Services Act**

Ms. Tharney explained the recent developments regarding this project to the Commission, including her appearance and testimony before the Assembly committee, and the fact that bill A1949 was ultimately held with the goal of redrafting to address commenter's concerns and returning the bill to the committee for consideration and release. She explained that she had provided the Staff's most recent draft to be used in the revising of the bill, even though no report had been formally released by the Commission, since there had been considerable comment on the Commission's drafts. Mr. Cannel indicated that the bill contemplated the participation of for-profit entities.

Commissioner Bunn asked if Staff was recommending that the Commission stay its hand and take no action on the project at this time and Ms. Tharney said that was her recommendation; the Commission concurred and no action was taken on this project.

### **Miscellaneous**

Ms. Brown stated that the Construction Lien Law bill had passed the full Senate but that there were last minute issues raised prompting a request for a conditional veto. Staff had provided clarification of certain issues to Governor's counsel at their request.

Mr. Cannel told the Commission about the impending relocation of the office to a new building. He also advised that Assemblyman Barnes had replaced Assemblywoman Greenstein on the Commission.

The next meeting of the Commission is scheduled for January 20, 2011.