

## MINUTES OF COMMISSION MEETING

January 25, 2024

Present at the meeting of the New Jersey Law Revision Commission, held remotely, were: Vice-Chairman Andrew O. Bunn; Commissioner Virginia Long; Commissioner Louis N. Rainone; Professor Edward Hartnett, of the Seton Hall University School of Law, attending on behalf of Interim Dean John Kip Cornwell; Professor Bernard W. Bell, of the of Rutgers University Law School, and Grace C. Bertone, of Bertone Piccini, LLP, attending on behalf of Dean Johanna Bond.

### Minutes

On the motion of Commissioner Bertone, seconded by Commissioner Long, the Minutes of the December 21, 2023, meeting, as amended, were unanimously approved by the Commission. The amendments added language erroneously omitted from the discussion of three projects confirming that the votes for action on those projects were unanimously approved, and also clarified potentially confusing language in the third paragraph on page 9 of the draft Minutes.

### Retroactive Modification of Child Support Obligations

Whitney G. Schlimbach discussed with the Commission a Draft Tentative Report concerning the Retroactive Modification of Child Support Obligations. She began by mentioning that preliminary work in this area was done by Nicole Sodano, during her time as a pro bono volunteer with the NJLRC, and that additional research was conducted by Shelby E. Ward, Esq., also as a pro bono volunteer with the Commission.

Ms. Schlimbach explained that N.J.S. 2A:17-56.23a does not permit a court to modify child support obligations prior to the period during which the application to modify was pending, except in very limited circumstances. Courts have, however, recognized the death or the emancipation of a child as exceptions to the prohibition against retroactive modification back to the date of the changed circumstance.

*K.A. v. F.A.* addressed whether adult adoption similarly qualified as an exception to the bar on retroactive modification. *K.A.* addressed a defendant's child support obligation to his three children, which was unallocated as to the two younger children. The two oldest children were over eighteen and were adopted by their stepfather. Their father filed an application to terminate his obligation to the two older adopted children and modify his obligation to his youngest child, back to the date of the adoption, rather than to the date on which his application was filed.

The *K.A.* Court compared adult adoption to emancipation, a previously established exception, and considered the cases of *Mahoney v. Pennell* and *Bowens v. Bowens*. In both decisions, the Appellate Division held that, because emancipation is the conclusion of the dependent relationship between a parent and child, child support obligations are similarly

terminated as of the date of emancipation. In *Mahoney*, the Appellate Division analyzed the purpose of the child support statute and found that it was enacted to ensure that support obligations that become due are paid. In the case of emancipation, a child support obligation is immediately extinguished and, if there is no longer a duty of support the child, no child support can become due.

The *K.A.* Court compared adult adoption to emancipation and noted that the obligations, duties, and rights of parent and child are terminated upon adoption just as they are in the case of emancipation. Additionally, adult adoption does not require notice to the natural parent and is treated by the statutes and courts as akin to a contract between consenting adults. The Court therefore found that the two events are fundamentally similar as they relate to child support obligations. The *K.A.* Court held that N.J.S. 2A:17-56.23a does not bar retroactive modification of child support where the substantial permanent change in circumstances is an adult adoption.

Proposed modifications to the statute that incorporate the exceptions for emancipation and adult adoption are set forth in the Appendix. The proposed language is added to the end of the second paragraph and clarifies that when the change of circumstances prompting the application for modification is a child's emancipation or adult adoption, the non-modification provision does not prohibit modification back to the date of emancipation or adult adoption.

The proposed language parallels the language used in the first paragraph, which indicates that the statute is applicable to payments or installments of an order for child support, or those portions of an order that are allocated for child support. The proposed language is also modeled on the language used in the last sentence of the statute, which refers to the prohibition on retroactive modification as the non-modification provision.

Ms. Schlimbach added that there are no pending bills that address N.J.S. 2A:17-56.23a and requested that the report be released as a Tentative Report.

Chairman Gagliardi indicated, in advance of the meeting, that he supports the release of the Tentative Report. Commissioner Bell said that the Report was very well done, as was the language proposed in the Appendix. He expressed a concern, however, that there might be other situations that merit similar treatment, and said that the Commission does not want to foreclose further development of this area by the courts. Even if the proposed language cannot be changed in recognition of that concern, he said that the Report should reflect that it is prepared in response to, and to codify, the determination of the Court in *K.A. v. F. A.*, but is not intended to inhibit or discourage the courts from further developing this area of the law.

Commissioner Long said that she shares Commissioner Bell's concern about other circumstances that might warrant similar treatment. She added that she thought that the draft language in the Appendix could be modified to account for this, suggesting that in the first sentence of proposed language, after the statutory citation, the following language could be inserted: "or

any other situation in which the obligation of support is extinguished.” Commissioner Bell indicated that he supports that language.

Commissioner Hartnett agreed with the suggested language and added that the statutory reference in that sentence is not necessary and might, in fact, be problematic in circumstances in which the adult adoption took place pursuant to the law of another state. Ms. Schlimbach said that the statutory reference had been included because adult adoption is such a specific event, but that Staff had not considered an adoption that took place in another state. She indicated that she wanted to check to see if “extinguish” as suggested by Commissioner Long is used in the case law, and it was confirmed that the term was used in the cases. Ms. Schlimbach then confirmed that Commissioner Long’s suggested language would be added to the first sentence in the Appendix and, as suggested by Commissioner Bell, language would be added to the report reflecting that proposed modifications reflect only what the Court has addressed so far in *K.A. v. F. A.*, but are not intended to inhibit or discourage future judicial development in this area of the law.

On the motion of Commissioner Long, seconded by Commissioner Bell, the Commission unanimously released the Tentative Report as amended.

### **Expungement Statute – Meaning of “Closely Related Circumstances”**

Zahirah Sabir, a fourth-year law student at Rutgers School of Law – Camden, and a pro bono volunteer with the Commission, explained that subject to certain enumerated exceptions, New Jersey’s expungement statute (in N.J.S. 2C:52-2) allows a person to present an expungement application to the Superior Court for more than one indictable offense. Crimes, or a combination of crimes, and offenses that were interdependent or “closely related in circumstances” and were committed as part of a sequence of events that took place within a “comparatively short period of time” may be eligible for expungement. This is colloquially referred to as a “crime spree.”

In *the Matter of C.P.M.*, the Appellate Division analyzed the term “closely related in circumstances” to determine whether offenses committed during a three-month period in which the defendant was under the influence of drugs were sufficiently related to grant his petition for an expungement. The Appellate Division concluded, based on the plain language of the statute, that the convictions “were not interdependent or closely related in circumstances” because they did not share common elements, nor were they similar in nature. The Court did not address whether the offenses were committed within a “comparatively short period of time.”

Staff examined the common law and statutes of all fifty states to ascertain whether they might provide any assistance in defining the phrase “closely related in circumstances.” The review of the law governing expungements was divided into four categories: (1) a review of New Jersey’s statutory language; (2) an examination of the Legislature’s work in this area; (3) a fifty-state survey of other state’s expungement law, both statutory and common law; and (4) a review and synthesizing of the law in this area. With respect to the second step, Ms. Sabir noted that, during

New Jersey's 2022-2023 legislative session, seventeen bills regarding various aspects of expungement were introduced.

Ms. Sabir summarized the findings of the fifty-state survey. She explained that thirty-nine states and D.C. permit the expungement of certain misdemeanor and felony records. Several of these states have expanded eligibility requirements to include individuals who have been convicted of one or more criminal offenses. Although the statutory language describing qualifying offenses varies among the twenty states in which it exists, Ms. Sabir noted that there is a common denominator. She explained that the transgressions must arise from the same incident, although the meaning of that concept varies between jurisdictions. She provided the example of Michigan, which is the only state that requires the crimes to occur within twenty-four hours and arise from the same transaction. Ms. Sabir concluded that, among the remaining jurisdictions, some have adopted language similar to the existing New Jersey statute, while others incorporate language more stringent than the New Jersey statute when considering the expungement of multiple offenses.

Ms. Sabir requested guidance from the Commission regarding whether to continue to attempt to clarify the meaning of "interdependent," "closely related circumstances," and "comparatively short period of time" as set forth in subsection a. of New Jersey's expungement statute, N.J.S. 2C:52-2, or leave the development and definition of such terms to the common law.

Chairman Gagliardi, in advance of the meeting, commended Staff on the great scholarship involved in this project, and indicated that while this project may not be one in which the Commission ultimately makes a specific recommendation to the Legislature, he did support continuing work in this area as a result of the lack of clarity and certainty.

Commissioner Bell indicated that he echoed the Chair's comments and added that it was important for the Legislature to have access to Staff's work in this area. He pointed out that there seems to be a balance, in the various states, between specificity and generality in the statutory language, and that New Jersey's statute falls in the middle of the spectrum. He suggested that this is useful because there is guidance, but also a good deal of flexibility built into the statute. Since the situations addressed by the statute are very fact sensitive, Commissioner Bell found it hard to envision a rule that would result in the "right" answer in such a wide variety of circumstances. He added that he would prefer to focus on the issue of intoxication in this context, because the determination of the trial court resulted in an unworkable paradigm. Ultimately, he suggested that what New Jersey's statutory language appears intended to capture with the "crime spree" concept is two or more crimes committed during a single bout of intoxication, without a period of sobriety between them, and no more than a few days separating the crimes.

Commissioner Hartnett said that he supports the continuation of the work to see what it produces but noted his instinct is that, ultimately, the Commission will leave this issue up to case law development. He explained that the case law was fairly restrictive in this area, the Legislature responded by broadening the statutory language, and courts are now following that lead. Rather

than try to pin down the language more precisely right now, he would leave it to the courts to develop the case law. Commissioner Long agreed that the Commission may ultimately refrain from making a specific recommendation, but she supported further work in this area. Commissioner Bertone agreed with Commissioner Long. Vice-Chairman Bunn provided that the scholarship should be released even if the Commission does not ultimately make a recommendation.

The Commission unanimously agreed that work in this area should continue.

### **Operating Uninsured Automobiles**

Carol Disla-Roa discussed with the Commission a Memorandum presenting a potential project to address the statutory provisions pertaining to operating uninsured motor vehicles. She began by explaining that initial work in this area had been done by Shelby Ward, Esq., as a recent law school graduate and pro bono volunteer with the Commission.

Ms. Disla-Roa explained that N.J.S. 39:6A-4.5(a) provides that if a person is operating an uninsured automobile and an accident occurs, an action for recovery of economic or noneconomic loss will be barred. The term “operating” is not defined in Title 39. N.J.S. 39:1-1 does, however, define “operator” as “a person who is in actual physical control of a vehicle.”

New Jersey courts have broadly construed the phrase “operates a motor vehicle” in New Jersey’s driving while intoxicated law (in N.J.S. 39:4-50(a)), finding it applicable to an individual who is asleep with the engine running in a parked car, and in a variety of other circumstances.

In *Memudu v. Gonzalez*, the Superior Court, Appellate Division, considered the novel issue of whether N.J.S. 39:6A-4.5(a) would bar the plaintiff’s Wrongful Death and Survivor Act claims because the decedent did not have automobile insurance at the time of the accident. The *Memudu* case was brought on behalf of Mr. Memudu’s estate under the Wrongful Death Act and the Survivor Act. It arose from two consecutive accidents, where the first accident disabled Mr. Memudu’s vehicle, and the second accident occurred when Mr. Memudu was in the disabled vehicle only searching for his cellphone.

The *Memudu* Court examined prior case law and the sequence of events leading up to the decedent’s death, and held as a matter of first impression that the Plaintiff’s claims were not barred because, at the time of the accident, the decedent was not “operating” the automobile for purposes of the statute.

In its analysis, the *Memudu* Court examined the New Jersey Supreme Court case of *Perrelli v. Pastorelle*, in which the plaintiff was driving her uninsured vehicle with her friend as a passenger. When the friend took over driving, the vehicle was involved in an accident. The Supreme Court held that the *Perrelli* Plaintiff was “operating” her vehicle at the time of the accident and thus was barred from recovering any economic or noneconomic loss under N.J.S. 39:6A-4.5(a). Thus, the bar to recovery may apply to an owner whether injured as a driver or a passenger.

Distinguishing *Perrelli*, the *Memudu* Court explained that although the decedent was operating the vehicle at the time of the first accident, neither he nor anyone else was operating the disabled vehicle at the time of the second accident which led to the decedent's death. The Court emphasized that the plain language of the statute refers to injuries that occur "while operating an uninsured automobile."

Ms. Disla-Roa further explained that in the DWI context, variations of the term "operate" have been discussed in cases decided under Title 39 addressing whether an individual was operating a vehicle while under the influence of substances as prohibited by the statute. In the recently decided case of *State v. Thompson*, the Court held that "an intoxicated and sleeping defendant behind the wheel of a motor vehicle with the engine running is operating the vehicle within the meaning of N.J.S. 39:4-50(a), and even if the vehicle was not observed in motion it is the possibility of motion that is relevant."

The *Thompson* Court explained that New Jersey's "Supreme Court has recognized that 'operation' may be found from evidence that would reveal 'a defendant's intent to operate a motor vehicle.'" Both the intent to operate and evidence of recent operation in an intoxicated state fall under the definition of "operating" for purposes of N.J.S. 39:4-50(a). The *Thompson* Court also explained that the statute must be construed flexibly to deter drunk driving for the protection of the public.

There is one bill pending that seeks to repeal N.J.S. 39:6A-4.5(a). It was introduced in this legislative session and in the past three sessions. In each of the sessions, the bill was introduced in the Senate and referred to the Senate Commerce Committee with no further progress. There are bills pending to amend N.J.S. 39:4-50, but none seek to modify the language of subsection (a).

Chairman Gagliardi indicated in advance that he approved of continued work in this area. Commissioner Long said that she had no objection to going forward with a project, but she did not believe that, in the end, the Commission will be able to make a recommendation that assists in the clarification of the law in this area. Commissioner Bell added that the case that brought this issue to the attention of the Commission involved a very unusual set of circumstances and that it is unlikely to recur. He said that because determinations in this area are so fact-specific, the Commission is unlikely to come up with language that would be of assistance, and he is inclined to pass on a project in this area. Commissioner Rainone and Commissioner Bertone both agreed with Commissioner Bell. Commissioner Hartnett said that he had no objection to going forward.

Since the Commission was divided on the question of pursuing a project in the area, Laura Tharney suggested that Staff could undertake a review of the cases in the area and engage in limited outreach to the relevant committee of the New Jersey State Bar Association to ask if knowledgeable practitioners thought that modification of the statute could be of assistance. Commissioner Rainone suggested that Staff look at the considerable DWI case law concerning "operation" of a vehicle and the wide variety of circumstances under which an individual is found to be "operating" one, and should engage in a careful review of the bills that were introduced in

the prior session, and that are introduced in the new legislative session, so that the Commission can be made aware of the scope of each and what each is intended to accomplish.

The Commission unanimously directed Staff to proceed with limited additional research and outreach as described by Ms. Tharney and Commissioner Rainone, and to advise the Commission of the results of this work at an upcoming meeting.

### **Juvenile Sex Offender Lifetime Registration**

Ms. Schlimbach discussed with the Commission a potential project concerning lifetime registration for juvenile sex offenders, explaining that this issue was brought to the attention of the Commission by Fletcher Duddy, Deputy Public Defender, Special Litigation Unit, while he was providing assistance on another project.

Ms. Schlimbach indicated that sex offenders in New Jersey must comply with the registration and notification requirements set forth in Megan's Law. In N.J.S. 2C:7-2(g), certain qualifying offenders, including certain juveniles adjudicated delinquent, are subject to mandatory lifetime registration. She added that death sentences, lifetime, and long-term punishments for juveniles have been found unconstitutional in various contexts given the recognized sociological and psychological differences between adults and juveniles.

In *State in Interest of C.K.*, the New Jersey Supreme Court held that lifetime registration obligations are unconstitutional as applied to juvenile offenders adjudicated delinquent of qualifying sex offenses. *C.K.* involved an individual charged with sex offenses that occurred when he was a juvenile, although he was over eighteen when he was eventually charged. *C.K.* pled guilty to aggravated sexual assault in juvenile court. Over the next fifteen years, he filed two petitions for post-conviction relief, both challenging the constitutionality of his lifetime registration and notification obligations. The PCR court found that any loosening of Megan's Law requirements must come from either the Supreme Court or the Legislature and, on appeal, the Appellate Division agreed.

The New Jersey Supreme Court limited its review to the issue of the constitutionality of imposing Megan's Law lifetime registration and notification requirements on juveniles adjudicated delinquent of committing certain sex offenses. The Court reviewed the legislative history of subsection (g), which was enacted to conform with the corresponding federal sex offender registration scheme (Jacob Wetterling Act) so that New Jersey would remain eligible for federal funding. The Jacob Wetterling Act was repealed in 2006 and replaced with the Adam Walsh Act or SORNA. SORNA does not contain a permanent lifetime registration provision for juveniles and although it requires substantial compliance with its provisions to receive federal funding, it also provides states with discretion regarding juvenile registration specifically. In addition, it essentially contains an "out" if a provision has been found unconstitutional by a jurisdiction's highest court.

Ms. Schlimbach explained that the Court then analyzed the constitutionality of the requirement of lifetime registration of juvenile sex offenders. To comply with substantive due process, a provision must reasonably relate to a legitimate legislative purpose and not impose arbitrary or discriminatory burdens on a class of individuals. The Court explained that subsection (g) is premised on an “irrebuttable presumption” that juvenile offenders who committed certain sex offenses will forever pose a danger to society. The Court found that this not only disregards individual assessments of potential recidivism, but also conflicts with the well-established scientific and sociological principle that juvenile sex offenders have lower recidivism rates than adults, particularly if they have not reoffended for a long period of time. The Court added that an irrebuttable presumption is not necessary given that subsection (f) in the statute provides that registered offenders are only eligible for termination after fifteen offense-free years.

Therefore, the *C.K.* Court held that, once the remedial purposes of Megan’s Law are satisfied, the registration and notification obligations are inappropriately punitive as applied to juveniles and violate the New Jersey Constitution’s due process clause.

Ms. Schlimbach added that there are no pending bills that address the constitutionality of N.J.S. 2C:7-2(g) and requested authorization of further research and outreach on this issue.

Chairman Gagliardi indicated in advance of the meeting that he supported pursuing a project in this area. Vice-Chairman Bunn agreed. Commissioner Hartnett indicated that he wanted to flag an issue at the outset, explaining that Staff should be mindful of whether the courts are focusing on juvenile status when the offense was committed, or when the matter was adjudicated. He said that he was concerned that when the defendant commits an act as a juvenile but is tried as an adult, the rationale of the United States Supreme Court cases in this area should apply, but he is not sure if the *C.K.* opinion does that. Commissioner Bell agreed and added that he is not sure that the United States Supreme Court would interpret the United States Constitution in the same way that the New Jersey Supreme Court would interpret the New Jersey State Constitution.

The Commission unanimously authorized work in this area.

### **Biometric Data Collection**

Laura Tharney noted that since Samuel Silver was testifying at a hearing of the Senate Transportation Committee on a bill based on the Commission’s work in the area of personal convenances, she would be presenting on this project based on the work done by Mr. Silver.

She explained that biometric information consists of data generated through the analysis of an individual’s biological characteristics. These may include retina and iris scans, fingerprints, voiceprints, a record of a person’s hand or face geometry, or other unique biological patterns or characteristics that identify a specific individual. The rate at which this data is collected and the



possibility of it being stolen and used for nefarious purposes has led many states to consider its regulation.

Ms. Tharney indicated that attempts by the states to legislate in this area have met with difficulties, noting that the methods of data collection, storage, and dissemination are changing at a rapid pace. There are a limited number of states that have enacted biometric privacy laws, and legal questions involving standing, preemption, and claim accrual are in the process of being decided by the federal courts.

At this time, New Jersey has no comprehensive data privacy laws. Illinois is the first state to enact a Biometric Information Privacy Act (BIPA), which is similar to the cutting-edge bills that have been introduced in New Jersey for many years. The goal of BIPA was to regulate “the collection, use, safeguarding, handling, storage, retention, and destruction of biometric identifiers and information.”

After BIPA was enacted, a wave of litigation ensued. From 2008-2018, there were 163 BIPA class actions. In 2019, there were more than 300 filed. Ms. Tharney added that she understood that Mr. Silver had recently heard informally from an attorney who was involved with seven class actions in a number of states on the employer side of this issue.

A 50-state survey revealed that only three states (Illinois, Texas, and Washington) have biometric privacy laws. In 2022, seven states introduced biometric privacy laws. In 2023, five new “rights-based” data privacy laws became enforceable in the US (in CA, VA, CO, CT, UT). These laws differ from conventional data protection regulations because they grant individuals a specific set of rights. These rights encompass the ability to request a copy of their personal data held by businesses and the right to have it corrected or deleted. According to the National Conference of State Legislatures, at least 25 states and Puerto Rico introduced or considered almost 140 consumer privacy bills in 2023. In 2023, [c]omprehensive. . . consumer privacy legislation was a common type of bill being considered at least 25 bills in at least 25 states.”

Given the large number of bills in numerous state legislatures, it is not clear which approach provides the broadest possible consumer protection. New Jersey is among those state legislatures actively working in this area.

Neither the ALI nor the ULC has yet provided guidance in this area.

Ms. Tharney explained that, from 2002 to 2022 (with the exception of 2016-2017), a bill involving biometric data has been introduced in almost every year. In 2023, there were four bills pending in the New Jersey Legislature on the subject of biometric privacy. In the current legislative session, which is less than a month old, two bills have already been introduced on the subject of biometric privacy. At the very end of the prior legislative session, a Consumer Data Privacy law was enacted in New Jersey. This law did not focus on biometric data collection, but it does address – at least in a limited way – genetic or biometric data.

Ms. Tharney said that given the pace at which the legal landscape in this area is changing, the Legislature's awareness of the subject matter, and the possible policy and fiscal ramifications of working in this field, Staff recommends the conclusion of work on this subject.

Chairman Gagliardi indicated in advance of the meeting that he supports the conclusion of work in this area. Commissioner Bell noted that it was a question by him that initial brought this issue to the Commission's attention, and that the initial question was much more limited in scope – focusing on the intersection between biometric data privacy and workers compensation. He added, however, that it is not worth considering that more limited issue until the New Jersey Legislature acts in this area. Commissioner Bell also said that the Update Memorandum should be available to the members of the Legislature. Commissioner Rainone agreed.

Ms. Tharney said that if the Commission approves, Staff could reach out to the appropriate section of the Office of Legislative Services and send the Update Memorandum to them, explaining that the Commission was concluding its work in this area, but if any information that the Commission collected during the course of its preliminary research might be of interest, Staff will happily share it.

The Commission unanimously agreed that work in this area should be concluded, and that Staff should proceed in the manner described by Ms. Tharney.

### **Annual Report**

Laura Tharney explained that Staff has made corrections based on the ongoing internal review of the draft 2023 Annual Report, that it now contains the Statement of the Chairman, and that corrections were made in response to errors noted by Commissioner Hartnett. She said that Staff would be making at least one more proofreading pass through the document and that if any members of the Commission noted any additional changes that should be made – including updates to Commissioner bios – she would be happy to make them.

She said that, if it meets with the Commission's approval, she was asking for the Commission to release the Annual Report so that Staff can distribute it to the Legislature and others at the beginning of the coming week.

On the motion of Commissioner Bertone, seconded by Commissioner Hartnett, the Commission unanimously agreed to release the updated 2023 Annual Report.

### **Miscellaneous**

Laura Tharney briefly mentioned that A2351/S2991, based initially and largely on a Final Report of the Commission that had been released in 2011, passed the Legislature and was signed by the Governor at the end of the last legislative session.

She added that, as requested by the Commission at the December 2023 meeting, she was providing an update regarding the Commission’s project pertaining to Expungement – Inclusion of Local Ordinances in the “Clean Slate” Statute – N.J.S. 2C:52-5.3. Ms. Tharney explained that the bills, which included a reference to municipal ordinance violations, moved through the Legislature with considerable speed at the end of the session and were, in fact, enacted, so it did not appear that further work in this area by the Commission was required. On motion of Commissioner Bell, seconded by Commissioner Rainone, the Commission unanimously voted to conclude work in this area.

Ms. Tharney also mentioned that she would be sending the Commission’s usual “welcome to the Commission” email to Assemblywoman Park, the new Chair of the Assembly Judiciary Committee, who is now an ex officio member of the Commission.

Finally, Ms. Tharney indicated that the Commission began the process for its summer law student hiring, and that she was pleased to say that the Commission had already received offers from students who wanted to do some pro bono work with the Commission.

On motion of Commissioner Bertone, seconded by Commissioner Bell, the meeting was unanimously adjourned by the Commission.

The next meeting of the Commission is scheduled for February 15, 2024, at 10:00 a.m.