

MINUTES OF COMMISSION MEETING

February 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 Albert Burstein, and Commissioner Andrew Bunn. Professor Ahmed I. Bulbulia of Seton Hall Law School attended on behalf of Commissioner Patrick Hobbs.

Also in attendance were: Shireen B. Meistrich, L.C.S.W., of the New Jersey Council of Collaborative Practice Groups; Linda L. Piff, Esq., of the New Jersey Council of Collaborative Practice Groups; Patricia E. Carney, Esq., of the New Jersey Council of Collaborative Practice Groups; Anna Maria Pittella, Esq., of the New Jersey Council of Collaborative Practice Groups; Jeffrey D. Urbach, CPA, of the New Jersey Council of Collaborative Practice Groups; Caryl W. Leightman, Esq., of the New Jersey Council of Collaborative Practice Groups; M. Claire French, Monmouth County Clerk; Rita Marie Fulginiti, Cape May County Clerk; Kristin M. Corrado, Esq., Passaic County Clerk; Joanne Rajoppi, Union County Clerk and President of IACREOT; Pamela E. Gardner, Hudson County Register; and Lorraine Senerchia, Hudson County Deputy Register.

Minutes

The Minutes of the January meeting were unanimously approved on motion of Commissioner Bunn, seconded by Commissioner Bulbulia.

New Jersey Family Collaborative Law Act

Marna Brown said that the revised draft submitted to the Commission reflected all comments received since the November 2012 version of the report, including comments from several guests attending the meeting. She explained that despite her efforts and the efforts of others, comments from the Family Law Section of the New Jersey Bar regarding the report were not obtained. Letters regarding the AOC's position had been distributed to the Commission.

Ms. Brown explained that the introduction to the report had been revised considerably. The introduction now states that according to the International Academy of Collaborative Professionals, collaborative practice for dispute resolution is now occurring in 39 states. The introduction also clarifies, referring to Opinion 699, which was issued by the New Jersey Supreme Court Advisory Committee on Professional ethics in 2005, that collaborative law practice is permitted in New Jersey as a "limited scope representation" under RPC 1.2 (c) so long as the limitation is reasonable under the circumstances and the client gives informed consent. Reference is also made to the unbundling of legal services, also permitted by RPC 1.2 (c).

Ms. Brown said that the focus of the report is on the evidentiary privilege which, if it is to be incorporated into New Jersey law, must be done by statute. Efforts were made to eliminate from the report uniform law provisions pertaining to the rulemaking authority of the courts and the regulation of attorneys. Despite the changes, the AOC expressed concerns regarding the project, and Ms. Brown is trying to meet with AOC representatives to discuss their concerns in greater detail.

Ms. Brown explained how the report tries to address issues raised in the letters provided by the AOC. The court programs for complimentary dispute resolution, though excellent, exist within the court system, while the act proposed in the report provides for a dispute resolution procedure outside of that system. The AOC notes that there is no formal discovery procedure under the proposed act, but no formal discovery procedure exists for mediations outside the court system either. The AOC domestic violence concerns have been addressed by two changes to the report, in a manner similar to the approach followed in the District of Columbia where the same concerns were raised. First, a change is made to the definition of “collaborative law process”, providing that a collaborative law process may not proceed if either party is subject to a restraining order; and second, language now provides that there is no privilege for a collaborative law communication made in a report of suspected domestic violence to an appropriate agency under New Jersey law.

The AOC also expressed concerned about the implications of attorney disqualification, including potential misuse and professional conduct issues that might arise. Ms. Brown said that Opinion 699 recognizes that an attorney’s limited representation, as characterized by those practicing collaborative law, is a permissible limitation under the Rules of Professional Conduct (as already described). The report now states that the proposed act, the collaborative law process and the collaborative law participation agreement all must comply with the Rules of Professional Conduct.

The AOC concerns with regard to piecemeal litigation issues are addressed by the definition of “collaborative law participation agreement” and other limits placed upon the collaborative law process. The report also makes changes specifically requested in an earlier telephone conference with AOC representatives. Staff continues to welcome further comments from the AOC. Ms. Brown was advised by commenters in Maryland that a similar approach was being taken there, i.e., to recommend that the evidentiary privilege section of the uniform law be enacted by statute, while all other provisions be addressed by the promulgation of court rules.

Ms. Brown concluded that the trend is in favor of collaborative law practice, and that since the report was first drafted, several more states had adopted the uniform law and she had been advised that it was about to be introduced in Pennsylvania.

Linda Piff explained that participants in the collaborative process do not file a complaint for divorce until the conclusion of that process and the consideration of all matters involved in it. The concern of the AOC that the matter not be presented to the court until the case is fully resolved really is not a concern.

Jeffrey Urbach, who said he was the treasurer of his local collaborative group and in practice for over 20 years, expressed his concern that although non-attorney professionals participating in the collaborative process may have a “contractual privilege”, there is no built in protection in the law for them. This becomes an issue with regard to turning over files if a subpoena is issued, for example. With regard to financial discovery, he said that the AOC’s concerns are misplaced and litigants are well-protected in the process, as discovery is not treated any differently in a collaborative matter than it is in a litigated matter. He said he has his own professional obligations and standards and requests documentation. He explained that if any party withholds information, and he cannot perform his job without that information, he would resign.

Shireen Meistrich said that the collaborative process takes place outside of the court system to begin with and in the court system only about 2% of families go to trial. She said that the collaborative law process seeks to be as protective and helpful as possible so that families are not damaged. This is accomplished with the help of coaches and child specialists and financial advisors working with the lawyer as a team. She said that section 8 of the proposed act refers to informal discovery at the request of the parties. There is a contractual privilege that provides protection with regard to non-lawyer participants, such as financial professionals who are not covered by the attorney/client privilege, but no legal privilege protects the non-attorney professionals. Mr. Urbach concurred that there is no privilege for a CPA.

Patricia Carney explained that collaborative law is not right for every case, but much like mediation, the goal is to offer the consumer options and to protect the consumer. With collaboration there is counsel and professionals by the consumer’s side during the entire process.

Ms. Brown asked whether the proposed Legislative finding should be included in the report. The finding was added to attempt to clarify that the intent of the proposed act is to create an evidentiary privilege. The Commission agreed to leave the finding in the report for comment. The report was released as a Tentative Report on motion of Commissioner Burstein, seconded by Commissioner Bulbulia.

Tuition Aid Grants

Laura Tharney explained that this potential project arose as a result of Commission Staff’s monitoring of case law and concerned an ambiguity identified by the Court regarding what it means to be a “resident” of New Jersey in the context of a

dependent student. The plaintiff in the underlying case applied for financial aid and was informed that she was ineligible because her parents were not legal residents of New Jersey. The Higher Education Student Assistance Authority argued that, according to *N.J.A.C. 9A:9-2.2(a)(1)*, the plaintiff was required to be domiciled in New Jersey in order to satisfy the statutory residence requirement and, because residence was synonymous with domicile, her domicile was deemed to be that of her mother since she was considered a dependent student.

The Appellate Division reviewed the legislative history of the Tuition Aid Grant program, and the residency requirements outlined in the relevant statutory section, and determined that irrebuttably assigning the domicile of the parents to a dependent student alters the plain meaning of the statute and is contrary to the legislative intent.

Mr. Enwereuzor's draft proposes adding a single sentence to the statute to state that for the purposes of the section, the residence of a dependent student is presumed to be that of the primary guardian. The Commission expressed concerns regarding the source of the language "primary guardian" contained in the proposal, and asked whether a situation could arise in which a student would have two primary guardians. In light of the concerns raised, additional information will be provided for Commission consideration at the March Commission meeting.

Department of Corrections Identification Card and License to Drive

Ms. Tharney said that, at the last Commission meeting, the issue presented that Department of Corrections identification cards, issued by the State, are not accepted by the State as official identification for certain purposes, including as one of the six points of identification for obtaining a New Jersey driver's license.

Preliminary research revealed that the information regarding the six points of identification for a driver's license was contained in the regulations (*N.J.A.C. 13:21-8.2(a)*) rather than in the statutes. The list of items in the regulations identifying acceptable primary and secondary documents included references to items arguably similar to the Corrections' identification cards, like a firearms purchaser identification card and a public assistance card. There is no reference to the DOC identification cards anywhere in Title 39 of the statutes or in the licensing provisions contained in Title 13 of the Administrative Code.

There is language in Title 30, Chapter 1B of the Statutes (which pertains to the Department of Corrections) which makes reference to the DOC identification card and the non-driver identification card issued by the Motor Vehicle Commission. *N.J.S. 30:1B-6.2*, subsection f., provides that the DOC shall provide to each inmate, at least ten days prior to release from a State correctional facility, a non-driver identification card

issued by the Motor Vehicle Commission for which the MVC shall accept a former inmate's DOC identification card to have a two-point value.

Ms. Tharney proposed adding a single sentence to the existing statute stating that the DOC identification cards shall also have a two-point value if a former inmate applies for a license to drive in the State of New Jersey.

Chairman Gagliardi said that the individual who brought this project to the attention of the Commission recommended that the proposed language also include a reference to identification cards issued by county jails. Commissioner Bunn questioned the inclusion of language that directs activity of the Motor Vehicle Commission in Title 30, rather than Title 39. The Commission asked that Ms. Tharney obtain feedback from the Department of Corrections and from the Motor Vehicle Commission regarding the proposed change to the statute and in order to determine whether it was necessary or appropriate to include language in Title 39 as well.

Recording Mortgage Servicers

John Cannel explained that the proposed Act provides for the recordation of mortgage servicers to update the mortgage recording process to bring it in line with present-day practices. Mortgages are routinely assigned to a series of mortgage holders. The entity that manages the mortgage is the servicer, but the identity of the servicer is not recorded. The draft offers a new approach to mortgage recording which avoids problems presented by commenters at the November 2012 meeting. It provides a voluntary statewide system to identify servicers.

Kristin Corrado, the Passaic County Clerk, introduced all of the county clerks present. She stated that the State Records Committee has worked with the county clerks and registers to record documents at the county level instead of the state level and that all the clerks were working together for the good of the public. It was pointed out that electronic recording has been approved and that all counties are required to bring their systems into compliance in order to provide for it by May of 2017.

Rita Marie Fulginiti, Cape May County Clerk, indicated that she agrees with the idea of recording mortgage servicers but disagrees with recording them at the state level. She explains that this is her job as a Clerk to do so in order to make sure that all of the land records are tied together, and asked the Commission to not release the tentative report with a provision that would call for the work to be done by an entity other than the county clerks.

M. Clair French, Monmouth County Clerk, explained that Clerks recognize that there are differences among the offices of the county clerks but added that all clerks are working together to implement electronic recording in all 21 counties. Currently, 14

counties have decided to make this service free to public. They have the technology to do so and nothing has been lost in ‘cyberspace’.

Joanne Rajoppi, Union County Clerk, said that her county is not subscribed through the portal for electronic recording that was described by Ms. French. She added that a task force was established to find jurisdictions that have mortgages servicers and, currently, Canada is the only jurisdiction that she is aware of with such a service. There was general agreement that all of the county clerks are ready, technologically, to handle electronic recording of mortgage servicers and that such recording should be linked with the original mortgage recordation.

While the county clerks recommend that the recordation of mortgage servicers be mandatory, Mr. Cannel noted that all recordation is not now mandatory for anyone.

The Commission determined that formal action on this project would be deferred. Mr. Cannel will obtain additional input from the Clerks and see whether county digital recording is feasible.

Underground Facility Protection Act

Ms. Johnson proposed to the Commission a project resulting from the recent New Jersey Supreme Court decision in *Jersey Central Power & Light Co. v. Melcar Utility Co.*, 2013 WL 263107 (N.J. Jan. 24, 2013), in which the Court held *N.J.S. 48:2-80(d)* unconstitutional because it compels alternative dispute resolution for common law claims without preserving the right to a jury trial. *N.J.S. 48:2-80(d)* mandates arbitration for claims involving less than \$25,000 in underground facility damage disputes. In the case, JCPL sought reimbursement for costs incurred for repairing underground electrical lines damaged during Melcar’s excavation work pursuant to the Underground Facility Protection Act, *N.J.S. 48:2-73, et seq.*

The Supreme Court ruled that JCPL brought a negligence suit seeking property damages, in which the right to a jury trial attaches. The Court found that in other cases when the Legislature has acted to compel arbitration, it has permitted the right to a trial *de novo* at the conclusion of the arbitration process if the right to a jury trial was implicated. In the statutory provision in issue, the right to a jury trial was not preserved. The Court determined that its only recourse was to rule subsection (d) unconstitutional because the Court was powerless to add language to the statute.

Ms. Johnson recommended that a project be authorized to modify the Act insofar as it has been deemed unconstitutional. The Commission authorized Ms. Johnson to proceed with this project.

Uniform Principal and Income Act

Ms. Tharney advised that she had, during the early stages of the project, received from the New Jersey State Bar Association general support for the incorporation of the Uniform Law Commission amendments to the Uniform Principal and Income Act. She did not receive any more detailed information regarding this project from the NJSBA.

Additional research did not indicate that it would be problematic to include the ULC language as drafted in subsection d. of *N.J.S. 3B:19B-17*. Ms. Tharney also explained that the inclusion of the four percent figure in subsection g. of that section was consistent with the action taken by a majority of the states that had enacted the proposed ULC amendments. 36 jurisdictions have adopted the amendments and, of those, 27 states and D.C. chose the 4% figure, six chose 3%, one chose 3.5%, one chose 3-4%, and one chose 5%.

The Report was released as a Final Report on motion of Commissioner Bunn, seconded by Commissioner Bulbulia.

Legislative Updates

Ms. Tharney said that S2427, which pertained to DWI offenses and the use of ignition interlock devices was introduced in the Senate on January 8, 2013 and that a Committee hearing was held on January 28, 2013. Ms. Tharney testified at the hearing after reviewing the Commission's report in this area and identifying the aspects of the bill that were consistent with the Commission recommendations. The bill was recommitted to the Senate Budget and Appropriations Committee and an identical bill was introduced in the Assembly on February 14th.

Miscellaneous

The Commission, on motion of Commissioner Burstein seconded by Commissioner Bunn, approved the release of the Annual Report after Staff modifies the Legislative Summary information on page 7 of the Report to include a sentence identifying the Commission projects enacted in 2012.

Ms. Tharney explained that in an effort to increase the accessibility of the Commission's work to Legislators, she contacted all four Partisan Staff Offices and offered to add them to the distribution list for Commission reports. All four offices were receptive to the outreach and interested in receiving the reports. As a result of her conversations with members of Partisan Staff, Ms. Tharney asked if the Commission had any objection to expanding the distribution list further by adding the Chairs of the Assembly and Senate Committees. The Commission requested that she do so. The

Commission also had no objection to sending the Annual Report to all those on the distribution list for reports.

Ms. Tharney mentioned that the Seton Hall Legislative Law Journal may be interested in publishing a Commission report.

David Liston, who resigned from his position as a Legislative Law Clerk, asked that Ms. Tharney convey to the Commission that he was grateful to have had the opportunity to serve the Commission and wished the Commissioners and the Commission all the best.

The Commission will consider an alternative date for the May Commission meeting since the May 16th date conflicts with the New Jersey State Bar Association Convention.