

MINUTES OF COMMISSION MEETING

March 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, and Commissioner Virginia Long. Professor Bernard Bell of Rutgers School of Law attended on behalf of Commissioner John J. Farmer, Jr., Professor Ahmed Bulbulia of Seton Hall Law School attended on behalf of Commissioner Patrick Hobbs, and Grace C. Bertone, of Bertone Puccini LLP, attended on behalf of Commissioner Rayman Solomon.

Also in attendance were: Lorraine Senerchia, Hudson County Deputy Register; Virga Webb, Administrative Assistant to the Hudson County Register; Kristin M. Corrado, Esq., Passaic County Clerk; and Christine Clarke.

Minutes

The Minutes of the February meeting were approved as drafted and the Commission actions from the prior meeting were ratified on motion of Commissioner Long, seconded by Commissioner Bulbulia.

Recording Mortgage Servicers

Chairman Gagliardi explained that the Commission was in receipt of the letter from the Constitutional Officers Association of New Jersey (COANJ), signed by Ms. Fulginiti, and asked that Mr. Cannel brief the Commission regarding the status of this project.

Mr. Cannel explained that the project had been redrafted in response to comments at the last meeting. The new draft provides for a county-by-county system of recording. He explained that he had heard that the federal government might be implementing some changes in the area of recording, but that it turns out that they are simply compiling statistical data by examining one in every five mortgages. Although changes at the federal level may ultimately be made, this does not provide assistance in the short run, and it is necessary to continue with the project. The draft was distributed to Ms. Fulginiti three weeks ago and the Clerks have been considering it.

Chairman Gagliardi said that he understood the letter from COANJ as a request for additional time in order to allow the Clerks to meet with representatives from both the

title and mortgage industries. He asked if, in addition to requesting that the Commission defer action until June, the representatives of the Clerks had any additional requests or anything to add, and they did not.

The Commission did not object to deferring action on this project to allow meetings with stakeholders and the project will be tentatively scheduled for June. Chairman Gagliardi thanked the Clerks for the work they have put in to this project.

Title 9 – Child Abuse and Neglect

John Cannel presented the draft tentative report revising Title 9, Chapter 6, concerning child abuse and neglect. The report addresses the definitions of child abuse and neglect, proceedings concerning child abuse and neglect, and provisions that govern proceedings to terminate parental rights. Mr. Cannel stated that because the current law was enacted over a long period of time, there are provisions that no longer reflect current practice.

Christine Clarke, a concerned citizen, presented case studies and data to the Commission to support her position that the definition of child abuse should include shaking, striking or spanking children under the age of two. Ms. Clarke referred to findings stating that due to their stage of cognitive development, children under the age of two cannot make a connection between their actions and the resulting adult response of shaking, striking or spanking. Consequently, Ms. Clarke suggested that the adult response is an act of abuse because it is a stand-alone action that does not serve as discipline. She detailed the negative effects of shaking, striking, or spanking children under two, including bodily injury and even death. Ms. Clarke also provided to the Commission an example of the instructional information provided by New Jersey hospitals to parents that informs them of the effects of shaking, striking, or spanking children under two years old. Ms. Clarke suggested that parents in the State are not ignorant or uninformed about the effects of shaking, striking, or spanking young children.

Commissioner Long acknowledged the need to update the statutory definitions of child abuse and said that the current definitions do not give sufficient guidance to courts. However, Commissioner Long cautioned that other parts of the draft were important and while the definitions may not be inclusive enough, inaction with regard to the report generally, resulting from an inability to improve the definitions section, would be more injurious than proceeding even with the definitions currently in the report.

Chairman Gagliardi instructed Staff to revisit the definition of child abuse in light of Ms. Clarke's recommendations. Commissioner Bunn suggested that Staff further

discuss the definition of child abuse with other stakeholders. The Commission agreed to hold the Title 9 report to provide Staff the opportunity to consult with stakeholders about the definition of child abuse.

Tuition Aid Grants

Uche Enwereuzor said that Staff wished to clarify the intent of the Legislature with regard to State Scholarship and Grants provisions outlined in N.J.S. 18A:71B-2 subsection b. in light of a regulation that appears to be contrary to the Legislative intent. The case of *A.Z. ex rel. B.Z. v. Higher Educ. Student Assistance Authority*, 427 N.J.Super. 389 (App. Div. 2012) raised the issue of what it means to be a “resident” of this State in the contest of a dependent student whose primary caregiver is prevented from, or has not, established a New Jersey domicile. The Appellate Division in *A.Z.* held that the intent of the Legislature was that “a student’s legal residence [is] only presumed to be that of his or her parents’ residence,” and such presumption can be rebutted.

Mr. Enwereuzor said that based on the comments from the last meeting, he changed the language in the proposed draft from “primary guardian” to “parents or guardians”, which is language used in the remainder of the statute. He explained that although he used the word “presumed” in the revision, in the case of *Shim v. Rutgers-State University of New Jersey*, the word “presumed” means rebuttable presumption. Mr. Enwereuzor proposed adding the word “rebuttable” before the word “presumption” to clarify the draft.

The Commission discussed the relevance of the parents’ domicile, and concerns about the denial of aid to students who are legal residents of New Jersey because of their parents’ legal status. Commissioner Bunn said that language should be included to make clear that the immigration status of the parents is not a consideration here. Chairman Gagliardi said that doing so might go beyond the scope of authority of the Commission. Commissioner Bulbulia said that perhaps the term “domicile” should be replaced with “habitual residence” of the child, adding that the focus should be on the child, and a connection to New Jersey should suffice.

Mr. Enwereuzor said that the student can address the domicile issue if he or she is a resident in New Jersey. Commissioner Long said that if the parent moves to Florida or is an illegal immigrant, the child has the ability to overcome the presumption. Chairman Gagliardi said that if the Commission wishes to codify the language in the *A.Z.* case, the proposed “rebuttable presumption” language accomplishes that task in a neutral way. Commissioner Bell asked whether it is possible that two students in the same situation are treated differently because of different decision-makers. Mr. Enwereuzor said that this

was possible but that the law is clear as to what constitutes being domiciled in New Jersey. The student must simply meet the requirements. Ms. Tharney said that if the person meets the criteria, then the person rebuts the presumption, but expressed concern that students are currently losing aid as a result of the lack of clarity in the statute.

The Commission discussed various options for language that could be included in the statute to address the issue posed by the *A.Z.* case and determined that it was appropriate to pursue the project and present revised language for the next meeting.

Bias Intimidation Statute

Jayne Johnson explained that the New Jersey's bias intimidation statute was being brought to the attention of the Commission as a result of the Court's decision in the case of *State v. Pomianek*, 430 N.J. Super. 339 (App. Div. 2013), which raised concerns about *N.J.S. 2C:16-1*, subsection a.(3).

That subsection of the bias intimidation statute focuses not on the defendant's intent but on what the victim "reasonably believed." As a result, it allows for a subjective evaluation by the victim of the defendant's actions. In *State v. Pomianek*, the Appellate Division reversed a conviction because of the focus on the victim's perception and not the defendant's intent. The subsection in issue was described as restrictive of the defendant's free speech and the Court said there must be a showing of the intent of the defendant in committing a violation of subsection a.(3) of the statute.

Ms. Johnson explained that it seems that prosecutors have been reluctant to charge under *N.J.S. 2C:16-1* subsection a.(3), and that courts have had difficulty formulating jury charges with regard to that subsection. Chairman Gagliardi acknowledged that the statute creates problems, but asked whether taking on this project might take the Commission in to the area of policy. Commissioner Bunn recommended looking further into the issue. Commissioner Bell suggested that it is appropriate for the Commission "weigh in" on this and to recommend a change to the language of *N.J.S. 2C:16-1* subsection a.(3).

Justice Long said that because the Appellate Division case involved a question of constitutional law, the State may yet have more time available in which to appeal to the New Jersey Supreme Court. The Commission determined that no action would be taken on the project at this time and that Staff would monitor the status of any appeal and provide that information to the Commission when it became available.

Revised Uniform Law on Notarial Acts

Ms. Johnson explained that this uniform law was promulgated in 2010 as a result of the expanded use of electronic records in both business and personal transactions. In addition, the ULC expressed concern about the variations in practice from state to state and the fact that rapid changes in commercial and lending practices have broadened the differences between the states. The uniform law was last revised in 1982. So far, the uniform law has been enacted in two states, North Dakota and Iowa, and two additional states are considering it.

This project would revise and update the Commission's Notarial Act Report from 1989. The New Jersey law regarding notaries has not been revised since 1979, although bills were introduced in the last legislative session and in the current legislative session to modify certain provisions of the law. Unlike the requirements of the RULONA, there is no requirement for training of notaries in New Jersey. Currently, a notary must be 18 years old and a New Jersey resident or regularly maintain an office or employment in the State. New Jersey notaries are commissioned for five year terms.

Chairman Gagliardi asked that Ms. Johnson review the pending bills and modify the provisions of the RULONA as necessary and Commissioner Bunn recommended that useful provisions of New Jersey's current law be retained.

Uniform Asset-Freezing Orders Act

Steven Brizek said that the UAFOA, promulgated in 2012, is designed to create a uniform process for the issuance of *in personam* asset freezing orders. The UAFOA would permit the freezing of assets of a defendant by the imposition of injunctive restraints on the asset owner and collateral restraints upon non-parties, such as a defendant's bank, in order to preserve assets from dissipation, pending judgment

Mr. Brizek explained that what is new about the UAFOA is that, to this time, the primary remedy available to a litigant to preserve assets from dissipation, pending judgment, has been an *in rem* order directed to the attachment of restraints upon specific assets. Proceedings have not generally focused on the asset owner or others to prohibit their unauthorized transfer for the purpose of avoiding satisfaction of a judgment.

An injunction prior to judgment was issued to prevent the transfer or dissipation of assets beyond the jurisdiction of the court by an English court in 1975, by way of what has come to be referred to as a "*Mareva* injunction". New Jersey does not have a

generally recognized and sanctioned mechanism to deal with this situation. The current state of the law in New Jersey on this subject seems not to have developed beyond the view expressed by the Court in *Delaware River and Bay Authority v. York Hunter Const., Inc.*, 344 N. J. Super 361 (Ch. 2001). That case said that such relief was equitable and, subject to a change in the statute providing for the attachment of assets to preserve them to satisfy a judgment in a pending action at law, the courts were unable to provide it, absent an independent equitable basis for so doing. The United States Supreme Court held that while federal courts are without the inherent power to grant such relief, the power to grant it could be provided to the courts through legislation.

Mr. Brizek said that the UAFOA is a well-crafted statute that deals with a real perceived need. Its adoption would bring New Jersey in line with the United Kingdom and most other common law countries.

Commissioner Bunn asked which States have adopted the UAFOA and was advised that while no States have adopted it yet, it has been introduced before the legislatures of North Dakota and Colorado and was approved by the ABA at its February, 2013 meeting.

Commissioner Bunn said that the operation of the UAFOA could create a workload problem in the court system if too many lawsuits for money judgments required input from the Chancery Division to control the disposition of assets subject to judgment in a pending action at law. Mr. Brizek said that while the *in personam* remedy provided by the UAFOA is of an injunctive nature, and subjects one who disobeys an asset freezing order to contempt proceedings, it is a remedy available at law and does not require that the matter be heard in chancery.

In response to Commissioner Bell's question concerning how one subject to an asset freezing order would be able to conduct his life and business, Mr. Brizek explained that there are specific provisions in the UAFOA allowing parties whose assets are frozen to access funds for living, business and legal expenses. Mr. Brizek also said that there are provisions in the UAFOA for security and indemnification that may have to be provided to defendants and non-parties bound by an asset freezing order. The Commission approved continued work on this project.

Uniform Deployed Parents Custody and Visitation Act

Marna Brown discussed the Uniform Deployed Parents Custody and Visitation Act (UDPCVA) promulgated by the ULC in 2012. She explained that the UDPCVA addresses child custody and visitation issues that arise when parents are deployed by the

military or for other national service. The ULC identified that custody issues raised by such deployment are not adequately dealt with in the laws of most states.

Ms. Brown explained that the recently enacted New Jersey law (P.L. 2013, c. 7), which becomes effective March 26, 2013, addresses all of the concerns raised in the UDPCVA and provides a straightforward mechanism for achieving these goals consistent with New Jersey practice. The provisions of New Jersey's new law supplement New Jersey's version of the Uniform Child Custody Jurisdiction and Enforcement.

Ms. Brown suggested that adoption of the UDPCVA in New Jersey is not necessary. Commissioner Bunn concurred and said that the New Jersey state statute is considered a model in this area law. He noted that legal experts, including Ms. Patricia Apy, Esq., were instrumental in drafting the new state law. Ms. Brown stated that the New Jersey State Bar gave awards to sponsors of the legislation and the attorneys who worked on the legislation. Ms. Brown will prepare a Draft Final Report recommending that the uniform law not be adopted in New Jersey.

Traffic on Marked Lines

Mr. Enwereuzor reminded the Commission that the Traffic on Marked Lines project resulted from the confusion regarding *N.J.S. 39:4-88(b)* as to whether the first and second clauses identify two separate, independent, offenses or combine to describe a single offense. He explained that Laura Tharney had spoken informally with police officers and that the officers who offered opinions did not object to the proposed change to the statute and indicated that the proposed change could be helpful in the enforcement of the section.

Commissioner Bunn made a motion to release the report as a Final Report, which was seconded by Commissioner Bell and approved by the Commission.

Miscellaneous

Chairman Gagliardi proposed changing the date of the May Commission meeting from May 16th to May 23rd since some of the Commissioners may be attending the New Jersey Bar Association Convention on May 16th. There was no objection and the new meeting date is May 23, 2013 at 4:30 p.m.

Ms. Brown requested that the comment period be extended on the Collaborative Law project through June to allow an additional opportunity for input from the Family

Law Section of the NJSBA and the Commission agreed that it would be appropriate to do so.

Mr. Enwereuzor asked for guidance regarding the Sexual Offenses project. He explained that the project dealt generally with two substantive issues, changes to the language dealing with the use of force and changes to the language dealing with sexual activity involving an individual with an intellectual or developmental disability. Mr. Enwereuzor said that, to this time, the comments received regarding the language pertaining to force were positive in nature, but the comments regarding a single sentence of the section pertaining to those with intellectual or developmental disability were negative since that sentence was described as problematic.

Mr. Enwereuzor said that, in order to move the project forward, an attempt could be made to move the project forward with the troubling sentence, or the project could be bifurcated to separate the sections dealing with force from the sections pertaining to individuals with an intellectual or developmental disability, or the sentence to which commenters had objected could be removed. The Commission requested that the objectionable sentence be removed, and that the project proceed without it.