

MINUTES OF COMMISSION MEETING

April 21, 2022

Present at the New Jersey Law Revision Commission meeting, held via video conference, were: Chairman Vito A. Gagliardi, Jr.; Commissioner Andrew O. Bunn; Commissioner Louis N. Rainone; Professor John K. Cornwell, of Seton Hall University School of Law, attending on behalf of Commissioner Kathleen M. Boozang; Professor Bernard W. Bell, of Rutgers University attending on behalf of Commissioner Rose Cuison-Villazor.

Minutes

The Minutes of the March 17, 2022, meeting were unanimously approved by the Commission on the motion of Commissioner Bell, seconded by Commissioner Bunn.

Disability Benefits After Leaving Public Employment

Whitney Schlimbach discussed with the Commission a Draft Final Report proposing modifications to N.J.S. 43:15A-42 to clarify that eligibility for ordinary disability retirement benefits in the Public Employees' Retirement System (PERS) does not include members who leave public employment before the onset of their disability. The statute provides for ordinary disability retirement benefits (ODRB) when the member is physically or mentally incapacitated for the performance of duty and should be retired.

In *Murphy v. Board of Trustees, Public Employees Retirement System*, 2019 WL 1646371 (App. Div. Apr. 15, 2019), the petitioner left public employment in 2012 and began work in the private sector. During that time period she remained a member of PERS because membership continues for two years after a PERS member leaves public employment. In 2013, the petitioner became totally and permanently disabled. In 2014, the petitioner applied for ODRB. Her application was denied by the Board, granted by an Administrative Law Judge, and then reversed again by the Board. The petitioner appealed from the Board's final decision.

The petitioner argued on appeal that the plain language of the statute only requires membership in PERS and does not require current public sector employment. The Board maintained that the petitioner was not eligible because she voluntarily resigned from public employment before becoming disabled. The court addressed whether a PERS member who left public sector employment before becoming disabled was eligible to apply for ODRB.

The Appellate Division found that the language of N.J.S 43:15A-42 was ambiguous. To ascertain the Legislature's intent regarding eligibility of former members, the court examined extrinsic sources. The Court determined that the phrases "for the performance of duty" and "should be retired" demonstrated that the Legislature intend to limit ODRB to those who are performing duties for a public entity *at the time* of the disability and ODRB application. In addition, the court cited *In re Adoption of N.J.A.C. 17:1-6.4*, 454 N.J. Super. 386 (App. Div. 2018), in which the court addressed language in the administrative code which explicitly states that termination of

employment, for non-disability reasons, makes a member ineligible for disability benefits. The court in *In re Adoption of N.J.A.C. 17:1-6.4* found, and the *Murphy* court agreed, that it is “obvious” that the enabling statutes did not explicitly state that leaving public employment must be due to the disability because it is common sense that disability retirees leave their jobs due to a purported disability when seeking ODRB. Further, PERS rehabilitation statutes require that disability retirees whose disability has abated to return to active service. The court determined that a PERS member must be disabled from public sector employment to be eligible for ODRB pursuant to N.J.S. 43:15A-42.

In connection with this Report, Staff sought comment from knowledgeable individuals and organizations, including the New Jersey Division of Pensions and Benefits; the New Jersey Public Employment Relations Committee; the Chair and Legislative Coordinators, of the Labor and Employment Law Section of the New Jersey State Bar Association; the Chair of the New Jersey Retired Public Employees Advisory Board; the New Jersey Attorney General’s Office; the Deputy Attorney General serving as Legal Advisor to PERS Board; the National Association of State Retirement Administrators; Professor Timothy Glynn of Seton Hall University Law School; Professor Pam Jenoff of Rutgers University School of Law; and private practitioners. Ms. Schlimbach advised the Commission that none of these individuals or organizations provided any comment to the Commission on this subject.

There is no legislation that would address the issue raised in this work that has been introduced in the Legislature.

Ms. Schlimbach recommended that the Commission modify N.J.S. 43:15A-42 to clarify that otherwise eligible PERS members who leave public employment for a reason other than disability, are not entitled to ordinary disability retirement benefits. Such modifications would include subdividing the sections into numbered and lettered sections to improve readability and accessibility; adding language to new subsection a. that would clarify that a PERS member must be currently employed in PERS eligible position at the time of disability to be eligible to receive ODRB; and eliminating the provision in subsection b. that sets forth that service requirements become effective five years after act’s effective date, which was in 1966.

On the motion of Commissioner Bell, seconded by Commissioner Bunn, the Commission unanimously voted to release the work as a Final Report of the Commission.

Farmland Assessment

The purpose of the Farmland Assessment Act of 1964 is to preserve family farms by providing farmers with some measure of economic relief. The Act permits land that is “actively devoted to agricultural or horticultural use” to receive special tax treatment provided that it meets the minimum gross sales requirement in the statute.

Samuel Silver stated that the Act also provides that separate and independent financial consequences can occur if the land “is applied to a use other than agriculture or horticulture,” subjecting the landowner to “roll-back taxes.” The absence of a statutory definition for the term “applied to a use other than agricultural or horticultural” has led the Tax Courts to develop a

common law definition for the term that is not readily apparent from a plain reading of the statute and appears to deviate from the intent of the Legislature.

Mr. Silver indicated that a review of *Balmer v. Holmdel*, 2019 WL 6716716 (Tax Ct. Dec. 09, 2019), brought the issue concerning roll-back taxes to the Commission's attention. At the July 16, 2021, Commission meeting, Staff was asked to ascertain the frequency with which roll-back tax cases are filed. During the period of 1988-2019, an average of fourteen cases per year were brought before the tax courts according to information received from the New Jersey Tax Management Office.

Consistent with the legislative intent underlying the Act, the proposed modification of N.J.S. 54:4-23.8(b) clarifies that the cessation of agricultural or horticultural activity during a given year is not a change in the property's "use" and does not trigger the imposition of rollback taxes upon the property owner, in the absence of an active conversion of the land to a non-agricultural or non-horticultural use. The balance of the proposed modifications is designed to make the statute more accessible and easier to read and understand.

In connection with this Report, Staff sought comment from knowledgeable individuals and organizations, including private practitioners in this area, New Jersey Department of Treasury, the New Jersey Agricultural Society, the Tax Law Sections of the New Jersey State Bar Association, each of the twenty-one County Tax Boards and the six regional offices of the New Jersey Division of Taxation.

Staff received support from a private practitioner who indicated "the Act should be clear that the mere cessation of agricultural activity on a property, does not by itself trigger the imposition of rollback taxes. There should be some actual change in the use on the property. The Commission's proposed amendment to N.J.S. 54:4-23.8(b) requiring active conversion of the land to non-agricultural use makes it clear that an actual change is required."

Mr. Silver advised the Commission that prior to the meeting, Commissioner Long had been in contact with Laura Tharney, the Commission's Executive Director and expressed a preference for a modification of the language set forth in subsection (b) that mirrored the formulation offered by the commenter. Mr. Silver explained that the terms "actively devoted" and "agricultural use" are defined in separate statutes and have separate and independent consequences for farmland assessments. These two distinct aspects are the preferential treatment as an incentive to preserve farmland, and the ability of the tax authority to recoup taxes when the land is applied to a different use other than agriculture or horticulture. Noting the decision in *Burlington Township v. Messer*, 8 N.J. Tax 274 (1986), in which the court began to require that farmers engage in continued farmland activity to avoid the roll-back provision contained in the act, Mr. Silver stated that the phrase "while negating the farmland assessment," found in the commentator's remarks may lead courts to conflate the two actions.

Commissioner Rainone suggested that the phrase "active conversion" in section (b) is ambiguous. He suggested that the word "active" should be removed from the sentence. As modified the statute would read "...in the absence of the conversion of the land to a non-

agricultural or non-horticultural use.” Commissioner Bunn and Commissioner Bell concurred with Commissioner Rainone’s modification.

Chairman Gagliardi asked that the citations to *Jackson v. Paolin*, be modified to reflect that this was a decision of the Tax Court. Mr. Silver confirmed that he would make these corrections.

With the changes approved by the Commission and on the motion of Commissioner Rainone, seconded by Commissioner Bell, the Commission unanimously voted to release the work as a Final Report of the Commission.

Public Health Act

Whitney Schlimbach discussed with the Commission a Draft Final Report proposing modifications of various statutes in Title 26, the Health and Vital Statistics Act, to create a consolidated definition section and eliminate duplicative definitions. Ms. Schlimbach stated that, as originally authorized, the project involved the consolidation of two duplicative definitions sections: N.J.S. 26:1-1 and N.J.S. 26:1A-1. The scope of the project was subsequently expanded to address the numerous instances of duplicative definitions in Title 26 and to create an easily identifiable and broadly applicable consolidated definition section. The Tentative Report included 149 modifications to ninety-one statutes, not including the modifications to the initial definition sections. The Commission’s goal was to create a general definition section that incorporated other terms that had been defined repeatedly and consistently in Title 26 and eliminate duplicate definitions of those terms.

Ms. Schlimbach stated that the consolidation of the definitions section afforded the Commission the opportunity to eliminate the older definition section which contained identical terms and terms that had been encompassed in the new definitions section. The proposed definition section, at N.J.S. 26:1A-1, would include fifteen terms that had been defined repeatedly and consistently and three terms that had been defined repeatedly and inconsistently. In addition, the proposed definition section called for the elimination of duplicate definitions of all the terms appearing in the consolidated definition section.

Comments, according to Ms. Schlimbach, were sought from knowledgeable individuals and organizations. Director of Policy Mary Ciccone advised the Commission that Disability Rights New Jersey is overall supportive of the efforts to reduce duplicative definitions and consolidate them into one section. In addition, she pointed out two inconsistencies in the Appendix. First, she noted the inconsistent capitalization of the term “Department” in the Appendix. Next, she noted that the comment to N.J.S. 26:2F-3 notes that the duplicative definitions of the term “Commissioner” and “Local Health Agency” are proposed for removal and yet the modification to the text of the statute does not eliminate the word “Commissioner” because it includes his designee in the definition. Ms. Schlimbach advised the Commission that both errors had been corrected and that she reviewed the Appendix for any other similar inconsistencies.

Additional support for the project was received from Dr. Paschal Nwako, the County Health Officer & Public Health Coordinator for the Camden County Department of Health and Human Services. Dr. Paschal advised the Commission that he was glad that the Commission was

looking at the various discrepancies in Title 26. He further noted that individuals in the public health practice community have discussed this topic over the years.

There are several bills pending in the New Jersey Legislature that involve the various statutes in the Health Act. None of these bills, however, address the duplicative definition sections in the Act. If a bill is pending that is relevant to a statute that is set forth in the Appendix, the bill, its subject and its impact on the statute are noted in the Comments that follow the statute.

Commissioner Bunn stated his support for the project. Chairman Gagliardi concurred with Commissioner Bunn's enthusiastic support for this work and asked that the support be so reflected in the Minutes.

On the motion of Commissioner Bell, seconded by Commissioner Bunn, the Commission unanimously voted to release the work as a Final Report of the Commission.

Parentage

As a preliminary matter, Chairman Gagliardi noted that at this stage of the project, there are multiple decisions to be addressed by the Commission. John Cannel stated that in his memorandum he has summarized the comments from interested parties.

The central issue in the Parentage Act, according to Mr. Cannel, is the concept of a "spousal equivalent." Mr. Cannel explained that the spousal equivalent concept is an attempt to incorporate changing social and cultural norms into the Parentage Act, specifically the general acceptance of unmarried individuals raising children together. Commenters have raised concerns regarding the difficulty of incorporating an entirely new concept into the statute, both in terms of changing the reach of the statute and its effect on different groups of people.

Given the competing differences of opinion surrounding the inclusion of the spousal equivalent concept in the statutes, Mr. Cannel requested guidance from the Commission. He recalled that when work on the Parentage Act was initially authorized, it was limited in scope but as the project progressed, various groups of commenters raised new and important issues. As a result, the project has expanded in a number of areas.

Chairman Gagliardi stated that it would be very helpful to the Commission to have the benefit of written comments from interested individuals when discussing how to proceed with any modifications to the statute. The first topic that Chairman Gagliardi wished to address was that of spousal equivalent.

Commissioner Bunn asked why the Parentage Act is focused on a spousal relationship rather than the parent-child relationship. He stated that he was under the impression that New Jersey courts have consistently recognized parent-like relationships between a child and a co-parenting adult that was independent of the relationship between the two parenting adults. Mr. Cannel responded that, although this issue was initially addressed by the report, one commenter pointed out that decisions issued by the courts are better able to address the nuances of those situations than the definition in the statute, which adhered more closely to the uniform law. Therefore, that aspect of parentage was left to the courts rather than addressed in the statute, given

the judicial system's ability to be more flexible on the issue. Laura Tharney added that one of the commenters has raised this issue. The commentor, she continued, stated that the focus should be on the relationship with the child and that the failure to do so risked excluding deeply rooted parent-child relationships that might not fall within the concept of spousal equivalent.

Chairman Gagliardi pointed out that the spousal equivalent concept does not derive from any New Jersey decision or uniform law, or statutory concept in other states. He expressed concern that the attempts to refine this concept are in conflict with the Commission's general practice of carefully avoiding making policy determinations other than those prompted by caselaw, the uniform law or a clear change in societal norms. Both Commissioners Bunn and Bell expressed their agreement that continuing to work in this area implicates policy questions and determinations that are better made by the Legislature.

Chairman Gagliardi opined that the project has evolved to the point of requiring policy determinations that it would be inappropriate for the Commission to make, and therefore, that the project should return to its original mission. The Chairman noted that if the Commission issues a Report in this area it may choose to bring the policy issues and relevant concerns to the attention of the Legislature. Mr. Cannel confirmed that the original focus of the project was to ensure that the same rights that have been extended to opposite sex spouses are also provided to same sex couples. Chairman Gagliardi stated that the project would no longer address the concept of spousal equivalent and should be limited to making sure the rights of same sex parents are the same as opposite sex parents. Commissioner Bell agreed with the Chairman's recommendation.

Lisa Chapland, the Senior Managing Director of Government Affairs for the New Jersey Bar Association, added that although the Bar Association had not yet submitted written comments on the issue, she wanted to clarify for the Commission that the Parentage Act is focused more upon the rights that are available to those with genetic or non-genetic relationship with the child, rather than focusing on the marital status of the parents. Chairman Gagliardi thanked her for her comments and hoped she would continue to provide feedback to the Commission on relevant issues involved in this project. Chairman Gagliardi directed that in creating the Tentative Report, commenters should be encouraged to submit their comments in writing so that the Commission would have the benefit of written comments when considering these complex issues.

Chairman Gagliardi summarized the direction that the project should follow. First, the Commission agreed to conclude work on the concept of spousal equivalent. Next, the focus of the project would return to clarifying and ensuring the equivalency of same sex and opposite sex parents under the statute. Finally, the Commission's work should identify for the Legislature those issues that have arisen in connection with the project with a recommendation that the statute should be modernized to reflect current times and the recognition that work is not within the statutory mandate of the Commission.

Compulsory Civics Education

On March 25, 2022, Staff was asked by a Commissioner to examine the Model Act on Civics Education (Model Act) that had been prepared by the American Legislative Exchange

Council (ALEC). Staff's examination of this issue included the Model Act, news articles, the New Jersey statutes, and the bills introduced during the current legislative session.

Mr. Silver stated that the Model Act attempts to provide students with a firm knowledge and understanding of the documents involved in the founding of this country - the Declaration of Independence, the Constitution, and the Federalist Papers. To achieve this goal, high school students would receive mandatory civics education. These students would also be tested on their knowledge of the founding documents to be eligible to receive a diploma. The Act would require the applicable state and local entities to adopt rules and regulations to administer the Act and ensure that students receive a passing grade on exams involving the founding documents. Mr. Silver noted that the Act places reporting and accountability requirements upon state and local entities.

In 2021, New Jersey adopted Laura Wooton's Law. This law requires that at least one course in civics or United States government be made a part of the social studies credit requirement before a student could graduate from middle school. Mr. Silver noted that the newly enacted New Jersey statute and the Model Act have several differences. The civics education pursuant to the Model Act occurs at the high school level whereas Laura Wooton's Law commences civic education in middle school. The Model Act also teaches the founding documents whereas Laura Wooton's Law is based upon the values and principles of the United States' system of democracy. There is also no high school testing requirement under the Laura Wooton's Law and the curriculum would be developed by the Rutgers Center for Civic Education. Finally, under the Laura Wooton's Law, there is no reporting requirement since the New Jersey education system is compulsory and a student must complete the middle school civics course requirements to enter high school.

Mr. Silver advised the Commission that there are four bills pending that address this subject matter. The Legislature, he continued, is actively working in this area. He requested guidance from the Commission regarding whether Staff should continue to work in this area or discontinue work in light of current legislative activity.

Commissioner Bell stated that the issues raised by this potential project involve questions that are better directed to local boards of education or the Legislature. He stated that while the founding documents referenced in the Model Act are important historical documents, they do not provide a complete history of the American experience. He noted that the Model Act omits references to important historical work such as Lincoln's Gettysburg Address, Franklin Delano Roosevelt's "Four Freedoms" speech, and Dr. Martin Luther King, Jr.'s "I Have a Dream" speech. He opined that Laura Wooton's Law is designed to provide a better understanding of United States history within a framework that allows educators and students to critically assess assertions of fact and opinion to discern their credibility and potential bias. Commissioner Bell concluded by stating that that what the New Jersey Legislature has done here is far better than what is set forth in the Model Act.

Commissioner Rainone questioned whether it is the obligation of the Commission to consider every model act prepared by every interest group. Chairman Gagliardi noted that the Commission is only statutorily obligated to review the work of the Uniform Law Commission and

that the Commission will sometimes review model acts. Commissioner Bell questioned whether forwarding the Model Act to the Legislature puts the Commission's imprimatur on the work.

Commissioner Rainone made a motion not to forward the Model Act to the legislature. Commissioner Cornwell seconded Commissioner Rainone's motion. The Commission agreed not to undertake further work on this project and not to transmit the Model Act to the Legislature.

Termination of Alimony

Thevuni Athalage presented a project addressing termination of permanent alimony. Ms. Athalage stated that, based on a judgment of divorce, New Jersey law permits permanent alimony to allow a dependent spouse to maintain the same lifestyle enjoyed during marriage. Permanent alimony and the modification or termination of such an award is set forth in N.J.S. 2A:34-23. Subsection (n) provides that alimony may be terminated when the moving party presents a prima facie case of remarriage or cohabitation by the party receiving alimony.

Ms. Athalage noted that the statute sets forth six factors which courts "shall consider" when determining whether cohabitation has occurred between two individuals. The statute defines cohabitation as an intimate personal relationship in which a couple has undertaken duties and privileges commonly associated with marriage or a civil union, although they do not necessarily maintain a single common household.

In the case of *Temple v. Temple*, 468 N.J. Super. 364 (App. Div. 2021), the plaintiff moved to terminate alimony on the basis that the defendant was in a fourteen-year relationship that had assumed the duties and privileges associated with marriage or a civil union. The lower court denied the motion, holding that because plaintiff did not present evidence on all six factors listed in N.J.S. 2A:34-23, he had not presented a prima facie case of cohabitation.

Ms. Athalage explained that the Appellate Division concluded that the lower court had incorrectly relied on the holding in *Landau v. Landau*, 461 N.J. Super. 107 (App. Div. 2019), that the express language of the statute requires a movant to present a prima facie case of cohabitation by presenting evidence on each of the six factors in the statute, to obtain discovery. The *Temple* court found that, although a prima facie case of cohabitation must be presented before discovery, the statute does not articulate what constitutes a prima facie case. The *Temple* court continued that the Legislature has defined cohabitation in the statute as a mutually supportive and intimate personal relationship in which the couple has undertaken duties and privileges commonly associated with marriage or a civil union. Therefore, a moving party does not need to present evidence of all circumstances listed in subsection (n) to establish a prima facie case of cohabitation.

Ms. Athalage concluded that, although N.J.S. 2A:34-23 states that the six factors in subsection (n) should be considered by the court, the statute does not expressly require that all six factors must be met to demonstrate cohabitation. Ms. Athalage explained that because the sixth factor is followed by the conjunction "and," the implication is that all factors must be satisfied to obtain the requested relief. Such a reading is inconsistent with the holding in *Temple* that a party must present evidence of a certain type of relationship to demonstrate cohabitation.

Commissioner Bell indicated his support, explaining that it seemed like a worthwhile project. The Commission authorized Staff to engage in additional research and outreach on this subject.

Miscellaneous

Laura Tharney advised the Commission that on March 23, 2022, she served as a panelist at the 2022 Warren M. Anderson Legislative Seminar on the Revitalization of the New York State Law Revision Commission. At the session, the panelists discussed the history of the Commission, some of its past important work developing legislation, restructuring possibilities, and the New Jersey Commission as an example for a future New York Commission.

Ms. Tharney informed the Commission that that her legislative outreach continues. At the end of May she has several meetings scheduled with legislators to discuss the work of the Commission and sponsorship of Commission work.

Adjournment

The meeting was adjourned on the motion of Commissioner Bell, seconded by Commissioner Bunn.

The next Commission meeting is scheduled for May 19, 2022, at 4:30 p.m. at the office of the New Jersey Law Revision Commission.