

MINUTES OF COMMISSION MEETING

May 19, 2022

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 O. Bunn; Commissioner Virginia Long; 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; and Grace Berton, of Bertone Piccini, LLP, attending on behalf of Commissioner Kimberly Mutcherson.

Minutes

Commissioner Bell requested that his comments regarding the Compulsory Civics Education memorandum be modified to include a reference to Franklin Delano Roosevelt’s “Four Freedoms” speech after the reference to Lincoln’s Gettysburg Address. In addition, he requested that the typographical error in the title of Dr. Martin Luther King, Jr.’s “I Have a Dream” speech be corrected. Finally, he asked that the existing language in the next sentence, following the conjunction, be replaced with the following language after the word “to” – “critically assess assertion of fact and opinion to discern their credibility and potential bias.”

The Minutes of the April 21, 2022, meeting were unanimously approved by the Commission, with the modifications proposed by Commissioner Bell, on the motion of Commissioner Bunn, seconded by Commissioner Cornwell.

Receivership Act

The statutory language addressing the appointment of a receiver set forth in N.J.S. 2A:42-117 was interpreted in *Manufacturers and Traders Trust Company v. Marina Bay Towers Urban Renewal II, LP*, 2019 WL 5395937 (App. Div. 2019). In that case, the Appellate Division determined that a trial court has discretion to appoint or deny a receiver when the conditions in the section are found to exist.

Whitney Schlimbach explained that at the February 17, 2022 Commission meeting, the Commissioners observed that the language of N.J.S. 2A:42-117 – “based upon the evidence provided by the plaintiff” – could be read to imply that the court may only consider the plaintiff’s evidence when deciding whether to appoint a receiver. The Commission authorized additional research to clarify the meaning of this language.

In *Manufacturers and Traders Trust*, the Appellate Division reviewed the legislative history and the language in N.J.S. 2A:42-123, which also addresses the appointment of a receiver but employs permissive language. The Court determined that the language in N.J.S. 2A:42-117

should be read permissively. Ms. Schlimbach advised the Commission that Staff also reviewed language in other statutes in the Act. A review of these statutes confirmed that the court's powers related to a receivership are described permissively with very few exceptions.

Ms. Schlimbach advised the Commission that Staff examined three sources in an attempt to clarify the scope of a court's consideration of evidence when determining whether to appoint a receiver. The other sections of the Act set forth detailed procedures for providing notice of the proceeding to adverse and interested parties as well as for presenting arguments and evidence in support of, and in opposition to, the receivership. In addition, N.J.S. 2A:42-117 also authorizes a summary action to appoint a receiver.

Other New Jersey statutes that either authorize or require a summary action do not employ language implying that a court can only consider one party's evidence. The rent receiver statute mandates that the court dismiss a petition if a party "fail[s] to affirmatively establish the allegations." A court is instructed to "render judgment as shall be proper upon the proofs presented" in an action for property omitted from a tax assessment. Finally, a court may provide relief "if convinced of the merit of the action" in an action to correct an error in a deed, which must be held as a summary proceeding.

Staff also examined the New Jersey Rules of Court. A party may file a verified complaint pursuant to Rule 4:67-1(a), and if a sufficient showing is made the court shall order the defendant to show cause why the movant is not entitled to the requested relief. The order to show cause serves as the defendant's notice of the proceeding. A court may also proceed ex parte, pursuant to Rules 4:67-4 and -5. These rules provide the court may determine the matter "on the papers" if a defendant has defaulted and there is no genuine issue of material fact. If the language of N.J.S. 2A:42-117 refers to either of these circumstances, it does not do so clearly.

In addition, N.J.S. 2A:42-117 authorizes a "summary action or otherwise." There is no apparent connection between the language "based upon evidence provided by the plaintiff" in the last paragraph and the authorization to proceed in a summary manner in the first sentence of the statute. Ms. Schlimbach stated that the language "based upon evidence provided by the plaintiff," seems to be overly broad given the narrow and specific circumstances in which a court may proceed ex parte, and the procedures set forth in Act which require that adverse and interested parties receive notice of the action and be given the opportunity to present arguments and evidence

Ms. Schlimbach advised the Commission that there is currently no legislation pending that addresses the language of N.J.S. 2A:42-117.

Consistent with the holding in *Manufacturers*, Staff proposed modifying the word "shall" to "may" in the last paragraph of the statute. In addition, Staff proposed eliminating the language "based upon evidence provided by the plaintiff" because the language does not appear in any other statute authorizing a summary action. The proposed modification makes clear that a court is not

restricted to considering only the plaintiff's evidence when determining whether to appoint a receiver and is consistent with the remaining statutes in the Act and the applicable New Jersey Court Rules. Consistent with contemporary legislative drafting, the statute has been modified to include both lettered and numbered subsections to improve accessibility. Finally, the internal cross-references have been updated to be consistent with the proposed statutory modifications.

Commissioner Bunn stated that this is an efficient revision of the statute that reflects the direction of the Commission. Chairman Gagliardi, along with Commissioners Bertone and Cornwell, concurred with Commissioner Bunn's statement.

On the motion of Commissioner Bunn, seconded by Commissioner Cornwell, the Commission unanimously agreed to release the Revised Tentative Report.

Wrongful or Mistaken Imprisonment and NERA

In New Jersey, parole supervision for persons convicted of violent crimes begins upon the completion of the sentence of incarceration, as set forth in N.J.S. 2C:43-7.2(a) and (c). Samuel Silver explained that N.J.S. 2C:43-7.2 did not contemplate whether a defendant wrongfully or mistakenly compelled to remain in prison beyond their prescribed sentence should be required to serve the entire period of parole supervision.

In *State v. Njango*, 247 N.J. 533 (2021), the New Jersey Supreme Court considered whether the period of parole supervision a defendant was required to serve under the No Early Release Act (NERA) should be reduced when the defendant's time in prison exceeded the permissible custodial term authorized by their sentence.

In *Njango*, the Court specifically noted that the defendant's case took a "strange and tortuous procedural path." The defendant perpetrated violent crimes against his ex-mother-in-law and while out on bail, he committed additional crimes against his ex-wife. Defendant was convicted and sentenced to concurrent, eighteen-year prison terms, subject to NERA, which made him ineligible for parole until he completed eighty-five percent of his sentence, and five years of parole supervision. Mr. Silver noted that absent an extraordinary circumstance, a sentence for a crime committed while on bail runs consecutively to the sentence for the preceding crime.

The defendant's first motion for post-conviction relief asserted that he was under the influence of prescription medication at the time of his plea and his counsel provided ineffective assistance, which was denied. The defendant in *Njango* also filed a motion to correct his illegal sentence, advancing the argument that he should have received consecutive sentences. The trial court denied the motion, finding that the imposition of concurrent sentences was a part of the plea bargain. However, the Appellate Division reversed and remanded to the trial court to justify the concurrent sentences with a finding of extraordinary circumstances or vacate the plea and reinstate the charges.

Before the trial court could fulfill the remand requirements, the defendant entered into a superseding plea agreement with the State. The defendant was sentenced to a ten-year NERA-eligible sentence for the crimes committed against his mother-in-law. For the crimes committed against his ex-wife he received an eight-year NERA-eligible sentence. The ten-year sentence was to be followed by five years of parole supervision and the eight-year sentence, by three years of parole supervision. Pursuant to the terms of this plea agreement, the ten-year sentence was to run consecutive to the eight-year sentence. The trial court denied the defendant's request to provide him with service credits for the time already served on both sentences. Instead, the court applied the seven and a half years of time served to the front-end of his eighteen-year aggregate sentence.

The Appellate Division reversed the trial court on this issue, finding that failing to credit the defendant on each sentence violated his Fifth Amendment right against double jeopardy. Citing *North Carolina v. Pierce*, 395 U.S. 711, 717 (1969), the court reasoned that the punishment already endured, and punishment already exacted, must be fully credited in imposing sentence upon a new conviction for the same offense. As a result, the sentencing court amended the sentence, and the defendant was released.

The defendant in *Njango* then filed a second application for post-conviction relief. The defendant argued that the one-year and seven-months that he spent in prison before his appeal was decided, and his sentence corrected, should be credited toward his term of parole supervision. The trial court denied the motion, and the Appellate Division affirmed, holding that the period of parole supervision is mandatory and to reduce it would subvert the Legislative purpose of enacting a mandatory parole statute. The Supreme Court granted certification.

The Supreme Court determined that parole is "in legal effect imprisonment" and therefore, punishment. Since the defendant had already been punished with an excess prison term, his parole term should be reduced accordingly. Mr. Silver explained that the Supreme Court concluded that the Legislature did not contemplate whether a defendant wrongly or mistakenly compelled to remain in custody beyond the prescribed sentences should be mandated to serve the entire period of parole supervision without remedy. Therefore, by reducing the defendant's parole supervision by the excess time in prison, the *Njango* Court conformed NERA to the State Constitution in a manner likely intended by the Legislature.

Chairman Gagliardi clarified that the outreach to interested parties would request comments or feedback on the statutory modifications proposed by the Commission. He then inquired whether Staff had any sense of how often this issue arises. Mr. Silver indicated that, although the particular circumstances of *Njango* may not occur often, the calculation of prison sentences is often complicated by the timing of offenses and judgments, as well as the amount of time served prior to the resolution of the case. Mr. Cannel also pointed out that sentencing miscalculations are sometime just the result of human or clerical errors.

Chairman Gagliardi noted that outreach to interested parties would give the Commission some sense of how often practitioners encounter the issue and whether modifying the statute would be beneficial. Commissioner Bunn stated that he believed it is appropriate to modify a statute to better reflect the law, even if the issue does not arise frequently.

The Commission authorized Staff to engage in additional research and outreach in this area.

Autobus

Samuel Silver began by thanking Farida Shawkat, a former Spring 2022 Legislative Law Clerk, for her preliminary research and drafting on the project. He explained that both the Petroleum Products Gross Receipts Tax Act and the Motor Fuel Tax Act contain identical provisions that exempt specific bus services from the tax on fuel. He explained further that all of the references and explanations relating to the Motor Fuel Tax Act are applicable to the Petroleum Products Gross Receipts Tax Act, as well. The sentence governing the exemption, and the subject of controversy in *Senior Citizens United Community Services, Inc. v. Director, Division of Taxation*, 32 N.J. Tax 381 (2021), is 112 words long and contains ten conjunctions – three “whiles,” three “ands,” and four uses of the word “or” - all before the first period.

The issue before the court in *Senior Citizens United Community Services, Inc.* was whether the term “autobus,” as used in the Public Utilities statutes has been incorporated into the Taxation statutes, thereby excluding certain types of bus service from the tax exemptions otherwise permitted pursuant to the Motor Fuel Tax and the Petroleum Products Gross Receipts Tax.

Senior Citizens United Community Service (SCUCS) is a non-profit corporation that provides special rural transportation services for senior citizens and the disabled through contracts with New Jersey Transit and county governments. They sought a refund pursuant to both the Motor Fuel Tax Act and the Petroleum Gross Receipts Tax Act. Each request was denied by Director of Taxation. SCUCS argued that the Title 48 Public Utilities definition of autobus has not been incorporated into Title 54 Taxation statutes. The Director of Taxation maintained that SCUCS was not operating an autobus as defined in the Public Utilities statutes and therefore not entitled to either refund.

The Court engaged in an in-depth historical examination of the origin and evolution of the statute from the 1920s until the early 1990s. The Court rejected the Director’s argument that the Title 48 definition of “autobus” should be incorporated into Title 54 for four reasons. First, the tax court judge noted that the emphasis of the statute is on the “service,” not the vehicle. Second, Title 48 contains three definitions of the term “autobus,” and it was unclear why the definition selected by the Director should be the definition that controlled in this particular case and not either of the other two definitions. Next, when the Legislature sought to include a Title 48 exemption, it did so explicitly, which was not the case with the exemption suggested by the Director. Finally, each of

the definitions contained in N.J.S. 48:4-1 use the introductory language, “as used in this chapter,” limiting their application to Chapter 4 of Title 48.

The Court ultimately held that neither the express words of any amendment to this particular statute, nor the legislative history, indicate an intent to change the definitional language of autobus in N.J.S. 48:4-1.

Commissioner Bell questioned whether Staff knew the amount of money involved in the tax exemptions. Mr. Silver stated that he was unaware of the amount of money generally refunded under each exemption but would be happy to investigate this subject if further work on the project is authorized by the Commission. Commissioner Bertone stated that the statute is much more convoluted than it needs to be and therefore, further research is needed. Commissioner Bunn agreed with Commissioner Bertone that the statutory language is convoluted and should be clarified so that it can be easily read by practitioners and members of the public. Commissioner Cornwell stated that the clarification of this statute is important because of the services that are being provided by non-profit organizations to individuals with disabilities and the elderly.

The Commission approved the request to continue further research on this project.

Theft of Immovable Property

Whitney Schlimbach explained that, in January of 2018, the Commission authorized a project related to the definition of the word “transfer” as used in the theft of immovable property section of the Theft by Unlawful Taking or Disposition statute. This statute, N.J.S. 2C:20-3(b), prohibits the unlawful “transfer” of any interest in immovable property of another with the purpose of benefitting himself or someone else not entitled to the property. In *State v. Kosch*, 444 N.J. Super. 368 (App. Div. 2016) the Appellate Division considered the definition of the word “transfer” in the statute.

In *Kosch*, the defendant was convicted of immovable theft based on his preparation of fraudulent deeds to unoccupied property that he then leased to a third party. In a third instance the defendant contacted a property owner with an offer and when seller requested the return of the deed, it was discovered the defendant had somehow obtained it from escrow and again leased the property to someone else. The defendant appealed his conviction.

Defendant argued on appeal that the evidence did not support jury finding that he committed theft of immovable property under N.J.S. 2C:20-3(b). The Appellate Division confirmed that defendant never lawfully acquired the property interests he was charged with taking and questioned whether his actions constituted a “transfer.” The Code of Criminal Justice Criminal Code does not define term “transfer.” The Appellate Division adopted a definition of a “transfer of an interest in real estate” from the New Jersey Statute of Frauds. This definition includes the “sale, gift, creation or extinguishment of an interest in real estate.” The court did not address

whether this definition might criminalize actions not intended to be subject to criminal penalties by the Legislature.

At the time of the Commission's initial consideration of this potential project in 2018, it did not appear that any bills were pending that addressed the issue raised for Commission consideration. However, due to subsequent legislative initiatives, Staff deferred substantive work in this area.

Ms. Schlimbach advised that Assembly Bill 983 was pre-filed in the 2022 legislative session and was then introduced and referred to the Assembly Housing Committee. On March 07, 2022, it was reported out of the Assembly Housing Committee with amendments and referred to the Assembly Judiciary Committee. On March 21, 2022, an identical bill - Senate Bill 2293 - was introduced and referred to the Senate Community and Urban Affairs Committee. The bill prohibits a person from knowingly or purposefully claiming ownership or possession, or taking possession, of a residential dwelling without the owner's consent for the purpose of renting it to another or otherwise obtaining a benefit or knowingly or purposefully causing another to do so.

Commissioner Bunn stated that this is a very specific, narrowly tailored issue, and suggested that the Commission conclude its work in this area. John Cannel responded that, when the statute is enacted, it might still present an issue that the Commission may wish to address. Chairman Gagliardi stated that, rather than conclude the work, the Commission will suspend work in this area, and depending on the steps taken by the Legislature, the Commission may wish to revisit this subject matter.

Model Entity Transaction Act

Samuel Silver discussed an Update Memorandum on the Model Entity Transactions Act (META). This project was initially presented at the March 15, 2017, meeting, and Staff was authorized to engage in research and outreach to determine whether states with economies and demographics similar to New Jersey had enacted, or considered enacting, META. At the same meeting, Staff was asked to identify issues considered by other jurisdictions when determining whether to adopt META, or parts of it.

Following the March 2017 meeting, Staff engaged in research and began outreach in the area. META represents a collaborative effort between the Uniform Law Commission (ULC) and the American Bar Association (ABA) to address business issues that fall within their shared areas of expertise. Mr. Silver advised the Commission that nine states have adopted META in its entirety: Alaska, Arizona, Connecticut, Hawaii, Idaho, Indiana, Kansas, Pennsylvania, and the District of Columbia. In addition, Arkansas and Montana have incorporated some portions of META into existing statutes.

META was drafted to cover four specific business transactions. These four areas of business associations are: (1) mergers, (2) conversions, (3) interest exchanges, and (4) domestication. Mr. Silver stated that the New Jersey statutes presently address three of the four areas discussed in META. Mergers are governed by N.J.S. 14A:10-1; share exchanges are governed by N.J.S. 14A:10-13; and domestications are covered by N.J.S. 14A:13-3. However, New Jersey is one of few states that does not allow for conversion, which is the process of converting one type of business entity into another type.

During the period of Staff's work in this area, a bill was introduced in the Legislature addressing much of the substance of META, and similar bills have been introduced in subsequent legislative sessions. As a result of this legislative action, Staff deferred substantive work in the area. In the current legislative session, Senate Bill 142 was introduced and referred to the Senate Commerce Committee. On May 16, 2022, S142 was reported out of committee for a second reading and subsequently referred to the Senate Budget and Appropriations Committee. The bill addresses the issue of conversion.

Commissioner Bell questioned whether the Commission is statutorily obligated to comment on ULC proposals. In addition, Commissioner Bell noted that it does not appear to be a foregone conclusion that S142 will pass the Legislature. Given that a bill has been introduced on this subject during several successive sessions he pondered whether articulating the Commission's position on the ULC's META proposal might be of assistance to the Legislature.

Mr. Silver explained that Staff has monitored the Legislature's work in the area. Chairman Gagliardi concurred that it was prudent to defer work in this area given the legislative action. Given that there has been no movement on the bill in three consecutive sessions, however, he proposed that the Commission consider commenting on the ULC's work in this area. Chairman Gagliardi directed Staff to inquire whether there was any real prospect that S142 will move so quickly through the legislature so as to render futile the Commission's preparation of a report on this subject. The Chairman requested that Staff update the Commission on the prospects of the bill at the June meeting of the Commission, at which time the Commission will decide whether to assess and comment on META.

Miscellaneous

Mr. Silver informed the Commission that two Legislative Law Clerks would be joining Staff for the summer. They are scheduled to begin their work with the Commission on May 31, 2022. Both Legislative Law Clerks, Mara Pohl and James Finnegan, attend Seton Hall University School of Law.

Mr. Silver advised the Commission that Staff has received comment in response to the preliminary outreach Staff was asked to conduct on the potential project concerning audit adjustments involving tax returns from closed years at the March 2022 meeting. Staff

communicated with Michael Duffy, the Deputy Attorney General who argued the case of *R.O.P. Aviation, Inc. v. Director, Division of Taxation*, 32 N.J. Tax 346 (2021).

On May 16, 2022, Mr. Klein, Counsel for the Director of the Division of Taxation, contacted Mr. Silver via electronic mail and again on May 17, 2022, via telephone. Mr. Klein informed Mr. Silver that if the New Jersey Law Revision Commission has specific recommendations to make regarding revised statutory language, the recommendations should please be provided to the Division of Taxation as soon as possible.

In light of Mr. Klein's communications, Mr. Silver requested authorization to begin drafting language for the Commission's review at the June 2022 meeting. Commissioner Bunn recalled that this was an important project, and Chairman Gagliardi and Commissioner Bertone concurred with Commissioner Bunn. Chairman Gagliardi said that the Commission should respond quickly to those individuals who are charged with implementing a statute when they ask for the Commission's recommendations. Given the position of the Department of Taxation, Staff should attempt to provide the Commission with proposed language for the Commission's review during the June meeting.

Adjournment

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

The next Commission meeting is scheduled for June 16, 2022, at 4:30 p.m. at the office of the New Jersey Law Revision Commission.