MINUTES OF COMMISSION MEETING

June 18, 2020

Present at the New Jersey Law Revision Commission meeting, held via video conference, were: Chairman Vito A. Gagliardi, Jr.; Commissioner Andrew O. Bunn; Commissioner Virginia Long; Commissioner Louis N. Rainone; Professor Bernard W. Bell, of Rutgers Law School, attending on behalf of Commissioner David Lopez; Professor John K. Cornwell, of Seton Hall University School of Law, attending on behalf of Commissioner Kathleen M. Boozang; and, Grace Bertone, of Bertone Piccini, LLP, attending on behalf of Commissioner Kimberly Mutcherson.

Minutes

On the motion of Commissioner Cornwell, which was seconded by Commissioner Long, the Minutes from the May 21, 2020, meeting were unanimously approved by the Commission.

Games of Chance

Laura Tharney advised the Commission that this project was on the agenda because Staff substantively and significantly updated the previously-released Final Report. The Commission was fortunate to have the assistance of Chris Mrakovic, an attorney who recently graduated from law school, who conducted a preliminary review of the statutes in this area and provided his research to Staff for further work.

The Final Report concerning Games of Chance was issued by the Commission on September 26, 2002. Samuel Silver thanked Mr. Mrakovic for his work on this project. He then advised the Commission that the New Jersey statutes regulating bingo, raffles, and amusement games are found in Title 5, Chapter 8, and collectively referred to as "legalized games of chance". Chapter 8 consists of 169 statutes within 5 articles. In the Final Report, the Commission observed that the laws in this area are repetitive, overly detailed, and complex. These concerns led to the Commission's work to propose modifications simplifying the statutes so they can more easily be understood by those who regulate, and operate, these types of amusements.

The Revised Final Report now consists of 62 proposed statutory sections, a Table of Dispositions, and a "quick reference" guide to the proposed statutory modifications. The Revised Report also features a consolidated definitions section, references to statutes enacted after the Commission issued its Final Report, and references to pending legislation involving legalized games of chance. Mr. Silver noted that many of the revisions contained in the Report recognize the advances in electronic and computerized gaming.

Chairman Gagliardi observed that he and Commissioner Bertone are the last two Commissioners who participated in the original Report. He recalled that stakeholders were concerned about the impact that these statutes would have on the games of chance operated at the

New Jersey Shore. The Chairman noted that he does not have any opposition to this project. Commissioner Long observed that the second sentence of Chapter 2, section 10 repeats itself but uses a different dollar amount. She asked that Staff delete the superfluous sentence.

With the correction requested by Commissioner Long and on her motion, which was seconded by Commissioner Bunn, the Commission unanimously voted to release the Revised Final Report of the Commission.

Kidnapping

Samuel Silver presented a Draft Tentative Report proposing modifications to the "unharmed release" provision of New Jersey's kidnapping statute, N.J.S. 2C:13-1(c)(1) as discussed in the cases of *State v. Sherman*, 367 N.J. Super. 324 (App. Div.) *cert denied*, 180 N.J. 356 (2004) and *State v. Nunez-Mosquea*, 2017 WL 3623378 (App. Div. Aug. 24, 2017).

The "unharmed release" provision of NJ's kidnapping statute, N.J.S. 2C:13-1(c)(1), does not set forth the type of harm contemplated by the Legislature for a defendant to be convicted of first degree kidnapping. In *State v. Nunez-Mosquea*, a woman was kidnapped at gunpoint and forced into the defendant's van. The defendant drove the victim to his home, sexually assaulted her, and eventually released her. From the defendant's apartment and van, the police recovered the victim's clothing, college identification, phone, and phone case. The defendant was arrested and charged with first degree kidnapping, convicted, and ultimately sentenced to twenty-five years in prison.

At the April 13, 2020 meeting, the Commission authorized Staff to conduct further research in this area.

Mr. Silver explained that prior to the meeting, he and John Cannel discussed modifying the language set forth in section b.(1) of the Appendix. As drafted, the language of this subsection sets forth the language contained in the Model Jury Charge for kidnapping. The language does not, however, address instances in which the kidnapper does not release the victim. In addition, in the revised version, the second reference to the term "knowingly" would be removed from the proposed modification.

Commissioner Cornwell questioned the change to section b.(1). He stated that as originally drafted, this subsection provided that an individual could be found guilty of first-degree kidnapping if that person, "…*knowingly* harmed the victim or *knowingly* released the victim in an unsafe place prior to being apprehended". He contemplated a situation in which a kidnapper instructed an accomplice to take the victim and release them in a safe place and those instructions were not followed. In removing the second reference to "knowingly" Commissioner Cornwell was concerned that this change would eliminate the *mens rea* element discussed in his hypothetical. He indicated that he preferred the original language. Comissioner Bell agreed with Commissioner Cornwell.

Mr. Cannel commented that the current law contains an exception to first degree kidnapping, but only if the kidnapper succeeds in releasing the person in a safe place, and it

would have to be alleged. The original draft language did not address situations in which the victim was not released at all. In such a situation, Mr. Cannel continued, neither sections one nor two would work, and the change that has been made would remedy this problem. Finally, he mentioned that the current law does not contain a *mens rea* requirement where the kidnapper fails to release the victim.

Commissioner Cornwell commented that the proposed modification might make sense if there was no *mens rea* for either or if there was a *mens rea* requirement for both. Mr. Cannel suggested that it can be drafted to put *mens rea* into both by adding the phrase "knowingly fails to release" to the second portion of the sentence.

Commissioner Bell observed that it is important to have a *mens rea* for the law regarding harm, but it would have to be "knowingly harm". Commissioner Rainone commented that the Legislature's intent was that a kidnapper bears the responsibility of not just trying, but actually releasing the victim unharmed. Commissioner Bunn suggested that it might be worth footnoting the inconsistency discussed herein and keep the drafting in line with the current law. He further noted that it might be a more consistent structure to have "knowingly".

Chairman Gagliardi asked if the Model Penal Code carries the *mens rea* element throughout the kidnapping statute. Commissioner Cornwell replied that the Code is so focused on the *mens rea* of a crime that unless there is a contrary purpose, it will apply to the *actus reus* and New Jersey has followed this aspect of the Model Penal Code.

Chairman Gagliardi requested that Staff redraft the language in the Appendix consistent with the decision of the Appellate Division and add the language that would bring this deviation to the attention of the Legislature as stated by Commissioner Bunn. Commissioner Long agreed with Chairman Gagliardi and then suggested combining section a., 1, 2 and 4, which all use the term "removes", and also combining subsections 3 and 5 which both deal with the "confinement" of the victim. Commissioner Long asked whether subsection 4 was necessary because subsections 1 and 2 appear to cover that type of behavior. Mr. Silver responded that this language is in the current statute in 13-1(b) and it was moved into section 1. He offered to conduct additional research and redraft this aspect of subsection b.

Commissioner Bell asked what the legislative intent was for the separate sections of the "removal provisions". Commissioner Bell said, with regard to section b.(1)1 concerning "knowingly harmed", that kidnapping is harmful itself or causes emotional harm, psychologically harm and physical harm to the victim. He suggested that "knowingly harm" would have to be something that is done after the kidnapping takes place.

Commissioner Bunn agreed with Commissioner Bell and noted that the harm should be something other than the kidnapping, but it would be difficult to make that clear as the statute is currently constructed, because of the two elements of "removal" and "confinement". Commissioner Long mentioned that the temporal aspect of their suggestion is difficult to draft into a statute. Chairman Gagliardi suggested that "in the course of" might resolve this issue and noted that harm incurred during the course of a kidnapping was beyond the scope of this project.

Chairman Gagliardi requested that Staff redraft the language as discussed by the Commission and to conduct further research into the legislative history to address Commissioner Bell's question. Commissioner Bunn also suggested researching the most current language in the Model Penal Code, which might contain language that may be helpful to this discussion.

Interpretive Statement

Mark Ygarza discussed with the Commission a Revised Draft Tentative Report proposing modifications to N.J.S. 19:3-6 regarding whether the interpretive statement that accompanies a public ballot question must be drafted by the governing body pursuant to the discussion in *Desanctis v. Borough of Belmar*, 455 N.J. Super. 316 (App. Div. 2018).

Previously, the Commission asked Staff to conduct a fifty-state survey and revise the language set forth in the Appendix. As a result, the language of N.J.S. 19:3-6, subsection b. was both modified and reorganized into three sections. These sections set forth the statutory requirements pertaining to public questions involving amendments to the State Constitution, a state statute; and a local ordinance or resolution. Additionally, the language in section a.(3)(B) and subsection c. of the statute were modified to require that an interpretive statement fairly and accurately reflect the ballot question presented to the voters. Finally, the statutory revisions make it evident that the approval of any interpretive statement "shall not be unreasonably withheld" by the governing body.

The Commission's concerns regarding the use of the terms "true purpose" and "unclear" were addressed by modifying the statute to include the language used by the Court in *City of Orange Twp. Bd. of Educ. v. City of Orange Twp.*, 451 N.J. Super. 310, 325 (Ch. Div. 2017). In that case, the Court determined that describing the "true purpose" of the question would mean that the voter would have a better understanding of the consequences and scope of their vote for the public question.

Mr. Ygarza engaged in further research that revealed that there are two hundred forty-nine statutes that contain the search term "public question". One hundred seventy-five of those statutes employ the term "public question" in the text. Most of these references are contained in Title 19 and relate to elections. Other statutory references are contained in Titles 40 and 40A and relate to municipalities and counties. Of the two hundred and fort-nine statutes, thirty contain *pro forma* ballot questions included in the statutory language, some of which allow for modification. Finally, only N.J.S. 40:54-7.1 embeds an interpretive statement in the statute.

A fifty-state survey was conducted to determine whether the statutes of other states might provide any guidance. Only four states had statutory language specifically referencing the term "interpretive statement", and the statutes of those states offered limited guidance.

Commissioner Long opined that it was peculiar that the governing body, that formulates the public question, is also called upon to draft the interpretive statement. Commissioner Bell followed-up by asking whether the proposed statutory language, "informative, fair and balanced" is being relied on to ensure that the objectivity in the process. Chairman Gagliardi responded that

although the public body writes both the public question and the interpretative statement, the Assignment Judges work extremely hard to ensure fairness in the process. Commissioner Long agreed. The interpretative statement, according to Chairman Gagliardi is designed to give the voter the critical information necessary to determine its vote. Staff was instructed to revise section c. and delete the phrase "…shall not merely repeat the language of the questions, but…"

Subject to the changes discussed by Chairman Gagliardi, on the motion of Commissioner Bell, seconded by Commissioner Long, the Commission unanimously voted to release the Tentative Report.

Worker's Compensation - Statute of Limitations

Samuel Silver discussed a Draft Tentative Report proposing modifications to clarify the statute of limitations in disputed medical-provider claims as discussed in *Plastic Surgery Center, PA v. Malouf Chevrolet-Cadillac, Inc., 457 N.J. Super. 565 (App. Div. 2019), certif. granted,* 238 N.J. 30, (2019) *and certif. granted,* 238 N.J. 31, (2019) *and certif. denied,* 238 N.J. 57 (2019); 241 N.J. 112 (2020).

In *Plastic Surgery Center, PA v. Malouf Chevrolet-Cadillac, Inc.,* the medical providers filed petitions more than two years from the date of the accident but less than six years from the claims or accrual date of contract law. The compensation judge interpreted the statute of limitations set forth in the Worker's Compensation statute, N.J.S. 34:15-51, to require "every claimant," including medical providers, to file a petition with the Division within two years from the date of the accident.

The Appellate Division reversed, indicating that the term "claimant" appears in twenty-five statutes in Title 34. Twenty of them are found in Chapter 15. Claimant for compensation is generally reserved in compensation law to employee. The New Jersey Supreme Court indicated that "[t]he Legislature is, of course, free to address the [statute of limitations] […] in the future."

On May 21, 2020, the Commission authorized Staff to conduct preliminary outreach on the statute of limitations issue and provide the Commission with an updated memorandum regarding the results. Mr. Silver contacted Richard Rubenstein, a certified workers compensation attorney, who recommended that the Commission address the statute of limitations in contested medical provider cases by setting forth the limitation in a statute.

N.J.S. 34:15-15 consists of six undesignated paragraphs. The Appendix to the project restructures the statute to replace archaic language and promote the accessibility of the law. Mr. Silver stated that, as drafted, subsection f.(2) explicitly cross-references the statute of limitations in contractual matters that is set forth in N.J.S. 2A:14-1. Consistent with the holdings in *Plastic Surgery Center, PA v. Malouf Chevrolet-Cadillac, Inc.,* this modification clarifies that medical provider claims are subject to the six-year limitation. The six-year provision has been placed in subsection N.J.S. 34:15-15 because the Legislature established the exclusive jurisdiction of the Division in this statute.

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

Uniform Wage Garnishment Act

John Cannel presented a Memorandum discussing the Uniform Wage Garnishment Act. The current law contains three to four sections, with most substance left to the courts to address. The Uniform Law is much more detailed and ornate. Mr. Cannel sought the Commission's guidance regarding whether Staff should examine the Uniform Law or discontinue work in this area.

Chairman Gagliardi stated that it is within the Commission's mandate to review the Uniform Law, even if the Commission ultimately recommends no action. Commissioner Long stated that this is a worthy project. Although this project may not result in a complete revision, she agreed that there may be some aspects of the Uniform Law that might benefit the current body of law. Commissioners Bunn, Bertone, and Chairman Gagliardi concurred with Commissioner Long's comments. Commissioner Cornwell expressed no opinion on the project.

The Commission authorized Staff to conduct further work in this area.

Child Endangerment

Samuel Silver presented a Memorandum to define the term "harm" as set forth in subsection (a)(2) of New Jersey's Child Endangerment statute and discussed by the New Jersey Supreme Court in *State v. Fuqua*, 234 N.J. 583 (2018). The *Fuqua* Court considered whether the State must prove that a child suffered "actual harm" in order to convict a defendant under New Jersey's child endangerment statute, N.J.S. 2C:24-4(a)(2).

New Jersey's endangerment statute provides that any person who has a legal duty to care for a child, and who causes the child harm that would make the child an abused or neglected child, is guilty of a crime of the second degree.

In *State v. Fuqua*, police entered the defendant's motel room to find the defendants, various co-defendants, and the defendant's six children, along with an assortment of controlled dangerous substances easily accessible by the children and in proximity to children's toys on the table-top and windowsill.

The trial court denied the defendants' motion for judgment of acquittal and provided that the State was only required to prove the defendants subjected the children to a "risk of harm" in order to secure a conviction. The Appellate Division agreed, and the Supreme Court focused on the conduct of the parent who exposes the child to 'substantial risk of death or physical harm'. The State therefore was not required to prove actual harm to the victim; rather, the State was only required to prove that the victim was exposed to a substantial risk of harm.

Previously, the Commission asked Staff to conduct a 50-state survey to determine how other states use the term "substantial risk of harm", as well as the range of behavior

contemplated by the use of this term. Mr. Silver advised the Commission that all fifty states have laws that punish those who injure or expose a child to the risk of injury. There is, however, no universally accepted child endangerment statute. Staff examined all statutes on endangerment, abuse, neglect, cruelty & mistreatment of kids. In the 51 statutes, 25 use the word "endanger," 15 use abuse, neglect or both, and 4 states and the District of Columbia recognize "cruelty."

Presently, New Jersey and Washington use the term "causes harm" in their statutes. The courts in both states, however, have indicated that exposure to a "substantial risk of harm" is sufficient to convict a defendant.

\The term "substantial risk of physical injury" is used in six states and Washington D.C. Arkansas and West Virginia use the language, "creating a risk of death or serious physical injury." The phrase, "circumstantial or situational exposure," is used in 34 states, includes physical or emotional harm to prohibit conduct that would harm a child.

Commissioner Cornwell stated that this is an important project, and that the New Jersey statute should make it very clear that a "risk of harm" is incorporated with child endangerment. Commissioner Bell agreed and indicated that the statute should be refreshed to catch-up to the current state of the law. Commissioner Long concurred.

The Commission authorized Staff to continue further work in this area.

Remarriage

Arshiya Fyazi presented a Memorandum on the status of her project involving remarriage and alimony obligations as governed by N.J.S. 2A:34-23 and as discussed in *Sloan v. Sloan*, 2017 WL 1282764 (App. Div. Apr. 6, 2017).

In *Sloan*, the Final Judgment of Divorce required the defendant to pay plaintiff alimony until his death or remarriage. Subsequently, plaintiff and his significant other held a commitment ceremony, publicly announced their engagement, and referred to each other as husband and wife. When the defendant sought to terminate her alimony obligations the plaintiff objected, since he had not officially remarried. At trial, the defendant succeeded in having her alimony payments terminated, but the Appellate Division reversed and remanded, with instructions to consider "changed circumstances" and a then-recent amendment to the alimony statute.

The amendment to N.J.S. 2A:34-23 addresses changed circumstances but does not specify whether it applies retroactively. Ms. Fyazi noted that when this issue was first brought before the Commission, Commissioner Long pointed out that in *Quinn v. Quinn*, 234 N.J. 34 (2016), the Supreme Court made clear, albeit in a footnote, that the amendment was not retroactive. Commissioner Bell questioned whether the Supreme Court, in a new case, would clarify the law. The Commission requested that Staff engage in outreach to try and ascertain how frequently this issue recurs.

Ms. Fyazi reached out to a number of practitioners and members of the State Bar Association's matrimonial section in an effort to obtain the information requested by the Commission. There was no consensus on the issue of retroactivity.

Commissioner Cornwell was unsure about the ambiguity and the lack of a definition for "cohabitation." Laura Tharney noted that courts differed in their approaches to the amendment, with some applying it retroactively and others only prospectively. Commissioner Long said there was no ambiguity in *Quinn* that would encourage such a result, while Commissioner Bell said the case required a careful read to determine why the Supreme Court's holding is not being followed.

So far in the current legislative session, five bills dealing with alimony have been introduced. None address the question of alimony and remarriage. Commissioner Long stated that it seemed peculiar that there is no pending legislation regarding this issue. Commissioner Rainone proposed that the Commission study all the alimony laws enacted in the last two years to determine whether any of them address this issue. Commissioner Bell stated that this project could help the Legislature by emphasizing the need to specify in the statute whether the amendment is retroactive. Laura Tharney suggested that the Commission could reach out to bill sponsors to discuss potential changes to the bills to address the issue.

Chairman Gagliardi asked that Staff prepare a memo to be released in July for bill sponsors. Commissioner Long stated that she would like the memorandum to include any cases that have dealt with this issue regardless of the court's approach to the amendment. She commented that it is likely that the Supreme Court will address the question, even though many matrimonial lawyers agree that the law is not retroactive. Commissioner Rainone also asked that Staff review the Supreme Court cases that address cohabitation. Commissioner Long said that many parties put the "death or remarriage" clause into their marital separation agreements.

With Commissioner Long's consent, Chairman Gagliardi instructed Staff to prepare a memorandum in advance of the next filing date and provide it to Commissioner Long, who agreed to provide Staff with the benefit of her expertise on the subject. Thereafter, the memorandum would be revised and submitted to the Commission with the balance of the filing day documents.

Miscellaneous

Laura Tharney confirmed with the Commission that the July meeting date will be moved from July 16, 2020 to July 30, 2020. She also advised that on May 27, 2020, John Cannel testified on behalf of the Commission regarding the legislation involving Common Interest Communities.

Adjournment

The meeting was adjourned on the motion of Commissioner Long, which was seconded by Commissioner Bunn. The next Commission meeting is scheduled to be held on July 30, 2020, at 4:30 p.m.