

## **MINUTES OF COMMISSION MEETING**

**September 20, 2012**

Present at the New Jersey Law Revision Commission meeting held at 153 Halsey Street, 7<sup>th</sup> Floor, Newark, New Jersey were Chairman Vito A. Gagliardi, Jr. 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 Pinccini LLP, attended on behalf of Commissioner Rayman Solomon.

Also in attendance were Christina W. Strong, Esq., Dr. John Halperin, and William Reitsma, Director of Clinical Services at the New Jersey Organ and Tissue Sharing Network.

After calling the meeting to order, Chairman Gagliardi asked that the Minutes reflect the Commission's acknowledgment of John Cannel's retirement at the end of the month from the position of Executive Director of the New Jersey Law Revision Commission. Chairman Gagliardi expressed the Commission's gratitude for Mr. Cannel's work and for making the Commission what it is. Mr. Cannel thanked the Commission in return for the opportunity to continue working on a volunteer basis at what he called "the best legal job in the world."

Chairman Gagliardi then asked about the status of the second pejorative terms project, which was discussed at the Commission's last meeting. Marna Brown replied that she was waiting for comments, which she expected to receive at the end of the month, and that she anticipated that a draft would be ready for the October meeting.

### **Minutes**

The Minutes of the July meeting were unanimously approved on motion of Commissioner Virginia Long, seconded by Commissioner Ahmed Bulbulia.

### **Uniform Determination of Death Act**

At the last meeting, the Commission directed Ms. Brown to prepare a Final Report recommending that no legislative action be taken on this act because New Jersey already has a determination of death statute that enhanced the uniform law. Marna Brown said that she subsequently learned from Christina Strong, Esq., that there is some concern about the New Jersey statutory provisions regulating medical standards. As a result, the focus has shifted from consideration of a uniform law, to include consideration of whether New Jersey's current determination of death statute should be amended.

Ms. Strong said she is General Counsel for the New Jersey Organ and Tissue Sharing Network, an organization active in the northern three-quarters of the state. She introduced Dr. John Halperin, neurologist and chairman of the board of the New Jersey Organ and Tissue Sharing Network, and Mr. William Reitsma, Director of Clinical Services at the New Jersey Organ and Tissue Sharing Network. Ms. Strong said that New Jersey was one of the last states to pass a declaration of death act and that the issues had been very hotly contested at the time, especially the religious exemption. The organization for which she has been counsel for 20 years was directly involved in this process. Ms. Strong explained that the New Jersey statute contains a clause that is not part of the uniform law and that requires two state agencies to create clinical diagnostic criteria for death determinations. The New Jersey statute also requires that doctors determining death have certain training. These additions reflected constituents' concerns at the time the legislation was passed.

Ms. Strong said the statute's requirement that two state agencies create clinical guidelines is the problem. Guidelines take too long to be approved and cannot keep pace with advances in medical practice. Ms. Strong said it took three years—from 2004 to 2007—to finalize brain death guideline regulations, and after they were finalized, a critical typographical error was discovered. When she and her colleagues tried to correct these guidelines, they realized that medical practice had changed and that the guidelines were no longer current.

Organ procurement is federally regulated and the United Network for Organ Sharing will not permit the recovery of anatomical gifts from a person not deemed legally dead in their state, even if the person is clinically dead. Because of New Jersey's regulations, it often happens in New Jersey that a person who is determined to be clinically dead is not deemed legally dead and therefore is unable to donate organs.

John Cannel asked whether the regulatory agencies wanted authority over death determination guidelines and would resist it being taken away. Ms. Strong responded that she does not know but does not think so.

Dr. John Halperin introduced himself as a professor of neurology and a practicing neurologist at Mount Sinai Hospital. He is involved with organ donation and helped write the organ donation guidelines for the state of New York. The American Academy of Neurology creates these guidelines, and he serves on their organ donation guidelines committee.

Dr. Halperin said death determination does not belong in state regulation; instead, standards should be set forth by the medical profession. As it stands now, there are aspects of death determination that are not found in the regulations, and the regulations sometimes conflict with hospital guidelines. Dr. Halperin said that for brain death, doctors look at three things: whether the person is in a comatose condition, whether the person is breathing, and whether the brain stem is working. He gave an example of an inconsistency regarding body temperature. New Jersey regulations require a body temperature of 92 degrees Fahrenheit or less in order to make a determination of death. An apnea test is also required. However, in order to conduct an apnea test, the body temperature must be 97 degrees Fahrenheit. Inconsistencies like this are not helpful from a clinical practice perspective. As a result of the amount of time required to correct and approve new regulations, the medical literature or recommendations will have changed. As a result, New Jersey's guidelines could be too strict or not strict enough, depending on medical practice at a given time.

Mr. William Reitsma added that conflicting clinical and regulatory guidelines create a dilemma for families: families know a loved one is dead, but doctors continue performing tests because they are required by state regulations. This creates doubt in the minds of family members as to whether their loved one is truly gone. Dr. Reitsma added that he has been in the field for 30 years and has never seen a case where a person was determined to be dead with a clinical exam and an apnea test and was later determined to be alive after further confirmatory testing.

Commissioner Long asked the speakers what should be done to remedy the problem. Ms. Strong said that N.J.S. 26:6A-4 b.(2) should be eliminated. That subsection states that the Board of Medical Examiners and the Department of Health together adopt, and from time to time revise, regulations setting forth "currently accepted medical standards, including criteria, tests and procedures, to govern declarations of death upon the basis of neurological criteria."

Chairman Gagliardi asked whether the change recommended by the speakers would move New Jersey's law closer to the uniform law and Ms. Brown answered that they would. Commissioner Bell asked who sets the medical standards and whether clinical guidelines were accessible to the public. Dr. Halperin said that the standards were written and published by the American Academy of Neurology. Commissioner Bell asked how the Board of Medical Examiners would react to the proposed change. The commenters said that the Board of Medical Examiners might be relieved not to have to revise the regulations yet again.

Commissioner Long moved to rescind the Commission's direction for Ms. Brown to prepare a Final Report on the Uniform Determination of Death Act and instead directed her to prepare a report reflecting the proposed new statutory language for the October meeting. The motion was seconded by Commissioner Bell and adopted unanimously.

### **Uniform Commercial Code Article 4A**

John Cannel explained that a Draft Final Report regarding Uniform Commercial Code Article 4A had been provided for Commission consideration because there was a change in federal regulations last summer, taking a small group of wire transfers out of law completely. Before the meeting, a legislative committee accepted the change to Article 4A as an amendment to pending legislation. Chairman Gagliardi recommended changing the report's introduction to include when it was approved and also the status of the revision in other jurisdictions and then moved that the report be released as a Final Report. The motion was seconded by Commissioner Bell and adopted.

### **Multiple Extended Term Sentences**

Commissioner Long asked why a change to the statute was necessary since she read the *Hudson* court decision as articulating what the statute means. Chairman Gagliardi responded that the Commission is charged with the responsibility for making sure the statutory language matches the court determinations in order to eliminate potential confusion.

Chairman Gagliardi gave the example of the pledge of allegiance and Title 18A. Decades ago, the Third Circuit ruled that the statute requiring that a person stand during the pledge of allegiance was unconstitutional. The statute, however, remains unchanged and at least once a year, he is required to address this issue in the course of his representations of school boards. The Commission proposed a revision of the statute to match the case law to avoid the confusion.

Ms. Tharney said that the automatic case law searches established by Staff identify cases in which a court notes an ambiguity or an inconsistency in statutory language to avoid statutes that are traps for the unwary. Commissioner Long noted that the majority in *Hudson* did not find the language ambiguous, only the dissent did.

Commissioner Long said that in this instance, it is not necessary to read cases to clarify the statutory language. Commissioner Bell said that, in his view, the statute does appear ambiguous. The court gives the example of when a second extended sentence is

required and suggests there may be circumstances in which it is not possible for a court to comply with subsection (a), but it is not clear what those circumstances might be.

Mr. Liston said that clarifying statutory language could avoid a situation in which a similar case comes before the Supreme Court when there are enough factual differences to distinguish that case from *Hudson* and reach a different outcome. He said that even though the statute was clear enough for a majority of the Supreme Court, it is not as clear as it could be and may not be clear enough for someone who reading the statute without the benefit of the case law.

Ms. Tharney said this was a two-step question for the Commission. The first question was whether this is a project that is necessary and, if so, whether the language as drafted is clear enough. Chairman Gagliardi asked whether the Commission wished to undertake the project, and all agreed that it was appropriate to do so. Mr. Liston said that Staff chose to offer two versions of the language. The first, a more limited version of the language, reflects a belief that there probably are no scenarios other than a mandatory extended-term sentence where compliance with subsection (a) would not be possible. The alternate version is more open-ended and is intended to account for unforeseen sentencing situations. Since the Commission had not yet seen or authorized the project, Staff had not sought comment on the issue of which language might be more appropriate. Ms. Tharney asked if the Commission had thoughts about a direction the project should take. If not, Staff would begin by seeking comment on the issue.

Commissioner Bell said that he preferred the more general language since the Supreme Court did not identify a single situation in which the language in question might apply. He suggested, however, that both versions be distributed for comments. Mr. Liston asked whether the alternate version should say, “except as otherwise provided by statute” or “except as otherwise provided by law.” Commissioner Bell said it should say “except as otherwise provided by law.” The Commission agreed and unanimously authorized Staff to proceed with the project.

### **No Early Release Act**

Uchechukwu Enwereuzor briefly summarized the history of the Act, explaining that when the No Early Release Act was first enacted the Legislature did not include any provisions regarding parole supervision for an inmate that had completed their specified term. The provisions regarding parole were added later. The issue is that the act does not specify whether people who are sentenced to more than one term should serve the post-release parole supervision period consecutively or concurrently. The Supreme Court held that having concurrent parole periods was not consonant with Legislature’s objective.

Mr. Enwereuzor said Staff is seeking authorization to revise the statute in accordance with the *Friedman* case since a defendant should know all of the consequences of a conviction under the statute.

Commissioner Bell said he is not persuaded that just because the act was meant to give longer sentences that this also meant that at every possible decision point the convicted person will get the longest sentence, or that a rule should be adopted that results in the longest possible parole supervision period. If you have two sentences close in time, once you finish the first term in prison, you have a five-year parole period. If you violate that parole, there may be a penalty. Commissioner Bell suggested that the terms should be concurrent or judges should have the choice at the time of the sentencing. He added that this issue pertains to a very small group of people with very long sentences.

Chairman Gagliardi said that the decision was a year or so old and the Legislature had not reacted to it. Ms. Tharney said that since there is no mechanism by which opinions are directed to anyone at the Legislature, it is hard to interpret Legislative inaction on an issue, and that is why Staff included this project for consideration by the Commission. Chairman Gagliardi said that the Court's decision was sufficient to resolve the issue and Commissioner Long agreed. The Commission unanimously agreed not to take any further action on this project.

### **NJ Filial (Family) responsibility/support statutes**

Marna Brown said this matter was brought to her attention by the Office of the Ombudsman for the Institutionalized Elderly. Filial support statutes require relatives to bear responsibility for the financial support of indigent family members. Although about 29 states have such laws, few of them are enforced. Pennsylvania's statute, however, was invoked in a way that has caused concern among observers in New Jersey. After review, Staff concluded that New Jersey law was quite different from Pennsylvania law, and probably would not be applied in a similar manner. However, Staff found that New Jersey's law in this area is unclear and uses anachronistic terms like "overseer of the poor." Ms. Brown said she believed this would be a worthy revision project. Commissioner Bell said that he does not like the idea of nursing homes being able to sue the children of patients, so he would support a project to clarify the law and Commissioner Long said she thinks this is a good project. The Commission unanimously approved of Staff proceeding with the project.

## **Uniform Certificate of Title for Vessels Act (UCOTVA)**

David Liston said that Commission authorized Staff to proceed with this project in February 2012. The Uniform Act was released in July 2011 by the Uniform Law Commission and so far, only Connecticut's legislature has introduced the act, which moved through the senate there.

Mr. Liston said that Staff reached out to various groups in New Jersey who might have an interest in this legislation and received some initial feedback and promises of further comment. Mr. Liston spoke with the president of the Marine Trades Association who said her organization needed more time to consider the proposed legislation but would be providing comments. A member of the United States Power Squadrons, a recreational boating organization, said that group would be holding a national meeting this month and that the Uniform Act would be raised at the meeting.

Mr. Liston said he attended a meeting of the New Jersey Boat Regulation Commission, where he got initial reactions to some of UCOTVA's provisions from individuals in attendance. Mr. Liston said he also spoke with the commander of the local Coast Guard sector who explained that while she does not have the legal expertise to comment on particular provisions of the act, the Coast Guard generally favors state law uniformity.

Mr. Liston said the comments received to this time did not identify particular problems with the current titling system but that the UCOTVA provisions generally received a positive response from those in the boating community. Mr. Liston said the people with whom he spoke liked the idea of the title branding provision and that a commenter had suggested requiring personal watercraft, such as jet skis, to be covered by New Jersey's titling law. Personal watercraft can be quite valuable and easy to steal, because they are only required to be registered, not titled. The commenter said it made more sense for the value, rather than the length, of the vessel to determine whether the vessel must be titled. UCOTVA's definition of vessels that must be titled addresses this concern by taking into account whether the vessel is powered or unpowered. Current New Jersey law requires vessels longer than 12 feet to be titled but gives no consideration to whether the vessel is powered or unpowered.

Commissioner Long asked whether any more states were in the process of adopting the uniform act. Mr. Liston replied that the only state to even introduce it so far was Connecticut. Mr. Cannel said that this was a relatively new uniform act and that the Coast Guard wanted a very uniform system and might begin encouraging adoption gradually.

Chairman Gagliardi said that the Commission appreciates the extensive cross-section of entities with whom Mr. Liston had interacted and said that if the boating entities think this is a good law, then the Commission is doing something valuable.

Mr. Liston asked that the Commission consider two revisions to the report. First, Mr. Liston said that an existing chapter on abandonment of vessels that has implications for titling. He said the law was recently amended at the suggestion of the Marine Trades Association to make it easier for marina owners to take title and dispose of vessels that have been abandoned on their property. He said that chapter should not be superseded by this act and should remain as part of the statutes. He suggested adding a subsection (e) to UCOTVA section 21 to make that clear. The second proposed revision was to add a reference to the ULC website alerting readers that detailed explanations of UCOTVA's provisions and its drafting history are available there. Chairman Gagliardi asked for a motion to release the draft tentative report as modified by the handout and verbal description by Mr. Liston. Commissioner Bell made the motion, which was seconded by Commissioner Long, and the Commission unanimously agreed to release the project as a Tentative Report with a 60-day comment period with room for additional time if requested by commenters.

### **Equine Activities Liability Act**

Mr. Enwereuzor said that the Court had determined that the Equine Act contained a latent ambiguity as result of the interaction between the broad nature of the inherent risks and the acts that can result in operator liability. Mr. Enwereuzor said that he drafted the proposed language to be structurally similar to the Ski Act and the Roller Rink Act. Ms. Tharney explained that the lack of clarity and the latent ambiguity in the statute may arise in part from the current structure of the statute and not the language of its provisions. The Roller Rink Act and the Ski Act appeared to be less subject to misinterpretation, so this act was restructured to resemble them.

Ms. Tharney said that an appellate division case had been decided this week that again dealt with the issue of an operator's exposure to liability and the type and level of risk that is assumed by a participant. Mr. Enwereuzor suggested that since this issue has arisen in more than one case, clarifying the statute would be useful. In section 9, as currently drafted, the language can be interpreted to create an affirmative obligation on the part of the operator to eliminate all risks. This language is similar to that which appears in the Ski Act and was chosen after reading the initial language, which imposes liability on the operator if someone is injured because of a known latent condition that the operator did not eliminate.



Ms. Tharney said that on page 5, subsection (a)(3), the standard may be have been expanded beyond a requirement to warn to include an obligation on the part of the operator to eliminate reasonably known dangerous latent hazards or to post warnings if they cannot be eliminated. Staff does not want to change the legal standard unless the Commission feels it is appropriate to do so.

Chairman Gagliardi said that because this change goes to the heart of the project, he was not sure this was ready for a tentative report. Ms. Tharney said that Staff hoped that providing draft language to potential commenters might encourage comment.

Commissioner Bell said that he would add obligations to section 9 which he suspects will prompt some responses. For example, it seems that operators should have a duty based on their knowledge of horse behavior and an obligation to give notice of the peculiarities of a horse so that the rider has more information about whether or not he or she might want to try to ride that horse. It should not be the operator's responsibility to determine whether the horse matches the rider without this information. He also said he was not thrilled with subsection 9 (a) (1). The Equine Act suggests language that does not imply any obligation to check regularly to make sure equipment is not faulty. The Roller Rink statute contains such an obligation and perhaps language could be added specifying that it is the responsibility of the operator, to the extent possible, to check equipment to make sure it is in good mechanical working order. Also, in the Roller Rink statute, there is a provision that requires posting the obligations of both the operator and the person who uses the equipment. Although there is a warning requirement in section 10, it is very broad and requires signs indicating that the operator is not responsible for someone's death because of the inherent risks of equine activity. Commissioner Bell said that it is unclear what is inherent and what is not. Ms. Tharney said that the statute defines inherent risk in subsection 3 and that language could be incorporated into the warning requirement. Commissioner Bell agreed that it would be appropriate to do so. Mr. Enwereuzor said that there is language in the statute about an obligation for reasonable assessments, and that it is the participant's obligation to identify him or herself as someone who has never been on a horse, as opposed to someone who competed in the Olympic equestrian events.

Ms. Tharney asked whether the Commission approved expanding the language and creating affirmative obligations as directed by Commissioner Bell. The Commission asked that a draft be prepared and sent informally to interested parties for comments.

## **Miscellaneous**

Marna Brown said that the Commission's report on UMOVA was just introduced in the Assembly, and that the New Jersey Adult Guardianship and Protective Proceedings Jurisdiction Act was recently signed by the Governor. She also said that she was advised of an Assembly sponsor for the first pejorative terms project. John Cannel said that the UCC revision had been released from Committee earlier in the day and that he expected the revised LLC bill to be signed by the Governor.

The Commission meeting went into an executive session on motion of Chairman Gagliardi, seconded by Commissioner Long. The meeting then returned to public session on motion of Commissioner Long, seconded by Commissioner Bell. Chairman Gagliardi reported that the Commissioners agreed to promote Laura Tharney to the position of Executive Director of the Commission, effective October 1, 2012, and approved salary increases for Ms. Tharney, Marna Brown, and Jenene Hatchard. These recommendations were approved on motion of Commissioner Bell, seconded by Commissioner Long. Chairman Gagliardi reported that he had spoken with Commissioner Burstein, and that Commissioner Burstein expressed his approval of these recommendations. The Commission also approved a change in John Cannel's title from Executive Director to Reviser of Statutes, effective October 1, 2012, as well as corresponding changes to Commission letterhead, on motion of Commissioner Long, seconded by Commissioner Bell.

The Commission then agreed to set the starting time of the October meeting at 4:00pm at the recommendation of Chairman Gagliardi and the meeting was adjourned on motion of Commissioner Bell, seconded by Commissioner Long.