

## MINUTES OF COMMISSION MEETING

October 19, 2017

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 Virginia Long (via telephone), and Commissioner Andrew Bunn. Professor Edward A. Hartnett, of Seton Hall University School of Law, attended on behalf of Commissioner Kathleen M. Boozang, and Grace C. Bertone, Esq., of Bertone Piccini LLP, attended on behalf of Commissioner Michael T. Cahill.

### Minutes

The Minutes of the September 19, 2017, Commission meeting were unanimously approved on motion of Commissioner Bunn, seconded by Commissioner Long.

#### **Alternative Procedure for Dispute Resolution Act (APDRA)**

Samuel Silver discussed a Draft Final Report intended to ameliorate the ambiguity in the language of N.J.S. 2A:23A-13(a) which was recognized by the New Jersey Appellate Division in *Citizen United Reciprocal Exch. v. N. NJ Orthopedic Specialists*. He noted that the statute currently provides a party with certain time periods within which to commence a summary action after receiving an award; or, after receiving an award that had been modified pursuant to subsection d. of the statute.

During the September meeting, Commissioner Hartnett asked Staff to provide clarification of the proposed language to N.J.S. 2A:23A-13(a), specifically the proposed subsection (2). Commissioner Long suggested a reunification of the statute, eliminating the subsections, and provided Staff with draft language that would do so. Mr. Silver noted that that the recommendations of both Commissioner Long and Commissioner Harnett had been incorporated into the proposed, amended statutory language.

Chairman Gagliardi observed that the full text of N.J.S. 2A:23A-13(a) appears in the "Executive Summary." In addition, he pointed out that the full text also appears in the second paragraph of the section of the report entitled "Background." The Chairman suggested striking the second reference to the full text from the "Background" section of the report. The balance of the Commissioners agreed with the Chairman's recommendation.

With the correction of a typographical error and the striking of the duplicative paragraph, the Commission voted unanimously to release the Final Report on the motion of Commissioner Bunn, seconded by Commissioner Long.

## **Subpoena v. Subpena**

Samuel Silver spoke about a Draft Final Report relating to the spelling of the word “subpoena” throughout the New Jersey Statutes. Mr. Silver noted that the New Jersey statutes currently utilize two spellings of the word “subpoena.” Presently, there are 345 New Jersey statutes that utilize the traditional spelling “subpoena” and 87 statutes that reference an alternative spelling of the word – “subpena.” Although some legal search engines appear to return results for both spellings, an individual who is conducting research in this area may obtain inaccurate or incomplete computer based search results because of the inconsistency in the spelling depending upon the search engine or the program used.

Commissioner Hartnett stressed that consistency in search results, particularly for non-lawyers, was imperative. Commissioner Long remarked that this was a worthy project. Chairman Gagliardi inquired about support for the project received during the outreach period.

Mr. Silver advised the Commission that during outreach, the project received support from an experienced State reference librarian. In addition, he noted that support was received from the judiciary. Mr. Silver stated that the Central Appellate Research Staff of the Appellate Division of the New Jersey Superior Court transmitted a letter supporting the unification of the spelling of the term in the New Jersey Statutes. Chairman Gagliardi asked that this support be reflected in the final version of the report.

Subject to that proposed modification raised during the meeting, the Commission voted unanimously to release the Final Report on the motion of Commissioner Bunn which was seconded by Commissioner Hartnett.

### **Definition of “Marital Status” in Law Against Discrimination**

Timothy Prol summarized the Memorandum prepared by Beshoy Shokralla, an NJIT student and former extern with the Commission, concerning the definition of “marital status” and whether this term should be explicitly defined in the New Jersey “Law Against Discrimination.” The case that brought this issue to the attention of the Commission was the 2016 decision of the New Jersey Supreme Court decision in *Smith v. Millville Rescue Squad*.

Mr. Prol noted that the current statutory scheme defines the terms “familial”, “civil union”, and “domestic partnership”. It does not, however, define the term “marital status.” Commissioner Long commented that this appears to be a worthwhile project. She noted, however, that the Supreme Court has defined marriage. In light of the Court’s definition, Commissioner Long questioned whether the Commission should attempt to define it.

Commissioner Bunn, concurring with Commissioner Long, stated that the Court has defined “marital status.” He continued that an attempt by the Commission to further define “marital status” may spawn unintended consequences. Commissioner Bunn explained that societal values shift over time and that caution should be taken not to limit the definition of a term such as “marital status.”

Commissioner Hartnett expressed concern, however, that *pro se* litigants may be involved in matters concerning the law against discrimination. He commented that he would be interested to see how the definition is used in future matters. Commissioner Bertone agreed with Commissioner Hartnett’s observations.

Chairman Gagliardi remarked that the Commission’s mandate is to clarify the law rather than define it, adding that before determining whether Commission work in this area was appropriate, he was interested to hear of the reactions of both the plaintiff’s bar and defense bar to the current definition of marital status and whether a modification could be of assistance.

The Commission authorized outreach to the various stakeholders to determine whether they support or oppose defining “marital status” in the New Jersey “Law Against Discrimination.”

### **“Misdemeanor” Usage in Statutes**

In connection with research conducted relative to New Jersey partnership statutes, Samuel Silver noted that it was presently a “misdemeanor” for a partnership to transact business in New Jersey if it had not filed the appropriate paperwork with the County Clerk’s Office. He discussed with the Commission a potential project concerning the usage of the terms “misdemeanor” and “high misdemeanor” in the New Jersey Statutes. These terms are not in current usage. Instead, New Jersey’s criminal law now refers to crimes by their degree.

There are still, however, 271 references to the term “misdemeanor” in the New Jersey Statutes. These references span 41 titles and 1 appendix. Further, where no alternate punishment is specified in the individual statute, Subtitle 3, Chapter 42, Section 1, subsection b. equates a misdemeanor to a crime of the fourth degree. Thus, the potential penalty for those found guilty of a misdemeanor would be up to eighteen months incarceration and up to a \$10,000 fine.

In addition to misdemeanors, Mr. Silver noted that the New Jersey Statutes still contain 36 references to “high misdemeanors.” A “high misdemeanor” is the equivalent of a crime of the

third degree. Where no penalty is set forth in the statute, a person who is found guilty of a “high misdemeanor” would be subject to up to five years of incarceration and a \$15,000 fine.

John Cannel advised the Commission that historically, the New Jersey statutes did not classify crimes as felonies. He noted, however, that the statutes referenced only misdemeanors and high misdemeanors. Mr. Cannel further indicated that at the time that Title 2C was enacted, statutory references to “misdemeanors” should have been conformed to the present statutory schema.

Chairman Gagliardi stated that it is important for the citizens of New Jersey to understand the potential consequences of their actions. He asked whether references to misdemeanor would be replaced with the current statutory counterparts. Laura Tharney answered that each of the statutes containing these terms would be reviewed by Staff. She added that outreach would be conducted in order to determine whether each statute was still relevant; whether the punishment set forth in each statute fit with the present criminal code equivalent; and, whether the crime was subsequently incorporated in the New Jersey Criminal Code. Commissioner Bunn suggested that this was a worthwhile project, and Commissioner Hartnett agreed, noting that in light of the potential immigration or other consequences if the misdemeanor was considered a felony pursuant to federal law, this project could be important.

Staff was authorized to move forward with the research and outreach on a project in this area.

### **Tort Claim Act Notification**

Timothy Prol discussed a Memorandum drafted by Legislative Law Clerk Erik Topp, based upon the holding of the Court in *Alberts v. Gaeckler*.

Mr. Prol summarized the facts of the case involving a pair of tort actions raised by a married couple. The lead plaintiff filed a timely claim pursuant to N.J.S. 59:8-8. This complaint, however, did not contain an allegation on behalf of her husband for negligent infliction of emotional distress or a bystander liability claim. After the statute of limitations had run, the plaintiffs sought to amend to their complaint to incorporate a claim on behalf of plaintiff-husband.

The Court examined the following issues: (1) whether a claimant asserting a bystander liability claim was required to comply with the notice requirements of the New Jersey Tort Claims Act (TCA), N.J.S.59:1-1 to -14-4; and, (2) if a separate tort claim notice is not required,

does the two-year statute of limitations on personal injury actions bar a bystander liability suit arising from the same set of operative facts.

In addressing the first issue, the *Alberts Court* required that a plaintiff asserting bystander liability claims against the state must comply with the requirements of the TCA. Regarding the second issue addressed by the Court, Mr. Prol noted that the filing date of an amended complaint alleging bystander liability damages may not relate back to the date of the original filing.

Staff sought the Commission's authorization to conduct additional research and outreach to determine whether the Tort Claims Act (TCA) should be modified to clarify that bystander liability claims must comply with the notice requirements of the TCA.

Commissioner Hartnett supported additional research in this area as it related to the Torts Claim Act. He advised Staff that the scope of additional research should be limited to the TCA. For purposes of this project, Commissioner Hartnett suggested that Staff avoid the "relation back" doctrine.

With the unanimous agreement of the Commissioners, research and outreach were authorized regarding this issue.

### **Driving after Suspension but Before Reinstatement of License**

Laura Tharney discussed a Memorandum, drafted by Erik Topp, requesting Commission authorization to conduct additional research and outreach to determine whether modifying 2C:40-26 would aid in interpreting the law and eliminate further litigation regarding the issue raised in *State v. Torella*.

After summarizing the facts of the case, Ms. Tharney commented that the issue in this case was whether an individual may be found criminally liable for driving with a suspended license, after the period of suspension had ended but before the formal reinstatement of a driver's license. Ms. Tharney noted that the *Torella* Court relied upon the reasoning employed by the Appellate Division in *State v. Perry*. She also noted that the Court, held that the statute does not criminalize the conduct presented in this case.

The Commission engaged in a discussion of what could make this statute clearer. Commissioner Hartnett suggested that the statute is clear and that those charged during this "gap time" are not guilty of this offense. He reasoned that there may be instances where law enforcement charges a person with a violation of this statute; however, education concerning this subject should not emanate from the Commission. Commissioner Bunn concurred with Commissioner Hartnett.

Chairman Gagliardi suggested that Staff engage in preliminary outreach to law enforcement and municipal court practitioners on this issue in order to determine whether there is confusion among in this area.

### **Miscellaneous**

The Commission extended its thanks to Jayne Johnson for her years of service to the Commission and wished her well.

The meeting concluded and was adjourned on motion of Commissioner Hartnett, seconded by Commissioner Bunn.

The November 16, 2017, Commission meeting is a morning meeting – beginning at 10:00 a.m.