

## **MINUTES OF COMMISSION MEETING**

**December 20, 2018**

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; Professor Bernard W. Bell, of Rutgers Law School, attended 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 C. Bertone, Esq., of Bertone Piccini LLP, attending on behalf of Commissioner Michael T. Cahill.

### **Minutes**

The Minutes of the October 19, 2018 Commission meeting were unanimously approved on the motion of Commissioner Bunn, seconded by Commissioner Cornwell.

### **Definition Aggravated Recklessness**

John Cannel discussed with the Commission a Draft Final Report proposing that a definition of aggravated recklessness be added to the New Jersey Code of Criminal Justice (the Code). He noted that the mental state for “aggravated recklessness,” in which the actor demonstrates recklessness under circumstances manifesting an extreme indifference to the value of human life is not defined in N.J.S. 2C:2-2b.

Mr. Cannel recommended that N.J.S. 2C:2-2(a) be modified to reflect that a person may be found guilty of an offense if he or she acts with aggravated recklessness. This mental state is defined in what would become N.J.S. 2C:2-2(b)(3). The two paragraphs that follow this newly added section would be respectively renumbered (4) Recklessly; and, (5) Negligently.

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

### **Unclaimed Property**

John Cannel discussed with the Commission a Draft Final Report relating to Unclaimed Property.

Mr. Cannel’s outreach to the Office of the Administrator of Unclaimed Property revealed that the Administrator was of the opinion that RUUPA did not contain substantive improvements to New Jersey law. The Administrator did, however, suggest that the substantive provisions added by the Law Revision Commission, to include real property and modernize the handling of

unclaimed property in safe deposit boxes, would be useful additions to New Jersey law, and the Report was prepared accordingly.

The Commission unanimously voted to release the project as a Final Report on the motion of Commissioner Bunn, which was seconded by Commissioner Cornwell.

### **Mens Rea for Disorderly Persons Offenses**

Mr. Cannel next discussed with the Commission a Draft Final Report relating to the applicability of *mens rea* to disorderly persons offenses. This issue was raised in the case of *State v. Bessey*, 2014 WL 99282205 (App. Div. 2015). In *Bessey*, the Court held that where a statute does not set forth a *mens rea* requirement, N.J.S. 2C:2-2 provides a presumption that a crime must be committed knowingly. The statute, however, does not contain such a presumption for disorderly persons offenses.

Mr. Cannel explained that Staff had examined all of the disorderly persons offenses contained in the Code. Because of the number of offenses contained in statutory provisions outside the Code – many of which are regulatory offenses – categorizing them would be difficult. Therefore, Mr. Cannel stated that the recommended changes were limited to offenses within the Code.

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

### **Public Assistance Law**

With regard to the Public Assistance Law, Mr. Cannel explained that many of the statutes in the earlier chapters of Title 44, The Poor Law, were enacted in the nineteenth century. As a result, much of Title 44 is now anachronistic. In addition, very little of Title 44 is used by those who administer welfare programs. After a thorough review, Staff had concluded that only a select number of statutes, buried among the multitude of statutes that have no modern function, should remain. The Draft Final Report before the Commission represents the merger of the Commission's work in the area of filial responsibility and its previously-released work on the "poor" laws.

Commissioner Bell and Mr. Cannel engaged in a discussion regarding the "payback provisions" contained in Section 2.10. Mr. Cannel noted that when a parent or relative or legal guardian with whom a dependent child is living applies for or receives benefits they may be required to execute a written promise to repay those funds if it appears that there is pending entitlement to a payment.

Chairman Gagliardi inquired whether Mr. Cannel has had any discussions about this topic with any legislators. Mr. Cannel responded that his discussions had been limited to those individuals who work in this area of the law. Ms. Tharney added that this project has been slated for outreach to various legislators upon its completion and release.

Commissioner Bunn asked whether the regulations are affected and whether these changes require a ratification clause. Mr. Cannel said yes, and added that when drafted it will require an effective date. He also noted that there will be a need for additional modification of the law in the future since there remain a handful of municipalities that still run their own offices. When these cease to operate, the relevant statutes can be repealed.

Chairman Gagliardi stated that he found the progress in this area and the response to be encouraging. On the motion of Commissioner Cornwell, which was seconded by Commissioner Bunn, the Commission unanimously voted to release the project as a Revised Final Report

### **Guardianship**

Samuel Silver explained that as a result of a request from a Senator, Staff engaged in an extensive review of the New Jersey Guardianship statutes, the laws of all 50 states, and the new Uniform Law in this area in order to determine whether New Jersey is employing the “best practices” in this area of law. The 50-state survey included the following areas: terminology and definitions; types of guardianships; types of training; types of monitoring and reporting.

To ensure that the information was provided to the Senator without undue delay, Mr. Silver wanted to send the information to the Senator before the end of the year. Even though the work began as a legislative request, Staff wanted to track the usual Commission procedures, so the information was prepared in the form of a Draft Tentative Report.

Prior to discussing the substance of the project, Mr. Silver took a moment to thank those involved in the research and preparation of the Report and the Appendix. Those individuals include: Commissioner Grace Bertone and legislative law clerks Eric Topp, Andrew Edmonson, and Timothy Bott.

Title 3B contains two general definition sections that contain 42 terms. In addition, however, the Title contains 24 separate and distinct definition sections as well as 14 statutes that define terms without using the term “definition.” The significant terms - such as guardian, beneficiary, person, and fiduciary - are defined differently throughout the Title. Mr. Silver suggested that Title 3B would benefit from the consolidation of these multiple definition sections and a clear definition of each term.

Prevalent in Title 3B is the use of the terms “incapacitated individual” and “ward.” Currently, 31 states use the term incapacitated individual and 28 states utilize the term ward in their statutes. These terms, have recently been characterized as demeaning and offensive to individuals with disabilities. New Jersey has a long standing history of using “people first” language. Consistent with this practice, Mr. Silver recommended the adoption of the terms “individual subject to” guardianship, conservatorship or a protective order to replace the terms currently contained in Title 3B.

Title 3B provides for a wide array of guardianship options. The judiciary may impose a general guardianship, a limited guardianship, a temporary guardianship, or a protective arrangement. In this regard, New Jersey is among the more progressive states when addressing an individual’s liberty and property. These statutes, however, may benefit from a clarification of: who may seek protective arrangements; who may have access to an individual subject to a protective order; and by allowing a protective arrangement in lieu of a conservatorship.

In New Jersey, neither the Rules of Court nor the statutes set forth qualifications that an individual must possess in order to become a guardian. Instead, to become a guardian, an individual need only review a training guide and watch an instructional video prior to the first judicial proceeding. According to Mr. Silver, there is currently no statute that disqualifies an individual from becoming a guardian based on that person’s criminal history. He suggested that additional outreach be conducted regarding the collateral consequences of a criminal conviction or bankruptcy.

Commissioner Cornwell commented on the lack of training required to become a guardian. Commissioner Bertone responded that the training in New Jersey is minimal. She noted that additional training is provided when the individual subject to guardianship has property. Commissioner Bertone commented that family members usually volunteer to become guardians and because the group of potential volunteers is so small, rigorous statutory requirements could further diminish the pool of volunteers.

Finally, Mr. Silver stated that guardians are expected to do what is “best” for individual subject to guardianship. This decision-making process is frequently a difficult one for inexperienced guardians. Therefore, Mr. Silver observed that in order to preserve the individual’s self-determination, some of the language of the 2017 Uniform Guardianship, Conservatorship and Other Protective Arrangements Act, should be incorporated into the New Jersey statutes in order to produce a more supported-decision-making paradigm.

Commissioner Gagliardi noted that as a result of the cancellation of the November meeting, the dates for the outreach period should be adjusted accordingly. On the motion of

Commissioner Bunn, seconded by Commissioner Bertone, the Commission unanimously voted to release the project as a Tentative Report.

### **Definition of Tumultuous**

Samuel Silver next discussed the Draft Tentative Report addressing the terms “public” and “tumultuous” as they appear in N.J.S. 2C:1-1 (the Disorderly Persons statute). This issue came to the attention of the Commission after the Appellate Division decided *State v. Finnemen*, 2017 WL 4448541 (App. Div. Oct. 6, 2017). In that case, the Court addressed what it meant to be “tumultuous” in public within the meaning of the statute. The defendant in *Finneman* created a disturbance inside a Walgreens store, yelling obscenities and making obscene hand gestures towards employees. The responding officers observed the defendant to be irate and gesticulating wildly.

Mr. Silver explained that the term “tumultuous” is not defined in the New Jersey statutes. In an attempt to ascertain a definition for this infrequently-used word, the trial court consulted a dictionary published in 1978 (the year that the statute was enacted). The dictionary, however, was of little assistance as it defined tumultuous as “marked by tumult”; “tending or disposed or cause to excite a tumult”; and “marked by violent or overwhelming turbulence or upheaval.” Given the limited assistance provided by the dictionary definition, the Court turned to the limited case law in this area for guidance.

In 2001, the Appellate Division examined the word “tumult” in the context of municipal ordinances affecting the rental of summer properties and defined it as either an “uproar” or “violent agitation of mind or feelings.” In addition, the Court found that excessive noise could be an uproar or violent agitation from the perspective of the victim.

Staff conducted a survey of each state’s disorderly conduct statutes. This survey revealed that 24 states use the term tumultuous in their statutes, while the remaining states do not. When the term is used, it is most closely associated with riotous behavior. Indiana is currently the only state that provides a statutory definition for the term tumultuous.

Based on Staff’s research, Mr. Silver suggest three possible options for clarifying New Jersey’s disorderly conduct statute: (1) eliminate the term tumultuous from the statutes; (2) remove the word tumultuous from the statute and include a provision prohibiting “excessive or unreasonable noise”; (3) add to the statute a definition for the term “tumultuous” adopted from the Indiana Criminal Code.

Commissioner Cornwell observed that the Indiana Option defines tumultuous conduct as behavior that results in or is likely to result in serious bodily injury to a person. He continued that the phrase “serious bodily injury” is a term of art in the criminal statutory context, and includes behavior that may result in death or the risk thereof. Such a definition, he suggested, sets the bar

too high. Commissioner Cornwell suggested a definition that eliminated the word “serious” from the bodily injury portion.

Commissioner Bunn said that it appeared that the statute was attempting to address the “one man riot.” He also discussed the importance of proposing a revision that provides constructive notice to members of the public. With this in mind, Commissioner Bunn favored a statutory definition, but said that he believed that “tumultuous” is an outdated term. Chairman Gagliardi concurred with Commissioner Bunn’s assessment of the statute and his recommendation.

Commissioner Bell stated that the statute should cover disorderly behavior, and observed that subsection b. of the statute can regulate noise consistent with the First Amendment. He then expressed concern that any attempt to regulate the content of an individual’s speech might run afoul of the First Amendment.

Chairman Gagliardi asked Staff to examine whether the current statute infringes upon the right to free speech protected by the First Amendment. In addition, Chairman Gagliardi suggested that Staff use the Indiana definition of tumultuous and conduct additional research to see how the Commission can come up with statutory language to cover frightening or threatening noises and see whether behavior similar to what occurred in *Finnemen* is covered elsewhere in the New Jersey Statutes.

### **Hearsay Exception in Title 9 and Title 30**

In the case of *New Jersey Division of Child Protection and Permanency v. T.U.B.*, Mr. Cannel observed that the Appellate Division considered the special evidentiary provision for Title 9 cases as established in N.J.S. 9:6-8.46. This provision allows the admission of certain hearsay statements by children regarding allegations of abuse or neglect. The issue raised by the case was whether the provision applies in Title 30 cases involving the termination of parental rights.

Mr. Cannel noted that while the provision had been applied to Title 30 cases in the past, the Appellate Division found that it applies only to Title 9 cases.

Commissioner Bunn questioned whether the hearsay exception for child abuse should carry over to matters involving the termination of parental rights. He asked whether allowing the exception in that context would violate the Confrontation Clause, and suggested that the Commission should be cautious about expanding such an evidentiary exception.

Commissioner Cornwell pointed to the distinction between criminal and quasi-criminal proceedings. A termination hearing, according to Commissioner Cornwell is a quasi-criminal proceeding and some protections are therefore afforded to the litigant. He opined that statutes should be generous in protecting the children involved in abuse and neglect matters but that this

does not mean that statements like those in *T.U.B.* should be permitted in cases involving the termination of parental rights. He continued that proceedings to terminate parental rights do not bring with them the same sense of urgency associated with allegations of child abuse. Commissioners Bell and Bertone agreed with Commissioner Cornwell's assessment.

Commissioner Bunn noted that any change to the State's evidence rules should reference the federal rules so that the two remain parallel. The Commission asked Staff to present revised language at an upcoming meeting.

### **Mistaken Imprisonment Act**

Rachael Segal, a Legislative Law Clerk, discussed her Memorandum concerning the Mistaken Imprisonment Act, prepared in response to the Appellate Division decision in *Kamienski v. State Department of Treasury*. The Mistaken Imprisonment Act currently allows a claimant to receive monetary compensation for the time he, or she, was mistakenly incarcerated. To be awarded such a recovery, the claimant must first satisfy a number of requirements.

The Plaintiff in *Kamienski* was convicted of two counts of purposeful murder, felony murder, and conspiracy to possess cocaine with intent to distribute. He did not challenge his cocaine conviction. The Court of Appeals for the Third Circuit reversed Kamienski's murder convictions and ordered that his petition for habeus corpus be granted. In his civil action, Kamienski was awarded \$343,000 for wrongful imprisonment. Kamienski appealed, claiming that the trial court erred in interpreting the requirements for the calculation of damages and the scope of reasonable attorney fees under the Act.

On appeal, the Court observed that the Act is silent regarding the specific circumstances of this case. Ms. Segal stated that although seemingly counter-intuitive, the imposition of a consecutive sentence inures to plaintiff's benefit. The absence of any disqualifier in the Act based on defendant's guilt on *another* charged offense, or the consecutive sentence imposed, supports the conclusion that N.J.S.A. 52:4C-6 does not bar a defendant from seeking compensation under the Act.

Next, Ms. Segal noted that the Plaintiff argued that the trial court erred in multiplying the number of years of his incarceration by \$20,000 rather than by the amount he earned in the year prior to his incarceration. The Appellate Division found that "the doctrine of the last antecedent ... holds that, unless a contrary intention otherwise appears, a qualifying phrase within a statute refers to the last antecedent phrase." Since the phrase "for each year of incarceration" was not separated from \$20,000 with a comma, "the doctrine of last antecedent provides support for the interpretation that 'for each year of incarceration' applies only to \$20,000." Ms. Segal noted that the legislative history of the damages provision was persuasive to the Court, specifically the restructured definition of the ceiling for damages enacted in 2013, which states that: "Damages awarded under this act shall not exceed the greater of: (a) twice the amount of the claimant's income in the year prior to his incarceration; or (b) \$50,000 for each year of incarceration."

The Commission authorized Staff to conduct additional research and outreach in order to determine whether modifying the statute would aid in interpreting the provision.

### **Miscellaneous**

Laura Tharney advised the Commission that the 2018 Annual Report will be distributed on the filing day for the January 2019 meeting.

Ms. Tharney also reported to the Commission that sixteen bills based on Commission work were introduced in 2018, and that while some have made progress through the Legislature, none made it through both houses.

She also indicated that Commission Staff drafted an article for publication in the Seton Hall Legislative Law Journal and will be working with the Birmingham Law School in the United Kingdom to review certain aspects of the criminal law on the request of a Professor there who said the Commission came to his attention as a result of “impressive work done in the area of criminal law.”

The Commission thanked Rachael Segal of Rutgers Law School for her valuable contributions and service to the Commission during her tenure as a Legislative Law Clerk and wished her well.

### **Adjournment**

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

The next Commission meeting is scheduled to be held on January 17, 2019 at 10:00 a.m.