

**MINUTES OF COMMISSION MEETING**  
**October 22, 2009**

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., Commissioner Albert Burstein, Commissioner Andrew Bunn and Commissioner Sylvia Pressler. Professor Ahmed I. Bulbulia of Seton Hall Law School attended on behalf of Commissioner Patrick Hobbs. Professor Bernard Bell of Rutgers University School of Law attended on behalf of Commissioner John J. Farmer, Jr. Grace C. Bertone, Esq. of McElroy, Deutsch, Mulvaney & Carpenter, LLP, attended on behalf of Commissioner Rayman Solomon.

Also in attendance were Donald M. Legow, Legow Management Company, LLC; Nicholas J. Kikis, New Jersey Apartment Association; and Paul J. McGrath on behalf of the Builders Owners and Managers Association.

**Minutes**

The Minutes of the September meeting were approved upon motion by Commissioner Bunn, seconded by Commissioner Pressler subject to the correction of the spelling of Commissioner Gagliardi's name on the first page of the minutes.

**Title 22A**

Laura Tharney described the changes made to the report since the last meeting. She indicated that updated correspondence, with more accurate figures, had been received from the Surrogates since the letter included in the filing day packet and was provided with the meeting materials. The updated letter also brought to the Commission's attention the impact of guardianships filed by State entities with no filing fee.

Ms. Tharney also explained that the information provided on behalf of the Surrogates after release of the Final Report made it clear that reducing the fees for certifications and exemplifications to the same fee for those services that is charged in the Law and Chancery Divisions did not reflect the real difference in time and effort expended by the Surrogates in the course of preparing substantially different documents. Since there was no practical way to distinguish between certifications and exemplifications that were akin to those prepared in the Law and Chancery Divisions, and those unique to the Surrogates' offices, the fee for all such documents was returned to the current statutory level. Ms. Tharney noted that the goal of this project had been to improve the statute, not disrupt the budget of any entity impacted by the statute. The fee for issuing a subpoena remains at the level identical to that imposed in the Law and Chancery Divisions since the Surrogates had not indicated that such a reduction posed a problem.

Copying fees for copies made by Surrogates' staff were also returned to the current statutory levels as a result of the substantial budgetary impact of reducing those fees. The language in the statute referring to the copying charge for bulk-request data was again modified, this time to refer to the provision in *Court Rule* 1:38-9 calling for the establishment by the Supreme Court for a fee schedule. The charge for self-service copies, which had been included in the draft at \$0.25 per page was removed and replaced with the words "actual cost" to reflect case law determinations throughout the State that are currently consolidated on appeal. In addition, the Introduction to the report was changed to reflect changes in copying fees. Ms. Tharney also pointed out the language change made as a result of the existing statutory language requiring the State, rather than any county, to pay juror fees.

The Commission unanimously agreed to release a Revised Final Report incorporating the changes made by Ms. Tharney, after a motion by Commissioner Pressler seconded by Chairman Gagliardi.

## Title 9

John Cannel explained that this draft included language addressing the Commission's concern that the *Fawzy* case had been construed too broadly. This draft limits 9:2A-1(f) to results of arbitration, and subsection (h) calls on a court to give deference to arrangements "freely and knowingly" agreed to by both parents. Commissioner Pressler suggested that the word "freely" be changed to "voluntarily" in subsection (h) and that the language in both subsections (h) and (f) use the words "voluntarily and knowingly". Mr. Cannel asked whether the deference standard is the correct standard and, in response, both Commissioner Pressler and Chairman Gagliardi indicated that was the essence of what the Commission had previously discussed. Commissioner Pressler stressed that *Fawzy* should be construed as narrowly as possible.

As suggested by Professor Bell, Mr. Cannel changed 9:2-7.1(b)(5) to broaden the factors considered before determining grandparent visitation. Commissioner Burstein suggested that in section 2A-1(a), the word "effectuate" in the first paragraph should be replaced with "implement." Commissioner Pressler agreed and commented that the words "regardless of" in the second line are unnecessary and that the language should instead read "continuing contact with both parents, whether the parents have separated..." Chairman Gagliardi suggested that in section 2(a)(2) which requires that the court indicate the basis of its decision on the record, the word "indicate" should be "state." Commissioner Pressler also noted that in 9:2A-1(f), the words "that was" after arbitration and before "agreed" were unnecessary and should be replaced with customary arbitration language to the effect of "the Court shall confirm the arbitration award establishing custody provided the award was voluntarily and knowingly agreed to..."

Commissioner Pressler asked whether the intention in section 2a(5) was to say that if any parent supports application, the grandparent does not have to prove harm, only the best interests

of the child. Mr. Cannel said that was the intention of the subsection and Commissioner Pressler said that the language needed to be clarified to reflect that. Mr. Cannel said that the requested changes would be reflected in the revision of the report provided at the next meeting.

### **UEVHPA**

Steve Rappoport said that Staff was looking for guidance on sections 10, 11 and 12 of this report before it was released for further comments. He explained that Staff had received comments from about a third of the entities from whom comment had been solicited.

In Section 10, the Department of Health and Senior Services (DHSS) had raised a concern that there could be conflicting rules or directives from different governmental entities. Since each group has sovereign power over the groups they oversee, various regulations could result and one entity could foreseeably promulgate a regulation that intruded into another entity's jurisdiction. Commissioner Bell suggested that a governing council could be established. Commissioner Bunn said that since this statute is only relevant in an emergency situation, OEM should be the regulatory body in charge of coordinating government response to the emergencies addressed by the UEVHPA. Mr. Cannel added that the benefit of having OEM or the Department of Health coordinate this is that they each have fulltime operations. Commissioner Burstein said that since OEM will be the centralized implementing body, it should be the agency promulgating regulations after consultation with others having an interest.

Professor Bell noted that the governing statutes of these agencies might have to be rewritten to allow OEM to be in charge in emergencies. Commissioner Pressler suggested that it is best if OEM promulgates regulations for emergencies after consultation with these agencies. Commissioner Pressler said that if there was a potential that DHSS would strongly object to OEM having the power to promulgate the regulations, then DHSS should be in charge of doing so after consultation with all of the agencies. Her concern is that there should be a single promulgator of regulations; whether OEM or DHSS.

Section 11 of the draft immunizes volunteers from liability to varying degrees and provides two alternatives. Alternative A immunizes all volunteers using language from the Good Samaritan Act. Alternative B immunizes those making less than \$500 if they go to the scene of the emergency. Commissioner Pressler asked whether the volunteers would be covered by malpractice insurance. Mr. Rappoport replied that the answer varied. A non-physician would not likely be covered by insurance. A physician would likely be covered by out-of-state insurance only if sent by the hospital for which the physician worked and acting within the scope of employment. The result is that virtually none of the physicians the Act seeks to encourage to volunteer would be covered by insurance. Mr. Rappoport's inquiries to insurers revealed that the availability of coverage may also vary by insurer. One large insurer indicated that if physicians were licensed in New Jersey, then they might have coverage. The Act, however, does not license

physicians in New Jersey; it merely allows them to engage in limited practice here during the emergency conditions. Commissioner Gagliardi suggested that the immunity available in Option A might be a way to address the issue. Commissioner Bunn added that giving immunity to out-of-state physicians gives them an incentive to come to New Jersey and help here, which is the point of the Act.

Mr. Rappoport also raised the issue of whether the Act should apply to in-state people as well as out-of-state because New Jersey's Good Samaritan Act affords less protection than the Act. The Good Samaritan Act only protects doctors working at the side of the road, not in an emergency room. Commissioner Bunn suggested that the Commission did not want to immunize everyone in the state who does anything during the course of the emergency, whether emergency-related or not. Mr. Rappoport noted that several other states have chosen not to adopt this section and simply refer to their own Good Samaritan acts. Since New Jersey's Good Samaritan Act does not cover work done in hospitals, if the Commission wishes to give volunteers an incentive, those volunteers should not be deterred by the prospect of being forced to make a claim against their insurance policy.

Chairman Gagliardi said that even if insured, a person would have to endure being sued and having a claim against their policy, and paying a deductible. He suggested that there be immunity as set forth in version A for both in-state and out-of-state volunteers as long as the aid they are providing is emergency-related. Commissioner Pressler suggested that the language provide that the immunity afforded by this section shall apply to care providers in this state who are providing emergency services. Chairman Gagliardi added that "emergency services" need to be defined and Commissioner Bunn noted that Section 2(b) contains some language that can be used to define emergency services. Commissioner Bunn said that in 2(c), Staff may want to add after "laws" "and of the United States" because the President may be the one who declares an emergency.

Commissioner Bell asked why the organizations that employ the individuals who volunteer to help here should not be responsible for providing coverage for them and it was suggested that that might act as a deterrent to the use of volunteers. Commissioner Bunn and Chairman Gagliardi said they would like to see another revision of this section before the Commission makes a final decision regarding whether to retain or discard this section.

When the possibility of using the services of physician volunteers from other countries, as well as other states, was raised, Mr. Rappoport said he would check with the Board of Medical Examiners on that issue.

Commissioner Bell asked about entities using the services of out-of-state medical personnel and asked whether the hospital should have liability in that situation, explaining that seriously injured individuals may have no other recourse but to sue the hospital. Commissioner

Bunn said that the draft needs to clarify that the hospital in another state that sent a doctor is not liable solely because the doctor is normally employed there or was sent by the hospital. Commissioner Bell suggested that the draft should not expand the vicarious liability of an in-state hospital to make them liable when they would not otherwise be liable if it was an in-state person.

Commissioner Pressler questioned the meaning of subsections 11b(3) and (4). Mr. Rappoport explained that subsection (4) allows a hospital to sue a volunteer even though an injured person cannot do so. Commissioner Bunn pointed out that this section provides the term “host entity” which Staff can use when redrafting. Commissioner Pressler asked what “contract” in subsection (3) meant and Mr. Rappoport explained that it referred to a contract that does not involve care; failing to pay a hotel bill or being paid for services not rendered are two examples. Commissioner Pressler asked that Staff omit an exception in subsection 11b(5) for vehicles not being used for emergency purposes.

Mr. Rappoport said that the language of the draft could include language indicating that the Good Samaritan Act applies to apply to out-of-state doctors under emergency circumstances as described in the draft. That language could clarify that it applies both in and out of hospitals and covers people who help during the course of the declared emergency. The GSA would only apply to in-hospital assistance provided by to out-of-state volunteers. Commissioner Bunn requested the inclusion of language protecting for out-of-state sending entities. Commissioner Gagliardi requested that Staff revise the draft language to state that the liability protection afforded by the Good Samaritan Act is extended to provide protection for in- and out-of-state emergency workers in the context of the emergency only.

Mr. Rappoport asked whether volunteers should be allowed workers compensation as appeared in section 12, noting that it could be expensive and the state would have to pay for it. Commissioner Pressler replied that they should be allowed workers compensation, noting that if the issue were litigated, the workers would likely be considered special employees anyway. The Commission agreed that the State should be the party to offer the coverage. Commissioner Bunn said that where the Act refers to death “under the law”, it should be clarified to read “under the workers compensation law” and said that the Act should cover the person automatically, rather than requiring an election. He suggested eliminating section (2) and line 5 of paragraph (c).

Commissioner Gagliardi suggested that the Act as drafted by the Commission should comply with the overriding purpose of the law, which is to encourage volunteers to come here in case of an emergency.

### **Landlord Tenant**

Marna Brown asked the Commission to consider outstanding issues relating to the proposed Landlord Remedies Chapter that were carried from the last meeting. She explained

that she had worked with Commissioner Bell on the revision to the double rent holdover provision but that Mr. Pascale had advised her before the meeting that he was still against the provision even though it had been pared down quite a bit. The provision allows a landlord damages or double rent when a tenant gives notice but does not leave the premises when stated in the notice.

Commissioner Bunn asked who would decide whether to elect the remedy of damages or double rent. Ms. Brown said the plaintiff/landlord would choose the remedy. Commissioners Burstein and Pressler agreed that this section should be treated as the use and occupancy section which provides only for actual damages. Mr. Kikis expressed his concern that that change would eliminate the penal effectiveness of the statute. The statute has existed since 1855, and the concept of double rent is commonplace in state statutes. The double rent provision protects an important interest of the landlord in ensuring that apartments are transitioned in an orderly fashion.

Ms. Brown asked the Commission whether subsection (c), which applies to nonresidential leases, should permit a double rent remedy. There is no automatic holdover in nonresidential tenancies and often a tenant does not give the landlord proper notice that the tenant does not intend to continue the lease. Commissioner Pressler said that double rent should be eliminated in this subsection as well and that the landlord should be entitled to actual damages only. She said that the “excusability” language at the end of subsection (a) should also be eliminated. Ms. Brown proposed that subsection (c) should include the language “unless the lease provides otherwise”, and that subsection (e) was no longer needed.

Ms. Brown asked the Commission about its preference regarding proposed alternate versions of the definition of property subject to distraint. She explained that Staff had tried to modernize and update the definition because the original statute dealt with things like cattle and crops. Each version includes a reference to the exclusion of property owned by a public entity based on the Commission’s earlier determination. In addition, Staff preserved the exclusion for personal clothing, from the original statute. Commissioner Pressler asked whether the statute would apply to nonresidential leases with charitable entities, such as, for example, the Red Cross. Both Ms. Brown and Mr. Cannel said they believed it would, although this was not addressed in the current statute. The Commission preferred Version C.

Ms. Brown then discussed the provisions regarding “waste” and whether it was necessary to retain them. Mr. Cannel noted that the term “waste” in a modern sense means both destruction of the property and a change in the character of the leasehold and explained that the case law was not consistent. Ms. Brown suggested that the waste provisions were no longer necessary because their sole purpose was to provide a remedy of treble damages. Otherwise, the landlord has a breach of contract or tort action. She referred to a New Jersey case that held that alterations to the property that changed the nature of the building, even where the value

increased, were “waste” if the burden to the landlord also increased. In this particular case, the landlord was required to pay an increase in taxes. Commissioner Pressler said the statute should except any alteration which increases the property’s value. Commissioner Burstein and Commissioner Bunn agreed that commercial landlords should be able to take care of these issues themselves in the lease drafting. Commissioner Burstein suggested that perhaps a contract rather than a property approach was best, and that the recourse should be to actual, not treble, damages. Commissioner Gagliardi asked whether the concept of “waste” could be removed entirely from the statute. Ms. Brown replied that it could not because some “waste” provisions pertained to tenants in common and reversionary interests. The consensus of the Commission was that the the “waste” provision should remain but without treble damages.

Finally, Ms. Brown said that at an earlier meeting, the Commission wanted to remove the action for use and occupation as unnecessary because the landlord has an action for ejectment or trespass. Staff determined that since that statute was concerned with parol leases, which were addressed in the revision to the Statue of Frauds, the need for the statute no longer existed and it could be eliminated in its entirety.

The proposed chapter on Landlord Registration was held until the next meeting.

#### **Title 2A (capias)**

Commissioner Pressler moved to release the report and Commissioner Bunn seconded the motion. Commissioner Bunn said that he had some grammatical changes to the report which he would provide to Staff.

#### **Handicapped Parking**

Based on Laura Tharney’s report, Commissioner Pressler moved and Commissioner Burstein seconded that no action be taken on the proposed change to the law. The Commission concurred.

#### **Miscellaneous**

Mr. Cannel noted that Ms. Brown met with Commissioner Burstein and other attorneys at his office concerning the Durable Power of Attorney Act project. Commissioner Burstein indicated that there had been requests for a revised draft since that meeting and that people were looking forward to the project.

The November Commission meeting is scheduled for November 19, 2009.