

## **MINUTES OF COMMISSION MEETING**

**September 16, 2010**

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

Also in attendance were Michael Splaine, Director, State Affairs of the Alzheimer's Association-National Organization; Leena Shah, Coordinator of Public Policy Advocacy & Volunteers; Kenneth Zaentz, VP of Development, Alzheimer's Association-Greater New Jersey Chapter; Laura Holly-Dierbach, VP Programs and Services of the Alzheimer's Association-Greater New Jersey Chapter; Linda Coppinger, Executive Director for New Jersey of the Alzheimer's Association-Delaware River Valley Chapter; Meredith L. Grocott, Esq., Schenck, Price, Smith & King, LLP; Shirley B. Whitenack, Esq., Schenck, Price, Smith & King, LLP; Sharon Rivenson Mark, Esq., on behalf of NAELA; and David McMillin, Esq., of Legal Services of New Jersey.

### **Minutes**

The minutes of the July 15, 2010 meeting were approved unanimously subject to the amendment reflected in an e-mail from Professor Bell clarifying that the Commission took no action and did not recommend a change to the statutory language in the report pertaining to the extension of service facilities.

#### **Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act**

Ms. Brown suggested that if the Commission recommended adoption of the uniform act in its entirety, Staff likely would still need to make certain New Jersey specific revisions.

Shirley Whitenack, Esq. of Schenck Price, introduced herself as a person who had participated in drafting the uniform law. She agreed that there needs to be some tweaking to accommodate New Jersey practice. She stated that the act did not raise as many concerns on the issue of domicile as one might think. The home state of the person means the state which decides who gets jurisdiction; that state had the first crack at making that determination and a home state court could still decide that another state should have jurisdiction. She noted that when working on the uniform act participants tried hard to follow the uniform child custody act. She stated that the more states that adopt the jurisdictional act, the better it will be for seniors because the act will help address the needs of our mobile society.

Ms. Leena Shah of the Alzheimer's Association stated how important the act was to persons with Alzheimer's. Caregivers live distant from their loved ones and often in other states. She explained that with different state laws, the uniform law would improve people's lives. She reiterated that 19 states have already enacted the uniform law. She submitted a written statement.

Linda Coppinger of the Alzheimer's Association testified that her chapter experienced caregivers grappling with guardianship issues across state lines. She reiterated that caregivers should be able to concentrate their time on taking care of their loved ones and not getting bogged down in court proceedings. She submitted a written statement.

Michael Splaine of the National Chapter of the Alzheimer's Association stated that he was helping to promote the uniform act through a national enactment committee. Mr. Splaine stated that Delaware and Maryland have passed it, and that Pennsylvania was in the pre-legislative process and that he expected a bill would be introduced there soon. He also noted that he was working hard with the bar sections in New York to get it introduced there as well. He stated that New Jersey would be surrounded with neighboring states adopting the uniform act. He explained that guardianship jurisdiction was important because of multistate care markets, long distance caregivers, etc. In states where it has been enacted, the legal community knows the act is simply the regular, mundane navigation of the guardianship system. He emphasized that the UAGPPJA did not open up all guardianship codes in all states; it limited itself to jurisdictional issues. He submitted written information regarding the UAGPPJA.

Commissioner Bunn asked whether any one opposed this uniform law. Ms. Whitenack stated that there was no one that opposed it to her knowledge. Mr. Splaine commented that he knew of no active opposition although his association had encountered concerns in dialogue with the legal community and the disability community. He stated, however, that front-end dialogue can help solve a lot of problems before the legislative step.

Ms. Whitenack also explained that the Administrative Office of the Courts (AOC) raised a small concern involving *Winberry v. Salisbury*, 5 N.J. 240, 252 cert. denied, 340 U.S. 877, (1950). Some provisions in the uniform act might need some tweaking to harmonize with New Jersey's constitution. Mr. Splaine noted that other states had changed the uniform law slightly to harmonize with current state law.

Meredith Grocott, Esq. of Schenck Price, urged the Commission to adopt the uniform law but not to go the Kansas route by shoehorning the uniform law into the current state law. She stated that the uniform law provides a specific way to transfer guardianship and to have two different actions in different states ends up harming the incapacitated person. She offered her assistance with drafting of the proposed bill.

Sharon Rivenson Mark, Esq. stated that she was the President of the Guardianship Association of New Jersey (GANJ), the President of the National Academy of Elder Law

Attorneys (NAELA) and also practiced in the guardianship area. She expressed that the uniform law was of critical importance to the guardianship community and urged its quick adoption with the necessary tweaking.

Chairman Gagliardi commented that unless there was dissent, the Commission would ask Staff to make the minor changes necessary and prepare a draft tentative report for October or November. Commissioner Bunn asked whether Ms. Whitenack had any recommendations for navigation around *Winbury* issues and she replied that she would be glad to work with the Commission in this regard. The project was unanimously approved by the Commission.

### **New Jersey Debt-Management Services Act**

Ms. Tharney briefly summarized the background of the report, explaining that in 2005, NCCUSL recommended its Uniform Debt Management Services Act enactment, and that the Act was later revised by NCCUSL in 2008. The UDMSA was enacted in six states and the Virgin Islands and was under consideration in five to 10 others. Ms. Tharney explained that a bill was introduced in the New Jersey Legislature by Assemblyman Jack Connors that is similar to, but not identical to, the uniform law. The bill responds to the fact that New Jersey consumers find themselves in dire situations because of debt management issues. Ms. Tharney said that Staff had spoken with Assemblyman Connors' office and would be keeping his office updated regarding this project. She indicated that Staff seeks Commission guidance on certain preliminary issues.

The most significant question to be addressed by the Commission is whether “for profit” entities should be allowed to participate in debt management services in New Jersey. They are not currently permitted to do so. Generally, “for profit” and “not-for-profit” entities offer different services to consumers. Based on the information provided to this time, it is the understanding of Staff that not-for-profit entities are not allowed to engage in “debt settlement”, which involves a reduction in the principal amount of the debt. For-profit entities do offer “debt settlement” services. The “for profit” business model focuses on the consumer paying a percentage of the principal amount of the debt owed to the creditor in a lump sum (or over a three or six month period). Funds need to be accumulated by consumer and then offered to creditors, focusing on the creditors one-by-one. Not-for-profit entities, on the other hand, focus on paying down the entire principal amount of the debt, generally over a period of three to five years, after concessions by the creditors including reduction in interest rates, finance charges, and fees. Ms. Tharney explained that the information available to this time suggests that the different business models serve two different segments of New Jersey consumers. About 80% of the states now permit for-profit entities to provide debt management services to the residents of those states. In 2004, approximately 25 states permitted only not-for-profit entities to engage in debt management activities.

Ms. Tharney explained that she hoped to obtain Commission guidance on the issue of secured vs. unsecured debt, the level of fees that would be appropriate, the accreditation of

counselors and entities, and the application of the act to personal debt incurred for a farm or other business. Commissioner Bunn asked if the Department of Banking and Insurance had a stand on whether for-profit debt management entities should be allowed in New Jersey. Ms. Tharney explained that although the Department's spokesman was not able to attend the meeting because of a scheduling conflict, the Department was amenable to the participation of for-profit entities, properly regulated.

David McMillin of Legal Services explained that debt settlement, the business model used by for-profit entities, is a serious problem for low income New Jersey consumers and consumers generally, both here and throughout the country. He explained that the practices involved in debt settlement have received what may be the most criticism of any current practices in consumer finance marketplace. He added that, at Legal Services, they have never seen a debt settlement agreement that they liked. He indicated that Consumer Reports had said much the same thing and that while the arrangement sounds good, it is, in practice, very harmful.

Commissioner Bell asked if Mr. McMillin was referring to for-profit or not-for-profit entities and Mr. McMillin explained that not-for-profit entities rarely deal in debt settlement but instead, like Consumer Credit Counseling Services of New Jersey, focus on providing debt management plans. Ms. Tharney explained that she had been advised that although not-for-profit entities would like to engage in the principal reduction aspects of debt settlement, they were precluded from doing so by the impact of federal law (501 q) on their not-for profit status.

Mr. McMillin explained that in practice, although for-profit entities are not allowed in New Jersey, they still find New Jersey consumers on TV and the internet. They have historically charged high up-front fees, so the money that the consumer thinks is going or will go toward debt reduction is, instead, used as fees to the for-profit entities. Consumers may remain unaware of this until they get sued by creditors who have not been paid. Commissioner Bunn clarified that New Jersey consumers were dealing with out-of-state entities. Commissioner Bunn asked if the draft act contemplates Department approval of debt settlement contracts. Ms. Tharney replied that the entities would be required, under the act, to submit their contracts as a part of their application for licensure. Those entities would also be required submit information regarding their plans for debt management activities, to include certain disclosures, and to limit their advertising.

Commissioner Bunn asked if Mr. McMillin supported the licensing requirement. Mr. McMillin responded that he did not think for-profit entities should be able to deal with New Jersey consumers. He suggested that in 2009, the Better Business Bureau determined that for profit debt settlement was an inherently problematic type of business. He also mentioned the recently adopted Federal Trade Commission Rule through which the FTC substantially expanded its telemarketing sales rule and jurisdiction to address problems in the area of debt settlement and related businesses. The Rule, effective September 27<sup>th</sup>, bans the imposition of advance fees and, without including a specific dollar amount, limits the amount of the fees that can be charged. The

Rule applies only to for-profit entities and only to those whose business practices involve at least one interstate telephone call. The uniform law does not include these fee limitations since they did not exist at the time it was drafted.

Mr. McMillin also made reference to the study by the United States General Accountability Office study that was not favorable regarding debt settlement companies. He strongly urged the Commission to put this project on hold and not recommend it, or to substantially increase the consumer protections.

Commissioner Bunn asked if the application of the FTC rule more broadly to non-telephone solicitations would be the sort of broader protection called for by Mr. McMillin, and Mr. McMillin replied that such an expansion would be a good step and that the Commission should watch after the FTC Rule takes effect to see how it works.

Mr. McMillin pointed out that Illinois is the state that adopted a debt settlement law most recently and that it contains a much stronger fee cap provision. He added that the Department of Banking and Insurance has a good fee regulation that applies to consumer counseling and debt management plans and is similar to what Illinois recently adopted. Ms. Tharney noted that the fee cap information is provided in the comments to the report.

Commissioner Bell asked if internet communications were covered by the FTC Rule and Ms. Tharney indicated that the Rule only applies in situations involving at least one interstate telephone call. Ms. Tharney explained that the FTC Rule provisions pertaining to fees are effective October 27<sup>th</sup> and that the remainder of the provisions take effect next week. Chairman Gagliardi asked Staff if it made sense to see what there was to be gleaned from the changing landscape. Ms. Tharney responded affirmatively, indicating that Staff had been wrestling with the issue of fees and that there was limited guidance to be obtained from states that had already adopted the act since they did so well in advance of the FTC Rule. In addition, even NCCUSL had been unable to provide any detailed guidance or suggestions regarding the impact of the Rule on their draft. Because of the way that the Rule is drafted, it is not as simple as lifting language from the Rule and inserting it in to the statute. She explained that Staff had handed out a preliminary draft of a new fee section at the meeting and will be looking to see if it is possible to determine what other states have done or are doing.

Commissioner Bunn explained that he would prefer to hear from the Department of Banking and Insurance before proceeding with this project. He suggested that he wanted to wait for the FTC Rule implementation and look at what was done in Illinois. Richard Angelo explained that Illinois had passed the most recent debt management and debt settlement act in the country and that its act was in a very different form. Illinois enacted a separate bill for consumer protections. Mr. Angelo explained that Staff had reviewed the Illinois law, like the laws in other states that have been active in this area, and that some sections of the Illinois law might be useful to incorporate.

Ms. Tharney explained that Staff had reviewed the FTC Rule documents, including the comments associated with the rulemaking process and had also looked at the GAO study referred to by Mr. McMillin. She explained that although there were stories of consumers in dire circumstances that fell victim to predatory actors of both the for-profit and not-for-profit variety, there were also for-profit entities operating in other states that have an A rating from the Better Business Bureau with very few complaints reported. The information provided by commenters and through Staff research to this point did not suggest that allowing for-profit entities to participate in debt settlement was destined to lead to disaster. Ms. Tharney also explained that since the current law in New Jersey, which is more than 30 years old, did not protect consumers as well as it could, and since legislation in this area has been introduced, action by the Commission might be useful at this time. Commissioner Bertone said that she would like to see the statute drafted in the alternative, so that the Commission can consider the for-profit/not-for-profit issue in more detail. Commissioner Bunn suggested that Staff look closely at the Illinois statute concerning fee limitations.

Ms. Tharney said that Staff will redraft in such a way that the Commission can consider the for-profit vs. not-for-profit issue, and will ask that a Department of Banking and Insurance representative be available at the next meeting. Commissioner Bell asked if there was any state that successfully regulated for-profit entities and any independent body that has indicated that such a state provides good service. He suggested that if there is no state that successfully regulated for-profit entities, and no model that successfully protects New Jersey consumers, there is no point in allowing them to operate in New Jersey.

Commissioner Bunn expressed a concern that New Jersey consumers not be left without assistance, and Ms. Tharney said that, based on the information Staff had received, not-for-profit entities would like to be able to engage in the principal reduction model. She suggested that the desire of not-for-profits to be able to offer this service indicated that it might be a beneficial service for New Jersey consumers if done correctly. Ms. Tharney said that Staff would review any information that could be obtained that might shed some light on the experiences of other states and would see if there was any federal information resulting from Congressional hearings that might be of assistance.

### **Title 39 *State v. Moran***

Ms. Tharney explained that the memorandum on this issue that was provided to the Commission included some background language regarding the decision of the New Jersey Supreme Court in *State v. Moran*. That case dealt with *N.J.S. 39:5-31*, which permits the Chief Administrator of the Motor Vehicle Commission or a judge to suspend or revoke a driver's license in his or her discretion. The New Jersey Supreme Court, in *Moran* provided a list of factors to be considered before a license is suspended or revoked. At the Commission's direction, Staff incorporated the list of factors into draft statutory language for insertion in the revised Title 39.

Commissioner Bunn asked whether revocation and suspension were addressed in the penalty provisions in the revised Title. Ms. Tharney explained that the schedule classifying various offenses dealt with fines, incarceration and community service, and not with suspension or revocation. She added that while certain sections of the statute provided for suspension or revocation for specific offenses, *N.J.S. 39:5-31* is general and allows for suspension or revocation in the discretion of the chief administrator or judge without reference to a specific offense. She explained that of the 74 statutory sections allowing revocation or suspension of a license, 49 are in Title 39.

Commissioner Kologi said that 39:5-31 has been the bane of municipal court practitioners for years because it provides a general power to suspend or revoke a license without any time parameters, which lends itself to arbitrary action. He said that he approves of the draft language but that the statute remains problematic. A legislative solution is required to more fully address the problem. He suggested that the word “trial” be included in the draft language referring to municipal court, rather than “hearing”. He also objected to the Supreme Court’s focus on “willful”, but said that with the changes the law is better than it was.

Commissioner Bell said that for the sake of uniformity, the court or administrator should evaluate whether or not its decision is consistent with those of other courts or other administrative decisions. Ms. Tharney expressed a concern that, in municipal courts, there are no readily accessible published decisions. Commissioner Bell said that agencies have the opportunity to review administrative law decisions and should be required to do so. He recommended separating the standard applicable to the chief administrator from the standard applicable to municipal court judges. Commissioner Kologi said that subsection c. refers only to judges and that the requirement for placing reasons on the record should also apply to the chief administrator to allow for proper appellate review. Both Commissioner Bell and Commissioner Kologi questioned the inclusion of age as a factor and suggested that the length of time someone had a license and the length of time since the last infraction were more relevant. Commissioner Bell suggested that Staff should not be wedded to the language used by the Court. Ms. Tharney said that Staff will redraft for the next meeting.

### **Durable Power of Attorney**

Ms. Brown explained that of the amendments made to the Final Report, most made minor changes of language. The one significant change was made to the application section. Commissioner Burstein had sent Staff separate approval of the changes made. The New Jersey Bar Association had approved the May 13<sup>th</sup> Final Report but had not yet considered the amendments made.

Commissioner Bunn questioned Section 10, the “catch-all” provision, commenting that he had not seen language similar to this used anywhere before. Mr. Cannel explained that the problem was that many documents referred to as powers of attorney were not really powers in

which the principal is incompetent or ceding autonomy. Ms. Brown explained that Staff did not want to exclude certain powers from the act's coverage by being too specific and perhaps missing something important. Mr. Cannel stated that New York's approach of creating a long list of documents that were to be excluded from the coverage of their law was a problem because no list could be exhaustive. The Commission agreed that having "catch-all" language made sense and did not make any changes to the current language.

Commissioner Bunn asked about subsection b. in the applicability section. Ms. Brown explained that this language was created as a result of a conversation with Larry Fineberg. Commissioner Bunn suggested that the concern addressed by subsection b. probably did not occur. Commissioner Bell noted that the parties could draft the language into the document regardless of subsection b. Nonetheless, the Commission unanimously agreed to preserve subsection b. in the draft.

Ms. Rivenson Mark advised the Commission that members of the Elder and Disability Law section of the Bar had spent a lot of time working on this project and the compromises made were thoughtful and well-reasoned. She believed that the revised Final Report was a vast improvement over existing law and ready for sponsorship by the Legislature.

Commissioner Bunn moved to release the Revised Final Report, seconded by Commissioner Bell and the report was released by unanimous vote.

#### ***N.J.S. 54:3-27 Payment of Tax Pending Appeal***

Alex Fineberg informed the Commission of the results of Staff's inquiries concerning Assembly Bill 120. Neither the bill's drafter nor anyone Staff spoke with in the Office of Legislative Services knew of a municipality that offered a discount for the prepayment of property taxes. Mr. Fineberg said that, as a result of this information and the input of Saul A. Wolfe, Tax Counsel for the League of Municipalities, Staff was fairly confident that the practice was either rare or nonexistent. He asked the Commission whether a specific statutory reference to *N.J.S. 54:4-67* be inserted in *N.J.S. 54:3-27* or whether subsection d. should be removed entirely. Commissioner Bell asked for a recommendation from Staff. Mr. Fineberg explained that the most conservative option would be to clarify subsection d. and insert the statutory reference, while avoiding an alteration of substantive law. Commissioner Bell agreed. Commissioner Bunn made a motion to release Staff's revisions as a tentative report. Commissioner Kologi seconded.

#### **Door-to-Door Retail Sales Installment Act**

The Commission carried this project to the October meeting.

#### **Landlord Tenant**

Ms. Brown explained that the chapters already seen by the Commission (along with two



new chapters and a definitions chapter) had been compiled into a 165-page document that had been distributed to commenters in preparation for two working sessions at which Staff hoped to finalize definitions and iron out differences. Ms. Brown expressed her anticipation of submitting a draft tentative report with the new Title for the Commission’s October meeting. She sought guidance, however, on whether a proposed chapter 10 that incorporated the tenant property tax rebate act should be included in any tentative report, having taken the position that the act should remain in the tax title.

Ms. Brown explained that the property tax rebate act, although directing municipalities how to compute taxes, also regulated landlord conduct, imposing penalties on a landlord for noncompliance with the act. Because the act was enacted with other tax rebate legislation, however, Staff felt the act should remain in Title 54. Staff mentioned other examples of statutes belonging in two places. Ms. Brown also stated that for the October meeting Staff would compile a list of those statutes that affect landlord and tenant but, in Staff’s view, do not belong in the title. Professor Bell noted that the Commission might need a session to concentrate on the last two chapters which had been presented on the agenda but not addressed. Ms. Brown suggested that those chapters did not alter current language other than to eliminate archaic and unclear terms. She noted that these chapters could be addressed when addressing the full title either at the next meeting or in November. Ms. Brown expressed her hope that the Commission would release a tentative report by year’s end.

#### ***N.J.S. 2A:34-23 and N.J.S. 3B:8-1***

Mr. Fineberg updated the Commission on developments since the project’s authorization. He explained that granting judges the authority to engage in equitable distribution prior to a final judgment of divorce would solve problems other than the “black hole” scenario of *Kay v. Kay*, 200 *N.J.* 551 (2010). Under the current statutory scheme, a surviving spouse whose adversary dies in the midst of divorce litigation would often inherit the vast majority of the estate in the case of intestacy and all property subject to rights of survivorship—a result contrary to the decedent’s wishes.

Mr. Fineberg described commenters’ feedback as enthusiastic. They approved of Staff’s initial approach: a bright line rule that allowed a judge to proceed with equitable distribution at any point after the filing of a complaint for divorce. Mr. Fineberg added that Staff was further encouraged by *Brandenburg v. Brandenburg*, 83 *N.J.* 198 (1980), which fixed the effective date of valuation of marital property for equitable distribution at the filing of complaint. Staff will solicit additional input from matrimonial practitioners and produce language for Commission review at the November meeting.

#### **Title 46 Property**

The Commission carried this project to the October meeting.

### **Miscellaneous**

Commissioner Kologi presented a new project which focused on the affect of a vote to abstain at a public meeting under the jurisdiction of the open publics meetings act. Although, there is little doubt that the voter intends the vote to be a nullity, unfortunately, case law does not bear that out and there is no statute on the subject. In some cases, the abstention is counted as a “yes” vote and sometimes as a “no” vote. If no specific number of votes is required, the abstention is effectively a “yes” vote.

Commissioner Kologi stated that he had spoken to associations involving governmental attorney work, and all felt this issue was a problem. He expressed his view that it could be accomplished by the addition of a simple paragraph in 40A or 18A. The presence of the person who is voting, however, could be counted for quorum purposes.

Mr. Cannel said that he would draft something for the next meeting. Professor Bell noted that some states limit the ability to be able to abstain from voting.

### **Miscellaneous**

Commissioner Bulbulia moved to adjourn, Commissioner Bertone seconded, and the meeting was adjourned.