

MINUTES OF COMMISSION MEETING

January 20, 2010

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, and Commissioner Albert Burstein. Grace C. Bertone, Esq. of McElroy, Deutsch, Mulvaney & Carpenter, LLP, attended on behalf of Commissioner Rayman Solomon and Professor Ahmed I. Bulbulia of Seton Hall Law School attended on behalf of Commissioner Patrick Hobbs.

Minutes and Proposed 2011 Meeting Dates

The minutes of the December 16, 2010 meeting were approved unanimously. The Commission approved the proposed meeting dates for 2011 except that April's meeting date was changed from Thursday, April 21st to Thursday, April 14th.

Elective Spousal Share

Alex Fineberg stated that three issues regarding this project had been identified for resolution. First, the equitable distribution statute, which does not refer to domestic partnerships, omits them intentionally, as evidenced by *N.J.S. 26:8A-10a.(3)*. Given the limited applicability of domestic partnerships (only available to couples 62 years of age and older), no modification to this section is required. Also, the elective spousal share statute does not refer to civil unions. *N.J.S. 37:1-31* through *1-33* provide that any rights attendant marriage also exist for civil unions. Accordingly, a reference to civil unions has been added.

A second issue concerns the establishment of the filing of a complaint for divorce as the point at which a court may perform equitable distribution. Commissioner Bunn had suggested that this trigger should be limited to complaints that were valid. Staff reviewed the issue and added the requirement that the complaint be "valid" and defined a "valid" complaint as one that would withstand a *Rule 4:6-2* motion to dismiss. Staff considered incorporating a summary judgment standard for dismissal of the complaint, but determined that such a standard would require the analysis of too much factual information before that information might reasonably be available. The Commission agreed with this resolution.

The third issue concerns Staff's preliminary decision not to follow the language of the "slayer" statute, *N.J.S. 3B:7-1.1*, to identify those individuals who should not benefit from the killing of a decedent. The statute uses the broad language "intentional killing", which is not defined and is not a precise match for the statutory language in Title 2C pertaining to homicide. Staff proposed three alternatives. Option A, which is a simple

solution, merely makes “murder” a bar to receiving equitable distribution. Option B includes murder and passion-provocation manslaughter. Mr. Fineberg was concerned by the type of fact pattern presented in *State v. Franklin*, 184 N.J. 516 (2005), in which a spouse was convicted of passion-provocation manslaughter after killing a paramour he found in bed with his estranged wife. Mr. Fineberg suggested that it was improper for someone to take under equitable distribution if he killed a spouse under these circumstances. Option C is the broadest of the three options and includes “depraved heart” manslaughter—a reckless homicide evincing extreme indifference to human life. Ms. Tharney explained that since attempted murder and conspiracy preclude someone from collecting under the current statute, someone who successfully killed his or her spouse should not be permitted to collect if someone who merely attempted to do so could not.

Commissioner Bunn asked for clarification regarding the operation of the slayer statute, and Mr. Cannel explained that the definition of “intentional killing” is narrower than the definition of murder. For a conviction for murder, it is enough if one has knowledge of the act; the perpetrator need not actually *intend* the act. Therefore, “intentional killing” does not capture all murders, while Option A would. One problem may be that this question—whether someone committed murder or intentional killing—will not necessarily be decided at the time the estate will be divided. The criminal trial may still be ongoing, may not have commenced, or the defendant may be unfit to stand trial.

Commissioner Bunn was concerned that, under systems like those established under the slayer statute, an adjournment might be required in probate court until it could be determined whether a killing was “intentional”. Mr. Fineberg explained that, under the current equitable distribution statute, this problem already existed. To disqualify a surviving spouse from receiving equitable distribution, *N.J.S. 2A:34-23* requires a conviction for attempt or conspiracy to murder.

Mr. Cannel suggested that a problem with Options B and C is posed by the fact that a number of criminal cases are resolved by nonspecific pleas. A person may plead guilty to manslaughter but the plea agreement will not specify whether the plea is to passion-provocation or some other type of manslaughter. Opting to limit the bar to murder will result in a better defined, bright-line test.

Mr. Cannel said that there were situations where the criminal trial is not completed and the estate could be in probate for years. Commissioner Burstein stated that the probate courts are not equipped to handle these situations. Commissioner Bunn suggested that in those situations, the slayer statute is useful because you can have a civil adjudication of responsibility for death without the criminal trial outcome. He stated that even in the absence of a ban on the defendant receiving equitable distribution, the court

will still take the death of the decedent, and the circumstances of the death, into account. Mr. Cannel suggested that this opened the door to inconsistent results, and Ms. Tharney said that the inconsistency between a civil and a criminal determination is not uncommon. Commissioner Bunn noted the different standards of proof. Commissioner Bunn stated that Staff should start from the position of not expecting a timely criminal determination for guidance.

Commissioner Bunn supported the idea of the slayer statute, even if it is flawed. The advantage of the slayer statute is that a civil trial can be used to determine whether a killing was intentional. Commissioner Bunn suggested that Staff draft in a way that adopts the concept behind the slayer statute, noting that the slayer rule in New York permits adjudication without a criminal conviction.

Commissioner Bunn suggested that mirroring the slayer statute might make the Commission feel more comfortable, because there is case law on this issue. In addition, this would incorporate a standard that is already in use. Commissioner Burstein said that Staff should draft accordingly and reference the slayer statute explicitly. If the statute changes, this law will automatically reflect those changes.

Mr. Fineberg raised a final issue relating to the interplay between post-mortem equitable distribution and the laws of intestacy, as brought to Staff's attention by Commissioner Bunn at the last meeting. Mr. Fineberg said that Staff cannot assume that intestacy will not apply. To resolve this issue, *N.J.S.* 3B:5-3 should specify that a "surviving spouse" does not include one who either files a complaint for divorce, or one who has such a complaint filed against him or her. Ms. Bertone agreed that this explanatory language should be placed in Title 3B as that is where someone would look to determine whether a party takes pursuant to the intestacy laws. The Commission agreed.

Commissioner Burstein also pointed out that in addition to the mention of a valid complaint as a triggering point in 2A:34-23, the "valid complaint" language should also appear in 3B:8-1, which states that at the time of death neither the decedent nor the surviving spouse has filed for divorce. Staff will make that change.

UPHPA

Chairman Gagliardi agreed with Staff's assessment that this uniform law should not be recommended for adoption and asked that Staff prepare a short report stating that no further consideration is warranted. Commissioner Burstein asked whether anyone wanted further discussion before a formal vote. Commissioner Bunn moved to adopt Staff's recommendation in a report to the Legislature, Commissioner Bertone seconded the motion and the Commission unanimously agreed.

Door-to-door Retail Installment Sales

Richard Angelo said that, while preparing the Tentative Report for release, he included the suggestions of Commissioner Bunn from the last meeting. He also made an additional change to the statutory language to reflect the revised waiting period to make the statute internally consistent.

NJDMSA

Ms. Tharney provided a status update regarding this project, explaining that she had been in contact with the legislative aide to Assemblyman Connors, sponsor of A1949, and that she had a conference call with a for-profit entity to discuss the fee provisions. Information provided by the for-profit entity during the conference call was provided to Assemblyman Connors's office. She said that it was still her understanding that the legislative aide was relying upon the Commission's draft as a starting point and that the document she had provided to him described the differences between the Commission's draft and A1949 in the comments.

Commissioner Bunn asked where this left the Commission. Mr. Cannel indicated that the Commission had never approved a Tentative Report before the project was held in abeyance pending action by the Legislature. Commissioner Bunn clarified that the Commission had documents on its website pertaining to this project, but had suspended its activities on the project. Ms. Tharney explained that since Staff had been asked to work with Assemblyman Connors and provide its most recent draft on the project, additional work on the project had ceased in December. She said that she hoped that the Commission's work would be useful, since the Commission had the advantage of detailed feedback from a variety of parties and that it did not appear to make sense to continue to work on the project while the Legislature was actively working on the same issue. The latest information available to Ms. Tharney was that the pending bill might be back before the Assembly committee by late February or early March.

Commissioner Burstein asked if A1949 called for the participation of for-profit entities in New Jersey. Ms. Tharney explained that it did and Mr. Cannel added that the pending bill, as drafted, did not provide as much in the way of consumer protection as the Commission draft did. Commissioner Burstein suggested that it would be useful to see another report on this project for the February meeting highlighting areas in which the Commission still needs to make decisions so that those issues can be resolved and a report issued regardless of what may happen in the Legislature. Staff will prepare the draft.

Title 39 – DWI

Ms. Tharney explained to the Commission that Staff had been asked to review the

provisions in the current law pertaining to driving while intoxicated with an eye toward moving away from mandatory lengthy suspensions because they are ineffective. Short suspensions may occasionally be effective, but when longer suspensions are imposed, people just drive, and quickly discover that it is a low-risk proposition because it is easy to do so without getting caught. Staff was asked to look at the possibility of limited licenses and the use of ignition interlocks.

Staff reviewed studies conducted by and materials prepared by: the Department of Transportation, national Highway Traffic Safety Administration (“NHTSA”); the National Conference of State Legislatures; the Governors Highway Safety Association; the Insurance Institute for Highway Safety; the United States Department of Health and Human Services, Office of Applied Studies, Substance Abuse and Mental Health Services Administration; Mothers Against Drunk Drivers (“MADD”); Officer.com (which features law enforcement technology and product news); and the Pacific Institute for Research and Evaluation (an independent non-profit public health organization). In addition, Staff reviewed the DUI laws from other states, preliminarily focusing on the 12 states in which ignition interlock use is mandatory or “highly incentivized” for even first offenses (Alaska, Arizona, Arkansas, Colorado, Hawaii, Illinois, Louisiana, Nebraska, New Mexico, New York, Utah and Washington) and the 12 states that saw a reduction in drunk driving rates in the last decade (Alaska, Florida, Idaho, Illinois, Maryland, Michigan, Mississippi, Missouri, New Mexico, Pennsylvania, Texas and Washington).

Ms. Tharney said that Staff still had more materials to review, but that based on the information reviewed so far, a draft revision had been prepared imposing ignition interlock use or an alternative sanction for all DWI offenses, including first offenders and low level DUI offenders for a second or subsequent offense.

Ms. Tharney explained that the information reviewed to this point indicated that the volume of first offenders caught was significant (50-66% of DWI arrests) and that “first offenders” are said to have driven between 50-87 times before their first arrest for DWI. Up to 75% of individuals continue to drink and drive after an arrest for DWI. The first six months after a DWI arrest is the period involving the highest likelihood of recidivism. 32% of traffic fatalities resulted from alcohol-related crashes in 2008. Nationwide, the cost of alcohol-related crashes is said to be \$51 billion annually. Nationwide, 32 people a day are killed in crashes involving a DWI driver. 13.2% of drivers aged 16 and older (more than 30 million people) drive while intoxicated every year, according to studies involving self-reporting. 0.6% of them, or 1.2 million people, are arrested.

Ms. Tharney indicated that ignition interlocks are already supposed to be in use in New Jersey. Instead, they are ordered but not installed and the statutory mandate for installation is not enforced. New Jersey seems to be about at the national average of a

10% compliance rate with interlock installations. Interlocks appear, based on the available studies, to be the most effective tool for reducing DWI because they separate drinking from driving. The average drop in recidivism while the interlock is installed is 64%. New Jersey's current law is considered "weak" and an increased use of interlocks appears, generally, to have the support of law enforcement and the MVC, but more comment is necessary in order to obtain detailed information.

Commissioner Bunn asked about someone else starting the car for a person with an ignition interlock installed in his or her vehicle and Ms. Tharney explained "rolling retests", which require that the person blow into the device during the time that the vehicle is in use on an average of every 20 minutes or so. If the person fails to do so, the engine will not cut off, but the device can be programmed to cause the lights to flash and the horn to sound. In addition, to discourage others from blowing into the device, an individual with an interlock is required to blow into the device in various patterns. The interlock devices are small and connected to the ignition to prevent the car from starting if the driver has been drinking, but they have a bypass option to allow repairs to the vehicle, for example.

Commissioner Burstein noted that New Jersey is one of the ten states with the lowest incidence of drunk driving infractions and Ms. Tharney agreed but pointed to New Jersey's low incidence of compliance with the current mandatory interlock laws. When the period of "hard suspension" concludes in New Jersey, current law requires that the person demonstrate the installation of an ignition interlock before their ability to drive is restored. That is not currently done.

Commissioner Bunn asked if enough of the devices are available in New Jersey and Ms. Tharney indicated that she believed that there were sufficient devices, and said that there are eight authorized providers of the devices in New Jersey and that the cost of the device is \$2-3 per day, an annual cost, with installation, of about \$1,000-1,500. Commissioner Burstein asked if the MVC regulated the devices and Ms. Tharney said that the regulations prepared by the MVC contain requirements and criteria for the devices and their use. Mr. Cannel pointed out that the use of the devices is being proposed as an alternative to lengthy license suspensions and Ms. Tharney added that New Jersey imposes fairly long license suspensions but people drive anyway, as those who work in the municipal courts are well aware. Ms. Tharney said that with the ignition interlock, the defendant can still go to work, to school, and meet his or her other obligations. Now, if a defendant follows the law and does not drive during a period of suspension, unless they have someone to drive them to work every day, it is likely that they will lose their job. Losing their job means they are not likely to be able to pay the fines and surcharges (for a first offense, these are: \$250-400 fine, \$230 to IDRC, \$100 to the drink driving fund, \$100 to the alcohol education and rehabilitation fund, \$75 to the neighborhood services fund, and \$1,000/ year for three years as an insurance surcharge).

Commissioner Burstein asked about the vocational (also called a conditional or limited) licenses and Ms. Tharney explained that based on what she had read, vocational licenses are frequently abused. In addition, they are very difficult to support and met with no support from the police officers she informally surveyed.

Ms. Tharney indicated that when the Commission was initially asked to look at this issue, the request was that something be completed by March. Commissioner Bunn said that this sounds more complicated than just the interlock issue and suggested that a comprehensive look at the relevant sections of the statute was warranted. He said that compliance should be made streamlined, as simple as possible and should be drafted to include changes to technology and that March might not be a realistic deadline. Commissioner Burstein agreed, adding that he thought the Commission should take this up as a project since it is significant issue. The Commission asked for proposed language for February. Commissioner Bunn asked that Staff look for any applicable federal law. Ms. Tharney will note some issues for Commission consideration at that time and provide draft language.

Pejorative Terms

Ms. Brown explained that the Mental Health Association of New Jersey, Inc. wants very much to be involved in this project. They feel language is the key to helping people think differently about the mentally ill. Ms. Brown recently met with the President and Chief Executive Officer of the MHANJ, Carolyn Beauchamp, and she suggested gathering together a group of people who are expert in this area to review the sections containing language used to replace pejorative terms. She felt that this group could assist the Commission in making sure that the replacement language for pejorative terms is used consistently with its use in the mental health community. Staff is hoping to meet with MHANJ and the others suggested by Ms. Beauchamp in February to go over all of the sections containing replacement for pejorative terms. It has become clear to Staff that the replacement terms used by the Commission are not “one size fits all”. MHANJ also has lobbyists who will help to get sponsorship from the Legislature.

Commissioner Bunn asked whether the Commission has a current document to review on this project. Ms. Brown explained that she had revised the introduction to the project which states that the impetus for doing something further and beyond the Commission’s initial report is the recent bill for elimination of pejorative terms with regard to the developmentally disabled. Ms. Brown advised the Commission that she would provide a draft of the Introduction at the February meeting.

Miscellaneous

Commissioner Burstein asked whether any legislator had expressed an interest in sponsoring the Durable Power report and Ms. Brown advised that Assemblyman Diegnan

had expressed interest but she had not heard further. Commissioner Gagliardi thanked Staff for its work on the Construction Lien Law report and Commissioner Burstein discussed the significance of the Construction Lien Law enactment.

Commissioner Bunn moved to adjourn, which was seconded by Commissioner Bertone. The next meeting is scheduled for February 17, 2011.