

## **MINUTES OF COMMISSION MEETING**

**April 18, 2013**

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 Virginia Long. Professor Bernard Bell of the Rutgers School of Law attended on behalf of Commissioner John J. Farmer, Jr., and Grace C. Bertone, of Bertone Piccini LLP, attended on behalf of Commissioner Rayman Solomon.

Paul Axel-Lute, of the Rutgers Law Library, also attended.

### **Minutes**

The Minutes of the March meeting were unanimously approved on motion of Commissioner Long, seconded by Commissioner Bertone.

### **Uniform Electronic Legal Material Act**

Laura Tharney explained that Maliha and Vanessa, students at NJIT, have been interning with the Commission for the semester and will conclude their work for the Commission on April 30th. They have been working with Ms. Tharney on this project as a result of the intersection of legal and technical issues that it presents, and each will make a brief presentation in the nature of a “final project” to conclude their work with the Commission.

Ms. Tharney said that she was not seeking formal release of the Report at this time, and that the information that has been gathered to date was in the form of a Tentative Report in order to identify issues for commenter consideration. Given the nature of the project, it was difficult to elicit specific comments without: identifying the New Jersey materials currently available online; examining what other states had done in this area; and identifying the current New Jersey statutory and regulatory provisions that might provide useful guidance. Ms. Tharney explained that she had already received useful feedback from the New Jersey Law Librarians Association that will allow enable her to revise the draft to address some outstanding concerns and questions.

Maliha began her presentation by identifying some of the current options for online access to the legal materials from the three branches of State government.

For the Executive Branch, the Official Website for the State of New Jersey makes available electronically certain Executive Orders, as does the New Jersey Digital Legal Library, maintained by Rutgers, the State University. The State of New Jersey,

Department of Law & Public Safety, Office of the Attorney General, makes available electronically some of the formal Opinions of the Attorney General, and the New Jersey Digital Legal Library provides access to some of those Attorney General Opinions as well.

In addition to making information regarding proposed and pending bills available to the public, the Legislative Branch, through the New Jersey Legislature's website, provides access to the New Jersey statutes and the complete text of the New Jersey Constitution (including a searchable version of the New Jersey Constitution). Some of these materials are also available through other sources.

The New Jersey Judiciary makes available opinions issued by the New Jersey Supreme Court, the Appellate Division of the Superior Court, and the Tax Court. Unpublished appellate court opinions, Trial Court opinions approved for publication by the Judiciary Committee on Opinions, unpublished Trial Court opinions, and "business related opinions" "issued by the New Jersey Supreme Court, Appellate and Superior Courts" are also available for specified periods of time. Some of these materials are also available through other sources.

Ms. Tharney explained that the information presented was not a comprehensive summary of the legal information currently available online. Instead, it was provided to give examples of those materials. Maliha also provided a chart identifying the legal materials that other states have chosen to include in their enacted or proposed versions of the act. Since a list of what the states have done or proposed runs to more than a page, the chart was prepared to show at a glance how New Jersey's proposed approach compares to the approaches of other states.

Ms. Tharney explained that on other projects and bills with technical impacts, the argument is sometimes made that it might be financially difficult or impossible to comply with the proposals because of the associated costs. In an effort to determine the likely impact of this project, Staff preliminarily reviewed the status of the current law and the requirements regarding authentication and preservation. Vanessa said that one key reason why the UELMA has received considerable support is because of the authentication and preservation aspects of the act. While the currently available technologies might be new, New Jersey already has many statutory and regulatory provisions that contain detailed requirements regarding the preservation and storage of data. It is clear that public entities have been dealing with these issues for a number of years because a look at the available law reveals the development of the technologies used to preserve and authenticate this material. There is language requiring that paper-based documents have a minimum PH balance of 7.5. Micro-film records are to be stored in a polyester-based silver gelatin film

in order for the film to properly be preserved. Image processing systems require that scanners possess a scanning density minimum of 200 dots per inch (Dpi) in order for images to be clear and preserved accurately.

Vanessa explained that there are different costs associated with the many available methods of preservation, authentication, and security of electronic legal materials, and provided to the Commission a chart including examples of the range of potential costs. Using open source technologies can result in costs on the lower end of the spectrum, while third-party proprietary solutions can be more expensive. More research would be needed in order to obtain more detailed estimates of the numbers that might be involved for New Jersey. Finally, Vanessa explained that, with regard to the Opinions of the Attorney General, a public user can see that the opinions contain the New Jersey State seal and the seal of the Office of the Attorney General, but there are no other indications at the present time that an opinion is an official document.

Chairman Gagliardi asked how the Opinions of the Attorney General are currently indexed. Vanessa explained that they are in chronological order, but not indexed by subject. Chairman Gagliardi confirmed that Ms. Tharney did not require input from the Commission until she had the opportunity to synthesize the available information and make some determinations regarding the manner in which the UELMA might most appropriately be tailored to accomplish the goals of the act in New Jersey. Chairman Gagliardi thanked Maliha and Vanessa for the work with the Commission and wished both of them the best of luck in their future endeavors.

### **New Jersey Soldier's and Sailor's Civil Relief Act**

Steven Brizek advised that the predecessor legislation to the federal Service members Civil Relief Act dates from the Civil War. He explained that Jayne Johnson reviewed the New Jersey statute and that he examined the federal counterpart. The current federal act was relatively recently revised, and is comprehensive. It is designed to offer service members protection from the negative impacts of civil actions that might otherwise be taken against them while they are serving in the military and unable to adequately respond and protect their interests. There is some overlap between the provisions of the federal act and the State law, but they are not identical. One difference between the two is that the New Jersey National Guard and reservists are not covered by the federal act. Those two groups are covered by State law, but State law does not currently protect the interests of service members in the same way that federal law does.

Jayne Johnson said that she, Laura Tharney and Marna Brown attended a seminar by Patricia Apy, a leading voice in this area of the law. Ms. Apy explained the provisions and significance of the federal statute and said that there was a need to update State law,

last revised in 1979, so that New Jersey service members were afforded appropriate protection and that the results reached in these cases were consistent and properly applied the law. Ms. Johnson said that there are discrepancies between the federal and state law. For example, under the federal law, it is mandatory that the service member is appointed legal counsel while under state law the court has discretion to appoint counsel. Stays and the vacating of judgments also are discretionary under the state statute. Ms. Johnson said that the state statute should be updated because, as Ms. Apy explained, there are cases in which New Jersey courts are not applying the federal law; but are instead relying only on State law, which, in some instances, offers less protection to service members.

Ms. Johnson recently learned that Ms. Apy is working with the Military Law Section of the New Jersey State Bar Association to draft a statute that updates New Jersey law and addresses the inconsistencies with the federal law. It is Ms. Johnson's understanding that the goal is to prepare a draft by the end of summer. Ms. Tharney said that, when Commission Staff first learned of the issues in this area, no one was working on them but now that the NJSBA was apparently working in this area, it might make sense to work cooperatively, rather than prepare two drafts. Chairman Gagliardi said that this was an important project and if the key issues could be resolved by adding a sentence or two to an existing statute, then it did not seem as though more than one entity needed to be working on the project. Ms. Tharney explained that a more comprehensive approach might be appropriate. The Commission determined that it would take no action on this project pending further outreach and would decide at a later meeting whether to move forward with a very limited Tentative Report in this area of the law.

### **Tuition Aid Grants**

Uche Enwereuzor stated that based on the comments from the March meeting he added the term "rebuttable presumption" to the draft language clarifying the State Scholarship and Grants provisions outlined in *N.J.S. 18A:71B-2(b)*. In *A.Z. ex rel. B.Z. v. Higher Educ. Student Assistance Authority*, 427 N.J. Super. 389 (App. Div. 2012), the Appellate Division considered the application of that section of the statute to a dependent student whose parent or guardian is prevented from or has not established a New Jersey domicile. The Court, in *A.Z.*, held that the intent of the Legislature was that "a student's legal residence [is] only presumed to be that of his or her parents' residence," and that such presumption is rebuttable. As a result, using the term "rebuttable presumption" best codifies the *A.Z.* decision.

Commissioner Bunn acknowledged that the terms "parent" and "guardian" create ambiguity that could be resolved by using another term like "custodial parent" but he agreed with Commissioner Long that because the terms are used in many other statutes the benefit of replacing them is outweighed by the benefit of preserving consistency.

Commissioner Bunn made a motion to release the report as a Tentative Report, which was seconded by Commissioner Long and approved by the Commission.

### **Title 2C – Sexual Offenses**

Mr. Enwereuzor explained that the problematic sentence in 2C:14-2(a) addressing sexual activity on the part of an individual with an intellectual or developmental disability has been removed from the draft as requested by the Commission in March. He said that the proposed language now codifies the decisions involving sexual assault and other sexual offenses, particularly *State in Interest of M.T.S.*, 129 N.J. 422 (1992) and *State v. Triestman*, 416 N.J. Super. 195 (App. Div. 2010). Commissioner Bunn made a motion to release the report as a Revised Tentative Report, which was seconded by Commissioner Bell and approved by the Commission.

### **Pejorative Terms Regarding Persons with Physical or Sensory Disabilities**

Marna Brown asked the Commission for approval to hold this matter for one month in order to accommodate an ongoing debate regarding whether “birth defects” constitutes a pejorative term requiring remediation. There have been a number of commenters from various interest groups who have weighed in on the question thus far, and Ms. Brown wanted to be sure that there was adequate time to allow for additional input. The Commission agreed that none of the alternative terms proposed to this time seemed to be ideally suited and that additional input from groups with knowledge and experience in this area would be useful. The Commission approved the request that this matter be held for one month.

### **Revised Uniform Law on Notarial Acts**

Jayne Johnson said that the Draft Tentative Report regarding the Revised Uniform Law on Notarial Acts had been prepared to compile the provisions of the existing State law, the uniform act, pending legislation and, as appropriate, bills introduced in prior sessions that were not enacted in order to create a comprehensive draft. She reached out to Ann Laurie Fratticcioli, President of the New Jersey Notary Association, who expressed openness to reviewing the draft.

The Commission did not object to Ms. Johnson circulating the draft informally for comments while continuing to revise it in anticipation of a formal release of the Report at a later time. In anticipation of further revisions, the Commissioners made a number of suggestions, including: consideration of revisions to the definition of “State” and consistent capitalization of the term when it refers to New Jersey; changing references within the draft to refer to the State Treasurer as the authority with responsibility for notaries; reordering the provisions on page 9 in the prohibited acts section; and

consideration of the provisions on page 13 and the need for clarification regarding who has authority to sign a document that will be notarized (signing with consent). Chairman Gagliardi noted that Commission anticipated these and other revisions to the uniform law and the existing New Jersey law in the Report of the comprehensive draft.

### **Uniform Electronic Recordation of Custodial Interrogations Act**

Steven Brizek explained that the UEROCIA addresses the use of audio and/or videotaping to record law enforcement interviews of criminal suspects who are in custody. Since it provides for discretion on the part of the enacting states, adoption of the UEROCIA would not necessarily yield the interstate benefits generally to be expected by the wide adoption of a uniform law. Mr. Brizek also pointed out that New Jersey's criminal justice system has been operating under such a mandate since 2007, pursuant to R. 3:17, and mentioned that enactment of the uniform law could present a *Winberry* problem. He added that although the Court Rules do not bind law enforcement officers, the consequence of failing to proceed in accordance with the Rules could limit the use of information gathered during the questioning and, since New Jersey appears to have adequately addressed this issue, he did not recommend taking action pursuant to the uniform act. Commissioner Bunn moved that a Final Report be issued recommending no action on this act and Commissioner Long seconded the motion, which was unanimously approved.

### **Uniform Deployed Parents Custody and Visitation Act**

Ms. Brown recommended that a Final Report be released recommending that the UDPCVA not be adopted in New Jersey because the existing New Jersey law is better drafted than the proposed UDPCVA in many respects and current New Jersey law renders the UDPCVA unnecessary. Release of a Final Report declining further action was authorized on motion of Commissioner Bunn, seconded by Commissioner Long are unanimously approved.

### **Miscellaneous**

Chairman Gagliardi reminded the Commission that the May meeting had been rescheduled to May 23rd.

John Cannel said that both parts of the residential mortgage satisfaction act were before the Assembly.