

## **MINUTES OF COMMISSION MEETING**

**May 23, 2013**

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 Virginia Long, Commissioner Albert Burstein, Professor Ahmed I. Bulbulia of Seton Hall Law School attended on behalf of Commissioner Patrick Hobbs, and Grace C. Bertone, of Bertone Piccini LLP, attended on behalf of Commissioner Rayman Solomon.

Rita Marie Fulginiti, Cape May County Clerk, President of the Constitutional Officers Association of New Jersey (COANJ) was joined by another representative of COANJ, Cindy Fine appeared on behalf of the Education Law Center, and an observer on behalf of the Princeton Public Affairs Group was also in attendance.

### **Minutes**

The Minutes of the April meeting are to be modified to clarify that the release of the Final Report regarding UDPCVA was unanimously approved, but, with that change, were unanimously approved on motion of Commissioner Long, seconded by Commissioner Bertone.

Chairman Gagliardi acknowledged the departure of Marna Brown as Counsel to the Commission. He thanked her for her dedicated service and stated that the Commission was fortunate to have selected her from among many worthy candidates.

Commissioner Burstein also commended Ms. Brown for her stellar work and credited her for successfully leading several complex projects through to conclusion, particularly the Construction Lien project, and described her as a catalyst in bringing together divergent parties to create a beneficial result for the public. Ms. Brown thanked the Commission and said that working with the Commission has been a highlight of her legal career.

### **Pejorative Terms**

Marna Brown explained that action on this Report had been held for one month in order to accommodate an ongoing debate involving the issue of whether “birth defects” constitutes a pejorative term requiring remediation. Ms. Brown reported to the Commission that the issue has been resolved. The majority of the interested parties agreed that the term “birth defects” is not a pejorative term and will not be included in the Report.

Ms. Brown added that references to community hospitals, substance use and abuse, drug use and abuse, and other related terms should be given diagnostic descriptions as provided in the Fifth Edition of the *Diagnostic and Statistical Manual for Mental Disorders*. Ms. Brown proposed that the Report be released for public comment as a Tentative Report. The Commission unanimously voted to release the Tentative Report on motion by Commissioner Bertone, seconded by Commissioner Bulbulia.

### **Mortgage Recording**

John Cannel explained that the current draft on this project is more limited in scope than earlier drafts. However the more limited draft still addresses problems with foreclosure and recording mortgage satisfaction and would be useful if enacted. Mrs. Fulginiti said that the County Clerks do not have any objections to the Report in its present form.

Based on the Memorandum submitted to the Commission with the Report, Mr. Cannel asked the Commission whether an additional provision should be included in the Report. The proposed provision is designed to provide protection to a property owner who makes payments to a party appearing to be a new mortgage servicer after receiving a notice that seems to comply with federal regulations. After discussion, the Commission elected to include the proposal in the Report. The Commission unanimously voted to release the Tentative Report for public comment on the motion of Commissioner Long, seconded by Commissioner Bulbulia.

### **Underground Facility Protection Act**

Jayne Johnson proposed the release of a Tentative Report concerning *N.J.S. 48:2-80(d)*, the subsection of the Underground Facility Protection Act (UFPA) held unconstitutional by the New Jersey Supreme Court because it compels alternative dispute resolution for common law claims without preserving the right to a jury trial. *Jersey Central Power & Light Co. v. Melcar Utility Co.*, 212 N.J. 576, 581 (N.J. Jan. 24, 2013) (*JCP&L*). *N.J.S. 48:2-80(d)* mandates arbitration for claims involving less than \$25,000 in underground facility damage disputes and permits arbitration when the parties consent for claims in excess of \$25,000.

In *JCP&L*, the utility company sought reimbursement for costs incurred for repairing underground electrical lines damaged during Melcar's excavation work pursuant to the Underground Facility Protection Act, *N.J.S. 48:2-73*, et seq. The Supreme Court ruled that the right to a jury trial attaches to the negligence suit brought by JCP&L

seeking property damages. The Court said that, in other situations in which the Legislature has compelled arbitration, it has permitted the right to a trial *de novo* at the conclusion of the arbitration process if the right to a jury trial was implicated. In the statutory provision at issue, the right to a jury trial was not preserved. The Court determined that its only recourse was to rule subsection (d) unconstitutional because the Court was powerless to add language to the statute.

Ms. Johnson recommended that the report be released for public comment as a Tentative Report. The Commission unanimously voted to release the Tentative Report on motion by Commissioner Long and seconded by Commissioner Bulbulia.

### **Multiple Extended Terms**

Laura Tharney proposed the release of a Tentative Report on the project that resulted from the decision in *State v. Hudson*, 209 N.J. 513 (2012), in which the New Jersey Supreme Court considered whether and under what circumstances a defendant could be sentenced, pursuant to subsections a. and b. of *N.J.S. 2C:44-5*, to more than one extended term of imprisonment when the sentences are imposed in separate proceedings and when the second sentence is imposed for an offense committed prior to the imposition of the first sentence.

The initial draft language presented to the Commission provided two alternatives, one was focused on changing the statutory language to incorporate a reference to mandatory extended terms, and the second was more broad – calling for the application of the prohibition on multiple extended term sentences “except as otherwise provided by law”. No commenters have thus far indicated a preference for either of the options contained in the prior draft. Ms. Tharney said that she had revised the Report to include a single provision based on the Commission’s previously expressed preference for the “except as otherwise provided by law” language. She altered the language to substitute “required” for “provided” in an effort to encourage a more limited application of the language in light of the Court’s discussion of the issue.

Ms. Tharney said that that additional outreach would be made to criminal law practitioners and said that she hoped that the release of a Tentative Report will encourage more response from commenters. The Commission voted unanimously to release the Tentative Report on motion of Commissioner Long, seconded by Commissioner Bertone.

## Miscellaneous

Ms. Tharney explained that she attended the annual meeting of the American Law Institute and that the ALI was working in areas that are of interest to the Commission, including collateral consequences of conviction and sexual offenses, and that the recipient of one of the awards at the meeting conveyed some interesting information about MERS.

Mr. Cannel advised the Commission that pending bill A4023 proposed technical changes to the Revised Uniform Limited Liability Company Act concerning the rights of creditors of members of the LLC. He asked whether the Commission wished to consider the issue and take a position on the proposed amendment. The Commission determined that no action was necessary at this time.

Ms. Tharney mentioned that a recent decision by the New Jersey Supreme Court in *State v. Rangel*, addressed one of the statutory sections included in the Commission's 2C Sexual Offenses Tentative Report. The Commission will consider relevant case law in addition to any comments received regarding the Report.

Ms. Brown said that she and Ms. Tharney met with representatives of the Administrative Office of the Courts to discuss issues involving the Collaborative Law project. Ms. Brown said that, in advance of the meeting, Ms. Tharney suggested some additional changes to the Report that were acceptable to those present at the meeting. It is anticipated that additional feedback on this project will be provided in advance of the July meeting.

The following updates regarding pending legislation were provided:

- May 20, 2013 - Bill A-3276 which repeals anachronistic, superseded, or invalidated sections of statutory law passed the House with a vote of 77-0-0;
- April 29, 2013 - Bill A-1551 which establishes or enforces property rights related to adverse possession passed the House with a vote of 57-16;
- April 29, 2013 - Bill A-3586 which removes statutory authority of the Department of Health and the Board of Medical Examiners over medical standards governing declarations of death upon the basis of neurological criteria passed the House with a vote of 62-14;
- April 29, 2013 - Bill S-2144 which repeals and replaces Chapters 1 and 7 of the Uniform Commercial Code and revises various additional

provisions of the code passed both Houses (Senate, 39-0; House 76-0) and was sent to the Governor.

The meeting was adjourned after a motion by Commissioner Burstein, seconded by Commissioner Bertone.