

## **MINUTES OF COMMISSION MEETING**

**December 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 Albert Burstein, and Commissioner Virginia Long (participating via telephone). Grace C. Bertone, of Bertone Piccini 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**

Chairman Gagliardi requested that Staff add the word “be” to the last line of the section of the Minutes pertaining to Title 9 – Child Abuse and Neglect after “Report” and before “considered”. The Minutes were unanimously approved as amended on motion of Commissioner Burstein, seconded by Commissioner Bulbulia.

### **Title 9 – Child Abuse and Neglect**

John Cannel explained that the Draft Tentative Report prepared in advance of this meeting contained all of the modifications requested by the Commission at the November meeting, with the exception of one issue in Section 9:27-14 for which Staff was not in agreement as to the direction provided by the Commission. Section 9:27-14 contains language permitting third party private action by an individual “with knowledge of facts substantiating the abuse or neglect or need of services.”

The Commission determined that the provision should permit third party, private action in both child abuse and neglect actions, as well as in actions involving “a child in need of services,” and the permissive statutory language should be identical in each subsection. Commissioner Long added that at this stage of the drafting Section 9:27-14 should allow the Division of Child Permanency and Protection (DCPP) to be made a party to the action. Commissioner Long stated that the draft should also allow DCPP, at the judge’s discretion, to act in the place of the third party, private plaintiff once the action has been filed. Commissioner Long noted that by including both provisions at this stage of the drafting interested parties might generate comment, providing Staff an opportunity to determine whether each section should remain in the Commission’s final recommendations to the Legislature.

Commissioner Long also recommended revising the comment to Section 9:27-1 that discusses “excessive physical punishment” in subsection b.(3).

Commissioner Long applauded the efforts of Mr. Cannel on this project. She said that, if adopted, the statutory revisions to this Title would serve as one of the recent top achievements of the Commission.

The Commission voted unanimously to release the Tentative Report on motion of Commissioner Long, seconded by Commissioner Bulbulia.

### **Equine Activities Liability Act**

Vito Petitti presented a Memorandum responsive to the Commission's request for a summary of the *Hubner* case and the excerpts of prior discussions of this project. The Memorandum also contained drafting options based on the comments of the Commissioners. Mr. Petitti also provided information responsive to Professor Bell's request for information regarding the impact of release from liability forms and the question of whether New Jersey had, or should have, statutory provisions pertaining to skate parks.

Ms. Tharney said that there were a few specific issues on which Staff wished to focus the Commission's attention. She first addressed the language drafted for 5:15-3 a.(3) pursuant to Commissioner Long's suggestions and asked if the Commission wanted this language to appear in the next draft. Staff had eliminated language added in prior revisions, and removed language pertaining to responsibilities in response to Commissioner Long's concerns that the prior version might have been unnecessarily complex and seemed to overlap with the duty of care of the ordinary business proprietor.

Chairman Gagliardi asked whether anyone objected to the incorporation of the revised version. There were no objections, and all agreed that this language should be incorporated into the draft.

Chairman Gagliardi then directed the Commission's attention to Section 5:15-9. Commissioner Bunn had suggested modifications to the end of Section 5:15-9 a.(5) to add "except as to the risks assumed" under Section 5:15-3. Commissioner Long and Commissioner Bell disagreed, expressing concern that such a change would alter the balance that had been struck between the protections provided for operators and the risks assumed by the participants. Commissioner Burstein agreed with the concerns expressed by Commissioners Bell and Long.

With regard to Section 5:15-9 a.(4), noting that Commissioner Long had expressed concerns about this language, and had suggested that Staff might want to change the direction of its drafting – eliminating the more detailed language found in the prior draft, and replacing it with language that tracked the standard duty of care owed to invitees generally. In the draft under consideration, Staff included language found in tort cases dealing with premises and invitees generally. The new language is more general and less focused on the specifics of equine situations than the language in the prior draft.

Commissioner Long said that she preferred the new language, and the Commissioner agreed.

The Commission then considered 5:15-9 subsection b., which had been proposed for removal by Commissioner Bunn. Justice Long disagreed with the removal of the section, but proposed it be changed to read “Nothing in N.J.S. 5:15-3 and N.J.S. 5:15-4 should be read to insulate an operator from any of the obligations imposed upon the operator by this section.” Chairman Gagliardi said that if the Commission were writing this statute from the beginning, the section might not be included, but noted that in light of the general provisions regarding statutory interpretation, taking it out could send a signal that the standards and balance are being entirely changed, which is not the intention of the Commission. Commissioner Burstein agreed, but noted that this change – and the others made to the Report - should be explained in the commentary. In light of prior Commission discussions, the question was raised about how the revised language would work in a situation in which a proprietor hires an employee known to have prior convictions for disturbing the peace, who is known to bring an air horn to the stable, and who then blows the air horn near a horse, frightening the horse and injuring its rider. Mr. Petitti noted that under this version, that behavior would likely be considered negligent disregard. Justice Long agreed. Ms. Tharney noted that if the language “except as to risk assumed” discussed earlier had been added to the statute, that would change the balance of assumption of risks and the liabilities imposed on operators.

Ms. Tharney said that Staff would make the changes requested and asked whether the Commission would like to review this again at the January meeting or would prefer to release it as a Tentative Report. In light of the interest expressed by both Commissioner Bell and Commissioner Bunn, who were not in attendance, the Chairman suggested that the Commission should see the Report again in January.

When the Commission ended its discussion relating to the Equine Act, Mr. Petitti asked whether the Commission would like to see a Memorandum regarding a possible Skate Park project in response to Professor Bell’s query. Chairman Gagliardi asked how many other states have skate park statutes. Mr. Petitti did not yet know the answer to this question, but said that his preliminary research indicated that there is lobbying by both skate park associations and by trial lawyers in this area. He added that although Title 5 contains legislation controlling various sports activities, including the Ski Act and Roller Skating Rink Act, there is no statute guiding the operation of skate parks in New Jersey.

Chairman Gagliardi said that since the Commission did not yet have enough information to determine whether this was an appropriate project, a short Memorandum to the Commission with some background would be helpful.

## **New Jersey Soldiers' and Sailors' Civil Relief Act**

Jayne Johnson discussed the prior presentation of this project at the April Commission meeting where Staff presented a memorandum examining the two statutes in force in New Jersey that provide protections to active duty service men and women, the Federal statute, the Servicemembers Civil Relief Act ("SCRA"), 50 U.S.C. App. 501 et seq; and the state statute, the New Jersey Soldiers' and Sailors' Civil Relief Act ("NJSSCRA"), N.J.S. 38:23C-1 et seq.

Ms. Johnson explained that the NJSSCRA provides the initial reference point for New Jersey courts when faced with matters involving relief provided by both the NJSSCRA and the SCRA. Ms. Johnson stated that, in April, Staff proposed a project to determine whether the NJSSCRA presents problems for legal practitioners when representing servicemembers in New Jersey courts; particularly, a court's ability under the NJSSCRA to exercise discretion when determining whether to stay a proceeding, to vacate or set aside a judgment or decree against a servicemember, or to appoint an attorney to represent the servicemember.

Ms. Johnson noted that just prior to the April Commission meeting, an interested member of the New Jersey State Bar Association (NJSBA) informed Executive Director Laura Tharney that the Military Law and Veterans' Affairs Section of the bar anticipated drafting a state statute by the end of the summer that harmonized the NJSSCRA with federal law. In light of this information, the Commission determined that it would not take action on this project pending further outreach to determine if the NJSBA or other entities were preparing draft legislation, and would consider at a later meeting whether to move forward with a Tentative Report. In the ensuing months, Staff reached out to the NJSBA to determine the status of the draft legislation.

In her most recent conversation with the NJSBA, Ms. Johnson was informed that the NJSBA is not involved in or aware of any draft legislation reconciling inconsistencies between the NJSSCRA and the SCRA, and it is not the intention of any section or subcommittee to begin work on such legislation in the near future. Based on this update, the Commission unanimously authorized Staff to further investigate whether there are legal or practical issues presented by the NJSSCRA that may require amendment to ensure its compatibility with the SCRA.

## **2013 Annual Report**

Chairman Gagliardi asked if any member of the Commission had any comments on the draft 2013 Annual Report that had been provided for Commission consideration. The Commission generally approved the form and content of the draft Report and Staff will review the Report and make any necessary additions and corrections and submit a final version with the January meeting materials for formal approval by the Commission

so that the Annual Report may be released and distributed in compliance with the statutory February 1<sup>st</sup> deadline.

### **Miscellaneous**

The Commission approved the proposed date of the January Commission meeting (January 16, 2014 at 10:00 a.m.) and will consider and approve the dates for the rest of the 2014 meetings at that January meeting.

Laura Tharney and John Cannel briefly advised that there had been Legislative movement on the Adverse Possession and Declaration of Death Act.

The Commission meeting was adjourned on motion of Commissioner Burstein, seconded by Commissioner Bulbulia.