

## **MINUTES OF COMMISSION MEETING**

**January 16, 2014**

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, Commissioner Albert Burstein and Commissioner Virginia Long (participating via telephone). Professor Bernard Bell, of Rutgers School of Law - Newark, attended on behalf of Commissioner John J. Farmer, Jr.; 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.

Alida Kass, Esq. from the New Jersey Civil Justice Institute and David McMillin, Esq., of Legal Services of New Jersey were also in attendance.

### **Minutes**

The December Minutes were unanimously approved on motion of Commissioner Burstein, seconded by Commissioner Bulbulia.

### **Equine Activities Liability Act**

Vito Petitti began by presenting the Revised Tentative Report (RTR), dated January 6, 2014, containing the changes agreed upon by the Commission members at the December 2013 meeting. Mr. Petitti reminded the Commissioners that, in light of the interest expressed by Commissioners Bell and Bunn, neither of whom was in attendance at December's meeting, the Chairman had suggested looking at the RTR at today's meeting.

The Chairman invited discussion and Commissioner Bunn noted his continued concern that the language in 5:15-9, "Responsibilities of operators; exceptions to limitations on operator liability", with the obligations imposed there, could override the assumption of risk doctrine. Professor Bell suggested that the New Jersey Supreme Court had done a good job of maintaining the balance between protections and risks. Justice Long agreed with Professor Bell, and said that she was satisfied with this draft of 5:15-9. The Chairman added that, while it would still be possible for a skilled plaintiff's attorney to take advantage of the language, it appears that it will be effective. Commissioner Burstein suggested changing the word "purports" to "states" under N.J.S 5:15-9 on Page 3 of the RTR, to which there was general agreement.

The Commission voted 6-1 to release the Revised Tentative Report on motion of Commissioner Long, seconded by Professor Bell; with Commissioner Bunn voting against the motion.

## **Consumer Fraud Act**

Jordan Goldberg began by explaining that the Consumer Fraud Act (CFA) is one of the most complicated statutes in New Jersey, and one that receives a significant amount of legislative attention each year. She explained that a project concerning the CFA was being proposed in order to consider how to streamline what is undoubtedly a complex and confusing set of statutes and amendments. The project could also address redundancies and ambiguities in the statute, without engaging in the kind of policy decision-making regarding the statute's operations that have been the focus of legislative discussion over the years. Given the extensive nature of the CFA, the presence of redundancy and ambiguity in its terms and structure, and the ongoing interest in a robust consumer protection statute, Ms. Goldberg proposed that the Commission consider a project to revise and restructure the CFA in order to ensure better clarity, to excise redundancy, and to attempt to address ambiguities that have been identified in case law and by scholars and legislators.

The Chairman noted the importance of eliminating redundancies and asked whether Staff required a consensus from the Commission, to which Ms. Tharney replied in the affirmative. Commissioner Bunn noted that the FTC Act history should be kept in mind because it would be useful to mirror FTC Act language to inform jurisprudence. Justice Long commented that each time the Consumer Fraud Act is "laid to rest," another issue arises. The chairman then recognized David McMillin, Senior Attorney with Legal Services of New Jersey, and invited his comments.

Mr. McMillin informed the Commission that the Act contains a lot of statutory language but, because many Legal Services clients are affected, it is of "crucial importance" that nothing be done to weaken the three key sections: 1, 2, and 19. He said that, while another section might be unwieldy and might be worthy of attention, the three crucial sections usually work very well and are very simple and straightforward. Mr. McMillin also pointed out that, while the FTC Act does not provide a private cause of action, Section 19 of the CFA does.

The Chairman informed Ms. Goldberg that the Commission unanimously approved her request and would look forward to the progress of this project.

## **Insurance Project**

Chairman Gagliardi conveyed the Commission's agreement with the recommendation contained in the Memorandum concerning this project that no action be taken by the Commission at this time.

## Judgments and Their Enforcement

John Cannel presented the Draft Tentative Report concerning Judgments and Their Enforcement, which revises and updates an earlier Commission report. Since the Report was presented to the Commission in July, Mr. Cannel has received comments from the Legal Services of New Jersey (LSNJ), the Administrative Office of the Courts and Gerard Felt, Esq., of Pressler and Pressler, LLP. David McMillin, appearing on behalf of the LSNJ, expressed concern about the current statutory level of exemptions provided to debtors, and the method of evaluating personal property.

Mr. McMillin began by noting that this is an issue of great significance to the LSNJ because, outside of eviction actions, the cases involving judgments and enforcement generate the most volume for the LSNJ. Mr. McMillin suggested that New Jersey law is not concerned about leaving people destitute as the result of a judgment against them, since it allows creditors to have access to debtors' basic necessities. Mr. McMillin cited a study by the National Consumer Law Center (NCLC) that includes a grading system for enforcement of debt in each of the fifty states. Mr. McMillin stated that New Jersey received a low score in the report regarding that study because New Jersey lacks exemptions for cars, homes and basic necessities. Mr. McMillin asserted that low income consumers are vulnerable in New Jersey because the current statute provides no meaningful necessities exemption – only \$1000 for household furniture plus another \$1000 for all other provisions. Mr. McMillin added that there are many low-income New Jersey consumers who own houses, and their houses are at risk as a result of the enforcement of judgments. Mr. McMillin observed that creditors order enforcements against people's homes for medical or credit card debt; and the threat of that enforcement makes low income consumers bargain away their other assets, even exempt income like social security. Mr. McMillin offered the bill proposed by the National Consumer Law Center as a model act for the Commission, if it drafts language to revise the exemption provision.

Mr. McMillin suggested that the Commission include in this project the following exemptions: (1) homestead, (2) car to get to work/health appointments, (3) modest amount of savings, (4) an increased exemption that reflects the cost of living and inflation rates since the current \$1000 general exemption was enacted in 1973; and (5) a CPI rider. Chairman Gagliardi inquired about the scope of the project, and asked whether changing the level of exemptions would constitute updating an existing law that has not been revisited since 1973 or whether it was a policy decision.

Commissioner Burstein asked Mr. McMillin whether the NCLC grading system provided analysis of the consequences associated with a lower or higher exemption than New Jersey's current law. Mr. McMillin responded that, based on his recollection, there had not been many studies, but that those that existed had not found any particular

connection with bankruptcies or other consequences. Commissioner Burstein noted that the reason he had asked the question was that there is a reluctance to move away from exemptions that have existed for many decades, if there is no clear evidence to show invidious effects of the law. Mr. McMillin responded that some of the effects are largely unmeasurable – particularly situations where individuals are feeling pressured to use exempt income like Social Security to satisfy a debt. Commissioner Burstein stated that this posed a problem, but it was unclear what would happen if the thresholds were changed.

Commissioner Bunn asked why the personal exemption has not changed since 1973, asking whether it had been proposed and failed to pass, or whether the issue had simply not come up. Mr. Cannel responded that an earlier report from the NJLRC had recommended changing the exemption, but the sponsor had removed that provision before introduction. The exempt amount, however, would be \$5,000 or \$6000 if adjusted for inflation.

Commissioner Bunn suggested that rather than include this in the body of the report, Staff should create a separate section dealing just with the exemptions and include a comment explaining that this section has not been adjusted for inflation or revisited at all since 1973, and that we recommend that the Legislature revisit it. Commissioner Bunn said that he would prefer not to put in a dollar figure at all, since it becomes obsolete so quickly, and that it might be best to provide all of the information to the Legislature for consideration without recommending a dollar amount. Commissioner Bell said that it makes sense to change the exceptions, because other recommended changes to the law would make debts easier to collect, so there should be some accommodation for debtors who rely on the current intricacies of the New Jersey process to protect them. Commissioner Bell asked that Mr. Cannel provide a blank model statute from the NCLC's report.

The Commission also considered the following requests: (1) changing the name of the Judgment Docket to the "Judgment Lien Index;" (2) requiring the address of lien creditors, and (3) changes to the consent judgments provision. The Commission accepted the name change from the Judgment Docket to the "Judgment Lien Index." The Commission agreed to leave provisions requiring the address of lien creditors and the provision on consent judgments unchanged from the current draft. Mr. McMillin expressed support for that decision.

With regard to the evaluation of debtor property, Mr. McMillin noted that the current law has been the same for centuries, that if there's an execution on personal property, the executor appoints three "judicious" people to decide the value of the property. A second option would be that both debtor and creditor have to agree about the value of the property, and if there is a disagreement than the matter would be decided by

the court. Commissioner Bunn asks what happens now in disputes. Mr. McMillin responded that a Special Civil Part Officer goes to the debtor's home, knocks on the door and asks to inspect the property, and then generally concludes that there is nothing of value available. Nonetheless, the impact of this procedure is to scare the debtor, who then may be more likely to give up things that should be untouchable like Social Security. Mr. McMillin noted, however, that there are very few disputes over value. Mr. Cannel agreed that there is typically nothing of value, and also noted that the Report cannot suggest a process that will remove the potential fear experienced by the debtor. It was also noted that the Report recommends language stating that either the creditor or debtor may appeal a dispute about the value.

Mr. McMillin identified two possible methods to determine the value of the debtor's property: (1) the debtor and the creditor come to an agreement, and if an agreement is not reached, the matter is brought before the courts; or (2) three assessors - or "judicious persons" as they are described in the statute - determine the value of the property. Mr. McMillin stated that the LSNJ proposes the second method and he suggested that the current law already allows for this process. The Commission rejected the three assessors approach, and tentatively decided to have the draft provide that if the two parties could not agree, the collection officer would decide and either party could challenge that assessment in court.

Mr. McMillin requested that the Commission consider a reasonable home exemption and address the related issues involving the availability of real estate, and consider a reasonable homestead exemption of approximately \$125,000 per debtor in line with federal bankruptcy law. Mr. McMillin noted that the homestead exemption was passed by the New Jersey Legislature years ago, but did not become law because of a conditional veto.

Chairman Gagliardi requested that Mr. Cannel update the Report, research the exemption issue (including a review of the Report from the NCLC), and draft a revised Report for Commission consideration at an upcoming meeting.

### **Ante-Mortem Planning Project**

Ms. Goldberg began by explaining that Commissioner Burstein recently brought to the attention of Staff a recent New Jersey Law Journal (NJLJ) article raising a new issue in the area of estate planning that might be worth exploring as a Commission project. Specifically, the NJLJ ran a story entitled "Ante-Mortem Probate: Why Wait Until It's Too Late?" that describes an approach taken by a few states to allow testators to probate the validity of their wills prior to death. Commissioner Burstein added that this kind of approach would have resulted in a more appropriate resolution of a number of cases that he had encountered, and had suggested that it might be worth bringing to the

Commission's attention. Ms. Goldberg conducted some limited additional research to be able to provide a balanced review of the proposals contained in the article, and had determined that four states have such policies, three of which were adopted in the 1970s. She added that scholars had identified both pros and cons to the different options for ante-mortem planning.

Ms. Goldberg advised that no case law appeared to exist on the subject. Commissioner Bunn noted that the existence of the statute might be the reason for that, as going through the process described would preclude a later will contest. Commissioner Long suggested that this was potentially one of the salutary aspects of the policy. The Commission unanimously approved Ms. Goldberg's request for authorization to proceed with this project.

### **2013 Annual Report**

The Commission unanimously approved the release of the 2013 Annual Report on motion of Commissioner Bunn, seconded by Commissioner Burstein.

### **Miscellaneous**

The Commission approved the tentative 2014 meeting schedule.

Laura Tharney advised the Commission that the bill revising the Declaration of Death Act had been signed by the Governor on January 13, 2014.

The meeting was adjourned on motion of Commissioner Bunn, seconded by Commissioner Long.

The next meeting of the Commission is scheduled for Thursday, February 20, 2013 at 10:00 am.