

## **MINUTES OF COMMISSION MEETING**

**December 18, 2014**

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 Bunn, Commissioner Anthony Suarez, and Commissioner Virginia Long. Professor Bernard Bell, of Rutgers School of Law - Newark, attended on behalf of Commissioner John J. Farmer, Jr.

### **Minutes**

The Minutes of the November Commission meeting were approved, and the actions taken at the November meeting were ratified, on motion of Commissioner Long, seconded by Commissioner Bunn. Commissioner Suarez abstained.

### **Uniform Interstate Family Support Act**

Mr. Cannel presented the Draft Final Report concerning the Uniform Interstate Family Support Act. The Uniform Law Commission adopted amendments to the Act in 2008, modifying the current version of UIFSA's international provisions to comport with the obligations of the United States under the 2007 Hague Convention on Maintenance. In 2014, the Convention was implemented, and federal legislation required all states to enact the 2008 UIFSA Amendments as a condition of continuing to receive federal funds for state child support programs. These amendments change state law in that they allow the enforcement of foreign support orders. Mr. Cannel explained that this was a time-sensitive matter since it was necessary to enact during the 2015 legislative year in order to comply with the federal law, and the Department of Human Services and the Administrative Office of the Courts (AOC) will need some time after enactment to train personnel and prepare forms. As a result, it is desirable the amendments be considered by the Legislature as soon as possible.

Staff consulted with the Department of Human Services and the AOC to determine the appropriate New Jersey specific provisions to be inserted into the Uniform Act. In addition, after discussion with the Office of Legislative Services, the amendments were drafted as a new law to replace the current version of the Uniform Interstate Family Support Act, now compiled as N.J.S. 2A:4-30.65 et seq. In addition, a replacement law would allow for the preservation of the numbering and captions of the uniform law.

Staff received additional comments from the AOC and the Department of Human Services after filing day regarding the designation of the support enforcement agency and the designation of the state information agency. Mr. Cannel explained that the parties had come to an agreement regarding the designation of the state enforcement agency as the Department of Human Services and the Probation Division of the Superior Court, but that he was seeking guidance from the Commission regarding the designation of the state information agency. After

considering the comments of the two entities, the Commission elected to retain the status quo and identify the Administrative Office of the Courts as the state information agency. The Commission unanimously elected to release the Final Report on motion of Commissioner Long seconded by Commissioner Bunn.

### **Sexual Offenses**

Susan Thatch presented a Draft Final Report regarding Title 2C: Sexual Offenses, explaining that this project was commenced in 2011 and has gone through several revisions based upon the input of commenters. Ms. Thatch noted that the version before the Commission reflects substantial commentary from the AOC and the concerns that they expressed regarding the manner in which previous versions of the proposed revisions had altered the fundamental structure of the statute. AOC conveyed their concerns that reworking the entire structure could have unintended consequences for criminal prosecutions and prove problematic for practitioners and the courts.

As a result, Staff sought to simplify its approach and incorporate modifications necessitated by case law into the existing statutory framework. AOC expressed support for that approach. Ms. Thatch said that the Report was designed to ensure that the statutory provisions relating to sexual offenses accurately reflect the modern understanding and application of the sexual offense law without promoting the uncertainty or confusion that a wholesale reorganization of the statute could potentially create.

Ms. Thatch discussed several areas of modification, including: (1) modifying the physical force requirement to more accurately reflect modern case law interpretations and current jury charges; (2) providing additional language in N.J.S. 14-a.(7) to enhance protection of those possessing a mental or physical incapacity consistent with *State v. Olivio*; (3) clarifying the object of the aggravated assault crime referenced in subsection N.J.S. 14-2 a.(3) consistent with *State v. Rangel*; (4) adding the crime of carjacking as an aggravating predicate crime in N.J.S. 14-2 a.(3); and (5) the removal of certain outdated gender terminology.

Chairman Gagliardi asked whether the commenters objected to the inclusion of carjacking, to which Ms. Thatch replied in the negative.

The Commission discussed the suggestion of one commenter that references to “coercion” be replaced with “physical coercion” and Ms. Thatch expressed her concerns that doing so would contradict the definition of “coercion” upon which the statute currently relies (N.J.S. 2C:13-5, entitled Criminal Coercion, is cross-referenced in the statute in question). In light of that information, the Commission chose not to change the term “coercion”.

Commissioner Bunn moved to release the project as a Final Report, Commissioner Long seconded the motion, and the Commission approved it unanimously.

## **Base Salary**

Susan Thatch presented a Draft Final Report defining Base Salary as contained within N.J.S. 40A:10-21 consistent with the Appellate Division's interpretation in *Paterson Police PBA Local 1 v. City of Paterson*. Ms. Thatch noted that the Report proposes a minor statutory revision which explicitly cross references the definition of "Base Salary" in N.J.S. 40A:10-21 to the definition contained in N.J.S. 34:13A-16.7(a) (the Police and Fire Public Interest Arbitration Reform Act). In keeping with the Court's determination in *Paterson Police PBA*, this revision would define Base Salary to include regular salary in addition to longevity, educational incentives, and night and detective differentials.

Ms. Thatch informed the Commission that she received a positive response from the New Jersey League of Municipalities suggesting that *Paterson Police* was a beneficial case for both municipalities and taxpayers and that the proposed statutory revisions adequately reflect the holding of the Appellate Division. Chairman Gagliardi asked if any other comments had been received and Ms. Thatch replied that she has reached out to other potentially interested parties including the New Jersey State PBA, the Professional Firefighter's of New Jersey, and the New Jersey Division of Consumer Affairs but did not receive comment. Laura Tharney commented that sometimes it unfortunately goes that way.

The project was released as a Final Report on motion of Commissioner Long, seconded by Commissioner Bunn and unanimously approved by the Commission.

## **Franchise Practices Act**

Alex Firsichbaum briefly addressed forum selection and arbitration clauses in franchise agreements, pointing out that based on the research conducted to this time, it appeared that the provision prohibiting forum selection clauses in the New Jersey Franchise Practices Act was intended to apply to all New Jersey franchises, not just motor vehicle franchises. He noted that in *Kubis v. Sun Microsystems*, the New Jersey Supreme Court interpreted the NJFPA in that fashion.

Commissioner Long pointed out that there are a number of cases holding that states are preempted from limiting arbitration by statute as a result of the Federal Arbitration Act and that agreements including language that purports to limit arbitration and contain a forum selection clause are not upheld except in certain cases in which the challenge is based on contract law. Commissioner Bunn specified that arbitration clauses are enforced because it is crystal clear that the Federal Arbitration Act preempts state law that disfavors enforcement of arbitration agreements. Commissioner Bunn then asked whether the forum selection clause language should be left in the New Jersey statutory provision in issue, and Mr. Firsichbaum replied in the affirmative, adding that language limiting the statutory prohibition only to motor vehicle

franchises should be taken out. There followed some discussion among the Commission regarding various punctuation, grammar, and drafting issues.

Since the Commission was working in this area of the law, Commissioner Bell asked whether the definition of “franchise” has kept up with the times or whether it needed to be updated. He asked if there was New Jersey case law suggesting the need for an update of the language. Commissioner Bunn requested that Staff see what other states have done regarding the definition of “franchise”. Chairman Gagliardi directed that the project be carried to a subsequent meeting in order to allow Staff the opportunity to provide the additional information requested.

### **Uniform Voidable Transactions Act**

Jayne Johnson presented the Commission with a Draft Tentative Report relating to the Uniform Voidable Transactions Act (UVTA). Ms. Johnson explained that the Uniform Law Commission approved and recommended for enactment amendments to the 1984 Uniform Fraudulent Transfer Act (UFTA), which New Jersey adopted in 1989. These amendments seek to: (1) re-categorize transfers as “voidable” rather than “fraudulent” to more accurately reflect the nature of these transfers and prevent confusion; (2) provide guidance on conflict of law issues; (3) clarify the burden of proof and create certain presumptions; (4) modify the definition for insolvency of a partnership; (5) create certain defenses; and (6) address the emergence of series organizations. Ms. Johnson explained that she met with Professor Kenneth C. Kettering, the ULC reporter to the UVTA drafting committee, who stated that the 1984 UFTA needed some clarifications and that the necessary clarifications are reflected in the UVTA.

Commissioner Bunn commented that the provisions regarding series organizations contained in proposed section 25:2-33 are very dense and difficult to understand. Ms. Johnson stated that the UVTA adopted the definition found in sections 401-402 of the Uniform Statutory Trust Entity Act and seems to address a series of LLCs that have separate constitutions existing under the umbrella of a larger organization. John Cannel said that it appears to be a method of isolating assets in sub-LLCs.

Commissioner Bunn requested that the definition of “Debtor” contained in section 25:2-21 be modified to read “a person who” rather than “a person that” is liable on a claim. Commissioner Long stated that the two phrases can be used interchangeably. Ms. Johnson noted that “a person that” is language from the UVTA and that New Jersey’s existing law reads “a person who” so it would make sense to leave it as “a person who” in light of the Commissioners’ concerns.

Commissioner Bunn asked about the statute references to law as “R.S.” rather than “N.J.S.” Mr. Cannel explained some of the history and the differentiation between the R.S., N.J.S. and C. references currently contained in the statute.

Commissioner Long pointed out that section 25:2-31 contains a reference to a fraudulent transfer that should be changed to a voidable transfer.

Chairman Gagliardi asked Ms. Johnson who would be solicited for input on this report. Ms. Johnson responded that she would begin outreach with bank lobby groups, the Administrative Office of the Courts, and various sections of the New Jersey State Bar Association. Commissioner Bunn said that the debtor/creditor bar would be interested in this project and Commissioner Bell added that consumer groups might also be interested. Chairman Gagliardi requested a motion to release this Report with the recommended changes (to “who” rather than “that” following “person”). The project was released as a Tentative Report on motion of Commissioner Long, seconded by Commissioner Bunn, and unanimously approved by the Commission.

### **Driver’s License – Penalties, N.J.S. 39:3-10**

Laura Tharney asked that this matter be carried to the January 2015 Commission meeting since Staff had been reworking some of the proposed draft statutory language and wanted to refine it further before Commission consideration and the Commission agreed.

### **Workers’ Compensation**

Mark Leszczyszak informed the Commission that, based upon Staff’s research and the preliminary comments received, it did not appear that attempting to define the term “control” in the statute would be of assistance in clarifying this area of the law. He added that the preliminary comments also suggested that the language of Senator Scutari’s bill appeared sufficient to address the issue on which it focused. As a result, Staff did not recommend further action by the Commission in this area and the Commission agreed to conclude its work at this time.

### **Miscellaneous**

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