

## **MINUTES OF COMMISSION MEETING**

**February 19, 2015**

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 Virginia Long (participating by telephone), and Commissioner Anthony Suarez. Professor Bernard Bell, of Rutgers School of Law - Newark, attended on behalf of Commissioner Ronald K. Chen and Grace C. Bertone, Esq., of Bertone Piccini LLP, attended on behalf of Commissioner John Oberdiek.

### **In Memoriam**

Chairman Gagliardi called for a moment of silence in light of the sad, untimely, passing of Professor Ahmed Bulbulia on January 28, 2015. Professor Bulbulia was selected to represent Commissioner Patrick Hobbs, Dean of Seton Hall University Law School, on the Commission in 2009, after having previously served as the Dean's representative in the earlier years of the Commission. He will be missed.

### **Minutes**

The Minutes of the December 2014 Commission meeting were unanimously approved with one correction as noted at the meeting, and the Minutes of the January 2015 Commission meeting were also approved, both on motion of Commissioner Bunn, seconded by Commissioner Long. Commissioner Suarez abstained from the vote on the January Minutes.

### **Uniform Foreign-Country Money Judgments Recognition Act**

Vito Petitti presented a Draft Final Report concerning the Uniform Foreign-Country Money Judgments Recognition Act (UF-CMJRA), informing the Commissioners that, since the last meeting when the Commission directed Staff to pursue the enactment of the Uniform Law Commission (ULC) act, Assemblyman Patrick J. Diegnan, Jr., introduced Assembly Bill No. 4163 (A4163). The bill, entitled the "Foreign Country Money-Judgments Recognition Act of 2015," is intended to replace existing state statutes, N.J.S. 49:4A-16, et seq., concerning the recognition of foreign country money-judgments.

Mr. Petitti summarized the several provisions in the bill distinguishing it from the ULC act, pointing out that, as the Commission is aware, such additional language is not unusual when states enact ULC acts, and that it did not appear that the additional proposals would cause a conflict in this case.

Justice Long acknowledged that adding the phrase "as determined by the court" to the language of Section 4 was proposed to preserve the discretion of the courts and ensure that their right is not impinged. Justice Long noted that the current statutory language does not reference

court rules, and although *Winberry* challenges had not been asserted against the existing state statute, the proposed language conforms more closely to the holding in that case.

Commissioner Bell asked whether the proposed changes pose an obstacle to uniformity in this area of the law. John Cannel responded that the ULC recognized the introduction of A4163, but did not express any objections to the proposed changes.

The Commission voted to release the Final Report, recommending the Legislature enact A4163 and offering support to the Legislature as the bill is considered, on motion of Commissioner Bunn and seconded by Commissioner Bell.

### **Uniform Act on Prevention of and Remedies for Human Trafficking**

Susan Thatch explained to the Commission that the Draft Tentative Report regarding the Uniform Act on Prevention of and Remedies for Human Trafficking addressed two separate areas of New Jersey's human trafficking law codified within 2C:13-8. She stated that she has been in contact with members of the Office of Attorney General (OAG) and had the opportunity to attend the OAG's Human Trafficking Awareness event in Trenton in furtherance of this project.

Ms. Thatch explained that the Uniform Act contains robust language creating business entity liability for human trafficking crimes. While four states have incorporated similar language into their human trafficking statutes, Delaware has instead chosen to reference its existing corporate liability statute. Ms. Thatch stated that N.J.S. 2C:2-7 contains a general principle of corporate liability for criminal acts and 2C:43-4 contains penalties specific to corporate actors. She recommended referencing these corporate liability provisions within 2C:13-8. Doing so will not create a new standard of business entity liability, but may encourage business entities to remain vigilant in efforts to recognize and prevent human trafficking crimes.

Ms. Thatch further explained that the Uniform Act specifically addresses forced sexually explicit performances as a human trafficking crime. She noted that research indicates that traffickers view strip clubs and other sexually oriented businesses as fertile areas for undetected exploitation. While New Jersey law addresses human trafficking crimes involving "sexual activity" and "labor or services," it neither includes sexually explicit performances within its definition of sexual activity nor defines the term services. Ms. Thatch stated that language contained within the Draft Tentative Report represents the most direct method of addressing this deficiency by adding a reference to sexually explicit performances to the statutory text.

Chairman Gagliardi asked whether the Uniform Law Commission is satisfied with the Law Revision Commission's approach, to which Ms. Thatch replied in the affirmative.

Commissioner Bunn asked about the definition of "sexually explicit performance." Ms. Thatch and Mr. Cannel responded that there is no single accepted definition.

Commissioner Bell asked whether the phrase, “any other” should be added to subsection a.(1) after “provide” and before “labor or service” in 2C:13-8. There was consensus on the Commission to add that phrase and the document was released as a Tentative Report on motion by Commissioner Bell, seconded by Commissioner Long. The motion carried unanimously.

### **Sales and Use Tax Act**

Ms. Thatch discussed the Draft Tentative Report concerning the sales and use tax provision in N.J.S. 54:32B-8.28 that resulted from the New Jersey Appellate Court decision *Air Brook Limousine, Inc. v. Director, Division of Taxation*, which declined to read N.J.S. § 54:32B-8.28 *in pari materia* with the New Jersey’s Public Utility Laws (Title 48) and Motor Vehicle Laws (Title 39), but noted that “[g]iven the risk of impinging on the legislative function, [the court] considers it ‘better to wait for necessary corrections by those authorized to make them, or in fact, for them to remain unmade, however desirable they made be.’” 2012 WL 3166607 (App. Div. 2009), *certif. denied*, 213 N.J. 568, 65 A.3d 835 (2013).

In keeping with the Appellate Division’s determination that “bus” should be construed in accordance with its ordinary and well understood meaning, Ms. Thatch explained that the proposed statutory language defines “bus” as a vehicle that is both registered as an “omnibus” pursuant to Title 39 and is engaged in the type of scheduled, routed service that is typically provided by a bus. The proposed language is similar in structure to the definition of “limousine” contained in N.J.S. 54:32B-8.52. The Report seeks to address the issue raised by the court and will be circulated to relevant stakeholders for comment and review.

Justice Long stated that the proposed revisions address the concerns of the court and allow N.J.S. 54:32B-8.28 to be read *in pari materia* with the relevant provisions in Title 48 and Title 39. Justice Long noted that unless there is a latent tax issue that undermines this approach it is a sensible result.

Professor Bell observed that, to effectuate the intended meaning, the phrase “defined to be” should be added before the phrase “used exclusively in the business of carrying passengers for hire conducted on a scheduled basis and a regular route.” Staff was also directed to confirm that the term “state” in the proposed language was defined to include D.C.

The Report with the modification was unanimously released for distribution, on motion of Commissioner Bunn and seconded by Professor Bell.

### **Civil Unions**

Mr. Petitti discussed the Memorandum providing background information regarding the state of civil unions and same-sex marriages in New Jersey, and described a disconnect between the grounds for dissolving civil unions and marriages. He pointed out that, although New Jersey statute does not permit same-sex couples to dissolve their civil unions based on irreconcilable differences, the Administrative Office of the Courts has instructed family court judges to recognize those grounds. He explained that his preliminary outreach regarding this issue had met

with general support for the modification of the statute to harmonize with the current practice in the State.

Mr. Petitti informed the Commission that Staff had recently become aware of Assembly Bill 3633 (A3633), the “Full Marriage Recognition for Civil Union Couples Act,” which would, under certain circumstances, act to backdate same-sex marriages in New Jersey to the date of the couples’ civil unions. He added that a representative from the State Bar Association’s Family Law and LGBT sections testified in Assembly Judiciary proceedings recently that the SBA opposed the bill and would withhold its support until certain amendments could be made. Mr. Petitti explained the representative’s rationale that there were federal tax issues with backdating the marriage dates, as well as issues involving the adoption tax credit, pre-civil union agreements, and ongoing difficulties for couples attempting to dissolve a civil union outside of New Jersey.

Mr. Petitti requested the Commission’s permission to move forward with the project as proposed, in order to expeditiously address a known problem with early support from potential commenters. He added that Staff wanted to alert the Commissioners of the existence of A3633 in case their preference would be potentially expand the scope and complexity of the project.

Chairman Gagliardi stated that the issues addressed by A3633 seem to be more policy based while the discrepancy between the marriage and civil union statutory provisions is a known and obvious defect. Laura Tharney mentioned that the Office of Legislative Services has already been working on A3633 and therefore she recommended focusing on the more modest project initially identified by Staff.

Commissioner Bell agreed that an expanded project is not necessary at this time and the Commission should focus on the discrepancy between the two statutes. Commissioner Bunn encouraged Staff to draft modifications to the civil union statute in conformance with the language of New Jersey’s marital statute to the greatest extent possible.

Chairman Gagliardi requested that Mr. Petitti present the proposed modifications as a Draft Final Report at the next Commission meeting.

### **Unlawful Possession of Weapons**

Mark Leszczyszak informed the Commission of the recent Supreme Court of New Jersey decision, *State v. Grate*, in which the trial court found that the defendants were involved in organized criminal activity and applied the minimum mandatory sentence pursuant to N.J.S. 2C:39-5(i). During *Grate’s* appeal, the United States Supreme Court held in *Alleyne v. United States* that any fact increasing the mandatory minimum sentence for a crime is an element of the crime, not a sentencing factor, and must be submitted to the jury. *Alleyne* has the effect of expanding *Apprendi v. New Jersey*, which held that, with the exception of prior convictions, any fact increasing the penalty for a crime beyond the prescribed statutory maximum must be submitted to the jury and proved beyond a reasonable doubt. Thus the New Jersey Supreme

Court determined that N.J.S. 2C:39-5(i) is now constitutionally infirm since it requires the court – and not a jury – to find that a defendant was involved in organized criminal activity.

Laura Tharney asked the Commission for its approval to work in this area, since the New Jersey Supreme Court had explained that judicial rehabilitation of the statutory provision in question is not an option. In *Grate*, both the Attorney General and the State conceded that the statute was unconstitutional as written, but the Court nevertheless declined the State's request to amend it. Ms. Tharney pointed out that John Cannel had suggested that the project may be larger than Staff had originally contemplated since some statutory provisions might benefit from revision since they had not been revised after the United States Supreme Court decision in *Apprendi*.

Commissioner Bunn asked whether a project in this area would involve the entire criminal code. Mr. Cannel replied that there are provisions throughout the Code that provide for a hearing before the judge and that Staff would need to search for them. He added that there would need to be a finding by a jury because it would be impractical to require a second hearing in these cases. Commissioner Bunn suggested the use of juror interrogatories. Commissioner Bell noted that it seemed unusual to require proof of membership in organized crime as an element of a crime. Mr. Cannel stated that the Supreme Court directed that it must be added as an element.

Commissioner Bunn suggested that Staff look for guidance to the New Jersey Racketeer Influenced Corrupt Organization (RICO) Act. Mr. Cannel pointed out the need to remove provisions calling for judicial hearings, specifying that judges are permitted only to find prior convictions. Commissioner Bell noted that, to prove some things in court is to give up confidential sources. Mr. Cannel said it will be important to work closely with the OAG on this project.

Chairman Gagliardi, noting the difficulty of proceeding without knowing the scope of the project, instructed Staff to first identify the statutory provisions which appear to fall within the potential scope of the proposed project, and then to reach out to the OAG for their input. Staff was advised that work in this area is tentatively approved pending the OAG's input and a refining of the scope of the project.

### **Uniform Premarital and Marital Agreement Act**

Jayne Johnson presented a Memorandum regarding the Uniform Premarital and Marital Agreement Act (UPMAA). Ms. Johnson explained that the ULC promulgated the UPMAA to replace and update the 1983 Uniform Premarital Agreement Act (UPAA) which was adopted by New Jersey in 1988 and most recently amended in 2013. She noted that the UPMAA has only been adopted in two states.

Ms. Johnson stated that New Jersey's most recent amendments to the UPAA modify the "second look" provision of the law by requiring that an assessment of unconscionability be based

upon the time the agreement was signed, rather than upon the time enforcement is sought. The amendments also narrow and clarify the requirements supporting a finding of unconscionability.

Ms. Johnson further stated that the UPMAA treats premarital and marital agreements under the same set of principles and requirements. In contrast, New Jersey courts have declined to apply the same standard of review to prenuptial and marital agreements, recognizing that the dynamics and pressures involved in each type of agreement are qualitatively different.

In light of the Legislature's most recent amendments and the fact that New Jersey's body of case law diverges from the recommendations incorporated in the Uniform Act, Ms. Johnson recommended against enactment of the UPMAA in New Jersey. Commissioner Long agreed with that recommendation, stating that the most recent amendments were comprehensive and courts are still grappling with some of the issues presented by them.

Chairman Gagliardi asked whether any Commissioners disagreed with this determination. Hearing no objection, Staff was directed to prepare a Final Report reflecting the Commission's recommendation against enactment.

### **Miscellaneous**

Ms. Tharney provided brief updates regarding the Adverse Possession bills, and the status of the Uniform Trust Code.

The Commission meeting was adjourned on Commissioner Long's motion, seconded by Commissioner Bunn.