

MINUTES OF COMMISSION MEETING

March 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, 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.

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

Minutes

The Minutes of the February 2015 Commission meeting were unanimously approved with one correction to change the reference in the fifth paragraph on page 3 from "D.C." to "the District of Columbia", on motion of Commissioner Bunn, seconded by Commissioner Suarez.

Civil Unions

Vito Petitti informed the Commission that Staff had proceeded directly to a Draft Final Report in light of the recent introduction of A3633, the Full Marriage Recognition for Civil Union Couples Act, which recognizes certain civil unions as marriages dating back to the inception of the civil unions. Mr. Petitti noted that there had been no changes to the status of the bill, still listed as "posted but held in Assembly Judiciary," and explained that the new language in the Draft Final Report was responsive to the Commission's specific guidance.

Mr. Petitti stated that the proposed language conforms to language contained within the New Jersey's marital statute. Commissioner Bunn pointed out that it would be prudent to note the Commission's intention to modify the civil union statute in a manner mirroring the language of New Jersey's marital statute to the greatest extent possible, and Staff will include such language in the Report.

Commissioner Bell noted that the marital and civil union statutes differ in format regarding capitalization in their respective provisions. Mr. Petitti asked whether the Commission wanted to expand the scope of the project to propose format-related changes. Commissioner Bell replied that the Commission should probably leave the capitalization scheme unmodified, but advised that proposed 2A:34-2.1(h) should be adjusted to match the other Civil Unions Act provisions.

Commissioner Bunn made a motion to release the Final Report as amended, which was seconded by Commissioner Bell and unanimously approved by the Commission.

Uniform Premarital and Marital Agreement Act

Jayne Johnson presented the Commission with a Draft Final Report relating to the Uniform Premarital and Marital Agreement Act (UPMAA). Ms. Johnson stated that UPMAA was promulgated by the ULC to replace and update the 1983 Uniform Premarital Agreement Act (UPAA) and that New Jersey enacted the UPAA and recently amended the statute in 2013. Ms. Johnson added that the Draft Final Report reflects the Commission's observations that New Jersey courts are still grappling with some of the issues presented by these amendments. Based on the recent enactment and comprehensive nature of the 2013 amendments, the Commission recommended against enactment of the UPMAA in New Jersey at this time.

Commissioner Bunn moved for release of the Final Report with a recommendation against enactment at this time. Commissioner Suarez seconded the motion, which was passed unanimously.

Uniform Voidable Transaction Act

Jayne Johnson explained that she had circulated the Tentative Report regarding the Uniform Voidable Transactions Act (UVTA) to potentially interested parties but had not received comments. She said that the Administrative Office of the Courts had not expressed any objections to the UVTA.

Ms. Johnson further explained that three additional states have introduced the UVTA since the Tentative Report was presented to the Commission. Chairman Gagliardi asked whether there has been any feedback from adopting states. Ms. Johnson replied that because the laws have been very recently adopted, she was unaware of state-level feedback, but she did mention that individuals involved with the drafting process were optimistic about the UVTA's progress.

Chairman Gagliardi recommended that if any state legislatures have passed the UVTA but it has not been enacted, the Commission may wish to hold the release of the Final Report until the state enacts the UVTA so that information regarding the new jurisdiction can be added to the Report before distribution.

Ms. Johnson stated that the Draft Final Report has omitted Section 11 of the UVTA, dealing with Series Organizations, because New Jersey does not recognize series LLCs. She further explained that commenters opposed incorporating these provisions in advance of state recognition. Ms. Johnson also contacted Professor Kenneth C. Kettering, who advised against modifying this Section but instead recommended omitting the section in its entirety, which is similar to the approach taken in California. She concluded that, based upon preliminary research, it appears that the Uniform Law Commission is working to address series organizations more comprehensively.

Commissioner Suarez made a motion to release the Final Report, which was seconded by Commissioner Bunn and unanimously approved by the Commission.

Consumer Fraud Protection Act

Susan Thatch began by explaining that the Consumer Fraud Act was introduced in New Jersey in 1960 and has, over time, become one of the State's most unwieldy statutes, generating dozens of legislative amendments and court cases annually. Ms. Thatch stated that as the initial focus of this project, Staff is proposing a reorganization of the existing statute. She further explained that it might be beneficial to group sections of general applicability, streamline the definitions section, and clarify definitions incorporating key interpretive language.

Ms. Thatch also discussed pending legislative initiatives seeking to address four or five contentious areas evolving from the language of N.J.S. 56:8-19, including: (1) mandatory treble damages, (2) attorney fees for technical violations of the CFA, (3) out-of-state litigants utilizing New Jersey's CFA, and (4) whether an individual actually relied upon the alleged fraudulent action.

Commissioner Bunn commended the memorandum Ms. Thatch provided and expressed his support for the continued work of the Commission in this area of the law even in light of the pending legislation. He explained that in recent years, there have been a number of legislative proposals to amend the CFA and, as a result, this was a rare exception to the Commission's general approach of not working in an area in which the Legislature is already focusing since the Commission's work in this case would complement, rather than compete with, the work of the Legislature.

David McMillin, of Legal Services of New Jersey, expressed general support for reorganizing the CFA, but strongly recommended that the work of the Commission not weaken the protections found in what he described as the three key sections of the statute, sections 1, 2, and 19. He suggested revisiting the organization of the Merchandise section to include services and goods. Mr. McMillin added that instead of grouping definitions, it may be best to define certain terms in the sections to which they apply, if they are of limited application. He referenced the organization of the materials provided by the National Consumer Law Center as a guide for reorganization. Mr. McMillin cautioned against revisiting the definition of the term "ascertainable loss." He explained that the existing definition is analogous to the proximate cause standard and is reasonably clear.

Alida Kass of the New Jersey Civil Justice Institute explained that she generally agreed with Mr. McMillin. She commended the work of the Commission and expressed support for the project. She parted ways with Mr. McMillin, however, when she encouraged the Commission to revisit the definition of "ascertainable loss" because the current language is restrictive.

Commissioner Bell stated that the project meets soundly with the goals of the NJLRC "to promote and encourage the clarification and simplification of the law." He suggested proposing

additional definitions and including limited statutory changes to reflect developments in the case law. Commissioner Bertone suggested that, when outreach was being conducted, Staff should not hesitate to ask for recommendations about how to reorder the statutory provisions. Commissioner Bunn suggested that Staff might wish to review the Gann publication in this area of the law as a part of the ongoing research.

Chairman Gagliardi observed that, based on the overwhelming support for the project to reorganize the CFA, the Commission approves the proposed outreach, and also continued work on this project. Commissioner Bell noted that the Commission will welcome interim reports to provide updates on Staff's progress. The Commission voted unanimously, on motion of Commissioner Bunn and second by Commissioner Bertone, to move forward with the work on this project pursuant to the direction provided by the Commission.

Uniform Limited Partnership Act

John Cannel began by explaining that Staff appreciated and relied upon members of the New Jersey State Bar Association who concurred with Staff's recommendation for the enactment of Uniform Limited Partnership Act 2001 and suggested a single change from the uniform text regarding contributions received from the partners which have not been returned before dissolution and winding up. He asserted that the enactment of the uniform law seemed to be a good step in simplification and clarification and the project was ready for a Tentative Report.

Commissioner Bunn noted that the revision doesn't specify that partnership agreements can override the provision regarding return of capital, pointing out that there is no similar provision in the uniform act. He asked whether there is a substantial difference on this subject between current New Jersey law and the uniform act. Mr. Cannel replied that he didn't think so, but would research the issue prior to the next meeting.

Chairman Gagliardi asked Mr. Cannel to provide a new draft after conducting additional research.

Special Needs Trust

Ikechukwu Onukogu began by providing a summary of *Saccone v. Board of Trustees*, in which the Court considered whether a retired Newark firefighter's survivor's benefits may be paid into a first-party special needs trust created pursuant to federal law. The issue in *Saccone* was whether the trust could be permitted to stand in place of the firefighter's son as a beneficiary to whom survivors' benefits could be paid. Because the plaintiff's son received public assistance as a result of a disability, and because the assistance received is available only to individuals with limited income, the payment of survivor's benefits directly to his son could negatively

affect eligibility. The New Jersey Supreme Court determined that the statute does not prohibit the payment of such benefits to a special needs trust and, as a result, Mr. Onukogu requested the Commission's authorization to begin a project in this area.

Commissioner Bell expressed support for the project, noting that the statute would seem to make it difficult to arrive at the decision of the Supreme Court, and that bringing the statute more in line with the result in the *Saccone* case could be beneficial. Commissioner Bunn pointed out that the Memorandum erroneously referred to Judge Cuff as "Justice" and Staff will correct the error.

Chairman Gagliardi agreed that the decision seems to call for an adjustment to the statute. Ms. Tharney told the Commission that Staff would need to research what happened when the case was remanded, and also would research Miller Trusts in more detail in order to understand the implications of this issue for the project. Commissioner Bunn agreed that it would be important to better understand Miller Trusts so as not to exceed the New Jersey Supreme Court's ruling.

Miscellaneous

Ms. Tharney advised the Commission regarding legislative activity and Jayne Johnson provided an update regarding the New Jersey Supreme Court's recent decision in the case of *State v. Pomianek*.

On motion of Commissioner Bunn, seconded by Commissioner Suarez, the Commission meeting went into an executive session for the purpose of discussing certain personnel matters. The meeting then returned to public session on motion of Commissioner Suarez, seconded by Commissioner Bell.

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