

MINUTES OF COMMISSION MEETING

May 21, 2015

Present at the New Jersey Law Revision Commission meeting held at 153 Halsey Street, 7th Floor, Newark, New Jersey, were Acting Chairman Andrew Bunn, Commissioner Anthony Suarez, and Commissioner Virginia Long (participating by telephone). Professor Bernard Bell, of Rutgers School of Law - Newark, attended on behalf of Commissioner Ronald K. Chen, Grace C. Bertone, Esq., of Bertone Piccini LLP, attended on behalf of Commissioner John Oberdiek, and Professor Edward A. Hartnett, of Seton Hall University School of Law, attended on behalf of Commissioner Patrick Hobbs.

Minutes

The Minutes of the April 2015 Commission meeting were unanimously approved on motion of Commissioner Long, seconded by Commissioner Bertone.

Retroactive Child Support Orders

Vito Petitti discussed Staff's Draft Tentative Report regarding Retroactive Child Support Orders, noting that it contained modest revisions intended to bring the Child Support Statute more in line with the recent *Cameron* ruling that 1) reporting of technical arrears against a non-delinquent child support obligor is not required and 2) the Probation Department in that particular case was required to refrain from reporting to the credit reporting agencies.

Mr. Petitti summarized a letter from the Office of Child Support Services, which acknowledged the Commission's work and expressed concern with the concept of technical arrears. According to the letter, the Commission's proposed language is too broad to be implemented by the agency.

Mr. Petitti informed the Commission of Staff's intention to reach out to other potential commenters, with the main two constituents being members of the family bar and child support enforcement.

Commissioner Long asked whether members of the family bar have been comfortable with these modifications and Mr. Petitti responded in the affirmative. Commissioner Bunn asked whether Mr. Petitti was planning to respond to the Office of Child Support Services, and Mr. Petitti replied that he would continue to seek their input.

Commissioner Bell noted that, in the last line of subsection b., it may be more accurate to reference “any such arrearage” rather than the more vague “information.” Commissioners Bunn and Bertone agreed.

Commissioner Bell praised the overview of other states’ law provided in Mr. Petitti’s memo. Commissioner Hartnett asked whether there is a difference between violating the terms of a child support order and being delinquent. He noted that, to the extent they are the same, they should be described in the same way. Commissioner Bunn agreed that the statutory language should either define delinquency as violating the terms of a child support order or should use those specific words.

Commissioner Long noted that, conceptually, this kind of retroactive obligation is not really an arrearage, but rather a new order and obligation going forward. Commissioner Bunn agreed that the word “arrearages” is a misnomer but recognized that this is how these situations are presently described. Commissioner Bell cautioned that the Commission shouldn’t let the perfect be the enemy of the good and that the term “arrearages” probably works sufficiently. Mr. Petitti stated that the term “arrearages” is necessary in certain cases, such as when an individual with outstanding retroactive support obligations receives a financial windfall. He explained that, under certain circumstances, an individual may have an arrearage but not be delinquent.

Commissioner Bunn commented that the first sentence of subsection b. seems like a good addition and suggested that the second sentence of subsection b. should be inverted. Commissioner Long stated that the first sentence should reference an “existing child support order” because when a judge issues an order for retroactive payments, there is no violation as of that date.

Ms. Tharney said that the existing terminology permits the reporting decision to be a binary choice. Commissioner Bunn agreed, stating that the standard should be whether or not someone has violated a court order. Commissioner Long asked Mr. Petitti if these suggestions have addressed the Office of Child Support Services’ concerns. Mr. Petitti responded that Child Support Services maintains that the proposed statutory modifications are overly broad; adding that they would like something beyond the court order, such as a statutory timeframe guiding a finding of delinquency.

Commissioner Bunn recognized Child Support Services’ concerns but noted that the point of the *Cameron* decision was to account for the reality surrounding these retroactively ordered obligations. He directed Mr. Petitti to modify the second sentence of subsection b. to reflect the violation of a court order since, in cases in which there is no violation of a child support order, there should be no reporting to credit reporting agencies.

Ms. Tharney asked whether the Commission would like to see the revised statutory provisions at the next Commission meeting prior to releasing the Draft Tentative Report. Commissioner Bell responded that this might be a prudent course and the Commissioners agreed.

Special Needs Trust

Jayne Johnson discussed a memorandum updating the Commission on the status of the project resulting from the Supreme Court's decision in *Saccone v. Bd. of Trustees of Police and Firemen's Retirement Sys.* Ms. Tharney informed the Commission that Staff wanted to present this interim report to solicit the Commission's input.

In *Saccone*, the Court considered whether a retired firefighter's survivor benefits may be paid into a first-party special needs trust, since the firefighter's son received public assistance as a result of a disability, and payment of survivor's benefits directly to the son could negatively affect his Medicaid eligibility.

Ms. Johnson noted that *Saccone* was decided in September 2014, before New Jersey eliminated the Medically Needy program on December 1, 2014. She explained that, prior to December 1, 2014, New Jersey had two major Medicaid programs: "Medically Needy" and pure Medicaid, or the "Medicaid Only" program. The determination of which program an applicant may enroll in, prior to December 1, 2014, was based on whether or not the applicant's income exceeded the "income cap." Under the single Medicaid program, there is no income cap. Instead, any income in excess of the Supplemental Security Income Federal Benefit Rate is placed in a pass through vehicle, i.e., a Qualified Income Trust (QIT), also known as a Miller Trust, without impacting the individual's Medicaid eligibility.

Ms. Tharney noted that Staff sought to consider the impact of the *Saccone* holding and the recent changes to the Medicaid program before recommending statutory revisions.

Commissioner Long observed that the Supreme Court's holding clarified the ambiguity in the plain language of the statute. Ms. Johnson said that similar observations were made in her brief discussions with elder law attorneys, who provided amicus briefs in *Saccone*. While it was noted that the decision, along with the recent changes in the state Medicaid program, sufficiently addresses the concerns with the plain language of N.J.S. 43:16A-12.1., it was also brought to Ms. Johnson's attention that other jurisdictions were considering legislative proposals involving similar pension provisions.

Commissioner Hartnett asked whether the scope of the project should be broadened to include review of other New Jersey statutes for language similar to that found in N.J.S. 43:16A-12.1. The Commission agreed and Commissioner Bunn stated that Staff should conduct additional research to determine if other New Jersey provisions contain language similar to that

found in N.J.S. 43:16A-12.1 and then provide recommendations concerning the project to the Commission.

Nonprofit Organizations

Susan Thatch summarized a Memorandum addressing two separate areas of New Jersey's Nonprofit Organizations law. She explained that a member of the public contacted the Commission with concerns that New Jersey's Nonprofit Corporation Act does not contain revisions which modernize and streamline various aspects of corporate governance in a manner similar to New Jersey's for-profit Corporations Act.

Ms. Thatch said that the Legislature intended for the Nonprofit Corporation Act to track the Business Corporation Act to the greatest extent possible and practicable. She noted, however, that the Legislature has amended New Jersey's Business Corporations Act numerous times over the years to reflect modern concepts of corporate governance but has not similarly modified New Jersey's Nonprofit Corporation Act.

Ms. Thatch indicated that she has been in contact with New Jersey's Center for Nonprofits to discuss this potential project and that the Center is also concerned about the Nonprofit Corporation Act and is in the preliminary stages of reviewing it for potential modifications. She explained that the Center's Executive Director submitted a letter expressing support for this Commission project.

Commissioner Bunn asked about the scope of the project. Ms. Thatch indicated that she anticipates the project will remain modest in scope. Commissioner Bunn asked whether Staff intended to: 1) revise New Jersey's Nonprofit Corporation Act, while simultaneously advancing adoption of the Revised Uniform Unincorporated Nonprofit Associations Act; or 2) recommend incorporating provisions of the Uniform Act into Title 15A to modernize and update the existing statute. Ms. Thatch replied that, regarding the potential Title 15A project, Staff will also evaluate the Revised Uniform Unincorporated Nonprofit Associations Act for potential applicability in New Jersey. She explained that this Uniform Act is intended to provide default protections and certain powers to unincorporated nonprofit associations, noting that, while New Jersey's historical nonprofit law contained provisions addressing unincorporated associations, the drafters of the 1983 Nonprofit Corporate Act considered and expressly declined to afford protections to unincorporated associations with a stated belief that that unincorporated associations should be discouraged.

Ms. Thatch expressed optimism that the commonality of interested parties will permit these two nonprofit projects to advance simultaneously or potentially be consolidated, depending on public input. The Commission agreed that work on these two issues should move forward.

Uniform Common Interest Ownership Act

John Cannel began by explaining that all stakeholders agree on the need for some law regarding common interest ownership communities. He explained that the initial question is what should the law apply to, adding that taking the approach of applying it only to new communities in New Jersey would not work. He explained that some general principles, however, might be appropriate for prospective application only, such as the rights of developers, for example. He will draft accordingly and provide the drafting to the Commission.

Commissioner Bunn said that an important objective in this area is to enact something that provides guidance and clarity. Mr. Cannel indicated that only three states had enacted the uniform law in this area.

Mr. Cannel suggested that a second question to be addressed is what kinds of communities should be governed by the proposed law, and which should not. He explained that a challenge is posed by the variation of the types of communities to which any law in this area could apply. Mr. Cannel noted, for example, that Planned Unit Developments (PUDs) can be described as a mid-ground since the unit owner owns the roof and the walls and has responsibility for those items but that there is also a substantial common area that is largely controlled by a board that can control what color the exterior of your home is painted and how you may decorate its exterior. One commenter suggested that a bright line rule in this area should depend on the power of the board. Another option is to base it on the degree of common interest property. Commissioner Hartnett asked about the need for a scope limitation and Mr. Cannel said that perhaps procedural rules should apply to everyone and that we might not know what the limitations of the act are until we know what the restrictions are. The Commission agreed that UCIOA should apply to all communities. Mr. Cannel also said that the act should not make invalid things done under the old law.

Commissioner Bunn suggested that Staff should check the case law to see what sort of issues arise in this context, suggesting that there may be cases regarding leaflets, lawn signs, flags, etc. He noted that it may be appropriate to see the rulings in those cases generalized to some extent. Commissioner Bunn also suggested that Staff should prioritize and not feel compelled, at this juncture, to work out every single detail pertaining to every possible issue, but rather should start with the view from 20,000 feet. Mr. Cannel said that the uniform laws generally contain a great deal of detail, but added that the hope is that we will be able to distill some generalities from the detail. He will draft temporal scope limitations for the next meeting, and will leave the subject matter scope for a later meeting after we have a better sense of what the issues are.

Miscellaneous

Laura Tharney advised the Commission of the recent legislative action regarding the Uniform Interstate Family Support Act (UIFSA) and the Pejorative Terms project, both of which were proposed for introduction.

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