

MINUTES OF COMMISSION MEETING

June 22, 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. and Commissioner Virginia Long (participating by telephone). Professor Bernard Bell, of Rutgers School of Law - Newark, attended on behalf of Commissioner Ronald K. Chen and Professor Edward A. Hartnett, of Seton Hall University School of Law, attended on behalf of Commissioner Patrick Hobbs.

Also in attendance were: Marjorie E. Crawford, Head of Technical and Automated Services, Rutgers School of Law – Newark and Dianne Oster, Government Documents Librarian, Seton Hall School of Law.

Minutes

The Minutes of the May 2015 Commission meeting were unanimously approved on motion of Commissioner Bell, seconded by Commissioner Hartnett.

Retroactive Child Support Orders

Vito Petitti informed the Commissioners that the Draft Tentative Report regarding retroactive child support orders had been revised to reflect guidance expressed by the Commission during the May 2015 meeting. He explained that the first sentence of N.J.S. 2A:17-56.21 subsection b. had been adjusted to present tense and the second sentence revised so as to clarify that an individual who has not acted in “violation of a child support order” would not be reported with respect to “any such arrearages.”

Mr. Petitti reported that Staff had additional informal contact with potential commenters representing child support enforcement and, upon formal release of the Tentative Report, plans to reach out to more family law professionals, including judges. He said that Staff hoped to achieve consensus on proposed language, which might include a limited timeframe within which a noncustodial parent would be required to pay off arrears.

Chairman Gagliardi indicated that the Commission would be inclined to release the Draft Tentative Report pending remaining questions and concerns.

Commissioner Bell asked whether the revisions could potentially present *Winberry* concerns regarding the separation of powers. Mr. Petitti replied that he did not believe it would invoke *Winberry*, because the statute already provides substantial guidance regarding child support issues. Commissioner Long agreed that these types of revisions would fall within the Legislature’s statutory authority.

Commissioner Hartnett suggested that the last sentence of the first paragraph of the report should be modified to read that the statute “seems to mandate” or “apparently mandates.” The Chairman concurred with the Commissioner’s suggestion and requested a motion to release the Draft Tentative Report as modified. Commissioner Bell so moved, seconded by Commissioner Hartnett.

New Jersey Filial Responsibility Statutes

Jayne Johnson addressed a memorandum relating to filial responsibility and support under Title 44, and the issues involving the statutory duty to care for an indigent relative. Ms. Johnson noted that the Commission first considered the provisions in September 2012 and the Commission requested that Staff revisit the issue after giving further consideration to comments received from elder law attorneys, recent court decisions, and legislative developments in other jurisdictions. Ms. Johnson stated that the memorandum provides an update on the status of the legal developments in this area of the law. She presented several possible approaches for the future direction of the project, including proceeding with a stand-alone project or incorporating it into an upcoming project which would anachronistic statutes.

Commissioner Long remarked that during the course of her tenure she had not encountered these provisions and that she was intrigued with the prospect of Staff revisiting this area of law. She inquired about the viability of repealing the statutes.

Chairman Gagliardi also noted that he had not encountered these provisions during the course of his practice, but observed that work in this area of the law presents a quintessential Commission project. The chairman also asked about the impact of repealing the statutes, recommending the isolation of work in this area of the law, as opposed to coupling it with another project, in order to more specifically gauge the feedback from commenters.

Commissioner Bell agreed with Chairman Gagliardi that the work in this area should constitute a stand-alone project, but cautioned that work in this area of the law might put these Title 44 statutes in the spotlight. Nonetheless, he shared the chairman’s sentiment that this area of the law presents the type of issue that the Commission is mandated to address.

Mr. Cannel pointed out that there are few New Jersey cases dealing with these statutes and that these provisions present multi-faceted issues. He added that incorporating this project into the anachronistic statutes project might revive interest in the statutes, and could lead to some controversy.

Commissioner Hartnett stated that he was not convinced that repealing these statutes was appropriate. While not persuaded either way, he asked whether it was problematic for children who can afford to pay for the medical expenses of an indigent parent to be required to do so.

Commissioner Bell acknowledged that indigent parents are taxpayers and thus entitled to a certain safety net. Chairman Gagliardi pointed to Staff’s findings that close to one-third of the

states which had enacted filial responsibility statutes have repealed them. The chairman expressed appreciation for Staff's research and noted the importance of further study to determine other states' motives in repealing or retaining these provisions. Commissioner Bell agreed, adding that the legislative history of the repealed statutes would enlighten the considerations of the Commission and inform the debate.

Chairman Gagliardi expressed the Commission's approval for further work on this project.

New Jersey Electronic Materials Act

Susan Thatch discussed a Revised Tentative Report Relating to the New Jersey Electronic Materials Act. Ms. Thatch stated that the Tentative Report had been revised in response to the issues raised at the April 2015 meeting. She explained that the RTR modifies the Uniform Electronic Materials Act (UELMA) to address issues specific to the accessibility of legal materials in New Jersey. She stated that an official publisher utilizing appropriate authentication procedures can produce an accessible and trustworthy document. She continued, saying that the RTR does not incorporate UELMA's requirement that legal material must be designated "official" to trigger the requirements of Sections 4b., 5 and 7. As described in the RTR's comments, the determination of whether or not a legal material should be considered "official" by the end-user could be satisfied by having the official publisher comply with the authentication provisions of Section 5.

Ms. Thatch also noted that previous Commission discussions about the act noted the possibility that requirements regarding judicial decisions could violate *Winberry* and potentially infringe upon the New Jersey Supreme Court's exclusive authority over court administration. She observed that the New Jersey Courts and the Administrative Office of the Courts have historically established the rules regarding the publication of court materials. Accordingly, the Commission has recognized the need to consider whether the judiciary has fully exercised its power with respect to the matter at issue. Ms. Thatch stated that the definition of legal materials contained in the RTR does not include judicial materials, and Staff will conduct additional outreach to determine whether this is the appropriate course.

Commissioner Long stated that she did not foresee a *Winberry* issue, as long as the statutory language does not provide for an express grant of authority.

Ms. Thatch also noted that the RTR includes a penalty provision in response to Commission's concerns that failure to comply with the act should result in a mandated consequence. Ms. Thatch highlighted that the focus of the act, which does not include a penalty provision, is to preserve and authenticate legal materials published in an electronic format. She observed that, since the RTR includes a penalty provision, the Commission may wish to consider adding a provision to mandate publication. Ms. Thatch informed the Commissioners that the RTR now includes a penalty provision for failing to authenticate or publish, and the language derives from the penalty provision of the Open Public Records Act (OPRA). The draft language

of the penalty provision, she explained, had been incorporated to generate comment and is not in final form.

Commissioner Hartnett observed that the requisite *mens rea* requirement in the OPRA penalty provision is “knowingly and reasonably.” He observed that “knowing and willfully” is most common and may be considered for inclusion in the final revisions. .

Chairman Gagliardi noted that, in the context of OPRA violations, the determination by a public official not to produce may be based on a completely “reasonable” rationale such as cost. Should the individual requesting information seek enforcement, a judge could rule that the official “knowingly” did not release the information to the requester, but it was reasonable not to do so. The chairman acknowledged that the penalty provision language would be revised pending consideration of feedback from commenters.

Dianne Oster, Government Documents Librarian of Seton Hall School of Law, averred that, although electronic publications are valuable and can enhance the discovery process, current methods of preservation for online legal materials are inadequate. She stressed the importance of electronic publication of legal materials, noting that preserving legal materials cannot be left to the whims of budgetary concerns and other considerations. Ms. Oster offered the support of the New Jersey Law Libraries Association for the release of the Report and subsequent recommendation to the Legislature for the New Jersey Electronic Legal Materials Act.

Marjorie E. Crawford, Head of Technical and Automated Services, Rutgers School of Law – Newark, concurred with Ms. Oster and thanked the Commission for its efforts to make electronic materials available to the public in an authentic format. She encouraged the Commission to move forward with the release of the RTR for additional comments. Chairman Gagliardi thanked Ms. Oster and Ms. Crawford for providing comments and stated that he anticipated their continued contributions to the project going forward, as additional voices are heard.

Commissioner Bell suggested that, along with the listing of government agencies or educational institutions, Section 4b. should be broadened to include not-for-profit entities, as long as they do not require a fee for services.

Commissioner Hartnett noted that there is a distinction between for-profit and non-profit educational institutions and that the language regarding joint resolutions could be reworded to enhance clarity. Commissioner Long agreed that not-for-profit educational institutions should be included.

Commissioner Hartnett raised the issue of which authority takes preference in cases of a conflict between the print and electronic legal materials, and whether a statutory provision should mandate the hierarchy of authorities, as is the case with statutory code and session laws. He observed that adding the “official” designation may be necessary to establish such a hierarchy of authorities, particularly if the conflict arises during the course of litigation. Commissioner Bell observed that an official document should be evident and a statutory mandate may not be required, and that each agency or entity should instead identify which publication should be

relied upon in case of conflict. Commissioner Hartnett noted that Staff may need to revisit the discussion in the narrative portion of the RTR concerning judicial notice of legislative facts and questions of law.

The Commission voted to release the Revised Tentative Report upon motion of Commissioner Bell, seconded by Commissioner Hartnett.

Uniform Common Interest Ownership Act

John Cannel discussed a memorandum regarding the Uniform Common Interest Ownership Act (UCIOA). Mr. Cannel informed the Commission that he drafted parts of Article 1 of the act not yet discussed by the Commission, noting that the issue of the subject matter exemption had been left open, at Commissioner Bunn's suggestion.

Mr. Cannel stated that the memorandum had been circulated to representatives of both unit owners and the New Jersey Chapter of the Community Associations Institute (CAI). He said he had not received substantive comments from either group but called the Commission's attention to a letter proffered by the Legislative Action Committee of the CAI. Mr. Cannel explained that the letter included a draft of the act prepared by the CAI in 2005 which can be tentatively regarded as the CAI's position on the act's various provisions.

Regarding Section 1-105 (a) of the act, which treats a cooperative's ownership interest as personalty, Mr. Cannel stated that the treatment of a cooperative ownership interest is not as clear under New Jersey law as it once was and suggested deleting this subsection as it could potentially create confusion.

Mr. Cannel expressed his belief that Section 1-106 correctly reflects New Jersey law with respect to planned unit developments. He said Section 1-107, which addresses eminent domain, can remain as drafted in the act.

Regarding Sections 1-108, Supplemental general principles of law applicable, and 1-109, Construction against implicit repeal, Mr. Cannel informed the Commissioners that they are probably unnecessary, but harmless to include. He elaborated that Section 1-110, Uniformity of Application and Construction, may ultimately prove inappropriate, but should be left in the draft for now. He concluded that Section 1-111, regarding severability, was also probably unnecessary, but harmless to include.

Mr. Cannel expressed ambivalence with respect to Section 1-112's provisions on unconscionability, asserting that, because New Jersey has a strong body of law regarding the unconscionability of agreements, it might not make sense to include such a provision in this draft. He stated that Section 1-113, which imposes an obligation of good faith, is probably unnecessary, but also harmless.

Mr. Cannel informed the Commission that Section 1-114 is largely appropriate but expressed concern about the section's second sentence limiting consequential, special, or

punitive damages, except as authorized by another law, and requested the Commissioners' guidance. Upon Commissioner Hartnett's articulated concerns consequential damages could be substantial in certain situations, Mr. Cannel suggested deleting this sentence and providing an appropriate comment regarding the revised Section 1-114.

Regarding Section 1-115, Mr. Cannel advised the Commission to refrain from considering the adjustment of dollar amounts provided there unless and until specific dollar amounts are incorporated into the Commission's draft statutory language. He informed the Commissioners that Section 1-116 is not offensive and is contained in all uniform acts.

Upon Chairman Gagliardi's inquiry as to the project's next steps, Mr. Cannel replied that he would prepare a draft of statutory language already considered by the Commission and a memorandum detailing new provisions contained in Article 2 of the act. He further stated that it is a challenging project as the CAI letter indicates distance between CAI and unit owners.

Regarding common interest communities, Commissioner Hartnett asked whether the ULC's definition captured those common interest communities sharing expenses without any commonly owned property. Mr. Cannel responded that he would look more closely at the ULC's definition and attempt to revise it in a manner making it less opaque. Commissioner Bell commented that the Commission should consider very small condominium arrangements, in which the condominium is not necessarily managed by an organization, and may not hold meetings or elect officers. Mr. Cannel suggested that the Commission may ultimately wish to exempt these smaller communities from the provisions of the act because the provisions are potentially too burdensome. He noted that, for the most part, condominium communities are either very large and organized or very small.

Commissioner Hartnett observed that, in Section 1-106, it was surprising that different building codes aren't applied to various structures. Mr. Cannel stated that his interpretation of this provision relied on New Jersey statute which provides for identical building codes. Chairman Gagliardi requested that Mr. Cannel ensure that this provision is consistent with current New Jersey law.

Commissioner Hartnett questioned the equal division of eminent domain proceeds attributable to the acquisition of a limited common element contained in Section 1-07(c), stating that it may be more appropriate to distribute any such award proportionate to each individual's ownership interest in the limited common element. Mr. Cannel assured the Commission that he would look at this provision in greater detail and provide information for further discussion.

Chairman Gagliardi asked whether Mr. Cannel required any more direction on the issues raised in his memorandum, to which Mr. Cannel responded that the Commission had provided adequate guidance on these preliminary proposals.

Miscellaneous

The Commission meeting was adjourned upon motion of Commissioner Bell, seconded by Commissioner Hartnett.