

MINUTES OF COMMISSION MEETING

July 16, 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 Anthony R. Suarez, and Commissioner Virginia Long (participating by telephone). Professor Bernard W. 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 Kathleen M. Boozang.

Also in attendance was Sharon Rivenson Mark, Esq., of the National Academy of Elder Law Attorneys, New Jersey Chapter.

Minutes

The Minutes of the June 2015 Commission meeting were approved with amendments on motion of Commissioner Bell, seconded by Commissioner Long. Commissioner Suarez abstained.

New Jersey Filial Responsibility Statutes

Jayne Johnson presented a Memorandum prepared in response to the Commission's request at last month's Commission meeting for additional information concerning the status of filial responsibility statutes in other jurisdictions. Ms. Johnson stated that this project involves the New Jersey filial responsibility and support statutes under Title 44, and the issues concerning the statutory duty to care for an indigent relative. Ms. Johnson explained that these statutory sections are vestiges of previous "poor laws" and similar provisions remain on the books in thirty jurisdictions. She noted that some states have repealed these provisions in light of federal law.

Ms. Johnson introduced Sharon Rivenson Mark, Esq. an elder law attorney who provided comment on this project when it was first presented to the Commission in 2012. Ms. Rivenson Mark explained that she served as president of the New Jersey Chapter of the National Academy of Elder Law Attorneys and like, other practitioners in this area of the law, periodically encounters issues involving filial responsibility in her practice.

Ms. Rivenson Mark stated that the existing filial responsibility statutes were part of New Jersey's old welfare scheme and predated modern Medicaid coverage. She further explained that Medicaid has a five-year look back for disqualifying transactions. If a disqualifying transaction has occurred, it may be remedied by claims of fraud, theft or breach of fiduciary duty, without holding innocent family members responsible. She added that in the Pennsylvania case, Health

Care & Retirement Corp. of America v. Pittas, the adult child did not act in bad faith, but had financial assets and was ultimately held liable for the mother's non-dischargeable debt.

Ms. Rivenson Mark stated that administrative delays in determining financial eligibility and performing the physical assessment screening required to receive Medicaid benefits may create a gap in Medicaid coverage, and families may be held financially liable to health care facilities for costs accrued during this gap period. She concluded that these provisions should be repealed to prevent lawsuits and confusion going forward. Mr. Cannel noted that the current provisions are unclear as it is difficult to identify who is entitled to bring a claim and the statutory framework was originally designed to provide public welfare in the 1930s.

Commissioner Long noted that this area presents broad philosophical questions and contemplated whether this project is within the Commission's mandate. Chairman Gagliardi stated that he shared Commissioner Long's perspective, but thinks it is appropriate for the Commission to identify these existing laws for the Legislature and to highlight that these statutes could potentially be used in a way that was not intended.

Mr. Cannel stated that New Jersey's filial responsibility statutes were written for the state to recoup costs, not for third parties, and that clarification may be within the Commission's purpose. Commissioner Suarez remarked that it may make sense to modify the provisions for consistency.

Commissioner Hartnett explained that the law seems archaic and falls within the Commission's mandate to remedy or update. Commissioner Hartnett added that the conflict with federal law is not as obvious as these statutes address costs not picked up by the federal public safety net. He wondered whether the delayed administrative processing creating the gap in the public safety net could cause nursing homes to stop providing services. He stated that he was unsure whether the laws regarding fraudulent or other abusive transfers will address every situation, as some transfers are not fraudulent but nevertheless invalidate eligibility. He concluded that given the very serious value judgments involved, he is uncomfortable recommending repeal.

Commissioner Long asked how this project originally came to the Commission's attention, and Ms. Johnson replied that the Office of the Ombudsmen for the Institutionalized Elderly requested that the Commission research these provisions in 2012. Ms. Rivenson Mark stated that the administrative delays creating a gap in coverage could cause nursing homes to commence collection actions against family members. She further added that the statute doesn't seem appropriate in the modern era of Medicare and Medicaid.

Chairman Gagliardi stated that it may be useful to issue a report identifying the issues involved with these statutory provisions, as well as how the concept is handled in other jurisdictions, so that the legislature can decide whether to repeal or modify them to reflect

modern law. Commissioner Long agreed that bringing forth these statutes for legislative consideration could be a good solution.

Commissioner Bell also agreed and stated that it seems inappropriate to burden individuals with problems caused by procedural inefficiencies. Commissioner Bell noted that it would be appropriate for the Commission to state that the statutes were not designed for this modern use, but for the Commission to refrain from proposing changes involving policy determinations. Commissioner Bell observed that the legislative history leading to the recent repeal of the filial responsibility statutes in Idaho and New Hampshire should be included in a report prepared for the Legislature

Commissioner Hartnett agreed that these problems may be caused by procedural inefficiencies, but requested additional information analyzing whether there is a risk of individuals not receiving services if nursing homes lack the ability to recoup costs. He also requested information regarding the issue of lawful transfers causing Medicaid ineligibility, noting that it is not clear why beneficiaries of such lawful transfers should not be held financially liable for the debts. Ms. Rivenson Mark stated that current law can address situations in which a person holding a power of attorney makes transfers effecting Medicaid eligibility by permitting a facility to make a claim for fraudulent transfer against the property recipient.

Chairman Gagliardi requested that Ms. Johnson prepare a report consolidating the Commission's work to date, as well as the additional areas described by Commissioner Hartnett. He commended Ms. Rivenson Mark for providing her expertise and concluded that the Commission will continue to collect information on this area.

Uniform Protection of Genetic Information in Employment Act

Vito Petitti summarized the content of the Draft Final Report, which compares New Jersey's Genetic Privacy Act with federal law and with the UPGIEA. He noted that the Commission had chosen to recommend against adoption of the UPGIEA because of New Jersey's existing protections in this area.

Commissioner Bell asked Mr. Petitti to clarify the proposed changes referencing N.J.S. 10:5-46 and Mr. Petitti replied that the Draft Final Report will provide additional background on N.J.S. 10:5-46. Commissioner Long noted that no states have adopted UPGIEA in the three years since its release and asked whether other states have adopted their own laws on genetic information or if they have adopted discrete pieces of the UPGIEA. Mr. Petitti responded that thirty-seven states have their own laws regarding the protection of genetic information and some believe that New Jersey's existing genetic information laws are the strongest and most comprehensive. He further stated that the New Mexico legislature introduced UPGIEA, but was unable to pass the legislation over concerns about the definition of employers.

Commissioner Hartnett said that he agreed with the Final Report's conclusion and suggested that Mr. Petitti modify footnote 22 to identify the source material for the quote. Commissioner Hartnett further stated that he would like to delete footnote 29, referring to an exception in the Americans with Disabilities Act, as too tangential.

Commissioner Hartnett also noted that he found the Uniform Law Commission's discussion of federal preemption unpersuasive; he accordingly suggested that Mr. Petitti change the reference on page 5 from "[t]he ULC emphasizes" to "the ULC argues."

Chairman Gagliardi noted that the word "law" contained in footnote 32 should be capitalized. Commissioner Hartnett stated that he would like to delete the sentence in the last paragraph on page 8 discussing disparate impact.

Chairman Gagliardi asked for a motion to release the UPGIEA Final Report as modified. Commissioner Long so moved, seconded by Commissioner Hartnett.

Expungement

Susan Thatch presented a potential project arising from the New Jersey Supreme Court decision, *In re D.J.B.*, 216 N.J. 433, where the Court held that the petitioner's prior juvenile delinquency adjudications bar the expungement of his adult convictions pursuant to N.J.S. 2C:52-2. Enacted in 1979, N.J.S. 2C:52-2 provides for the expungement of indictable adult convictions: The statute, however, fails to provide a comparable method for the expungement of juvenile adjudications. Ms. Thatch stated that to address the oversight, in 1980 the Legislature enacted N.J.S. 2C:52-4.1(a). The trial and appellate court held that the final paragraph of 2C:52-4.1(a) effectively converts a juvenile adjudication into a "prior or subsequent crime" barring expungement of an adult conviction pursuant to N.J.S. 2C:52-2.

After carefully analyzing the expungement law's legislative intent and history, as well as relevant rules of statutory construction, the New Jersey Supreme Court rejected the trial and appellate courts' reading of the statute and held that the final paragraph of 2C:52-4.1(a) was intended only to apply to the portion of the statute governing the expungement of juvenile adjudications. Accordingly, the Court held that *D.J.B.*'s juvenile adjudications did not constitute "prior crimes" which would automatically prevent the expungement of his adult conviction.

Ms. Thatch explained that while the Court's decision in *In re D.J.B.* provides a key interpretation of New Jersey's expungement law, the statute as written remains "concededly, unclear on its face." Ms. Thatch proposed a project to clarify the statute in accord with the findings of the Supreme Court.

The Commission approved the project to clarify this area of the expungement law and requested that Staff prepare a draft tentative report to reflect the legislative intent of the statute and the interpretation of the Supreme Court concerning this provision.

Seatbelt Use

Nicole Grasso proposed a project concerning the interplay between 39:3-76.2f and 2C:40-18. Ms. Grasso explained that this proposal is based on the recent New Jersey Supreme Court decision in *State v. Lenihan*. In that case, defendant was charged under 2C:40-18 for a violation of her duty to tell her sixteen year old front seat passenger to wear her seatbelt. Defendant argued, among other things, that she was not on notice that a violation of 39:3-76.2f, which imposes a minimal fine, could be a predicate offense to a criminal charge under 2C:40-18. Ms. Grasso requested the authorization of the Commission to undertake a project addressing the issue of notice that a violation of 39:3-76.2f could act as a predicate offense to 2C:40-18.

Commissioner Bell originally addressed his concerns in a follow up memorandum to the original project. The Supreme Court in the *Lenihan* decision decided to focus primarily on the issue at hand, although defense counsel raised concerns about the breadth and vagueness of 2C:40-18. Commissioner Bell suggests the Commission grapple with the issues not addressed by the Supreme Court, namely, the scope of 2C:40-18. Commissioner Bell adds that the Commission should review the legislative history of 2C:40-18 to determine whether the scope was intended to be narrower than the text might suggest.

Chairman Gagliardi observed that the Commission could choose one of three options: to take no action, to propose a modification to the statute based on the *Lenihan* case, or to broaden the scope of the project as recommended by Commissioner Bell.

Commissioner Bell noted that, while the decision in *Lenihan* makes sense regarding the seatbelt statute, there may be an issue regarding the statute's breadth if prosecutors begin applying it in a manner not anticipated by legislators. Commissioner Long added that, because 2C:40-18 does not go far enough, Staff should broadly study the statute. Commissioner Hartnett expressed concern regarding the nature of the causation and mens rea requirements, suggesting that, because neither had been adequately addressed, the project should be broadened to include consideration of these elements. Chairman Gagliardi agreed that the project should not be limited to the narrow seatbelt issue.

Nursing Home Responsibilities and Residents' Rights Act

Dominic DiLeo proposed a project arising from the decision in *Ptasynski v. Atlantic Health Systems, Inc.*, where the Appellate Division held that a private party, the estate of a

deceased nursing home resident, may not bring an action under N.J.S. 30:13-4.2 of the Nursing Home Responsibilities and Residents' Rights Act ("NHA"). The court concluded that the footnote in N.J.S. 30:13-4.2 after the second occurrence of the phrase "this act" explicitly restricts the applicability of the statute to state actions through the Department of Health ("DOH").

To determine the scope of a private right of action under the NHA, the court in Ptasynski reviewed the legislative history of the NHA. Mr. DiLeo explained that the NHA was enacted in 1976, and N.J.S. 30:13-4.1 and N.J.S. 30:13-4.2 were added by amendment in 1991. The court held that N.J.S. 30:13-4.2 only allows private parties to recover from a violation of N.J.S. 30:13-4.1, not a violation of any other provision of the NHA. In accord, the court concluded that the phrase "this act" in N.J.S. 30:13-4.2 only intended to apply to N.J.S. 30:13-4.1 and N.J.S. 30:13-4.2, the two added provisions. Mr. DiLeo proposed a project to research and clarify the statutory language of the NHA in keeping with the judicial interpretation of the court in Ptasynski.

Commissioner Long inquired about the current status of the case. Mr. DiLeo answered that the case had been reversed and remanded to the trial court. Mr. DiLeo added that he understands that the Commission usually does not consider "live" cases, and the project was submitted to the Commission for consideration before he became aware of the current status.

The Commission decided not to proceed with this potential project since the underlying case is still active. Staff will continue to monitor the progress and disposition of the case.

Local Redevelopment and Housing Law

Patrick McGinnis proposed a project arising from a recent Supreme Court decision, 62-64 Main Street, L.L.C. v. Mayor and Council of City of Hackensack, concerning a subsection of the local redevelopment and housing law, N.J.S. 40A:12A-5(e). The local redevelopment and housing law provides the statutory framework that enables municipalities to categorize private property as "in need of redevelopment," and thus subject to taking by eminent domain. The Court, in a 3-2 decision, held that a necessary condition for categorizing a property as "in need of redevelopment" is a determination that the deterioration or stagnation "negatively affects surrounding properties." In accord, the majority concluded that the prior unanimous Gallenthin Realty Development, Inc. v. Borough of Paulsboro ruling applied only to N.J.S. 40A:12A-5(e), and that municipalities did not need to demonstrate "deterioration or stagnation that negatively affects surrounding properties" in order to classify a property as "in need of redevelopment."

In his dissent, Chief Justice Rabner indicated that the language of Gallenthin was clear, and that the majority in 62-64 Main Street failed to recognize the constitutional command of the Blighted Areas Clause and its interplay with the local redevelopment and housing law. He

further suggested that the majority was erasing the most significant impact of Gallenthin: “guard[ing] against the real risk of abuse that the power of eminent domain presents.”

Chairman Gagliardi stated that, while statutory drafting may clarify the issues presented in the 62-64 Main Street case, this area of the law remains unsettled. He added that based on the current state of the law in this area, this proposed project may extend beyond the Commission’s mandate. Commissioner Long noted that it would be best to allow further judicial review to clarify this area of the law.

The Commission voted unanimously to monitor the case law developments in this area of the law and not to proceed with any further work on this project at this time.

Uniform Common Interest Ownership Act

John Cannel summarized the first draft presented to the Commission, noting that it had been sent to potential commenters, with no response yet, although he said he expected responses in September. Chairman Gagliardi observed that summer vacation schedules may have impacted feedback from potential commenters, to which Mr. Cannel agreed, adding that the more controversial material, to be circulated later, would help the project gain momentum.

Chairman Gagliardi informed Mr. Cannel that, in the absence of feedback for the September meeting, October would be acceptable.

Miscellaneous

Ms. Thatch provided an update to the Commission regarding Staff’s interaction with the Human Trafficking Commission in Trenton, saying that the relationship has been productive and that the Human Trafficking Commission had expressed its gratitude and desire to continue to work with the Law Revision Commission. Chairman Gagliardi encouraged Staff to continue its work with the Human Trafficking Commission.

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