

## **MINUTES OF COMMISSION MEETING**

**October 15, 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 Anthony R. Suarez, and Commissioner Virginia Long (participating by telephone). Professor Bernard W. Bell, of Rutgers Law School, attended on behalf of Commissioner Ronald K. Chen and Ms. Grace C. Bertone, Esq., of Bertone Piccini, LLP, attended on behalf of Commissioner John Oberdiek.

Ronald L. Perl, Esq., of Hill Wallack LLP, J. David Ramsey, Esq., of Becker & Poliakoff, and Kareen Bar-Akiva, Esq., of the New Jersey Division of Family Development, Office of Child Support Services, were also in attendance.

### **Minutes**

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

### **Retroactive Child Support Orders**

Vito Petitti discussed revisions to the previously discussed Tentative Report, which incorporate specific feedback received from Legal Services of New Jersey and from the Division of Family Development, Office of Child Support Services, the State agency responsible for overseeing New Jersey's Title IV-D child support program. Mr. Petitti mentioned new proposed language for the section of the judgment statutes discussed at the last meeting, which would bar the entry of a retroactive child support order as a civil judgment, where there is no violation of an order, unless a judge has ruled otherwise.

Mr. Petitti informed the Commission that, although Mary McManus-Smith, Director of Litigation and Family Law Chief Counsel, could not be present, she had reiterated the support of Legal Services for the proposed language in the Tentative Report. Mr. Petitti told the Commissioners that Staff would like to proceed to a Final Report, but that the Office of Child Support Services had not yet been heard by the Commission since that organization's last communication with Staff just prior to filing day, regarding specific proposed policy changes within the Office of Child Support Services.

Kareen Bar-Akiva, Esq., Special Assistant, New Jersey Office of Child Support Services ("Child Support Services"), began by thanking the Commission for its communications on this project and said that she was hoping to reinforce the written comments previously provided by the Office of Child Support Services. As background, she mentioned that Child Support Services' Executive Director is New Jersey's Title 40 Director. Ms. Bar-Akiva explained that Child Support Services has concerns with the proposed modifications, as well as with the

*Cameron* decision, in light of the federal laws and regulations that may be implicated. She further stated that Child Support Services believes that all arrearages should be treated similarly, and that it would not comport with federal law to treat technical arrearages differently than other arrearages.

Ms. Bar-Akiva explained that child support arrearages are tracked in categories which are then reported to the federal government for comparison with other states. She elaborated that creating a separate tracking for technical arrears would involve more than just staff retraining, but would affect federal government accountability and could negatively impact New Jersey's federal aid. As an alternative, Ms. Bar-Akiva suggested that Child Support Services will promulgate regulations to achieve the changes contemplated by the *Cameron* decision. Such regulations could increase the monetary thresholds, expand the timeframe for credit reporting, and give a non-custodial parent the opportunity to protest credit reporting and permit the entry of a retroactive order as a reason to contest the reporting. Ms. Bar-Akiva expressed similar concerns regarding the proposed modifications to other statutory provisions. She noted that license suspension is an effective tool for child support collection, but that Child Support Services would consider changing the threshold for this remedy. She concluded by saying that Title 40 requires a judgment of child support obligations as it becomes due, so the proposed modifications would jeopardize New Jersey's federal compliance.

Commissioner Bunn asked Ms. Bar-Akiva what the timeframe would be to promulgate regulations addressing this issue. She replied that it is unclear how quickly regulations could be issued, but stated that Child Support Services could administratively implement the proposed regulatory changes before the regulations were adopted. Commissioner Long asked if Child Support Services would have the same concerns identified by Ms. Bar-Akiva if the federal government approved of the proposed modifications. Ms. Bar-Akiva said that Child Support Services' position would be unchanged under that circumstance, and if the proposed modifications are introduced in the Legislature, Child Support Services will develop a strategy to oppose their adoption.

Commissioner Long stated that even if the Commission does not act, Child Support Services must still deal with the implications of the *Cameron* decision. Ms. Bar-Akiva responded that the probation department can manually exempt specific remedies, such as credit reporting, in response to court orders. She stated that a court order with a specific exemption is presently manually exempted. Ms. Bar-Akiva acknowledged that a judge would need to make that determination and order the exemption accordingly. Commissioner Bell expressed concern that under the current policy, a judge must issue a court order requiring the exemption, and without the court order the exemption is not available. As a result, two individuals in a similar situation could experience two different outcomes, based on whether the judge issues a court order requiring exemption.

Commissioner Bunn requested additional information regarding the Child Support Offices' position on the impact to the status of an individual's driving license. Ms. Bar-Akiva stated that any applicant for a license with arrears greater than six months is denied the license and the Child Support Office cannot distinguish between retroactive and overdue arrearages. Commissioner Bell asked whether the federal statute requires each jurisdiction to report

arrears against occupational or professional licenses, to which Ms. Bar-Akiva responded in the affirmative.

Commissioner Long noted that the measures impacting licenses, including driving, occupational, or professional licenses, are an effective tool for collecting delinquent child support, but individuals with technical arrears, like those discussed in *Cameron*, should not be subjected to those consequences. Ms. Bar-Akiva agreed that the license provisions help to bring people into compliance with their obligations, and that the Child Support Office suspends licenses by operation of law to compel compliance.

Commissioner Bell asked whether other states recognize technical arrears. Mr. Petitti replied that other states recognize the difference, but offer little guidance for determining a method of classifying the type of technical arrears presented in *Cameron*. Commissioner Bell asked whether the federal government has taken a position on this issue and Mr. Petitti responded that he is unaware of any federal guidance.

Chairman Gagliardi affirmed that the Commission seeks to codify the holding in *Cameron*. Commissioner Bunn noted that, in accord with the *Cameron* decision, the Commission Report recommends a statutory provision that distinguishes between delinquent child support and technical arrears. He stated that punitive remedies might be effective as applied to individuals who are delinquent in their child support payments, but they should not be utilized against individuals who are not delinquent in payment of their obligations. Commissioner Bunn added that the Commission Report seeks to address this issue which the current policy fails to resolve. In the absence of any dissenting views among the Commissioners, Chairman Gagliardi directed Mr. Petitti to move forward with a Final Report.

### **Uniform Common Interest Ownership Act**

John Cannel presented the findings of his outreach concerning the Uniform Common Interest Ownership Act (UCIOA). Mr. Cannel stated that he met with the legislative committee of the Community Associations Institute, an international organization that provides education and resources to community association homeowner leaders, professional managers, association management companies and other businesses, and professionals who provide products and services to community associations. The committee agreed that current New Jersey law on the subject of condominiums, cooperatives, and planned developments is inadequate, and UCIOA would improve the existing State law. The question was how to achieve a viable project to use the framework of UCIOA without allowing the potentially contentious issues in Article 3 to doom the effort. Mr. Cannel acknowledged the insight and considerable assistance provided by the two attorneys in attendance on behalf of CAI to this time.

Ronald L. Perl, Esq., who worked with the initial legislative proposal to revise the state provisions in this area of the law, said that based on his experience, he recommends presenting several bills that can be introduced in succession, rather than proposing introduction of the entire uniform act. One of the primary objectives of the uniform act was to create a uniform enabling

act relating to condominiums, coops, and HOAs. That may be the primary benefit of the Act – the creation of a single statutory scheme in which all forms of common interest ownership are addressed. As a result, however, the Act is comprehensive in scope and may be too substantial for a single bill. The Uniform Act is the product of many years of experts convening to address issues relevant to this area of the law. One of the benefits of uniform legislation is that it encompasses the interpretations of courts across the country. As a result, when possible to do so, it would be wise to stick as closely as possible to the uniform language. Mr. Perl stated that he is pleased that the Commission is revisiting this area of the law and looks forward to supporting the work of the Commission.

David Ramsey, Esq., explained that he had been involved for more than a decade in advocating for the adoption of UCIOA. He also expressed support for the project and for either a series or package of bills. As a preliminary matter, Mr. Ramsey recommended against adopting the uniform act definitions, suggesting instead that the Commission use the terms as defined under New Jersey law, which have withstood our State judicial review.

Justice Long asked whether the project would tackle Article 3, to which Mr. Cannel replied that he will discuss the matter further with the interested stakeholders to determine if all or portions of Article 3 may be addressed incrementally.

Chairman Gagliardi directed Mr. Cannel to move forward with the project, preparing a draft incorporating Sections 1 and 2 of the Uniform Act and reserving the remaining sections for a bill-by-bill or multi-bill-package approach. Staff will prepare a Tentative Report for the Commission’s consideration.

### **Expungement**

Susan Thatch discussed a Draft Tentative Report based on the *In re D.J.B.* holding, in which the New Jersey Supreme Court considered whether juvenile adjudications should be considered “prior crimes” for purposes of expungement of an adult conviction. Ms. Thatch explained that the Report presents three alternate revisions to the current expungement provisions. She also explained the recommendations offered by Commissioner Bell prior to the Commission meeting which expressed preference for the third drafting option, along with minor changes to the proposed revisions.

Justice Long expressed her preference for the third drafting option as presented by Commissioner Bell. Commissioner Bunn suggested that if addressing the order in which expungement requests are processed further clarifies the statute, such language should also be added to the proposal. Commissioner Bell noted that before drafting additional language to clarify the order of process, Staff should first review the existing structure, in light of any policy issues that were considered when it was established. This would allow the Commission to assess whether or not the Legislature intended to preclude the expungement of juvenile delinquency adjudications if there is a subsequent adult conviction, for example. Commissioner Bunn agreed with this recommendation to avoid disturbing any underlying policy objectives.

Chairman Gagliardi said the Commission looked forward to considering a revised Report incorporating the recommendations presented by Commissioner Bell and the findings of Staff concerning the order of process for expungement requests.

### **Special Needs Trust**

Jayne Johnson discussed a memorandum concerning the retirement systems administered by the New Jersey Department of Treasury, Division of Pensions and Benefits, and the status of the guidelines provided to the pensions and benefits members concerning designation of a beneficiary, in light of the September 2014 decision in *Saccone v. Bd. of Trustees of Police and Firemen's Ret. Sys.* In that case, the New Jersey Supreme Court held that a retired firefighter could direct the survivors' benefits for a child with a disability to a first-party special needs trust (SNT).

Ms. Johnson stated that the State of New Jersey administers five defined benefit plans for active public employees, two defined contribution plans, and a central fund that governs a series of noncontributory pension acts. Each system administers a series of plans to govern a certain segment of the state's public employees, with the Public Employees' Retirement System covering the largest group of employees. The State of New Jersey administers the retirement systems through the Division of Pensions and Benefits.

Ms. Johnson noted that each retirement system identifies the requirements for designating a beneficiary for the pension benefits that remain at the death of an active or retired member. The Division provides "fact sheets" and other guidelines to explain the parameters for beneficiary selection under each state-administered plan. Ms. Johnson stated that the guidelines for designating a beneficiary are provided for in "Fact Sheet No. 68," which members are requested to review before they name a minor, use a trust agreement, act as a power of attorney for the member, or nominate a civil union partner or domestic partner. According to the Division's website, however, Fact Sheet No. 68, which describes the requirements for designating a trust as a beneficiary, is "temporarily unavailable pending revision." Under the guidelines that are currently available to the public, the Division provides a general explanation of the payout method for active member benefits, under each plan.

Ms. Johnson sought guidance from the Commission regarding whether it supported codifying the *Saccone* decision to: (1) increase public awareness of the New Jersey Supreme Court's determination that a Special Needs Trust be deemed an extension of the beneficiary; (2) clarify the statutes governing state-administered retirement systems; and/or (3) provide uniformity among the state-administered retirement systems to further the implementation of the Court's holding.

Commissioner Bunn suggested that revising the statutes would provide clarity, and the other Commissioners agreed.

Chairman Gagliardi directed Staff to prepare a Tentative Report with draft language revising the relevant provisions.

### **Miscellaneous**

The Commissioners were reminded that the November meeting is scheduled for the morning, at 10:00 a.m. on November 19<sup>th</sup>.

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