

## **MINUTES OF COMMISSION MEETING**

**July 20, 2017**

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 (via telephone). Professor Bernard W. Bell, of Rutgers Law School, 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.

### **Minutes**

The Minutes of the June 2017 Commission meeting were approved on motion of Commissioner Long, seconded by Commissioner Bell.

### **New Jersey Franchise Practices Act**

Jayne Johnson presented a Revised Draft Tentative Report proposing revisions to the New Jersey Franchise Practices Act (NJFPA). The proposed revisions would be consistent with the case law regarding the gross sales threshold N.J.S. 56:10-4 and the arbitration clauses found in N.J.S. 56:10-7.3a. With regard to section 7.3, the revisions propose removing language disfavoring arbitration, similar to the language the United States Supreme Court found to violate the Federal Arbitration Act (FAA), in the recent *Kindred Nursling, L.P. v. Clark* decision.

Ms. Johnson noted when discussing the gross sales threshold that, under the NJFPA, the threshold currently applies only to a franchise where the gross sales of products or services between the franchisor and franchisee exceed \$35,000 for the 12 months preceding the institution of suit. She explained that the New Jersey Supreme Court, in *Tynan v. General Motors Corp.*, addressed this statutory provision and highlighted the need to clarify N.J.S. 56:10-4 subsection a.(2).

Commissioner Long agreed with the recommendations revising the gross sales threshold in N.J.S. 56:10-4 to reflect the New Jersey Supreme Court decision in *Tynan v. General Motors Corp.* Commissioner Long added, however, that the state of the law governing arbitration is in a constant state of flux, and given the constant changes in this area of the law, it may best to maintain the current statutory language in N.J.S. 56:10-7.3.

Commissioner Hartnett brought to the attention of the Commission the Federal Motor Vehicle Franchise Contract Dispute Resolution Process, 15 U.S.C. § 1226, which provides for the election of arbitration by written consent of all parties. Commissioner Hartnett said that it would be best to retain the existing statutory provisions, particularly in light of the federal statutory authority provided in this area of the law. Commissioner Bell added, if the state of the

federal law is in flux or if the language is permitted by federal law, then it would be best to retain the existing statutory language in section 7.3. Commissioner Bell suggested adding the following phrase to the beginning of the section, if changes are proposed, “to the extent permitted by federal law.”

Chairman Gagliardi advised, in response to Laura Tharney’s question about whether the Commission wanted to see the revised Report language before it was released, that Staff should update the Revised Tentative Report and retain the existing statutory language in section 7.3 as discussed by the Commission, and present the revised version of the Tentative Report for further consideration at an upcoming meeting.

### **Subpoena v. Subpena**

Samuel Silver discussed the divergent spelling of the word “subpoena” in the New Jersey statutes. In his Draft Tentative Report Mr. Silver sought authorization from the Commission to engage in outreach regarding the inconsistent spelling and usage of the word subpoena to determine whether it would be of assistance to have uniformity in the spelling of the work throughout the New Jersey statutes.

Mr. Silver provided a brief background that may account for the divergent spellings. In the early 1940s, in the United States, a movement began to remove digraphs from the English language. By 1943, lexicographers changed the spelling of the word “subpoena” to “subpena” and in 1973 the Government Printing Office (GPO) referenced the word “subpena.” By 1984 the GPO abandoned the new spelling of the word “subpena.” Mr. Silver noted that the result of this phenomenon was that state statutes were left with these anomalous spellings.

Mr. Silver noted that there are currently 432 statutes that use the word “subpoena.” Of these statutes, 345 use the traditional spelling of the word “subpoena.” The remaining 87 statutes, spanning twenty-seven titles, use the modern spelling of the word “subpena.” Mr. Silver also observed that the spelling of this word may vary in both the statutory title and text. He also advised the Commission variations in the spelling of “subpoena” may vary in a code section and even within one act.

Searches of both the Westlaw and the Rutgers databases reveal no divergence in search results based upon the spelling according to Mr. Silver. A search of the New Jersey Legislative database, however, confirms that search results vary tremendously depending on how the word is spelled by the user. Mr. Silver observed that not everyone has access to Lexis or Westlaw and that the State search engine should return the accurate results.

Commissioner Long noted the significance of the traditional spelling of the word “subpoena.” She observed the meaning of the word is derived from its Latin origin. She

continued that the traditional spelling allows even those unfamiliar with the meaning of the word to understand that it means “under penalty.” Commissioner Long expressed a preference for the traditional spelling of the word and supported the revision of those statutes that used the modern spelling of the term.

The Commission voted unanimously to release the Draft Tentative Report on motion of Commissioner Hartnett, seconded by Commissioner Bell.

### **Clarification of Tenure Issues**

Ms. Tharney began by explaining that the current Revised Draft Tentative Report, incorporated the suggestion from the Commission to provide two alternatives to circulate for comment – one with the original proposed drafted provisions, and the other with proposed subsections d.(1) and d.(3) consolidated. Ms. Tharney said that Staff seeks authorization to release the Revised Tentative Report for comment.

Commissioner Long asked why the language in subsections d.1(a) and 1(b) was not consistent. Ms. Tharney responded that initially, the proposed language was drafted to deal with the “voluntariness” issues raised in *DiNapoli*, dealing with a voluntary transfer to a new position which was deemed to be an abandonment of a previously tenured position. Commissioner Hartnett asked whether the objective of the second alternative is to leave the tenure gap open or to resolve it against the employee. Ms. Tharney responded that the objective of this alternative is generate comment and was purposely drafted to create a tenure gap, rather than resolving the issue against the employee.

Commissioner Long acknowledged the previous discussion concerning these provision recommended maintaining the voluntary/involuntary distinction. She added that the Commission also favored retaining the phrase “is transferred or promoted” but recommended that, before distribution, the language of subsections 1.(a) and 1.(b) be made consistent. Ms. Tharney stated Staff would revisit the language to ensure that it is consistent with the Commission’s guidance.

With regard to the language at the end of subsection d.1.(b) regarding the salary and increases for the employee who is returned to the former position at a , Ms. Tharney asked if it was the Commission’s wish to include this language in the draft, even though it is different and more specific than the other provisions in the draft. Chairman Gagliardi said that the language should be left in for purposes of comment since it accurately reflects the law pertaining to superintendents.

Chairman Gagliardi also directed that Staff eliminate the language in the first paragraph on page 7 of the Report pertaining to the transfer of the option for superintendents since

superintendents cannot be transferred. Ms. Tharney said that the reference would be removed, and that she would also update the language pertaining to cases citing *DiNapoli* since additional cases have cited to that case since the Report was initially drafted. Chairman Gagliardi also said that additional explanatory language should be added to make clear that language and issues on which comment is sought.

The Commission voted unanimously to release the Revised Draft Tentative Report with the modifications discussed for comment, on motion of Commissioner Hartnett, seconded by Commissioner Bell.

### **Title 44 – The Poor Law**

John Cannel began by discussing the background of his Memorandum concerning whether to recommend for repeal sections of Title 44 which require relatives to be responsible for the county and municipal welfare costs of an indigent family member or whether to revise these statutes to cover current Work-First programs. He stated that N.J.S. 44:1-139 to 140 apply to the old county and municipal welfare programs. Mr. Cannel noted these statutes were last amended in 1979, which would suggest, as supported by case law, that they were applicable to Aid to Families with Dependent Children, the program that followed the old county and municipal welfare programs, and preceded Work-First New Jersey. He added, that while there is some authority holding that these provisions create a general duty to support relatives, no New Jersey case has suggested that a third party, a person other than the poor person or the welfare director, can use these provisions as a basis for a claim. In addition, the duty of children to support their parents under N.J.S. 44:1-40 has been superseded by N.J.S. 2A:17-56.67 - Termination of obligation to pay child support.

Mr. Cannel noted, in response to the inquiry of Commissioner Long concerning the origin of the project, that the Commission first considered Title 44 during its review of anachronistic statutes. Later, N.J.S. 44:1-139 to 140 and other sections were considered as a part of a project considering the scope of filial responsibility, following developments in Pennsylvania case law and proposed legislation in Pennsylvania concerning the duty of an adult child to bear the third-party costs for care of a parent.

Mr. Cannel stated that Staff contacted the Department of Human Services, Division of Family Development (the Department) to determine whether N.J.S. 44:1-139 to 140 provides statutory authority for state and local agencies to collect from adult relatives of Work-First New Jersey recipients. The Department responded in a letter dated July 18, 2017, that “the practice is not in use and, as it pertains to spouses somewhat unconventional; however, such an order may

be appropriate for someone receiving General Assistance.” The Department recommended repealing the provision requiring support from adult children.

Mr. Cannel added that to the best of Staff’s knowledge, no claim has been made under these statutes since 1980. The current position of the Department is the same as that taken during consultations with the Department when the Commission was considering these statutes in 2009. In further support, the Department’s regulations on evaluating applicants for benefits do not refer to any relatives beyond those in the “assistance unit” - the household of the applicant. The Department spokesperson said that an applicant is required to sign an assignment of future assets.

Commissioner Bell asked whether there is a regulation permitting enforcement against spouses. Mr. Cannel said that he was not aware of any such regulation and noted that the General Assistance programs imposed a duty on spouses, but did not require filial responsibility. Commissioner Hartnett stated that the existing statute is an entitlement, not conditioned upon repayment. He suggested that statutory requirements would best establish the spousal duty to support, adding that he did not find in the materials provided to the Commission sufficient reason to remove the existing statutory references concerning adult children.

Chairman Gagliardi indicated that at the federal level, the “Chevron Doctrine” (from the case of *Chevron U.S.A. v. Natural Resources Defense Council*) describes the deference accorded to a governmental agency responsible for applying a law in circumstances in which the law does not have a clear meaning. Mr. Cannel said that he would contact the Department to determine the procedures they follow in these circumstances.

Chairman Gagliardi made reference to the Commission’s statutory charge and recounted the findings of the Department, indicating that it has been more than three decades since an action has been brought by the Department under these provisions. He also stated that the agency involved and the Commission’s reading of the statute suggests that reference to adult children should be removed.

Commissioner Long suggested removing the reference on the basis that it no longer conforms to existing practice and is no longer applicable under the existing assistance programs, and distributing a Tentative Report without the reference for comment. Commissioner Bell said that pursuing this issue is at least a way to bring to the attention of the Legislature that there is not a clear statutory basis for imposing a duty to repay. Chairman Gagliardi stated that the majority of the Commission members present recommend removing statutory references which may be interpreted to impose a duty on adult children. Chairman Gagliardi requested Staff to provide further research, including a 50 state survey, in the Tentative Draft Report.

## **Meaning of Physical Examination and Scope of Public Entity Immunity**

Kiersten Fowler discussed her Memorandum based on the decision in *Parsons ex rel. Parsons v. Mullica Tp. Bd. Of Educ.*, in which the New Jersey Supreme Court addressed the issue of whether New Jersey's Tort Claims Act ("TCA") immunizes public entities and their employees for failure to report the results of a preventative public health examination. Ms. Fowler explained that the young student was given two visual acuity tests, administered by the elementary school nurse one during the 2001-02 academic year, and the other in 2004. The student failed both tests with regard to her right eye, but her parents were not notified of the results until after the second test in 2004. Thereafter, the student was diagnosed with amblyopia in her right eye.

The Supreme Court held, after an analysis that defined the components of "physical examination" and reviewed the legislative intent regarding the scope of public entity immunity, that reporting the results of Parsons' visual acuity test is within the purview of TCA immunity. Ms. Fowler requested authorization to conduct additional research and outreach in order to determine if a modification of the statutory language would be appropriate in light of the broad application of the provisions pertaining to required physical examinations.

Commissioner Long recommended proceeding with the project. Commissioner Bell questioned whether clarification was as significant, particularly if the statute is mostly relied on by attorneys. Commissioner Hartnett stated that there are a lot of pro se litigants in this area of the law and Chairman Gagliardi agreed, noting the high number of pro se litigants in matters involving school districts.

The Commission authorized Staff to proceed with the project.

## **Defining "Residence" for Sex Offender Registration**

Ms. Tharney discussed the Memorandum prepared by legislative law clerk, Christian Weisenbacher, concerning the provisions of N.J.S. 2C:7-2 which require a convicted sexual offender to provide and verify his/her place of residence.

In *State v. Halloran*, a convicted sexual offender, who was living with his girlfriend, failed to register her address and only registered the address of his personal residence. Ms. Tharney stated that Staff seeks authorization to engage in further research and outreach in order

to determine if it would be appropriate to clarify what appears to be an ambiguity in N.J.S. 2C:7-2.

Commissioner Bell noted that the statute refers to a single residence and fails to define the term, leaving the definition subject to interpretation. He further observed that clarifying N.J.S. 2C:7-2 would benefit individuals who are completing the forms without counsel present.

Chairman Gagliardi noted the existence Supreme Court case making reference to an individual having “many residences, but only one abode” and suggesting that if the language of this section of the statute is not clarified, it defeats the purpose of the statute.

Commissioner Hartnett noted that if the term residence is used, it should be defined, since going to the shore for a weekend does not require the offender to provide a change of address. Chairman Gagliardi added it is crucial to define the terms in question, guided by case law. Commissioner Long acknowledged that this is a challenging task. Commissioner Bell noted that the terms should be defined within the context of Megan’s Law, which should narrow the scope of the project.

Chairman Gagliardi observed that this is a worthwhile project. And recommended that Staff look to cases pertaining to voting and school attendance for assistance in considering the difference between residence and domicile.

The Commission authorized Staff to proceed with the project.

### **Public Health**

Ms. Tharney next discussed a memorandum prepared by NJIT intern, Beshoy Shokralla, that identified two apparently duplicative sections of Title 26 concerning Health and Vital Statistics. Presently, the first chapter of Title 26 consists of only one section. This section, according to Ms. Tharney, defines terms that will be used in the law. She noted that Title 26:1A, contains virtually all of the same “defined terms” as its predecessor.

Ms. Tharney explained that Staff had the benefit of informal comment by an individual who suggested that the existence of these two statutory definitions sections has led to confusion.

Ms. Tharney stated that Staff seeks authorization to engage in further research and outreach in order to determine whether it consolidating the definition section would cause any problem. The Commission authorized Staff to proceed with the project.

## Miscellaneous

Ms. Tharney mentioned an article in The Star-Ledger, distributed at the time of the meeting, discussing the anachronistic statutes that had been identified by the Commission. Ms. Tharney noted that there might be some interest in a bill to eliminate these anachronistic provisions.

Ms. Tharney stated that A926/S2721 concerning pejorative terms referring to certain disabilities and substance use disorders passed both houses of the Legislature, and was sent to the Governor for signature and provided an update on the status of the Uniform Fiduciary Access to Digital Assets Act.

The meeting concluded and was adjourned on motion of Commissioner Bell seconded by Commissioner Hartnett.