

MINUTES OF COMMISSION MEETING

January 19, 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., Commissioner Andrew Bunn, and Commissioner Virginia Long (participating via telephone). Professor Bernard W. Bell, of Rutgers Law School - 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.

Minutes

The Minutes of the December 2016 Commission meeting were approved on motion of Commissioner Bunn, seconded by Commissioner Long.

Motorcycle License Plate Display

Vito Petitti summarized a Memorandum regarding the placement of motorcycle license plates under N.J.S. 39:3-3, and informed the Commission that the proposed new language had already been incorporated into a Revised Draft Final Report, which was also before the Commission.

Mr. Petitti explained that the Revised Draft Final Report reflected the language preferred by the New Jersey Motor Vehicle Commission MVC, which only refers to horizontal placement of motorcycle license plates.

The Commission voted unanimously to release the Revised Draft Final Report upon motion of Commissioner Bunn, which was seconded by Commissioner Long.

Uniform Asset Preservation Orders Act

Jayne Johnson presented a Memorandum discussing the Uniform Asset-Preservation Orders Act (UAPOA or the Act), which authorizes courts to issue an asset-preservation order that prevents the dissipation of assets and preserves them to satisfy an existing or future judgment. Ms. Johnson explained that the Commission first considered this Act in 2013, after the prior version, the Uniform Asset-Freezing Orders Act, was amended by the ULC and renamed the Act, to prevent confusion by more accurately conveying the scope of the remedy.

Ms. Johnson stated that in November 2014, she reached out to the Civil Practice Division (CPD) of the Administrative Office of the Courts. The CPD reviewed the Act and recommended against adoption of the UAPOA in New Jersey. The CPD noted that the UAPOA raises significant concerns, including the increased costs of doing business in New Jersey, a disproportionate impact on small businesses, and Constitutional issues regarding the ex parte attachment of assets and informational privacy.

Ms. Johnson added that during the course of Staff's outreach, members of the defense bar provided written comments strongly opposing enactment of the UAPOA in New Jersey.

In January 2015, Mr. Stephen Foley, Esq., attended the Commission meeting, representing the New Jersey Defense Association, to identify areas where the UAPOA raises concerns for members of the defense bar. Mr. Steven Richman, Esq., of Duane Morris, LLP, an ABA Advisor to the ULC Drafting Committee, was also in attendance at that meeting, and he presented the objectives of the Act and the benefits of enacting the UAPOA in New Jersey.

Ms. Johnson provided additional background information concerning common-law countries, including England, Canada, Singapore and New Zealand, which provide for procedural mechanism similar to the remedy provided under the UAPOA, called a "*Mareva* injunction." She added that, to date, no other U.S. state has introduced or enacted the UAPOA.

Commissioner Long noted that the lack of introductions or enactments over the past five years is a factor when considering whether to recommend the Act in New Jersey. Commissioner Hartnett observed that the UAPOA creates a procedural mechanism that generates the type of judicial interference warned against in *Winberry v. Salisbury*. Commissioner Hartnett added that while the UAPOA may extend judicial prerogatives, it is for the courts to determine whether to implement this procedure. Moreover, the burden to the defendant must also be considered by the courts. Chairman Gagliardi observed that the discussion generated several reasons to recommend against proposing the UAPOA to the Legislature.

The Commission directed that Staff prepare a Draft Final Report for an upcoming meeting detailing the reasons why the Commission does not recommend enacting the UAPOA in New Jersey at this time, and noting that the Commission will continue to monitor any developments in this area.

Property Tax

John Cannel described to the Commission the project on real property taxation. He said that this would be the first work by the Commission in this area in at least 15 years, and that the material submitted covers the first part of the project. Almost all of it is existing law. Mr. Cannel explained that some of the language in the draft is overly ornate, but that was a result of an effort to stay as close to existing law as possible. Newly added material concerns property of the federal government and of interstate authorities

The Commissioners considered whether the new sections were too broad. The question was raised, for example, regarding whether property taken by the FDIC becomes exempt from taxation. Mr. Cannel said that more research regarding the proposed language was warranted. He said most interstate authority is specifically protected from taxation, and that certain entities such as New Jersey Transit, do not pay taxes. Commissioner Bell added that the Commission must be careful to distinguish between the analysis of the issues pursuant to the provisions of the United States Constitution and the analysis pursuant to the New Jersey statutes.

With regard to the property of a school district or other entity that is leased to private concerns, Mr. Cannel discussed proposed language on page 4, section c. of his Memorandum, informing the Commission that the section was a placeholder for future provisions. Discussion ensued regarding various government entities with private lessees, with the resulting general agreement that, at this point, substantial changes to existing law were to be avoided. Staff will continue work on the project.

Meaning of “conviction” in N.J.S. 2C:7-2(f)

Laura Tharney discussed a Memorandum resulting from the decision of the New Jersey Appellate Division in the case of *In re J.S.* In that case, the Appellate Division considered whether the term “conviction” as used in N.J.S. 2C:7-2(f), refers to a plea of guilty, or to the entry of a judgment of conviction. Ultimately, the Court determined that “conviction”, in that section of the statute, referred to the judgment of conviction, rather than to the plea of guilty. In doing so, the Court suggested that “precision in drafting statutes would obviate the need for judicial interpretation” and noted that the issue on appeal was “an important matter of public interest and capable of repetition warranting our review.”

The issue in the case was when the clock started running for purposes of the 15-year time period set forth in N.J.S. 2C:7-2(f). That statutory section provides that “a person required to register under this act may make application to the Superior Court of this State to terminate the obligation upon proof that the person has not committed an offense within 15 years following *conviction* or release from a correctional facility for any term of imprisonment imposed, whichever is later, and is not likely to pose a threat to the safety of others. [emphasis added]”

The State agreed that the defendant met all of the requirements except for the running of the 15-year time period. In response, the defendant argued that the clock started running on the day that he pled guilty and, as a result, the required period had elapsed by the time he filed his application.

Ms. Tharney asked whether the Commission thought a modest change to the statute would be beneficial.

Commissioner Long observed that the word “conviction” is a term of art understood by criminal law practitioners to be a judgment at sentencing and inquired as to similar language in other parts of the statutes, articulating a concern that making a change could affect sections of statute beyond the scope.

The Commission discussed the consequences of defining conviction as attaching at time of sentencing, and the optimal place for a new definition. Commissioner Hartnett raised a hypothetical in the context of impeachment of a witness with a prior conviction, in which a defendant pleads guilty but is not yet sentenced. For that case, the witness should be considered convicted even though not yet sentenced. He suggested that the term “judgment of sentence,” as

used by federal judges, could provide clarity but, since the term was not one used in the State courts, it had the potential to create confusion, rather than resolving it.

The Commission discussed evidence rules regarding admission of guilt, along with *State v. Baker*, in which a confession of guilt served as evidence of conviction. John Cannel observed that, because of judges' discretion, these cases often evade appeal.

Commissioner Hartnett then suggested that "conviction" should be equivalent to "judgment of conviction," only for calculating time from conviction. The Commission asked Staff to conduct further research regarding the use of the word "conviction" in the statutes in order to identify the scope of the issue and the potential impact of any proposed change.

Affidavit of Merit

Jayne Johnson summarized her Memorandum relating to the proposed draft language revising the affidavit of merit requirement in professional malpractice cases. Ms. Johnson stated that the Commission was requested to weigh in on working draft language and she would share her insights at roundtable meeting discussing the proposed language. Laura Tharney informed the Commission that Staff had not been actively working in this area since the bill was introduced, in deference to the Legislature and was now proposing to resume work at the request of the Legislature.

Commissioner Hartnett provided several observations, including possible conflicts with *Winberry* and the Erie doctrine. Commissioner Long said it would be interesting to look at the legislative history of the statute to determine whether *Winberry* considerations influenced the existing statutory language. Commissioner Bunn added that the inability to secure the affidavit of merit due to the engagement of counsel within a short time before the statute of limitations is also an issue that should be considered.

Chairman Gagliardi commented that all of the observations should be raised by Ms. Johnson in the next meeting, and that it would be appropriate to provide any insight the legislative history of the Act offers concerning the issues raised.

Annual Report

The 2016 Annual Report of the New Jersey Law Commission was approved, subject to any corrections submitted to Staff on or before January 27th, on motion of Commissioner Bunn, seconded by Commissioner Hartnett.

Miscellaneous

At the conclusion of the meeting, Ms. Tharney conveyed Susan Thatch's appreciation and best wishes to the Commission. She also advised the Commission that Staff had worked on

two articles for publication this year, and was preparing a continuing legal education seminar to be conducted in conjunction with the New Jersey State Bar Association. She also indicated that the Commission would be hosting six students for the Spring semester, four from Seton Hall University School of Law, and two from the New Jersey Institute of Technology.

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