

MINUTES OF COMMISSION MEETING

December 21, 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 Virginia Long, and Commissioner Andrew Bunn. Professor Edward A. Hartnett, of Seton Hall University School of Law, attended on behalf of Commissioner Kathleen M. Boozang, and Grace C. Bertone, Esq., of Bertone Piccini LLP, attended on behalf of Commissioner Michael T. Cahill.

Minutes

The Minutes of the October 19, 2017, Commission meeting were unanimously approved on the motion of Commissioner Bunn, seconded by Commissioner Hartnett.

Partnership Trade Name Certificates

Samuel Silver discussed a Draft Tentative Report proposing modifications to the New Jersey Partnership Trade Name Statute, specifically N.J.S. 56:1-4. He recounted that this project came to the Commission's attention as a result of Staff's ongoing review of the Model Entity Transactions Act (META). During a review of the New Jersey partnership statutes, Staff noticed that the failure of a partnership to properly register its trade name could be result in a determination that the partners were guilty of a "misdemeanor." Mr. Silver noted that during the October 19, 2017, Commission meeting, Commissioner Bunn cautioned that care should be taken before simply replacing even the most arcane statutory language.

Mr. Silver summarized for the Commission the origin of New Jersey's partnership trade name statute. He noted that the statute is based upon the 1833 New York Statute entitled, "An Act to Prevent Persons from Transacting Business under Fictitious Names." The purpose of this statute was to protect persons giving credit to the fictitious firms on the faith of a fictitious designation. Mr. Silver noted that in 1906, New Jersey adopted, "an Act to Regulate the use of Business Names" with the same purpose as its New York counterpart – to protect creditors from fictitious firms.

Mr. Silver explained that there is very little case law in New Jersey involving this statute. The most recent case on this subject, *Kugler v. Roman*, was decided by the Appellate Division in 1970. In *Kugler*, the Appellate Division declined the Attorney General's request to enjoin the behavior of a defendant who, among other things, admitted to not filing a partnership trade name certificate. The Court reasoned that a criminal remedy is set forth in a statute, so equity courts must refrain from issuing injunctive relief. Noting that the criminal penalties set forth in the statute have never been reported in a court opinion, Mr. Silver summarized his outreach efforts,

explaining that he had the opportunity to speak with a representative from the New Jersey Department of the Treasury, a representative from a County Clerk's Office, and a seasoned corporate attorney about this subject. None of those individuals could identify a single occurrence in which a partnership was prosecuted for its failure to comply with the requirements of the statute. In practice, partnerships are generally given multiple opportunities to comply with the statute.

As a result, Mr. Silver recommended that the statute be modified to reflect New Jersey's current partnership theory – the entity theory. Modernization of the statute would permit a compliant partnership to become a limited liability partnership (LLP) by filing a one-page document with the Secretary of State. In addition, the revised statute would prohibit non-compliant partnerships from becoming limited liability partnerships until they have first filed the required partnership trade name documents. Finally, the revisions to the statute would honor the original intent of the statute by protecting the rights of partnership creditors by ensuring that the names and addresses of all partners are a matter of public record.

Commissioner Hartnett expressed concern regarding the proposed language set forth in paragraph c. of the proposed statute. He questioned the effect on the "partnership status" if the partnership did not properly file trade name documents. After reviewing proposed paragraph c., Laura Tharney suggested that the removal of the language, "...only affects a partnership's status and..." would streamline this paragraph and clarify this portion of the proposed statute. This modification was agreed upon by the Commissioners.

The failed attempts to repeal N.J.S. 56:1-4 were the subject of inquiry by Commissioner Long. Mr. Silver noted that no explanation is available for why the statute was never repealed by the Legislature. Commissioner Long also questioned why a business organization would want to remain as a partnership. In response, Mr. Silver responded that with the passage of the Uniform Partnership Act in 2000, there is no logical reason that a partnership would wish to remain a partnership. Rather, burgeoning business most likely begin as partnerships until they reach a level of sophistication and desire to limit personal liability.

Mr. Silver noted that the requirement that a partnership file in every county in which they transact business is set forth on several county websites. Commissioner Hartnett focused on the procedural requirement that a partnership register in every county in which it conducts or transacts business. The logic, according to Commissioner Hartnett, of filing in every county is belied by the fact that a copy of the trade name certificate is also filed with the Secretary of State. Commissioner Bertone concurred adding that it is highly unlikely that this requirement is being satisfied by every New Jersey partnership.

Chairman Gagliardi remarked that the presence of this information on County websites is significant because it places partnerships on notice regarding their filing obligations. Commissioner Bunn added that the presence of this requirement on county websites is also important because financial institutions are also on notice about the partnership filing requirements.

The Commission inquired as to whether additional modification of the statutory provision in question would be consistent with the Commission's mandate. Laura Tharney suggested that additional outreach, including to the Division of Commercial Recording on this subject matter, may prove useful. John Cannel opined that updating the statute is logical; however, he cautioned that the counties may object to the loss of the filing fee revenue associated with the registration of partnership trade names.

The consensus of the Commission was that additional outreach should be conducted by Staff to determine if additional modification was warranted. At the next meeting, the Commission will consider releasing a Tentative Report on this subject.

Revised Uniform Unclaimed Property Act (RUUPA)

John Cannel discussed his Memorandum concerning the Revised Uniform Unclaimed Property Act (RUUPA). He began his discussion with a historical overview of the RUUPA and noted that it was approved by the Uniform Law Commission in 2016. Since that time, it has been enacted in three states and is pending in four more.

Preliminary discussions with the Unclaimed Property Administrator confirmed their interest in the Act. Four areas of the Act were reviewed with the Commission: attorney's fees, nature of appeal, gift cards; and, the rights of owners when property is sold.

The RUUPA, according to John Cannel, contains several provisions that allow a successful litigant the right to recover their attorney's fees and costs. Mr. Cannel advised the Commission that there are no New Jersey provisions that provide for attorney's fees in unclaimed property litigation. Further, he is not aware of a reason to add such provisions to the current New Jersey statutes on this subject.

In New Jersey, a litigant may appear before an Administrative Law Judge (ALJ) with respect to an unclaimed property dispute. The ALJ will conduct an evidentiary hearing and place findings of fact and conclusions of law on the record. An appeal of the ALJ decision, Mr. Cannel continued, must be directed to the Superior Court, Appellate Division, and is limited to the

contents of the administrative record. Mr. Cannel believes that New Jersey would benefit from a statute that sets forth these requirements.

Mr. Cannel asked the Commission whether unused gift cards should be considered unclaimed property. According to Mr. Cannel, the RUUPA provides alternative language on this topic. Under current New Jersey law, gift cards fall under the statutory category of “stored value cards.” He also noted that the RUUPA and the New Jersey Statutes are substantially similar in their handling of “inactivity fees.”

Commissioner Bunn inquired about the origin of the “inactivity” fee, suggesting that Staff identify the manner in which other states handle this issue so that New Jersey would not be an “outlier”. Chairman Gagliardi concurred, and noted that other states’ experiences with this issue may prove useful in determining whether or not to modify the present New Jersey statute.

Finally, Mr. Cannel addressed an owners’ rights when their unclaimed property is sold. He noted that under the RUUPA, when property is sold by the Unclaimed Property Administrator before six years have elapsed, the owner may claim the greater of the sale price or the current value. The result is that the State may incur a loss if valuable property is sold before the six-year statute of limitations has run. In New Jersey, the current practice is that property may be sold after it has been unclaimed for one year – there is, however, no current law on this issue.

The Commission authorized Staff to conduct additional outreach and research on these topics.

Suspended License

During the October 19, 2017 Commission meeting Staff was authorized to review N.J.S. 2C:40-26 to determine whether it was possible to clarify this statute. The Commission authorized Staff to conduct additional research and engage in preliminary outreach to both law enforcement officers and municipal court practitioners to determine whether they believed that the statute was ambiguous.

Samuel Silver advised the Commission that since the October meeting, Staff had analyzed both the current case law and statutes on this subject matter. Consistent with the instructions from the Commission, Staff also conducted outreach to the suggested stakeholders. The product of Staff’s research and outreach was set forth in a Memorandum which Mr. Silver discussed with the Commission.

Mr. Silver began with a discussion of the facts in the matter of *State v. Torella*. He noted that in *Torella*, the Appellate Division considered the proper interpretation of N.J.S. 2C:40-26. The Court determined that an individual who drives after a court ordered suspension but before their license has been reinstated by the Motor Vehicle Commission (MVC) has not violated the statute. Consistent with the ruling of the Court in *State v. Perry*, the Court held that the statute clearly intends to criminalize the operation of a motor vehicle only during the court-ordered period of suspension, not thereafter. In response to a question raised during the October meeting, Mr. Silver advised the Commission that an individual found to be driving after suspension but before reinstatement of their license would properly be charged with driving with a suspended license – a violation of 39:3-40.

Laura Tharney had the opportunity to informally discuss the clarity of the statute with the membership of the New Jersey Police Traffic Officers' Association (NJPTOA) at a recent meeting. Ms. Tharney noted that the general consensus of those members in attendance at that meeting was that the reading and interpretation of the statute is a "training issue" and not an issue that requires an amendment to the current statute since the language of the statute, in the opinion of the officers with whom Ms. Tharney discussed the issue, is clear.

Mr. Silver had the opportunity to discuss this matter with Kenneth Vercammen, Esq., a certified municipal court law attorney. Mr. Vercammen confirmed that he believes that the statute is unambiguous. He expressed concern, however, that under the 2017 Criminal Justice Reform, individuals who were wrongfully charged with the criminal statute could spend up to 48 hours in jail before being released.

Commissioner Hartnett indicated that he was not convinced that the Commission could further clarify the language of the statute. Commissioner Long agreed that the statute is clear on its face. She suggested, however, that if a single sentence could prevent a person from spending 48 hours in jail, then an attempt should be made to draft language to effectuate that result. Chairman Gagliardi and Commissioner Bunn concurred with Commissioner Long's recommendation. Chairman Gagliardi suggested that Staff provide the Commission with proposed language encapsulating Commissioner Long's recommendation.

Alimony Modification

Renee Wilson, a Legislative Law Clerk with the Commission, summarized her Memorandum concerning the modification of alimony in anticipation of prospective retirement. The case that brought this issue to the attention of the Commission was the 2016 Chancery Division decision in *Mueller v. Mueller*. Ms. Wilson noted that the issue is that although the

current alimony statutes permit the modification of alimony in advance of retirement, it does not prescribe the time period for the filing of such an application.

In *Mueller*, the plaintiff sought to modify his ongoing, permanent alimony payment five years before his retirement. He sought a court order that would prospectively terminate his alimony obligation upon his retirement. The Court, construing the newly amended alimony statute, N.J.S. 2A:34-23(j)(2), found the plaintiff's application to be premature. Ms. Wilson explained that the Court found that, "the statute does not establish or address specific time periods for filing an advance motion based upon prospective retirement." In the absence of any post-amendment guidance, she noted that the Court suggested that the application would have been more suitable if it had been brought twelve to eighteen months before the plaintiff's prospective retirement.

Commissioner Bertone observed that the litigant in *Mueller* did not provide enough information to justify the application for terminating his alimony requirement. Justice Long suggested that filing of a motion could be subject to a condition precedent, for example, that the motion be filed "no sooner than 'x'." Commissioner Bunn, concurred and added that a motion for relief must be based on "good cause." Chairman Gagliardi posited a hypothetical in which the litigant was afflicted with a terminal illness. Such an illness, he continued, might justify the filing a motion and allow the movant to perform long term financial planning.

Commissioner Long recommended that Staff solicit input on this topic from matrimonial practitioners. Commissioner Bunn agreed and also suggested that Staff communicate with elder law attorneys and financial planning professionals to determine whether modifying the statute would be beneficial to practitioners and their clients. The Commission authorized outreach to the various stakeholders and asked Staff to report its findings to the Commission.

Unemployment Benefits

Laura Tharney discussed a Memorandum, drafted by Legislative Law Clerk Erik Topp, requesting Commission authorization to conduct additional research and outreach to determine whether modifying N.J.S. 43:21-5 would aid in interpreting the law and eliminate the need for further litigation regarding the issue raised in *Anderson v. Board of Review*.

Ms. Tharney summarized that the issue in this case was whether an employee who held two jobs with a single employer may avail themselves of unemployment benefits where they resign from one position and are fired from the other.

The Commission discussed the propriety of addressing the issue raised in the *Anderson* case. Commissioner Hartnett suggested that the remedy for this problem is regulatory and not statutory. He asked whether the Commission can ask, or advise, an agency to change a regulation. Ms. Tharney commented that Staff could informally reach out to an agency and discuss the matter, inquiring whether the Commission could be of any assistance to the agency in this area.

The Commission recommended that Staff engage in preliminary outreach to the appropriate agency on this issue to determine whether the Commission could be of assistance with this subject and then update the Commission regarding the outcome of its outreach.

Annual Report 2017

Ms. Tharney reported that the 2017 Annual Report is in the process of being reviewed and revised by Staff and will be provided to the Commission for consideration at the January 18, 2018, meeting.

Other Business

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

The next Commission meeting is scheduled for January 18, 2018, at 10:00 a.m. After discussion, the Commission agreed that the meeting of February 15, 2018, will be moved from 10:00 a.m. to 4:30 p.m. The remaining meeting dates, and times, will be confirmed at the January 18, 2018, meeting.