MINUTES OF COMMISSION MEETING

April 18, 2024

Present at the meeting of the New Jersey Law Revision Commission, held remotely, were: Chairman Vito A. Gagliardi, Jr.; Vice-Chairman Andrew O. Bunn; Commissioner Virginia Long; Professor Edward Hartnett, of the Seton Hall University School of Law, attending on behalf of Interim Dean John Kip Cornwell; Professor Bernard W. Bell, of the of Rutgers University Law School, and Grace C. Bertone, of Bertone Piccini, LLP, attending on behalf of Dean Johanna Bond.

Public Participants

Also in attendance were James H. Maynard, Esq., Maynard Law Office, LLC; Mary McManus-Smith, Esq., Legal Services of New Jersey; and Classie M. Colinet, Esq.

Minutes

On the motion of Vice-Chairman Bunn, seconded by Commissioner Bertone, the Minutes of the March 21, 2024, meeting were unanimously approved by the Commission.

Interpretation of the Vote by Mail Law

A New Jersey election may be contested by asserting one of the grounds in N.J.S. 19:29-1, which includes, in subsection (e), that the number of legal votes rejected was sufficient to change the election result. New Jersey's Vote By Mail Law (at N.J.S. 19:63-26), however, directs that an election “shall not” be held invalid due to irregularities or failures in the preparation or forwarding of mail-in ballots.

Whitney Schlimbach explained that in the case of In re Election for Atlantic County Freeholder District 3 2020 General Election, the Appellate Division held that N.J.S. 19:63-26 establishes a presumption of validity when there is an irregularity or failure in the preparation or forwarding of mail-in ballots. The presumption may be rebutted by asserting one of the grounds in N.J.S. 19:29-1 as a basis to invalidate the election.

Ms. Schlimbach said that in April 2023, a Tentative Report was released with modifications that reflected the Atlantic County Election holding. The Report also authorized further research and outreach regarding the scope of the jurisdiction of the Election Law Enforcement Commission (ELEC) as provided in the Campaign Contributions and Expenditures Reporting Act (Reporting Act).

During the November 2023 Commission meeting, the Commission requested a modification incorporating the Atlantic County holding that defective mail-in ballots fall within the scope of the phrase “legal votes rejected” in N.J.S. 19:29-1(e). The Atlantic County case cited the New Jersey Supreme Court’s language in In re Petition of Gray-Sadler, which defined the phrase “legal votes rejected” as including “any situation in which qualified voters are denied access
to the polls. The essential question is whether voters were denied the opportunity to vote for a candidate of their choice.”

The Commission released a Tentative Report in December 2023 proposing modifications that reflected the full holding of the Atlantic County case, as well as modifications clarifying the jurisdiction of ELEC over different types of violations of the Reporting Act.

Ms. Schlimbach said that outreach was conducted to knowledgeable and interested organizations and individuals.

In response to the outreach, Scott Salmon, Esq., expressed support for the recommended modifications but noted that the modified language in N.J.S. 19:29-1(a) – “sufficient to cast doubt on the validity of the result” – is new, potentially broader, language than is found in other subsections, that may prompt unnecessary litigation regarding its meaning. He also suggested modifying subsection (h) to clarify that the section is only applicable to violations of the Reporting Act resulting in criminal charges or injunctive relief, and to add a standard of review making clear that pursuant to subsection (h) a challenger need not allege that the violation “actually changed a specific number of votes.” Daniel Antonelli, Esq., who represented the respondents in the case of In re Contest of the Nov. 2, 2021 Gen. Election for the Old Bridge Tp. Comm, Fourth Ward, also supported the recommended modifications but suggested including language making it clear that courts have jurisdiction over violations of the Reporting Act when a petitioner brings an application for injunctive relief before an election.

There are no relevant bills pending.

Referring to page sixteen of the Report, Commissioner Bell inquired whether there is a more appropriate term than “sufficient” to describe the threshold for challenging an election. He noted that the term “sufficient” could raise the question of when it is enough to contest an election result. Ms. Schlimbach explained that, in this context, the term had been addressed by a body of case law, there did not appear to be confusion about its meaning, and practitioners in this area had not indicated a need for clarification.

Ms. Schlimbach asked whether subsection (h) should incorporate Mr. Salmon's proposed language. Chairman Gagliardi stated that the Commission’s research and outreach did not reveal support for the proposal, and that the Commission is not inclined to incorporate that change. Chairman Gagliardi thanked Ms. Schlimbach for her scholarship and tenacity on this project.

On the motion of Commissioner Long, seconded by Commissioner Bell, the Commission unanimously released the Final Report.

 Juvenile Justice – State Home for Boys and Girls

Samuel Silver explained that during the March 21, 2024, Commission meeting, there was a discussion among the Commissioners regarding the age at which incarcerated youths may be
transferred from Juvenile Justice Commission (“JJC”) facilities to a correctional facility operated by the Department of Corrections (“DOC”).

The Commission noted that a male prisoner could be transferred to an adult facility at the age of 15, but female prisoners were not eligible for transfer until the age of 16. The Commission sought clarification regarding the difference in the ages. The Commission’s work in this area was released as a Final Report including the age of 16 for both. Staff was, however, asked to speak with a representative from the JJC to discuss whether the age for the transfer age for young men in their custody should be 15 or 16.

Staff was instructed to bring the matter back to the Commission for additional consideration if the JJC (1) objected to the Commission’s proposed modification or (2) indicated that the age of transfer should be a “different” age than set forth in N.J.S. 30:4-85, or in the Commission’s proposed sections (c) and (d).

Mr. Silver indicated that Staff conducted further research into the legislative history of N.J.S. 30:4-85 which revealed amendments over the years, including a 1957 recognition of the challenges faced by incarcerated youth and establishment of the transfer ages. At that time, changes recommended by Senator Forbes were intended to enhance offender classification and rehabilitation programs, emphasizing the need for tailored approaches for different age groups. The law enacted in 1957 has remained unchanged for 67 years.

Mr. Silver said under certain circumstances, including when a youth has reached the age of 18, the JJC may initiate a transfer to the DOC. According to the JJC, when such a transfer is initiated, it is done without regard to gender-based age delimiters. The JJC further indicated that if the Legislature were to consider modifying the age of transfer, it might recommend that the statutory age be raised to 18 years of age or higher. The JJC cautioned against the elimination of the age references entirely because they establish the minimum age for such transfers. The JJC also noted that the absence of such a delimiter would leave such determinations to the discretion of the transferring and receiving entities. Mr. Silver expressed his gratitude to Dr. LeBaron and Christina Broderick of the JJC for their valuable contributions and guidance throughout the project.

Mr. Silver further noted that the draft language in subsection (c) includes references, in brackets, to the transfer ages of 15 and 16. Staff notes that raising the statutory transfer age to 16 (which would be consistent with the Legislature’s 1931 amendment) deviates from the 1957 statutory modification that reduced the age of transfer to 15 for males to allow the DOC and the JJC to work with youth populations in age-appropriate settings. The JJC suggested that if the Legislature contemplates altering the age of transfer, it might recommend increasing the age to 18 or beyond.

Commissioner Harnett proposed eliminating “for males” in subsection (c) and adding the ages 15, 16, and possibly 18 in brackets to flag this issue for the Legislature and invite legislators to choose the age they deem appropriate. He also recommended removing subsection (d) and questioned whether “for males” is needed in subsection (e). Commissioner Long agreed with
Commissioner Hartnett and noted that his approach removes the unconstitutionality and anachronism in the statute.

Vice-Chairman Bunn also agreed with Commissioners Harnett and Long and proposed including a footnote to the bracketed age of 18 indicating that the JJC noted that 18 is its preferred age. Chairman Gagliardi suggested that the changes proposed by Commissioner Hartnett offered an elegant solution.

With the modifications proposed by the Commission and on the motion of Commissioner Long, seconded by Commissioner Bertone, the Commission unanimously released the work, as amended, as a Final Report.

**Penalties for Community Supervision for Life Violations Unconstitutional as Ex Post Facto Law**

Whitney Schlimbach discussed with the Commission a Draft Final Report recommending modifications to N.J.S. 2C:43- 6.4 to reflect the holdings in *State v. Hester* and *State v. Perez*. Ms. Schlimbach explained that, in New Jersey, individuals convicted of certain sex offenses may be sentenced to parole supervision for life (“PSL”) pursuant to N.J.S. 2C:43-6.4. Prior to a 2003 amendment to the statute, offenders were sentenced to community supervision for life (“CSL”). A subsequent 2014 amendment changed violations of both PSL and CSL to third-degree, rather than fourth-degree, crimes and added a provision indicating that a violation of CSL converts it to PSL.

This issue was brought to Staff’s attention by Fletcher Duddy, Deputy Public Defender, Special Litigation Unit, New Jersey Office of the Public Defender, during the course of discussions regarding another project.

In *State v. Hester*, the New Jersey Supreme Court found that the 2014 amendment violated the ex post facto clauses of New Jersey and Federal constitutions when applied to individuals sentenced to CSL. The four defendants in *Hester* were sentenced to CSL after committing qualifying offenses. After 2014, all four defendants violated the conditions of their CSL, were convicted of third-degree crimes, and had their CSL converted to PSL, pursuant to N.J.S. 2C:43-6.4(a) and (d).

Both the trial court and the Appellate Division found that the application of the 2014 amendment to defendants was a violation of the ex post facto clause because it increased the punishment for CSL violations for defendants sentenced to CSL prior to 2014.

The New Jersey Supreme Court conducted an ex post facto analysis, which required that the law must (1) apply to events occurring before its enactment and (2) disadvantage the offender affected by it. With respect to the first requirement, the Court found that the “completed crime” was the predicate sexual offense, not the CSL violation. Regarding the second requirement, the *Hester* Court found that since the 2014 amendment retroactively increased the punishment for the initial sex offense conviction by enhancing penalties for violating CSL, the 2014 amendment was an ex post facto law.
The *Hester* Court relied on the Supreme Court’s reasoning in *State v. Perez*, in which the defendant was sentenced to CSL in 1998 and convicted of a new offense in 2011. Pursuant to the 2011 version of N.J.S. 2C:43-6.4(e), the *Perez* defendant was subject to a mandatory extended term without the possibility of parole. When he was sentenced to CSL in 1998, however, subsection (e) did not preclude parole when an individual on CSL committed a qualifying second offense.

The *Perez* Court held that the 2003 amendment violated the ex post facto clauses of the New Jersey and Federal constitutions as applied to a defendant sentenced to CSL prior to the amendment. Subsequent Appellate Division cases relied on the Supreme Court’s reasoning in *Hester* to reduce a defendant’s third-degree convictions for violating conditions of CSL to fourth-degree convictions given the ex post facto nature of the 2014 amendment.

New Jersey’s Administrative Code distinguishes between CSL and PSL. NJAC 10A:71-6.11 governs CSL and states that it is imposed for enumerated offenses committed prior to January 14, 2004, which is the effective date of the 2003 amendment. NJAC 10A:71-6.12 governs PSL, and states that it is imposed for offenses after the effective date of the amendment. Additionally, NJAC 10A:71-6.11 specifies that violations of CSL are fourth-degree offenses.

A Tentative Report was released in December 2023 that proposed modifications to the statute to reflect the holdings in *Hester* and *Perez*. There are no relevant bills pending.

Outreach was conducted to knowledgeable and interested individuals. A response was received from James Maynard, Esq., who practices in the area of sex offense law. He indicated that he supports the recommended modifications, but suggested an additional modification related to the burden of proof required to terminate CSL. His proposed language is set forth in the Report at page 14.

N.J.S. 2A:43-6.4(c) was amended in 2003 to permit a court to terminate PSL upon clear and convincing evidence that an individual has not committed an offense for 15 years and is not likely to pose a public safety risk. After the 2003 amendment, subsection (c) did not reference CSL at all. Prior to the amendment, the subsection did not articulate a burden of proof for termination of CSL and termination of CSL was mandatory upon satisfactory proof. Mr. Maynard noted that because there was no burden of proof set forth in the statute, the standard would have been a preponderance of the evidence. The amendment added a heightened burden of proof – clear and convincing evidence.

Mr. Maynard acknowledged that there is no case law addressing the ex post facto nature of this particular aspect of the statute, but he stated that the retroactive application of the clear and convincing evidence standard and the discretionary nature of the termination violate the ex post facto clause under the reasoning of *Hester* and *Perez*.

Ms. Schlimbach explained that Mr. Maynard supplied some additional comments and information in advance of the meeting. Ms. Schlimbach summarized that Mr. Maynard noted that the 2003 amendment replaced all references to CSL with PSL and the 2014 amendment reinserted CSL into subsections (a), which is the subsection that requires converted CSL to PSL following a
violation of CSL, and also in subsection (d), which is the subsection that increased degree of penalty for violations of both CSL and PSL.

Mr. Maynard suggested that the difference between the 2003 and 2014 amendments demonstrates Legislative intent to subject those on CSL to certain provisions and not others. In 2003, when subsection (c) was amended, the Legislature did not make the section applicable to CSL, however, it did do so in 2014 when it enhanced the penalties in subsection (d) and made the subsection explicitly applicable to both CSL and PSL.

Mr. Maynard also distinguished holdings in cases cited in the Appendix, *Molnar* and *Humanik*. He noted that in those cases, the burden of proof on the ultimate factual determination to be made by the trier of fact was not changed. The 2003 amendment changed the standard of proof for the ultimate factual questions. In addition, Mr. Maynard said that the 2003 amendment had the potential to increase the supervisee’s punishment by extending the period of supervision, whereas in *Molnar* and *Humanik* the change impacted the burden of proving affirmative defenses at trial, which was “explicitly authorized” by the Legislature.

Mr. Maynard brought two additional Supreme Court cases to staff’s attention: *In the Matter of G.H./G.A.* and *In the Matter of Registrant J.D.F.* In these cases, the Court analyzed N.J.S. 2C:7-2(g), which imposes lifetime registration and notification obligations under Megan’s Law on certain offenders. The Court in those cases found no “express or implied intent” to apply subsection (g) retroactively to offenders convicted prior to the enactment of the subsection.

Finally, Mr. Maynard wrote, that “because the 2003 amendment did not repeal the original statute, that statute’s provisions remain in force for those sentenced to CSL.”

Ms. Schlimbach explained that the bolded and bracketed modifications in the Appendix were proposed by Mr. Maynard.

Continuing with her overview of the Appendix for the Commission, Ms. Schlimbach explained that in subsection (a), the language requiring a sentence of CSL to be converted to PSL following a violation of CSL has been eliminated consistent with the holding of the Supreme Court in *Hester*. In subsection (c), the language proposed by Mr. Maynard clarifies that the burden of proof required for termination of CSL is by a preponderance of the evidence and that termination is mandatory upon sufficient proof. As noted in the comments, it is unclear from the available case law whether increasing the defendant’s burden of proof in this context is a procedural or a substantive provision subject to ex post facto review. *Hester* and *Perez* both concluded that the substantive differences between PSL and CSL made it unconstitutional to apply the consequences of PSL to an individual originally sentenced to CSL.

With respect to Mr. Maynard’s proposed modifications, Ms. Schlimbach requested Commission guidance as to whether the issue should be addressed by the Report. If so, she asked whether Mr. Maynard’s proposed modifications should be incorporated into the Appendix or whether the issue should be brought to the Legislature’s attention in some other way.
Ms. Schlimbach explained that language had been added in subsection (d) to clarify that a violation of CSL is a fourth-degree crime, rather than a third-degree crime, as held in *Hester* and as set forth in Administrative Code. In subsection (e), the section has been divided into two subsections that address the consequences of committing a qualifying offense while serving either CSL or PSL. Subsection (e)(1) imposes an extended term of imprisonment for a qualifying second offense while serving either CSL or PSL, as was required prior to the 2003 amendment to the statute. Subsection (e)(2) excludes the possibility of parole when the offender was serving PSL but clarifies that the prohibition on parole is not applicable to an offender on CSL, as held in *Perez*.

When public comment was invited, Mr. Maynard introduced himself as a practitioner in the area of sex offense law. He explained that the proper application of the 2003 enhanced standard of proof for terminations of PSL should be applied only to PSL supervisees who seek termination. CSL supervisees should be subject to the provisions of the 1994 CSL statute which is still fully in effect since there is no indication that it has been repealed. Mr. Maynard explained that because the 1994 statute made no mention of a standard of proof, the standard for CSL termination was – by default – a preponderance of the evidence. The 2003 amendments regarding PSL specifically articulates a clear and convincing evidence standard. Mr. Maynard said that such a retroactive application of the law is fraught with constitutional complications and that there is a great deal of confusion among practitioners about which standard to apply to CSL and PSL supervisees eligible for termination.

Commissioner Hartnett asked Mr. Maynard whether judges are under the same impression that different standards of proof apply to CSL and PSL terminations under an ex post facto argument. Mr. Maynard replied that judges presiding over CSL terminations are commonly persuaded by prosecutors that the standard of proof is clear and convincing evidence, but that since the supervision is frequently terminated, there are no appeals from these cases.

Commissioner Long, indicated that she shared Commissioner Hartnett’s concern – since judges are rejecting the argument, it is problematic to include it in the Report. She added that the Report seeks only to codify *Hester* and *Perez* which are directly on point. Mr Maynard’s argument reasons inferentially.

Chairman Gagliardi agreed with Commissioner Long and asked the Commission whether they believed the Maynard language should be removed or be flagged in the Report in a footnote or a sentence in the body of the Report. He noted that it goes beyond the scope of the Report.

Commissioner Bell indicated there seemed to be no clear precedent establishing that changing the burden of proof is an ex post facto violation. He added that he did not see a reason why the Legislature could not impose a clear and convincing standard and that while he didn’t object to flagging it for the Legislature, if the Commission did so, it should also indicate that there is no relevant precedent.

Vice-Chairman Bunn agreed with Commissioner Bell, adding that he believed the issue was not mature enough to even be flagged by the Commission since there was not a disagreement between courts, and Mr. Maynard’s position had not yet been adopted by any court.
Mr. Maynard said that he believed that there was no ambiguity on the ex post facto nature of the provision, and no question that it enhances the punishment, and that *Hester, Perez, Beazell v. Ohio*, and *Weaver v. Graham* have said as much. He added that he believed judges have ruled against the argument as a practical matter, rather than a matter of law.

Commissioner Hartnett asked if there was any possibility anyone could be sentenced to CSL. Ms. Schlimbach responded that there is no such possibility since CSL sentences were eliminated with the 2003 amendments. Commissioner Hartnett then asked whether the last clause of subsection (e)(2) was superfluous and just for clarification. Ms. Schlimbach explained that part of the reason for including the language was to reflect the Administrative Code, and also because she had come across many cases that seemed to erroneously confuse CSL with PSL, and she wanted to make sure that the statute was clear.

Ms. Schlimbach also noted that footnote 128 in the report spoke about the 1925 case of *Beazell v. Ohio*, as mentioned by Mr. Maynard, and that it contained language showing an ex post facto violation was not found where the burden of proof was unchanged.

Chairman Gagliardi thanked Mr. Maynard for his commentary and presented the Commission with three potential options for moving forward. Option one is to disregard Mr. Maynard’s recommended provision entirely. Option two is to make a note of the recommendation in the preamble or as a footnote in the Report. Option three is to incorporate the proposed language, set forth in bolded and bracketed language, into the Report.

Commissioner Bunn stated he favored option one, and opposed option three but could be persuaded by option two. However, he believed the Commission did not have enough information to make a decision or comment. Commissioner Long said that she was in favor of commenting in the Report under option two, since the standard of proof currently being applied to CSL defendants is not the one prescribed by the 1994 statute that affects CSL. She added the question should just be raised and flagged, and not added to the proposal. Commissioner Hartnett agreed with Commissioner Long but added that the issue should be raised in a succinct manner, something along the lines of “there may similarly be an ex post facto issue with subsection (c)”. Commissioner Bertone agreed. Commissioner Bell added that he disagrees with the issue being flagged unless precedent is cited and there simply isn’t any. Commissioner Bunn agreed.

Chairman Gagliardi then acknowledged that Commissioners were split in opinion and moved for a vote by way of motion.

The vote to release the project as a Final Report as originally drafted by Ms. Schlimbach with no mention of Mr. Maynard’s recommendation was supported by Commissioner Bell and by Commissioner Bunn.

Next, Commissioner Hartnett provided language for the option two footnote which would state: “The Commission has received a comment that subsection (c) raises similar ex post facto concerns, and that such questions arise with some frequency in litigation.” Commissioner Bell asked whether Commissioner Hartnett would be amenable to removing the ex post facto reference
from the proposed footnote since he was concerned that it could be perceived as the Commission weighing in on the argument. Commissioner Hartnett responded that removing the reference would not make clear what the litigated concerns were. Chairman Gagliardi agreed and added that mentioning the ex post facto argument did not mean that the Commission endorsed it.

The vote to release the Report with the Hartnett amendment was supported by Commissioner Bertone, Commissioner Hartnett, Commissioner Long, and Chairman Gagliardi.

By a vote of four to two the Hartnett amendment was adopted.

As amended by Commissioner Hartnett’s footnote and on the motion of Commissioner Bertone, seconded by Commissioner Long, the Commission released the Final Report, as amended, by a vote of five to one (Commissioner Bell was opposed).

**Surrender in the Context of Voluntary Relinquishment of Parental Rights**

Mr. Silver presented an Update Memorandum addressing the use of the term “surrender” in the context of the voluntary relinquishment of parental rights. Mr. Silver explained that the New Jersey State Bar Association (“NJSBA”) requested that the Commission examine the use of the term “surrender” and consider replacing it with another appropriate term, such as “transfer” or “relinquish.” The NJSBA noted, when making its initial request, that the Judiciary often acknowledges that parents who voluntarily offer to terminate their parental rights are “acting in the best interests of their child and are acting selflessly by placing the child’s needs above their own.”

Mr. Silver said that the term “surrender” is used in twenty-one statutory sections across Title 9 and Title 30. He added that Staff also examined approximately 2,250 statutes in fifteen other states to determine the feasibility of replacing “surrender” with another comparable term.

The NJSBA explained that the term “surrender” is often an emotional hurdle to overcome in an already emotionally charged court proceeding. To “surrender” parental rights, a number of statutory safeguards must be met, including that (1) the surrender must be made in writing; (2) a written acknowledgement of surrender is valid regardless of the age of the surrendering person; (3) a surrender is invalid if made prior to birth or within the first seventy-two hours after birth; (4) counseling must be offered to the parent prior to surrender; (5) surrender to an agency requires a parent to be given certain information before surrender; and (6) surrender is irrevocable once executed with limited exceptions.

Mr. Silver indicated that, of the sixteen jurisdictions surveyed, only two offer a statutory definition of the term “surrender.” Mississippi defines the term in the context of its Safe Haven statute. In 1993, New Jersey enacted a definition of the term in N.J.S. 9:3-38(j) as: “a voluntary relinquishment of all parental rights by a birth parent, previous adoptive parent, or other person or agency authorized to exercise these rights by law, court order, or otherwise, for purposes of allowing a child to be adopted.”
Much like the term “surrender,” the term “relinquish” or relinquishment, is used in multiple states. The term “relinquish” means to abandon, give up or surrender, or to renounce some right or thing. Two states, South Carolina and West Virginia, provide a statutory definition of the term “relinquish.” In West Virginia, the term is defined as the “voluntary surrender to an agency by a minor child’s parent or guardian” of parental rights. Mr. Silver noted that the terms surrender and relinquish are used interchangeably and, in some instances, one term is used to define the other.

The term “transfer” is less prevalent among the sixteen states surveyed, and a definition was not found among the statutes of the states examined as part of the Memorandum. Mr. Silver stated that a concern arises with respect to the use of the term “transfer,” as it may imply a more temporary or conditional action regarding the extent and duration of the termination of parental rights.

Comments were received from Legal Services of New Jersey (“LSNJ”) on April 16, 2024, regarding the Commission’s work in this area. LSNJ noted that the definition of “surrender” used by the International Committee of the Red Cross is: “a unilateral act whereby, by putting their hands up, throwing away their weapons, raising a white flag or in any other suitable fashion, isolated members of armed forces . . . clearly express to the enemy during battle their intention to cease fighting.”

LSNJ analogized the term “surrender” in the context of terminating parental rights to military surrender, particularly the connotation that a participant must admit defeat and lay down their arms. LSNJ expressed concern that such an interpretation of the term may lead attorneys to believe that surrender requires admitting to the factual allegations in the complaint or that the agency would prevail if the matter were litigated. In addition, LSNJ emphasized the emotional consequences for parents and children, specifically that the term “surrender” amplifies a narrative that the birth family stopped fighting and admitted defeat because they did not love their child. Therefore, LSNJ suggested replacing the term “surrender” with “relinquish,” which, while sounding more technical, does not have an association with ceasing to fight or admitting defeat in a contested matter.

Mr. Silver added that the term “relinquish” is defined as “to abandon, to give up, to surrender, [or] to announce some right or thing” and explained that the substitution of relinquish may simply make “relinquish” the new “surrender.” He added that no single term may be able to abate or eliminate the weight of a person’s decision to willingly entrust their child to another individual or agency for adoption. The Legislature’s use of the term “surrender” within the adoption framework conveys the relinquishment of parental rights while simultaneously conveying the permanence of such a decision.

Mr. Silver requested the Commission’s guidance regarding whether to continue work or conclude the project concerning the potential replacement of the term “surrender” in the context of voluntary relinquishment of parental rights.

Chairman Gagliardi invited members of the public to provide their comments. Mary McManus-Smith, Chief Counsel for Family Law at LSNJ, stated that in the legal context, surrender and relinquish are very similar words that are often used interchangeably or to define one another.
However, the LSNJ believes that the more common use of the word “surrender” is related to the military term which implies admitting defeat and unilaterally laying down arms. Therefore, LSNJ explained that the word “surrender” suggests to both parents and children that the parent gave up the fight for the child. Ms. McManus-Smith explained that LSNJ’s preference for the term “relinquish” is related to the fact that it sounds more technical and does not have much use or common meaning outside of the legal context.

Classic Colinet, Esq., of the Child Welfare Section of the NJSBA, reiterated the NJSBA’s hope that the Commission will continue to consider replacing the word “surrender” and strongly suggested that the term be replaced with “relinquish.” Explaining that child welfare cases are very emotional, Ms. Colinet said that the term “relinquish” helps parents, who have often had a long and difficult journey to get to the point of voluntarily terminating parental rights, better understand and feel that they are making the best decision for their child in a way that the term “surrender” does not.

Chairman Gagliardi asked the Commission to weigh in regarding Mr. Silver’s request for guidance as to whether to cease or continue with the project. Commissioner Long stated that she would proceed. Commissioner Bell agreed but suggested removing the term “transfer” from the list of possible replacement terms given that it does not sufficiently convey the seriousness and finality of the decision to terminate parental rights.

Commissioner Hartnett indicated that, although he was initially persuaded that the likelihood of finding a more suitable term than surrender was low, he would not object to continuing work in this area. He flagged two issues however, noting first that the term “relinquish” is uncommon enough in daily parlance that it will require additional explanation and providing an accurate definition of the term to parents may defeat the purpose of replacing the word “surrender” in the first place. In addition, Commissioner Hartnett noted that the term “surrender” may also be more positively associated with giving something up for someone else’s benefit.

The Commission unanimously agreed to authorize further research and outreach in this area.

**Municipalities Right of Action to Sue for Cable Fees – N.J.S. 48:5A-1 et seq.**

Carol Disla-Roa discussed with the Commission a proposed project to consider whether the Cable Television Act would benefit from a modification to clarify whether the Legislature intended to provide a private right of action for municipalities to enforce fee provisions pursuant to N.J.S. 48:5A-1 et seq. This project was brought to Staff’s attention by Commissioner Bell after his review of the *Borough of Longport v. Netflix, Inc.*, 9 F.4th 303 (3d Cir. 2024).

The Cable Television Act (“CTA” or “Act”) was enacted in 1972. The purpose of the Act was to regulate cable television companies. One objective of the Act was to secure uniformity in the practices of cable television companies within municipalities, and to protect the interests of those municipalities.
The Board of Public Utilities (“BPU”) is vested with the authority to regulate cable television companies generally. The BPU “may institute a civil action in Superior Court for … relief” against a cable company or anyone who has violated, intends to violate, or will violate the provisions of the CTA. The Legislature has empowered the BPU to have the “full right, power, authority, and jurisdiction” to enforce the CTA pursuant to N.J.S. 48:5A-9. The CTA does not, however, does not address whether municipalities alone have a private right of action to collect fees owed to them pursuant to the CTA.

In Borough of Longport v. Netflix, Inc., 94 F. 4th 303 (3d Cir. 2024), two New Jersey municipalities brought an action in the United States District Court for the District of New Jersey on behalf of a putative class of all municipalities. The municipalities alleged that video streaming services failed to pay the franchise fees required under the CTA. Netflix and Hulu moved to dismiss the complaint for failure to state a claim and the District Court granted the motions, concluding that the municipalities had no private right of action under the CTA. The Third Circuit affirmed and declined the municipalities’ request to certify the question to the New Jersey Supreme Court, explaining that the question was not unclear.

The Longport Court explained that since the parties did not dispute that the CTA did not confer an express right of action on municipalities, the issue was whether the CTA implied such a right. The Court relied on factors established by the United States Supreme Court in Cort v. Ash, 422 U.S. 55 (1975) to determine the existence of an implied right of action. The Cort factors require courts to consider: (1) whether the plaintiff is in the class that the statute was enacted to benefit; (2) whether there is any evidence the legislature intended to create a private cause of action under the statute; and (3) whether implication of a private cause of action in this case would be consistent with the underlying purposes of the legislative scheme.

The Longport Court focused its analysis on the second and third factors, determining that they strongly opposed implying a private right of action.

Regarding the second factor, the municipalities argued against the delegation of “sole and exclusive” authority to the BPU by the Legislature. However, the Court rejected this argument, finding no evidence of legislative intent to grant municipalities a private right of action. The Court also emphasized that the Legislature had vested “all” enforcement authority in the BPU, as indicated by the repeated use of “all” in N.J.S. 48:5A-9(c).

Regarding the third factor (the underlying purposes of the legislative scheme), the Court reasoned that allowing individual municipalities to enforce the CTA would contradict its aim of ensuring uniformity across municipalities. Such a decentralized enforcement approach would result in inconsistent decisions on which providers to sue, when to initiate lawsuits, and what damages to pursue. The United States Court of Appeals for the Third Circuit held that the CTA does not afford municipalities a private right of action and that “the CTA plainly vests all enforcement authority in the BPU.”
Ms. Disla-Roa advised the Commission that when Commissioner Bell brought this matter to the Staff’s attention he suggested that he would not contemplate a project which merely clarified the CTA in a manner consistent with the Third Circuit opinion. Rather, he stated that the Commission should seek to apprise the Legislature of decision and recommend that the Legislature revise the statute to make explicit its intent regarding a right of action by municipalities to collect franchise fees.

Ms. Disla-Roa advised the Commission that she had received comments in advance of the meeting. These comments included one from the New Jersey Cable Telecommunications Association (“NJCTA”), the representative of which was unable to attend the meeting. The NJCTA expressed concern about the potential creation of a private right of action for municipalities regarding franchise fees, which they argued would disrupt the longstanding legal framework granting exclusive enforcement jurisdiction to the BPU over cable television companies. The NJCTA requested a meeting to explain why a private right of action is unnecessary, citing differences in business models between cable operators and streaming services, as well as the specific legal obligations of cable television companies regarding franchise fees. They underscored that streaming services, unlike cable operators, do not secure franchises, own cable systems, or remit franchise fees to municipalities, highlighting the unique regulatory landscape for each.

Chairman Gagliardi noted that there were three course of action that the Commission could pursue regarding this proposed project. First, the Commission could do nothing. Next, it could move forward with an eye toward codifying the holding of the Longport decision and engage in outreach. Finally, it could refrain from recommending the implementation of the decision and could merely advise the Legislature of the holding in Longport. Commissioner Long suggested that Staff could also consult with stakeholders. Chairman Gagliardi suggested that such an approach would be incorporated in the option number two.

Vice-Chairman Bunn stated that the statute is clear. He added that the question was answered by the Third Circuit when it declined to certify the case to the New Jersey Supreme Court, and that there is no work for the Commission to do relative to this statute. Chairman Gagliardi concurred and stated that there was no role for the Commission relative to this project. Commissioner Hartnett added that he was opposed to a project in this area, and that this was not an issue that would lack legislative attention.

Commissioner Bell stated that he raised this as a potential project based upon the right of action. He added that such a right of action is based upon legislative intent. A federal court, not a New Jersey court, decided this issue. He suggested that if no one other than the BPU can bring an action then there is no reason for the statute to contain subsection (b) and recommended advising the Legislature about the issue.

Commissioner Bertone stated that she concurred with Chairman Gagliardi, Vice-Chairman Bunn, and Commissioner Hartnett that no action be taken on this project.

Chairman Gagliardi confirmed that the Commission had reached a consensus not to pursue work related to this subject.
Miscellaneous

Laura Tharney briefly made reference to the Commission’s consideration of the area of neurorights in September of 2023 and advised that she had seen a news article earlier in the week indicating that the Colorado was the first state to enact a law extending the same protection to neural data as to fingerprints, facial images, and other sensitive biometric data.

Adjournment

On motion of Vice-Chairman Bunn, seconded by Commissioner Long, the meeting was unanimously adjourned by the Commission.

The next meeting of the Commission is scheduled for May 16, 2024, at 4:30 p.m. and will be held remotely.