

LOUISIANA STATE LAW INSTITUTE

THE MEETING OF THE COUNCIL

March 21-22, 2014

Friday, March 21, 2014

Persons Present:

Abramson, Neil C.	Levy, H. Mark
Adams, Marguerite (Peggy) L.	Maloney, Marilyn
Bergstedt, Thomas	Martin, Edward F.
Breard, L. Kent	Medlin, Kay C.
Brister, Dorrell J.	Michel, Lauren
Burris, William J.	Morris, Glenn G.
Carriere, Jeanne Louise	Nathan, Max
Carroll, Andrea	Norman, Rick J.
Chetta, Chloe	Odinet, Christopher
Claitor, Dan	Oppenheim, Patrice
Crawford, William E.	Popovich, Claire
Crigler, James C., Jr.	Reed, Angelique
Cromwell, L. David	Rennos, Kirsten
Curry, Kevin C.	Richard, Thomas
Darrados, Nicholas	Richardson, Sally
Davidson, James J., III	Riviere, Christopher H.
Dawkins, Robert G.	Roberson, Lynette
DiGiulio, John	Samuel, Cynthia A.
Dimos, Jimmy N.	Scalise, Ron J., Jr.
Doguet, Andre	Simien, Eulis, Jr.
Domingue, Billy J.	Sole, Emmett C.
Ellison, David M., Jr.	Stewart, James E., Sr.
Forrester, William R.	Storms, Tyler
Garrett, J. David	Stuckey, James A.
Gasaway, Grace B.	Suprenant, Monica T.
Gelpi, Jeffrey	Talley, Susan G.
Gilbert, James H.	Theus, Edwin K., Jr.
Gregorie, Isaac M. "Mack"	Thibeaux, Robert P.
Hamilton, Leo C.	Title, Peter S.
Hayes, Thomas M., III	Tooley-Knoblett, Dian
Haymon, Cordell H.	Tucker, Zelda W.
Hester, Mary C.	White, H. Aubrey, III
Holdridge, Guy	Whitehead, Jack K., Jr.
Jewell, John Wayne	Wilder-Doomes, Erin
Katz, Nicole	Wilson, Evelyn
Knighten, Arlene D.	Ziober, John David
Kostelka, Robert "Bob" W.	
Landry, Ron J.	
Lavergne, Luke	

The Friday, March 21, 2014 meeting of the Council of the Louisiana State Law Institute was called to order by the President, Mr. James C. Crigler, Jr. at 10:00 a.m. at the Monteleone Hotel in New Orleans, Louisiana.

Water Law

President James Crigler, Jr., opened the Friday session of the March 2014 Council meeting at 10:00 AM on Friday, March 21, 2014 at the Monteleone Hotel in New Orleans, LA. During the morning session, Professor Dian Tooley-Knoblett, Reporter of the Water Law Committee, presented the report to the Law Institute Council in response to SCR 53 of 2012.

Professor Tooley-Knoblett provided the Council with background information about SCR 53 of 2012, which requested that the Law Institute "study legal issues surrounding groundwater and surface water law and any needs for revision to current law". She informed the Council that the committee was specifically requested to study the disparate legal systems governing the use of surface water versus groundwater and the possible non-compensated use of surface water to prevent the exhaustion of groundwater resources. The committee's research on the background events leading up to the study request and state law regarding "running surface water", groundwater, and riparian rights was presented. At 11:40 a.m., the Reporter ended the morning portion of her presentation.

Uniform Commercial Code

The President of the Louisiana State Law Institute yielded the floor to the Chairman-Reporter of the Uniform Commercial Code Committee at 11:39 a.m. The Chairman-Reporter, Mr. James A. Stuckey, began his presentation by briefly introducing the history of the proposed changes and why they are necessary for current Louisiana law. He also made it clear that the changes that the Committee was recommending were those suggested by the Uniform Law Commission in response to the Dodd-Frank Wall Street Reform and Consumer Protection Act. A motion was made to adopt the amendments as proposed in the materials. This motion was seconded and unanimously passed. The Statute and its comment are to read as follows:

R.S. 10:4A-108. Exclusion of consumer transactions governed by federal law Relationship to Electronic Fund Transfer Act

(a) Except as provided in Subsection (b), this Chapter does not apply to a funds transfer any part of which is governed by the Electronic Fund Transfer Act of 1978 (Title XX, Public Law 95-630, 92 Stat. 3728, 15 U.S.C. §1693 et seq.) as amended from time to time.

(b) This Chapter applies to a funds transfer that is a remittance transfer as defined in the Electronic Fund Transfer Act (15 U.S.C. Sec. 1693o-1) as amended from time to time, unless the remittance transfer is an electronic fund transfer as defined in the Electronic Fund Transfer Act (15 U.S.C. Sec. 1693a) as amended from time to time.

(c) In a funds transfer to which this Chapter applies, in the event of an inconsistency between an applicable provision of this Chapter and an applicable provision of the Electronic Fund Transfer Act, the provision of the Electronic Fund Transfer Act governs to the extent of the inconsistency.

Uniform Commercial Code Comment – 2014 Revision

~~The Electronic Fund Transfer Act of 1978 is a federal statute that covers a wide variety of electronic funds transfers involving consumers. The types of transfers covered by the federal statute are essentially different from the wholesale wire transfers that are the primary focus of Article 4A. Section 4A-108 excludes a funds transfer from Article 4A if any part of the transfer is covered by the federal law. Existing procedures designed to comply with federal law will not be affected by Article 4A. The effect of Section 4A-108 is to make Article 4A and EFTA mutually exclusive. For example, if a funds transfer is to a consumer account in the beneficiary's bank and the funds transfer is made in part by use of Fedwire and in part by means of an automated clearing house, EFTA applies to the ACH part of the transfer but not to the Fedwire part. Under~~

~~Section 4A-108, Article 4A does not apply to any part of the transfer. However, in the absence of any law to govern the part of the funds transfer that is not subject to EFTA, a court might apply appropriate principles from Article 4A by analogy.~~

1. The Electronic Fund Transfer Act (EFTA), implemented by Regulation E, 12 C.F.R. Part 1005, is a federal statute that covers aspects of electronic fund transfers involving consumers. EFTA also governs remittance transfers, defined in 15 U.S.C. Sec. 1693o-1, which involve transfers of funds through electronic means by consumers to recipients in another country through persons or financial institutions that provide such transfers in the normal course of their business. Not all “remittance transfers” as defined in EFTA, however, qualify as “electronic fund transfers” as defined under the EFTA, 15 U.S.C. Sec. 1693a(7). While Section 4A-108(a) broadly states that Article 4A does not apply to any funds transfer that is governed in any part by EFTA, subsection (b) provides an exception. The purpose of Section 4A-108(b) is to allow this Article to apply to a funds transfer as defined in Section 4A-104(a) (see Section 4A-102) that also is a remittance transfer as defined in EFTA, so long as that remittance transfer is not an electronic fund transfer as defined in EFTA. If the resulting application of this Article to an EFTA-defined “remittance transfer” that is not an EFTA-defined “electronic fund transfer” creates an inconsistency between an applicable provision of this Article and an applicable provision of EFTA, as a matter of federal supremacy, the provision of EFTA governs to the extent of the inconsistency. Section 4A-108(c). Of course, applicable choice of law principles or enforceable choice of law provisions in an applicable agreement will also affect whether Article 4A will apply to all or part of any funds transfer, including a remittance transfer. See Section 4A 507. The following examples assume that choice of law principles or an enforceable choice of law provision will lead a court to examine the applicability of Article 4A to the funds transfer.

2. The following examples illustrate the relationship between EFTA and this Article pursuant to Section 4A-108.

Example 1. A commercial customer of Bank A sends a payment order to Bank A, instructing Bank A to transfer funds from its account at Bank A to the account of a consumer at Bank B. The funds transfer is executed by a payment order from Bank A to an intermediary bank and is executed by the intermediary bank by means of a clearinghouse credit entry to the consumer’s account at Bank B (the beneficiary’s bank). The transfer into the consumer’s account is an electronic fund transfer as defined in 15 U.S.C. Sec. 1693a(7). Pursuant to Section 4A-108(a), Article 4A does not apply to any part of the funds transfer because EFTA governs part of the funds transfer. The funds transfer is not a remittance transfer as defined in 15 U.S.C. Sec. 1693o-1 because the originator is not a consumer customer. Thus Section 4A-108(b) does not apply.

A court might, however, apply appropriate principles from Article 4A by analogy in analyzing any part of the funds transfer that is not subject to the provisions of EFTA or other law, such as the obligation of the intermediary bank to execute the payment order of the originator’s bank.

Example 2. A consumer originates a payment order that is a remittance transfer as defined in 15 U.S.C. Sec. 1693o-1 by providing the remittance transfer provider (Bank A) with cash in the amount of the transfer plus any relevant fees. The funds transfer is routed through an intermediary bank for final credit to the designated recipient’s account at Bank B. Bank A’s payment order identifies the designated recipient by both name and account number in Bank B, but the name and number provided identify different persons. This remittance transfer is not an electronic fund transfer as defined in 15 U.S.C. Sec. 1693a(7) because it is not initiated by electronic means from a consumer’s account, but does qualify as a funds transfer as defined in Section 4A-104. Both Article 4A and EFTA apply to the funds transfer. Sections 4A-102, 4A-108(a), (b). Article 4A’s provision on mistakes in identifying the designated beneficiary, Section 4A-207, would apply as long as not inconsistent with the governing EFTA provisions. Section 4A-108(c).

Example 3. A consumer originates a payment order from the consumer's account at Bank A to the designated recipient's account at Bank B located outside the United States. Bank A uses the CHIPS system to execute that payment order. The funds transfer is a remittance transfer as defined in 15 U.S.C. Sec. 1693o-1. This transfer is not an electronic fund transfer as defined in 15 U.S.C. Sec. 1693a(7) because of the exclusion for such types of transfers in 15 U.S.C. Sec. 1693a(7)(B), but qualifies as a funds transfer as defined in Section 4A-104. Under Sections 4A-102 and 4A-108(b), both Article 4A and EFTA apply to the funds transfer. The EFTA will prevail to the extent of any inconsistency between EFTA and Article 4A. Section 4A-108(c). For example, suppose the consumer subsequently exercised the right to cancel the remittance transfer under the right given under EFTA and obtain a refund. Bank A would be required to comply with the EFTA rule concerning cancellation even if Article 4A prevents Bank A from cancelling or reversing its payment order it sent to its receiving bank. Section 4A-211.

Example 4. A person fraudulently originates an unauthorized payment order from a consumer's account through use of an online banking interface. This transaction is an electronic fund transfer as defined in 15 U.S.C. Sec. 1693a(7) and would be governed by EFTA and not Article 4A. Section 4A-108(a). Whether the funds transfer also qualifies as a remittance transfer under 15 U.S.C. Sec. 1693o-1 does not matter to the application of Article 4A.

Example 5. A person fraudulently originates an unauthorized payment order from a consumer's account at Bank A through forging written documents that are provided in person to an employee of Bank A. This funds transfer is not an electronic fund transfer as defined in 15 U.S.C. Sec. 1693a(7) because the fund transfer from the consumer's account is not initiated by electronic means, but the funds transfer qualifies as a funds transfer as defined in Section 4A-104. Article 4A will apply to this funds transfer regardless of whether the funds transfer also qualifies as a remittance transfer under 15 U.S.C. Sec. 1693o-1. If the funds transfer is not a remittance transfer, the provisions of Section 4A-108 are not implicated because the funds transfer does not fall under EFTA, and the general scope provision of Article 4A governs. Section 4A-102. If the funds transfer is a remittance transfer, and thus governed by EFTA, Section 4A-108(b) provides that Article 4A also applies. The provisions of Article 4A will allocate the loss arising from the unauthorized payment order as long as those provisions are not inconsistent with the provisions of the EFTA applicable to remittance transfers. Section 4A-108(c).

3. Regulation J, 12 C.F.R. Part 210, of the Federal Reserve Board addresses the application of that regulation and EFTA to fund transfers made through Fedwire. Fedwire transfers are further described in Official Comments 1 and 2 to Section 4A-107. In addition, funds transfer system rules may be applicable pursuant to Section 4A-501.

Mr. Stuckey concluded his presentation at 11:44 a.m. At that time the President had the Council break its meeting for lunch.

L U N C H

Water Law

The President opened the afternoon session of the meeting at 1:30 p.m. Professor Tooley-Knoblett resumed her presentation of the committee's report. She presented the committee's research on the constitutional barriers surrounding the non-compensated use of surface waters owned by the state. The committee recommended that an interdisciplinary Water Code Committee be created to continue the study, with a view toward developing a comprehensive Water Code.

A motion was made to adopt the committee's report. The motion was seconded. Mr. Sole commented that the Executive Committee has the authority to create special committees and recommended that that opportunity be pursued. Professor Crawford made a motion to make the following amendment to the report: page 85, line 13, after

"a" and before "Water Code Committee" insert "Law Institute". The motion was seconded and passed. The report was adopted as amended.

Successions and Donations

Following a brief, concluding presentation by the Water Law Committee, the Chairman-Reporter of the Successions and Donations Committee, Mr. Max Nathan, took the podium and began his presentation of the Committee's materials at 2:20 p.m. He asked that the Council first consider the document entitled, "Select Current Issues in Successions and Donations Law." He gave a brief recitation of Code of Civil Procedure Article 3396.18 as it was the first item in the document. The Article provoked much discussion. The Chairman-Reporter stressed that it would be extremely beneficial for the State to have the revisions to C.C.P. art. 3396.18 be presented and passed into law during this legislative session.

Among the issues pertaining to C.C.P. art. 3396.18 that were discussed were: (1) Whether it should be mandatory that the detailed descriptive list be filed, (2) Whether the sentence, "The successor may be placed in possession by a final or partial judgment of possession.", as found in the last sentence of Paragraph B of current 3396.18, should be retained, and (3) Under the proposed language, who would need to have the record sealed and held confidential?

At this point the Council requested that a point of information be made: the members of the Council requested that the President make clear the order of those who had been recognized to address a question to the Chairman-Reporter. The President restored order by informing the Council of the order of those so recognized.

Much discussion followed upon the examination of line twenty-two of page one of the document. The Council asked the Chairman-Reporter whether, according to the proposed changes, the independent administrator would need to provide the detailed descriptive list to all legatees. Following this discussion, a motion was made for a point of order requesting whether the proposed modifications to the Article would result in a substantive change in Louisiana law. Much debate ensued.

At this point the Council called the question thereby moving that debate on the Article be concluded. This motion was seconded. The official count of the votes was: 22 yeas and 25 nays; the motion failed. Thereafter, a motion followed that the Article be adopted. This provoked much discussion. Of note, the Council voiced its concern that the drafting of proposed Paragraph B, confusingly mixed permissive with mandatory language. The Chairman-Reporter responded that he had drafted the Article by incorporating the comments submitted to him via email from the members of the Successions and Donations Committee.

A motion was then made that the Article be recommitted to the Committee. Before a vote could be taken, the Chairman-Reporter volunteered to have the Committee reconsider the Article. Thereafter, a motion was made that policy directives be given by the Council. Some discussion ensued, but the motion failed.

Mr. Nathan then asked the Council to consider the other issues presented in the materials. He explained that the Committee wishes to create a Subcommittee to study the issues presented in HCR No. 131 of 2012. The Council readily accepted the names that the Chairman-Reporter put forth as possible members: Harvey J. Lewis, Scott Bickford, John deGravelles, Tom Flanagan, and William Corbett. Later, a member of the Council also suggested that Eulis Simien, Jr. be added as a member of the Subcommittee.

The Chairman-Reporter then turned the Council's attention to Civil Code Article 1495. He asked the Council to review the comment to the Article that the Committee had reworked following the Council's recommendation from its October 2013 meeting. After Mr. Nathan's introduction, the Council made a motion to approve the comment as written. There was no discussion. The motion to approve the comments as presented

was seconded and was approved unanimously by the Council. Subsequently, edits to the comments were submitted to the Staff Attorney, and they were incorporated. The comments now read as follows:

Revision Comments – 2014

This Article clarifies an area of the law that previously had no clear answer: how to calculate the legitime of a grandchild who is a forced heir. The Article now provides the solution that the ascendant of a grandchild who is a forced heir should be treated as a single forced heir, and his share, as such, should be divided by his descendants who qualify as forced heirs by representation. For example, if the predeceased parent of a forced heir would not have attained age twenty-four at the time of the decedent's death, then all of his children would qualify together as one forced heir by representation, dividing the parent's root. On the other hand, if the predeceased parent would have attained the age of twenty-four at that time, then only those children of the predeceased parent who qualify as forced heirs by virtue of their permanent incapability would divide the root of the predeceased parent. As provided in the last sentence of the Article, this division of the root is limited—a forced heir by representation may not receive a share of the division that exceeds the share of an intestate successor of the person being represented.

Mr. Nathan then asked the Council to consider Civil Code Article 1522. He introduced the Article. Thereafter, no discussion followed. A motion was made to accept the Article as presented. This was seconded, and the Article was unanimously adopted to read as follows:

Art. 1522. Separate donations of usufruct and naked ownership

~~The same shall be observed as to the disposition *inter vivos* or *mortis causa*, by which the usufruct is given to one, and the naked ownership to another.~~

A disposition *inter vivos* or *mortis causa* by which the usufruct is given to one person and the naked ownership to another is not a prohibited substitution.

Next, the Council considered the issue of whether the legitime of a forced heir who qualifies as such because he is permanently incapable of managing his affairs should be held in a spendthrift trust or tied up in some other manner due to his incapacity. The Chairman-Reporter explained the Committee's findings on the issue as presented in the materials. A motion was made to accept the findings. This motion was seconded and unanimously passed.

The Chairman-Reporter then asked the Council to consider the next set of materials that was entitled, "Final Report to the Louisiana State Law Institute Council, In Response to HCR No. 107 of the 2013 Regular Session (Will Registry)." Once Mr. Nathan had presented the report and explained its conclusions, the Council moved adoption of the report. The motion was seconded, and the report was unanimously approved as presented.

The Committee report entitled, "Final Report to the Louisiana State Law Institute Council, In Response to SCR No. 26 of 2012 Regular Session (Heirship Property)" was the final item that Mr. Nathan requested that the Council consider. Following the Chairman-Reporter's introduction and explanation of the report, the Council moved that the report be accepted as presented. This motion was seconded and won unanimous approval.

This concluded the Chairman-Reporter's presentation of the Successions and Donations Committee's materials. At approximately 2:46 p.m., the President adjourned the March 21, 2014 meeting of the Council.

LOUISIANA STATE LAW INSTITUTE

THE MEETING OF THE COUNCIL

March 21-22, 2014

Saturday, March 22, 2014

Persons Present:

Adams, Marguerite (Peggy) L.	Knighten, Arlene D.
Baiamonte, Joseph	Kostelka, Robert "Bob" W.
Bergstedt, Thomas	Landry, Ron J.
Breard, L. Kent	Lavergne, Luke
Burris, William J.	Levy, H. Mark
Carriere, Jeanne Louise	Maloney, Marilyn
Crawford, William E.	Medlin, Kay
Crigler, James C.	Melton, Barbara
Cromwell, L. David	Morris, Glenn G.
Curry, Kevin C.	Norman, Rick J.
Curry, Robert L., III	Odinet, Christopher
Davidson, James J., III	Samuel, Cynthia A.
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Domingue, Billy J.	Thibeaux, Robert P.
Freel, Angelique	Thomas, Jane
Garrett, J. David	Tucker, Zelda
Gasaway, Grace B.	White, H. Aubrey, III
Hamilton, Leo C.	Whitehead, Jack K., Jr.
Hayes, Thomas M., III	Wilder-Doomes, Erin
Haymon, Cordell H.	Wilson, Evelyn
Hester, Mary C.	
Holdridge, Guy	
Jewell, John Wayne	

The Saturday, March 22, 2014 meeting of the Council of the Louisiana State Law Institute was called to order by the President, Mr. James C. Crigler, Jr. at 9:00 a.m. at the Monteleone Hotel in New Orleans, Louisiana.

The President called upon Ms. Evelyn Wilson, Reporter for the Power of Attorney for the Elderly Committee.

POWER OF ATTORNEY

The Reporter initiated presentation of the Committee's response to HR 112 of 2009 as contained in 3.11.14 POA Rpt to Council. The Reporter noted that the Council will be reviewing both the text of the proposed legislation and the accompanying comments. She also noted several changes which do not appear in the document but which will be part of the Council's review of the document.

The Reporter presented the proposal to enact 9:3851 on page 13.

It was moved and seconded to adopt Subsection C as presented. The motion to adopt passed.

It was moved and seconded to amend Subsection A by inserting on line15 ", and a curator with appropriate authority has not qualified," following "person". The motion to amend passed.

It was moved and seconded to amend Comment (j) to track the language of Section 3854(D) by deleting lines 35 and 36 and inserting "permits a court to order injunctive relief without the necessity of showing irreparable injury" following "Section 3854(D)". The motion to amend passed.

It was moved and seconded to adopt Section 3851 and the accompanying comments as amended. The motion to adopt passed.

The adopted proposal reads as follows:

§ 3851. Who may file; petition contents; service; venue

A. When the principal is a natural person, and a curator with appropriate authority has not qualified, any of the following persons may petition a court on the principal's behalf to review the acts of a mandatary and to grant relief authorized by this Chapter:

- (1) A person authorized to make healthcare decisions for the principal.
- (2) A spouse, a parent, or a descendant of the principal.
- (3) A presumptive heir or legatee of the principal.
- (4) A person named as a beneficiary to receive any real or personal right upon the death of the principal.
- (5) A trustee or beneficiary of an inter vivos or testamentary trust created by or for the principal.
- (6) A caregiver of the principal.
- (7) A person with sufficient interest in the welfare of the principal.

B. The petition shall be verified and:

- (1) Name as defendants the principal, the mandatary, and any other person against whom relief is sought.
- (2) State with particularity:
 - a. The facts establishing the petitioner's right to bring this action.
 - b. The reasons that a review of the acts of the mandatary is needed.
 - c. The relief sought.

C. The principal shall be personally served with the citation and petition. Service on the principal through a mandatary shall not be effective service.

D. This action shall be filed in the parish where the principal is domiciled, where the principal resides if without a domicile in this state, or where the principal is physically present or where immovable property of the principal is located if the principal is without either a domicile or a residence in this state.

Comments – 2014

(a) Given that a mandate is generally durable under Louisiana law, it is likely that a mandatary will continue to act for a principal after the principal is no longer able to monitor the performance of the mandatary. This Chapter creates a new right of action to allow persons other than the principal to initiate an action against a mandatary. This right of action is not available when the principal is not a natural person, as other law governs those claims. It has no impact on the

authority a principal has under other law to control the actions of a mandatary, to terminate a mandate, or to recover property or damages from a mandatary; it merely authorizes additional parties to bring those claims on the principal's behalf.

(b) Civil Code Articles 880 - 901 govern who is a presumptive heir.

(c) Governmental agencies are omitted from the list of those who may file this action because they have authority to bring similar actions under other laws. See, for example, R.S. 14:67.21 (Theft of the assets of an aged person or disabled person), R.S. 14: 93.3, (Cruelty to the infirmed), R.S. 14:93.4 (Exploitation of the infirmed), R.S. 15:1501-1511 (Adult Protective Services Act) and R.S. 46:437.1 et seq. (Medical Assistance Program Integrity Law).

(d) As Civil Code Article 2988 instructs, this action may be brought against a representative with respect to a procuration. See § 3856.

(e) The principal is named as a defendant and is personally served with the petition and citation to ensure the principal has actual notice of the action.

(f) The petitioner may name a person other than the mandatary and the principal as a defendant, and must provide a detailed explanation of the objectionable acts and the reasons for the objection.

(g) This Section requires a heightened pleading standard and a verified petition to discourage plaintiffs from filing frivolous suits. In addition, the prevailing party may be awarded costs and attorney fees. See § 3857.

(h) Subsection D addresses venue only and does not intend to create personal jurisdiction over any defendant.

(i) An action under this Chapter shall be by ordinary process, but the use of summary proceedings is available as provided by law.

(j) Section 3854 (D) permits a court to order injunctive relief without the necessity of showing irreparable injury.

The Council next considered Section 3852, on page 16, and the accompanying comments. It was moved and seconded to insert "that" on line 6 before "the" and to adopt the section as amended. The motion to adopt passed.

It was moved and seconded to amend the comments by deleting Comment (c) on lines 17 – 19 and renumbering the remaining comments accordingly; to incorporate "is able to comprehend generally" ,from § 3852(2),into Comment (a); to delete from Comment (d) "including the duty of loyalty" and to change "the statute" to "this Section". The motion to amend passed.

It was moved and seconded to adopt Section 3852 and the accompanying comments as amended. The motion to adopt passed.

The adopted proposal reads as follows:

§ 3852. Dismissal upon motion to dismiss filed by the principal

If the principal files a motion to dismiss this action:

(1) The principal shall testify in person at the hearing on the motion, or, by agreement of the parties or for good cause shown, by visual remote technology or by deposition.

(2) The court shall grant the motion to dismiss if it finds that the principal is able to comprehend generally the nature and consequences of the

acts of the mandatary, and that the mandatary's authority to act is not the result of fraud, duress, or undue influence.

Comments-2014

(a) A principal may choose to file a motion to dismiss the litigation. Before ruling on the principal's motion to dismiss, the court must hold a hearing to determine whether the principal is aware of the acts of the mandatary and not subject to fraud, duress, or undue influence, is able to comprehend generally the nature and consequences of the acts of the mandatary, and whether the principal appears able to make reasoned decisions.

(b) When a principal is aware of the acts of the mandatary, and is not subject to fraud, duress, or undue influence, and is able to comprehend generally the nature and consequences of the acts of the mandatary, the court shall grant the principal's motion to dismiss.

(c) The principal must be present in person at the hearing to allow the court to make the determinations described in this Section. The parties may agree to, or the court may order, remote testimony. The standard, in Paragraph 1, for permitting a principal to be absent from the proceeding, for good cause shown, is a lower standard than is required by Code of Civil Procedure Article 1633.1 which allows testimony by visual remote technology under compelling circumstances. This lower standard allows greater use of remote testimony in an appropriate case.

The Reporter presented Section 3853 on page 17. It was moved and seconded to amend Comment (a) by deleting "named in the will" on lines 7 and 8 and inserting "succession representative" in place of "executrix" on lines 7 and 10. The motion to amend passed.

It was moved and seconded to adopt Section 5823 and the accompanying comments as amended. The motion to adopt passed.

The adopted proposal reads as follows:

§3853. Substitution

Upon the interdiction or death of the principal, the court shall allow a curator with appropriate authority or the principal's legal successor to be substituted for the plaintiff.

Comments - 2014

(a) The principal's death terminates the mandate. This Section permits the principal's legal successor to be substituted for the petitioner in this litigation. The legal successor may then elect to continue or to dismiss the suit. Conflicts of interest may arise when the succession representative is also the defendant in this action. Under existing law, presumptive heirs and legatees may challenge the appointment of an executrix they deem to be unfit, or bring an action against an executrix.

(b) Full interdiction also terminates the mandate. A court may terminate a mandate in a limited interdiction by placing the property subject to the mandate under the authority of a curator. A curator, once qualified, can be substituted for the petitioner or can dismiss the suit. Temporary or preliminary interdictions have no effect on this action; the action remains available during a temporary or preliminary interdiction.

(c) Allowing substitution avoids res judicata issues that might arise as a result of a succession representative or curator filing separate litigation. The existing litigation continues with the new parties. Where prescription was interrupted by a filing under this Chapter its interruption continues.

The Council next began discussion of Section 3854 on page 18. It was moved and seconded to adopt the proposal.

A substitute motion was made and seconded to recommit the proposal and direct the Committee to draft a proposal placing the concept in the Civil Code.

Another substitute motion was made and seconded to delete Section 3854, renumber the remaining sections accordingly, and to refer the subject matter to the Mandate Committee.

A third substitute motion was made and seconded to delete from Subsection A the concept that a mandatory's act that violates the duty of loyalty is an unauthorized act and to delete Subsection B. That motion failed.

The Council then voted on the prior substitute motion to delete Section 3854, to renumber the remaining sections accordingly, and to refer the subject matter to the Mandate Committee. The motion passed.

The reporter moved to Section 3854 on page 19. After some discussion it was moved and seconded to include a comment that a person seeking information from a financial institution under Subsection B (2) must comply with the requirements of R. S. 6:333.

A substitute motion was made to provide for an override of R.S. 6:333 under Subsection (B) (2). The motion passed. It was then moved and seconded to place the override in R. S. 6:333 instead and to limit the override to Section 3854(B)(2). The motion to amend R.S. 6:333 passed.

It was moved and seconded to amend the introductory paragraph to Subsection B by moving "without first holding a contradictory hearing" to follow "Order" on line 39 and to insert "of the defendants to this action" at the end of line 40. The motion to amend passed.

It was moved and seconded to change "discovery" on line 43 to "disclosures". The motion failed.

It was moved and seconded to amend line 43 to read as follows "The court on its own may ...". The motion to amend passed.

It was moved and seconded to amend Subsection (B) (5) by deleting "until a hearing is held" from the end on line 2 on page 20. The motion to amend passed.

It was moved and seconded to amend line 8 by deleting " but not limited to". The motion to amend passed.

It was moved and seconded to reword Subsection D to read "Injunctive relief may be granted without the necessity of showing irreparable injury." The motion to amend passed.

It was moved and seconded to amend Comment (e) on page 21 by deleting the last sentence and inserting the language from Comment (j), page 14, to Section 3851. The motion to amend passed.

It was moved and seconded to adopt Section 3854 and the accompanying comments as amended. The motion to adopt passed.

The adopted proposal reads as follows:

§3854. Relief

A. If the court finds that a mandatory has violated a duty or failed to perform any obligation as a mandatory, the court may:

- (1) Grant any relief to which the principal is entitled.
- (2) Enjoin a mandatary from exercising all or some of the powers granted by the mandate.

B. While the action is pending, the court may:

- (1) Order an accounting from a mandatary.
- (2) Order, without first holding a contradictory hearing, a financial institution, a health care provider, or any other person to provide the financial, medical, or other information of any of the defendants to the action.
- (3) Appoint a qualified person to investigate the allegations in the petition and to report the findings.
- (4) The court on its own motion may order other appropriate discovery.
- (5) Enjoin a mandatary from exercising all or some of the powers granted by the mandate.
- (6) Appoint a person to exercise some or all of the authority granted by the mandate, including authority to perform routine financial transactions and to make health care decisions, if there is no successor or substitute mandatary named in the mandate who is able or willing to serve, or if no law otherwise provides a person to act.

C. In reaching its decision, the court shall consider the mandate and may consider any other relevant factors, including any of the following:

- (1) The express wishes of the principal.
- (2) The known or reasonable expectations of the principal.
- (3) The best interests of the principal.
- (4) Any will, trust, or beneficiary designation executed by the principal.
- (5) The principal's history or pattern of donations inter vivos.
- (6) Physical, financial, or psychological abuse of the principal.
- (7) Fraud, duress, or undue influence.
- (8) The principal's regular contact with family and friends other than a mandatary.
- (9) The ability of the principal to comprehend generally the nature and consequences of the acts of a mandatary.
- (10) The donee's knowledge or imputed knowledge that a donation was not for the benefit or gratification of the principal.
- (11) The good or bad faith of a defendant.

D. Injunctive relief may be granted without the necessity of showing irreparable injury.

Comments – 2014

(a) This action allows a person other than the principal to ask for court review of the acts of a mandatary. It does not create new standards of behavior for the mandatary. After a hearing, a court can order any relief to which the principal is entitled had the principal brought the claim against the mandatary.

(b) A court may take actions normally reserved to the principal such as terminating some or all of the authority granted by the mandate or collecting funds due to the principal. If a court enjoins a mandatary from acting, this Section authorizes the court to appoint a person to handle the principal's affairs pending disposition of the litigation. A principal apparently unable to make reasoned decisions may also be unable to name a new mandatary.

(c) This Section expressly authorizes the court to gather information from financial institutions and health care providers, and to appoint an investigator. Revised Statutes 13:3715.1 permits a court to issue an order for the production of a patient's records, but only after a contradictory hearing. This Section, however, allows the court to obtain medical records without a contradictory hearing.

(d) The list of factors for the court to consider offers guidance. It is illustrative, and not exhaustive.

(e) An action under this Chapter shall be by ordinary process, but the use of summary proceedings is available as provided by law. Code of Civil Procedure Article 3601 allows a court to issue an injunction, "where irreparable injury, loss, or damage may otherwise result to the applicant . . .". Subsection (D) permits a court to order injunctive relief without the necessity of showing irreparable injury.

It was moved and seconded to delete Section 3856 and to renumber the remaining sections accordingly. The motion to delete passed.

It was moved and seconded to adopt Section 3855 and the accompanying comments, on page 22, as presented. The motion to adopt passed.

The adopted proposal reads as follows:

§ 3855. Payment of costs and attorney fees

The court may render judgment for costs and attorney fees, or any part thereof, against any party. No costs or attorney fees shall be awarded to a petitioner when the petition is dismissed on the merits.

Comments – 2014

(a) Court costs and attorney fees are allowed to discourage frivolous suits, or to reimburse the petitioner who initiates this action to benefit the principal.

(b) The principal may be responsible for reimbursing the mandatary for expenses incurred in carrying out the mandate, as provided in Civil Code Article 3013.

It was moved and seconded to adopt Section 3856 and the accompanying comments, on page 22, as presented. The motion to adopt passed.

The adopted proposal reads as follows:

§3856. Applicability

A. This Chapter applies to a procuration and a representative in the same manner as it applies to a mandate and a mandatary respectively to allow an action against a representative for violating any duty or failing to fulfill any obligation in the procuration.

B. This Chapter does not apply to a mandate to the extent that the mandate is irrevocable as provided by law.

Comments – 2014

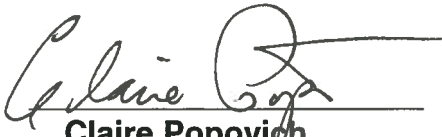
(a) Civil Code Article 2988 subjects a procuration to the rules governing mandate.

(b) This Chapter creates a new right of action to protect the interests of a principal when a mandatary is no longer prudently fulfilling the mandate. This protection may not be appropriate for all mandates. This Statute excludes from this protection a mandate intended to benefit the mandatary or a third person when the principal agrees that the mandate is irrevocable and when the law allows the mandate to be irrevocable.

(c) Civil Code Article 3025 governs when the parties may agree to make a mandate irrevocable. The most common occasion for irrevocability involves creditors who require an irrevocable mandate in case a debtor defaults. The "third party" identified in Civil Code Article 3025 could be a creditor.

There being no additional business the meeting adjourned at 11:45 AM.

 8/20/14
Lynette Roberson Date

 8/20/2014
Claire Popovich Date

 8/20/14
Joseph Baiamonte Date