

LOUISIANA STATE LAW INSTITUTE

THE MEETING OF THE COUNCIL

October 10-11, 2014

Friday, October 10, 2014

Persons Present:

Adams, Marguerite (Peggy) L.	Levy, H. Mark
Alston, Elizabeth A.	Medlin, Kay C.
Bergstedt, Thomas	Morris, Glenn G.
Breard, L. Kent	Norman, Rick J.
Burris, William J.	Odinet, Christopher
Crawford, William E.	Pohorelsky, Peter
Crigler, James C.	Popovich, Claire
Cromwell, L. David	Reed, Angelique
Davidson, John	Riviere, Christopher H.
Di Giulio, John E.	Roberson, Lynette
Dimos, Jimmy N.	Scalise, Ronald J., Jr.
Doguet, Andre	Sklamba, Steven
Forrester, William R.	Simien, Eulis, Jr.
Freel, Angelique	Suprenant, Monica T.
Garrett, J. David	Thibeaux, Robert P.
Hamilton, Leo C.	Title, Peter S.
Hargrove, Joseph L., Jr.	Tucker, Zelda W.
Harris, Jonathan	Uschold, Jim
Haymon, Cordell H.	White, Roederick
Hayes, Thomas M., III	Wilder-Doomes, Erin
Head, Stacy	Wilson, Evelyn
Holdridge, Guy	Wood, Ronald S.
Jackson, Rader	Ziober, John David
Kostelka, Robert "Bob" W.	
Lavergne, Luke	

President James Crigler, Jr., opened the Friday session of the October 2014 Council meeting at 10:00 AM on Friday, October 10, 2014 at the Monteleone Hotel in New Orleans, LA. During the morning session, Stephen G. Sklamba, Reporter of the Tax Sales Committee [New], made a presentation to the Law Institute Council.

Tax Sales

Mr. Sklamba introduced himself to the Council and introduced committee members present. He then discussed SR 40 of the 2013 Regular Session, which urged and requested the LSLI to study the feasibility of authorizing tax lien sales as a replacement or alternative to tax sale certificates, and SR 109 of the 2012 Regular Session, which requested the LSLI to study the laws regarding sheriff's tax sales in Orleans Parish and make recommendations relative to the feasibility of establishing a more expeditious process.

The Reporter noted that the Legislature has enacted a number of amendments to the Law Institute's 2008 revision of tax sale procedures. One of the purposes of the revision was to shift the burden of conducting extensive title searches and sending out multiple pre-sale notices from the tax collectors to tax sale purchasers. The Legislature in 2012 amended the revision to require that the tax collector obtain mortgage and conveyance certificates and send pre-sale notices to all interested parties identified on the certificates.

He also informed the Council that title insurers with few exceptions are not insuring tax sale titles due to the uncertainty of current law and the inability of a tax sale purchaser to obtain a judgment in a quiet title action that is *res judicata*.

The committee identified several approaches that it may take to address the resolutions. The Reporter requested guidance from the Council as to how to proceed, since the committee is divided as to whether to make amendments to Article VII, Section 25 of the current Louisiana Constitution and the current tax sale procedures or to recommend adoption of a tax lien system. He informed the Council that he and other committee members during the past year had prepared drafts of constitutional provisions and statutes for both tax sale revisions and tax lien procedures.

There was much discussion about both systems. A motion was made to discuss the tax lien system first. The motion was seconded and passed. After more discussion, a motion was made to direct the committee to study the feasibility and constitutionality of the tax lien system. The motion was amended to direct the committee to study the feasibility and constitutionality of both the tax lien and tax sale certificate systems and to present its findings to the Council. The motion was seconded and passed.

The Reporter asked the Council for policy guidance on its preference for allowing a purchaser of a tax lien to foreclose out the tax debtor's right of redemption without a subsequent public sale of the property or to require public auction where the property would be sold to the highest bidder. Council members responded that the intent of the motion was for the committee to provide its research to the Council so that it may provide further policy guidance. The Reporter asked whether, if the committee concludes the tax lien system is constitutional, the Council would be in favor of it and, if in favor, whether it would favor foreclosing out the right of redemption or requiring a public action. Council members responded that they would need to be presented with research of the constitutionality of the available courses.

There was a motion made to direct the committee to draft legislation to adopt the lien system. Members commented that the issue had been addressed by the previous motion. This motion was withdrawn.

The Council also provided policy votes on issues upon which the committee had reached a consensus. There was a motion made to adopt the committee's support for eliminating the language in Article VII, Section 25 of the Louisiana Constitution that allows a tax sale buyer to bid down the percentage of a property sold at tax sale. After discussion and support for preserving this option for the sale of rural tracts of land, the motion was amended to eliminate the ability for a tax sale buyer to bid down the percentage of a property sold at tax sale except where the property was divisible in kind. The motion was seconded and passed.

A motion was made to adopt the committee's support for enacting a prescription statute similar to R.S. 41:1328 ("Tax title by prescription") as an alternative to establishing title by proving acquisitive prescription by possession. No action was taken on the motion.

LUNCH

Trust Code

At 1:34 p.m. the Reporter of the Trust Code Committee, Prof. Ronald J. Scalise Jr., began his presentation to the October Council by recognizing the members of the Committee and the considerable work they had all put forth to create the document that the Council would be considering. He highlighted the proposed pet trust as an important accomplishment of the Committee. The Reporter then turned the Council's attention to the handout entitled, "Louisiana State Law Institute, Trust Code Committee, Prepared for the Meeting of the Council, October 10, 2014, New Orleans, Louisiana".

Prof. Scalise introduced R.S. 9:2263—a proposed Statute that would create a trust for the care of an animal. He explained that although it is already possible to create a traditional trust to benefit a pet, this is not a practical solution for persons with smaller estates. Thus, the Committee created the proposed pet trust statute. Moreover, he explained that in the proposed trust a pet would be treated as a beneficiary even though it is not a "person" under Louisiana law. Additionally, a "trustee" would be a person who would manage the corpus of the trust, the "caregiver" would possess and care for the pet, and a person could be designated to enforce the provisions of the trust. The Reporter then presented the provisions of proposed R.S. 9:2263 paragraph by paragraph.

The Reporter introduced the first paragraph. He then opened the floor to discussion. A member queried who would be responsible for any damage caused by the pet. The Reporter replied that in many stances the caregiver would be the liable party. After some further discussion a member moved adoption of the paragraph. The motion was seconded, and the paragraph was unanimously approved to read as follows:

A trust may be created to provide for the care of one or more animals that are in being and ascertainable on the date of the creation of the trust.

The Reporter then proceeded to present the second paragraph. After a brief introduction, a member of the Council moved that the paragraph be adopted as presented. This motion was seconded. Some discussion resulted. Another motion was made to adopt the paragraph as shown in the materials. This motion passed unanimously. It was agreed that the paragraph should read as follows:

The trust instrument may designate a caregiver for each animal. An animal's caregiver will have the custody of the animal and be responsible for its care. In the absence of a designation or if the designated or appointed caregiver is unable or unwilling to serve, the trustee shall appoint or act as the caregiver.

Next, Prof. Scalise introduced the third paragraph. After reading the text of the paragraph, a member asked that the word "party," as found on line 10 of page 1, be changed to "person." The Reporter accepted this change. Thereafter, a member moved adoption of the modified paragraph. This motion was seconded and unanimously passed. The paragraph was approved to read as follows:

The trust instrument may designate a person to enforce the provisions of the trust. In the absence of a designation or if the designated person is unable or unwilling to serve, the settlor or any of his successors or a caregiver may enforce the trust.

The Reporter then introduced the fourth paragraph of the proposed Statute. A member asked Prof. Scalise whether damage caused by the pet would be considered as an "expense" according to the paragraph. He responded that he believed that in some instances a damage award could be considered an

“expense.” Another member of the Council moved for adoption of the paragraph. This motion was unanimously approved, and the fourth paragraph was approved to read as follows:

Trust property may be used only for the care of each animal and for reasonable compensation and expenses of the trustee and the caregiver.

Prof. Scalise then introduced the fifth paragraph. A member of the Council requested that the work “unneeded,” as found on line 16 of page 1, be changed to “excess.” The Reporter agreed to this change. Another member moved adoption of the paragraph as modified. This motion was seconded and passed unanimously. The paragraph was approved to read as follows:

If the proper court determines that the value of the trust substantially exceeds the amount required to care for each animal and for reasonable compensation and expenses of the trustee and the caregiver, the court may terminate the trust as to the excess portion.

Next, the Reporter introduced the sixth paragraph. There was no discussion. A member moved adoption, this motion was seconded, and the paragraph was unanimously approved to read as follows:

The trust shall terminate upon the death of the last surviving animal provided for in the trust instrument.

After the Reporter’s introduction of the seventh paragraph, a member requested that “his,” as found on line 21 of page 1, be changed to “the settlor.” The Reporter agreed to this change. A motion was made that the paragraph be adopted as modified. This motion was seconded, and the paragraph was unanimously approved to read as follows:

The trust instrument may designate a person to receive the property upon partial or complete termination of the trust. In the absence of a designation, the trust property shall be distributed upon termination to the settlor, if living, or to the settlor’s successors.

The Reporter then moved on to introduce the eighth paragraph. There was some discussion as to how adopting proposed R.S. 9:2263 would create two types of pet trusts in Louisiana. The issue was resolved, and a member moved adoption of the paragraph. This motion was seconded. The paragraph was unanimously approved to read as follows:

A trust instrument that provides for the care of one or more animals shall be liberally construed to sustain its effectiveness and to fulfill the intent of the settlor.

Prof. Scalise then gave a brief introduction to the ninth paragraph. A member of the Council wondered what the “proper court,” as mentioned in the paragraph, would be. After discussing this issue, a member of the Council moved adoption of the paragraph. This motion was seconded. The paragraph was unanimously adopted to read as follows:

Unless otherwise required by the trust instrument or the proper court, a trustee is not required to post security or provide an accounting.

The Reporter then introduced the tenth, and final, paragraph. Some discussion ensued as to who the trustee is and how he is appointed. The

Reporter responded that the paragraph makes it clear that in all cases where 9:2263 has a gap reference should be made to the general provisions of the Louisiana Trust Code. A member of the Council moved adoption; the motion was seconded. Another Council member asked whether a pet trust could be in an *inter vivos* or testamentary form. The Reporter responded that it could take either form. The motion for adoption was re-urged. The motion was seconded, and the paragraph was unanimously approved to read as follows:

In all matters for which no provision is made in this Section, a trust for the care of an animal shall be governed by the provisions of the Louisiana Trust Code.

The Reporter then asked the Council to review the comments that accompany R.S. 9:2263 and asked that they be approved. A member of the Council requested that the comments be made gender-neutral. The Reporter agreed to this request. Thereafter, a motion was made that all of the comments be adopted as provided. This motion passed unanimously. The comments to 9:2263 were approved to read as follows:

Revision Comments – [2015]

1. This Statute is new. It is modeled, in part, on a similar provision in the Uniform Trust Code, as well as language from the Uniform Probate Code and the laws from a variety of other states. See, e.g., Unif. Trust Code § 408; Unif. Prob. Code § 2-907; 12 Del. C. § 3555; Cal. Prob. Code § 15212; N.C. Stat. § 36C-4-408; Tex. Pr. Code Ann. § 112.037; Florida Trust Code § 736.0408.
2. This Statute provides a simple and alternative way for an individual to provide for the care of an animal. To that extent, this Statute creates a unique exception to a foundational principle of Louisiana law and allows an animal to serve as the beneficiary of a trust, through a mechanism sometimes referred to as a “statutory pet trust.” It thus constitutes an exception to the ordinary requirement that a beneficiary be a natural or juridical person. See, e.g., R.S. 9:1801. Individuals may still provide for animals by using a traditional trust wherein a settlor can make a gift of an animal to an individual who is designated as an income beneficiary in a trust instrument. The trust instrument can then provide that the trustee would distribute income to the beneficiary as is necessary and provided that the beneficiary exercises care for the animal. Moreover, an individual may also provide for an animal by making a donation to an individual with an accompanying charge that the donee care for an animal.
3. Under this Statute, only animals that are “in being” are allowable beneficiaries of an animal trust. The general requirements of the Louisiana Trust Code that the beneficiary be sufficiently designated and that the beneficiary be “in being and ascertainable” on the date of the creation of the trust apply. See R.S. 9:1801 and 1803. An unborn animal is deemed to be “in being and ascertainable” if it is born alive. See R.S. 9:1803.
4. This Statute contemplates the existence of a tetrapartite, rather than tripartite relationship, under which there exists a settlor, trustee, caregiver, and beneficiary. Under this Statute, the settlor maintains the traditional role and function under the Louisiana Trust Code, R.S. 9:1761-1764. The animal serves as the beneficiary. The trustee’s role is to exercise his duties with respect to the money or other trust property used for the care of the animal. The caregiver is the party responsible for the care and custody of the animal.
5. Under a traditional trust, the beneficiary has the ability to enforce the trust and compel the trustee to perform his duties. In the context of a trust for the benefit of an animal, no human beneficiary exists.

Consequently, this Statute allows for the appointment of an individual in the trust to enforce the trust and to ensure that the trustee is appropriately discharging his duties. In the absence of the designation of a person to enforce the trust or if the person designated is absent, deceased, or refuses to serve, the trust provisions may be enforced by the caregiver or the settlor, if living, or the settlor's successors.

6. Under this Statute, a court has authority to terminate the trust in part if the trust property "substantially exceeds" the amount required to care for each animal and for reasonable compensation and expenses of the trustee and the caregiver. This provision is modeled on Section 2-907(c)(6) of the Uniform Probate Code rather than Section 408(c) of the Uniform Trust Code. The standard of care that the animal had received prior to the creation of the trust should be considered by a court in ascertaining whether the trust property "substantially exceeds" what is necessary.

7. A trust may be created for one or multiple animals. Under this Statute, the trust terminates upon the death of the last surviving animal. Thus, this Statute creates specific exception to the general provisions of the Louisiana Trust Code specifying a maximum term for a trust. See, e.g., R.S. 9:1831, 1832, and 1833.

8. Upon partial or complete termination of a trust, the trust property is distributed to the person named in the trust, who may be a natural or juridical person or the trustee of another trust. If the trust does not provide for a recipient upon partial or complete termination, the trust property shall be distributed to the settlor, if living, or to the settlor's successors.

9. As with the creation of any trust, no particular language need be used to create an animal trust, provided the intent to do so is clear. See R.S. 9:1753. Thus, a statement in a will as simple as, "I leave \$10,000 for the care of my dog" or "I leave \$10,000 to my dog" should be sufficient to establish an animal trust under this Statute.

10. Despite the stand-alone nature of this Statute, resort to the background rules of the Louisiana Trust Code is necessary in some instances. Thus, the attempt to provide for every possible contingency under this Statute has been avoided and, under the last provision of this Statute, reference is made to the rules of the Louisiana Trust Code, *mutatis mutandis*, when relevant.

The Reporter then asked the Council to turn its attention to the next issue presented in the materials—proposed R.S. 9:2047. After a brief introduction, he opened the floor to questions. A few members of the Council expressed their disapproval of the policy of the proposed Statute. As a result, much discussion ensued. A Council member suggested that the prepositional phrase at the beginning of the first paragraph of the Statute be placed at the end of the paragraph. Prof. Scalise agreed to this change. He also agreed to draft a comment to accompany the Statute to make clear the timing of a divorce and the revocation of revocable provisions in an *inter vivos* trust. A Council member requested that the word "court," as found on line 5 of page 5, be removed. The Reporter agreed to this change. Another member of the Council asked that words "termination of the settlor's marriage" on line 9 of page 5 be struck and replaced with "judgment, property settlement agreement, or divorce." The Reporter also agreed to this modification. A member of the Council moved that the Statute be adopted as modified. This motion was seconded; however, some dissent was expressed. In response, the President asked that a vote be taken of those in favor of the modified Statute. By a vote of 26 in favor and 4 opposed, the newly-changed Statute was approved by the Council to read as follows:

R.S. 9:2047. Revocation of *Inter Vivos* Trusts Upon Divorce

A divorce of the settlor revokes every provision that may be revoked or modified by the settlor in an *inter vivos* trust designating or appointing the settlor's former spouse unless expressly provided otherwise in the trust instrument or in a judgment or a property settlement agreement.

A trustee with no actual knowledge of the divorce, judgment, or property settlement agreement is not liable for actions taken in good faith regarding the settlor's former spouse.

Thereafter, Prof. Scalise asked the Council to approve the text of the comments for 9:2047. The Council agreed with him that the word "consisted," as found on line 13 of page 5, be changed to "consistent." Additionally, the Reporter agreed to change the masculine pronoun, as found on line 8 of page 6 of the materials, to a gender-neutral term. He also acquiesced to a request to modify the comments so that they would correspond with the changes made to the second paragraph of 9:2047. The Council then agreed that the comments should generally read as follows:

Revision Comments – [2015]

1. This provision changes the law. It is consistent with C.C. Art. 1608(5) and based, in part, upon Unif. Prob. Code § 2-804 and 760 Ill. Comp. Stat. Ann. 35/1.
2. This provision operates to revoke automatically upon divorce all revocable provisions "designating or appointing the settlor's former spouse." This provision is deliberately broad so as to include not only beneficiary designations but also fiduciary appointments, limited powers of appointment, and other similar designations. This Section recognizes that in most instances a settlor would not want to maintain the designation or appointment of a former spouse. The trust instrument, a court judgment, or the parties in a property settlement agreement may provide to the contrary. Automatic revocation under this Section is applicable only to designations or appointments of a former spouse. It is not applicable to designations or appointments of relatives of the former spouse whose status under the trust the settlor may wish to maintain.
3. This provision is not intended to conflict with trusts governed by federal law and must, in appropriate cases, yield when preempted. Under the Employee Retirement Income Security Act (ERISA) "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan" are preempted by ERISA. 29 U.S.C. § 1144(a). See also *Hillman v. Maretta*, 133 S.Ct. 1943 (2013) (recognizing the preempted effect of the Federal Employees' Group Life Insurance Act of 1954 on a Virginia statute that not only revoked beneficiary status for former spouses in contracts for death benefits but also gave a cause of action against the former spouse to the party who would have received death benefits, had federal law not pre-empted).
4. As a matter of law, a trustee is insulated from liability under this Section provided the trustee acts in good faith and does not know of the settlor's divorce *or of a judgment or property settlement agreement requiring the trustee to maintain a designation or appointment of the settlor's former spouse.*¹
5. Remarriage of the settlor to the divorced spouse does not serve to revive the designations and appointments of the spouse.
6. *Under this provision, designations or appointments of a former spouse are revoked upon the date of the divorce judgment.*

The Reporter then asked the Council to turn its attention to the next topic presented in the materials—proposed modifications to R.S. 9:1953. He gave an

¹ Italicized language indicates modification made by the Reporter following the October 2014 meeting of the LSLI Council.

introduction to the Committee's suggested minor changes to this Statute. A member of the Council moved that 9:1953 be adopted as presented. This motion was seconded. Another Council member requested that the word "his," as found on line 9 of page 7 of the materials, be changed to "beneficiary." The Reporter accepted this change without reservation. Another motion was made to approve the Statute as modified. This motion was seconded and passed unanimously. A member of the Council requested that the masculine pronouns used in the comments to 9:1953 be changed to gender-neutral pronouns. Prof. Scalise agreed to this suggested amendment and agreed to change, where practical, the masculine pronouns in the comments presented in the materials. Following this comment, the Council moved that all of the comments be adopted. This motion passed unanimously. The Council agreed that R.S. 9:1953 and its comment should read as follows:

R.S. 9:1953 Assignment of interest in trust and termination of trust for mixed private and charitable purposes

A. A Unless the trust instrument provides otherwise or specifically contains a special needs provision, a private beneficiary of a trust for mixed private and charitable purposes, including a spendthrift trust, may at any time gratuitously assign to a charitable principal beneficiary of the trust a fraction or all of the private beneficiary's interest in the trust unless the trust instrument specifically contains a special needs provision or provides otherwise. An interest in a spendthrift trust may be assigned only gratuitously. An interest that is assignable only to a charitable principal beneficiary of the trust shall not be deemed to be subject to voluntary alienation for purposes of R.S. 9:2004.

B. If the trust instrument provides for the termination of the trust at the end of the specified term of the private interests, the trust may be terminated early by the charitable principal beneficiary as to the portion of the trust that, for any reason, no longer has a private beneficiary.

Revision Comments – [2015]

1. This revision allows for practical planning opportunities and techniques, such as the exchange by a beneficiary of *the beneficiary's* interest in a charitable remainder trust for an annuity, which may be mutually advantageous to both the charity and the beneficiary. At the same time, however, this Section ensures that a beneficiary of a spendthrift trust is not allowed to onerously transfer his interest and thereby defeat the settlor's intent in establishing the trust.
2. Although the term "special needs provision" is not statutorily defined in the Louisiana Trust Code, it is intended to refer to those provisions in trusts designed to preserve the availability of means-tested governmental benefits for certain beneficiaries.
3. For the process by which a trust is terminated, see R.S. 9:2051.

Prof. Scalise then asked the Council to consider the next item in the materials—R.S. 9:2031. He gave a brief introduction to the Statute, explained the Committee's motivation in the proffered changes to the provision, and opened the floor to general discussion and questions. A member moved that the Statute be approved as shown in the materials. This motion was seconded. Another Council member asked that the Reporter change the word "he," as found on line 9 of page 9, be changed to "the individual." Prof. Scalise agreed to this change. Thereafter, a motion was made that 9:2031 and its comment be adopted in their modified forms. This motion was seconded and passed without opposition. The Statute and comment were approved to read as follows:

R.S. 9:2031. Delegation of right to modify amend

A trust instrument may authorize a person who is in being on the date of the creation of the trust ~~other than the settlor~~ to modify the provisions of the trust instrument in order to add or remove beneficiaries, or modify their rights, if all of the affected beneficiaries are descendants of the person given the power to modify. A beneficiary added pursuant to this Section may be a person who is not in being when the trust is created, provided the individual is in being at the time the power to add is exercised.

Revision Comments – [2015]

1. This revision clarifies the prior law by providing that the power to add beneficiaries includes the ability to add those beneficiaries not in existence at the time of the creation of the trust, provided they exist at the time the power to add is exercised.
2. This revision, however, does not allow for the creation of dynasty trusts as the person given the power to add beneficiaries must be in existence at the time of the creation of the trust. Because this Section allows for the addition of beneficiaries, it can have the effect of causing the maximum term for a trust to be extended. Cf. R.S. 9:1831 and 1833.

Next, the Reporter introduced R.S. 9:2026 by explaining that the only substantive change to this provision was in Subsection B. A member of the Council moved that the Statute be approved as presented in the materials. This motion was seconded. However, some discussion followed. Thereafter, a motion was made that the Statute be adopted without any changes made. This motion was seconded and passed unanimously. The Reporter asked that the “not,” as found on line 18 of page 11, be removed. The Council agreed, and a member moved that the comments be approved as modified. This motion was also seconded and passed without opposition. As such, R.S. 9:2026 and its comment were approved to read as follows:

R.S. 9:2026. Change of circumstances Termination or modification to prevent impairment of trust purposes; termination of small trust

A. The proper court may order the termination or modification of a trust, in whole or in part, if: ~~(1) The~~ the ~~continuance of the trust unchanged would defeat or substantially impair the purposes of the trust. In the event of termination of a trust under this Subsection, the proper court shall provide for the distribution of the trust property, including principal and undistributed income, to the beneficiaries in a manner that conforms as nearly as possible to the intention of the settlor.~~

B. ~~(2) Except as otherwise provided by the terms of the trust, and after obtaining the consent of all beneficiaries or their legal representatives, a trustee may terminate a trust if has determined that the market value of the trust is less than one hundred thousand dollars, and that, in relation to the costs of administration of the trust, the continuance of the trust unchanged would defeat or substantially impair the purposes of the trust. In such a case, the court may provide for the distribution of the trust property, including principal and undistributed income, to the beneficiaries in a manner which conforms as nearly as possible to the intention of the settlor and the court shall make appropriate~~

~~provisions for the appointment of a tutor in the case of a minor beneficiary. A~~
natural tutor, without need for a formal tutorship proceeding and concurrence of
an undertutor, may consent to the termination of a trust on behalf of a minor.

C. In the event of the termination or modification of a trust under ~~the~~
~~provisions of this Paragraph Section~~, the trustee shall not be subject to liability for
such termination or modification.

Revision Comments – [2015]

1. This revision changes the law in part. Prior law allowed for a court to terminate or modify a trust if continuance of the trust unchanged would defeat or substantially impair the purposes of the trust. This revision continues to allow for court-ordered termination or modification in cases where continuance of the trust unaltered would defeat or substantially impair the purpose of the trust. When such modification or termination occurs, the court shall order distribution of the trust property to the beneficiaries in the way that would conform as closely as possible with the intent of the settlor.
2. Prior law also allowed for court termination or modification of certain small trusts in circumstances where because of the costs of administration of the trust in relation to its value, continuance of the trust unchanged would defeat or substantially impair the purposes of the trust. This revision now allows for termination by a trustee without approval of the court of small or uneconomical trusts, deemed to be those trusts worth less than one hundred thousand dollars. Unlike prior law, a finding that the cost of administration of the trust would defeat or substantially impair its purposes is no longer necessary. This revision does, however, require a trustee who terminates a trust to obtain in advance the consent of all the affected beneficiaries or their legal representatives. Legal representatives include, but are not limited to, mandataries, curators, and tutors. In an effort to simplify consent to termination, natural tutors may consent without the need for formal proceedings. See, e.g., C.C.P. Art. 3396.9.
3. In all instances, when termination or modification occurs under this Section, the trustee is exonerated from liability for such termination or modification.

Next, Prof. Scalise asked that the Council turn to R.S. 9:2028. He introduced the changes that the Committee made to the Statute. Some discussion followed. Shortly thereafter a Council member made a motion that the provision and its comment be adopted. This motion was seconded and passed without opposition. The revised version of 9:2028 and its comment were approved to read as follows:

R.S. 9:2028 Concurrence of settlors in termination

Except as otherwise provided by law or the trust instrument, The the
consent of all settlors, trustees, and beneficiaries shall not be effective to
terminate the trust or any disposition in trust, ~~unless the trust instrument provides~~
~~otherwise.~~

Revision Comment – [2015]

This revision signals and highlights the change in Section 2026 of the Louisiana Trust Code by recognizing that in some limited instances the trustee is allowed, with the consent of the beneficiaries, to terminate a trust.

Thereafter the Reporter introduced R.S. 9:1904 and 1905. Both of these provisions and their comments were unanimously adopted by the Council to read as follows:

R.S. 9:1904. General rule

If the members of one class ~~of the settlor's children or grandchildren~~ are designated beneficiaries of income and members of a different class ~~of his children or grandchildren~~ are designated as beneficiaries of principal, the class of beneficiaries of income shall be governed by R.S. 9:1899 through 9:1901 and the class of beneficiaries of principal shall be governed by R.S. 9:1902 and 9:1903.

Revision Comment – [2015]

This revision updates Section 1904 on the closing of a class to make it consistent with the general Articles on class trusts. See R.S. 9:1891.

R.S. 9:1905. Interests in income

If members of the same class ~~of the settlor's children or grandchildren~~ are designated beneficiaries of both income and principal, interests in income before the class closes shall be governed by R.S. 9:1899 through 9:1901.

Revision Comment – [2015]

This revision updates Section 1905 on the closing of a class to make it consistent with the general rules on class trusts. See R.S. 9:1891.

Prof. Scalise then asked the Council to consider R.S. 9:2158. He introduced the Statute, and a member moved for adoption of the Statute. This motion passed unanimously. A member of the Council requested that the Reporter change the word "his," as found on line 8 of page 15, to "the trustee's." He agreed to this modification without reservation. Another member of the Council moved that 9:2158 and its comment be adopted as modified. This motion was seconded, and the Council unanimously agreed that they should read as follows:

R.S. 9:2158. Power to adjust

~~Subject to the limitations set forth in the Subpart, a~~ A trustee may make an adjustment between principal and income when the interest of one or more beneficiaries is defined by reference to the "income" of a trust, and the trustee determines, after taking into account the allocations for the year under Subpart D, that the adjustment is necessary in order for the trustee to satisfy ~~his~~ the trustee's duty to be fair and reasonable to all the beneficiaries, taking into account the purposes of the trust.

When income is distributed during the year, the income can be determined based on the adjustment to be made for the year. The adjustment to be made for the year can be determined in a way that causes the total amount distributed to the income beneficiary during the year to be equal to a percentage of the value of the trust property at the end of the prior year or at the end of an average of up to three prior years.

The authority to make an adjustment under this Section is subject to the limitations set forth hereafter in this Subpart.

Revision Comment – [2015]

This revision clarifies the law insofar as it establishes that an income-only trust may operate in a manner similar to a unitrust.

The next three Statutes presented in the materials were introduced by the Reporter individually. In each case, a member of the Council immediately moved that it and its respective comment be adopted as presented. Each time this motion was seconded and passed unanimously. As such, R.S. 9:1783, 1821, and 1822 and their comments were approved to read as follows:

R.S. 9:1783. Who may be trustee

A. Only the following persons or entities may serve as a trustee of a trust established pursuant to this Code:

(1) A natural person enjoying full capacity to contract who is a citizen or resident alien of the United States, who may be the settlor, the beneficiary, or both.

(2) A federally insured depository institution organized under the laws of Louisiana, another state, or of the United States, or a financial institution or trust company authorized to exercise trust or fiduciary powers under the laws of Louisiana or of the United States.

B. A nonprofit corporation or trust for educational, charitable, or religious purposes that is designated as income or principal beneficiary may serve as trustee of a trust for mixed private ~~or~~ and charitable purposes.

Revision Comment – [2015]

This revision clarifies the law. It provides that certain nonprofit corporations or trusts may in some circumstances serve as trustees of mixed trusts, defined as a trust for “private *and* charitable purposes.” See R.S. 9:1951 (emphasis added). This provision does not purport to specify who may be a trustee of a charitable trust. See R.S. 9:2272.

R.S. 9:1821. When testamentary trust created

A testamentary trust is created at the moment of the settlor’s death ~~without awaiting the trustee’s acceptance of the trust.~~

Revision Comment – [2015]

This revision clarifies the law. It makes clear that although a trustee’s acceptance is ultimately necessary, a testamentary trust is effective before the trustee accepts, as his acceptance is retroactive to the date of the creation of the trust under R.S. 9:1823.

R.S. 9:1822 When *inter vivos* trust created

An *inter vivos* trust is created upon execution of the trust instrument, ~~without regard to the trustee’s acceptance.~~

Revision Comment – [2015]

This revision clarifies the law. It makes clear that although a trustee’s acceptance is ultimately necessary, an *inter vivos* trust is effective before the trustee accepts, as his acceptance is retroactive to the date of the creation of the trust under R.S. 9:1823.

Following these approvals, the Reporter introduced the final topic in the

materials—R.S. 9:2087. A Council member moved that the Statute be approved as shown. Another member of the Council requested that the words “alienate, acquire” replace the word “transfer,” as is found on line 8 of page 18 of the materials. Prof. Scalise agreed with this modification. Another member of the Council asked that the word “price,” as found on line 9 of page 18, be changed to “terms.” Prof. Scalise also agreed with this change. He also volunteered to draft a comment for the Statute that would make it explicit that the list of terms in 9:2087(B)(2) is not exclusive. At this declaration the Council unanimously approved the revised version of Paragraph (B)(2).

Prof. Scalise then asked the Council members to consider Paragraph (B)(1). One of the members moved that the Paragraph be approved as presented in the materials. The Council asked that the syntax of the sentence comprising the first Paragraph of Subsection B be changed. The Reporter agreed that this should be done. Another member of the Council requested that the pronoun “he,” as found on line 5 of page 18, be changed to “the trustee” to remove the masculine pronoun. The Reporter agreed to this change. Yet another member of the Council moved that 9:2087 be adopted as modified. This motion was seconded and passed unanimously. The Statute was approved to read as follows:

R.S. 9:2087. Delegating performance

A. Except as otherwise provided in this Section, a trustee shall not delegate the performance of his duties.

B. (1) A trustee may, by power of attorney, delegate the performance of ~~ministerial duties and acts that he~~ the trustee could not reasonably be required to perform personally and the performance of ministerial duties.

(2) A ~~written~~ power of attorney ~~in authentic form, executed~~ granted by a trustee authorizing a mandatary to ~~sell~~ alienate, acquire, lease, or encumber specifically described ~~immovable~~ property at a specific ~~price~~ terms shall be considered the delegation of the performance of a ministerial duty as provided by Paragraph (1) of this Subsection.

C. A trustee may delegate the selection of specific investments by acquiring mutual funds registered under the Investment Company Act of 1940, or other pooled funds managed by a third party, so long as the portfolio of such a fund consists substantially of investments not prohibited by the trust instrument.

D. (1) A trustee may delegate investment and asset management functions that a prudent trustee of comparable skills could properly delegate under the circumstances. In connection with such delegation, the trustee has the duty to exercise reasonable care, skill, and caution in selecting the agent and establishing the scope and terms of the delegation consistent with the purposes and terms of the trust instrument, to review periodically the actions of the agent, and, in the event of a breach of the agent's duties discovered by the trustee, to take such action to remedy the breach as is reasonable under the circumstances.

(2) In performing a delegated function, an agent owes a duty to the trustee and to the beneficiaries to exercise reasonable care and skill, considering the scope and terms of the delegation. An agreement to relieve the agent from that duty is contrary to public policy and void.

(3) By accepting delegation from a trustee of a trust established pursuant to this Code, an agent submits to the jurisdiction of the courts of this state in all matters relating to the performance of his duties

Prof. Scalise then restated that he would draft a new comment for the newly-approved Statute and rearrange the comments as appropriate. Following this discussion, a Council member moved that the comment to 9:2087 be adopted as described by the Reporter. Thereafter, the comments were approved to generally read as follows:

Revision Comments – [2015]

1. This revision clarifies the law. It establishes that the trustee's authority to delegate by mandate is not limited solely to "ministerial duties" but includes both "ministerial duties" and also other "acts that he could not reasonably be required to perform," which might include discretionary as well as ministerial duties. Prior to the 2010 amendment, Louisiana jurisprudence on this issue was clear. See, e.g., *City of New Orleans v. Cheramie*, 509 So. 2d 58 (La. Ct. App. 1st Cir. 1987) (allowing City of New Orleans, as trustee, to delegate to agents the ability to negotiate and lease land held in trust).
2. This revision also makes clear that the *acquisition, alienation, lease, or encumbrance* of property may be an allowable delegation of a ministerial duty when the discretionary functions of the agent have been removed, such as when a trustee delegates the authority to an agent to consummate a transaction on specific terms. See, e.g., *Peter Title*, 1 La. Prac. Real Est. § 6:44 (2d ed. 2013). When discretionary considerations are involved, a trustee should not delegate authority unless it is to perform an act that he could not reasonably be required to perform personally.
3. *The types of actions provided in Paragraph B(2) are an illustrative list of delegable acts and not intended to be exhaustive or comprehensive catalog.*

After adopting R.S. 9:2087, the President called the October 10, 2014 meeting of the Council to a close. The meeting adjourned at 3:32 p.m.

LOUISIANA STATE LAW INSTITUTE

THE MEETING OF THE COUNCIL

October 10-11, 2014

Saturday, October 11, 2014

Persons Present:

Alston, Elizabeth A.	Kostelka, Robert "Bob" W.
Baiamonte, Joseph J.	Lavergne, Luke
Bergstedt, Thomas	Levy, H. Mark
Breard, L. Kent	McWilliams, John Ford
Burris, William J.	Medlin, Kay C.
Crawford, William E.	Morrison, Robert, III
Crigler, James C.	Norman, Rick J.
Cromwell, L. David	Riviere, Christopher H.
Di Giulio, John E.	Scalise, Ronald J., Jr.
Dimos, Jimmy N.	Simien, Eulis, Jr.
Doguet, Andre	Thibeaux, Robert P.
Garrett, J. David	Tucker, Zelda
Hamilton, Leo C.	Wilson, Evelyn
Hayes, Thomas M., III	Ziober, John David
Holdridge, Guy	
Joseph, Cheney C., Jr.	

The President, Mr. James C. Crigler, Jr. opened the Saturday session of the October 2014 Council meeting at 9:00 AM on Saturday, October 11, 2014 at the Monteleone Hotel in New Orleans, LA.

The President called on Judge Robert Morrison, Code of Criminal Procedure Revision Committee Co-Chair, and Professor Cheney Joseph, the Committee's Reporter, to present the Committee's materials.

Code of Criminal Procedure

The Council first considered the preliminary report in response to HR 149 which deals with a review of "stand your ground" laws both in Louisiana and in other states. That report is contained in document 9.26.14-HR149 of 2014 Preliminary Report.

The Co-Chair and Reporter traced the history of Louisiana's relevant statutory provisions beginning with the 1941 Projet of the Criminal Code. They reviewed statutes in other states. The current national trend reflects approval of "stand your ground" provisions. They pointed out that HB 826 of 2014 proposed repeal of Louisiana's "stand your ground" provisions. The legislature declined to pass that bill. Additionally the legislature elected to pass Acts 2014, No. 163 that amended the state's "stand your ground" provisions.

In light of the legislature's failure to pass HB 826, its passage of Act 163, and the current national trend the report recommends that Council should decline at this time to propose repeal of Louisiana's "stand your ground" law provisions.

After some discussion it was moved and seconded to adopt the report's recommendation to retain the state's current law at this time.

A substitute motion was made and seconded that it was the sense of the Council to adopt the concept of the "stand your ground" defense. The motion failed.

It was moved and seconded to vote on the main motion to adopt the report. The motion passed.

The vote to adopt the report passed.

The Council then took up discussion of the Committee's report to the Council in response to SCR 97 of 2013. That resolution requested that the Institute consider whether to propose responsive verdicts for the crime of aggravated incest, 14:78.1. The report is contained in document 9.26.14 SCR 97 of 2013 Report to Council Revised.

The Reporter explained that Acts 2014, Nos. 177 and 602 repealed 14:78.1 and incorporated the elements of the crime of aggravated incest into 14:89.1(aggravated crime against nature). He noted that neither act elected to amend the Code of Criminal Procedure to provide responsive verdicts for the elements of the former crime of aggravated incest, as now contained in 14:89.1.

The Reporter recommended that the Council report to the legislature that since the resolution's subject matter no longer exists submitting a report is now moot.

After some discussion it was moved and seconded that the Council recommit the report to the Committee for it to review whether it should propose responsive verdicts for the elements of the former crime of aggravated incest as now contained in 14:89.1. The motion to recommit passed.

The Council considered the final report, the Committee's report to the Council in response to HCR 26 of 2014. The resolution requested the Institute to study and make recommendations on the gun ownership rights of individuals who have attempted suicide. The report is contained in document 9.26.14-HCR 26 OF 2014 Preliminary Report.

The Reporter summarized the applicable state and federal law. He explained that proposing a restriction in the context of civil law would, for a variety of reasons, be problematical. He therefore recommends that any proposed legislation be in the context of criminal law. He further noted that any proposed legislation would be subject to the "strict scrutiny" standard now provided for in La. Constitution, Article I, Section 11.

After a discussion of the issues involved it was moved and seconded that the Council report to the legislature that the gun ownership restrictions provided for by federal law, 18 USC§(g)(4), are currently sufficient and that the Institute proposes no additional legislation. The motion passed.

There being no additional business the meeting adjourned at 10:00 AM.


Joseph Baiamonte 1/22/2015
Date


Lynette Roberson 1/22/2015
Date


Claire Popovich 3/3/2015
Date