

LOUISIANA STATE LAW INSTITUTE

THE MEETING OF THE COUNCIL

December 15-16, 2017

Friday, December 15, 2017

Persons Present:

Adams, Marguerite (Peggy) L.
Amacker, Dawn
Amy, Jeanne L.
Bergstedt, Thomas
Braun, Jessica
Breard, L. Kent
Carroll, Andrea
Castle, Marilyn
Crawford, William E.
Cromwell, L. David
Curry, Kevin C.
Dawkins, Robert G.
Dimos, Jimmy N.
Doguet, Andre
Forrester, William R., Jr.
Garrett, J. David
Griffin, Piper D.
Hamilton, Leo C.
Hargrove, Joseph L., Jr.
Hayes, Thomas M., III
Haymon, Cordell H.
Hogan, Lila T.
Holdridge, Guy

Jewell, John Wayne
Kostelka, Robert "Bob" W.
Little, F. A., Jr.
Medlin, Kay C.
Miller, Gregory A.
Morvant, Camille A.
Norman, Rick J.
Riviere, Christopher H.
Scalise, Ronald J., Jr.
Simien, Eulis, Jr.
Sole, Emmett C.
Suprenant, Monica T.
Talley, Susan G.
Tate, Bradley Joseph
Tate, George Jr.
Thibeaux, Robert P.
Title, Peter S.
Tooley-Knoblett, Dian
Tucker, Zelda W.
Waller, Mallory Chatelain
Weems, Charles S., III
Ziober, Emily Phillips
Ziober, John David

President David Ziober called the December 2017 Council meeting to order at 10:00 a.m. After asking the Council members to briefly introduce themselves, the President announced that it was Professor William E. Crawford's ninetieth birthday and congratulated him on his forty years of service as Director of the Louisiana State Law Institute. The President then called on Professor Andrea B. Carroll, Reporter of the Marriage-Persons Committee, to begin her presentation of materials.

Marriage-Persons Committee

Professor Carroll asked the Council to turn their attention to the material in response to House Concurrent Resolution No. 2 of the 2017 Regular Session which asks the Law Institute to study the laws of continuing tutorship and emancipation, to establish procedures for those under a continuing tutorship, and to address the needed protections for individuals placed under a continuing tutorship prior to the legislative revisions of 2009. The Reporter contacted Representative Foil and in addition to resolving the issue in current law, he also asked the Committee to consider other issues in present law, so the Reporter anticipates coming back to the Council at a later date to resolve other issues. But for today, Professor Carroll asked the Council to turn to Article 359.

Present Article 359 regards the legal capacity of a person placed under continuing tutorship. Upon reaching the age of eighteen, it grants the person the legal capacity of a minor who has been granted emancipation conferring the power of administration. However, this concept no longer exists in our law and the *Franques* case, highlighted in the resolution, authorized a person under continuing tutorship to enter into contracts and obligations even though he may have lacked mental capacity. Therefore, the Committee proposes to clarify that continuing tutorship provides restrictions on legal capacity, but will also authorize the court to modify the decree to grant the person some capacity to engage in juridical acts. With no further questions, the Council adopted the following and the Comment:

Art. 359. Restriction on legal capacity

The decree if granted shall restrict the legal capacity of the person with an intellectual disability to that of a permanent minor; ~~except that after the age of eighteen the person, unless formally interdicted, shall have the legal capacity of a minor who has been granted the emancipation conferring the power of administration as set forth in Chapter 2, Section 2 of this Book and Title.~~

Turning to the proposal in Article 361, the Reporter explained that existing law is phrased oddly and lacks a standard. Due to the strict legal capacity in Article 359, the Committee is proposing allowing the court to modify the restrictions for good cause which is the same standard in interdiction and emancipation. The Council discussed the procedural capacity of the person under continuing tutorship because present law says that he may contest the decree and the Reporter agreed to add a comment referencing the articles on capacity. Thereafter, the following was adopted:

Art. 361. Contest of decree restricting legal capacity

The decree restricting his legal capacity may be contested in the court of domicile by the person himself or by anyone adversely affected by the decree; ~~and upon evidence which would justify the full emancipation of a minor above the age of eighteen the decree shall be rescinded and set aside.~~ The court may modify or terminate the decree restricting legal capacity for good cause.

The Reporter informed the Council that Representative Foil asked that these changes apply retroactively. After some discussion of the appropriateness of this, the Committee decided to propose a retroactivity section to the legislative proposal but also wants a policy vote from the Council. With little discussion, the Council agreed with the Committee.

The next set of materials from the Marriage-Persons Committee include proposed changes to the parenting coordinator statutes. The Reporter reminded the Council that these were first proposed by the Law Institute in 2007 and enacted by the Legislature. After a decade of use, practitioners have asked for revisions. Turning to R.S. 9:358.1, the Reporter explained that the changes allow for the parenting coordinator to enter the process at an earlier point in the proceedings, extend the appointment to two years due to long litigation times, and grants the court more flexibility in setting costs. Without discussion, this statute was approved.

The next statute, R.S. 9:358.2, keeps the same sentiment as existing law, but adds more protections when the court does find good cause for a parenting coordinator to be appointed in a domestic violence situation because the parties have to agree and have an opportunity to consult with an attorney. It was noted that social science research has shown that mediation and parenting coordination may be conducted when there has been domestic violence. It is especially effective if the intimidation factor has been removed because communication can be done by phone or email rather than face to face. The Reporter further explained that the Committee researched other states' law and

Reporter further explained that the Committee researched other states' law and added in the Louisiana buzz words for domestic violence in crafting this proposal. There was further comment regarding the effectiveness of this process and the Council adopted the proposal without change.

R.S. 9:358.3 addresses the qualification of parenting coordinators and the practitioners have always requested that lawyers be allowed to be parenting coordinators just as they are in other states. The Council was immediately concerned with the placement of the changes in Subsection A because some read it to require a lawyer to have five years of related professional experience and some read that requirement to only apply to non-lawyers. After much discussion regarding adding an additional qualifier to lawyers, the Council made the policy decision to adopt the proposal as written with the understanding that a person has to either be a member in good standing with the bar and have no less than five years of related professional experience or possess a master's or Ph.D. and be licensed in a mental health field and have no less than five years of related professional experience. The Council also adopted Subsection F which requires the parenting coordinator to inform the court if they no longer meet the qualifications.

Moving to R.S. 9:358.4, Professor Carroll explained that this is the list of issues that the parenting coordinator can help the parties resolve. The proposal would prohibit the parenting coordinator from helping the parties make decisions regarding the education of the children so as not to erode the authority of the domiciliary parent. The Council was more concerned about the expansive nature of the existing language and the possibility that a parenting coordinator could change a ruling the judge has already made. The Committee's intent was for the parenting coordinator to help a family exchange the children at noon rather than 2:00pm on Christmas day, not to change visitation from one week to four weeks in the summer. If the parties disagree with the parenting coordinator, they can seek a de novo hearing, so protections and limitations remain in the law. During the discussion, the Council equated the old law to mediation and the new proposal to arbitration because of the changes in R.S. 9:358.5 which make the recommendations binding. Thereafter, action was delayed on R.S. 9:358.4 until resolution of the issues in R.S. 9:358.5.

In R.S. 9:358.5, the Committee proposes making the recommendations of the parenting coordinator binding. The complaint heard most often about present law is that there are no teeth and parties begin to ignore the process resulting in a loss of effectiveness. The Reporter notified the Council of the minority position of a member of the Committee due to the lack of due process and access to the judge and the erosion of the power of the domiciliary parent. However, everyone else on the Committee held firm that without adding teeth to the law, there is often no advantage to appointing a parenting coordinator. Therefore, the compromise proposal is to make the recommendations binding, but not effective until ordered by the court. During this discussion the Council equated this procedure to the role of hearing officers and questioned the extra requirement of filing for a de novo hearing. In the hearing officer scheme, the court automatically modifies, rejects, or accepts the recommendations. The Reporter explained that due to the nature of the issues faced by parenting coordinators there is no time to wait for court approval. The concert will be over, the vacation opportunity missed, or the haircut will be done. The Council also mentioned special matters and borrowing from that law and from arbitration which requires the parties to agree to the process and agree to be bound by the decision. Finally, the Council suggested splitting up the issues listed in R.S. 9:358.4, because some are minor and others are major, and letting the minor decisions be immediately binding but requiring court approval for the more substantive decisions.

With a great appreciation for all of the discussion by the Council today, the Reporter explained that she would like to take the proposals back to the Committee for further contemplation.

Professor Carroll then concluded her presentation, and the President announced that the Council would recess for lunch. He also announced that there would be a meeting of the Membership and Nominating Committee during this time.

LUNCH

Membership and Nominating Committee

After lunch, the President called on Mr. Emmett C. Sole, Chairman of the Membership and Nominating Committee, to present the Committee's report to the Council, a copy of which is attached. It was moved and seconded to adopt the report as presented, and the motion passed with no objection. Mr. Sole then thanked Mr. Ziober for his service as President, and Mr. Ziober thanked Mr. Sole and his Committee for all of their hard work. He also congratulated Ms. Susan Talley on her appointment as President and Judge Guy Holdridge on his appointment as Assistant Director.

The President then called on Mr. William R. Forrester, Jr., Reporter of the Code of Civil Procedure Committee, to begin his presentation of materials.

Code of Civil Procedure Committee

Mr. Forrester began his presentation by first informing the Council that the Code of Civil Procedure Committee was still considering two significant issues, the first of which was whether to make summary judgment procedure applicable to hearings on exceptions, and the second of which was whether to amend Article 1915(B) to provide for more specific procedures for certifying the finality of partial final judgments and supplying written reasons therefor. One member of both the Committee and Council suggested that perhaps Article 1915(B) should be eliminated altogether and replaced with unappealable interlocutory judgments subject to review by supervisory writ. The Reporter agreed that this should be considered and then asked the Council to turn to Article 194, on page 1 of the "Proposed Revisions" materials, and explained that the Committee had determined that there was no reason for requiring a final default judgment confirming a preliminary default to be signed in open court. As a result, the Committee proposed deleting the language on line 10 of page 1. It was moved and seconded to adopt the proposed changes to Article 194 as presented, and the motion passed with no objection. The adopted proposal reads as follows:

Article 194. Power of district court to act in chambers; signing orders and judgments

The following orders and judgments may be signed by the district judge in chambers:

* * *

(6) Order or judgment which may be granted on ex parte motion or application, except an order of appeal on an oral motion ~~and a judgment granting or confirming a default~~; and

(7) Any other order or judgment not specifically required by law to be signed in open court.

Subparagraph (6) of this Article has been amended to remove the exception requiring a judgment granting or confirming a default to be signed in open court. Rather, a district judge should be permitted to sign in chambers a final default judgment granting or confirming a preliminary default pursuant to Subparagraph (7) of this Article.

The Reporter next directed the Council to Article 1471, on page 2 of the materials. He explained that although the Council had previously approved replacing "judgment by default" with "preliminary default" or "final default judgment" throughout the Code of Civil Procedure, neither of these terms alone are sufficient replacements in the context of discovery sanctions as set forth by this provision. Mr. Forrester then explained that the Committee recommended using the term "final default judgment" for purposes of consistency with the Federal Rules of Civil Procedure but clarifying that the plaintiff still has to prove a prima facie case in accordance with the provisions of Article 1702. A motion was made and seconded to adopt the proposed changes to Article 1471 as presented, at which time one Council member expressed his concern with respect to the confusion that results from the manner in which judges are presently issuing discovery sanctions against defendants. A vote was then taken on the motion to adopt Article 1471 as presented, and the motion passed with no objection. The adopted proposal reads as follows:

Article 1471. Failure to comply with order compelling discovery; sanctions

A. If a party or an officer, director, or managing agent of a party or a person designated under Article 1442 or 1448 to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under Article 1464 or Article 1469, the court in which the action is pending may make such orders in regard to the failure as are just, and among others any of the following:

* * *

(3) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a final default judgment by default against the disobedient party upon presentation of proof as required by Article 1702.

* * *

Comments – 2018

Subparagraph (A)(3) of this Article has been amended to substitute "final default judgment" for "judgment by default" to make the article more easily understood and to make the terminology consistent with other related articles. The amendments also clarify that when a final default judgment is rendered against the defendant in accordance with this provision, the plaintiff must nevertheless prove a prima facie case in accordance with the requirements of Article 1702. See *Clark v. Clark*, 358 So. 2d 658 (La. App. 1st Cir. 1978).

The Council then considered Article 1913, on page 3 of the materials. Mr. Forrester reminded the Council that during its February 2017 meeting, concern was expressed with respect to deleting the phrase "and who filed no exceptions or answer." He explained that the Committee ultimately determined that this language should remain in Paragraph B of this Article because a defendant who files a motion or other pleading but then fails to file an exception or answer

should not be entitled to receive service by the sheriff of the notice of the signing of a final default judgment. As a result, the Committee proposed to add "or other pleading" to Paragraph B and to revise Paragraph C to clarify that in all cases that do not fall under Paragraph B, notice of the signing of a final default judgment shall be mailed by the clerk of court to the defendant. It was moved and seconded to adopt the proposed changes to Article 1913 as presented, and the motion passed with no objection. The adopted proposal reads as follows:

Article 1913. Notice of judgment

* * *

B. Notice of the signing of a final default judgment against a defendant on whom citation was not served personally, or on whom citation was served through the secretary of state, and who filed no exceptions, ~~or answer, or other pleading~~, shall be served on the defendant by the sheriff, by either personal or domiciliary service, or in the case of a defendant originally served through the secretary of state, by service on the secretary of state.

C. Except as provided in Paragraph B of this Article, notice ~~Notice of the signing of a final default judgment against a defendant on whom citation was served personally, and who filed no exceptions or answer,~~ shall be mailed by the clerk of court to the defendant at the address where personal service was obtained or to the last known address of the defendant.

* * *

Comments – 2018

(a) Paragraph B has been amended to add "or other pleading" to clarify that the requirement of service of the notice of the signing of a default judgment by the sheriff applies only if the defendant was not served personally, or was served through the secretary of state, and has filed no exceptions, answer, or other pleading.

(b) Paragraph C has been amended to clarify that in all other cases, notice of the signing of a final default judgment shall be mailed to the defendant by the clerk of court.

(c) When a final default judgment is rendered as a discovery sanction under Article 1471(A)(3) as amended, the judgment will be rendered in a contested case. As a result, the provisions of Paragraph A of this Article will apply, and notice of the signing of a final default judgment rendered pursuant to Article 1471(A)(3) must be mailed by the clerk of court to each party or his counsel.

The Reporter then directed the Council's attention to Articles 853 and 966, beginning on page 6 of the materials. He explained that as presently drafted, Article 853 conflicts with Article 966(A)(4) in that Article 853 provides that a copy of a written instrument that is an exhibit to a pleading is a part thereof "for all purposes." However, Article 966(A)(4) provides the exclusive list of documents that can be submitted in connection with a motion for summary judgment and includes pleadings but not exhibits to pleadings that have not themselves been properly authenticated. As a result, the Committee proposed amending Article 853 to remove the "for all purposes" language and adding a Comment to both Article 853 and Article 966 explaining the interaction between these provisions. At this time, one Council member expressed his desire to draft a definition of the term "written instrument" either in the Civil Code or in the Code of Civil Procedure. It was then moved and seconded to adopt the proposed

change to Article 853 and the Comments to that provision and Article 966 as presented, and the motion passed with no objection. The adopted proposals read as follows:

Article 853. Caption of pleadings; adoption by reference; exhibits

Every pleading shall contain a caption setting forth the name of the court, the title and number of the action, and a designation of the pleading. The title of the action shall state the name of the first party on each side with an appropriate indication of other parties.

A statement in a pleading may be adopted by reference in a different part of the same pleading or in another pleading in the same court. A copy of any written instrument which that is an exhibit to a pleading is a part thereof ~~for all purposes~~.

Comments – 2018

The amendment to this Article eliminates the phrase “for all purposes” to resolve a conflict that previously existed between this provision and Article 966(A)(4), which provides the exclusive list of documents that may be filed in support of or in opposition to a motion for summary judgment. Under Article 966(A)(4), a copy of a written instrument that is an exhibit to a pleading may not be filed in connection with a motion for summary judgment unless the written instrument itself is properly authenticated. See Article 966, Comment (c) (2015); see also *Raborn v. Albea*, 221 So. 3d 104, 111 (La. App. 1 Cir. 2017).

* * *

Article 966. Motion for summary judgment; procedure

* * *

Comments – 2018

Under Subparagraph (A)(4) of this Article, which provides the exclusive list of documents that may be filed in support of or in opposition to a motion for summary judgment, a copy of a written instrument that is an exhibit to a pleading may not be filed in connection with a motion for summary judgment unless the written instrument itself is properly authenticated. See Comment (c) (2015); see also *Raborn v. Albea*, 221 So. 3d 104, 111 (La. App. 1 Cir. 2017). Accordingly, Article 853 has been amended to eliminate the phrase “for all purposes” because a written instrument that is an exhibit to a pleading but is not otherwise properly authenticated is not a part of the pleading for purposes of summary judgment procedure.

Next, the Council considered Article 592, on page 8 of the materials. Mr. Forrester explained that the Committee discussed Subsubparagraph (A)(3)(e) of this Article and determined that the provision should be amended in light of several appellate court decisions permitting motions for summary judgment as to one or more common issues to be resolved prior to certification of the class. He also noted that the Committee considered whether to repeal Article 592(A)(3)(e) altogether but ultimately decided to amend the provision as indicated on line 32 of the materials. It was then moved and seconded to adopt the proposed changes to Article 592(A)(3)(e) as presented, and the motion passed over 1 objection. The adopted proposal reads as follows:

Article 592. Certification procedure; notice; judgment; orders

A.(1) * * *

* * *

(3)(a) * * *

* * *

(e) No order contemplated in this Subparagraph shall be rendered after a judgment or partial judgment on the merits of all common issues has been rendered against the party ~~opposing~~ supporting the class and over such party's objection.

* * *

Comments – 2018

Subsubparagraph (A)(3)(e) of this Article has been amended to provide that when a judgment or partial judgment on the merits of all common issues has been rendered against the party supporting the certification of a class, the class action shall not be certified. The phrase “and over such party’s objection” has been deleted as unnecessary in light of this amendment. These amendments are intended to recognize a series of jurisprudential decisions permitting motions for summary judgment that are dispositive of common and determinative issues to be resolved prior to certification of the class action. *See, e.g., Cooper v. CVS Caremark Corporation*, 176 So. 3d 422 (La. App. 1 Cir. 2015); *Smith v. City of New Orleans*, 131 So. 3d 511 (La. App. 4 Cir. 2013); *Clark v. Shackelford Farms Partnership*, 880 So. 2d 225 (La. App. 2 Cir. 2004); *see also Wade v. Kirkland*, 118 F. 3d 667 (9 Cir. 1997).

The Reporter then directed the Council's attention to Article 855, on page 10 of the materials, and explained that the Committee proposed this change to resolve an inconsistency between this provision and Article 4061.1, which requires a natural tutor to allege that he qualifies to act of right as tutor when bringing certain actions on behalf of the minor child. A motion was made and seconded to adopt the proposed change to Article 855 as presented, and the motion passed with no objection. The adopted proposal reads as follows:

Article 855. Pleading special matters; capacity

Except as otherwise provided by law, it is not necessary to allege the capacity of a party to sue or be sued or the authority of a party to sue or be sued in a representative capacity or the legal existence of a legal entity or an organized association of persons made a party. Such procedural capacity shall be presumed, unless challenged by the dilatory exception.

Comments – 2018

This Article has been amended to recognize and address exceptions to the general rule that it is not necessary to allege the capacity or authority of a party to sue and be sued. One such exception can be found in Article 4061.1, which requires the natural tutor who files certain actions for damages on behalf of a minor child to allege in the petition that he qualifies to act of right as tutor. *See Article 4061.1(B).*

Next, Mr. Forrester asked the Council to consider Article 1155, on page 10 of the materials. He first explained that the change on line 21 of page 10 was proposed by the Committee to alleviate concerns with respect to what constitutes "reasonable notice" by requiring the filing of a contradictory motion to ensure that the other party is afforded an opportunity to object to the filing of a supplemental pleading. The Reporter then questioned whether similar language should be added to the provisions on amended pleadings, and he directed the Council's attention to pages 2 and 3 of the "Alternative Revisions" handout. One Council member answered this question in the negative, explaining that supplemental pleadings are only appropriate with respect to new causes of action or defenses, to which the Reporter responded that Article 1155 also includes "items of damage." Other Council members then discussed that as a practical matter, practitioners often file "amending and supplemental" pleadings such that perhaps the requirements should be the same for both types of filings. As a result, one Council member suggested that the "by leave of court or with the written consent of the adverse party" language from Articles 1151 and 1152 should be incorporated into Article 1155 to make these provisions consistent. Another Council member questioned whether the requirements of both a contradictory motion and reasonable notice and just terms were necessary.

At this time, one Council member questioned whether a contradictory hearing would be required in the event that the other party objects to the filing of a supplemental pleading and, if so, whether prescription would be interrupted. The Reporter suggested that perhaps the action, defense, or item of damage would relate back to the filing of the original pleading, but other Council members disagreed, noting that Article 1153 applies only to amended pleadings rather than also to supplemental pleadings. The Council then engaged in a great deal of discussion concerning the importance of the interruption of prescription as it relates to the filing of supplemental pleadings, with one Council member noting that because Article 1155 applies only with respect to causes of action, defenses, or items of damage that have become exigible since the filing of the original pleading, perhaps the issue of prescription is not as important. The Reporter then suggested that prescription should be interrupted as of the filing of the motion to file a supplemental pleading, but the Council ultimately agreed that the proposed changes to Article 1155 should be recommitted for further consideration by the Committee.

The Reporter then directed the Council's attention to Article 1918, on page 10 of the "Proposed Revisions" materials and on page 1 of the "Alternative Revisions" handout. A member of both the Committee and Council explained that courts of appeal in every circuit have held that if a judgment does not contain decretal language identifying the parties and the relief that was granted or denied, the judgment is not final and must be remanded to the district court. One Council member agreed that not being able to identify the parties from the face of a judgment is a problem, and another Council member questioned whether the language should be amended to require the parties to be named but the relief to be *specified*. The Committee and Council member responded to this inquiry by explaining that the language on page 1 of the handout was copied verbatim from a series of appellate court decisions. Another Council member then expressed concern with respect to the proposed second sentence of Article 1918, on lines 5 through 7 of page 1 of the handout, particularly in light of the fact that judgments recognizing the effects of a mortgage or the terms of a contract typically refer to those documents as opposed to reproducing them in full.

The Council then engaged in a great deal of discussion with respect to this issue, with some Council members expressing that this is the jurisprudential requirement and others distinguishing between judgments that recognize the effects of mortgages or contracts and those that seize property and therefore should contain a legal property description. Several other Council members expressed concern with respect to this second sentence and questioned whether the proposed changes to Article 1918 were necessary at all. One Council

member then suggested that perhaps this sentence could be revised to require the judgment to adequately describe the relief that is granted or denied, as opposed to providing that such relief shall be ascertainable without reference to any other document. A member of both the Committee and Council then provided the example of a judgment reversing attorney fees but giving effect to all other relief granted by the judgment as the types of judgments that are being rejected by courts of appeal. Another Council member suggested either removing the reference to "other documents" or simply deleting the proposed second sentence of Article 1918 altogether. Notwithstanding these suggestions, another Council member expressed concern with respect to the fact that these jurisprudential requirements concerning decretal language and prohibiting references to extrinsic documents have only very recently developed.

In light of these concerns, several suggestions were made: one to amend the language of the proposed second sentence of Article 1918, on lines 5 through 7 of page 1 of the handout, to require that the judgment fully and particularly describe the relief that is granted or denied; another to delete this sentence in its entirety; and a third to recommit Article 1918 for further consideration by the Committee. After further concerns were expressed with respect to whether "decretal language" improperly suggests that sacred words must be included in the judgment, it was moved and seconded to recommit Article 1918 for further consideration by the Committee, and the motion passed with no objection.

The Reporter then asked the Council to turn to Article 3952, on page 11 of the "Proposed Revisions" materials. Mr. Forrester explained that the Council had previously approved the replacement of terminology improperly referring to attorneys appointed to represent defendants pursuant to Article 5091 as "curators ad hoc." He then explained that the proposed change on line 25 of page 11 was purely technical in nature and was intended to make a similar terminology change in this provision. A motion was made and seconded to adopt the proposed change to Article 3952 as presented, and the motion passed with no objection. The adopted proposal reads as follows:

Article 3952. Rule to show cause and affidavit

The rule to show cause provided in Civil Code Article 102 shall allege proper service of the initial petition for divorce, that the requisite period of time, in accordance with Article 103.1, or more has elapsed since that service, and that the spouses have lived separate and apart continuously for the requisite period of time, in accordance with Article 103.1. The rule to show cause shall be verified by the affidavit of the mover and shall be served on the defendant, the defendant's attorney of record, or the duly appointed ~~curator~~ attorney for the defendant prior to the granting of the divorce, unless service is waived by the defendant.

Comments – 2018

This Article was amended to replace "curator" with "attorney" for purposes of consistency with Article 5091.

Next, Mr. Forrester directed the Council's attention to page 12 of the materials, and he explained that during the 2017 Regular Session, a resolution was drafted requesting the Law Institute to study the possibility of eliminating the concept of preliminary default in Louisiana. He explained that although the resolution ultimately did not pass, he wanted the Council to be aware of it, particularly in light of the fact that the preliminary default's prior function – precluding the filing of exceptions – was eliminated from Article 928 in 1997.

The Reporter then asked the Council to turn to page 23 of the materials and explained that a practitioner had contacted the Law Institute after a judge

had precluded him from filing a portion of a trial transcript in connection with a motion for summary judgment because trial transcripts are not specifically listed in Article 966(A)(4). He also explained that the Committee had considered whether to add self-authenticating documents to this list but ultimately decided against this course of action after reviewing Code of Evidence Article 902 and concluding that some of the documents listed in that provision – such as newspapers – were far too broad for use in this context. The Reporter then asked the Council for guidance as to whether, as a matter of policy, it agreed with the Committee's conclusion or would prefer that an amendment to Article 966(A)(4) be made to address at least some types of self-authenticating documents.

One Council member responded that some judges are not treating the list of documents provided in Article 966(A)(4) as exclusive, but are instead using those documents as guidance for the types of things that should be permitted to be filed with respect to motions for summary judgment, such as sworn statements taken by court reporters, which are akin to affidavits. Other Council members agreed with the Committee's hesitations over amending Article 966(A)(4) but noted that the list of documents provided should be illustrative rather than exhaustive. The Council continued to discuss this issue, with some members suggesting that perhaps certain documents contained in Code of Evidence Article 902 should be included in Article 966(A)(4), such as certified Louisiana public documents, authentic and acknowledged acts, and commercial paper. One Council member then questioned whether the list provided by Article 966(A)(4) was even necessary, to which a member of both the Committee and Council responded that the Summary Judgment Subcommittee amended this provision several years ago in response to concerns caused by judges allowing any and all attachments to be filed in connection with motions for summary judgment.

At this time, several suggestions were made with respect to the exclusion of self-authenticating documents from Article 966(A)(4), including adding language to permit the filing of "other similarly certified documents" or "such other documents as the court determines to be properly authenticated," removing the word "only," or adding other specific types of documents from Code of Evidence Article 902 to the list, such as certified Louisiana public documents, authentic and acknowledged acts, and commercial paper. Based on this discussion, the Council decided to recommit Article 966 for further consideration of these suggestions by the Committee.

Following this discussion, Mr. Forrester concluded his presentation, and the Friday session of the December 2017 Council meeting was adjourned.

LOUISIANA STATE LAW INSTITUTE

THE MEETING OF THE COUNCIL

December 15-16, 2017

Saturday, December 16, 2017

Persons Present:

Adams, Marguerite (Peggy) L.	Keller, Angelic Sutherland
Bergstedt, Thomas	Kostelka, Robert "Bob" W.
Braun, Jessica	Lovett, John
Breard, L. Kent	McIntyre, Edwin R., Jr.
Carroll, Andrea	Miller, Gregory A.
Crawford, William E.	Morvant, Camille A.
Cromwell, L. David	Norman, Rick J.
Davis, Paula C.	Pittman, Richard
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Hogan, Lila T.	Waller, Mallory
Holdridge, Guy	Ziober, John David
Jewell, John Wayne	

President John David Ziober opened the Saturday session of the December 2017 Council meeting at 9:00 AM on December 16, 2017 at the Louisiana Supreme Court in New Orleans. During this session, Reporter, Kären Hallstrom represented the Children's Code Committee and presented materials regarding the placement of custody youth, anti-shackling, and a response to House Concurrent Resolution No. 79 of the 2016 Regular Session regarding adoption incentives.

Children's Code Committee

Mrs. Hallstrom started her presentation with the material relative to House Concurrent Resolution No. 79 of the 2016 Regular Session. This resolution requests the Law Institute to make recommendations relative to establishing consistent and specific procedures and law for all types of adoptions and for addressing the abuse of incentives in the adoption process. Regarding the consistency of procedures for all types of adoptions, the Reporter noted that the Committee has been reviewing all the articles and will present a report to the Council at a later date. The material before the Council today addresses the abuse of incentives in adoptions. The Reporter recapped the research of other states' laws, the parallel with surrogacy restrictions, and the Committee discussions. The Reporter noted that the unique relationship between the birth mother and the prospective adoptive parent must focus on the health of the mother and the child and not be a means for extortion by either party. Therefore,

limiting allowable expenses, clarifying criminal penalties, and requiring payments through the department, agency, or attorney are necessary.

Mrs. Hallstrom turned the Council's attention to the changes proposed in R.S. 14:286, the criminal statute regarding the sale of minor children. The Committee is proposing that authorized payments must be made through the Department of Children and Family Services, a licensed adoption agency, or an adoption attorney. The intent is to eliminate direct payments to a birth mother to end fraudulent behavior. However, the Council was concerned with the drafting of existing law and proposed Subsection C. The Council requested that the Committee redraft Subsections A through C to clarify the elements of the crime. Regarding Subsection D, the proposal mimics surrogacy law which only allows payment of actual expenses. The Committee was concerned that actual administrative expenses or actual attorney fees could be places where prohibited payments could be hidden, therefore the qualifier "reasonable" is retained. The Council thereafter adopted Subsection D.

The Reporter introduced Children's Code Article 1131 and stated that the proposal gives the court a chance to review fees and charges at an earlier stage in the adoption proceeding as a means of catching prohibited behavior. In existing law, the court does not review expenses until the petition for adoption is filed, but at this late stage, the offending payments have already been made. With little discussion, the Council adopted Article 1131.

To further curb abuses, Article 1200 mirrors the changes in R.S. 14:286 by also requiring the payment of allowable expenses to be through the department, agency, or attorney only and limiting payment to actual instead of reasonable expenses. Paragraph A and Paragraphs (B)(1) through (6) were adopted as presented. The Reporter explained that Article 1200(B)(7) is the main crux of the proposal to eliminate fraud in adoptions and this proposal parallels surrogacy restrictions in existing law. The payment of living expenses of the birth mother is intended to meet her needs, not her wants. It was explained that this proposal is an attempt to bring our law into line with other states' restrictions on living expenses with the goal of limiting luxury apartment rentals and iPhones when basic needs may be met with government assisted housing and go phones. The Council expressed concern over the term "adequate standard of living" but the Reporter explained that specific types of expense are listed and includes those intended to keep the unborn child safe and healthy. It was further explained that although baby selling is illegal in Louisiana, Louisiana is known for its liberal payments, sometimes as much as \$40,000, classified as living expenses. The exclusions on living expenses and the idea of a cap were borrowed from other states as well. The highest caps in other states range from \$300-\$5,000, but the Committee is proposing \$7,500 due to high rent rates in Louisiana. Some Council members felt that the cap was low, but further discussion revealed that often government assistance curbs some actual living expenses of the birth mother, and Paragraph (B)(9) provides the parties with a mechanism to seek court approval for additional reasonable and necessary expenses. After much discussion and concern over the reading of Paragraphs (B)(7) through (9), the Council recommitted those provisions to the Committee.

Proposed Paragraph C of Article 1200 addresses the issues of exploitation and monetary gain raised in House Concurrent Resolution No. 79. The Reporter explained that if a birth mother is not pregnant or if she is accepting money from multiple prospective adoptive parents, reimbursement of expenses paid should be an allowable remedy. The Council noted that the intent is not to limit any other causes of action the parties may bring such as civil damages and approved the Paragraph as written. They also approved the technical changes in Paragraphs E and F of Article 1200.

The final proposed changes regarding abuse of adoption incentives are in Article 1201. The Council questioned whether actual receipts are needed or just evidence of expenses such as copies of bills. They also discussed the lack of coordination and centralization of the collected data into a usable form, but



Paragraphs A and (C)(1) were adopted. In Paragraph (C)(2) the Committee proposed adding language to specifically notify persons who execute disclosure affidavits of the criminal penalties for violations of R.S. 14:286. The Reporter agreed with a Council member that the new language is misplaced and will be moved to the end of the sentence for clarity. Although the proposal was adopted as changed, the Council also asked the Committee to explore revising the penalty so that it is graduated relative to the amount of overpayment and adding a Comment cross referencing the criminal statute for fraud.

The Reporter explained that the changes to Articles 1223 and 1223.1 are the exact same as those previously approved for agency adoptions and the parallel changes adopted and recommitted by the Council will be made and reconsidered in these articles. The Council approved.

Next, the Reporter presented materials on anti-shackling of youth during court proceedings. She read the American Bar Association's position that all states "should adopt a presumption against the use of restraints on juveniles in court and to permit a court to allow such use only after providing the juvenile with an in person opportunity to be heard and finding that the restraints are the least restrictive means necessary to prevent flight or harm to the juvenile or others." The Reporter also noted that the Committee conducted an informal survey of the jurisdictions throughout our state and found that a few still shackle every child who comes to court. Therefore, the proposal before the Council amends the Children's Code and switches the presumption from shackling everyone to only shackling if the court determines it is necessary. The proposal will require the removal of any shackling upon entering the courtroom and permitting shackling to be reapplied upon exiting the courtroom, unless the court issues written findings of facts showing necessity. The Council discussed the fact that courthouses are large and there is the potential for interaction with the general public. The concern also included the fact that discretion is being taken away from the sheriff, who provides security in the courthouse, and the timing of the court determination. The Council also did not understand the meaning of the term "summary proceeding" as it relates to juvenile court and suggested that if the intent is to have an *ex parte* hearing, that needs to be explicit because this is a quasi-criminal proceeding. The Council seemed to agree with the intent of the proposal, but recommitted it to the Committee for further clarification.

The final proposal presented by the Reporter is in response to the issue of placement of custody youth brought to the Committee by the Office of Juvenile Justice. The proposal narrowly focuses on a single clarification needed to present Children's Code Article 911 due to some outlying court decisions. The proposal clarifies that decisions about the placement of a child, not custody, do not have to be approved by the court. The court and the district attorney are not involved unless the child will be released from custody. A modification of the disposition is not necessary for the department to change the placement of a child from a secure to nonsecure facility. The Council approved the proposal with little discussion.

Having completed the presentation of the material from the Children's Code Committee, the Council adjourned.

 Mallory Waller	<u>5/4/2018</u> Date
 Jessica G. Braun	<u>5-4-18</u> Date

12.15.17

**MEMBERSHIP AND NOMINATING COMMITTEE REPORT
December 15, 2017**

This committee met this date and respectfully makes the following nominations of officers and members to fill vacancies on the Council of the Louisiana State Law Institute for 2018 as follows:

OFFICERS OF THE INSTITUTE-2018

As Chair:

John David Ziober; 320 Somerulos Street, Baton Rouge, Louisiana, 70802.

Chair Emeriti:

James C. Crigler, Jr.; 1808 Roselawn Avenue, Monroe, Louisiana, 71201.

J. David Garrett; 526 Cumberland Drive, Shreveport, Louisiana, 71106.

James A. Gray, II; 1010 Common Street, Suite 2560, New Orleans, Louisiana, 70112-2406.

Charles S. Weems, III; 2001 MacArthur Drive, P.O. Box 6118, Alexandria, Louisiana, 71307-6118.

Cordell H. Haymon; 725 Main Street, Baton Rouge, Louisiana, 70802-5594.

Marilyn C. Maloney; First City Tower, 1001 Fannin, Suite 1800, Houston, Texas, 77002.

Thomas M. Bergstedt; P.O. Drawer 3004, Lake Charles, Louisiana, 70602.

Emmett C. Sole; One Lakeside Plaza, P.O. Box 2900, Lake Charles, Louisiana, 70602-2900.

Max Nathan, Jr.; Place St. Charles, 201 St. Charles Avenue, Suite 3815, New Orleans, Louisiana, 70170.

Robert L. Curry, III; P.O. Drawer 4768, Monroe, Louisiana, 71211.

As President:

Susan G. Talley; 546 Carondelet Street, New Orleans, Louisiana, 70130.

As Vice-Presidents:

Rick J. Norman; 145 East Street, Lake Charles, Louisiana, 70601.

L. David Cromwell; P.O. Box 1786, Shreveport, Louisiana, 71166-1786.

Thomas M. Hayes, III; P.O. Box 8032, Monroe, Louisiana, 71211-8032.

Leo Hamilton; One American Place, 301 Main Street, Suite 2300, Baton Rouge, Louisiana, 70825.

As Director:

William E. Crawford; Room W127, University Station, Baton Rouge, Louisiana, 70803-1016.

As Assistant Director:

Guy Holdridge; 1600 N. Third Street, Baton Rouge, Louisiana, 70802.

As Secretary:

Thomas C. Galligan, Jr.; Paul M. Hebert Law Center, Room 350, University Station, Baton Rouge, Louisiana, 70803.

As Assistant Secretary:

Robert "Bob" W. Kostelka; 1216 Stubbs Avenue, Monroe, Louisiana, 71201.

As Treasurer:

Joseph W. Mengis; P.O. Drawer 83260, Baton Rouge, Louisiana, 70884.

As Assistant Treasurer:

Glenn Morris; Paul M. Hebert Law Center, Room 348, University Station, Baton Rouge, Louisiana, 70803.

SENIOR OFFICERS:

Dorrell Brister; 2001 MacArthur Drive, P.O. Box 6118, Alexandria, Louisiana, 71307-6118.

William R. Forrester; 1442 Nashville Avenue, New Orleans, Louisiana, 70115.

EXECUTIVE COMMITTEE:

For one-year terms, expiring December 31, 2018

Robert P. Thibeaux; Energy Centre, 1100 Poydras Street, Suite 3100, New Orleans, Louisiana, 70163.

J. Randall Trahan; Paul M. Hebert Law Center, Room 338, University Station, Baton Rouge, Louisiana, 70803.

Gregory A. Miller; P.O. Box 190, Norco, Louisiana, 70079.

PRACTICING ATTORNEYS ELECTED AS MEMBERS:

For four-year terms expiring, December 31, 2021

L. Kent Breard; 1503 North 19th Street, Monroe, Louisiana, 71201.

Mary Hester; Chase Tower South, 451 Florida Street, Floor 8, Baton Rouge, Louisiana, 70801.

Kay C. Medlin; Louisiana Tower, 401 Edwards Street, Suite 1000, Shreveport, Louisiana, 71101-5529.

Robert P. Thibeaux; Energy Centre, 1100 Poydras Street, Suite 3100, New Orleans, Louisiana, 70163.

J. Michael Veron; 721 Kirby Street, Lake Charles, Louisiana, 70601.

PRACTICING ATTORNEY ELECTED AS MEMBER:

For three-year term expiring, December 31, 2020

Donald W. Price; 617 N. 3rd Street, Baton Rouge, Louisiana, 70802.

REPRESENTATIVE OF THE YOUNG LAWYERS SECTION:
For two-year term expiring December 31, 2019

Megan S. Petterson, Simon Peragine Smith & Refearn; 1100 Poydras Street, 30th Floor, New Orleans, Louisiana, 70163.

OBSERVERS OF THE YOUNG LAWYERS SECTION:
For one-year terms expiring December 31, 2018

David P. Hamm, Jr.; 333 Texas Street, Suite 450, Shreveport, Louisiana, 71101.

Allyson Mills; 201 St. Charles Avenue, Suite 4600, New Orleans, Louisiana, 70170-4600.

REPRESENTATIVE, PAUL M. HEBERT LAW CENTER
For four-year terms expiring, December 31, 2021

Andrea B. Carroll; Paul M. Hebert Law Center, Room 450, University Station, Baton Rouge, Louisiana, 70803.

J. Randall Trahan; Paul M. Hebert Law Center, Room 338, University Station, Baton Rouge, Louisiana, 70803.

REPRESENTATIVE, TULANE UNIVERSITY SCHOOL OF LAW
For four-year term expiring, December 31, 2021

Ronald J. Scalise, Jr.; Tulane University School of Law, Weinmann Hall, 6329 Freret Street, New Orleans, Louisiana, 70118.

REPRESENTATIVE, LOYOLA UNIVERSITY SCHOOL OF LAW
For four-year term expiring, December 31, 2021

Dian Tooley-Knoblett; Loyola University School of Law, 7214 St. Charles Avenue, New Orleans, Louisiana, 70118.

**THREE HONOR GRADUATES OF EACH LAW SCHOOL NOMINATED FOR
JUNIOR MEMBERSHIP IN THE INSTITUTE:**

For one-year terms, expiring December 31, 2018

PAUL M. HEBERT LAW CENTER

Steven E. Cheatham; 100 North Street, Suite 800, Baton Rouge, Louisiana, 70802.

Cody "C.J." Miller; 1301 Camellia Boulevard, Suite 400, Lafayette, Louisiana, 70508.

Mackenzie C. Schott; 335 Lafayette Street, Mandeville, Louisiana, 70448.

LOYOLA UNIVERSITY SCHOOL OF LAW

1. _____
2. _____
3. _____

SOUTHERN UNIVERSITY LAW CENTER

Crystal Etue; 3701 East Meadow Court, Zachary, Louisiana, 70791.

Erin Hammons; 4940 Main Highway, St. Martinville, Louisiana, 70582.

Briton Myer; 6617 Narcissus Drive, Greenwell Springs, Louisiana, 70734.

TULANE UNIVERSITY SCHOOL OF LAW

Andrew M. Cox; 906 4th Street, New Orleans, Louisiana, 70130.

Virginia S. (Sheridan) DuPont; 801 Henry Clay Avenue, Apartment 201, New Orleans, Louisiana, 70118.

Catherine P. Thibodeaux; 909 Poydras Street, 24th Floor, New Orleans, Louisiana, 70112.

APPOINTMENTS BY OPERATION OF LAW

ANY LOUISIANA MEMBER OF THE BOARD OF GOVERNORS OF THE NATIONAL BAR ASSOCIATION

For one-year term, expiring August 3, 2018

Christopher B. Hebert; 4552 Winnebago Street, Baton Rouge, Louisiana, 70805.

A LOUISIANA MEMBER OF THE NATIONAL BAR ASSOCIATION TO BE APPOINTED BY THE PRESIDENT OF THE ORGANIZATION

For one-year, expiring August 3, 2018

Arlene D. Knighten; Louisiana Department of Insurance, P.O. Box 9412, Baton Rouge, Louisiana, 70804.

THE PRESIDENT OF THE STATE CHAPTER OF THE LOUIS A. MARTINET SOCIETY OR HIS DESIGNEE

For one-year term, expiring December 31, 2018

Quintillis Kenyatta Lawrence; 300 North Boulevard, Suite 2201, Baton Rouge, Louisiana, 70801.

THE STATE PUBLIC DEFENDER OR HIS DESIGNEE

For one-year term, expiring December 31, 2018

John E. DiGiulio; 8075 Jefferson Highway, Baton Rouge, Louisiana, 70809.

MEMBER, HOUSE OF DELEGATES, ABA

For two-year terms, expiring August 2019

Richard K. Leefe; 3900 North Causeway Boulevard, Suite 1470, Metairie, Louisiana, 70002-7253

Barry H. Grodsky; 1100 Poydras Street, Suite 2100, New Orleans, Louisiana, 70163.

MEMBER, HOUSE OF DELEGATES, ABA

For three-year term, expiring August 2020

David F. Bienvenu; 1100 Poydras Street, Suite 3000, New Orleans, Louisiana, 70163-3000.

Respectfully submitted,

L. David Cromwell
Kevin C. Curry
Leo C. Hamilton
Thomas M. Hayes, III
Emmett C. Sole
Monica T. Surprenant
Susan G. Talley
John David Ziober

MEMBERSHIP AND NOMINATING COMMITTEE

By: Emmett C. Sole

Emmett C. Sole, Chair

December 15, 2017
