

LOUISIANA STATE LAW INSTITUTE

THE MEETING OF THE COUNCIL

February 2-3, 2018

Friday, February 2, 2018

Persons Present:

Amacker, Dawn
Boudreaux, Bernard E., Jr.
Braun, Jessica
Breard, L. Kent
Brister, Dorrell J.
Burris, William J.
Carroll, Andrea
Castle, Marilyn
Crawford, William E.
Crigler, James C., Jr.
Davidson, James J., III
Dawkins, Robert C.
Dimos, Jimmy N.
Ellison, David M., Jr.
Garofalo, Raymond E. Jr.
Gasaway, Grace B.
Gregorie, Isaac M. "Mack"
Hamilton, Leo C.
Hester, Mary C.
Hogan, Lila T.
Holdridge, Guy
Knighten, Arlene D.
Kostelka, Robert "Bob" W.
Lavergne, Luke

Mengis, Joseph W.
Miller, Cody "C.J."
Mills, Allison
Morris, Glenn G.
Norman, Rick J.
Odinet, Christopher
Price, Donald W.
Riviere, Christopher H.
Scalise, Ronald J., Jr.
Sole, Emmett C.
St. Amant, Chimene
Talley, Susan G.
Tate, George J.
Thibeaux, Robert P.
Trahan, J. Randall
Tranchina, Frank
Tooley-Knoblett, Dian
Varnado, Sandi S.
Vernon, J. Michael
Waller, Mallory Chatelain
Weems, Charles S., III
Wilson, Evelyn
Ziober, John David

President Susan Talley opened the Friday session of the February 2018 Council meeting at 10:00 AM on February 2, 2018 at the Lod Cook Alumni Center in Baton Rouge and called on Professor Andrea B. Carroll, representing the Marriage-Persons Committee, to present on divorce grounds and spousal support, House Concurrent Resolution No. 10 of the 2017 Regular Session regarding paternity and birth certificates, and House Concurrent Resolution No. 79 of the 2017 Regular Session regarding domestic abuse and the assessment of costs.

Marriage-Persons Committee

Professor Carroll asked the Council to turn their attention to the material regarding the grounds for divorce and the awarding of spousal support. The Reporter explained that under their continuous revision authority and related to House Concurrent Resolution No. 79, the Committee is suggesting the proposals before the Council today. Civil Code Article 103 provides fault-based grounds for divorce and particularly Subparagraphs (4) and (5) are related to abuse. These provisions were enacted in 2014, but problems have emerged with their application which warrant clean up. The phrase "during the marriage" in Article 103(4) was intended to provide retroactive application of the new law to abuse which occurred prior to its enactment. However, this language does not accomplish that goal. The Council questioned the application of reconciliation in Civil Code Article 104 for abuse which occurs prior to the marriage and agrees that the principal applies. However, the determination of whether the parties have reconciled is fact based and is flexible enough for the courts to find otherwise in domestic violence situations. The Reporter quickly explained the technical change to Article 103(5) and the proposal was approved as presented.

Turning to the proposed changes to Article 112, the Reporter stated that Paragraph B seems to make an award of final support mandatory when a spouse has not been at fault and the court determines that spouse is a victim of domestic abuse, but it is oddly placed between Paragraph A, which requires proof of need and ability to pay, and Paragraph C, which lists the factors the court shall consider to determine the amount and duration of an award. The Committee wondered if there would be an award if need was not shown, or if the victim of abuse committed another type of fault, or could the court award support in the amount of one dollar to satisfy the mandatory nature of the language. In debating these issues, the Committee decided to recommend a policy which mimics caselaw in the adultery context. Proposed Article 112(C) provides a presumption that if a spouse is granted a divorce based on fault grounds or if the court determines that the petitioning spouse is a victim of abuse, that spouse is presumed to be entitled to an award of final periodic support. The Reporter explained that it is important to include an allowance for the court to determine if a spouse is a victim and therefore entitled to the presumption because a spouse may choose not to file for a fault-based divorce but may still be a victim to which the presumption should apply.

The Council aided the Reporter in clarifying the language and adopted the following:

Art. 112. Determination of final periodic support

C. When a spouse is awarded a judgment of divorce pursuant to Article 103(2), (3), (4) or (5), or when the court determines that a party or a child of one of the spouses was the victim of domestic abuse committed during the marriage by the other party, that spouse is presumed to be entitled to final periodic support.

Moving to proposed Article 112(D), Professor Carroll explained that these concepts exist in present law and were merely relocated. A Council member explained that it is important to maintain the ability of the court to award support in a lump sum for the instances where spouses may not have a monthly income which warrants an award of support, but they do have community property assets. The Council questioned the punitive nature of a lump sum award and whether it could be capped or modified. The Reporter explained that ability to pay remains a criteria and offers protection for obligors. The Reporter also informed the Council that the Committee, at the direction of the House Concurrent Resolution, is working on a consistent definition for domestic abuse and domestic violence, but that work has not yet been completed. For now, the Committee recommends using the existing terminology in the Post-Separation Family Violence Relief Act and the Domestic Abuse Assistance Act. With a motion and second, the Council adopted this Paragraph and the Comment.

The Reporter informed the Council that due to the award of a divorce based on a consent decree in Article 103(5), there are ramifications on awards of support which have led to gamesmanship. The changes to Articles 113, 114, and 115 are designed to eliminate those games. In present law, to be awarded interim and final support for the longest period of time a spouse must request interim support early in the divorce proceeding but wait until the last minute to request final support so that an award of final support does not cut off an award of interim support. The Committee is recommending that all interim awards of support be for a maximum period of six months with a possible extension for good cause shown. With little discussion, the Council agreed with the Committee and adopted the proposal.

The Reporter explained that Articles 114 and 115 need clarification to ensure they are properly applied to both interim and final support awards. The Council questioned whether interim support could be terminated because it is not based on fault and the Reporter answered that if the requirement of need is no

longer met, the obligation of support is extinguished, and the award may be modified. Thereafter Articles 114 and 115 were approved. The Reporter noted that domestic violence advocates asked the Committee to recommend deletion of Article 118 and the Committee agreed to do so and added a Comment to Article 103 reiterating that the failure to seek a fault-based divorce does not affect the rights of a party to seek other remedies provided by law. The Council agreed.

The next set of materials from the Marriage-Persons Committee are in response to House Concurrent Resolution No. 10 of the 2017 Regular Session which directed the Law Institute to study the laws governing paternity and birth certificates to establish procedures to protect husbands and ex-husbands who are not the biological fathers of their wives' children. The Reporter informed the Council that presumptions of paternity are creating societal problems in the law and numerous legislators have reached out to us to create a less costly solution than disavowal. She also admitted that this draft does not solve all the problems in the Code related to this topic and the Marriage-Persons Committee will continue its work and provide more comprehensive proposals to the Council in the future.

Turning to the materials, the Reporter noted that prior to the birth certificates revision recommended by the Law Institute in 2016, Louisiana law allowed the surname of a child to be changed if the husband of the mother was not the father of the child and if the parties submitted an affidavit to the state registrar. However, this was repealed in 2016 because it is not consistent with the laws of filiation. In light of House Concurrent Resolution No. 10, the Committee is again recommending the filing of an affidavit, but also amending the laws on filiation. In reviewing R.S. 40:34.5.1, the Council questioned the best interest of the child, the frequency of this occurrence, and how this is contradictory to many marriage obligations in the Civil Code. Next, the discussion turned to why the proposal requires the husband or former husband and the mother to live separate and apart without reconciliation for 300 days prior to the birth of the child. The Reporter explained that that language is borrowed from Civil Code Article 185 and the Committee wanted any exception to the presumption to be very narrow because of the duty of fidelity owed between married persons. The Council debated the deletion of the 300-day requirement because the existing disavowal action acknowledges adultery and because such a narrow application will lead to lying and more absolute nullities. The Council adopted the following:

§34.5.1. Three-party acknowledgment of paternity; effect

Notwithstanding the provisions of R.S. 40:34.5(A) and 34.2(2)(a) and (c), the husband or former husband presumed to be the father of the child, the mother, and the biological father of the child may execute a three-party acknowledgment of paternity on the form provided by the Louisiana Department of Health. Upon receipt of that form the state registrar shall:

(1) For the father of the child, record the full name of the biological father.

(2) For the surname of the child, record the maiden name or surname of the mother, at her discretion. If the biological father and the mother agree, record as the surname of the child the maiden name or surname of the mother, the surname of the biological father, or a combination of the surname of the biological father and the maiden name or surname of the mother.

The next statute, R.S. 40:34.5.2, contains the mechanics to implement the three-party acknowledgment. After again deleting the 300-day requirement, the Council quickly adopted the proposal and moved to proposed Civil Code Article 187.1. This proposal changes the substantive law of filiation to authorize the execution of a three-party acknowledgment which changes the presumption of fatherhood. The Council inquired as to the timing of the execution. The

Reporter noted that most of the filiation articles contain a time limitation, but the Committee is not proposing one here because the vast majority of these will occur upon the birth of the child without a disruption of a formed relationship between a child and parent. However, the Council voted to include a peremptive period and then discussed an appropriate length. There were arguments for a short time period related to the birth and the execution of a birth certificate and there were arguments for a longer period to capture the circumstances in early childhood where a birth certificate is needed. Finally, the following was approved:

Art. 187.1. Three-party acknowledgment; alternative to disavowal; time period

The husband or former husband presumed to be the father of the child, the mother, and the biological father of the child may execute a three-party acknowledgment in authentic form certifying that the husband or former husband is not the father of the child and that the biological father is the father of the child. In such case, the husband or former husband is not presumed to be the father of the child. The biological father who has acknowledged the child by three-party acknowledgment is presumed to be the father of the child.

This acknowledgment shall be executed no later than ten years from the day of the birth of the child.

In all cases, this acknowledgment shall be executed no later than one year from the day of the death of the child.

These time periods are peremptive.

Professor Carroll explained that the remainder of the proposals are necessary clean up to the birth certificate statutes considering the substantive changes to filiation approved by the Council. With no debate the proposed changes to R.S. 40:34.2, 34.5, 46.4, and 46.9 were approved.

The final topic for presentation today by the Marriage Persons Committee is in response to House Concurrent Resolution No. 79 of the 2017 Regular Session which directed the Law Institute to address the need for consistency in the assessment of costs and attorney fees against an abuser in the Domestic Abuse Assistance Act, the Post-Separation Family Violence Relief Act, and in an action for divorce.

The Reporter asked the Council to turn to the proposed changes to R.S. 9:367 in the Post-Separation Family Violence Relief Act and to the changes to R.S. 46:2136.1 and Children's Code Article 1570.1 in the Domestic Abuse Assistance Act. The Committee simply recommends making the language in all three laws consistent and the Council approved.

Moving to Civil Code Article 2315.8, Professor Carroll explained that the award of exemplary damages in Paragraph A is clearly punitive. Although the placement of Paragraph B should limit its application to tort actions alleging domestic abuse, it is possible it could be interpreted to be more encompassing and apply to other actions alleging domestic abuse. Therefore, the Committee is proposing a clarification on this point. With a slight modification, the Council adopted the following:

Art. 2315.8. Liability for damages caused by domestic abuse

B. Upon motion of the defendant or upon its own motion, if the court determines that any action ~~alleging domestic abuse seeking damages under this Article~~ is frivolous or fraudulent, the court shall award costs of court, reasonable attorney fees, and any other related costs to the defendant and any other sanctions and relief requested pursuant to Code of Civil Procedure Article 863.

Civil Code Article 2326.1 was amended to allow the awarding of attorney fees in domestic violence cases. However, it is misplaced because this article

regards the classification of obligations as separate or community in the matrimonial context. Therefore, the Committee proposes retaining the intention of Paragraph B as to the nature of the obligation but placing the authorization for the award of attorney fees and costs in Title 9 as proposed R.S. 9:314. The Council instructed the Reporter to add a Comment referencing the incidental actions in Civil Code Article 105 and adopted the following:

Art. 2362.1. Obligation incurred in an action for divorce

* * *

~~B. Notwithstanding the provisions of Paragraph A of this Article, the court may assess~~ The obligation for attorney fees and costs awarded in an action for divorce granted pursuant to Article 103(4) or (5) or when the court determines that a party or a child of one of the spouses was the victim of domestic abuse committed during the marriage by the other party, and in incidental actions thereafter, against the perpetrator of abuse, ~~which shall be a separate obligation of the perpetrator.~~

Revision Comments—2018

See R.S. 9:314, authorizing the award of attorney fees and costs in domestic abuse cases.

§314. Attorney fees and court costs in domestic abuse cases

The court may assess all court costs, attorney fees, costs of enforcement and modification proceedings, costs of appeal, evaluation fees, and expert witness fees in an action for divorce granted pursuant to Civil Code Article 103(4) or (5), or when the court determines that a party or a child of one of the spouses to a divorce was the victim of domestic abuse committed during the marriage by the other party, and in incidental actions.

Revision Comments-2018

(a) This provision is consistent with the Post-Separation Family Violence Relief Act (see R.S. 9:367) and the Domestic Abuse Assistance Act (see R.S. 46:2136.1 and Ch.C. Art. 1570.1).

(b) See Civil Code Article 105, detailing incidental actions in family law matters.

Unpaid Wages Committee

Following the Marriage-Persons presentation, President Susan Talley introduced Reporter, Professor Luz M. Molina, representing the Unpaid Wages Committee to present on the Louisiana Wage Payment Act in accordance with House Concurrent Resolution No.76 of the 2012 Regular Session regarding a procedure for workers to quickly recover wages owed without great expense. After approving several technical changes to provisions already adopted by the Council at previous meetings, the Reporter drew everyone's attention to proposed R.S. 23:632(B)(2).

Although this proposal was previously adopted by the Council, the Reporter again explained that the purpose of this language is to provide a safe harbor for employers who have classified employees in good faith. If during the course of litigation, a court determines that the employee was improperly classified, the Committee is recommending that penalty wages not be awarded. The Council discussed the *Hickman* case and whether it would be overruled by the proposed definition of employee in these materials, but the Council ultimately agreed that the independent contractor test is a minimum standard in the law and the *Hickman* case and the following jurisprudence is an expansion of those factors. However, they decided not to add a Comment because that would be unusual in Title 23. The Reporter mentioned that this language is intended to give a nod to employers who seek counsel prior to classification and the Council adopted the following:

(2) If the good faith defense is based on the issue of whether a person should be properly classified as an employee but is unsuccessful, the court shall consider evidence of the employer's efforts to determine the proper classification so as to determine good faith or lack thereof.

The Reporter next asked the Council for a policy vote regarding the authority of a court to issue an award for contractual damages in a summary proceeding for unpaid wages after the court determines that the employee is an independent contractor. The Council discussed the procedure to amend from a summary to ordinary proceeding and the case law that allows the case to proceed summarily until a party objects. Thereafter the Council voted in favor of the intent of the proposal for the parties to proceed in a summary fashion.

The first new proposal before the Council today is R.S. 23:632(C). This is an attorney fee provision in existing law. The Council wondered about the meaning of "well-founded", but the Reporter assured them there are many cases interpreting this language and attorney fees are rarely awarded. Thereafter, this proposal was adopted. R.S. 23:632(D) addresses the joint employment relationship which happens frequently in the construction industry. The proposal provides that joint employers will be solidarily liable. The Council approved.

The next Subsection for consideration is R.S. 23:632(E). The Reporter informed the Council of a huge problem with collectability of wage claim judgments. The Committee looked to existing areas of law for possible solutions and borrowed the suspension of license idea from child support and existing practice by the Workforce Commission in the Fair Play Act to motivate employers to pay. The Council had many questions concerning the procedure and effect such a suspension of a business license may have on an employer. They discussed appeal rights, due process, writ of fieri facias, lack of personal liability, piercing the corporate veil, and the lack of state involvement to enforce judgments through an administrative process. Professor Molina agreed to take this issue back to the Committee for further review.

The Council next addressed R.S. 23:633 regarding the forfeiture of wages. The Committee retained the intent of existing law and cleaned up the language. The Council suggested changes for clarity and adopted the following:

§633. Unlawful forfeiture of wages

A. Any agreement or policy of the employer that requires an employee to forfeit wages is unenforceable.

The Council also suggested eliminating the double negative in proposed Subsections C, D, and E and adopted the following:

C. It is not a violation of this Section for an employer to recover damages when an employee willfully or negligently damages or breaks the property of the employer or property for which the employer is responsible. In all such cases, the employer may recover actual damages from the employee's wages only if it has previously furnished the employee with a written policy that states that it may deduct such sums from the employee's wages.

D. It is not a violation of this Section for an employer to recover amounts advanced to or on behalf of an employee and that the employee is contractually obligated to pay the employer, provided the contractual obligation is in writing and clearly states the right of the employer to deduct such amounts from the employee's wages.

E. It is not a violation of this Section for an employer to recover from the employee's wages damages suffered when an

employee is convicted of or has pled guilty to the crime of theft of employer property.

Moving to the final few statutes, the Council suggested a change for gender neutrality in R.S. 23:634 and quickly adopted that proposal and R.S. 23:635 and the repeal of R.S. 23:636.

With the agenda complete, the Council adjourned for the day.

LOUISIANA STATE LAW INSTITUTE
THE MEETING OF THE COUNCIL

February 2-3, 2018

Saturday, February 3, 2018

Persons Present:

Adams, E. Pete
Braun, Jessica
Breard, L. Kent
Brister, Dorrell J.
Crawford, William E.
Crigler, James C.
Dawkins, Robert G.
Dimos, Jimmy N.
Hallstrom, Kären
Hamilton, Leo C.
Hogan, Lila T.
Johnson, Pamela Taylor
Knighten, Arlene D.
Kostelka, Robert "Bob" W.
Lavergne, Luke
McGough, Lucy
Morris, Glenn G.
Norman, Rick J.

Pittman, Richard
Price, Donald W.
Richardson, Sally
Scalise, Ronald J., Jr.
Sole, Emmett C.
Sterling, Stephanie
Talley, Susan G.
Tate, George J.
Thibeaux, Robert P.
Thibodeaux, Catherine
Trahan, J. Randall
Veron, J. Michael
Waller, Mallory Chatelain
Wilson, Evelyn
Ziober, Emily
Ziober, John David

President Susan Talley opened the Saturday session of the February 2018 Council meeting at 9:00 AM on February 3, 2018 at the Lod Cook Alumni Center in Baton Rouge and called on Reporter Kären Hallstrom representing the Children's Code Committee to present materials regarding the use of restraints in juvenile proceedings, House Concurrent Resolution No. 79 of the 2016 Regular Session regarding adoption, and the Indian Child Welfare Act.

Children's Code Committee

Ms. Hallstrom started her presentation with the use of restraints in juvenile court proceedings. She reminded the Council that there are no existing laws on this topic, so the Committee recommends adding a rule, an exception, and the procedure to foster consistency throughout the state. The Reporter noted that based on the Council discussion at the January meeting, the Committee reworked the proposal to clarify the procedure for seeking the use of restraints and for the opportunity to be heard.

The Council noted that Children's Code Article 408(B) is limited to delinquency proceedings and adopted it as proposed. The Reporter explained that Children's Code Article 408(C) is meant to be an informal but on the record proceeding. The Council was concerned with the passive nature of the first two sentences but realized the need for a broad array of people to bring the child's behavior to the attention of the court. The Council also questioned the timing because the language in Paragraph B seems to refer to behavior in the courtroom, but Paragraph C speaks to a hearing prior to the court authorizing the use thereof. The Council discussed eliminating Paragraph C but quickly realized its necessity to ensure due process.

In response to a member's concern that Paragraph C may be applied more broadly to the use of restraints, the Reporter and the Council agreed to restructure the proposal and the following was approved:

Art. 408. Duty of court to control proceedings; use of restraints on a child

B. Restraints shall not be used upon a child during any juvenile court proceeding except in a delinquency proceeding as specifically provided in this Paragraph.

(1) A court may permit a juvenile to be restrained in the courtroom only upon the court's individualized determination that the use of restraints is necessary because the child presents a particularized risk of physical harm to himself or another or presents a particularized substantial risk of flight from the courtroom, and there are no less restrictive alternatives to restraints that will prevent flight or physical harm. The fact that the child is detained is insufficient to warrant a finding that the use of restraints is necessary.

(2) If it is alleged that the use of restraints upon a child is necessary, the district attorney or law enforcement shall inform the judge and the attorney for the child prior to the proceeding. The attorney for the child shall be given an opportunity to be heard and object on the record. If the use of restraints is ordered, the judge shall state on the record the reasons therefor.

The Reporter next presented the material relative to House Concurrent Resolution No. 79 of the 2016 Regular Session which requested that the Law Institute make recommendations relative to the abuse of incentives in the adoption process. Ms. Hallstrom turned the Council's attention to the changes proposed in R.S. 14:286, the criminal statute regarding the sale of minor children. At the December Council meeting the Committee was instructed to redraft this statute to clarify the elements of the crime. The Committee also eliminated the redundancy created by repeating the allowable expenses in both the crime and in the Children's Code. The Council suggested a few stylistic changes that the Reporter accepted, and the following was adopted:

§286. Sale of minor children and other prohibited activities; penalties

~~A. (1) Except as provided by Subsection C, it~~ It shall be unlawful for any person to sell or surrender a minor child to another person for money or anything of value, or to receive a minor child for such payment of money or anything of value except as specifically provided in Children's Code Articles 1200 and 1223.

~~B. (2) Except as provided in Subsection C, the payment or receipt of~~ It shall be unlawful for any person to pay or receive anything of value for the procurement, attempted procurement, or assistance in the procurement of a party to an act of voluntary surrender of a child for adoption is strictly prohibited except as specifically provided in Children's Code Articles 1200 and 1223.

~~C. (3) Unless approved by the juvenile court pursuant to Children's Code Article 1200, no~~ It shall be unlawful for any petitioner, person acting on a petitioner's behalf, agency or attorney or other intermediary shall to make or agree to make any disbursements in connection with the adoptive placement, surrender, or adoption of a child other than for the following: except as specifically provided in Children's Code Articles 1200 and 1223.

(4) It shall be unlawful to make a false statement in any adoption disclosure affidavit with the intent to deceive and with knowledge that the statement is false.

~~(1) Reasonable medical expenses, including hospital, testing, nursing, pharmaceutical, travel, or other similar expenses, incurred by the biological mother for prenatal care, and those~~

~~medical and hospital expenses incurred on behalf of the biological mother and child incident to birth.~~

~~(2) Reasonable medical expenses, including hospital, testing, nursing, pharmaceutical, travel, or other similar expenses, and foster care expenses incurred on behalf of the child prior to the decree of adoption.~~

~~(3) Reasonable expenses incurred by the department or the agency for adjustment counseling and training services provided to the adoptive parents and for home studies or investigations.~~

~~(4) Reasonable administrative expenses incurred by the department or the agency, including overhead, court costs, travel costs, and attorney fees connected with an adoption. In approving a reasonable fee for overhead, the court shall consider and include additional expenses incurred by the department or the agency not specifically allocated to the adoption before the court, including the cost of failed adoptions, where those expenses or fees represent actual costs of the department's or agency's adoption services permitted by the provisions of this Article.~~

~~(5) Reasonable expenses incurred for counseling services provided to a biological parent or a child for a reasonable time before and after the child's placement for adoption.~~

~~(6) Reasonable expenses incurred in ascertaining the information required by Children's Code Articles 1124 and 1125.~~

~~(7) Reasonable living expenses incurred by a mother for a reasonable time before the birth of her child and for no more than forty five days after the birth.~~

~~(8) Reasonable attorney fees, court costs, travel, or other expenses incurred on behalf of a parent who surrenders a child for adoption or otherwise consents to the child's adoption.~~

The Reporter reminded the Council that they previously adopted Children's Code Articles 1200(B)(1)-(6) and 1223(B)(1)-(6) and asked the Committee to rework (B)(7)-(9) of both articles relative to the payment of living expenses of the birth mother. The Committee clarified that the cap on living expenses may be extended to cover any additional expense the court authorizes as necessary prior to the payment thereof. Without comment, the Council adopted the proposals.

The final topic presented by the Children's Code committee consisted of material relative to the Indian Child Welfare Act (ICWA), and the Reporter restated that the intention of the proposal is to alert courts and practitioners to the applicability of ICWA in certain proceedings. After approving several provisions at the last Council meeting, the discussion revealed issues relative to the court's inquiry as to whether there is reason to know that a child is an Indian child and how to proceed thereafter. The Committee met and drafted several new articles for consideration today.

Ms. Hallstrom turned the Council's attention to Children's Code Article 624.1 which restates the standard for the determination of whether a child is an Indian child found in the regulations promulgated under ICWA. With little discussion, the proposal and the Comments were adopted.

At the last meeting, the Council was concerned that proposed Article 661.1 could lead to fraudulent claims to delay proceedings. The Committee reworked this proposal to guide the court following the required inquiry. The Reporter explained that if there is reason to know the child is an Indian child, the court must immediately proceed with the requirements of ICWA. However, if the particular tribe fails to respond with verification of the status of a child, the court may make a determination based on the information available and may proceed with adjudication. The proposal was adopted.

The Reporter next explained that the Committee is recommending a Comment to Children's Code Article 680 to alert the court and practitioners to ICWA and its requirements. The Council adopted the Comment and adopted the changes to Articles 749, 767.1, 767.2, 1019, 1034.1, and 1034.2 without discussion.

The Reporter noted that in Children's Code Article 1122 the language is slightly different because it is a surrender and not a petition. A member asked if the failure to include this fact could nullify an adoption, but the Reporter ensured everyone that substantial compliance is the standard. This provision was adopted.

The Council next inquired as to the necessity of only a statement as to whether the child is an Indian child or if a reason to know is needed in Article 1515 because it involves a parent voluntarily transferring custody. A member was concerned that a mother may not know if the father of her child is a member of a tribe thus making the child eligible. However, Professor McGough explained that if a child is illegitimate, the father's status is irrelevant unless the child has been acknowledged. The following was approved:


Art. 1515. Petition; contents; form

A. A petition for voluntary transfer of custody shall set forth specifically:

(8) Whether the child is an Indian child.

The final proposal to Article 1518 is necessary because although the Code does not automatically appoint counsel for parents in every proceeding, ICWA requires counsel to be appointed for indigent parents in a voluntary transfer of custody proceeding. The Council approved.

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

 5-4-18
 Jessica G. Braun Date