LOUISIANA STATE LAW INSTITUTE

MEETING OF THE COUNCIL

September 14-15, 2018

Friday, September 14, 2018

Persons Present:

Adams, E. Pete
Alonso, Pam
Bergstedt, Thomas M.
Boudreaux, Bernard E., Jr.
Braun, Jessica
Breard, L. Kent
Brister, Dorrell J.
Carroll, Andrea B.
Comeaux, Jeanne C.
Crawford, William E.
Crigler, James C., Jr.
Curry, Kevin C.
Davrados, Nick
Dawkins, Robert G.
Doguet, Andre'
Domingue, Billy J.
Ellison, David M., Jr.
Forrester, William R., Jr.
Garofalo, Raymond E., Jr.
Gregorie, Isaac M. "Mack"
Griffin, Piper D.
Hamilton, Leo C.
Hayes, Thomas M., III
Haymon, Cordell H.
Hester, Mary C.
Hogan, Lila T.
Holdridge, Guy
Jennings, Alan
Jewell, John Wayne
Johnson, Pamela Taylor
Knighten, Arlene D.
Manning, C. Wendell
McIntyre, Edwin R., Jr.
Mengis, Joseph W.
Miller, Cody "C.J."
Miller, Gregory A.
North, Donald W.
Philips, Harry "Skip", Jr.
Pittman, Richard M.
Price, Donald W.
Richardson, Sally Brown
Riviere, Christopher H.
Saloom, Douglas J.
Scalise, Ronald J., Jr.
Singletary, Robert
Smith, Anne
Sole, Emmett C., Jr.
Storms, Tyler
Stuckey, James A.
Talley, Susan G.
Thibeaux, Robert P.
Trahan, J. Randall
Tucker, Zelda W.
Vance, Shawn D.
Varnado, Sandi S.
Waller, Mallory
Weems, Charles S., III
Wilson, Evelyn L.
Ziober, John David

President Susan G. Talley called the September 2018 Council meeting to order at 10:00 a.m. on Friday, September 14, 2018, at the Lod Cook Alumni Center in Baton Rouge. After asking Council members to briefly introduce themselves, the President called on Mr. Richard Pittman to present a proposed Comment on behalf of the Children's Code Committee.

Children's Code Committee

Mr. Pittman began his presentation by reminding the Council that earlier this year, it had approved a recommendation to the legislature to address the use of restraints in juvenile court proceedings, a measure that was ultimately adopted as Acts 2018, No. 453. During the legislative process, legislators requested that the Law Institute draft a Comment to further clarify the intent of the law with respect to this issue. For example, Mr. Pittman drew the Council's attention to the second paragraph of this Comment, which describes the due process procedure that balances the rights of the child with the efficiency of the court proceedings. With a motion and a second, and without further discussion, the Council approved the following Comment to Children's Code Article 408:

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

* * *

Revision Comments – 2018

(a) The intent of Paragraph B is to allow for most youth who come to court to be unrestrained, with appropriate rare exceptions. Unnecessary use of restraints in court is stigmatizing and traumatizing to children, incompatible with the presumption of innocence when done prior to adjudication, hinders the communication between the youth and court officials including the child's attorney, and is counter to the goal of a rehabilitative juvenile justice system.

(b) Subparagraph B(3) provides for the procedure if it is alleged that a youth needs to be restrained. The procedure is intended to be expedited, balancing the child's due process rights against unnecessary restraint and with individualized determination with the court's interest in efficient procedure. This Subparagraph does not require a full contradictory hearing to make a determination. Instead, the prosecutor or law enforcement officer with the information giving rise to a potential need to restrain is authorized to inform the court and the attorney for the child of the basis of the need to restrain the youth. The child has a right to be heard through counsel and to object, providing reasons why the child should not be restrained. The court makes a determination on the need to restrain and, if ordering restraint, gives reasons on the record.

(c) Subparagraph B(4) provides that if the child is engaging in disruptive behavior indicating an imminent risk of harm or flight while a hearing is ongoing, the court may authorize the use of restraints.

(d) Subparagraph B(5) clarifies that this Paragraph applies only when the child is in the courtroom, not in the detention center or in transport, or while being held in the courthouse outside of the room where the proceedings will occur.

At this time, Mr. Pittman concluded his presentation, and the President called on Professor Ronald J. Scalise, Jr., Reporter of the Aleatory Contracts and Signification of Terms, Prescription, and Trust Code Committees, to begin his presentation of materials.

<u>Aleatory Contracts and Signification of Terms Committee</u>

Professor Scalise began his presentation by thanking the members of each of his Committees and suggesting that the Council first turn to the "Signification of Terms" materials. After noting to the Council that the Committee considered whether to retain a definitions article at all in light of the fact that many Civil Codes do not have such a provision, Professor Scalise explained that the Committee ultimately determined that Article 3506, on page 1 of the materials, should be retained but that many of the current definitions should be revised, relocated, or repealed. He then asked the Council to consider Article 3506(1) and (2), on page 1 of the materials, namely the proposed enactment of these provisions on gender and number as new Articles 14 and 15, on page 3 of the materials. The Reporter explained that because these provisions were interpretive in nature rather than true definitions, the Committee determined that they would be more appropriately placed in the Preliminary Title of the Civil Code with only minor stylistic changes to conform to existing provisions of the Code of Civil Procedure and Title 1 of the Revised Statutes. Several Council members agreed, and it was moved and seconded to adopt the relocation of the provisions on gender and number from Article 3506 to new Articles 14 and 15 as presented. The motion passed with no objection, and the adopted proposals read as follows:

Article 3506. General definitions of terms

Whenever the terms of law~~,~~ employed in this Code~~,~~ have not been particularly defined ~~therein~~ otherwise, they shall be understood as follows:

~~1. The masculine gender comprehends the two sexes, whenever the provision is not one, which is evidently made for one of them only:~~

~~Thus, the word man or men includes women; the word son or sons includes daughters; the words he, his and such like, are applicable to both males and females.~~

~~2. The singular is often employed to designate several persons or things: the heir, for example, means the heirs, where there are more than one.~~

* * *

Article 14. Use of gender

Unless the context indicates otherwise, words used with reference to one gender apply to other genders.

Revision Comments – 2019

This Article does not change the law. It restates the principles that existed in prior Article 3506(1). It is also consistent with other similar provisions on interpretation of laws. See, e.g., Code of Civil Procedure Article 5055; R.S. 1:8.

Article 15. Use of number

Unless the context indicates otherwise, words used in the singular include the plural and the plural includes the singular.

Revision Comments – 2019

This Article does not change the law. It restates the principles that existed in prior Article 3506(2) and reformulates them to be consistent with Code of Civil Procedure Article 5055 and R.S. 1:7.

Professor Scalise then noted that because an Article 14 on conflicts of laws presently exists, that provision would need to be redesignated, and he explained that the Committee had determined that this Article should be relocated to Book IV and reenacted as Article 3514, as reflected on pages 3 and 4 of the "Signification of Terms" materials. The Reporter also noted that aside from recommending minor stylistic and semantic changes, the Committee recommended simply reproducing existing Article 14 and its Comments as Article 3514. The Council agreed, and it was moved and seconded to adopt the proposed redesignation on pages 3 and 4 of the materials as presented. The motion passed with no objection, and the adopted proposal reads as follows:

~~CHAPTER 3. CONFLICT OF LAWS~~

~~Article 14. Multistate cases~~

~~Unless otherwise expressly provided by the law of this state, cases having contacts with other states are governed by the law selected in accordance with the provisions of Book IV of this Code.~~

* * *

BOOK IV. CONFLICT OF LAWS
TITLE I. GENERAL PROVISIONS

Article 3514. Multistate cases

Unless otherwise expressly provided by the law of this state, cases having contacts with other states are governed by the law selected in accordance with the provisions of this Book.

Revision Comments – 2019

(a) This Article does not change the law. Former Article 14 has been redesignated as current Article 3514 solely for purposes of more accurate placement in the Louisiana Civil Code. Comments (b) and (c) to this Article have also been reproduced from Comments (a) and (b) to prior Article 14 with only minor stylistic amendments.

(b) Role and function of this Article. This Article replaces Civil Code Articles 14 and 15 (Redesignated 1987) which contained virtually all the choice-of-law rules of the Code. The new choice-of-law rules are now placed in this newly-created Book IV. This Article delineates the scope of Book IV and establishes its residual nature vis-a-vis other more specific provisions of Louisiana legislation.

(c) Role and function of Book IV. The scope of Book IV encompasses all multistate cases or "cases having contacts with other states," whether these contacts pertain to the domicile of the parties, the transaction or the occurrence giving rise to the dispute, or the location of its object or subject matter. These contacts may implicate the laws of the involved foreign states in a way that raises the potential of a conflict between their laws and the law of this state. Book IV establishes the principles for determining whether such a conflict actually exists in a given case, and, if so, how it should be resolved. Through these principles, a court will determine whether the provisions of the first three books of the Civil Code as well as other Louisiana laws should apply to a particular case "having contacts with other states," and if so to what extent.

The residual nature of the provisions of Book IV is established by the introduction phrase of this Article "[u]nless otherwise expressly provided by the law of this state." This phrase means that the provisions of Book IV are not intended to supersede more specific choice-of-law rules contained in other Louisiana statutes, such as the Insurance Code, the Uniform Commercial Code, the Consumer Credit and Consumer Protection statutes, and the Lease of Movables Act. When applicable, those rules, being more specific, prevail over the provisions of Book IV.

Next, Professor Scalise asked the Council to consider the proposed relocation of the definition of "abandoned" in Article 3506(3), on page 1 of the "Signification of Terms" materials, which he noted was not a definition at all. He also explained that this provision had been enacted in conjunction with the addition of Paragraph E in Articles 2315.1 and 2315.2, which provide that a father or mother who has abandoned a child is deemed not to have survived him for purposes of the survival and wrongful death actions. As a result, the Reporter explained that the Committee recommended reproducing the substance of Article 3506(3) in Paragraph E of Articles 2315.1 and 2315.2. A motion was made and seconded to adopt the Committee's proposed deletion of Article 3506(3), on page 1 of the materials, and proposed revisions to Articles 2315.1(E) and 2315.2(E), on page 5 of the materials. One Council member then questioned whether the determination of whether a child had been abandoned for purposes of these provisions would require a court decree, and another Council member responded that abandonment would be proved as an affirmative defense in this context. A vote was then taken on the motion to adopt the Committee's proposed revisions as presented, and the motion passed with no objection. The adopted proposals read as follows:

Article 3506. General definitions of terms

Whenever the terms of law~~,~~ employed in this Code~~,~~ have not been particularly defined ~~therein~~ otherwise, they shall be understood as follows:

* * *

~~3. Abandoned.--In the context of a father or mother abandoning his child, abandonment is presumed when the father or mother has left his child for a period of at least twelve months and the father or mother has failed to provide for the child's care and support, without just cause, thus demonstrating an intention to permanently avoid parental responsibility.~~

* * *

Article 2315.1. Survival action

* * *

E. For purposes of this Article, a father or mother who has abandoned the deceased during his minority is deemed not to have survived him. Abandonment is presumed when the father or mother has left his child for a period of at least twelve months and the father or mother has failed to provide for the child's care and support, without just cause, thus demonstrating an intention to permanently avoid parental responsibility.

Revision Comments – 2019

This revision does not change the law. It redesignates and reproduces the substance of former Article 3506(3) as a second sentence of Paragraph E to this Article.

Article 2315.2. Wrongful death action

* * *

E. For purposes of this Article, a father or mother who has abandoned the deceased during his minority is deemed not to have survived him. Abandonment is presumed when the father or mother has left his child for a period of at least twelve months and the father or mother has failed to provide for the child's care and support, without just cause, thus demonstrating an intention to permanently avoid parental responsibility.

Revision Comments – 2019

This revision does not change the law. It redesignates and reproduces the substance of former Article 3506(3) as a second sentence of Paragraph E to this Article.

Next, Professor Scalise asked the Council to turn to the proposed revision of Article 3506(5), "assigns," as Article 3506(1), "assignment," on page 1 of the "Signification of Terms" materials. He explained that because "assigns" was being used as a noun rather than a verb, and the Civil Code does not use this term in that manner, the Committee recommended that the provision be reformulated to define "assignment" but that these proposed revisions were not intended to be substantive. A motion was made and seconded to adopt the proposed definition as presented, at which time one Council member questioned whether the term "assignment" was still used in the context of security interests. Other Council members responded in the negative, noting that even "assignment of rents" is now called "pledge" and that the concept of collateral assignments no longer exists in the Civil Code. A vote was then taken on the motion to adopt the proposed definition of "assignment," on page 1 of the materials, as presented, and the motion passed with no objection. The adopted proposal reads as follows:

Article 3506. General definitions of terms

Whenever the terms of law~~,~~ employed in this Code~~,~~ have not been particularly defined ~~therein~~ otherwise, they shall be understood as follows:

* * *

~~5.~~ (1) Assignment. ~~Assigns.--Assigns means those to whom~~ An assignment is a transfer of rights ~~have been transmitted~~ by particular title,~~;~~ such as by sale, donation, or particular legacy~~, transfer or cession~~.

The Council then discussed the proposed deletion of Article 3506(8), the definition of "children," and Article 3506(12), the definition of "family," on pages 1 and 2 of the "Signification of Terms" materials. Professor Scalise noted that although the Marriage-Persons Committee had proposed, and the Council had approved, revisions to the definition of "children" and deletion of the definition of "family" in the context of the same-sex marriage revision, that proposed legislation failed to pass during the 2018 Regular Session. He then explained that his Committee determined that the definition of "family" is archaic, and the definition of "children" is neither helpful nor accurate because it is used inconsistently throughout the Civil Code to refer to minors, to children who are filiated to a parent, and even to children who are not yet filiated to a parent. As a result, and because the Civil Code includes a provision stating that words should be given their ordinary meaning unless the context requires otherwise, the Committee recommended deletion of both definitions. It was then moved and seconded to adopt the Committee's recommendation as presented, and the motion passed with no objection. The adopted proposals read as follows:

Article 3506. General definitions of terms

Whenever the terms of law~~,~~ employed in this Code~~,~~ have not been particularly defined ~~therein~~ otherwise, they shall be understood as follows:

* * *

~~8. Children. Under this name are included those persons born of the marriage, those adopted, and those whose filiation to the parent has been established in the manner provided by law, as well as descendants of them in the direct line.~~

~~A child born of marriage is a child conceived or born during the marriage of his parents or adopted by them.~~

~~A child born outside of marriage is a child conceived and born outside of the marriage of his parents.~~

~~12. Family.--Family in a limited sense, signifies father, mother, and children. In a more extensive sense, it comprehends all the individuals who live under the authority of another, and includes the servants of the family.~~

Next, Professor Scalise asked the Council to consider the proposed addition of a definition of "juridical act," on page 2 of the "Signification of Terms" materials. The Reporter noted that the addition of a definition of this term was requested by numerous members of the bench and bar and that the Committee's proposal is consistent with the French Civil Code. It was moved and seconded to adopt the proposed definition of "juridical act" as presented, at which time one Council member questioned whether the manifestation of will would need to be in writing. The Reporter and other Council members responded in the negative, explaining that manifestations of will can be expressed orally or even tacitly. Another member of both the Council and the Committee asked the Reporter to explain the rationale for excluding any mention of "lawful" or "licit" from the definition of "juridical act," and Professor Scalise noted that the Committee had determined that this language was unnecessary in light of Article 7, which provides that juridical acts that derogate from laws enacted for the protection of the public interest are absolute nullities. A vote was then taken on the motion to adopt the proposed definition of "juridical act" as presented, and the motion passed with no objection. The adopted proposal reads as follows:

Article 3506. General definitions of terms

Whenever the terms of law~~,~~ employed in this Code~~,~~ have not been particularly defined ~~therein~~ otherwise, they shall be understood as follows:

* * *

(2) Juridical act. A juridical act is a manifestation of will intended to produce legal consequences. Juridical acts may be unilateral, such as donations mortis causa, or bilateral, such as contracts.

Next, the Council considered the Committee's proposed revisions to the definition of "successor," on page 2 of the "Signification of Terms" materials. After Professor Scalise noted that in his view, this definition of "successor" is extremely helpful and the one he felt most strongly about retaining with only minor changes in language, it was moved and seconded to adopt the proposed revisions as presented. One Council member suggested adding a Comment or cross-reference to provisions of the Code of Civil Procedure that use the term "legal successor," namely Articles 801 through 805 and 2701 through 2703, and the Reporter agreed to add a cross-reference. Another Council member questioned whether "donated" was being substituted for "ceded" on line 30 of page 2, and Professor Scalise responded in the negative, explaining that the Committee proposed to delete "ceded" simply because the term is no longer used in the Civil Code. One Council member then questioned whether "donee" on line 24 of page 2 should be qualified by inserting "inter vivos" to distinguish this type of particular successor from those who receive donations mortis causa, but the Council determined that this was clear from the use of "or particular legatee" on the same line. Another Council member questioned the use of "bequeathed" on line 30 of page 2, but the Council again decided to retain this terminology because it is used in other provisions of the Civil Code. The Reporter then agreed to draft a Comment explaining that whereas "particular legatee" and "bequeathed" are used in connection with donations mortis causa, "donee" and "donated" refer to donations inter vivos.

One Council member then questioned whether the statement on lines 26 and 27 of page 2 that the universal successor succeeds to all of the decedent's rights and charges conflicts with other articles limiting liability to only those charges that do not exceed the estate. A great deal of discussion then ensued with respect to this issue, including whether to replace "charges" with "duties" or "obligations," which the Council ultimately decided against after the Reporter noted that "charges" is used in other provisions of the Civil Code. Several other suggestions were made, including adding a Comment referencing Civil Code Article 1416 or providing that the universal successor "generally succeeds to all his rights and charges," "is entitled to succeed to all his rights and charges," or "succeeds to all his rights subject to charges." Ultimately, a motion was made and seconded to delete "all" on line 26 of page 2, and that motion passed with no objection. Professor Scalise then agreed to draft a Comment providing that nothing in this definition is intended to derogate from existing provisions of the Civil Code concerning the limitation of liability for universal successors or the inheritance of strictly personal rights. Another Council member then suggested moving "only" on line 29 of page 2 such that the provision would read "succeeds to only the rights," but the Council ultimately agreed not to make such change. It was then moved and seconded to adopt the proposed revisions to the definition of "successor" as amended, subject to the addition of a cross-reference to the Code of Civil Procedure's use of "legal successor" as well as Comments concerning donations inter vivos and mortis causa and existing provisions on the limitation of liability for universal successors and the inheritance of strictly personal rights. The motion passed with no objection, and the adopted proposal reads as follows:

Article 3506. General definitions of terms

Whenever the terms of law~~,~~ employed in this Code~~,~~ have not been particularly defined ~~therein~~ otherwise, they shall be understood as follows:

* * *

~~28.~~ (3) Successor.~~--Successor is, generally speaking, the~~ A successor is a person who takes the place of another.

There are ~~in law~~ two ~~sorts~~ kinds of successors: the universal successor, such as the heir, ~~the~~ universal legatee, and ~~the~~ general legatee; and the particular successor ~~by particular title~~, such as the buyer, donee, or particular legatee ~~of particular things, the transferee~~.

The universal successor represents the person of the deceased~~,~~ and succeeds to ~~all~~ his rights and charges.

The particular successor succeeds only to the rights appertaining to the thing ~~which~~ that is sold, ~~ceded or~~ donated, bequeathed, or otherwise transferred to him.

At this time, Professor Scalise explained that due to ongoing litigation concerning the inconsistencies between the definition of "third persons" in Article 3506 and the definition of "third person" in Article 3343, the Committee has deferred proposing any revisions at this time and will present its recommendations to the Council once the litigation has concluded. He then asked the Council to turn to the "Aleatory Contracts" materials.

The Reporter began his presentation of the materials on aleatory contracts by explaining that the Council had previously approved, at least in concept, the repeal of Title XIV of the Civil Code, "Of Aleatory Contracts," and Articles 2982 through 2984, in favor of enacting a single provision in the articles on obligations. Specifically, Professor Scalise explained that the Committee had determined that Article 2982 was unnecessary in light of the present definition of aleatory contract in Article 1912, and that Articles 2983 and 2984 should be replaced by a single provision added to Article 1968 on unlawful cause providing that "[g]aming, gambling, and wagering contracts not authorized by law are examples of obligations with unlawful causes." He also noted that the "gaming, gambling, and wagering" language, though repetitive, was replicated from Article XII, Section 6 of the Louisiana Constitution. Additionally, Professor Scalise noted that the proposed repeal of Articles 2983 and 2984 was a substantive change in that the existing provisions recognize exceptions for "games tending to promote skill in the use of arms, such as the exercise of the gun and foot, horse and chariot racing" as well as in cases where the winner practiced "fraud, deceit, or swindling." He then explained that the Committee determined that neither of these exceptions were worth preserving, particularly after consideration of commentary pertaining to the distinction between skill and chance, as well as existing Article 2033 on the effects of absolute nullities, which is mentioned in proposed Comment (b) to Article 1968.

It was then moved and seconded to adopt the proposed revisions to Article 1968, on page 1 of the "Aleatory Contracts" materials, at which time one Council member questioned the statement that contracts are examples of obligations, when really the two are different. The member then suggested rephrasing this provision to provide with respect to "the obligations created by gaming, gambling, and wagering contracts." Other Council members recognized the problem but disagreed with the suggestion, noting that there are no obligations created because these sorts of contracts are absolute nullities. Council members also discussed the importance of retaining the "not authorized by law" phraseology, particularly in light of Attorney General Opinions concerning gaming, gambling, and wagering. Other suggestions were made, including "claims based on or arising from gaming, gambling, and wagering contracts not authorized by law are examples of obligations with unlawful causes" or "a gaming, gambling, or wagering contract not authorized by law has an unlawful cause." The Council also discussed the debate among civil law theorists with respect to whether it is a contract or an obligation that has an unlawful cause, with one Council member pointing out that the first paragraph of Article 1968 speaks of "[t]he cause of an obligation" and the Reporter noting that Article 1970 refers to "a cause in a contractual obligation." Additional suggestions were made, including "the obligations purportedly created by gaming, gambling, and wagering contracts not authorized by law are examples of obligations with unlawful causes" and "an example of an obligation with an unlawful cause is one arising from a gaming, gambling, and wagering contract not authorized by law." The Council then agreed to defer further consideration of these materials until after lunch so that the Reporter could consider each of these alternative suggestions.

Prescription Committee

At this time, Professor Scalise asked the Council to turn to the Prescription Committee's draft report in response to Senate Concurrent Resolution No. 105 of the 2015 Regular Session. He informed the Council that this resolution requested the Law Institute to study whether mineral interests of the state, school boards, or levee districts should be subject to loss by prescription or conveyed to private parties. He also noted that a provision concerning the imprescriptibility and inalienability of state mineral interests appeared in both the previous Constitution of 1921 and the existing Constitution of 1974, and that this issue was heavily discussed during the most recent Constitutional Convention. The Reporter then explained that the motivations for such a provision were financial in nature, that the jurisprudence confirms state ownership of mineral interests in perpetuity, and that Louisiana's position with respect to this issue is consistent with that of many other states. He also noted that the motivations for such a provision have not changed since 1974 and that the imprescriptibility and inalienability of state mineral interests does not negatively impact commerce because there is a well-established leasing procedure in place with respect to such interests. Professor Scalise then explained that as a result, the Committee recommended that no change be made at this time with respect to the imprescriptibility and inalienability of state mineral interests. It was then moved and seconded to adopt the Committee's report as presented, and the motion passed with no objection.

Next, the Council turned to the "Proposed Prescription Revisions" materials, and the Reporter asked members to first consider the proposed deletion of Article 3502, on page 3 of the materials. Professor Scalise explained that although this article had been in the Code for quite some time, it is inconsistent with other provisions because it provides that actions for recognition of inheritance rights are subject to a liberative prescription of thirty years. However, the articles on successions provide that acceptance of succession rights is presumed and that ownership is transferred immediately upon the death of the decedent, and ownership is not subject to liberative prescription. The Reporter then explained that even though "liberative prescription" is used on line 6 of page 3 of the materials, the Committee considered whether acquisitive prescription would apply with respect to inheritance rights such that perhaps this provision should be amended and retained. However, the Committee ultimately answered this question in the negative after considering that, with respect to prescription against coheirs, some sort of overt act would be required, and even if that were the case, there would still be no need to restate the general rule here. As a result, and after review by the Successions and Donations Committee, the Prescription Committee recommended deletion of this provision in its entirety. It was moved and seconded to adopt the Committee's proposal as presented, and the motion passed with no objection. The adopted proposal reads as follows:

~~Article 3502. Action for the recognition of a right of inheritance~~

~~An action for the recognition of a right of inheritance and recovery of the whole or a part of a succession is subject to a liberative prescription of thirty years. This prescription commences to run from the day of the opening of the succession.~~

Next, Professor Scalise asked the Council to consider the proposed revisions to Article 2534, on page 1 of the "Proposed Prescription Revisions" materials, relative to redhibition and breach of the warranty of fitness for use. He explained that under the provision as presently drafted, the prescriptive period for redhibition is one year from delivery for good faith sellers of commercial or residential immovables, four years from delivery or one year from discovery for good faith sellers of movables and other kinds of immovables, and one year from discovery for bad faith sellers both movables and immovables. However, with respect to breach of the warranty of fitness for use, a specific prescriptive period is not provided, meaning that such an action would prescribe in ten years under the general prescriptive period provided by Article 3499 for personal actions. The Reporter noted that although these are two separate actions, in reality redhibition and breach of the warranty of fitness for use are very similar, as evidenced by jurisprudential decisions that struggle with distinguishing between the two due to the vastly different prescriptive periods that apply with respect to each type of action. He then explained that as a result, the Committee proposed unifying the prescriptive periods for both redhibition and breach of warranty of fitness for use by adding the language on line 5 of page 1 of the materials. Professor Scalise also explained that because it does not make sense for movables or undeveloped land to be subject to a longer prescriptive period than commercial or residential immovables, the Committee proposed to amend Article 2534 to provide that actions for redhibition or breach of the warranty of fitness for use against sellers in good faith prescribe one year from the day of delivery for both movables and immovables.

It was then moved and seconded to adopt the Committee's proposed amendments to Article 2534, on page 1 of the materials. One Council member then questioned whether some outer limit would apply with respect to the prescriptive periods applicable to actions for redhibition and breach of warranty of fitness for use, and another Council member pointed to Comment (b) to Article 2534, which states that an action for redhibition prescribes no later than ten years as provided by Article 3499. The Reporter then responded by noting that his proposed Comment (c) criticizes existing Comment (b) because Article 3499 by its terms applies "[u]nless otherwise provided by legislation," and Article 2534 provides comprehensively for the prescription that applies in connection with redhibition. One Council member then questioned whether, as a policy matter, an outer limit should apply with respect to the prescriptive periods provided in this article, or whether the time period provided by Paragraph B with respect to bad faith sellers should be peremptive rather than prescriptive. Other Council members suggested that courts are already applying an outer limit in these sorts of cases due to policy concerns regarding the otherwise open-endedness of these sorts of actions, particularly with respect to manufacturers.

The Council then discussed whether to approve the proposed changes to Paragraphs A and C, on page 1 of the "Proposed Prescription Revisions" materials, but recommit B for purposes of further study by the Committee, at which point one Council member questioned the reduction of the prescriptive period in cases of breach of warranty of fitness for use from ten years to one year and in cases of redhibition for movables from four years to one year. Another Council member then noted that the 1993 Comments explain the rationale for extending the prescriptive period to four years for movables for purposes of consistency with the Uniform Commercial Code and with other states, and the Reporter agreed that this was indeed the rationale but noted that other states do not have redhibition. The Council then discussed that if a four-year period, and certainly a ten-year period, is too long, but a one-year period is too short, perhaps some other period should be adopted, such as two years in cases of redhibition or breach of the warranty of fitness for use for good faith sellers of movables and immovables. Professor Scalise responded by explaining that the Committee did not consider other time periods and also did not see the need to harmonize these prescriptive periods with those of other states, but one Council member expressed concern with respect to buyers in other states not knowing of Louisiana's shortened time period. Another Council member disagreed, noting that in cases of both redhibition and breach of the warranty of fitness for use, the buyer should actually be using the thing within one year of delivery. One Council member then suggested tying the prescriptive periods for good faith sellers to one year from the date of discovery, but other Council members disagreed, expressing concerns with respect to the open-endedness of this period and also noting that one year from discovery is presently prescriptive period applicable to bad faith sellers.

The Council then continued to discuss whether to recommit Article 2534, on page 1 of the "Proposed Prescription Revisions" materials, including whether to amend these time periods or impose some sort of outside limitation or peremptive period. A vote was taken on the motion to adopt Article 2534 as presented, and the motion failed by a vote of 20 members in favor and 22 members opposed. Professor Scalise then asked for guidance with respect to several policy issues, including whether the prescriptive periods for redhibition and breach of the warranty of fitness for use should be harmonized, whether the prescriptive periods for movables and immovables should be unified, and how long these prescriptive periods should be and whether they should be tied to delivery or discovery. The Council generally agreed that that prescriptive periods applicable to redhibition and breach of the warranty of fitness for use should be the same, and the Council also agreed that the distinction between residential and commercial immovables and all other immovables should be eliminated. Members of the Council then discussed the implications of a one-year prescriptive period for movables and immovables, either from the date of delivery where the seller is in good faith or from the date of discovery where the seller is in bad faith, with respect to manufacturers and in the context of the New Home Warranty Act. Ultimately, the Council was split as to whether these one-year periods should be extended to a longer period of time, and if so, whether they should be extended with respect to both good faith and bad faith sellers. Most Council members agreed that the prescriptive period applicable to good faith sellers of movables should be one year from the date of delivery, although some Council members expressed support either for a longer period of time or for this time period to be tied to discovery, such as two years from delivery or one year from discovery, whichever occurs first.

At this time, President Susan Talley announced that the Council would adjourn for lunch and that there would be an Executive Committee meeting during this time.

<u>**Aleatory Contracts and Signification of Terms Committee**</u>

After breaking for lunch, the Council reconvened and briefly returned to the "Aleatory Contracts" materials. Professor Scalise explained that he and another Council member had redrafted the proposed amendment to Article 1968 in light of the Council's earlier discussions and that the proposed language would read as follows: "Examples of obligations with unlawful causes include those that arise from gaming, gambling, and wagering not authorized by law." It was moved and seconded to adopt this proposed amendment as well as the repeal of Articles 2982 through 2984, and the motion passed with no objection. The adopted proposals read as follows:

Article 1968. Unlawful cause

The cause of an obligation is unlawful when the enforcement of the obligation would produce a result prohibited by law or against public policy.

<u>Examples of obligations with unlawful causes include those that arise from gaming, gambling, and wagering not authorized by law.</u>

Revision Comments – 2019

(a) The second paragraph of this Article restates the principles of prior law contained in former Articles 2983 and 2984. It does not significantly change the law. The language creating exceptions of permissible gaming contracts under the prior Article 2983, which involved "games tending to promote skill in the use of arms, such as the exercise of the gun and foot, horse and chariot racing" has been deleted as anachronistic. The Constitution of Louisiana generally discourages "gaming, gambling, and wagering." See, e.g., La. Const. Art. XII, Sec. 6. The Louisiana Criminal Code also defines and prohibits gambling. See, e.g., R.S. 14:90. For specific examples of allowable games of chance, see, e.g., La. Const. Art. XII, Sec. 6(A); R.S. 27:1 et seq.; R.S. 27:502. This Article does not affect the existing jurisprudence holding that casino markers extended to patrons are enforceable extensions of credit. See, e.g., Strong v. Eldorado Casino Shreveport Joint Venture, 73 So. 3d 967

(La. App. 2 Cir. 2011); Players Lake Charles, LLC v. Tribble, 779 So. 2d 1058 (La. App. 3 Cir. 2001); Telerecovery of Louisiana v. Major, 734 So. 2d 947 (La. App. 1 Cir. 1999); Telerecovery of Louisiana v. Gaulon, 738 So. 2d 662 (La. App. 5 Cir. 1999).

(b) The provision in former Article 2984, which refused an action for recovery by a loser in a gaming or waging contract in the absence of "fraud, deceit, or swindling," has also been deleted in light of the provisions of Article 2033, which deny recovery of performance on an absolutely null contract except "in exceptional situations when, in the discretion of the court, that recovery would further the interest of justice."

(c) The definition of an aleatory contract contained in former Article 2982 has been deleted as unnecessary in light of existing Article 1912.

* * *

~~TITLE XIV – OF ALEATORY CONTRACTS~~

~~Article 2982. Aleatory contract, definition~~

~~The aleatory contract is a mutual agreement, of which the effects, with respect both to the advantages and losses, whether to all the parties or to one or more of them, depend on an uncertain event.~~

~~Article 2983. Actions for payment of gaming debts and bets~~

~~The law grants no action for the payment of what has been won at gaming or by a bet, except for games tending to promote skill in the use of arms, such as the exercise of the gun and foot, horse and chariot racing.~~

~~And as to such games, the judge may reject the demand, when the sum appears to him excessive.~~

~~Article 2984. Actions for recovery of payments made on gaming debts and bets~~

~~In all cases in which the law refuses an action to the winner, it also refuses to suffer the loser to reclaim what he has voluntarily paid, unless there has been, on the part of the winner, fraud, deceit, or swindling.~~

Prescription Committee

The Council then returned to its previous policy discussion concerning Article 2534, on page 1 of the "Proposed Prescription Revisions" materials. Members reaffirmed their general agreement that the distinction between residential and commercial immovables and all other immovables should be eliminated and that the prescriptive periods for actions for redhibition and breach of the warranty of fitness for use should be unified. Council members also agreed that the Committee should consider whether some outside time limitation or peremptive period should apply with respect to bad faith sellers under Paragraph B. The Council also discussed whether the prescriptive period for good faith sellers of movables and immovables should be the same, and if so, whether this period should be one year or some longer period of time. However, members of the Council were split with respect to this issue, with many expressing their preference for unifying the prescriptive period for movables and immovables, others expressing concern over tying this prescriptive period to delivery rather than to discovery, and still others expressing their preference for existing law – four years from delivery or one year from discovery, whichever occurs first. As a compromise, one Council member suggested providing that the prescriptive period for actions for redhibition and breach of the warranty of fitness for use for good faith sellers of both movables and immovables should be two years from delivery or one year from discovery, whichever occurs first. A motion was made and seconded to recommit Paragraph A for purposes of drafting a provision consistent with this suggestion, and the motion passed by a vote of 21 in favor and 9 opposed. The Council also agreed to recommit Paragraph B for purposes of studying whether an outside time limitation or peremptive period should apply with respect to the one-year period applicable to sellers in bad faith, and the Reporter agreed to present this issue to the Committee and to return to the Council after drafting the requisite revisions to Article 2534. Professor Scalise then concluded his presentation of the Prescription materials and asked the Council to turn to the materials prepared by the Trust Code Committee.

Trust Code Committee

The Reporter began his presentation by explaining that the Trust Code Committee had proposed comprehensive revisions to the provisions on allocation of receipts and expenses to income or to principal. He explained that these provisions were enacted in Louisiana in 1964 based on the Uniform Principal and Income Act (UPIA) of 1962 and were old and outdated, particularly in light of the Uniform Law Commission's overhaul of the Act in 1997 and minor amendments over the past decade. For example, Professor Scalise explained that although existing provisions of the Louisiana Trust Code on allocation to income and principal contemplate corporations, they do not mention limited liability companies because these entities were not in existence when the provisions were enacted. He then asked the Council to consider the Committee's proposed revisions to R.S. 9:2141, on page 3 of the materials, and explained that the Committee recommended replacing "expenditures" with "expenses" on line 5 of that page. It was moved and seconded to adopt the proposed revisions as presented, and the motion passed with no objection. The adopted proposal reads as follows:

R.S. 9:2141. General rule

A trust shall be administered with due regard to the respective interests of the beneficiaries in the allocation of receipts and ~~expenditures~~ <u>expenses</u>.

Next, the Council considered R.S. 9:2142, on page 4 of the materials. Professor Scalise explained that whereas R.S. 9:2141 provides that a trust shall be administered with due regard to the interests of the beneficiary, R.S. 9:2142 provides the specifics of how receipts and expenses should be allocated to income and principal – in accordance with the trust instrument; or if the trust instrument does not specify, in accordance with the Trust Code; or if the Trust Code does not specify, in accordance with what is reasonable and equitable. The Reporter also explained that the Committee's proposed revisions on lines 8 through 10 of page 4 change the default rule from allocation entirely to principal because in the Committee's view, a "reasonable and equitable" standard is preferable, plus this language is used in many other provisions of the UPIA. It was then moved and seconded to adopt the Committee's proposed revisions as presented, at which time one Council member expressed concern with respect to changing the default rule because allocation entirely to principal is clear, whereas allocation in accordance with what is reasonable and equitable has the potential to introduce confusion and increase litigation. Other Council members disagreed, noting that trustee discretion is provided in many other provisions of the Trust Code and that the trustee must abide by his fiduciary duties or will be held responsible for abuse of discretion.

One Council member then questioned the standard that is used in other states, and Professor Scalise responded by explaining that some states employ a reasonable and equitable standard, whereas others provide that the allocation should be made entirely to principal. Another Council member suggested that perhaps this default rule should provide that the allocation should be made equally to income and to principal, but others disagreed, noting that if the source of the expense or receipt is clear, the trustee should allocate the expense or receipt accordingly rather than be forced to employ some sort of brightline rule. A Council member then questioned whether this provision would apply retroactively, and the Reporter explained that it would but that this is only the default rule, so the settlor would always be able to deviate from this provision in the trust instrument. After other Council members agreed with providing the trustee with the discretion to make allocations in accordance with what is reasonable and equitable, a vote was taken on the motion to adopt R.S. 9:2142 as presented, and the motion passed with no objection. The adopted proposal reads as follows:

R.S. 9:2142. Allocation to beneficiaries of income and principal

A trust receipt ~~shall be credited, or an expenditure charged,~~ or expense shall be allocated to income or principal or partly to each:

(1) In accordance with the terms of the trust instrument, including any provision giving the trustee discretion, notwithstanding contrary provisions of this Subpart~~; or~~.

(2) In accordance with the provisions of this Subpart, in the absence of contrary provisions of the trust instrument~~; or~~.

(3) If no rule is provided in the trust instrument or this Subpart, ~~entirely to principal~~ in accordance with what is reasonable and equitable in view of the interests of those entitled to income as well as of those entitled to principal.

Revision Comments – 2019

Prior law provided that a receipt or expense shall be allocated entirely to principal if no provision in the trust instrument or other provision in this Subpart provided otherwise. This revision changes the default rule in an attempt to be fair to both beneficiaries of income and beneficiaries of principal. It is consistent with other provisions in this revision. See, e.g., R.S. 9:2148, 2151, 2152(A)(4), 2153(A), and 2154(A).

The Council then turned to R.S. 9:2143, on page 5 of the materials. Professor Scalise explained that this provision is unique to Louisiana and addresses the allocation of receipts and expenses to usufructuaries and naked owners, providing that the allocation should take place in accordance with the trust instrument; or if the trust instrument does not specify, in accordance with the Trust Code; or if the Trust Code does not specify, in accordance with what is reasonable and equitable. He then explained that the Committee proposed to delete the language on lines 12 and 13 of page 5 pertaining to the "prudent man" standard as unnecessary and unhelpful. It was moved and seconded to adopt the Committee's proposal as presented, and the motion passed with no objection. The adopted proposal reads as follows:

R.S. 9:2143. Allocation to beneficiaries of usufruct and naked ownership

A trust is administered with due regard to the respective interests of beneficiaries of usufruct and naked ownership in the allocation of receipts and expenses ~~expenditures if a receipt is credited or an expenditure is charged~~ to the beneficiary of usufruct or the beneficiary of naked ownership or partly to each:

(1) In accordance with the terms of the trust instrument and the law regulating usufruct, notwithstanding contrary provisions of this ~~Sub-part;~~ Subpart.

(2) In accordance with the provisions of this ~~Sub-part~~ Subpart, in the absence of applicable law regulating usufruct and if the trust instrument contains no provisions to the contrary~~;~~.

(3) If neither of the preceding rules applies, in accordance with what is reasonable and equitable in view of the interests of those who are beneficiaries of usufruct as well as those who are beneficiaries of naked ownership~~, and in view of the manner in which men of ordinary prudence, discretion, and intelligence would act in the management of their own~~

~~affairs~~.

Revision Comments – 2019

This revision modifies the law in part by making minor semantic clarifications and by deleting the "prudent man" rule that existed under prior law because persons of "ordinary prudence, discretion, and intelligence" do not generally consider the interests of successor beneficiaries in managing their own affairs. See, e.g., UPIA (1997) §103 cmt. Trustees, however, should consider the interests of all beneficiaries in discharging their fiduciary obligations.

The Reporter then asked the Council to consider R.S. 9:2144, on page 6 of the materials, and explained that in addition to a few semantic changes, the Committee proposed to delete "money or" on line 2 of that page because money is property. It was moved and seconded to adopt the proposed changes to R.S. 9:2144, as well as R.S. 9:2145 on page 7 of the materials, as presented, and the motion passed with no objection. The adopted proposals read as follows:

R.S. 9:2144. Income and principal distinguished

Receipts paid or delivered in return for the use of ~~money or~~ property forming a part of principal are income, unless this ~~Sub-part~~ Subpart expressly provides to the contrary.

Receipts paid or delivered ~~as the~~ in consideration for the sale or other transfer of property forming a part of principal or as the replacement of property forming a part of principal are principal unless this ~~Sub-part~~ Subpart expressly provides to the contrary.

R.S. 9:2145. When right to income arises

The right of an income beneficiary to income from property in trust arises at the time prescribed in the trust instrument, or, if no time is prescribed and the person receiving the right to income is the first income beneficiary to receive a right to income from the property, then:

(1) At the time the property becomes subject to the trust, with respect to property transferred by inter vivos disposition~~;~~.

(2) At the time when, under the laws regulating donations mortis causa, the legatee of the same type of legacy free of trust is entitled to receive income from such a legacy, with respect to property transferred by testamentary disposition.

Next, the Council considered R.S. 9:2146, on page 8 of the materials, and explained that the Committee's proposed revisions were intended to take cognizance of the facts that there are distributions other than those from corporations, such as those pertaining to interests of limited liability companies and other juridical persons. One Council member questioned whether a reference to limited liability companies should be included in the Comment, and Professor Scalise responded by explaining that because this Comment quotes Civil Code Article 24, it should not be edited. It was then moved and seconded to adopt the Committee's proposed revisions to R.S. 9:2146, as well as similar revisions to R.S. 9:2147, on page 9 of the materials, as presented, and the motion passed with no objection. The adopted proposals read as follows:

R.S. 9:2146. Apportionment of receipts when right to income arises

A. In the administration of property transferred in trust:

(1) Receipts due but not paid when the right of the first income beneficiary to receive income from the property arises shall be treated as

accruing when due~~;~~.

(2) Receipts in the form of periodic payments, other than ~~corporate distributions to stockholders~~ receipts on account of an interest in a juridical person or from a plan subject to R.S. 9:2152.2, not due when the right of the first income beneficiary to receive income from the property arises, shall be treated as accruing from day to day~~;~~.

(3) Receipts in the form of ~~corporate~~ distributions on account of an interest in a juridical person, which are allocated to income under R.S. 9:2149, ~~to stockholders~~ shall be treated as accruing on the date fixed for the determination of ~~stockholders of record~~ those entitled to distribution, or, if no date is fixed, on the date of declaration of the distribution by the ~~corporation;~~ juridical person.

(4) All other receipts shall be treated as accruing at the time of payment.

B. Receipts treated as accruing after the right of the first income beneficiary to receive income from the property arises, are income if they otherwise are income under the provisions of this ~~Sub-part~~ Subpart. Receipts treated as accruing at an earlier time are principal.

Revision Comments – 2019

This revision is consistent with prior law but expands the law to address receipts from juridical persons other than corporations. According to general principles of civil law, "[a] juridical person is an entity to which the law attributes personality, such as a corporation or a partnership." C.C. Art. 24.

R.S. 9:2147. Apportionment of receipts when right to income ceases

Upon the termination of an income interest, the income beneficiary whose interest is terminated (or his heirs, legatees, or assignees) is entitled to receive any required distributions of or from the following:

(1) Income paid to the trustee but undistributed on the date of termination~~;~~.

(2) Income due but not paid to the trustee on the date of termination~~;~~.

(3) Income in the form of periodic payments, other than ~~corporate distributions to stockholders~~ periodic payments on account of an interest in a juridical person, not due on the date of termination~~, accrued from day to day;~~ that was subject to daily accrual and which accrued prior to the date of termination.

(4) ~~Corporate distributions to stockholders~~ Distributions on account of an interest in a juridical person, which are allocated to income under R.S. 9:2149, paid ~~as income~~ after the termination of the interest if the date for determination of ~~stockholders of record~~ those entitled to distribution is a date before the termination of the interest, or, in the event no date is fixed, if the date of declaration of the distribution by the ~~corporation~~ juridical person is a date before termination of the interest.

Revision Comments – 2019

This revision is consistent with prior law but expands the law to address receipts from juridical persons other than corporations. According to general principles of civil law, "[a] juridical person is an entity to which the law attributes personality, such as a corporation or a partnership." C.C. Art. 24.

law attributes personality, such as a corporation or a partnership." C.C. Art. 24.

Next, the Council considered R.S. 9:2148, on page 10 of the materials. The Reporter explained that under existing law, this provision provides that succession receipts and expenses should be allocated in accordance with the Civil Code, and the Civil Code provides that the allocation of succession receipts and expenses is governed by the Trust Code. He further explained that the Committee extensively debated which allocation rule should apply to succession receipts and expenses and also considered whether the trustee should be required to look to the source of the expense or receipt and make the allocation in accordance with that source. Ultimately, however, the Committee determined that because no single rule worked in every situation, and because the trustee may not always be able to determine the source of the succession receipt or expense, the default rule of allocation in accordance with what is reasonable and equitable should apply here. It was then moved and seconded to adopt the Committee's proposed revisions to R.S. 9:2148 as presented, at which time one Council member questioned why the Committee abandoned the hierarchy in R.S. 9:2142 of looking first to the trust instrument, then to the Trust Code, and then applying the reasonable and equitable standard. Professor Scalise explained that the trust instrument will not be helpful with respect to this issue, and the only manner in which provisions of the Trust Code would apply is if the trustee knew the source of the succession receipt or expense. Further, the Comment to R.S. 9:2148 explains that a trustee who knows the source of a succession receipt or expense should allocate it accordingly, but that otherwise, trustees should have the flexibility to make allocations in accordance with what is reasonable and equitable.

One Council member then expressed concern with respect to the potential for litigation over whether a trustee allocated succession receipts and expenses incorrectly under the provisions of R.S. 9:2148, and another Council member questioned whether the provision should explicitly state that the trustee has discretion in these instances. Professor Scalise responded by noting that the allocation of succession receipts and expenses cannot solely be made in the trustee's discretion, but rather that they should be made in accordance with the objective "reasonable and equitable" standard. After one Council member noted that Civil Code Article 1426 employs the same standard with respect to the succession representative, a vote was taken on the motion to adopt the Committee's proposed revisions to R.S. 9:2148, on page 10 of the materials, as presented, and the motion passed with no objection. One Council member asked the Reporter to consider adding an additional Comment to this provision, and the adopted proposal reads as follows:

R.S. 9:2148. Succession receipts <u>and expenses</u>

Succession receipts ~~shall be credited~~ and ~~succession~~ expenses shall be ~~charged~~ <u>allocated</u> to a legacy in trust in accordance with ~~the laws regulating donations mortis causa~~ <u>what is reasonable and equitable in view of the interests of those entitled to income as well as of those entitled to principal</u>.

Revision Comments – 2019

(a) This revision changes the law by no longer deferring to the Civil Code regarding the allocation of receipts and expenses for a legacy in trust.

(b) In many cases, information from a succession representative may be helpful to a trustee in making an appropriate allocation between income and principal beneficiaries. In other cases, however, it may be very difficult for a trustee to reconstruct the nature of the expense allocated to the legacy during the succession administration, thus making it impossible for the trustee to reliably allocate the expense within the trust between the income and principal beneficiaries. This provision attempts to provide the trustee with flexibility in allocating receipts and expenses and at the same time achieve consistency with the rules on successions and other provisions of the Louisiana Trust Code. See, e.g., C.C. Art. 1426 and R.S. 9:2151, 2152(A)(4), 2153(A), and 2154(A).

Next, the Council considered R.S. 9:2149, beginning on page 11 of the materials. Professor Scalise explained that this provision currently provides with respect to every conceivable situation in which a corporate distribution should be allocated either to principal or to income, but now that corporations are no longer the dominant form of business entity, and drafting a statute that provides this thoroughly with respect to each type of juridical person is impractical, the Committee adopted the uniform approach with a few minor changes to incorporate Civilian terminology. He then explained that Subsection A states that except as otherwise provided, receipts from interests in juridical persons should be allocated to income, and that Subsection B provides that if the distribution is money, it should be allocated to income, but otherwise, it should be allocated to principal, subject to a few exceptions. Further, Professor Scalise explained that Subsection E provides that notwithstanding any of these rules, the trustee can allocate a receipt from a distribution based on the distribution's source and can rely upon the juridical person's statement with respect to such source. It was then moved and seconded to adopt the Committee's proposed revisions to R.S. 9:2149, at which time the Council discussed the provisions of Subsection D with respect to pass-through taxation. One Council member then suggested deleting "juridical person that is a" on line 17 of page 12, and another Council member suggested changing "trust's" to "trustee's" on line 15 of the same page. The Reporter and Council agreed with both of these changes and also agreed to add "interests in" after "from" on line 1 of page 11 and to replace "a" with "the" on line 9 of page 13. A vote was then taken on the motion to adopt R.S. 9:2149 as amended, and the motion passed with no objection. The adopted proposal reads as follows:

R.S. 9:2149. ~~Corporate distributions~~ <u>Receipts from interests in juridical persons</u>

~~A. Corporate distributions of shares of the distributing corporation, including distributions in the form of a stock split or stock dividend, are principal. A right to subscribe to shares or other securities issued by the distributing corporation accruing to stockholders on account of their stock ownership and the proceeds of any sale of the right are principal.~~

~~B. Except to the extent that the corporation indicates that some part of a corporate distribution is a settlement of preferred or guaranteed dividends accrued since the trustee became a stockholder or is in lieu of an ordinary cash dividend, a corporate distribution is principal if the distribution is pursuant to:~~

~~(1) A call of shares;~~

~~(2) A merger, consolidation, reorganization, or other plan by which assets of the corporation are acquired by another corporation; or~~

~~(3) A total or partial liquidation of the corporation, including any distribution that the corporation indicates is a distribution in total or partial liquidation, or any distribution of assets, other than cash, pursuant to a court decree or final administrative order by a government agency ordering distribution of the particular assets.~~

~~C. Distributions made from ordinary income by a regulated investment company or by a trust qualifying and electing to be taxed under federal law as a real estate investment trust are income. All other distributions made by the company or trust, including distributions from capital gains, depreciation, or depletion, whether in the form of cash or an option to take new stock or cash or an option to purchase additional shares, are principal.~~

~~D. All other corporate distributions are income, including cash dividends, distributions of, or rights to subscribe to, shares, securities, or obligations of corporations other than the distributing corporation, and the proceeds of the rights or of the property distributions, except as Sub-sections A, B, or C above provide otherwise.~~

~~E. If the distributing corporation gives a stockholder an option to receive a distribution either in cash or in its own shares, the distribution chosen is income, except as provided in Sub-sections B and C of this section.~~

~~F. A trustee may rely upon any statement of the distributing corporation as to any fact relevant under any provision of this Sub-part concerning the source or character of dividends or distributions of corporate assets.~~

A. Except as otherwise provided in this Section, a trustee shall allocate to income money received on account of an interest in a juridical person.

B. A trustee shall allocate to principal the following distributions received on account of a trustee's interest in a juridical person:

(1) Property other than money.

(2) Money received in one distribution or a series of related distributions in exchange for part or all of a trustee's interest in the juridical person.

(3) Money received in total or partial liquidation of the juridical person.

(4) Money received from a regulated investment company or a real estate investment trust if the money distributed is a capital gain dividend for federal income tax purposes.

C. Money is received in partial liquidation to the extent that the juridical person, at or near the time of a distribution, indicates that it is a distribution in partial liquidation. A partial liquidation also occurs if the total amount of money and property received in a distribution or series of related distributions is greater than twenty percent of the juridical person's gross assets, as shown by the juridical person's year-end financial statements immediately preceding the initial receipt.

D. Money is not received in partial liquidation, nor may it be taken into account under Subsection C of this Section, to the extent that it does not exceed the amount of income tax that a trustee or beneficiary must pay on taxable income of the juridical person that distributes the money.

E. Notwithstanding the provisions of this Section, if the receipt is one to which a more specific provision of this Subpart applies, a trustee may allocate the receipt based upon the source or character of the receipt and may rely upon a statement made by the juridical person regarding the source or character of the receipt.

Revision Comments – 2019

(a) This revision is based upon Section 401 of the 1997 version of the Uniform Principal and Income Act. Prior law contained in R.S. 9:2149 and 2150 was adopted verbatim (with the exception of R.S. 9:2149(D)) from the 1962 version of the UPIA. At the time of that Act, the dominant business form was the corporation. Thus, both the UPIA of 1962 and prior Louisiana law made no mention of limited liability companies or other modern business forms. The new UPIA of 1997 retains the same basic principles as the 1962 version but broadens the types of business forms to which the law is applicable. Given the multitude of types of juridical persons, it is not feasible to continue the old schematic that listed the various types of property that would be classified as principal. The 1997 UPIA and this revision classifies all non-monetary property as principal and thus includes all of the prior categories of property that were classified as principal.

(b) A cash distribution may be large (for example, more than 10% but not more than 20% of a juridical person's assets) and have characteristics that suggest it should be treated as principal rather than income. For example, a juridical person may have received cash from a source other than the conduct of its normal business operations because it sold an investment asset; or it sold a business asset other than one held for sale to customers in the normal course of business and did not replace it; or it borrowed a large sum of money and secured the repayment of the loan with a substantial asset; or a principal source of its cash was from assets such as mineral interests, 90% of which would have been allocated to principal if the trust had owned the assets directly. In such a case the trustee, after considering the total return from the portfolio as a whole and the income component of that return, may decide to exercise the power under R.S. 9:2158 to make an adjustment between income and principal.

(c) Subsection E of this Section provides the trustee with discretion to make an allocation regarding a receipt in accordance with the other provisions of this Section or in accordance with the source of the receipt, provided a more specific rule governs the source of the receipt in this Part. For instance, if the source of the receipt is due to the trustee's interest in a limited liability company derived from minerals, then the trustee may allocate the receipt in accordance with the provisions of this Section or in accordance with the provisions of R.S. 9:2152. In making the allocation, Subsection E also provides the trustee with the authority rely upon a statement of the relevant juridical person as to the source of the receipt without requiring the trustee to otherwise ascertain its source.

The Reporter then asked the Council to turn to R.S. 9:2150, on page 15 of the materials, explaining that the Committee's proposed revisions with respect to this provision were intended to conform with uniform law. It was moved and seconded to adopt R.S. 9:2150 as presented, and after a brief discussion concerning whether to change "obligation" to "obligations" or to specify that the obligation to pay money is to the trustee, the motion ultimately passed with no objection. The adopted proposal reads as follows:

R.S. 9:2150. ~~Bonds~~ <u>Obligation to pay money</u>

~~A. Bonds or other obligations for the payment of money are principal at their inventory value, except as provided in Sub-section B below. No provision shall be made for amortization of bond premiums or for accumulation for discount. The proceeds of sale, redemption, or other disposition of the bonds or obligations are principal.~~

~~B. The increment in value of a bond or other obligation for the payment of money payable at a future time in accordance with a fixed schedule of appreciation in excess of the price at which it was issued is income. The increment in value is distributable at the time provided in R.S. 9:1841 through 9:1847, R.S. 9:1891 through 9:1906, and R.S. 9:1961 through 9:1965, from the first principal cash available to the beneficiary who was the income beneficiary at the time of increment. If unrealized increment is distributed as income but out of principal, the principal shall be reimbursed for the increment when realized.~~

A. An amount received as interest, whether determined at a fixed, variable, or floating rate, on an obligation to pay money to the trustee, including an amount received in return for prepaying principal, shall be allocated to income without any provision for amortization of premium.

B. A trustee shall allocate to principal an amount received from the sale, redemption, or other disposition of an obligation to pay money to the trustee more than one year after it is purchased or acquired by the trustee, including an obligation whose purchase price or value when it is acquired is less than its value at maturity. If the obligation matures within one year after it is purchased or acquired by the trustee, an amount received in excess of its purchase price or its value when acquired by the trust shall be allocated to income.

C. This Section does not apply to an obligation to which R.S. 9:2151.2, 2152, 2153, or 2154 applies.

Revision Comments – 2019

(a) This revision is based upon Section 406 of the UPIA (1997).

(b) This revision changes the law by providing that the entire increase in value of discount obligations is attributable to principal when the trustee receives the proceeds from the disposition, unless the obligation, when acquired, has a maturity of less than one year.

Next, the Council turned to R.S. 9:2151, on page 17 of the materials, and Professor Scalise explained that although the rules for partnerships and other entities are set forth in the provision concerning juridical persons, sole proprietorships are not included. As a result, the Committee determined that this provision should be retained but that the "prudent man" standard should be eliminated from lines 5 through 7 of page 17. It was moved and seconded to adopt the proposed revisions to R.S. 9:2151 as presented, at which time the Council briefly discussed the rule that would apply with respect to unincorporated joint ventures, which, in the Reporter's view, would be the default rule under R.S. 9:2142. A vote was then taken on the motion to adopt R.S. 9:2151, and the motion passed with no objection. The adopted proposal reads as follows:

R.S. 9:2151. ~~Business operations~~ Sole proprietorship

~~If a trustee uses any part of the principal in the operation of a business of which, as trustee, he is a proprietor or a partner, the proceeds and losses of the business~~ The receipts and expenses of a sole proprietorship shall be allocated in accordance with what is reasonable and equitable in view of the interests of those entitled to income as well as of those entitled to principal~~, and in view of the manner in which men of ordinary prudence, discretion, and intelligence would act in the management of their own affairs~~.

Revision Comments – 2019

(a) This revision modifies existing law to make clear that this provision applies only to a trustee's operation of sole proprietorship. The operation of other business forms is treated in R.S. 9:2149.

(b) A sole proprietorship is not a separate juridical person in Louisiana, but merely a method of doing business in which an individual personally owns the assets and retains the liabilities of a business. *See, e.g., Robinson v. Heard,* 809 So. 2d 943, 946 (La. 2002) ("A sole proprietorship is not a legal entity. It is merely a designation assigned to a manner of doing business by an individual. While the individual involved in the sole proprietorship may consider the business to be separate and distinct from his/her person, there exists no legal distinction between the individual and the business.").

The Reporter then directed the Council's attention to R.S. 9:2151.1, on page 18 of the materials, and explained that this provision on insurance contracts is not presently included in the Trust Code but is included in the UPIA. As a result, the Committee determined that this provision should also be adopted in Louisiana. It was moved and seconded to adopt R.S. 9:2151.1 as presented, and the motion passed with no objection. The adopted proposal reads as follows:

R.S. 9:2151.1. Insurance contracts

A. A trustee shall allocate to principal the proceeds of a life insurance policy in which the trustee is named as beneficiary.

B. A trustee shall allocate to principal the proceeds of a contract that insures the trustee against loss for damage to, destruction of, or loss of an interest in a trust asset. The trustee shall allocate dividends on an insurance policy to income if the premiums on the policy are paid from income, and to principal if the premiums are paid from principal.

C. A trustee shall allocate to income proceeds of a contract that insures the trustee against loss of occupancy or other use by an income beneficiary, loss of income, or loss of profits from a business.

Revision Comments – 2019

This revision is based upon Section 407 of the UPIA (1997). The term "proceeds," as used in this Section, refers to the insurable benefit under the contract and does not include other payments associated with the benefit, such as interest.

The Council then considered R.S. 9:2151.2, on page 19 of the materials. Professor Scalise explained that this provision was modeled on a provision from the UPIA but that the language of the version drafted by the Committee was much more concise. He then noted that Paragraph (A)(1) concerns phantom stock plans, that Paragraph (A)(2) concerns individual retirement accounts, and that the Committee's intent was to allocate a greater percentage to principal because essentially, the asset is gradually being liquidated, plus the 90%/10% ratio is used with respect to both mineral interests and timber. It was then moved and seconded to adopt the Committee's proposed addition of R.S. 9:2151.2 as presented, and the motion passed with no objection. The adopted proposal reads as follows:

R.S. 9:2151.2. Deferred compensation, annuities, and similar payments

A. Payments made in money or other property to a trustee over a period of years or during the life of an individual from an annuity, an individual retirement account, an employee-benefit plan, a pension plan, a profit-sharing plan, a deferred compensation plan, or any similar arrangement created pursuant to income-tax incentives to fund for retirement are allocated as follows:

(1) To the extent that a payment is characterized as interest, a dividend, or a payment made in lieu of interest or a dividend, a trustee shall allocate the payment to income. The trustee shall allocate to principal the balance of the payment and any other payment received in the same accounting period that is not characterized as interest, a dividend, or an equivalent payment.

(2) If no part of a payment is characterized as interest, a dividend, or an equivalent, and all or part of the payment is required to be made, a

trustee shall allocate to income ten percent of the part that is required to be made during the accounting period and the balance to principal. If no part of a payment is required to be made or the payment received is the entire amount to which the trustee is entitled, the trustee shall allocate the entire payment to principal. To the extent that a trustee exercises a right of withdrawal, a payment is not considered to be required to be made.

B. If, in order to qualify for a marital deduction, a trustee must allocate more of a payment to income than provided for in this Section, the trustee shall allocate to income the additional amount necessary to qualify for the marital deduction.

Revision Comments – 2019

(a) This provision is based, in part, on Section 409 of the UPIA (1997) and informed by statutes from other states that have modified Section 409 of the UPIA. *See, e.g.*, Mass. Gen. Law. Ann. 203D-18; N. J. Stat. Ann. 3B:19B-17; N.Y. Estate, Prob. & Tr. Law 11-A-4.9; Alaska Rev. Stat. 13.38.690; Hawai'i Rev. Stat. 557A-409; Ohio. Rev. Code 5812.32.

(b) This Section applies to amounts received by a trustee under contractual arrangements that provide for payments to a third party beneficiary as a result of services rendered or property transferred to a payer in exchange for future payments. It applies whether the payments begin when the payment right becomes subject to the trust or are deferred until a future date, and it applies whether payments are made in cash or in kind, such as employer stock. In-kind payments usually will be made in a single distribution that will be allocated to principal under the second sentence of Paragraph (A)(2).

(c) Paragraph (A)(1) applies only to certain types of deferred compensation, phantom stock plans, and similar plans whose terms characterize a payment as dividends or interest. It does not apply to IRAs and similar arrangements. Paragraph (A)(2) applies to required payments from an IRA or similar arrangement.

(d) Paragraph (A)(2) of this Section differentiates between payments that are required to be made and all other payments. To the extent that a payment is required to be made (either under federal income tax rules, or, in the case of a plan that is not subject to those rules, under the terms of the plan), 10% of the amount received is allocated to income and the balance to principal. The right to receive payments under this Paragraph is a type of liquidating asset and therefore is treated similarly to property subject to depletion under R.S. 9:2154. All other payments are allocated to principal because they represent a change in the form of the principal asset. To that extent, this rule follows the general policy of R.S. 9:2144, which provides that property received in replacement of property shall be allocated to principal.

(e) Under Revenue Ruling 2006-26, the IRS declared that the 10% allocation provided in Section 409 of the UPIA did not qualify for the IRS's safe harbors, as 10% of a required minimum distribution is not a reasonable apportionment of the total return of the trust between income and principal. Under the ruling, the trustee is required to make available to the beneficiary the income of an IRA or defined contribution plan in order to qualify. To comply with the ruling, Section 409 of the UPIA was amended in 2008 to provide separate rules for determining the income of a marital trust that is the beneficiary of an IRA or similar arrangement. This revision simplifies the provisions of the UPIA while, at the same time, allowing the preservation of the marital deduction.

Next, the Council discussed R.S. 9:2152, beginning on page 21 of the materials, and Professor Scalise noted that this is the one provision that the Committee recommended excepting from the retroactive effectiveness provision because it represents a significant change in the law. He then explained that present law provides that with respect to mineral interests in trust, 72.5% of receipts from such interests shall be allocated to income, and 27.5% of receipts from such interests shall be allocated to principal, but that the IRS had abandoned this depletion allowance because it disproportionately favored income beneficiaries in that the majority of receipts from a capital asset were being allocated to income. As a result, the revised UPIA changed the allocation percentages of receipts from mineral interests to 90% to principal and 10% to income, but even though the vast majority of states have since incorporated this allocation scheme, the Committee recommended a slight deviation. As a result, the proposal beginning on page 22 of the materials would provide that the default rule of allocation in accordance with what is reasonable and equitable applies with respect to receipts from mineral interests, but Subsection D on page 23 further provides that an allocation of 90% to principal and 10% to income is presumed to be reasonable and equitable. He also noted that this presumption approach was modeled on Texas law but that other allocations would not be presumed to be inequitable.

The Council then engaged in a great deal of discussion with respect to this provision, with some Council members expressing their preference for a brightline rule rather than the default rule with a presumption concerning reasonableness, particularly in light of the potential for litigation resulting from the trustee's discretion. Council members also discussed the application of the retroactivity provision in light of the possibility that an income beneficiary may rely upon a 72.5%/27.5% allocation and ultimately agreed with the Committee's proposal to exempt this provision from having retroactive effect. One Council member then suggested replacing "oil, gas, and other minerals" with "mineral rights" throughout this provision to be more specific about the types of minerals that are included, and the Reporter and Council agreed. The Reporter then noted that R.S. 9:2153 on timber and 2154 on other property subject to depletion were related but that the Committee ultimately determined that these provisions should be retained as separate, distinct statutes. It was then moved and seconded to adopt R.S. 9:2152 as amended and R.S. 9:2153 and 2154 as presented, and the motion passed with no objection. The adopted proposals read as follows:

R.S. 9:2152. Proceeds of mineral interests

~~A. If any part of the principal consists of a right to receive royalties or overriding royalties, production from working interests or production payments, proceeds from net profits interests or payments for the right to extract minerals from immovable property, or other interests in oil, gas, and other minerals, the allocation of the proceeds of such interests shall be made as follows:~~

~~(1) If received as a delay rental on a lease, extension of payments on a lease, shut-in royalty, or bonus for the execution of a lease, the proceeds shall be allocated to income;~~

~~(2) If received from a production payment, then to the extent of any stated factor for interest or its equivalent, the proceeds shall be allocated to income; the balance of such proceeds shall be apportioned between principal and income by allocating to principal the fraction thereof that the unrecovered cost of the production payment bears to the remaining balance due upon the production payment (excluding any factor for interest or its equivalent) and by allocating the remainder of such proceeds to income;~~

~~(3) If received from a royalty, overriding royalty, limited royalty, or working interest, net profits interest, or from any other interest in oil, gas, or other minerals, not specifically covered in this section, such proceeds shall be allocated to principal until such time as the cost for such interest (including both tangible and intangible drilling cost) has been fully recovered; thereafter, such proceeds shall be apportioned between~~

~~principal and income so that twenty-seven and one-half percent of the gross proceeds (but not to exceed fifty percent of the net proceeds remaining after payment of all expenses, direct and indirect, computed without allowances for depletion) shall be allocated to a reserve for depletion to be added to principal and the balance of the gross proceeds, after payment therefrom of all expenses, direct and indirect, shall be allocated to income.~~

~~B. This section is not applicable to timber, water, soil, sod, dirt, turf, mosses, shells, gravel, or other natural resources.~~

A. To the extent that a trustee accounts for receipts from an interest in mineral rights pursuant to this Section, the trustee shall allocate them as follows:

(1) If received as delay rental or annual rent on a lease, a receipt shall be allocated to income.

(2) If received from a production payment, a receipt shall be allocated to income if and to the extent that the agreement creating the production payment provides a factor for interest or its equivalent. The balance shall be allocated to principal.

(3) If received as a royalty, shut-in-well payment, take-or-pay payment, or bonus, a receipt shall be allocated in accordance with what is reasonable and equitable in view of the interests of those entitled to income as well as of those entitled to principal.

(4) If an amount is received from a working interest or any other interest not provided for in Subsection A of this Section, a receipt shall be allocated in accordance with what is reasonable and equitable in view of the interests of those entitled to income as well as of those entitled to principal.

B. This Section applies whether or not a decedent or donor was extracting mineral rights before the interest became subject to the trust.

C. If the trust property includes an interest in mineral rights, on the effective date of this Section, the trustee may allocate receipts from the interest as provided in this Section or in the manner used by the trustee before the effective date of this Section. If the trustee acquires an interest in mineral rights after the effective date of this Section, the trustee shall allocate receipts from the interest as provided in this Section.

D. An allocation of a receipt under this Section is presumed to be reasonable and equitable if ninety percent is allocated to principal and ten percent to income. Any other allocation shall not be presumed to be unreasonable or inequitable.

E. This Section is not applicable to timber, water, soil, sod, dirt, turf, mosses, shells, gravel, or other natural resources.

Revision Comments – 2019

(a) This provision is new. It is based upon Texas Property Code Section 116.174 and Section 411 of the UPIA (1997). Unlike the UPIA but like Texas law, this Section allows for allocation of royalty payments associated with oil and gas leases in a manner that is reasonable and equitable. Under Subsection D but unlike the Texas statute, this provision adopts a safe harbor provision providing that an allocation of ninety percent to principal and ten percent to income is presumed to be reasonable and equitable but at the same time being clear that other allocations are not necessarily unreasonable or inequitable. Prior law allocated the royalty payments associated with oil and gas leases in the amount of 27.5% to principal and 72.5% to income. These percentages have been part of the Trust Code since 1964 and were included at that time because the Internal Revenue Code provided for a 27.5% depletion allowance. At that time, the UPIA of 1962 also provided similarly. The IRC now no longer provides for the 27.5% depletion allowance. As a result, many states have adopted a 90% depletion rate from the 1997 version of the UPIA. *See, e.g.*, Cal. Prob. Code § 16363; Mich. Comp. Laws § 555.811; Colo. Laws. 15-1-421. The rationale for this drastic change is that the old law inappropriately caused a large portion of oil and gas proceeds – 72.5% – to be paid out as income. Over the life of a well, the output would be depleted significantly. Allocating more to principal allows the trustee to obtain other income producing assets that might still be productive when the minerals are exhausted. The approach adopted by this Section allows the trustee flexibility in the allocation.

(b) Subsection B abolishes the open mines doctrine in trust.

(c) Under Subsection C, the new depletion allowances are made prospectively applicable. For oil and gas interests included in a trust on the effective date of this provision, the trustee has discretion in deciding which method of depletion (i.e., the old or new law) to apply.

(d) Unlike the UPIA and the Texas statute, this provision does not apply to water, timber, gravel, or other natural resources. R.S. 9:2153 and 2154 provide the appropriate rules with respect to timber and other property subject to depletion.

R.S. 9:2153. Timber

A. If part of the principal consists of land from which timber may be removed, the receipts from taking the timber from the land shall be allocated in accordance with what is reasonable and equitable in view of the interests of those entitled to income as well as of those entitled to principal~~, and in view of the manner in which men of ordinary prudence, discretion, and intelligence would act in the management of their own affairs~~.

B. An allocation of a receipt under this Section is presumed to be reasonable and equitable if ninety percent is allocated to principal and ten percent to income. Any other allocation shall not be presumed to be unreasonable or inequitable.

Revision Comments – 2019

(a) This revision updates the language but maintains the "reasonable and equitable" standard. Like R.S. 9:2152, Subsection B provides a safe harbor provision providing that an allocation of ninety percent to principal and ten percent to income is presumed to be reasonable and equitable but at the same time being clear that other allocations are not necessarily unreasonable or inequitable. It also deletes the "prudent man" rule that existing under prior law because persons of "ordinary prudence, discretion, and intelligence" do not generally consider the interests of successor beneficiaries in managing their own affairs. See, e.g., UPIA §103 cmt (1997).

(b) This Section is consistent with the principles of Louisiana property law that generally treat trees as capital assets rather than fruits. In some instances, however, trees in a tree farm or in a regularly exploited forest must be treated as fruits. See, e.g., C.C. Art. 551 cmt (b).

R.S. 9:2154. Other property subject to depletion

A. Except as provided in R.S. 9:2152 and ~~9:~~2153, if the principal consists of property subject to depletion, ~~receipts from the property not in excess of five percent of its inventory value are income, and the balance is principal~~ the receipts shall be allocated in accordance with what is reasonable and equitable in view of the interests of those entitled to income as well as of those entitled to principal.

B. An allocation of a receipt under this Section is presumed to be reasonable and equitable if ninety percent is allocated to principal and ten percent to income. Any other allocation shall not be presumed to be unreasonable or inequitable.

Revision Comments – 2019

This revision updates the law to make the depletion allowance consistent with the "reasonable and equitable" standard in R.S. 9:2153. Like R.S. 9:2152 and 2153, Subsection B provides a safe harbor provision providing that an allocation of ninety percent to principal and ten percent to income is presumed to be reasonable and equitable but at the same time being clear that other allocations are not necessarily unreasonable or inequitable.

At this time, Professor Scalise concluded his presentation, and the Friday session of the September 2018 Council meeting was adjourned.

LOUISIANA STATE LAW INSTITUTE

MEETING OF THE COUNCIL

September 14-15, 2018

Saturday, September 15, 2018

Persons Present:

Bergstedt, Thomas M.
Breard, L. Kent
Brister, Dorrell J.
Comeaux, Jeanne C.
Crawford, William E.
Crigler, James C., Jr.
Curry, Kevin C.
Davrados, Nick
Dawkins, Robert G.
Doguet, Andre'
Forrester, William R., Jr.
Garofalo, Raymond E., Jr.
Gregorie, Isaac M. "Mack"
Hamilton, Leo C.
Hayes, Thomas M., III
Hogan, Lila T.
Holdridge, Guy
Jennings, Alan
Jewell, John Wayne
Knighten, Arlene D.
Kunkel, Nick
Lonegrass, Melissa T.
Manning, C. Wendell
McIntyre, Edwin R., Jr.
Miller, Cody "C.J."
Price, Donald W.
Richardson, Sally Brown
Saloom, Douglas J.
Scalise, Ronald J., Jr.
Sole, Emmett C., Jr.
Storms, Tyler
Talley, Susan G.
Thibeaux, Robert P.
Thibodaux, Catherine Parsiola
Tucker, Zelda W.
Waller, Mallory
Wilson, Evelyn L.
Ziober, John David

President Susan G. Talley called the Saturday session of the September 2018 Council meeting to order at 9:00 a.m. on Saturday, September 15, 2018, at the Lod Cook Alumni Center in Baton Rouge. She then called on Professor Melissa T. Lonegrass, Reporter of the Notaries Committee, to begin her presentation of materials.

Notaries Committee

Professor Lonegrass began her presentation by explaining that the Notaries Committee had recently been formed in response to two resolutions passed during the 2018 Regular Session. She noted that the resolutions requested legislation on two distinct but related topics – electronic notarization and notaries with limited authority. The Reporter explained that her goal for the day was to get the Council's input on high-level policy matters related to the topics at issue.

After this introduction, Professor Lonegrass began by providing some basic background information on the issues being studied by the Committee. She began with House Concurrent Resolution No. 31, which directed the Law Institute to study electronic notary law. The Reporter further noted that this topic encompassed two concepts. The first, she explained, was the use of electronic signatures by notaries to execute instruments in electronic form while all parties were present in the same room. Professor Lonegrass illustrated this first concept with the example of passing around an iPad with a PDF writer or similar software. The second concept falling under the "electronic notarization" umbrella, the Reporter explained, was remote notarization. Noting that the latter topic was much more complex than the former, Professor Lonegrass explained that remote notarization refers to the execution of an instrument by use of web-conferencing technology – where the signatory is not physically present with the notary. In this process, she continued, the notary verifies the signatory's ID and affixes signatures electronically. Professor Lonegrass noted that, for the sake of clarity, she would be referring to these two issues as "electronic signatures" and "remote notarization," respectively.

The Reporter then moved on to discuss the purpose of the legislature's requests. With respect to electronic signatures, she noted that industry desires the ability to perform transactional work electronically and using electronic documents. Facilitating this process, she explained, would help Louisiana keep up with developing technology. With respect to remote notarization, Professor Lonegrass noted that the reasoning, too, was more complex. She cited the possible shortage and unavailability of notaries – especially in more rural areas of the state – and the convenience of being able to perform certain transactions, such as transferring and clearing land title, remotely. Another reason for the legislature's request regarding remote notarization, Professor Lonegrass continued, was the growing trend among other states. She explained that, to date, nine states had passed laws authorizing remote notarization, and that the Uniform Law Commission, the Mortgage Bankers Association, and the American Land Title Association had all incorporated the concept into their own uniform and model acts. Professor Lonegrass added that around 30 other states had considered but ultimately not yet passed legislation that would authorize remote notarization – and that, accordingly, Louisiana would, at the very least, need to consider the issue.

Next, the Reporter delved into the history of the project itself. She explained that, although the Notaries Committee was technically a newly-formed Committee, it was, in reality, a continuation of the Law Institute's Electronic Signatures Study Group. Professor Lonegrass further explained that the Study Group was initially asked to study remote notarization in 2015, and that it had issued an interim report to the legislature on the issue in 2017. The Reporter noted that, during the 2018 Regular Session, multiple bills were proposed that would have implemented a remote notarization scheme – but that these bills were opposed by the LLTA, the LBA, the NA, and other organizations, and ultimately failed. She explained that the opposition to these bills was multifaceted – there was disagreement over the types of acts that would be allowed, the types of technology that would be required, and the interaction of such a scheme with the concept of a "civil law notary" generally. Accordingly, Professor Lonegrass urged, it is important to remember that the Notaries Committee was actually picking up this project in the middle. She further emphasized the urgency and time constraints regarding the matter in asking the Council for general feedback so as to help guide the Committee's work.

The Reporter then moved to the substance of the day's discussions. Beginning with electronic signatures, Professor Lonegrass pointed out that, currently, LUETA already allows for instruments to be "notarized" electronically – so that part of the work is already complete in a sense. The issue, she continued, is that, despite being permitted under current law, this process is not being widely used. The Reporter further explained that LUETA is deliberately vague in defining the term "electronic signature." She noted that the Committee had discussed the possibility of adding additional precision to the definition but concluded that such a change would likely do more harm than good – as the breadth of the definition allows it to encompass evolving technology, and additionally makes sense in light of the fact that it is based on uniform law.

This led the Reporter to a discussion about why, specifically, nobody tends to have things notarized electronically. The primary reason for this, Professor Lonegrass explained, is the fact that only about one-third of all parishes in the state accept electronic recordation of the types of acts that might otherwise be done electronically. She noted that the inability to record such acts electronically effectively renders the process useless. Professor Lonegrass pointed out, however, that the legislature has required all parishes to accept electronic recordation in the conveyance records by 2022. Noting that this still leaves a several-year gap, the Reporter explained that the Committee had discussed the possible stop-gap solution of recording print-copies of electronic acts. The current issue with this, she continued, is that Article 3344 can be interpreted as not allowing the recordation of such a copy – and that, as a result, clerks currently do not generally accept these copies. Accordingly, Professor Lonegrass explained, the Committee had considered potentially drafting something to allow for the recordation of such print-copies as a stop-gap until 2022. She added that all relevant model acts contemplate a similar system.

The Reporter then asked for the Council's general opinion and thoughts on two items: making no changes to LUETA; and proposing legislation regarding the acceptance by clerks of the aforementioned printouts. One Council member spoke, first voicing the opinion that the ideas presented by the Reporter were great, and then inquiring as to whether the Committee had considered adopting any of the uniform or model act provisions. Professor Lonegrass answered that on this particular issue, the adoption of such provisions—as well as the provisions of other states—would certainly be something the Committee would consider, although likely without adopting model or uniform act provisions outright. The reason for this, she explained, is that the electronic recordation issues very well may just result from an anachronism specific to Louisiana. Another Council member wondered what the upside of performing these acts electronically is if the notary will still have to print a copy out anyway. Professor Lonegrass noted that this was a good point – and one the Committee had, in fact, discussed. Another Council member disagreed, opining that the process would still add a level of convenience.

Next, a Council member asked about the opinions of title examiners and insurers on the issues being discussed. The Reporter noted that before these parties would be willing to issue insurance, they would want a way for the instrument to be recorded. Expressing support for the Committee's work and emphasizing the belief that the Reporter was "on the right track," another Council member suggested that perhaps notaries could use something simple like a true-copy stamp to certify the printouts of instruments executed electronically. The Council member continued, noting that the only issue she could see with such a system would be with electronically-signed instruments that do not need to be notarized (and thus would have no seal). Professor Lonegrass agreed both that the suggestion was a good one and that the issue raised was something into which the Committee should look. The next question pertained to the potential cost of implementing such a system. The Reporter explained that there would actually be no additional cost – because all the clerks would be required to do would be to accept physical documents as they already do.

After a few more Council Members voiced support for the ideas that had been presented, the Reporter shifted focus to the next two issues at hand. Reminding the Council that these two issues were remote notarization and limited-authority notaries, Professor Lonegrass noted that she would be keeping her presentation of the issues tied together so as to help the discussion flow. After reiterating the basics of how remote notarization works, the Reporter pointed out that the obvious issue with the authorization of such a scheme in Louisiana is the fact that functions performed by other states' notaries are much more limited than those of the civil law notary in Louisiana. Professor Lonegrass further emphasized that the likely concerns of the Council in this area – for example, protecting against vices of consent – were shared by the Committee. Dovetailing with the fact that other states' notaries serve merely to verify signatures, she continued, the legislature further requested that the Committee draft legislation regarding limited-authority notaries. The Reporter added, as a suggestion, that perhaps it would make sense to deal with the two issues in tandem – allowing limited authority for remote notarizations.

The Reporter continued this line of thinking, noting that the biggest issue with remote notarization is what notarial functions would be allowed. She noted that everyone would probably be agreeable with allowing simpler transactions, such as those pertaining to car title – but added that industry had been pushing strongly for the ability to perform much more significant transactions remotely. The Reporter pointed out that this would obviously raise issues regarding executory process. She assured the Council that the Committee was not considering the possibility of executing wills remotely but added that a discussion needed to be had with respect to other transactions. Professor Lonegrass urged that, if a shift was made to allow for remote notarization, whatever scheme was put into place would necessarily have to include the same types of safeguards as are present in current law. Noting that, surely, the issue of limited-authority notaries would naturally arise as the discussion of what types of transactions ought to be allowed to be performed remotely unfolded, the Reporter then asked for comments from the Council.

The first concern raised by the Council related to donations. Pointing out that an act of donation not in authentic form is absolutely null, the Council member noted that allowing for such a transaction to be done remotely would be an enormous departure from current law. In response, Professor Lonegrass explained that *if* authentic acts were to be included in the list of acts that could be executed through remote notarization, it would require a change to the definition of the phrase "in the presence of" – and therefore not require quite as massive an upheaval of Louisiana's civilian tradition as contemplated by the Council member. The Reporter added, however, that this was nevertheless a very significant concern of the Committee. Next, a Council member asked the Reporter if she could go over the options in terms of the methods by which to accomplish remote notarization. Noting that she was not yet an expert on the specifics of the technology at issue, Professor Lonegrass explained that vendors provide specific software to verify identification and the like – and that the Secretary of State would be tasked with promulgating regulations with respect to technological requirements and similar issues. Additionally, the Reporter noted that another area of remote notarization in which there were different options to be explored was who must be present in the same room. Using the hypothetical of someone holding a gun under the table, she explained that one possible safeguard would be to perhaps require that a witness be physically present in the room with each signatory. The Reporter conceded, however, that even with such an approach, there were undoubtedly still issues.

Continuing, the Reporter noted that if those issues—again, for example, protecting against vices of consent—could not be satisfactorily dealt with, it might instead make sense to exempt certain transactions from being eligible to be accomplished through remote notarization. She added that, in such a case, proposed legislation could utilize either an opt-in system (by which eligible transactions would be specifically listed) or an opt-out system (by which *ineligible* transactions would be specifically listed). Professor Lonegrass further explained, however, that, from a uniformity perspective, it might be difficult if too many functions were exempted – so any such list of ineligible functions would need to be carefully curated and accompanied by very specific and convincing reasons for the exemptions. A Council member voiced agreement with this sentiment and opined that, especially considering that the language of the resolutions suggest inevitability, the Reporter made a good point, here. Referencing the events of the most recent legislative session, Professor Lonegrass agreed, and added that remote notarization will almost certainly be authorized with or without the Law Institute's input – making this opportunity critical.

Adding to the Reporter's point, Council member and Representative Ray Garofalo emphasized how close a remote notarization bill was to passing during the 2018 Regular Session. Representative Garofalo added that, in his estimation, it was worth considering a combination of the limited and remote notary issues. In response, Professor Lonegrass asked Representative Garofalo to comment on the viability of exempting authentic acts from eligibility to be executed through remote notarization – and expressed her concern that there would be a significant pushback at the legislature if authentic acts were not included. Representative Garofalo stated that the issue is executive process. He explained that it was his understanding that other states had different methods of executive process due to their lack of self-authenticating documents and suggested that perhaps a way to appease the lobbyists who would want executive process in this context without necessarily having to allow for remote authentic acts would be to study other states' analogues to executory process. One Council member suggested the possibility of using some aspects of a scheme similar to California's – under which many more basic acts would no longer require the service of a notary at all. Another Council Member urged significant caution against this idea. The member emphasized that the actual function of witnesses – which, under such a scheme, would be the only necessity to execute the relevant acts – does not provide the requisite safeguards.

On the issue of authentic acts potentially being permitted to be executed through remote notarization, many Council members voiced strong opposition. In response to this sentiment, the Reporter asked the Council if any members had comments in favor of allowing remotely executed authentic acts – noting that, if nobody felt that it was a good idea, it would be very informative to the Committee's work going forward. Ultimately, no Council members spoke in favor of allowing remotely executed authentic acts – and, instead, additional opposition was voiced. Echoing the nervousness of the rest of the Council, one member pointed out that a mortgage, for example, is valid as to form as an act under private signature – emphasizing again that the real issue was executive process. One Council member then voiced concern over jurisdictional issues with respect to out-of-state notaries. The Reporter noted that the member's concern was one of the problems with the failed bill from the prior legislative session, adding that the issue had been discussed and dealt with by the Committee.

Professor Lonegrass next asked the Council for comments on the possibility of allowing remote notarization for non-authentic acts. This led to a discussion of legislative hearings from the 2018 Regular Session regarding remote notarization. The Reporter again emphasized the incredibly tight deadline under which the Committee was operating. Next, responding to the Reporter's prior request for comments regarding what acts the Council might be okay with being performed remotely, one member stated that, while he had no specific opinion one way or the other with respect to which acts should be excluded, he felt that the Committee should at least consider allowing affidavits in support or opposition to a motion for summary judgment. The Council member added that, in general, he did not like the concept of guaranteed signatures, and suggested that the Committee might want to consider that issue as well. Professor Lonegrass agreed with this concern and noted that the Committee would need to consider how that would fit into the schema. The Reporter then reminded the Council of the importance of considering the likely opposition to any legislation that might exempt authentic acts from the remote notarization scheme. Noting that the aforementioned remote notarization bill from the prior legislative session came from the company CivicSource, she emphasized that any bill that would not afford the possibility of executory process with respect to acts done through remote notarization would likely face considerable pushback from CivicSource and related entities. In response, a Council member pointed out that no other state has anything truly analogous to executory process. The Council member continued, explaining that the "dirty little secret" in commercial lending is that, because of the industry, the requisite authentic evidence has slowly been chipped away – and that, as a result, there are already people beginning to worry about the potential unconstitutionality of foreclosure proceedings. She added that if there was legislation passed that would allow for authentic acts to be executed remotely, she could see it being a tipping point in that respect. The member further voiced concern in the context of donations, adding that oftentimes, a conscientious notary is the last line of defense against undue influence. Continuing, she emphasized her opinion that protecting against vices of consent in this context is hugely important, and that, at the very least, she would want to ensure that it would be possible, with respect to such transactions, to go back and check for capacity after the fact. In response to this concern, another Council member suggested the possibility of researching safeguards for remote testimony as potentially useful in this context.

Again taking the floor, the Reporter summarized the Council's concerns. She explained that she did not plan to take any votes, but that moving forward, the Committee might try to exclude authentic acts from the remote notarization scheme based on the sentiments expressed by the Council. The Reporter added that, if authentic acts were, in fact, excluded, it might be worth discussing whether adding a class of limited-authority notaries would be necessary. She then asked Representative Garofalo to discuss the topic of limited-authority notaries in more detail. Representative Garofalo noted that the idea was to create a class of notaries with limited authority for the purpose of performing simple transactions. He explained that the extensive authority and correspondingly heightened necessary qualifications for Louisiana notaries sets Louisiana businesses back by limiting the ability to have somebody on site for simple transactions. He added that his thought was to have a cut-off date where existing notaries are "promoted" and that, in his opinion, allowing signature-only notaries would put Louisiana on a level playing field with other states. One Council member brought up the issue of ex officio notaries, wondering whether they would simply be eliminated or would otherwise continue ad hoc. Representative Garofalo admitted that this was not an issue he had considered but agreed that it would need to be discussed. Several Council members spoke in favor of keeping ex officio notaries. Another Council member voiced opposition to the concept of limited-authority notaries, opining that if it were allowed, then "everyone would be one." Several additional Council members noted mild disagreement with the idea.

After this discussion, one Council member suggested taking a straw poll on the issue of excluding wills and authentic acts from a potential remote notarization scheme. A motion to take a straw poll on these issues was made and seconded. Ultimately, all voted in favor of excluding wills and authentic acts. Next, a motion was made and seconded to take a straw poll on the issue of whether there should be some category of documents for which the requirement of a notary ought be eliminated entirely. The poll was taken and slightly more than half of the votes were in favor.

Before concluding the meeting, the Reporter noted that she wanted feedback from the Council on the general strategy for the Committee's work moving forward. She suggested that perhaps, first, the Committee should develop and draft legislation with respect to a remote notarization procedure – and then, subsequently, particular instruments could be opted in. The Council was unanimous in its agreement with this suggestion. Following this, a Council member stated agreement with the possibility of signature-only notaries but added that the types of documents that signature only notaries could "notarize" ought to be limited. This, in turn, led to a brief discussion of what titles would apply to both the new class of limited-authority notaries and the existing class of notaries. Representative Garofalo explained that he intended for the new, limited-authority class to simply be called "notaries public," and for the current class to be "elevated" to the title of "civil law notary." In response, a Council member suggested referring to the new class of notaries simply as "signature-only notaries." Representative Garofalo voiced opposition to this suggestion, opining that out-of-staters would not understand that the "signature-only" notaries were actually equivalent to other states' notaries public. Ultimately, the issue was left unresolved.

At this time, Professor Lonegrass concluded her presentation, and the September 2018 Council meeting was adjourned.

Jessica G. Braun

Mallory C. Waller

Nick Kunkel