LOUISIANA STATE LAW INSTITUTE

MEETING OF THE COUNCIL

October 12-13, 2018

Friday, October 12, 2018

Persons Present:

Adams, Marguerite (Peggy) L.
Bergstedt, Thomas M.
Braun, Jessica
Breard, L. Kent
Brister, Dorrell J.
Carroll, Andrea B.
Clark, Marcus R.
Cromwell, L. David
Davidson, James J., III
Davrados, Nick
Dawkins, Robert G.
Dimos, Jimmy N.
Doguet, Andre'
Forrester, William R., Jr.
Freel, Angelique
Garofalo, Raymond E., Jr.
Garrett, J. David
Gilson, Rebecca
Gregorie, Isaac M. "Mack"
Griffin, Piper D.
Hargrove, Joseph L., Jr.
Hayes, Thomas M., III
Haymon, Cordell H.
Hogan, Lila
Holdridge, Guy
Knighten, Arlene D.
Kutcher, Robert A.
Lavergne, Luke
Maloney, Marilyn C.
Manning, C. Wendell
McIntyre, Edwin R., Jr.
Medlin, Kay C.
Miller, Gregory A.
Morris, Glenn G.
Norman, Rick J.
North, Donald W.
Philips, Harry "Skip", Jr.
Price, Donald W.
Saloom, Douglas J.
Sole, Emmett C., Jr.
Spaht, Katherine
Stuckey, James A.
Talley, Susan G.
Tate, George J.
Thibeaux, Robert P.
Title, Peter S.
Tooley-Knoblett, Dian
Tucker, Zelda W.
Vetter, Keith
Waller, Mallory
Weems, Charles S., III
Wilson, Evelyn L.
Woodruff-White, Lisa
Ziober, John David

President Susan G. Talley called the October 2018 Council meeting to order at 10:00 a.m. on Friday, October 12, 2018, at the Louisiana Supreme Court in New Orleans. She began by honoring Professor William E. Crawford, who recently announced his retirement from his position as Director of the Law Institute. The President then called on Professor Katherine S. Spaht, Chair of the Marriage-Persons Committee, to begin her presentation of proposed revisions to the law of tutorship.

Marriage-Persons Committee

Professor Spaht began her presentation by reminding the Council that the two main goals of the complete revision of tutorship are to reunite custody and tutorship and to move the substantive provisions from the Code of Civil Procedure to the Civil Code. Last November, the Council expressed concern with how tutorship will meld with custody, so the Committee drafted two new articles to provide specificity. The Chair explained that proposed Civil Code Article 138 in the section of the Code on child custody explicitly states that all the present custody principles will apply during the regime of tutorship when a custody proceeding arises, even if an action for divorce has not been filed. Proposed Civil Code Article 278 in the section of the Code on tutorship also reiterates the application of the custody principles to a proceeding for custody once tutorship has commenced. These articles reunite tutorship and custody but do not change the practice as it exists today. With little discussion, the following provisions were approved:

Article 138. Applicability

The principles of this Section and all laws related thereto apply in any proceeding between natural persons for the custody of a child unless otherwise specifically provided by law.

Revision Comments – 2019

(a) This Article clarifies that the law applicable in any proceeding to determine the custody of a minor child, not only one incidental to a petition for divorce, is in this Section and all related provisions unless specifically excluded. *See* Art. 136 and the comments thereto. Such proceedings include those instituted under R.S. 9:291 (other than Art. 136, *see* comment (d)), tutorship, habeas corpus, protective orders, Domestic Abuse Assistance Act, and Post Separation and Family Violence Relief Act.

(b) The use of the term "natural persons" is intended to exclude proceedings in which the state of Louisiana is a party, such as proceedings under the Children's Code, unless the law explicitly so provides.

(c) Article 278 is a parallel provision that applies the principles of this Section to custody proceedings during the regime of tutorship for the consideration of two additional factors if custody is to be awarded during the regime of tutorship. These two relevant factors are: (1) the kinds of tutorship, in Article 247, but also the dichotomy of tutorship of the person and tutorship of the property as provided for in Articles 266, 279, and 280; and (2) the designation of a tutor by the natural tutor dying last as an expression of preference by the tutor.

(d) "[U]nless otherwise specifically provided by law" includes the visitation rights of third parties before married parents file an action for divorce or custody of a child under R.S. 9:291. Those rights are governed not by Art. 136, but by R.S. 9:291.1-291.2. *See* comment to Art. 136.

Article 278. Custody principles apply after tutorship commences

The principles of determining custody of a child contained in this Book and all laws related thereto shall apply in a proceeding for custody of a child once tutorship has commenced. Additional factors in determining the best interest of a child during tutorship may include the kind of tutorship and the designation of a tutor by the natural tutor.

Revision Comments – 2019

(a) The principles, as interpreted by the jurisprudence and related laws, include the best interest of the child and the hierarchy of principles in a contest between parents, proof of substantial harm in a contest between a parent and a non-parent, and proof of a material change in circumstances for a change of custody plus the effect of a considered decree in such an action. See Title V, Chapter 2, Section 3 of Book I, and the comments thereto.

(b) The additional two factors to which this article refers are important provisions specific to determining custody of a child during tutorship. Art. 247 lists three kinds of tutors. Yet, there are also two kinds of tutors representing the two principal functions of a tutor—a tutor of the person and a tutor of the property. *See* Arts. 266, 279, and 280.

The second factor is the designation of a tutor by the natural tutor dying last, if relevant. Such a designation represents the choice made by a parent or grandparent who has had custody and control over the child's person and property and superior knowledge of the child and in whose custody and care his best interest will be served.

Article 131. Court to determine custody

* * *

Revision Comments – 2019

Article 138 explicitly applies the principles of this Section to actions for custody between natural persons before the filing of a divorce action and after the divorce action results in a judgment of divorce. See comments to Art. 138. In the latter instance the application of custody rules during the regime of tutorship, resulting from the divorce of the child's parents, was implicit by inclusion of the word "thereafter" in this article. See Art. 246. Furthermore, these custody rules apply, unless otherwise modified, in all other instances of custody litigation during tutorship, such as upon the birth of a child born outside of marriage or the adoption of a child by a single person. See Art. 246.

Article 134. Factors in determining child's best interest

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Revision Comments – 2019

Article 138 directs that all of the principles contained in this Section, including this article, apply to other proceedings in which natural persons seek custody of a minor child. Other proceedings include tutorship proceedings under Title VIII of Book I, of Persons. Article 278 adds two additional factors to be considered in tutorship proceedings. The first is the kind of tutorship: natural, designated and appointed, as well as tutor of the person and tutor of the property. The second is the designation of a tutor by the natural tutor. *See* comments (a) and (b), Art. 278.

Professor Spaht then explained that the next issue arose from the previous discussion and adoption of the concept of split tutorship where there may be both a tutor of the person and a tutor of the property. When only a tutor of the person exists, the Committee imposed a duty upon that tutor to notify the court when a tutor may be necessary to protect the minor's interest in property. This obligation is similar to the obligation imposed upon undertutors to notify the court in certain circumstances. The Council wondered if this duty creates liability for the tutor of the person if they fail to notify the court and someone is injured on the minor's property. The Chair responded that the Committee weighed the interests and concluded that the intent of the obligation is to protect the interest of the minor and that other provisions of law will cover any fallout. The Council also noted that the Tutorship Procedure Committee will need to create a procedure for the tutor of the person to notify the court because when a change of custody has occurred and only a tutor of the person is appointed, there may not be an ongoing proceeding for notice to occur. With a few changes to the proposal, the following was approved:

Article 266. Separate tutor of the property; tutor of the person

In exceptional cases and for good cause shown, the court may appoint a separate tutor of the property. This tutor may be a trustee in accordance with the Louisiana Trust Code.

If a person is tutor of the person only under this Article or other provisions of this Chapter, this tutor need not qualify to exercise authority over the person of the child except to represent the child in a civil action.

If there is no tutor of the property, the tutor of the person shall notify the court when a tutor is necessary to protect the minor's interest in property.

Revision Comments – 2019

* * *

(e) The third paragraph of this article is similar to the obligation of an undertutor in Art. 272.

Professor Spaht then explained that proposed Civil Code Article 279 provides that natural tutors with custody are both tutor of the person and tutor of the property, but any other person awarded custody shall at least be appointed tutor of the person. The Council was concerned that this language does not give enough direction to the court. It was not clear from the proposal that a natural tutor with custody is recognized by law to be the tutor of the child without being appointed as such by the court. However, the Chair expressed her desire to be clear that if a natural tutor loses custody or is not suitable to be both the tutor of the person and the tutor of the property, another person shall be appointed. With these friendly amendments, the following was adopted:

Article 279. Custody judgment after tutorship commences

If custody is awarded to a person who is a natural tutor or co-tutor of right, that person is both tutor or co-tutor of the person and of the property of the child and no appointment is necessary.

In other cases, the person awarded custody after tutorship commences shall be appointed tutor of the person of the child, except as otherwise provided by law. The appointment may include tutorship of the property of the child, or another person may be appointed tutor of the property as provided by law.

Next, the Chair presented other articles and statutes that the Committee recommends be amended in light of the tutorship revision. With little discussion, the following were approved:

Article 41. Domicile of unemancipated minor

The domicile of an unemancipated minor is that of the parent or parents with whom the minor usually resides. If the minor has been placed by court order under the legal authority of a parent or other person, the domicile of that person is the domicile of the minor, unless the court directs otherwise.

The domicile of an unemancipated minor under tutorship is that of his tutor. In case of joint tutorship, the domicile of the minor is that of the tutor with whom the minor usually resides, unless the court directs otherwise. When there is a tutor of the person and a tutor of the property, the domicile of the minor is that of the tutor of the person.

Article 1548. Unemancipated minor; persons authorized to accept

A donation made to an unemancipated minor may be accepted by a parent or other ascendant ~~of the minor or by his tutor,~~ having parental authority or by a tutor of the property, even if the person who accepts is also the donor.

Either a parent or an ascendant may have parental authority as determined under Art. 232 or Art. 234. The language "tutor of the property" necessarily includes a tutor who exercises both authority over the person of the minor (Art. 262) and authority over his property (Art. 265), but excludes the tutor who is only the "tutor of the person." Art. 266.

Article 2333. Minors

Unless fully emancipated, a minor may not enter into a matrimonial agreement without the written concurrence of his ~~father and mother~~ parents, or of the parent having his legal custody, or of the tutor of ~~his person~~ the property.

The proposed change to Civil Code Article 3469 failed to address grandparents who have parental authority as a result of being awarded custody of their grandchild. The Council suggested revisions, but concerns remained so this Article was recommitted to the Marriage-Persons Committee with the suggestion that the Prescription Committee also review it. The Council also recommitted the proposed change to Children's Code Article 116 and the definition of "tutor". The Council would like more information regarding how "parent" is defined and how the word "tutor" is used in the Children's Code. They also suggested deleting this definition. Without much discussion these changes were quickly approved:

R.S. 6:418. Pledge of assets to secure deposits; exceptions; penalty

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B.

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(2) Any bank or trust company acting as tutor of the property, curator, executor, administrator, or other fiduciary, whose trust department makes deposits with its banking department of moneys for which it is responsible as tutor, curator, executor, administrator, or other fiduciary, may secure those deposits by delivering to its trust department, as collateral security, readily marketable bonds or other obligations or assets of that institution having and maintaining a market value at least equal to the amount of those deposits.

* * *

R.S. 9:355.3. Persons authorized to propose relocation of principal residence of a child

The following persons are authorized to propose relocation of the principal residence of a child by complying with the notice requirements of this Subpart:

* * *

(5) A person who is the ~~natural~~ tutor or co-tutor of a child born outside of marriage.

(6) A person who is the tutor of the person only of a child born outside of marriage.

R.S. ~~9:961~~ 9:622. Provisional custody by mandate of a natural tutor or cotutors with custody, but not yet judicially qualified~~, or a grandparent awarded custody of a child~~; delegation

A natural tutor or ~~cotutors~~ co-tutors with custody, but not yet judicially qualified~~, or a grandparent awarded custody of a child after parental authority terminates,~~ may delegate the provisional custody of that child by written mandate to any natural person, subject to the same rules governing the duration of the mandate and the authority and obligations of the mandatary as those governing the provisional custody by mandate of persons having parental authority.

Revision Comments – 2019

(a) This provision clarifies its predecessor, which had expanded the right to delegate the provisional custody of a child to "a grandparent awarded custody of a child" after parental authority terminates. Under this revision a grandparent is, or grandparents with custody are, the natural tutor or co-tutors of right, thus accomplishing the same result as its predecessor. See C.C. Art. 250.

(b) Just as its predecessor, the natural tutor is, or co-tutors are to be subject in all respects, including duration and content, to the provisions governing a mandate of provisional custody granted by parents. See R.S. 9:951 (Rev. 2015).

Lastly, the Chair generally discussed with the Council the policy decision to move jurisdiction over tutorship to family courts, except for tort settlements. She explained that it has come to the attention of the Committee that trial lawyers want jurisdiction to remain in district court for all matters related to tort settlements including recognizing, confirming, or appointing the tutor. However, the East Baton Rouge Family Court would like to retain jurisdiction over all aspects of tutorship without exception. During much discussion, the Council again generally favored keeping the approval of settlements with the district courts.

Professor Spaht then concluded her presentation, and the Council adjourned for lunch, during which time there was a meeting of the Executive Committee.

The Council reconvened after lunch, and the President called on Mr. L. David Cromwell, Reporter of the Security Devices Committee, to begin his presentation of proposed revisions to the Private Works Act.

Security Devices Committee

Mr. Cromwell began his presentation by informing the Council that the Security Devices Committee was nearing the end of its comprehensive revision of the Private Works Act and that the materials under consideration today could be found in the "Excerpts of Avant-Projet No. 5" materials. He then asked the Council to turn to R.S. 9:4810, on page 10 of the materials, to consider the proposed addition of a definition of "professional consultant," beginning on line 34 of that page. The Reporter reminded Council members that this definition was added in response to a suggestion during a previous Council meeting and that upon consultation with industry members, the Committee determined that "professional surveyors and engineers," as opposed to "registered or certified surveyors and engineers," was the proper terminology. It was moved and seconded to adopt the proposed definition of "professional consultant" as presented, and the motion passed with no objection. The adopted proposal reads as follows:

§4810. Miscellaneous definitions

For purposes of this Part:

* * *

(5) A "professional consultant" is a professional surveyor, professional engineer, or licensed architect who is engaged by the owner or by a contractor or subcontractor.

* * *

Mr. Cromwell then asked the Council to turn to R.S. 9:4802, on page 5 of the materials, and explained that the Committee also proposed replacing previously approved language, on lines 36 through 40 of page 5, with language that uses the term "professional consultants." A motion was made and seconded to adopt the Committee's proposed revisions as presented, both in this provision and with respect to similar changes in R.S. 9:4801, on page 1; R.S. 9:4803, on page 8; and R.S. 9:4804, on page 9. The motion passed with no objection, and the adopted proposals read as follows:

§4801. Improvement of immovable by owner; privileges securing the improvement

* * *

(5) ~~Registered or certified surveyors or engineers, or licensed architects, or~~ Professional consultants engaged by the owner, and the professional subconsultants of those professional consultants, ~~employed by the owner,~~ for the price of professional services rendered in connection with a work that is undertaken by the owner. ~~A "professional subconsultant" means a registered or certified surveyor or engineer or licensed architect employed by the prime professional, as described in this Paragraph. In order for the privilege of the professional subconsultant to arise, the subconsultant must give notice to the owner within thirty days after the date that the subconsultant enters into a written contract of employment. The notice shall include the name and address of the subconsultant, the name and address of his employer, and the general nature of the work to be performed by the subconsultant.~~

§4802. Improvement of immovable by contractor; claims against the owner and contractor; privileges securing the improvement

* * *

A. The following persons have a claim against the owner and a claim against the contractor to secure payment of the following obligations arising out of the performance of work under the contract:

* * *

(5) ~~Prime consultant registered or certified surveyors or engineers, or licensed architects, or their professional subconsultants, employed~~ Professional consultants engaged by the contractor or a subcontractor, and the professional subconsultants of those professional consultants, for the price of professional services rendered in connection with a work that is undertaken by the contractor or subcontractor.

* * *

§4803. Amounts secured by claims and privileges

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D. When a professional consultant or professional subconsultant is a juridical person, claims and privileges under this Part arise in favor of that juridical person for amounts owed to it under this Section, and no claim or privilege arises under this Part in favor of any surveyor, engineer, architect, or other person that it employs.

§4804. Notices required of certain claimants

A. To be entitled to a claim arising under R.S. 9:4801(5) or a claim under R.S. 9:4802(A)(5) and the privilege securing the claim, professional consultants and their professional subconsultants shall deliver written notice to the owner within thirty days after the date of being engaged in connection with the work. The notice shall include the name and address of the claimant, the name and address of the person who engaged the claimant, and the general nature of the work to be performed by the claimant. No notice is required under this Subsection by a person who is directly engaged by the owner.

* * *

Next, the Reporter asked the Council to turn to R.S. 9:4805, on page 10 of the materials, and explained that although this provision had previously been approved, a citation needed to be updated in Subsection B on line 34. A motion was made and seconded to adopt the proposed citation change as presented, and the motion passed with no objection. The adopted proposal reads as follows:

§4805. Requests for statement of amounts owed

* * *

B. Notwithstanding R.S. 9:4844, the period within which a person is required to respond to a request made under Subsection A of this Section shall not commence to run until the person's actual receipt of the request.

* * *

The Council then returned to R.S. 9:4810, on pages 11 and 12 of the materials, to consider the Committee's proposed changes to the definitions of "professional subconsultant" and "qualified inspector." After the Reporter explained that the surveyor, engineer, or architect contemplated by the definition of "qualified inspector" is not necessarily a professional consultant, a motion was made and seconded to adopt the proposed revisions to both definitions as presented. The motion passed with no objection, and the adopted proposals read as follows:

§4810. Miscellaneous definitions

For purposes of this Part:

* * *

(6) A "professional subconsultant" is a professional surveyor, professional engineer, or licensed architect who is engaged by a professional consultant.

(7) A "qualified inspector" is a professional surveyor, a professional engineer, a licensed architect, a building inspector employed by the municipality or parish in which an immovable being inspected is located, or a building inspector employed by a lending institution chartered under federal or state law.

Next, Mr. Cromwell directed the Council's attention to the Committee's proposed revisions to the Civil Code articles on privileges, beginning on page 30 of the materials. He explained that although the 1926 version of the Private Works Act purported to exhaust the subject matter and to repeal all conflicting laws, including inconsistent provisions of the Civil Code, these articles were never expressly repealed. He then informed Council members that in light of this and the holding of the *Robertshaw* case, the Committee now recommends either express repeal of or amendments to certain articles on privileges in the Civil Code. For example, the Reporter explained that the Committee recommended repeal of Articles 2772, 2773, 2774, 2775, and 2776, on pages 30 through 32 of the materials. A motion was made and seconded to adopt the Committee's recommendation with respect to each of these provisions, and the motion passed with no objection. The adopted proposals read as follows:

~~**Article 2772. Privilege of contractors, laborers and materialmen; settlement of accounts.**~~

~~The undertaker has a privilege, for the payment of his labor, on the building or other work, which he may have constructed.~~

~~Workmen employed immediately by the owner, in the construction or repair of any building, have the same privilege.~~

~~Every mechanic, workman or other person doing or performing any work towards the erection, construction or finishing of any building erected under a contract between the owner and builder or other person, (whether such work shall be performed as journeyman, laborer, cartman, subcontractor or otherwise,) whose demand for work and labor done and performed towards the erection of such building has not been paid and satisfied, may deliver to the owner of such building an attested account of the amount and value of the work and labor thus performed and remaining unpaid; and thereupon, such owner shall retain out of his subsequent payments to the contractor the amount of such work and labor, for the benefit of the person so performing the same.~~

~~Whenever any account of labor performed on a building erected under a contract as aforesaid, shall be placed in the hands of the owner or his authorized agent, it shall be his duty to furnish his contractor with a copy of such papers, in order that if there be any disagreement between such contractor and his creditor, they may, by amicable adjustment between themselves or by arbitration, ascertain the true sum due; and if the contractor shall not, within ten days after the receipt of such papers, give the owner written notice that he intends to dispute the claim, or if, in ten days after giving such notice, he shall refuse or neglect to have the matter adjusted as aforesaid, he shall be considered as assenting to the demand, and the owner shall pay the same when it becomes due.~~

~~If any such contractor shall dispute the claim of his journeyman or other person for work or labor performed as aforesaid, and if the matter can not be adjusted amicably between themselves, it shall be submitted, on the agreement of both parties, to the arbitrament of three disinterested persons, one to be chosen by each of the parties, and one by the two thus chosen; the decision, in writing, of such three persons, or any two of them, shall be final and conclusive in the case submitted.~~

~~Whenever the amount due shall be adjusted and ascertained as above provided, if the contractor shall not, within ten days after it is so adjusted and ascertained, pay the sum due to his creditor with the costs incurred, the owner shall pay the same out of the funds as provided; and the amount due may be recovered from the owner by the creditor of the contractor, and the creditor shall be entitled to the same privileges as the contractor, to whose rights the creditor shall have been subrogated, to the extent in value of any balance due by the owner to his contractor under the contract with him, at the time of the notice first given as aforesaid, or subsequently accruing to such contractor under the same, if such amount shall be less than the sum due from the contractor to his creditor.~~

~~All the foregoing provisions shall apply to the person furnishing materials of any kind to be used in the performance of any work or construction of any building, as well as the work done and performed towards such building, by any mechanic or workman; and the proceedings shall be had on the account, duly attested, of such person furnishing materials, and the same liabilities incurred by, and enforced against the contractor or owner of such building, or other person, as those provided for work or labor performed.~~

~~If, by collusion or otherwise, the owner of any building erected by contract as aforesaid, shall pay to his contractor any money in advance of the sum due on the contract, and if the amount still due the contractor after such payment has been made, shall be insufficient to satisfy the demand made for work and labor done and performed, or materials furnished, the owner shall be liable to the amount that would have been due at the time of his receiving the account of such work, in the same manner as if no payment had been made.~~

~~Article 2773. Rights of workmen and materialmen against contractor and owner.~~

~~Workmen and persons furnishing materials, who have contracted with the undertaker, have no action against the owner who has paid him. If the undertaker be not paid, they may cause the moneys due him to be seized, and they are of right subrogated to his privilege.~~

~~Article 2774. Anticipated payments by owner to contractor, effect on rights of laborers and materialmen.~~

~~The payments, which the proprietor may have made in anticipation to the undertaker, are considered, with regard to workmen and to those who furnish materials, as not having been made, and do not prevent them from exercising the right granted them by the preceding article.~~

~~Article 2775. Contract exceeding $500, recordation essential for privilege.~~

~~No agreement or undertaking for work exceeding five hundred dollars, which has not been reduced to writing, and registered with the recorder of mortgages, shall enjoy the privilege above granted.~~

~~Article 2776. Contract under $500, recordation of statement essential for privilege.~~

~~When the agreement does not exceed five hundred dollars, it is not required to be reduced to writing, but the statement of the claim must be recorded, in the manner required by law, to preserve the privilege.~~

The Council then turned to Article 3249, on page 32 of the materials, and Mr. Cromwell explained that the Committee proposed retaining the vendor's privilege in Paragraph (1), revising Paragraph (2), and eliminating Paragraph (3) as unnecessary because this provision is subsumed under the Private Works Act. He then explained that the Committee also proposed eliminating Paragraph (4) as archaic, noting that the last case to cite to this provision was the *Wheelright* case in 1896, and even then the court held that the privilege did not apply. It was then moved and seconded to adopt the Committee's proposed revisions to Article 3249 as presented, and the motion passed with no objection. The adopted proposal reads as follows:

Article 3249. Special privileges on immovables

Creditors who have a privilege on immovables~~,~~ are:

~~1.~~ (1) The vendor on the estate by him sold, for the payment of the price or so much of it as is unpaid, whether it was sold on or without a credit.

~~2.~~ (2) ~~Architects, undertakers, bricklayers, painters, master builders, contractors, subcontractors, journeymen, laborers, cartmen and other workmen employed in constructing, rebuilding or repairing houses, buildings, or making other works~~ Those who are granted special privileges on immovables by legislation.

~~3. Those who have supplied the owner or other person employed by the owner, his agent or subcontractor, with materials of any kind for the construction or repair of an edifice or other work, when such materials have been used in the erection or repair of such houses or other works.~~

~~The above named parties shall have a lien and privilege upon the building, improvement or other work erected, and upon the lot of ground not exceeding one acre, upon which the building, improvement or other work shall be erected; provided, that such lot of ground belongs to the person having such building, improvement or other work erected; and if such building, improvement or other work is caused to be erected by a lessee of the lot of ground, in that case the privilege shall exist only against the lease and shall not affect the owner.~~

~~4. Those who have worked by the job in the manner directed by the law, or by the regulations of the police, in making or repairing the levees, bridges, ditches and roads of a proprietor, on the land over which levees, bridges and roads have been made or repaired.~~

Next, the Council considered the proposed revisions to Article 3267, on page 33 of the materials, and the Reporter noted that this particular article contains an error that renders it incomprehensible, namely its use of "movables" on line 24 as opposed to "immovables." He also noted that there presently exists an Editor's Note concerning a translation error in the use of "debts" on line 29 as opposed to "creditors," but after discussion, the Committee determined that retaining "debts" was preferable. It was then moved and seconded to adopt the proposed revisions to Article 3267 as presented, and after a brief discussion concerning the "affixing seals" language on line 29 of page 33 and the Committee's plan to engage in a comprehensive review of all of the Civil Code articles on privileges, the motion passed without objection. The adopted proposal reads as follows:

Article 3267. Special privileges on immovables and other privileges

If the ~~movables~~ immovables of the debtor are subject to ~~the vendor's privilege,~~ vendor's privileges or ~~if there be a house or other work subjected to the privilege of the workmen who have constructed or repaired it, or of the individuals who furnished the materials~~ other special privileges, the ~~vendor, workmen and furnishers of materials,~~ vendors and creditors having other special privileges shall be paid from the price of the object affected in

their favor, in preference to other privileged debts of the debtor, even funeral charges, except the charges for affixing seals, making inventories, and others which may have been necessary to procure the sale of the thing.

Mr. Cromwell then directed the Council's attention to Articles 3268 and 3272, on pages 35 and 36 of the materials. It was moved and seconded to adopt the Committee's proposed repeal of both of these provisions, and the motion passed with no objection. The adopted proposals read as follows:

~~**Article 3268. Vendor's privilege on land and workmen's privilege on buildings**~~

~~When the vendor of lands finds himself opposed by workmen seeking payment for a house or other work erected on the land, a separate appraisement is made of the ground and of the house, the vendor is paid to the amount of the appraisement on the land, and the other to the amount of the appraisement of the building.~~

~~**Article 3272. Privileges of contractors, mechanics and materialmen; recordation and ranking**~~

~~Architects, undertakers, bricklayers, painters, master builders, contractors, subcontractors, journeymen, laborers, cartmen, masons and other workmen employed in constructing, rebuilding and repairing houses, buildings, or making other works; those who have supplied the owner or other person employed by the owner or his agent or subcontractor with materials of any kind for the construction or repair of his buildings or other works; those who have contracted, in the manner provided by the police regulations, to make or put in repair the levees, bridges, canals and roads of a proprietor, preserve their privileges, only in so far as they have recorded, with the recorder of mortgages in the parish where the property is situated, the act containing the bargains they have made, or a detailed statement of the amount due, attested under the oath of the party doing or having the work done, or acknowledgment of what is due to them by the debtor.~~

~~The privileges mentioned in this article are concurrent.~~

The Council next considered Article 3269, on page 36 of the materials, and the Reporter explained that the Committee proposed revisions similar to those that had been approved in Article 3267. A motion was made and seconded to adopt the Committee's recommended changes as presented, and the motion passed with no objection. The adopted proposal reads as follows:

Article 3269. Order of payment out of immovables; distribution of loss among mortgage creditors

With the exception of special privileges~~, which~~ <u>that</u> exist on immovables in favor of ~~the vendor, of workmen and furnishers of materials~~ <u>vendors and other creditors</u>, as declared above, the debts privileged on the movables and immovables generally~~,~~ ought to be paid, if the movables are insufficient, out of the product of the immovables belonging to the debtor, in preference to all other privileged and mortgage creditors.

The loss which may then result from their payment must be borne by the creditor whose mortgage is the least ancient, and so in succession, ascending according to the order of the mortgages, or by pro rata contributions where two or more mortgages have the same date.

The Reporter then directed the Council's attention to Article 3274, on page 36 of the materials. He first explained that without additional language, the first sentence of this provision is incorrect because there are several privileges throughout the law that have effect against third persons regardless of whether recordation has occurred – for example, under the Private Works Act, and also with respect to the vendor's privilege and Article XIX, Section 19 of the Louisiana Constitution of 1921, which is still in effect today. As a result, the Committee proposed adding the "except as otherwise provided by law" language to the beginning of this provision. A motion was made and seconded to adopt Article 3274 as presented, at which time one Council member questioned whether the scope of this provision should be limited only to the vendor's privilege, which prompted a great deal of discussion with respect to the fact that, as drafted, Article 3274 applies more broadly than just to the vendor's privilege, although it is the primary example. Another Council member questioned whether the "except as otherwise provided by law" language should also apply with respect to the second sentence, and after discussion, a motion was made and seconded to amend Article 3274 to add this phrase on line 38 of page 36. The motion passed with no objection, and the Council then unanimously approved Article 3274 as amended. The adopted proposal reads as follows:

Article 3274. Time and place of recordation; effectiveness

~~No~~ Except as otherwise provided by law, no privilege shall have effect against third persons, unless recorded in the manner required by law in the parish where the property to be affected is situated. ~~It~~ Except as otherwise provided by law, it shall confer no preference on the creditor who holds it, over creditors who have acquired a mortgage, unless the act or other evidence of the debt is recorded within seven days from the date of the act or obligation of indebtedness when the registry is required to be made in the parish where the act was passed or the indebtedness originated and within fifteen days, if the registry is required to be made in any other parish of this State. It shall, however, have effect against all parties from date of registry.

At this time, the Council returned to a consideration of Private Works Act matters, specifically the revisions in bold to R.S. 9:4820 on page 13 of the materials. With respect to Paragraph (A)(2), the Reporter explained that the proposed revisions were stylistic in nature and intended to improve the readability of this provision. A motion was made and seconded to adopt the proposed revisions to Paragraph (A)(2) as presented, and the motion passed with no objection. Mr. Cromwell then explained that the proposed revisions to Subsection B codify the Comments to this provision, which set forth what the text of this provision was intended to say. For example, the Reporter explained that this provision only applies when a notice of contract is not filed, and that when work on an existing building ceases for at least thirty days, the claimant has a choice as to whether to file his statement of claim or privilege within sixty days of the commencement of the cessation, in which case the claimant's privilege will outrank the rights of third parties that are acquired during the cessation; or at the end of the project, in which case the claimant's privilege will be outranked by the rights of third parties that are acquired during the cessation. A motion was made and seconded to adopt the proposed revisions to Subsection B as presented, at which time one Council member suggested that perhaps a Comment should be added explaining what is meant by "commencement of the suspension" as well as reproducing the hypothetical in the Reporter's Note on lines 26 through 30 of page 15 of the materials. A vote was then taken on the motion to adopt Subsection B as presented, and the motion passed with no objection. The adopted proposals read as follows:

§4820. Privileges; effective date

A. Except as otherwise provided in this Part, the ~~The~~ privileges granted by this Part arise and are effective as to third persons when:

(1) Notice of the contract is filed as required by R.S. 9:4811; or

(2) The work is begun by placing materials at the site of the immovable to be used in the work or conducting other work at the site of the immovable the effect of which is visible from a simple inspection and reasonably indicates that the work has begun. For these purposes, the site of the immovable is defined as the area within the boundaries of the property. In determining when work has begun, services rendered by a professional consultant, professional subconsultant, or other surveyor, architect, or engineer, or the placing of materials having an aggregate price of less than one hundred dollars on the immovable, driving of test piling, cutting or removal of trees and debris, placing of fill dirt, demolition of existing structures, and clearing, grading, or leveling of the land surface shall not be considered~~, nor shall the placing of materials having an aggregate price of less than one hundred dollars on the immovable be considered. For these purposes, the site of the immovable is defined as the area within the boundaries of the property.~~

B. (1) If ~~the~~ work for which notice of contract was not filed as required by R.S. 9:4811 is for the addition, modification, or repair of an existing building or other construction, the suspension of the work for thirty days or more shall cause that part of the work performed before ~~a third person's rights become effective shall~~ the suspension to be considered, for the purposes of ~~R.S. 9:4821~~ ranking privileges arising under this Part against the rights of third persons, ~~be considered~~ a ~~distinct~~ separate work from the work performed ~~after such rights become effective~~ thereafter. A work is suspended if the cost of the work done, in labor and materials, is less than one hundred dollars during ~~the thirty-day~~ a period of thirty days or more. ~~immediately preceding the time such third person's rights become effective as to third persons.~~

(2) A privilege arising under this Part with respect to work performed before the suspension, other than a privilege arising under R.S. 9:4801(2) or a privilege securing a claim arising under R.S. 9:4802(A)(2), retains its priority under R.S. 9:4821 over the rights of third persons acquired prior to the resumption of work only if the claimant having the privilege files a statement of claim or privilege no later than sixty days after the commencement of the suspension.

* * *

The Reporter then directed the Council's attention to R.S. 9:4823, on page 17 of the materials, and explained that in addition to semantic changes, such as replacing "which" with "that" on line 45 of page 17, the Committee proposed adding the "notwithstanding Subsection A" language on line 1 of page 18 to make clear that, where applicable, Subsection B serves as an exception to the general rule provided by Subsection A. The Reporter also explained that the change of "the contractor" on line 17 of page 18 to "a contractor or subcontractor" was made because the Private Works Act permits multiple contractors to file a bond with respect to a work, and the effect of a bond filed by a subcontractor should be the same as the effect of a bond filed by a contractor. A motion was then made and seconded to adopt the proposed revisions to R.S. 9:4823 as presented, and the motion passed with no objection. The adopted proposal reads as follows:

§4823. Extinguishment of claims and privileges

A. A privilege provided by R.S. 9:4801, a claim against the owner and the privilege securing it provided by R.S. 9:4802, or a claim against the contractor provided by R.S. 9:4802 is extinguished if:

(1) The claimant or holder of the privilege does not preserve it as required by R.S. 9:4822; or

(2) The claimant or holder of the privilege does not institute an action against the owner for the enforcement of the claim or privilege within one year after filing the statement of claim or privilege to preserve it; or

(3) The obligation ~~which~~ that it secures is extinguished.

B. ~~A~~ Notwithstanding Subsection A of this Section, a claim against a contractor granted by R.S. 9:4802 is not extinguished by the failure to file a statement of claim or privilege as required by R.S. 9:4822 if a statement of the claim or privilege is delivered to the contractor within the period allowed for its filing by R.S. 9:4822. The failure to file an action against the owner as required by ~~R.S. 9:4823(A)(2)~~ Paragraph (A)(2) of this Section shall not extinguish a claim against a contractor or his surety if an action for the enforcement of the claim is instituted against the contractor or his surety ~~within~~ no later than one year after the expiration of the time given by R.S. 9:4822 for filing the statement of claim or privilege to preserve it.

C. The extinguishment of a claim or privilege arising under this Part shall not affect other rights the claimant or privilege holder may have against the owner, the contractor, or the surety.

D. A privilege granted by this Part is extinguished if a bond is filed by the owner as provided by R.S. 9:4835.

E. A claim against the owner and the privilege securing it granted by this Part are extinguished if a bond is filed by ~~the~~ a contractor or subcontractor as provided by R.S. 9:4835.

F. In a concursus proceeding brought under R.S. 9:4841, the joinder of the owner and a person who has a privilege or a claim against the owner, or the joinder of the contractor or surety and a person who has a claim against the contractor, constitutes the institution of an action for the enforcement of the claim or privilege against the owner, contractor, or surety, as the case may be.

Next, the Council considered R.S. 9:4832, on page 19 of the materials, and Mr. Cromwell explained that the proposed revisions to Subsections A and B were purely stylistic. He then explained that the Committee proposed reworking the language of Subsection C into new Subsections C and D to clarify the requirements for and effect of cancelling notices of contract. It was then moved and seconded to adopt the proposed revisions to R.S. 9:4832 as presented, and the motion passed with no objection. The adopted proposal reads as follows:

§4832. Cancellation of notice of contract

A. The recorder of mortgages shall cancel from his records a notice of contract upon written request of any person made more than thirty days after the filing of a notice of termination of work performed under the contract if:

(1) A statement of claim or privilege with respect to the work was not filed ~~within~~ before expiration of the thirty day period; and

(2) The request contains or has attached to it the written concurrence of the contractor or a written receipt from the contractor acknowledging payment in full of all amounts due under the contract.

B. If the request for cancellation of a notice of contract does not contain or is not accompanied by the written concurrence or receipt of the contractor, but a statement of claim or privilege was not filed ~~within~~ before expiration of the thirty day period, the recorder of mortgages shall cancel the notice of contract as to all claims and privileges except that of the contractor. The recorder of mortgages shall completely cancel the notice of contract from his records upon written request of any person if:

(1) The request is made more than sixty days after the filing of the notice of termination and the contractor did not file a statement of his claim or privilege ~~within that time~~ before expiration of the sixty day period; or

(2) The request contains or is accompanied by the written concurrence of or a written receipt from the contractor acknowledging payment in full of all amounts due under the contract.

C. The recorder of mortgages shall immediately cancel a notice of contract if both of the following occur:

(1) A request for cancellation of notice of contract signed by the owner and contractor is filed.

(2) Within four business days after the filing of the request for cancellation, an affidavit made by a qualified inspector is filed to the effect that he inspected the immovable at a specified time subsequent to the filing of the request for cancellation and that work had not then begun, as the beginning of work is defined by R.S. 9:4820.

D. A notice of contract cancelled in accordance with Subsection C of this Section shall have no effect.

The Council then turned to R.S. 9:4835, on pages 20 and 21 of the materials, and the Reporter explained that in addition to "suit" being replaced with "action," the last sentence of Subsection A, on lines 1 and 2 of page 21, was being deleted for purposes of consistency with the substantive revision to the law of suretyship. A motion was made and seconded to adopt the Committee's proposed changes as presented, and the motion passed with no objection. The adopted proposal reads as follows:

§4835. Filing of bond or other security; cancellation of statement of claim or privilege or notice of pendency of action

A. If a statement of claim or privilege or a notice of pendency of action is filed, any interested party may deposit with the recorder of mortgages either a bond of a lawful surety company authorized to do business in the state, cash, or certified funds to guarantee payment of the obligation secured by the privilege or that portion as may be lawfully due together with interest, costs, and attorney fees to which the claimant may be entitled up to a total amount of one hundred twenty-five percent of the principal amount of the claim as asserted in the statement of claim or privilege or ~~such a suit~~ in the action. ~~A surety shall not have the benefit of division or discussion.~~

* * *

Next, Mr. Cromwell directed the Council's attention to R.S. 9:4841, beginning on page 21 of the materials. He first explained that Subsections A and B contained stylistic changes, the intent of which was to clarify the meaning of these provisions. A motion was made and seconded to adopt the proposed changes to both Subsections as presented, and the motion passed with no objection. With respect to Subsection C, the Reporter first explained that line 41 of page 21 had been amended to clarify that although the owner can make a motion, it is the court who orders the parties to show cause. He also noted that the proposed revisions on line 44 of the same page were made for purposes of

coordinating with the provisions of the Code of Civil Procedure, and that Paragraph (D)(2) was added on lines 24 and 25 of page 22 to clarify that these orders may be appealed immediately. It was moved and seconded to adopt the proposed changes in Subsection C and Paragraph (D)(2), at which time one Council member questioned whether "by rule" was necessary and whether "rule" should be replaced with "motion" throughout these provisions. After discussing the procedure for issuing rules to show cause, the Council determined that "by rule" should be deleted from line 41 of page 21, "rule" should be changed to "motion" on line 43 of the same page, and "on a rule" should be deleted from line 25 of page 22. The Council also determined that in Paragraph (D)(1), "on the rule" should be changed to "on the motion" on line 15 of page 22, and "rule" should be changed to "motion" on lines 16 and 21 of the same page. After one Council member questioned whether the court must order the other parties to show cause once a motion has been filed by the owner, the Council also agreed to change "may" to "shall" on line 41 of page 21. A vote was then taken on the motion to adopt Subsection C and Paragraph (D)(2) of R.S. 9:4841 as amended, and the motion passed with no objection. Mr. Cromwell then explained that the proposed changes to Paragraph (D)(1) and Subsection F, on page 22 of the materials, were made to improve the readability of these provisions but were not intended to change the law. A motion was made and seconded to adopt Paragraph (D)(1) as previously amended and Subsection F as presented, and the motion passed with no objection. The adopted proposals read as follows:

§4841. Enforcement of claims and privileges; concursus

A. After the period provided by R.S. 9:4822 for the filing of statements of claims or privileges has expired, the owner or any other interested party may convoke a concursus and shall cite all persons who have preserved their claims against the owner or their privileges on the immovable~~, and shall cite the~~ to establish the validity and rank of their claims and privileges. The owner, the contractor, and the surety shall also be cited if they are not otherwise parties to ~~establish the validity and rank of their claims and privileges~~ the concursus.

B. The owner who convokes or is made a party to the concursus may deposit into the registry of the court the amounts ~~owed by him~~ he owes to the contractor.

C. ~~The~~ Upon motion of the owner, the court shall ~~may by rule~~ order the other parties to the ~~action~~ concursus to show cause why a judgment should not be entered discharging and cancelling their claims and privileges or discharging the owner from further responsibility to them. The ~~rule~~ motion shall be tried ~~and appealed separately from the main cause of action~~ as a summary proceeding and shall be limited to a consideration of the following matters:

* * *

D. (1) If the court determines that the owner has properly deposited all sums ~~owed by him~~ he owes to the contractor; that the owner has complied with this Part by properly and timely filing notice of a contract and bond as required by R.S. 9:4811 and ~~R.S. 9:~~4812; and that the bond complies with the requirements of this Part, ~~or if it finds that any of the claims or privileges have not been preserved,~~ it shall render a judgment on the ~~rule~~ motion directing the ~~claims or privileges to be cancelled by the recorder~~ cancellation of all statements of claim or privilege and declaring the owner discharged from further liability. ~~for such claims or~~ If the court finds that any of the claims or privileges have not been preserved, it shall render a judgment on the motion directing the cancellation of such claims or privileges and declaring the owner discharged from further liability for such claims. The court may also render judgment on the motion limiting the claims and privileges to the amounts as may be owed by the owner or otherwise granting such relief to the owner as may be proper.

(2) A suspensive or devolutive appeal may be taken as a matter of right from an order or judgment issued under Subsection C of this Section.

* * *

F. The attorney for the owner~~,~~ who convokes a concursus under this Section, or the attorney for a claimant or privilege holder who convokes the concursus ~~where more than~~ when no other person has done so within ninety days ~~have elapsed from the~~ after expiration of the time given by R.S. 9:4822 for claimants or privilege holders to file statements of their ~~claim and such a concursus has not been convoked,~~ claims or privileges, shall be entitled to recover from the contractor and his surety a reasonable fee for his services in convoking the concursus. The fees awarded may be paid out of the funds deposited into the registry of the court but only after satisfaction of all valid claims and privileges.

* * *

The Reporter then asked the Council to turn to R.S. 9:4842, on page 23 of the materials, and explained that this provision, along with R.S. 9:4843, 4844, 4845, and 4810(2), set forth the procedure for and mechanics of giving notice under the Private Works Act, including notices of statements of claim and privilege given by claimants to owners and contractors and notices of nonpayment given by suppliers to contractors. Mr. Cromwell then proceeded to provide the Council with an overview of each of these provisions, beginning with R.S. 9:4842 on page 23 of the materials. He explained that this provision sets forth the general rule of giving notice and contemplates two options: that the communication or document was actually received under R.S. 9:4843, which was drafted to mirror the language of Civil Code Article 1938; or that the communication or document was deemed to have been given or delivered under R.S. 9:4844 or 4845. With respect to R.S. 9:4844, the Reporter explained that Subsection A contemplates sending the communication or document via United States mail, and Subsection B contemplates sending the communication or document via commercial courier, which is not presently precluded by the Private Works Act but would only be effective upon delivery and not when the notice was sent. He then noted that Subsections C through F specify the various addresses that should be used when sending a communication or document to a recipient. Next, Mr. Cromwell explained that R.S. 9:4845 provides for delivery of communications or documents by electronic means, but only if the recipient has consented to such method of delivery. He further explained that Paragraph (1) provides for facsimile transmissions and requires a confirmation of receipt; Paragraph (2) provides for email transmissions and requires a confirmation of receipt, though not necessarily a read receipt; and Paragraph (3) tracks the language of LUETA and cites to a specific provision of that Act, R.S. 9:2615. Finally, Mr. Cromwell explained that the Committee also proposed adding a definition of "commercial courier" to R.S. 9:4810, on page 11 of the materials, and noted that this language was borrowed from the Code of Civil Procedure and Louisiana's long-arm statute, R.S. 13:3204.

At this time, a motion was made and seconded to adopt R.S. 9:4842, 4843, 4844, 4845, and 4810(2), and the Council discussed whether use of "to the intended recipient" in R.S. 9:4844(B), on line 24 of page 24, would preclude delivery to a person's agent, whereas in R.S. 9:4843, on line 5 of the same page, contemplates receipt by a person authorized by the recipient to receive delivery. Another Council member questioned whether delivery of a notice or communication would be effective if it was given to a registered agent for service of process, and the Reporter responded by explaining that the Committee specifically rejected this concept. Mr. Cromwell also discussed the requirement that communications or documents deposited to a commercial courier must actually be received within a reasonable time, noting that the Committee discussed that the type of commercial courier that can be used should not be limited to national services like FedEx or UPS, but that the risk of using an unreliable commercial courier should be borne by the sender rather than the recipient. The Council then engaged in a great deal of discussion with respect to the meaning of "reasonableness" and "deemed" as used in these provisions. One Council member then questioned whether priority mail should be included in addition to certified or registered mail in R.S. 9:4844(A), and after discussion,

a motion was made and seconded to add "or by other method of delivery for which the United States Postal Service registers and tracks the communication or document" after "mail" on line 20 of page 24. It was then moved and seconded to adopt R.S. 9:4844 as amended and R.S. 9:4842, 4843, 4845, and 4810(2) as presented, and the motion passed with no objection. The adopted proposals read as follows:

§4842. Delivery of ~~notice~~ communications or ~~other~~ documents ~~and materials; burden of proof~~

~~A. A notice~~ Delivery of a communication or document required or permitted by this Part to be given ~~by this Part~~ or delivered is accomplished when the communication or document is received in accordance with R.S. 9:4843 by the person to whom it is sent or when it is deemed to have been given or delivered in accordance with R.S. 9:4844 or 4845. ~~or any document required or permitted to be delivered by this Part shall be deemed to have been given or delivered when it is delivered to the person entitled to receive it, or when the notice or document is properly deposited in the United States mail for delivery by certified or registered mail to that person.~~

~~B. Proof of delivery at the site of the immovable by a claimant asserting a claim or privilege under the provisions of R.S. 9:4801(3) or R.S. 9:4802(3) is prima facie evidence that the movables became component parts of the immovable, or were used on the immovable, or in machinery or equipment used at the site of the immovable in performing the work.~~

§4843. Receipt of communications or documents

A communication or document is received when it comes into the possession of the person to whom it is sent or of a person authorized by him to receive it.

§4844. Delivery by mail or commercial courier

A. A communication or document required or permitted by this Part to be given or delivered shall be deemed to have been given or delivered when it is properly deposited in the United States mail for delivery to the intended recipient by certified or registered mail or by other method of delivery for which the United States Postal Service registers and tracks the communication or document.

B. A communication or document required or permitted by this Part to be given or delivered shall be deemed to have been given or delivered at the time that it is properly deposited with a commercial courier for delivery to the intended recipient, provided that the communication or document is received by the intended recipient within a reasonable time after such deposit.

C. A communication or document ~~The mailing~~ may be addressed to an owner, contractor, or surety at the address given in a notice of contract or attached bond filed in accordance with this Part, or to a claimant at the address given in the statement of claim or privilege filed by the claimant ~~or a notice given by the claimant~~ under the provisions of ~~R.S. 9:4822~~ this Part. Alternatively, a communication or document may be addressed to an owner, contractor, surety, or claimant at the intended recipient's address designated as an address for notice in any previous communication given by the intended recipient to the sender with respect to the work.

D. If an address for an owner, contractor, or surety is not given in a filed notice of contract or attached bond, and no address for notice has been designated by the owner, contractor, or surety in a previous communication to the sender with respect to the work, the communication or document may be addressed to the owner or contractor at the address of the place of business through which the contract between the owner and contractor was made, or to the surety at the address of the office through which the bond was issued, or at any other place held out by the owner, contractor, or surety as the place for receipt of communications related to the work.

E. If an address for a claimant is not given in a statement of claim or privilege, and no address for notice has been designated by the claimant in a previous communication to the sender with respect to the work, the communication or document may be addressed to the claimant at his place of business through which the contract with the claimant was made concerning the provision of labor, services, material, or equipment with respect to the work or at any other place held out by the claimant as the place for receipt of communications related to the work.

F. As an alternative to any other address permitted by this Section, a communication or document may be addressed to a juridical person that is incorporated, formed, or organized under the laws of this state, or that has registered or obtained a certificate of authority to do business in this state, at the address of the person's registered office in Louisiana or the address of its principal office, principal place of business, or principal business establishment in Louisiana, in each case as reflected on the records of the Louisiana Secretary of State.

§4845. Delivery by electronic means

A communication or document required or permitted by this Part to be given or delivered shall be deemed to have been given or delivered when it is delivered by electronic means to a recipient who has consented to that method of delivery of communications or documents related to the work. Delivery by electronic means is accomplished when any of the following occurs:

(1) The communication or document is sent by facsimile transmission to a telecopier number at which the recipient has consented to receive communications or documents related to the work, provided that the sender receives a facsimile confirmation of receipt.

(2) The communication or document is delivered to an electronic mail address at which the recipient has consented to receive communications or documents related to the work, provided that the sender receives an electronic confirmation of receipt.

(3) The communication or document enters an electronic information processing system designated or used by the recipient for purposes of receiving communications or documents related to the work, and the communication or document is deemed to have been received by the recipient in accordance with R.S. 9:2615.

§4810. Miscellaneous definitions

For purposes of this Part:

* * *

(2) A "commercial courier" is any juridical person that has as its primary purpose the delivery of letters and parcels of any type.

* * *

The Council then considered R.S. 9:4846, on page 27 of the materials, and the Reporter explained that the text of this provision presently appears in R.S. 9:4842 but that it is not related to delivery of notice, but rather delivery of movables on the jobsite. As a result, the Committee proposed that it be relocated to a standalone provision, and a motion was made and seconded to adopt the Committee's recommendation as presented. The motion passed with no objection, and the adopted proposal reads as follows:

§4846. Proof of delivery of movables; prima facie evidence

Proof of delivery of movables at the site of the immovable by a claimant asserting a claim or privilege under R.S. 9:4801(3) or 4802(A)(3) is prima facie evidence that the movables became component parts of the immovable, or were used on the immovable, or in machinery or equipment used at the site of the immovable in performing the work.

Finally, the Council turned to R.S. 9:4852, on pages 28 and 29 of the materials, and Mr. Cromwell explained that this provision in the Residential Truth in Construction Act sets forth the notice that must be provided to homeowners who are having improvements made to their property. He further explained that although the Act presently does not impose any sort of severe penalty against a contractor who does not provide the requisite notice to the homeowner, such as loss of the contractor's privilege, the Act does provide for the payment of attorney fees and court costs, and there is also a provision in Title 14 that provides for criminal liability in such a situation. As a result, the Committee ultimately decided not to impose additional penalties but to redraft the notice in plain English so that it may be more easily understood by the average homeowner. It was then moved and seconded to adopt the Committee's proposed revisions to R.S. 9:4852, at which time one Council member suggested replacing "The way to protect yourself is to do one of the following:" on line 10 of page 29 with "You might protect yourself if you do one of the following:". A vote was then taken to adopt R.S. 9:4852 as amended, and the motion passed with no objection. The adopted proposal reads as follows:

§4852. Notice

A. Prior to or at the time of entering into a contract for residential home improvements under the provision of this Subpart, the contractor shall deliver to the owner or his authorized agent, for such owner's or agent's signature, written notice in substantially the following form:

NOTICE OF LIEN RIGHTS

Delivered this _____ day of _____, 20___, by _____, Contractor.

~~I, the undersigned owner of residential property located at (street address) in the city of _____, parish of _____, Louisiana, acknowledge that the abovenamed contractor has delivered this notice to me, the receipt of which is accepted, signifying my understanding that said contractor is about to begin improving my residential property according to the terms and conditions of a contract, and that in accordance with the provisions of law in Part I of Chapter 2 of Code Title XXI of Title 9 of the Louisiana Revised Statutes of 1950, R.S. 9:4801, et seq.:~~

~~(1) A right to file a lien against my property and improvements is granted to every contractor, subcontractor, architect, engineer, surveyor, mechanic, cartman, truckman, workman, laborer, or furnisher of material, machinery or fixtures, who performs work or furnishes material for the improvement or repair of my property, for the payment in principal and interest of such work or labor performed, or the materials, machinery or fixtures furnished, and for the cost of recording such privilege.~~

~~(2) That when a contract is unwritten and/or unrecorded, or a bond is not required or is insufficient or unrecorded, or the surety therefor is not proper or solvent, I, as owner, shall be liable to such subcontractors, materialmen, suppliers or laborers for any unpaid amounts due them pursuant to their timely filed claims to the same extent as is the hereinabove designated contractor.~~

~~(3) That the lien rights granted herein can be enforced against my property even though the contractor has been paid in full if said contractor has not paid the persons who furnished the labor or materials for the improvement.~~

~~(4) That I may require a written contract, to be recorded, and a bond with sufficient surety to be furnished and recorded by the contractor in an amount sufficient to cover the cost of such improvements, thereby relieving me, as owner, and my property, of liability for any unpaid sums remaining due and owing after completion to subcontractors, journeymen, cartmen, workmen, laborers, mechanics, furnishers of material or any other persons furnishing labor, skill, or material on the said work who record and serve their claims in accordance with the requirements of law.~~

~~I have read the above statement and fully understand its contents.~~

You are having work done on your home. Under Louisiana law, all those who work on your home, including the contractor, any subcontractors, and their employees, as well as all those who supply materials or equipment for the work, can file a lien against your home if they are not paid. They can also recover from you personally the amounts they are owed. This can occur even if you pay the contractor all amounts that you agreed to pay for the work.

You might protect yourself if you do one of the following:

(a) Before the work begins, have the contractor supply you with a signed contract and bond and make sure these are properly recorded in the parish mortgage records.

(b) Do not pay the contractor unless you are sure that all those who worked on your home or supplied materials or equipment have been paid in full. To do this, you might want to require the contractor to give you written lien waivers signed by all those who worked on your home or supplied materials or equipment, acknowledging that they have been paid.

If you have further questions, contact a lawyer.

By signing below, you acknowledge that you have been provided with this notice.

_____

Owner or Agent

_____

Date

B. The notice herein required shall not be considered a condition of the construction contract.

At this time, Mr. Cromwell concluded his presentation, and the President announced that Saturday's meeting would begin at 8:30 a.m. rather than the usual 9:00 a.m. The Friday session of the October 2018 Council meeting was then adjourned.

LOUISIANA STATE LAW INSTITUTE

MEETING OF THE COUNCIL

October 12-13, 2018

Saturday, October 13, 2018

Persons Present:

Adams, Marguerite (Peggy) L.
Boneno, David
Braun, Jessica
Breard, L. Kent
Caraway, Jay
Comeaux, Conrad
Cromwell, L. David
Dawkins, Robert G.
Dimos, Jimmy N.
Garrett, J. David
Gregorie, Isaac M. "Mack"
Hargrove, Joseph L., Jr.
Hayes, Thomas M., III
Hogan, Lila
Holdridge, Guy
Kutcher, Robert A.
Lavergne, Luke
Maloney, Marilyn C.
McIntyre, Edwin R., Jr.
Medlin, Kay C.
Miller, Gregory A.
Morel, Stephen
Norman, Rick J.
North, Donald W.
Price, Donald W.
Sklamba, Stephen
Sole, Emmett C., Jr.
Stuckey, James A.
Talley, Susan G.
Thibeaux, Robert P.
Tucker, Zelda W.
Uschold, Jim
Vetter, Keith
Waller, Mallory
Wilson, Evelyn L.
Woodruff-White, Lisa

President Susan G. Talley called the Saturday Session of the October 2018 Council meeting to order at 8:30 a.m. on Saturday, October 13, 2018, at the Louisiana Supreme Court in New Orleans. The President called on Mr. Stephen G. Sklamba, Reporter of the Tax Sales Committee, to begin his presentation of materials.

Tax Sales Committee

Mr. Sklamba began his presentation by briefly reviewing the background of his Committee's work and reminding the Council that the Committee's previous proposed revisions were ultimately reconstituted by the Council in December of 2016. Mr. Sklamba then made the Council aware of a handful of typos throughout the draft before moving to the substance of his presentation. The Reporter noted that he would be going through the draft revisions today but would not yet be asking for the Council's approval of many of the statutes.

Mr. Sklamba asked the Council to first turn its attention to R.S. 47:1993. He highlighted the changes that the Committee had elected to make, first noting that, at the assessor's suggestion, "filing" had been changed to "delivery." The Reporter then explained that Subsection G had been deleted, and that the lien provided for in former Subsection G would now arise by operation of law as opposed to the filing of the roll, thus avoiding a potential issue of unconstitutionality under *U.S. v. Connecticut.* He pointed out that Paragraph (D)(2), which sets out Hurricane Katrina-related contingencies, had also been deleted, as it was no longer necessary. Finally, Mr. Sklamba explained, the changes to Subsection H—now redesignated Subsection F in light of the preceding deletions—would do away with the requirement that the recorder of mortgages index the tax roll, another aspect of this provision that he identified as no longer necessary.

The Reporter then turned to R.S. 47:2051.1 and 2051.2 on page 3 of the materials. He explained that the revisions to these Sections were simply a matter of language, with the word "auction" replacing "sale" so as to more accurately reflect the fact that, under the proposed regime, no actual sales of properties would be taking place.

Moving next to R.S. 47:2121 on page 5 of the materials, Mr. Sklamba explained that the deleted language had been removed to reflect the fact that the Committee's revisions would be doing away with the concept of tax sale title and moving to a lien system. He added that the deletions in R.S. 47:2121 on page 6 were not actually deletions but rather provisions that were being moved to a new location.

Turning his attention to R.S. 47:2121.1, the Reporter noted that this provision laid out the purposes of the revision and highlighted some of the important points. First, he explained, the revisions would establish a deadline date for payment of taxes and impose a penalty after a certain period. Mr. Sklamba pointed out that concerns regarding penalizing late payors had led the Committee to move the aforementioned period. In turn, he continued, this would accomplish two additional goals: more effective collection of revenues for tax collectors and the incentivization of timely payment. The Reporter further explained a few more of the stated purposes, including remedying issues of constitutionality and confusion regarding absolute nullities.

The Reporter then moved to R.S. 47:2122, the definitions provision. He explained that the Committee's revisions would replace the concepts of transfer of title and adjudication with a lien system and the issuance of "certificates of no bid." Mr. Sklamba noted that he would not yet be seeking the Council's approval of this Section on definitions so as to leave them open to any changes necessary to comport with changes to the rest of the draft. He stated the same with respect to R.S. 47:2123.

Mr. Sklamba then asked the Council to turn its attention to R.S. 47:2126, on page 11 of the materials, noting that, with respect to this provision, he would be seeking the approval of the Council. He stated that the revisions to this provision change the law with respect to the information found on the tax roll, explaining that, as revised, R.S. 47:2126 requires the tax collector to continue to send tax bills to the owner listed in the assessor's record. As opposed to the old rule, under which the tax sale purchaser was required to pay additional taxes, Mr. Sklamba continued, the revision allows the owner-debtor to still receive the tax bill and affords him the opportunity to pay future impositions. Failure of this, he added, allows the certificate purchaser the option to pay them, in which case he becomes entitled to an additional five-percent penalty.

At this, several Council members offered questions and comments. In response to a question as to whether a tax sale purchaser also receives notice the following year, the Reporter answered negative as a general matter, with the caveat that such party has the option to file a request for notice with the tax collector. Next, one Council member identified a potentially troubling hypothetical—in particular, a situation in which a year-two tax purchaser initiates conversion proceedings after a year-one tax purchaser is unable to pay the subsequent year's taxes because he did not receive notice. The Council member pointed out that, as opposed to a situation where the year-one purchaser fails to pay after receiving notice and thus loses his interest, a year-one purchaser who was not notified would still hold a lien. Further, he continued, this lien would ultimately prime any others obtained later.

Another Council member pointed out that, although the revision would do away with the three-year time period, the notice and suit procedures were much improved and would safeguard due process. A guest of the Council then inquired as to what would happen in year two if taxes were not paid, and the Reporter answered that the tax purchaser can pay if the owner does not. Mr. Sklamba added that in such case, a second certificate would be issued showing that year-two taxes were paid, and rather than an auction, there would simply be another certificate on which to collect. One Council member voiced concern that, under this system, the burden would be shifted onto tax purchasers to monitor the situation. Other Council members then voiced support for the system, namely insofar as they felt it would make title examinations easier.

Another question was raised by the Council, this time a member seeking to gain clarity on the revised timeline. The Council member noted that, under current law, the right to file suit vests after three years. Mr. Sklamba pointed out that suits to quiet title are not res judicata under *Weebeland* and that if the debtor does not get notice, he can argue an absolute nullity. By contrast, he continued, the revision allows filing one year after the

auction. This, the Reporter explained, takes the burden off of tax collectors and shifts it to tax purchasers. He further added that the Committee, in this context, had held discussions regarding actual notice. A Council member wondered about assessing all co-owners. Mr. Sklamba explained that the names of all owners are placed on the rolls but only one address is on the account because the bill needs to be sent somewhere. He also assured the Council that parties would not lose rights this way unless they had been served in suit.

At this, a motion and second were made to adopt R.S. 47:2126. With all votes in favor, the provision was adopted as reproduced below:

§2126. Duty of assessors; single assessment; exception

> Each assessor shall deliver to the appropriate tax collector the tax roll for the year in which taxes are collectible by November fifteenth of each calendar year, except as otherwise provided by law. At the same time, the assessor ~~may file~~ shall deliver the tax roll ~~in the mortgage records of~~to the recorder of mortgages for the parish in which property subject to the taxes is located. The assessor shall use reasonable efforts to list on the tax roll all co-owners of record of the property~~, or if there has been a tax sale to a party other than a political subdivision, the tax sale purchaser and the other owners, to the extent their interests were not sold at tax sale~~. The tax roll shall be updated as of January first or later of the year in which the taxes are collectible. There shall be only one assessment for each tax parcel, and the full assessment shall be on each tax bill sent pursuant to R.S. 47:2127(C); however, if requested by a tax debtor, the assessor may, but shall not be obligated to, make separate assessments for undivided interests in each tax parcel. The assessor shall not list the name of the purchaser of a tax certificate on the tax roll.

The Reporter then moved to R.S. 47:2127, on page 12 of the materials. Beginning with Subsection A, he pointed out that the added language made exception for Orleans Parish, which collects in January. Next, he noted that, in Subsection B, the Committee had replaced an instance of "ad valorem taxes" with "statutory impositions," as well as adding a sentence setting out the time period after which a penalty shall be imposed. In Subsection C, Mr. Sklamba explained that the Committee had deleted the phrase "use reasonable efforts to," as the Committee agreed that it was both superfluous and ambiguity-adding language. He further noted to the Council that "deadline date" as it appears in Subsection C is a defined term. The Reporter also explained that he had left most of the safe harbor notice form as it already appeared. However, he pointed out one change to the form, the addition of an explanatory paragraph at the end of the form. A motion and second to adopt the provision was made.

One Council member first pointed out that the correct statutory phrasing of the exception added on page 12, line 4 was "except as *otherwise* provided by law." This suggestion was accepted as a friendly amendment. The Council member further raised an issue regarding the use of the term "deadline date," pointing out that the term had been defined as the first date taxes are delinquent but was not used to hold that same meaning in all instances throughout the provision. He suggested either changing the definition of "deadline date" to identify the final day *prior to* delinquency or changing the defined term to "delinquency date" and revising the relevant sentences in R.S. 47:2127. The Council member also pointed out issues with use of the word "taxes" in certain instances in this provision, suggesting that, in some of these instances, "taxes" should be replaced with "statutory impositions." He recommended that the Committee review each use of the word "taxes" to ensure consistent and correct usage. Finally, the Council member suggested moving the "indicate if applicable" language in the safe harbor form from the end of its sentence to the beginning. The Reporter again agreed with these suggestions.

One Council member raised an additional question about the term "statutory impositions," wondering if the revision might run into trouble as a result of the inclusion of certain types of liens. Dovetailing with this, another Council member identified a potential timing issue with respect to various components of "statutory impositions," noting that, whereas taxes are due on a particular date each year, code enforcement liens, for example, are due "always." One Council member then suggested that this issue could be dealt with in the Committee's review of its use of the words "taxes" and "statutory impositions" and recommended special care so as to avoid using these terms inappropriately, for the reasons outlined by the Council. Next, another Council member recommended an additional look at statutory impositions in relation to potential issues with rankings. He recommended that R.S. 47:2127 be recommitted so that the Committee could sort out the various issues with respect to timing and ranking as related to the various components of "statutory impositions" in addition to ad valorem taxes. A motion and second was made to recommit R.S. 47:2127, and all but one vote came in favor of recommittal. The Reporter resolved to study use of the term "statutory impositions," as well as to examine timing and ranking issues related to various liens and mortgages and the aforementioned issues pertaining to the term "deadline date."

Mr. Sklamba then moved to R.S. 47:2128 on page 14 of the materials, noting that he had deleted the first sentence as unnecessary. A motion and second were made to adopt R.S. 47:2128. A Council member pointed out that the provision needed to be revised so as to comport with the new concept of the tax sale process—namely, that tax certificates were now being sold at tax auctions. After some discussion of how to rework this provision, a motion and second was made to recommit. The motion passed with all votes in favor.

Next, the Reporter called the Council's attention to R.S. 47:2266, on pages 50 and 51 of the materials. Explaining that R.S. 47:2266 sets out the process for the suit a certificate purchaser may file, Mr. Sklamba briefly summarized the changes the Committee had made to existing law. A motion and second was made to adopt the provision.

One member of the Tax Sales Committee then pointed out that this was a quiet title exclusive procedure, noting that current law provides an option, with other post-sale notice procedures being laid out in R.S. 47:2156 and 2157. He reiterated that the proposed revision makes the suit mandatory and explained that the argument against the proposed procedure is cost with respect to the portion of properties that will not be redeemed. He noted that, usually, the nicest properties are always redeemed anyway, and that the proposal leaves only a single, very costly option even with respect to low-end properties. The Committee member then voiced his objection to the proposal. The Reporter noted that the opinion expressed by the Committee member represented the minority view of the Committee, and that this minority favored a procedure whereby an avenue would be opened for people to lose their property without being served; this, he explained, was the most significant point in opposition to the minority opinion.

The floor was then opened for the Council's comments. One Council member voiced concerns about placement—or, more importantly, non-placement—of lower-end properties in commerce, arguing that the extra cost necessary to clear title under the proposed revision would make it cost-prohibitive for lots worth minimal amounts to be returned into commerce. On this basis, the Council member noted his agreement with the Committee member and the Committee's minority position. Another Council member raised a separate issue, cautioning that by eliminating reference to quiet title, the revision might risk importing old jurisprudence. He offered a second thought, urging caution with respect to providing who, exactly, constitutes a tax auction party—pointing out that, because certain interests such as predial servitudes cannot be terminated, tax sale party ought be more limited than simply "anyone with an interest." The Council member then posed a hypothetical, asking whether, in a situation where there is a petition alleging nullity, a reconventional demand, and a responsive pleading answer alleging nullity, the answer is sufficient to allege nullity—or if a reconventional demand must be filed. After the Reporter explained that, in such situation one would not typically file a reconventional demand, the Council member suggested changing all references to "reconventional demand" to "pleading." Mr. Sklamba accepted this suggestion.

Another Council member then asked whether forbidden purchase nullity applied to interposed parties and co-ownership. Pointing out that now, co-owners just redeem, he wondered how the procedure would work for these issues. The Reporter explained that the revision was not changing current law in this context, but rather simply adding a definition. Another Council member then asked what result would follow if a co-owner filed a defense. The Reporter stated his belief that, in such situation, a partition would be necessary. Next, a guest of the Council asked about the situation of a deceased owner whose taxes had not been paid. He noted that, here, the delay cannot be extended because if the property is not blighted or abandoned but rather the owner is simply deceased, the result is inconsistent, and the family ought to be given time to sort things out. Mr. Sklamba explained that it was necessary to balance the neighbor's interest. The guest of the Council conceded that he liked the idea of tax certificates in place of sale of property, but again asked about the thought process behind the proposed shorter period, noting that it had been dropped from three years to just one year under the revision. The Reporter tried to assuage these concerns, pointing out that, as a practical matter, the period was only being shortened from three years to roughly two years—as, by the time suit has been filed and everyone has been served, it will almost certainly have taken around two years. He further noted that many states only have a one-year redemptive period, so the Committee accordingly felt comfortable with two years.

Another Council member then reasoned that, while judicial proceeding may be the best option, he personally fell somewhere in the middle. He noted that, a person who does not have to bring a quitclaim for ten years can simply sit on the property and collect interest, making things more difficult for the tax sale purchaser. For blighted properties, the member suggested, perhaps acquisitive prescription—with a five-year period in lieu of the traditional ten-year period—might be an option. He added his support for such an approach. The Reporter stated that such a proposal was not on the table today. He asked the Council whether it liked the mandatory judicial proceeding approach, noting that, if so, the Committee would simply go back and fix the time periods. The President concurred, opining that acquisitive prescription fell beyond the purview of the Tax Sales Committee.

The Committee member again raised the arguments favored by the Committee's minority. In response, the Reporter assured the Council that the Committee was, indeed, on the right track with the judicial procedure. After additional brief discussions on the relative merits of the Committee's majority and minority positions, Ms. Talley voiced concern that, with several Council members having departed, a quorum might no longer be present. Reasoning that R.S. 47:2266 was much too important to approve with possibly deficient attendance, Mr. Sklamba then concluded his presentation, and the October 2018 Council meeting was adjourned.

Jessica G. Braun

Mallory C. Waller

Nick Kunkel