LOUISIANA STATE LAW INSTITUTE

MEETING OF THE COUNCIL

January 10, 2020

Friday, January 10, 2020

Persons Present:

Adams, Marguerite (Peggy) L.
Braun, Jessica
Breard, L. Kent
Brister, Dorrell J.
Burrell, Roy
Carroll, Andrea B.
Comeaux, Jeanne C.
Crigler, James C., Jr.
Crigler, John D.
Curet, Jourdan Elise-Moschitta
Curry, Kevin C.
Davidson, James J., III
Davis, Monette M.
Dawkins, Robert G.
Dimos, Jimmy N.
Doguet, Andre'
Ellison, David M., Jr.
Forrester, William R., Jr.
Gasaway, Grace B.
Gregorie, Isaac M. "Mack"
Hamilton, Leo C.
Hash, Endya
Herring, Jimmie C.
Hester, Mary C.
Hogan, Lila T.
Holdridge, Guy
Jewell, John Wayne
Kostelka, Robert "Bob" W.
Kunkel, Nick
Lampert, Loren M.
LaVergne, Luke A.
Lee, Amy Allums
Lonegrass, Melissa T.
McEvey, Lydia
Medlin, Kay C.
Mengis, Joseph W.
Morel, Stephen
Nedzel, Nadia E.
Norman, Rick J.
Papillion, Darrel James
Philips, Harry "Skip", Jr.
Price, Donald W.
Pritt, Jacob J.
Richardson, Sally Brown
Riviere, Christopher H.
Scalise, Ronald J., Jr.
Sklamba, Stephen
Smith, Annie
Sole, Emmett C.
Surprenant, Monica T.
Talley, Susan G.
Tate, George J.
Thibeaux, Robert P.
Tooley-Knoblett, Dian
Tucker, Zelda W.
Veron, J. Michael
Walker, Elizabeth
Waller, Mallory
White, H. Aubrey, III
Wilson, Evelyn L.
Ziober, John David

President Rick J. Norman called the January 10, 2020 Council meeting to order at 10:00 a.m. at the LSU Foundation in Baton Rouge. After making a few administrative announcements concerning the scheduling of a one-day meeting on January 24, 2020 and the annual banquet on October 16, 2020, the President asked the Council members to briefly introduce themselves. He then called on Professor Ronald J. Scalise, Jr., Reporter of the Trust Code, Prescription, and Successions and Donations Committees, to begin his presentation of materials.

Trust Code Committee

Professor Scalise began by thanking the members of all three of his Committees and informing the Council that he would begin with the revisions drafted by the Trust Code Committee. The Reporter asked the members of the Council to turn to the "Draft Bill on Allocation to Income and Principal," reminding them that the Council had previously approved these provisions and informing them that, due to the fiscal nature of the 2019 Regular Session, the bill had not been submitted to the legislature. In the interim, the Committee discussed making several changes to the provisions as previously adopted, including correcting semantic issues, suppressing the existing Comments, and making stylistic changes with respect to mineral law issues after consultation with the Reporter of the Law Institute's Mineral Law Committee, Mr. Pat Ottinger. The Reporter explained that these changes appeared in bold throughout the bill.

With that introduction, Professor Scalise directed the Council's attention first to the semantic issues, beginning on page 5 of the bill, where he noted that "subject to daily accrual" had been moved for clarity. He also explained that the text of Civil Code Article 24 had been replaced with a reference on page 6, that the tense of two words had been changed on page 9, and that two changes had been made in the Comment on page 10. The Reporter further noted that "a" had been added on page 12, and the first instances of "IRAs" and "IRS" had been replaced with "individual retirement accounts" and "Internal Revenue Service" on pages 14 and 15. Finally, "provision" had been deleted after "safe harbor" on pages 18 through 20 of the bill, and several changes had been made in the Comments on pages 24 and 25. A motion was made and seconded to adopt all of these changes as presented, and the motion passed with no objection.

Professor Scalise next asked the Council to turn to proposed Section 3 of the bill, on pages 25 and 26, concerning the suppression of the existing Comments to certain provisions that were being amended by the bill. He reminded the Council that this practice was established in connection with the Private Works Act revision and that the rationale for doing so was that continuing to publish old and often inconsistent Comments after a provision had been entirely rewritten could lead to unnecessary confusion. The Reporter also explained that Comments had been added to each of the relevant provisions informing the reader where the old Comments could be found. A motion was made and seconded to adopt proposed Section 3 of the bill as well as the Comments on pages 6, 10, 11, 12, 18, 19, and 20. One Council member asked whether there were any Comments other than those that were added when the provisions were enacted in 1964, and Professor Scalise answered in the negative. The motion to adopt Section 3 of the bill and the related Comments then passed with all members in favor.

Next, the Council considered the changes that had been made to R.S. 9:2152 with respect to issues concerning mineral law, on pages 16 and 17 of the bill. Professor Scalise explained that Mr. Pat Ottinger, Reporter of the Law Institute's Mineral Law Committee, had raised a concern with respect to the "interest in mineral rights" language, noting that land with minerals would not be included because it was not a "mineral right" but a "right in minerals." As a result, Mr. Ottinger recommended that the phrase "or other interest in oil, gas, or other minerals" be added in three places on pages 16 and 17. Professor Scalise noted that a similar change had also been made on lines 9 and 10 of page 17, but in this case, "mineral rights" was being replaced with "oil, gas, or other minerals" because one does not extract mineral rights. Professor Scalise also explained the other changes that had been made to this provision, namely, the addition of "mineral" before "lease" on line 17 of page 16 and "overriding royalty" on line 1 of page 17, both for purposes of clarity, and the correction of the cross-reference on line 6 of page 17. A motion was then made and seconded to adopt all of these changes as presented, and the motion passed with no objection.

Finally, the Reporter directed the Council's attention to R.S. 9:2151.1 on pages 12 and 13 of the bill, noting that the sentence on lines 1 through 3 of page 13 had originally been part of Subsection B but should apply to both Subsection A and Subsection B. As a result, the Committee had designated this provision as Subsection C and redesignated existing Subsection C as Subsection D. A motion was made and seconded to adopt this change as presented, and the motion passed with no objection. Professor Scalise then thanked the Council and noted that these revisions would be submitted to the legislature during the upcoming Session.

Next, the Reporter asked the Council to turn to the "Miscellaneous Revisions" materials, beginning with R.S. 9:1783 on page 2. He noted that the scope of this provision was expanded during the most recent legislative session to allow out-of-state trust companies to serve as trustees of Louisiana trusts subject to certain requirements in Title 6 – namely, that Louisiana trust companies are treated similarly by that state. He then explained that the bill, which had been proposed by the Louisiana Bankers Association, had gone too far in referencing R.S. 6:626 as a whole, noting that Paragraph (A)(3) deals with trust representative offices, which were not intended to be included. As a result, Professor Scalise consulted with the Bankers Association concerning a possible amendment to add a more specific cross-reference to limit which out-of-state trust companies can serve as trustees of Louisiana trusts. They agreed with this suggestion, and the Trust Code Committee approved the addition of "(A)(1) and (2)" as reflected in bold on line 18 of page 2. A motion was made and seconded to adopt this change as presented, and the motion passed with no objection. The adopted proposal reads as follows:

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

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

* * *

(3) A financial institution or trust company organized under the laws of Louisiana or the United States, authorized to exercise trust or fiduciary powers under the laws of Louisiana or of the United States, or trust company organized under the laws of another state and operating in Louisiana pursuant to R.S. 6:626<u>(A)(1) and (2)</u>.

Finally, the Reporter directed the Council's attention to R.S. 9:2207 on page 1 of the materials. Professor Scalise explained that this provision allows a beneficiary to provide the trustee with a written instrument that relieves the trustee from liability, but the provision restricts this ability if the limitation would be for the improper advancement of money or conveyance of property with respect to a spendthrift trust. The Reporter noted that the Committee had recommended two changes to this provision, the first of which was the deletion of "competent" on line 6 of page 1. He explained that the rationale for deleting this qualifier was that Louisiana law refers to "capacity" rather than "competency," and the provision is not intended to limit representatives of a beneficiary without capacity from acting on the beneficiary's behalf to relieve the trustee of liability. Professor Scalise then noted that this would not be good policy and that other states do not have this sort of limitation. With respect to the second change – the deletion of the language on lines 9 through 11 of page 1 – the Reporter explained the Committee's concern that if the trustee of a spendthrift trust makes a discretionary distribution, that could be considered an improper advancement of money, a problem that is only exacerbated by the fact that almost all trusts nowadays are spendthrift trusts. Professor Scalise also explained that the Committee had struggled to come up with a meaningful distinction between "advancing money" and "conveying property" and noted that this provision was controversial when it was added in 1964, and neither the Uniform Trust Code nor the Restatement of Trusts included such a provision either then or now. For all of these reasons, the Committee had determined that this limitation should be removed from R.S. 9:2207.

A motion was made and seconded to adopt the proposed changes, at which time one Council member questioned whether the settlor's intent would be defeated if the trustee could be absolved from liability for violating the terms of a spendthrift trust. Professor Scalise responded that the requirement that the trustee act in good faith still applies, but that if this language remained in R.S. 9:2207, trustees of all spendthrift trusts could be subject to liability for any discretionary distributions that were made. A member of both the Council and the Committee elaborated on this point, noting that trustees of spendthrift trusts are hesitant to make distributions even if they have the discretion to do so because the beneficiary may want the distribution now but could argue years later when circumstances have changed that this constituted an improper advancement of money. One Council member then expressed her concern with respect to prospective releases from liability, and the Reporter responded by noting that the other exceptions in this provision on lines 11 through 13 are being retained. After additional discussion concerning the intent that these sorts of waivers of liability will be executed contemporaneously with the discretionary distribution, a vote was taken on the motion to adopt the proposed changes to R.S. 9:2207. The motion passed with no objection, and the adopted proposal reads as follows:

R.S. 9:2207. Relief from liability by beneficiary

A ~~competent~~ beneficiary who is acting with knowledge of the material facts and whose action is not improperly induced by the conduct of a trustee may, by written instrument delivered to a trustee, relieve a trustee from liabilities that otherwise would be imposed upon him. The instrument shall not be effective ~~if it purports to limit a trustee's liability for improperly advancing money or conveying property to a beneficiary of a spendthrift trust or a trust under which a beneficiary's right to alienate is restricted, or~~ if it limits prospectively and in general terms a trustee's liability for breach of the duty of loyalty to a beneficiary, or for breach of trust in bad faith.

Revision Comments – 2020

This revision changes the law in two ways. First, it deletes the reference to "competent" beneficiaries, as this provision is not intended to limit authorized representatives of a beneficiary, such as a mandatary, tutor, or curator, from acting on behalf of the beneficiary. Moreover, the term "competent" is not defined by the Louisiana Trust Code and the corresponding concept in the Louisiana Civil Code is "capacity" rather than "competency." See, e.g., La. Civ. Code arts. 27, 1470-1477, 1918. Second, it removes the limitation that prevents a beneficiary from agreeing to limit a trustee's liability for "improperly advancing money or conveying property" to a beneficiary of a spendthrift trust or a trust with restrictions on the beneficiary's right to alienate his interest. Even at the time of the enactment of the original provision in 1964, this limitation was controversial. It has been deleted in light of a modern trend not to so limit a beneficiary's ability to relieve a trustee of liability. See, e.g., Unif. Trust Code § 1009; Restatement (Third) of Trusts § 97.

<u>Prescription Committee</u>

Having concluded his presentation of materials prepared by the Trust Code Committee, Professor Scalise asked the Council to turn to the materials on prescription, specifically the proposed changes to Civil Code Article 2041 concerning the revocatory action. The Reporter explained that the second paragraph of this provision had been added in 2013 when it was amended onto a Law Institute bill that enacted Articles 3505 through 3505.4, which had been drafted pursuant to a resolution to study contractual extensions of prescription. He further explained that the revocatory action allows a creditor to annul any acts made by the debtor that have caused or increased the debtor's insolvency, but that the addition of the second paragraph of Article 2041 has led to a number of concerns. Some of these concerns include creating issues with respect to stability of title, reinjecting the concept of fraud into the revocatory action, and leading to uncertainty overall as evidenced by several jurisprudential decisions discussed in the materials. Professor Scalise elaborated by noting that not only is the meaning of "fraud" in this context unclear, but even if it were clear what constituted fraud for purposes of the revocatory action, the second paragraph of Article 2041 provides that the three-year period does not apply but fails to specify the time period that does apply. For example, is the applicable time period in cases of fraud one year from discovery as set forth in the first paragraph of Article 2041, and if so, is that good policy considering its destabilizing effect on title as an exception to the good faith purchaser and public records doctrines? Or perhaps the five-year period from Article 2032 for cases of fraud generally or the ten-year period from Article 3499 for all other personal actions should apply instead? The Reporter then explained that in light of all of the uncertainty surrounding this provision, the Committee recommended that the language on line 7 of page 1 of the materials be deleted.

A motion was made and seconded to adopt the proposed amendment to Article 2041, at which time one Council member suggested that perhaps there is some element of fraud in all cases that give rise to the revocatory action, since the debtor is causing or increasing his insolvency to the prejudice of his creditor. The Council discussed the meaning of "insolvency" in this context, specifically whether the revocatory action would be available to a creditor whose debtor reduces his assets to the point where there is not much left but does not necessarily have fewer assets than liabilities as is required for "true" insolvency. Another Council member then questioned whether the three-year period is peremptive, and Professor Scalise responded that the one-year period is considered prescriptive and the three-year period is considered peremptive even though these words are not used in the article. A vote was then taken on the motion to adopt the proposed change to Article 2041, and the motion passed with no objection. The adopted proposal reads as follows:

Article 2041. Action must be brought within one year

The action of the obligee must be brought within one year from the time he learned or should have learned of the act, or the result of the failure to act, of the obligor that the obligee seeks to annul, but never after three years from the date of that act or result.

~~The three year period provided in this Article shall not apply in cases of fraud.~~

Revision Comments – 2020

This revision changes the law by repealing the second paragraph of prior Article 2041, which was added in 2013 and which created an exception to the three-year period in the first paragraph in cases of fraud. The 2013 amendment had the potential to create instability in title to immovables, as any instance in which a transfer of property occurred "fraudulently" and in violation of the law on revocatory actions potentially allowed the original transferor to recover the property within "one year from the time he learned or should have learned of the act, or the result of the failure to act." The three-year period provided in this Article creates an important protection for third parties and an obvious attempt "to protect the security of transactions." In addition, the 2013 amendment risked re-injecting the concept of fraud into the revocatory action – a concept that was eliminated in 1984 because of the confusion and uncertainty that it caused. As part of the general revision to the law of obligations in 1984, the concept of fraud was eliminated from the revocatory action and in its place the legislature substituted the concept of "insolvency." This revision restores Article 2041 to its original text as revised in 1984.

Successions and Donations Committee

Professor Scalise then turned to the materials prepared by the Successions and Donations Committee, explaining that these materials include several issues that have been brought to the attention of the Committee over a number of years. With respect to the first, the calculation of the legitime of a forced heir, the Reporter reminded everyone of the two situations in which someone may be a forced heir and noted that grandchildren may be forced heirs through representation. He also explained that there has always been confusion in the law over the calculation of the forced portion under representation.

Professor Scalise then explained that in proposed Civil Code Article 1495.1, the Committee is recommending in the first paragraph a clear statement of existing law that when all of the forced heirs are of the first degree, the division of the forced portion is made by heads. The second paragraph only applies if at least one forced heir is a grandchild by representation, in which case the division of the forced portion is made by roots, taken from Civil Code Article 885, and within each root, by heads. Professor Scalise also noted that the third paragraph, known as the *Greenlaw* rule, is moved from present Civil Code Article 1495 to ensure its applicability to both forced heirs of the first degree and forced heirs by representation as described in the first and second paragraphs of proposed Article 1495.1. The Council satisfactorily worked through a few examples of the calculation but then questioned moving the *Greenlaw* rule from Article 1495, wondering if, as a result, *Greenlaw* would no longer be applicable to the disposable portion. The Reporter agreed to add a Comment that if the legitime is reduced because of *Greenlaw*, the reduction does not result in a piece of the forced portion being unassigned. The following was approved:

Civil Code Article 1495. Amount of forced portion and disposable portion

Donations *inter vivos* and *mortis causa* may not exceed three-fourths of the property of the donor if he leaves, at his death, one forced heir, and one-half if he leaves, at his death, two or more forced heirs. The portion reserved for the forced heirs is called the forced portion and the remainder is called the disposable portion.

~~Nevertheless, if the fraction that would otherwise be used to calculate the legitime is greater than the fraction of the decedent's estate to which the forced heir would succeed by intestacy, then the legitime shall be calculated by using the fraction of an intestate successor.~~

Civil Code Article 1495.1. Calculation of the legitime

To determine the legitime of a forced heir when all forced heirs are of the first degree, the division of the forced portion is made by heads.

When representation occurs for purposes of forced heirship, the division is made by roots among those qualifying as forced heirs or being represented. Within each root, any subdivision is also made by roots in each branch with those qualifying as forced heirs by representation taking by heads.

Nevertheless, if the fraction that would otherwise be used to calculate the legitime is greater than the fraction of the decedent's estate to which the forced heir would succeed by intestacy, then the legitime shall be calculated by using the fraction of an intestate successor.

Revision Comments – 2020

(a) This revision provides a definitive statement as to how to calculate an individual forced heir's legitime. In that vein, it should be read in conjunction with Article 1495, which provides the method of calculation of the forced portion, i.e., the amount to which all forced heirs are collectively entitled.

(b) The first paragraph of this revision is applicable when all forced heirs are forced heirs of the first degree. When one or more forced heirs is a forced heir by representation, the second paragraph specifies the method by which the legitime is calculated. Both the first and the second paragraphs of this Article are subject to the limitation provided in the third paragraph.

(c) The second paragraph of this revision closes a gap that has long existed in Louisiana law, namely, how to calculate the legitime of a forced heir grandchild. Under this revision, the forced portion is initially calculated by assessing the number of descendants who are forced heirs in their own right or who are forced heirs by virtue of being represented by their descendants. The legitime is then calculated by roots and within each root by heads, but only among those who qualify as forced heirs by representation. Descendants of those who are treated as forced heirs under this Article but do not themselves qualify as forced heirs by representation are not considered for purposes of calculation of the legitime. By way of example, A may have two predeceased children, B and C, neither of whom qualified as a forced heir in his own right. B has a child D, who is a forced heir by representation, and C has three children, E, F, and G, but only E and F qualify as forced heirs by representation. Under this example, the calculation of the forced portion would be made at the generational level of B and C because B and C are both represented by forced heirs although neither B nor C is a forced heir in his own right. Consequently, the forced portion would be ½. B's root (or his 1/4th share) would be distributed to D, his child who is a forced heir by representation. C's root (or his 1/4th share) would be divided equally between E and F, but not G, as E and F are the only forced heirs by representation in C's root.

(d) The third paragraph of this Article specifies the limitation, commonly known as the *Greenlaw* rule, which has been moved from Article 1495 to this Article. This revision has not disturbed its applicability in the ordinary case where the legitime share of a forced heir of the first degree is reduced to an intestate share. Rather, it has clarified that the *Greenlaw* rule is also applicable to the share of a forced heir by representation and may, in some instances, serve to reduce the legitime fraction of a forced heir by representation to that of an intestate successor.

The next issue for the Council's consideration involved the calculation of the active mass of the succession for purposes of forced heirship. Professor Scalise stated that for over two hundred years, Civil Code Article 1505 has mistakenly provided a mathematically impossible formula, which has led to the plain language of the article being ignored. He explained that this revision makes it clear that the debts of the succession are subtracted from the aggregate property to determine the net estate, and then donations are fictitiously added. The Reporter noted that any other method of calculation would result in an unintended benefit for creditors and an incentive for people to divest themselves of all of their property prior to death. He also explained that the intent of the Committee was not to change the law, and although he admits that the drafting of existing law is not perfect, the Reporter does not wish to disturb any more language than is necessary to clarify the proper calculation. The Council adopted the following proposal:

Civil Code Article 1505. Calculation of disposable portion on mass of succession

A. To determine the reduction to which the donations, either *inter vivos* or *mortis causa*, are subject, an aggregate is formed of all property belonging to the donor or testator at the time of his death; <u>the sums due by the estate are deducted from this aggregate amount</u>; to that is fictitiously added the property disposed of by donation *inter vivos* within three years of the date of the donor's death, according to its value at the time of the donation.

B. The ~~sums due by the estate are deducted from this aggregate amount, and the~~ disposable quantum is ~~calculated~~ <u>determined</u> on the ~~balance~~ <u>above calculation</u>, taking into consideration the number of forced heirs.

* * *

Revision Comment – 2020

This revision corrects a mistake that has long existed in Louisiana law regarding the calculation of the mass of the succession for purposes of forced heirship. Paragraph A of the prior version of Article 1505 declared that in ascertaining the reduction to which donations are subject an aggregate is formed of all the decedent's property and certain donations inter vivos are fictitiously added. Paragraph B then provided that the "sums due by the estate" were to be subtracted from the aggregate amount formed in Paragraph A. This language was derived from Article 922 of the French Civil Code, which has been characterized as "not clearly express[ing] the intention of the legislation." Aubry & Rau, Droit Civil Français: Testamentary Successions and Gratuitous Dispositions § 684 n.15. Specifically, the order of calculation suggested by the prior version of Article 1505 proved problematic in instances in which the value of the property left at death is less than the debts. In such a case, the value of debts must be subtracted *prior* to adding fictitiously certain donations inter vivos. After all, "the sum which the donees are permitted to keep can neither be affected by the payment of the debts, because creditors cannot profit by the reduction ... nor attributed to the forced heirs whose reserved portion will be greater than that contemplated by law." *Id.* *See also* Philippe Malaurie et Claude Brenner, Droit des Successions et des Libéralités 431 (8th ed. 2018). The current revision makes clear that the proper method of computing the succession mass is to deduct the debts of the succession from the aggregate of the extant property. Only after the "net estate" is calculated does one "fictitiously add[] the property disposed of by donation inter vivos within three years of the date of the donor's death, according to its value at the time of the donation." Art. 1505(A). In light of the above, it should also be clear that when the decedent's estate is insolvent and the amount of debts exceeds the assets, the "net estate" is considered to be zero, and the succession mass for forced heirship purposes is based solely upon the donations inter vivos that are fictitiously added back. *See* Malaurie et Brenner, *supra*, at 431.

The Reporter next directed the Council to page 5 of the materials to discuss the repeal of R.S. 9:2401. He explained that Louisiana currently has two provisions on the formal validity of wills executed outside of Louisiana and that, in addition to R.S. 9:2401, Civil Code Article 3528 was adopted in 1992 with the Conflicts of Law revision. Professor Scalise further explained that Revision Comment (f) to Article 3528 refers to "former" R.S. 9:2401, as it was the intent of the redactors of the 1992 revision to repeal R.S. 9:2401, yet the provision has never been repealed. The Council and the Reporter confirmed that the meaning of "state" in Civil Code Article 3516 is equally as broad as the language in R.S. 9:2401 and would also cover any wills executed in foreign nations. The proposed repeal was approved.

Moving to Civil Code Article 897, Professor Scalise explained that the Committee is simply proposing to update antiquated language. The Reporter noted that the term "posterity" is no longer defined in the Civil Code and has been replaced elsewhere with the term "descendant". With no discussion, the following was approved:

Civil Code Article 897. Ascendant's right to inherit immovables donated to descendant

Ascendants, to the exclusion of all others, inherit the immovables given by them to their children or their descendants of a more remote degree who died without ~~posterity~~ <u>descendants</u>, when these objects are found in the succession.

If these objects have been alienated, and the price is yet due in whole or in part, the ascendants have the right to receive the price. They also succeed to the right of reversion on the happening of any event which the child or descendant may have inserted as a condition in his favor in disposing of those objects.

Revision Comment – 2020

The term "posterity" as used in the first paragraph of Article 897 has been replaced with the term "descendants," as "posterity" is no longer defined in the Civil Code. Under the Civil Code of 1870, the term "posterity" was defined to mean "all the descendants in the direct line." Art. 3556(24) (1870). It was deleted in 1999.

The next two issues for the Council's consideration concerned the administration of successions as provided in the Code of Civil Procedure. Professor Scalise first reminded the Council of their previous work in 2017 on Code of Civil Procedure Article 3396.18, which created a right to request the sealing of a detailed descriptive list when a succession is under independent administration. It came to the Committee's attention that the revision perhaps inadvertently created ambiguity in the law because it did not carry forward language relative to placing a successor in possession by a final or partial judgment of possession. As a result, practitioners wondered whether a judgment of possession is required at all in an independent administration. The Reporter explained that the Committee certainly did not intend to change the law in this regard and is therefore proposing to add the appropriate language back into the article. With little discussion, the following was adopted:

Code of Civil Procedure Article 3396.18. Inventory or sworn descriptive list

A. Before the succession can be closed, a judgment of possession rendered, and the independent administrator discharged, there ~~must~~ shall be filed an inventory or sworn detailed descriptive list of assets and liabilities of the estate verified by the independent administrator.

* * *

Revision Comment – 2020

This revision clarifies the law by definitively stating that the rendition of a judgment of possession is still necessary even when a succession is independently administered. The 2017 amendments did not intend to repeal the requirement of a judgment of possession, even though independent administrators have "all the rights, powers, authorities, privileges, and duties of a succession representative provided in Chapters 4 through 12" of Title II of Book VI of the Code of Civil Procedure. See Art. 3395.15. Nothing in this Article affects the rendition of a partial judgment of possession pursuant to Articles 3362 or 3372.

Professor Scalise then turned the Council's attention to Code of Civil Procedure Article 2952 and informed them that the changes to this article are the same changes regarding the sealing of a detailed descriptive list previously made to Code of Civil Procedure Article 3396.18 in independent administration. The Reporter noted that it was always the Committee's intention to extend that right to successions without administration, and it finally had the opportunity to do so. With no discussion, the following was approved:

Code of Civil Procedure Article 2952. Descriptive list of property, if no inventory

A. If no inventory of the property left by the deceased has been taken, any heir, legatee, or other interested party shall file in the succession proceeding a detailed, descriptive list, sworn to and subscribed by him, of all items of property composing the succession of the deceased, stating the actual cash value of each item at the time of the death of the deceased.

B. The detailed descriptive list shall be sealed upon the request of an heir or legatee.

C. If the detailed descriptive list is sealed, a copy shall be provided to the decedent's universal successors and surviving spouse. Upon motion of any successor, surviving spouse, or creditor of the estate, the court may furnish relevant information contained in the detailed descriptive list regarding assets and liabilities of the estate.

Revision Comment – 2020

This revision extends the procedure adopted in 2017 in the context of independent administration to successions in which an heir is sent into possession without an administration of the succession. For the reasons explained in the Comments to Article 3396.18, the detailed descriptive list may be filed under seal.

At this time, Professor Scalise concluded his presentation, and the Council adjourned for lunch. After lunch, the President announced that tomorrow's meeting – Saturday, January 11, 2020 – had been cancelled due to the threat of inclement weather, and that the material scheduled to be presented would be rescheduled to a future meeting. The President then called on Mr. Stephen G. Sklamba, Reporter of the Tax Sales Committee, to begin his presentation of materials.

Tax Sales Committee

Mr. Sklamba began by first addressing a group of provisions – R.S. 47:2135 through 2137 – that had been discussed but not approved at a prior Council meeting. The Reporter explained that the Committee, after seeking feedback from assessors, was recommending no substantive changes to these statutes. A motion was made and seconded to approve the provisions. Without any substantive discussion, the motion carried, and the provisions were approved as follows:

§2135. Acceptance of pro rata taxes on property acquired by state from private owners

A. The tax collector is directed to accept the payment of pro rata ad valorem taxes on property purchased in full ownership for rights-of-way or other purposes by the state of Louisiana or any of its political subdivisions and more particularly the Department of Transportation and Development, for the period of time for which the liability for ad valorem taxes have been due by the private owner or owners of the property.

B. The tax collector is authorized to accept the payment of the pro rata ad valorem taxes on property, regardless of whether the tax roll has been filed.

C. Notwithstanding any other provisions of law to the contrary, when property becomes exempt from ad valorem taxation due to an act of donation, the pro rata share of ad valorem taxes for the year in which the act of donation is made shall be due and payable by the donor. The pro rata share of ad valorem taxes shall be calculated and adjusted in accordance with R.S. 47:2135 through 2137. The public entity donee, whether the state of Louisiana or any of its legal subdivisions or entities thereof, shall be responsible for notifying the proper assessor and the Louisiana Tax Commission in order to properly carry out the intent and purposes of this Subsection.

§2136. Duty of assessors and ~~tax commission~~ Louisiana Tax Commission to amend tax roll to conform to proration of ad valorem taxes

All assessors throughout the state of Louisiana and the Louisiana Tax Commission are authorized and directed to adjust and amend all tax rolls and records within their respective offices in order to properly carry out the intent and purposes of R.S. 47:2135 through 2137.

§2137. Computation of proration; placing of property on exempt roll

The proration of ad valorem taxes shall be computed to the closest half month or fifteen-day period to the date of the transfer of title to property from private to public ownership, and the assessor shall place the property on the exempt tax roll.

Mr. Sklamba next asked the Council to turn its attention to R.S. 47:2154 on pages 33 and 34 of the materials. Reminding the Council that Subsection C had been recommitted, the Reporter explained that, per the Council's request, he had confirmed that the provision would be palatable to sheriffs statewide. In particular, he noted that one Tax Sales Committee member who was very active in the Sheriffs' Association had gathered information indicating that at least 55 parishes used an identical software program for their accounting. Thus, the Reporter concluded, the adjusting entry required by Subsection C would be entirely uncontroversial amongst sheriffs. A motion was then made and seconded to approve R.S. 47:2154(C), and the floor was opened for discussion.

A Council member inquired as to how, exactly, the second sentence of Subsection B would be enforced. The Reporter explained that the penalty referred to would be part of the redemption price. He further noted that, under the current system, the penalty was applied on the "front end" but that the Committee's recommended scheme would alleviate a fair deal of administrative burden. The Council member followed up, wondering whether the redeemer would pay this amount to the sheriff or to the purchaser directly. Mr. Sklamba explained that redemption would be made through the sheriff, at least up until the judicial proceeding. The Council member was satisfied, and the motion on the floor ultimately carried. The provision was approved as follows:

§2154. Tax ~~sales~~ auctions; time of ~~sale~~ auction; price

* * *

C. Immediately prior to the auction, the tax collector shall make an adjusting journal entry removing the five percent penalty from the tax bill. Upon redemption, the tax debtor shall be obligated to pay this penalty to the tax auction purchaser.

* * *

Mr. Sklamba then asked the Council to turn its attention to R.S. 47:2266, noting that he would be temporarily skipping over the spot where his most recent presentation left off in favor of discussing a provision that was, in his opinion, the most important of the entire revision. He noted that the judicial proceeding – the topic of R.S. 47:2266 – had come up and been discussed during his prior presentations, but that the Council had never directly examined this particular statute. The Reporter further noted that he would not be asking for Council approval, as there was still work to be done with respect to the exact language, but that he wished to receive feedback on the substance of the provision. Mr. Sklamba then explained the proceeding set forth in R.S. 47:2266, highlighting a few issues in particular: that the petition would be served on every party whose interest would be terminated; that, if such a party could not be located, a court-appointed attorney would represent their interest; that costs and attorney fees would be added to the price, assuming that the party in question sent the requisite notice; and, finally, that the interest could be converted to ownership one year after service. Mr. Sklamba further noted that the Committee had considered the possibility of a cap on fees for court-appointed attorneys under this Section, as large attorney fees often made it difficult for the properties at issue to be returned into commerce. Despite the provision of a $750 cap in R.S. 47:2243, however, he clarified that the Committee had not made a final decision on this issue, hence the provision for "reasonable" fees in R.S. 47:2266. Mr. Sklamba then asked the Council for its thoughts.

The first comment came from a Council member who pointed to lines 13 and 14 of page 50 as problematic for their use of the term "peremption." In particular, the Council member raised two issues: first, whether the "thing" occurring was actually peremption; and second, whether it was even possible for state law to "perempt" (or otherwise terminate) a claim under federal law. The Reporter noted that these were salient points, agreeing both that "peremption" was likely the wrong choice of word and that state law was incapable of terminating a federal claim. He resolved to either delete the offending language or revise it accordingly. Next, a Council member raised an issue with respect to Paragraph (A)(1). In particular, he noted confusion with the language of the contingency pertaining to blighted and abandoned property. The Reporter explained that the language at issue simply represented an attempt to reduce the standard twelve-month period to three months in the case of blighted or abandoned properties. The Council member noted that the structure of the sentence made it unclear on which date the three-month period would commence. He requested that the Committee revise the language at issue to make it less confusing, and the Reporter agreed to do so.

The next question from the Council pertained to the timeline of events set out in R.S. 47:2266. Mr. Sklamba explained that the first major event in the timeline would be the auction. One year later, suit could be filed. Then, one year after service of the suit, assuming there had still been no redemption, the auction purchaser could convert his certificate to ownership. The Reporter further noted that the overall time allotted the tax debtor prior to loss of property fell directly in the middle of national standards. Emphasizing that the process recommended by the Committee was fair to all parties, he added that, among states with mandatory judicial proceedings, this period would actually be on the *longer* side. Next, pointing to the mandatory contents of the petition, another Council member noted that anything required in the judgment should also be required in the petition. Mr. Sklamba agreed and resolved to ensure that the statute so provided. This prompted another Council member to inquire as to the consequences for a party's failure to include all of the petition's requisite contents. Another Council member noted that this issue – clarification of consequences for failure of particular requirements – arose throughout R.S. 47:2266. The Reporter noted that this was a very helpful point of feedback and resolved to alleviate the problem with the Committee.

Mr. Sklamba then moved to Paragraph (A)(2), and a Council member inquired as to the extent of the curator's obligation to locate the property owner. In response, the Reporter noted that the Committee had deliberated about this issue but ultimately decided that it was better left unaddressed, owing to the fact that jurisprudence very heavily favored the validity of the judgment regardless of error or lack of effort by the curator. Accordingly, he added, the Committee feared that any requirements might be at best ignored and at worst struck down, given courts' favor of merchantable title. Mr. Sklamba did, however, remind the Council of the notice provided for in R.S. 47:2156, emphasizing that the revision *did* take steps to ensure that the debtor was located prior to the termination of his interest.

Next, a Council member suggested that the $750 cap on fees found in R.S. 47:2243 could be carried over but should be subject to an exception for good cause shown. In light of this suggestion, Mr. Sklamba opined that perhaps the current language – "a reasonable fee" – might work best after all, nevertheless adding that the $750 amount was something that the Committee felt was fair if indeed it decided to provide a specific cap. A member of the Tax Sales Committee then suggested that perhaps a more detailed standard for calculating the fee could dictate a better number. A Council member arguing against a specific cap noted that, at some point, any number provided would become obsolete and that provision of a specific *cap* would lead courts to simply provide such amount in every case; this, he argued, might destroy the curator's incentive to do thorough work. Other Council members found these arguments persuasive, but the issue was ultimately set aside.

One Council member then pointed out that Paragraph (A)(2) seemed to cover a wide range of topics and suggested dividing the provision into discrete issues. Mr. Sklamba agreed with this suggestion and resolved to review the statute with plans to follow this advice. Another Council member, pointing to the language "ownership interest," wondered whether this verbiage was accurate and suggested possibly using the term "principle real right" instead. Mr. Sklamba again agreed to look further into this issue. Returning to the issue of attorney fees for the court-appointed attorney, a Council member suggested looking into whether a cap was provided in similar situations, and, if so, where that cap was set. Another Council member argued that the issue would remain unsolved without getting a sense of which way the Council was leaning. The Council member moved to take a nonbinding policy vote on the issue, suggesting a cap with "absent good cause" language as the topic thereof. The motion was seconded. The Council voted overwhelmingly against the use of a cap with a "good cause" exception. Next, a vote was taken as to whether there should be no dollar figure at all. Most, but not all, of the Council favored this approach. One judge, echoing earlier comments by the Council, urged that the provision of a specific dollar-figure cap would result in judges simply giving the full amount in virtually every case. Other judges in attendance agreed with this statement, and, ultimately, the Council decided in favor of providing no cap on fees.

Next, a guest attendee inquired as to the constitutionality of the scheme being proposed. The Reporter assured her that there were no constitutional issues, emphasizing that the current proposals included more constitutional protections than current law. The guest nevertheless wondered whether the lack of a "hard requirement" under R.S. 47:2156 might be unconstitutional. Mr. Sklamba confirmed that there were in fact no such issues, reading direct language from a case on point. Ultimately, the Council was satisfied that no constitutional issues were present.

Mr. Sklamba then moved to Paragraph (A)(3), and a Council member noted that, although this provision ostensibly provided for default judgment, it failed to set out any such procedures. The Reporter agreed with the Council member's argument, resolving to draft such procedures with the Committee. Another Council member, pointing to the word "where" on line 45 of page 50, wondered what exactly this language meant. He suggested that the Committee clarify such language, and the Reporter agreed.

Next, a Council member raised issue with the apparent limitation of defenses, wondering what would happen in a situation where the defendant wished to assert some defense other than the three listed in the statute. The Council member urged that the Committee ensure against loss of property simply because a party's defense did not happen to be listed. Another Council member suggested that this problem could be remedied simply by adding the language "or other defense" at the relevant place. The Reporter cautioned against this approach, however, arguing that the entire point of the limitation – avoiding burdening the courts with ancillary issues – would be defeated. Mr. Sklamba added that allowing for "full-on litigation" would put investors in the position of not wanting to invest. A member of the Tax Sales Committee argued that the real issue was not the limitation but rather the simple oversight of failing to carry down the language "except for good cause shown" utilized earlier in the statute. He argued that adding the language here would solve the problem identified by the Council member, who noted her satisfaction with this approach but nevertheless cautioned against use of the term "peremption" except where certain its use was appropriate.

Mr. Sklamba then moved to Paragraph (A)(4), briefly explaining its function. One Council member urged the Reporter to revise the language of the provision to make clearer the fact that service and the passage of one year were separate requirements. Another Council member inquired as to the issue of eviction proceedings and dispossession during the appeals process. Mr. Sklamba clarified that, despite the generally expedited process, parties would still be required to go through regular channels after foreclosure. This led another Council member to suggest that the Committee provide for some type of expedited appeals process – perhaps only a suspensive appeal, for example. Ultimately, no decisions were made in this regard. The Reporter moved next to Paragraph (A)(5), and the Council provided two suggestions with respect to this provision: to break it into two sentences and to double-check for consistency regarding the use of "twelve months" versus "one year."

Next, Mr. Sklamba directed the Council's attention to Paragraph (A)(6). One Council member asked whether the extension would need to run prior to the running of the one-year period. The Reporter clarified that it would. A Council member suggested using language more specific than "mental or physical infirmity" and further raised issue using language more specific than "mental or physical infirmity" and further raised issue regarding service members stationed overseas, afterwards noting that a special provision here was likely unnecessary, as the general rules protecting such parties would nevertheless be applicable. Another Council member, noting an affinity for the concept set out in this provision, suggested that it could instead be built into Paragraph (A)(3). A Council member then raised a more substantive issue with the statute overall, expressing concern that a loss of attorney fees might not be a sufficiently consequential penalty for failure to provide post-sale notice. The Council member argued that this was the case because there would *be* no attorney fees if the party at issue failed to make it into court, opining that unscrupulous investors would make such a calculation, resulting in an affirmative, strategic decision not to provide notice. Mr. Sklamba emphasized again that this was nevertheless a minor issue, highlighting the fact that post-sale notice was unnecessary from a constitutional perspective. He further explained that the protections built into the proposed scheme were on par with or greater than those required in other states.

The Reporter turned next to Subsection B, explaining that its purpose was to deal with the *Webeland* decision. The Council raised no issues regarding the provision. Mr. Sklamba then moved to Subsection C, explaining that it simply stated that the procedure described in this particular statute was the exclusive procedure in such context and that no personal obligation was created as a result of the tax auction process. He further noted that it had been added so as to eliminate the practice whereby investors purchase properties and then subsequently claim to be creditors of the debtor's succession, leading to their appointment as representatives of the succession and affording themselves the ability to sell the property and get paid. Several Council members opined that the provision was an excellent addition to the law and would serve its stated purpose well. Aside from this support for proposed Subsection C, there was no further discussion of the provision.

Having completed his review of R.S. 47:2266, the Reporter asked the Council to turn back to R.S. 47:2156, which had been recommitted for the purpose of adding a standard of care with respect to sending the post-sale notice at issue. Mr. Sklamba then asked the Council to take the statute one Subsection at a time, and a motion was made and seconded to approve R.S. 47:2156(A). The motion carried with no discussion, and the provision was approved as follows:

§2156. Post-sale notice

~~A. Within the applicable redemptive period, the tax sale purchaser may send a written notice to any or all tax sale parties notifying the parties of the sale. The notice shall provide full and accurate information necessary to contact the tax sale purchaser, including the name, physical address, and telephone number of the purchaser. It shall be accompanied by a copy of the tax sale certificate received by the tax sale purchaser under the provisions of this Part and copies of the documents that the purchaser received with that sale. The notice shall inform the tax sale parties that the failure to redeem the property prior to the expiration of the applicable redemptive period will terminate the right to redeem the property, and the purchaser will have the right to seek confirmation of the tax title and take actual possession of the property. The notice shall be sufficient if it is in the form set forth in Subsection B of this Section.~~

<u>A. The auction certificate holder shall use reasonable diligence to determine the name and current address of each tax auction party whose interest will be terminated by a subsequent action brought pursuant to R.S. 47:2266.</u>

* * *

Mr. Sklamba then took up Subsection B of R.S. 47:2156. A motion was made and seconded to approve the provision, and the motion carried without discussion. The adopted provision read as follows:

§2156. Post-sale notice

* * *

B. At least ninety days prior to bringing an action pursuant to R.S. 47:2266, the auction certificate holder shall send notice to each tax auction party discovered pursuant to Subsection A of this Section.

* * *

The Reporter then did the same with respect to Subsection C. A motion was made and seconded to approve the provision, and a Council member asked whether it was conceivable that the only notice a debtor might receive would be 90 days prior to the suit. Mr. Sklamba explained that after the tax auction, the tax debtor would receive notice twice: the R.S. 47:2156 post-sale notice and service of the suit. He further noted that such party would likely receive a *pre*-sale notice, adding that if such notice "came back" that it would trigger a requirement for additional efforts to notify the debtor of the auction. The Council member expressed further concern, wondering if it might be advisable to extend the relevant time period if in fact service could not be made on the debtor. Mr. Sklamba argued that such consideration was "missing the forest for the trees," stating that no approach would be perfect and emphasizing that the proposed approach contained far *more* protections than found in present law. He urged the Council to consider the issue of executory process as a point of comparison, contrasting its relative lack of constitutional protections to those at issue here. The Council found this to be persuasive, and the concerns were alleviated. Ultimately, the motion on the floor carried, and R.S. 47:2156(C) was approved as follows:

§2156. Post-sale notice

* * *

C. An auction certificate holder who fails to satisfy the requirements of this Section shall not be entitled to recover attorney fees and costs in connection with a subsequent action brought pursuant to R.S. 47:2266.

* * *

Mr. Sklamba moved next to Subsection D, noting that it was essentially a safe-harbor form and reading the contents of the form aloud. A Council member pointed out that no actual date was located anywhere on the form and urged that a date should be provided. She also suggested that a copy of the tax certificate should be attached to the notice. The Reporter noted these as excellent suggestions and agreed to make the related changes. He then accepted two more minor suggestions: the addition of the phrase "or a substantially similar" preceding the safe-harbor form and the replacement of "will terminate" with "may be terminated" on line 17 of page 38, so as to avoid the implication that such termination occurred automatically by law. Returning to the "peremption" issue previously identified with respect to R.S. 47:2266, a Council member pointed out that the current provision would require revision once the attendant revisions to R.S. 47:2266 were made. The Reporter agreed, and a motion was then made and seconded to recommit R.S. 47:2156(D). The motion carried.

With time growing short, the Reporter asked the Council to turn its attention to R.S. 47:2267, noting that he would like the Council to provide any policy feedback it might have with respect to this particular proposed revision. A Council member raised the issue that the category of rights at issue – liens; real rights – do not perempt. Mr. Sklamba once again agreed with the criticism levied, resolving to check the entirety of the draft to make sure that this term was used properly. He asked the Council if it had any additional comments. Another Council member noted that, from a policy perspective, he found the statute to be a sound, commendable addition to the law. He added that the provision could benefit from some additional detail but emphasized that the concept itself was good. The rest of the Council agreed with this assessment. Another Council member stated support for the five-year time period in particular.

At this time, Mr. Sklamba thanked the Council for these comments and concluded his presentation. The January 10, 2020 Council meeting was then adjourned.

Jessica Braun

Nick Kunkel

Mallory Waller