LOUISIANA STATE LAW INSTITUTE

MEETING OF THE COUNCIL

February 5, 2021

Friday, February 5, 2021

Persons Present:

Alford, Cory
Becker, Kelly Brechtel
Bartholomew, Trey K.
Becnel, Sadie
Belleau, Ashley L.
Bowers, Clinton M.
Braun, Jessica
Breard, L. Kent
Carroll, Andrea B.
Cassagne, Rachal C.
Castle, Marilyn
Chehardy, Susan M.
Comeaux, Jeanne C.
Coreil, Jeffrey
Crigler, James C., Jr.
Crigler, John D.
Cromwell, L. David
Curry, Kevin C.
Davrados, Nikolaos A.
Dawkins, Robert G.
Doguet, Andre'
Donewar, Blake C.
Duplechain, Alixe L.
Epstein, Jacqueline M.
Forrester, William R., Jr.
Freel, Angelique D.
Garofalo, Raymond E., Jr.
Gasaway, Grace B.
Gauthier, Emily M.
Gonzales, Zack
Guidry-Leingang, Kansas M.
Hamilton, Leo C.
Hayes, Thomas M., III
Hogan, Lila T.
Holdridge, Guy
Holthaus, C. Frank
Janke, Benjamin West
Jefferson, Lakeisha
Jones, Carrie LeBlanc
Knighten, Arlene D.
Lampert, Loren M.
Lawrence, Quintillis
LeDuff, Taylor M.
Lee, Amy Allums
Little, F.A., Jr.
Lonegrass, Melissa T.
Maloney, Marilyn C.
Manning, C. Wendell
Martinez, Magali
Medlin, Kay C.
Miller, Gregory A.
Morvant, Bill
Nedzel, Nadia E.
Norman, Rick J.
North, Donald W.
Owens-Jordan, Megan
Pirtle, Amy
Price, Donald W.
Puder, Markus G.
Rayford, Andrew C.
Robert, Deidre Deculus
Saloom, Douglas J.
Scalise, Ronald J., Jr.
Schimpf, Michael C.
Smith, Annie
Smith, Gary L., Jr.
Stuckey, James A.
Talley, Susan G.
Taranto, Todd Charles
Tate, George J.
Thibeaux, Robert P.
Title, Peter S.
Tooley-Knoblett, Dian
Tucker, Zelda W.
Vance, Shawn D.
Ventulan, Josef Philip M.
Wallace, Monica
Waller, Mallory
Weems, Charles S., III
Wheeler, Adrienne
White, H. Aubrey, III
Wilson, Evelyn L.
Woodruff-White, Lisa

President Rick J. Norman called the Zoom meeting of the Council to order at 9:05 a.m. on Friday, February 5, 2021. Several administrative announcements concerning meeting procedures and other matters were made, after which the President called on Professor Andrea B. Carroll, Reporter of the Marriage-Persons Committee, to begin her presentation of materials.

Marriage-Persons Committee

Professor Carroll began by explaining that today's materials include changes to the domestic abuse definition bill, which was introduced during the 2020 Regular Session as House Bill No. 727 but was delayed due to the COVID-19 pandemic. The Reporter reminded Council members that this project resulted from House Concurrent Resolution No. 79 of the 2017 Regular Session, which noted the "need for a consistent and comprehensive definition of 'domestic abuse' in Louisiana statutes." She further explained that while the legislation was delayed, the Marriage-Persons Committee continued working with domestic abuse advocacy groups and made a few changes to the proposal that was originally approved by the Council at its December 2019 meeting.

With that introduction, the Reporter asked the Council to turn its attention to R.S. 9:364 on page 3 of the materials, explaining that this statute is part of the Post Separation Family Violence Relief Act. Professor Carroll noted that Subsection A creates a presumption that a parent shall not be awarded joint or sole custody of his child when certain circumstances concerning domestic abuse exist, and Subsection B states how this presumption may be overcome. The proposal approved by the Council and introduced in House Bill No. 727 amended the introductory language of Subsection B to cure a timing concern. Professor Carroll noted that the three requirements listed in Subsection B are not usually met before an initial award of custody is made but would have to be overcome for the parent to seek modification of an existing custody order. Domestic abuse advocates, however, asked the Committee to reconsider the proposed change because it may be possible for the three requirements to be met prior to an award. The Committee agreed that the law needs to be clear that custody, modification, and visitation can all have different standards that apply depending upon the facts of the case and that under the Post Separation Family Violence Relief Act, in addition to the *Bergeron* standard, the conditions in R.S. 9:364(B) have to be met. The Committee therefore recommends deleting the proposed amendment, thus reverting back to present law, and also adding a Comment to clarify this point. A motion was made and seconded to adopt the Committee's recommendation, and the proposed changes were approved.

Next, a representative of the juvenile and family court judges expressed a concern she received regarding R.S. 9:364(B)(3). The argument is that if a parent completes an abuse intervention program and is not abusing alcohol or illegal substances, the court does not have enough discretion under Paragraph (B)(3) to award the parent custody unless the other parent is absent, mentally ill, or abusing substances. The Reporter suggested that although she understands the point, this is a new issue that should be presented to the Committee for further discussion and deliberation.

Moving to Civil Code Article 134, Professor Carroll noted that this article includes a list of factors that courts consider in every custody and visitation proceeding and asked the Council to focus on the first factor. She explained that the law was changed a few years ago to provide that the potential for the child to be abused shall be the primary consideration. The Committee recommended, and the Council approved, the deletion of the primary consideration language in Civil Code Article 134(1). Nevertheless, the Reporter explained that she was bringing this issue to the Council's attention once again because domestic abuse advocates asked the Marriage-Persons Committee to remove this proposal and restore current law. The Committee discussed this issue at length and chose not to remove the recommendation because the introductory language in Paragraph A has always made it clear that these and all other relevant factors shall be considered. Professor Carroll explained that traditionally, there has never been a hierarchy established by this list of factors because the list is illustrative and no one factor is more important than any other factor; rather, every factor is significant and bears on the child's wellbeing. The Reporter also informed that Council that the primary consideration language in the first factor creates unnecessary confusion in the law regarding presumptions, burdens of proof, and judicial discretion.

As a compromise, however, the Committee recommended the deletion of a sentence from Comment (a) on page 7 of the materials. Several Council members expressed continued support for the proposed change to Civil Code Article 134(1), and the following revised Comment was approved:

Revision Comments – 2021

(a) The placement of factors related to domestic abuse at the start of this list is deliberate, as the existence of or potential for domestic abuse speaks directly to safety, and therefore, the child's best interest. Moreover, the Post-Separation Domestic Abuse Relief Act limits custodial and visitation rights of perpetrators of domestic abuse substantially. R.S. 9:361 et seq.

Next, a Council member questioned the meaning of the term "a party" in the second factor of Civil Code Article 134 and wondered if the provision is broad enough to cover a situation whereby a child is abused by someone other than a party to the proceeding. The ensuing discussion included the fact that the first factor includes any situation of abuse and the second factor, although slightly repetitive on the surface, is important for its parallel to the spousal support language in Civil Code Article 112(B)(9). A few other Council members noted that they read the first and second factors very differently and believe they require a different focus when considering the best interest of a child. Furthermore, a member of the judiciary reiterated that regardless of any further changes to the second factor, courts shall and do consider all relevant factors, and if abuse is present, R.S. 9:364 and the factors are considered together. With discussion complete, the following was approved:

Article 134. Factors in determining child's best interest

A. Except as provided in Paragraph B of this Article, the court shall consider all relevant factors in determining the best interest of the child, including:

* * *

(2) <u>The existence, effect, and duration of any act of domestic abuse committed by a party or in a party's household.</u>

Finally, the Reporter explained that the last issue regarding this material was the proposed deletion of R.S. 9:341. Professor Carroll stated that in the recommended legislation, the substance of this statute appears elsewhere and, with the call for clarification and consistency in House Concurrent Resolution No. 79 of the 2017 Regular Session, the Committee continues to recommend this provision's deletion. Domestic abuse advocates, however, have expressed their desire to retain this law to provide victims with as many avenues for relief as possible. The Reporter noted that she was highlighting the Committee's recommendation for the Council due to its potential to cause conflict at the legislature. Without any discussion or motions, the recommended repeal of R.S. 9:341 stands.

At this time, Professor Carroll concluded her presentation, and the President called on Mr. William R. Forrester, Jr., Reporter of the Code of Civil Procedure Committee, to begin his presentation of materials.

<u>Code of Civil Procedure Committee</u>

Mr. Forrester began his presentation by noting that there were several sets of materials that had been drafted by the Code of Civil Procedure Committee for the Council's consideration. He explained that first, the Council would consider the proposals to eliminate preliminary default in Louisiana, which had been drafted in response to House Resolution No. 50 of the 2020 Regular Session by Representative Robby Carter. He also noted that a few changes had been made to the Committee's continuous revision bill, which had been filed during the 2020 Regular Session but was ultimately not considered due to the prioritization of other legislation concerning COVID-19 and hurricane relief. Mr.

Forrester then explained that there were two new sets of proposals for the Council's consideration – one that had been prepared by the Louisiana Supreme Court Technology Commission, and the other that makes technical changes to correct cross-references and other outdated language.

With that introduction, Mr. Forrester asked Judge Guy Holdridge to explain the proposed revisions that would eliminate preliminary defaults in Louisiana. Judge Holdridge began by noting that as indicated in House Resolution No. 50 of the 2020 Regular Session, preliminary defaults presently serve little practical purpose. He then asked members of the Council to engage in general discussion with respect to whether there was any opposition to eliminating the concept of preliminary default from Louisiana law, noting that several judges, local bar associations, and worker's compensation judges had been consulted and voiced no objection. Several Council members then expressed their general agreement that preliminary defaults are not particularly helpful procedural devices, although a few noted their initial hesitation about eliminating the concept altogether. One Council member questioned whether eliminating preliminary defaults would have a negative impact with respect to debt collection practices, and Judge Holdridge explained that this issue had arisen a couple of years ago in response to a resolution on allowing courts to raise prescription *sua sponte* and was being addressed in the continuous revision bill.

Another Council member then questioned whether the Committee had given any thought to eliminating preliminary defaults but allowing a defendant against whom a default judgment had been rendered to set aside the default judgment within a very short period of time. Judge Holdridge noted that he had suggested something similar in a concurring opinion – that perhaps the rendition of a default judgment should be allowed to be raised in a motion for new trial – but that the Committee had not considered this, although he agreed that it was an interesting concept. The Council member agreed to suggest some language on this point at the appropriate time. Another Council member then questioned whether the elimination of preliminary default would have any effect on city and other courts of limited jurisdiction, noting that Article 4903 was not presently included in the materials. The Council also discussed that the provision requiring seven days' notice if a party's attorney had contacted the plaintiff or the plaintiff's attorney in writing concerning the case had not been included in Article 4904, and questions were raised as to whether these provisions should be made consistent with Article 1702.

Having strayed from its general discussion of the concept of eliminating preliminary default in Louisiana, the Council agreed to return to the beginning of the materials to consider the proposed changes specifically, beginning with Articles 253.3, 284, and 928 on page 2. Judge Holdridge explained that these provisions contained only changes in terminology, and a motion was made and seconded to adopt the provisions as presented. This motion passed with no objection, and the adopted proposals read as follows:

Article 253.3. Duty judge exceptions; authority to hear certain matters

A. In any case assigned pursuant to Article 253.1, a duty judge shall only hear and sign orders or judgments for the following:

* * *

(3) ~~Entry of preliminary defaults, confirmation of defaults~~ Default judgments, stipulated matters, examination of judgment debtors, orders to proceed in forma pauperis, orders allowing the filing of supplemental and amending petitions when no trial date has been assigned, orders allowing incidental demands when no trial date has been assigned, orders allowing additional time to answer, and judicial commitments.

* * *

Article 284. Judicial powers of district court clerk

The clerk of a district court may render, confirm, and sign ~~final~~ default judgments or judgments by confession in cases where the jurisdiction of the court is concurrent with that of justices of the peace, as provided in Article 5011.

Article 928. Time of pleading exceptions

A. The declinatory exception and the dilatory exception shall be pleaded prior to or in the answer and, prior to or along with the filing of any pleading seeking relief other than entry or removal of the name of an attorney as counsel of record, extension of time within which to plead, security for costs, or dissolution of an attachment issued on the ground of the nonresidence of the defendant, and in any event, prior to the signing of a ~~final~~ default judgment. When both exceptions are pleaded, they shall be filed at the same time, and may be incorporated in the same pleading. When filed at the same time or in the same pleading, these exceptions need not be pleaded in the alternative or in a particular order.

* * *

Next, the Council considered Article 1001, on page 2 of the materials, concerning the delay for answering. Judge Holdridge explained that in light of the elimination of preliminary default, the fifteen-day delay for answering had been extended to twenty days, unless discovery requests are also filed with the petition, in which case the delay for answering would be thirty days for purposes of consistency. He further noted that this amendment would eliminate confusion with respect to self-represented litigants and would function similarly to Article 1458(B) for family law matters. One Council member then questioned whether the Committee had given any thought to making the general delay for answering twenty-one days versus twenty days to be consistent with the Federal Rules of Civil Procedure, noting additionally it had been found that delays in fractions of seven were generally preferable because the deadlines were not as likely to fall on weekends. Other Council members agreed with this sentiment, and a motion was made and seconded to change "twenty days" to "twenty-one" days in all applicable places. This motion passed with no objection.

Another Council member then offered to consult the Louisiana City Court Judges Association with respect to whether the ten-day delay in city court under existing Article 4903 should be changed to twenty-one days for purposes of consistency. He noted that in his view, the extension of this time period to thirty days when discovery requests are filed would impede the work of city courts tremendously but that this exception could simply be excluded from Article 4903. The Council agreed that the input of the city court judges should be sought before any changes are recommended, and another Council member then questioned whether the language on line 41 of page 2 should be made consistent with the language on line 39 of the same page. Specifically, she suggested replacing "an answer shall be filed by the defendant" with "the defendant shall file his answer," and another Council member then suggested adding "to the petition" for purposes of clarity. A motion was made and seconded to adopt Article 1001 and its Comment as amended, and the motion passed with no objection. The adopted proposal reads as follows:

Article 1001. Delay for answering

A. A defendant shall file his answer within ~~fifteen~~ twenty-one days after service of citation upon him, except as otherwise provided by law. If the plaintiff files and serves a discovery request with his petition, the defendant shall file his answer to the petition within thirty days after service of citation and service of the discovery request.

B. When an exception is filed prior to answer and is overruled or referred to the merits, or is sustained and an amendment of the petition ordered, the answer shall be filed within ~~ten~~ fifteen days after the exception is overruled or referred to the merits, or ~~ten~~ fifteen days after service of the amended petition.

C. The court may grant additional time for answering.

Comments – 2021

(a) The revision to Paragraph A of this Article extends the time within which the defendant must file an answer from fifteen to twenty-one days after service of citation. If the plaintiff files a discovery request with his petition, the delays for answering and for responding to the discovery request will be thirty days. See Articles 1458(A), 1462(B)(1), and 1467(A). This change is intended to eliminate confusion, particularly for self-represented litigants who are served with a discovery request along with the petition, since the delays for responding to both are now the same.

(b) The revision to Paragraph B of this Article extends the time within which the defendant must file an answer to fifteen days after an exception is overruled or referred to the merits, or fifteen days after service of an amended petition when an exception is sustained and an amendment is ordered.

Turning next to Articles 1002 and 1471, on page 3 of the materials, Judge Holdridge explained that the only change that had been made in these provisions was the deletion of "final" before "default judgment." A motion was made and seconded to adopt the provisions as presented, and the motion passed with no objection. The adopted proposals read as follows:

Article 1002. Answer or other pleading filed prior to signing of ~~final~~ default judgment

Notwithstanding the provisions of Article 1001, the defendant may file his answer or other pleading at any time prior to the signing of a ~~final~~ default judgment against him.

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

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

* * *

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

* * *

Next, Judge Holdridge explained that the Committee had recommended deleting Article 1701, but that the substance of Paragraph B had been included as Article 1702(G)(2). A motion was made and seconded to approve the deletion of Article 1701, and the motion passed with no objection. The Council then considered Article 1702 on page 4 of the materials, beginning with Paragraph A. Mr. Forrester noted that on lines 1 and 2 of page 5, the Committee had added a provision stating that no formal motion to obtain a default judgment shall be required. This led to a great deal of discussion with respect to how, as a practical matter, the request would be made, as well as whether this would cause conflicts with respect to local court rules, specifically in light of the ongoing pandemic during which many court employees are working remotely. One Council member suggested adding language creating an exception if local rules provide otherwise, and another Council member noted that in his view, this language is unnecessary. After additional discussion ensued with respect to whether this provision should be relegated to the Comments, a motion was made and seconded to delete the sentence from lines 1 and 2 of page 5 in its entirety, and the motion passed with no objection.

The Council then considered Article 1702(B) and (C) on page 5 of the materials. One Council member questioned whether the certified mail requirement also contemplates some sort of proof of receipt, and Judge Holdridge explained that the only proof that is required is that the notice was sent via certified mail, not that any sort of signature or confirmation of receipt was obtained. The Council member then questioned whether contact by an attorney who is anticipating that he will be representing the defendant in the case would be sufficient to trigger the notice requirement in Paragraph C, and Judge Holdridge responded that whether someone qualifies as a party's attorney is an issue that will need to be decided by the courts on a case-by-case basis. Another Council member then questioned why a party contacting the plaintiff or the plaintiff's attorney in writing would be insufficient, and the Council discussed the Committee's concern that permitting this would "open the floodgates" when, as a practical matter, these kinds of issues usually arise when one attorney grants an extension to another as a professional courtesy. One Council member then expressed concern with respect to the broad nature of the "concerning the action" language on line 10 of page 5, and another Council member suggested reworking this language to delete "After an action has been filed" on line 9 and to replace "concerning the action" on line 10 with "concerning an action after it has been filed." The Council agreed with this suggestion. Another Council member then reiterated that perhaps this language should be replicated in Article 4904 with respect to city courts.

After Judge Holdridge noted that only terminology and other technical changes had been made in Paragraphs D, E, and F, the Council considered Paragraph G on page 6. Specifically, Judge Holdridge explained that Subparagraph (1) had been amended to remove any concept of preliminary default, and Subparagraph (2) had been added as the substance of former Article 1701(B). One Council member then questioned whether the two-day delay for obtaining a divorce under Civil Code Article 103(1) when everything has been waived should be removed, the Council agreed to refer this issue to the Marriage-Persons Committee for review. A motion was then made and seconded to adopt Article 1702 and its Comment as amended, and the motion passed with no objection. The adopted proposal reads as follows:

Article 1702. ~~Confirmation of preliminary default~~ <u>Default judgment</u>

A. ~~A preliminary default must be confirmed by proof of the demand that is sufficient to establish a prima facie case and that is admitted on the record prior to the entry of a final default judgment. The court may permit documentary evidence to be filed in the record in any electronically stored format authorized by the local rules of the district court or approved by the clerk of the district court for receipt of evidence. If no answer or other pleading is filed timely, this confirmation may be made after two days, exclusive of holidays, from the entry of the preliminary default. When a preliminary default has been entered against a party that is in default after having made an appearance of record in the case, notice of the date of the entry of the preliminary default must be sent by certified mail by the party~~

~~obtaining the preliminary default to counsel of record for the party in default, or if there is no counsel of record, to the party in default, at least seven days, exclusive of holidays, before confirmation of the preliminary default.~~ If a defendant in the principal or incidental demand fails to answer or file other pleadings within the time prescribed by law or by the court, and the plaintiff establishes a prima facie case by competent and admissible evidence that is admitted on the record, a default judgment in favor of the plaintiff may be rendered. The court may permit documentary evidence to be filed in the record in any electronically stored format authorized by the local rules of the district court or approved by the clerk of the district court for receipt of evidence.

B. If a party has made an appearance of record in the case, notice that the plaintiff intends to obtain a default judgment shall be sent by certified mail to counsel of record for the party who failed to answer, or if there is no counsel of record, to the party who failed to answer, at least seven days, exclusive of holidays, before a default judgment may be rendered.

C. If an attorney for a party has contacted the plaintiff or the plaintiff's attorney in writing concerning an action after it has been filed, notice that the plaintiff intends to obtain a default judgment shall be sent by certified mail to the attorney for the party who failed to answer at least seven days, exclusive of holidays, before a default judgment may be rendered.

~~B.~~ D.(1) When a demand is based upon a conventional obligation, affidavits and exhibits annexed thereto which contain facts sufficient to establish a prima facie case shall be admissible, self-authenticating, and sufficient proof of such demand. The court may, under the circumstances of the case, require additional evidence in the form of oral testimony before entering a ~~final~~ default judgment.

(2) When a demand is based upon a delictual obligation, the testimony of the plaintiff with corroborating evidence, which may be by affidavits and exhibits annexed thereto which contain facts sufficient to establish a prima facie case, shall be admissible, self-authenticating, and sufficient proof of such demand. The court may, under the circumstances of the case, require additional evidence in the form of oral testimony before entering a ~~final~~ default judgment.

(3) When the sum due is on an open account or a promissory note or other negotiable instrument, an affidavit of the correctness thereof shall be prima facie proof. When the demand is based upon a promissory note or other negotiable instrument, no proof of any signature thereon shall be required.

~~C.~~ E. In those proceedings in which the sum due is on an open account or a promissory note, other negotiable instrument, or other conventional obligation, or a deficiency judgment derived therefrom, including those proceedings in which one or more mortgages, pledges, or other security for the open account, promissory note, negotiable instrument, conventional obligation, or deficiency judgment derived therefrom is sought to be enforced, maintained, or recognized, or in which the amount sought is that authorized by R.S. 9:2782 for a check dishonored for nonsufficient funds, a hearing in open court shall not be required unless the judge, in his discretion, directs that such a hearing be held. The plaintiff shall submit to the court the proof required by law and the original and not less than one copy of the proposed ~~final~~ default judgment. The judge shall, within seventy-two hours of receipt of such submission from the clerk of court, sign the proposed ~~final~~ default judgment or direct that a hearing be held. The clerk of court shall certify that no answer or other pleading has been filed by the

defendant. The minute clerk shall make an entry showing the dates of receipt of proof, review of the record, and rendition of the ~~final~~ default judgment. A certified copy of the signed ~~final~~ default judgment shall be sent to the plaintiff by the clerk of court, and notice of the signing of the ~~final~~ default judgment shall be given as provided in Article 1913.

~~D.~~ F. When the demand is based upon a claim for a personal injury, a sworn narrative report of the treating physician or dentist may be offered in lieu of his testimony.

~~E.~~ G. (1) Notwithstanding any other provisions of law to the contrary, when the demand is for divorce under Civil Code Article 103(1) or (5), whether or not the demand contains a claim for relief incidental or ancillary thereto, a hearing in open court shall not be required unless the judge, in his discretion, directs that a hearing be held. The plaintiff shall submit to the court an affidavit specifically attesting to and testifying as to the truth of all of the factual allegations contained in the petition, the original and not less than one copy of the proposed ~~final~~ default judgment, ~~and~~ a certification ~~which shall indicate~~ indicating the type of service made on the defendant~~,~~ and the date of service, ~~the date a preliminary default was entered,~~ and a certification by the clerk that the record was examined by the clerk, including the date of the examination, and a statement that no answer or other pleading has been filed. If the demand is for divorce under Civil Code Article 103(5), a certified copy of the protective order or injunction rendered after a contradictory hearing or consent decree shall also be submitted to the court. If no answer or other pleading has been filed by the defendant, the judge shall~~, after two days, exclusive of holidays, of entry of a preliminary default,~~ review the submitted affidavit, proposed ~~final~~ default judgment, and certification~~,~~ and render and sign the proposed ~~final~~ default judgment~~,~~ or direct that a hearing be held. The minutes shall reflect rendition and signing of the ~~final~~ default judgment.

(2) If the demand is for divorce under Civil Code Article 103(1) and the defendant, by sworn affidavit, acknowledges receipt of a certified copy of the petition and waives formal citation, service of process, all legal delays, notice of trial, and appearance at trial, a default judgment of divorce may be entered against the defendant two days, exclusive of legal holidays, after the affidavit is filed. The affidavit of the defendant may be prepared or notarized by any notary public.

Comments – 2021

(a) Paragraph C of this Article adopts a new rule that, prior to the rendition of a default judgment, notice must be sent to a party's attorney who has contacted the plaintiff or his attorney in writing about the case. The term "in writing" includes electronic means as well as any other type of writing. If such notice is not given, any default judgment rendered shall be a nullity similar to a lack of the notice required by Paragraph B. See, e.g., First Bank & Trust v. Bayou Land and Marine Contractors, Inc., 103 So. 3d 1148 (La. App. 5 Cir. 2012).

(b) Paragraph G of this Article continues the authorization under former Articles 1701 and 1702(E) for a judgment of divorce under Civil Code Article 103(1) to be granted without a hearing in open court two days, exclusive of holidays, after the filing of the defendant's affidavit waiving all legal delays, and for a judgment of divorce under Civil Code Article 103(5) to be rendered without a hearing in open court after the delays for answering have expired.

The Council then turned to Article 1702.1, on page 6 of the materials, to consider the two alternatives being proposed with respect to Paragraph A. More specifically, the alternative proposed by Committee and Council member Tom Hayes would require the plaintiff to file a written request for a default judgment, whereas the other alternative would not provide any sort of guidance with respect to what must be submitted to the court in order to obtain a default judgment. The Council discussed the differences between a written request and a formal motion, and one Council member noted that in light of the ongoing pandemic, requests for default judgments are being sent electronically using the itemized form, which is important for the clerk to be able to determine what the party is seeking to do. After discussion concerning whether "an itemized form with" should be restored in the first alternative on line 1 of page 7, a motion was ultimately made and seconded to adopt the alternative proposed by Tom Hayes. The Council agreed to delete "final" between "proposed" and "default" on line 20, and the motion passed with no objection. Turning to Paragraph B, one Council member questioned whether the clerk should be required to certify that no one had made an appearance, but several Council members expressed concern with respect to requiring clerks of court to determine what constitutes an "appearance" in the case. A motion was then made and seconded to adopt Paragraph B as presented. The motion passed with no objection, and the adopted proposal reads as follows:

Article 1702.1. ~~Confirmation of preliminary default~~ Default judgment without hearing in open court; required information; certifications

A. When the plaintiff seeks ~~to confirm~~ a ~~preliminary~~ default judgment without appearing for a hearing in open court as provided in Article 1702~~(B)(1) and (C)~~(D)(1) and (E), ~~along with any proof required by law, he or his attorney shall include in an itemized form with a written motion for confirmation of preliminary default and proposed final~~ the plaintiff shall file a written request for default judgment containing a certification that the suit is on an open account, promissory note, or other negotiable instrument, on a conventional obligation, or on a check dishonored for nonsufficient funds, and that the necessary invoices and affidavit, note and affidavit, or check or certified reproduction thereof are attached, along with any proof required by law and a proposed default judgment. If attorney fees are sought under R.S. 9:2781 or 2782, the attorney shall certify that fact and the fact that the number of days required by R.S. 9:2781(A) or 2782(A), respectively, have elapsed since demand was made upon the defendant.

B. The certification shall indicate the type of service made on the defendant~~,~~ and the date of service~~, and the date a preliminary default was entered,~~ and shall also include a certification by the clerk that the record was examined by the clerk, including therein the date of the examination and a statement that no answer or other pleading has been filed within the time prescribed by law or by the court.

The Council then turned to Article 1703, on page 7 of the materials, and a motion was made and seconded to approve the terminology change. The motion passed with no objection, and the adopted proposal reads as follows:

Article 1703. Scope of judgment

A ~~final~~ default judgment shall not be different in kind from that demanded in the petition. The amount of damages awarded shall be the amount proven to be properly due as a remedy.

Next, the Council considered Article 1704, on page 7 of the materials, and agreed to change "twenty days" to "twenty-one days" for purposes of consistency with Article 1001. A motion was made and seconded to adopt Article 1704 and its Comment as amended, and the motion passed with no objection. The adopted proposal reads as follows:

Article 1704. ~~Confirmation of preliminary default~~ Default judgment in suits against the state or a political subdivision

A. Notwithstanding any other provision of law to the contrary, prior to ~~confirmation of a preliminary~~ the court rendering a default judgment against the state or any of its departments, offices, boards, commissions, agencies, or instrumentalities, ~~a certified copy of the minute entry constituting the preliminary default entered pursuant to Article 1701,~~ the plaintiff or his attorney shall send notice of the plaintiff's intent to obtain a default judgment, together with a certified copy of the petition or other demand, ~~shall be sent by the plaintiff or his counsel~~ to the attorney general by registered or certified mail, or the notice and petition shall be served by the sheriff personally upon the attorney general or the first assistant attorney general at the office of the attorney general. If ~~the minute entry and~~ the notice and petition are served on the attorney general by mail, the person mailing such items shall execute and file in the record an affidavit stating that these items have been enclosed in an envelope properly addressed to the attorney general with sufficient postage affixed, and stating the date on which such envelope was deposited in the United States mail. ~~In addition the~~ The return receipt shall be attached to the affidavit which was filed in the record.

B. If no answer or other pleading is filed during the ~~fifteen~~ twenty-one days immediately following the date on which the attorney general or the first assistant attorney general received notice of the ~~preliminary~~ intent to obtain a default judgment as provided in Paragraph A of this Article, a ~~preliminary default entered~~ default judgment against the state or any of its departments, offices, boards, commissions, agencies, or instrumentalities may be confirmed by proof as required by Article 1702.

C. Notwithstanding any other provision of law to the contrary, prior to ~~confirmation of a preliminary~~ the court rendering a default judgment against a political subdivision of the state or any of its departments, offices, boards, commissions, agencies, or instrumentalities, ~~a certified copy of the minute entry constituting the preliminary default entered pursuant to Article 1701,~~ the plaintiff or his attorney shall send notice of the plaintiff's intent to obtain a default judgment, together with a certified copy of the petition or other demand, ~~shall be sent by the plaintiff or his counsel~~ by registered or certified mail to the proper agent or person for service of process at the office of that agent or person. The person mailing such items shall execute and file in the record an affidavit stating that these items have been enclosed in an envelope properly addressed to the proper agent or person for service of process, with sufficient postage affixed, and stating the date on which such envelope was deposited in the United States mail. ~~In addition the~~ The return receipt shall be attached to the affidavit which was filed in the record.

D. If no answer or other pleading is filed during the ~~fifteen~~ twenty-one days immediately following the date on which the agent or person for service of process received notice of the ~~preliminary~~ intent to obtain a default judgment as provided in Paragraph C of this Article, a ~~preliminary default entered~~ default judgment against the political subdivision of the state or any of its departments, offices, boards, commissions, agencies, or instrumentalities may be confirmed by proof as required by Article 1702.

Comments – 2021

Article 1704 continues the requirement that, prior to a default judgment being rendered against the state of Louisiana or any of its departments, offices, boards, commissions, agencies, or instrumentalities, the office of the attorney general must receive notice of the plaintiff's intent to obtain the default judgment along with a certified copy of the petition or other demand. The same notice requirement applies to any political subdivision of the state.

Judge Holdridge then asked the Council to consider Articles 1843, 1913, and 2002, all of which consisted of terminology changes. One Council member questioned whether "a final judgment" should be added between "is" and "that" in Article 1843 on line 44 of page 8, and a great deal of discussion ensued with respect to whether all default judgments are final judgments. After discussing whether several examples would be considered final judgments under Article 1915, such as a default judgment on a reconventional demand against the plaintiff but not on the main demand, the Council concluded that it is not true that a default judgment is necessarily a final judgment. A motion was then made and seconded to adopt all of these provisions as presented, and the motion passed with no objection. The adopted proposal reads as follows:

Article 1843. ~~Final default~~ Default judgment

A ~~final~~ default judgment is that which is rendered against a defendant who fails to plead within the time prescribed by law.

Article 1913. Notice of judgment

* * *

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

C. Except when service is required under Paragraph B of this Article, notice of the signing of a ~~final~~ default judgment shall be mailed by the clerk of court to the defendant at the address where personal service was obtained or to the last known address of the defendant.

* * *

Article 2002. Annulment for vices of form; time for action

A. A final judgment shall be annulled if it is rendered:

* * *

(2) Against a defendant who has not been served with process as required by law and who has not waived objection to jurisdiction, or against whom a valid ~~final~~ default judgment has not been taken.

* * *

Next, the Council turned to Article 4904, on page 9 of the materials, concerning default judgments in parish and city courts. Members of the Council again discussed whether this provision should be made consistent with Article 1702, including, at the very least, replicating Paragraphs B and C of that provision. The Council also discussed whether the time period for answering in parish and city courts should be extended from ten days to twenty-one days and agreed to seek feedback from city and parish court judges as to both of these issues. As a result, a motion was made and seconded to recommit Article 4904 so that the Code of Civil Procedure Committee could incorporate any feedback it received, and the motion passed with no objection.

Motions were then made and seconded to approve the proposed changes to Articles 4921, 4921.1, and 5095 and R.S. 13:3205 and 4990 as presented, and these motions passed with no objection. The adopted proposals read as follows:

Article 4921. ~~Final default~~ Default judgment; justice of the peace courts; district courts with concurrent jurisdiction

A. If the defendant fails to answer timely, or if he fails to appear at the trial, and the plaintiff ~~proves his~~ establishes a prima facie case by competent and admissible evidence, a ~~final~~ default judgment in favor of the plaintiff may be rendered. ~~No preliminary default is necessary.~~

B. ~~The plaintiff may obtain a final default judgment only by producing relevant and competent evidence which establishes a prima facie case.~~ When the suit is for a sum due on an open account, promissory note, negotiable instrument, or other conventional obligation, prima facie proof may be submitted by affidavit. When the demand is based upon a promissory note or other negotiable instrument, no proof of any signature thereon shall be required.

Comments – 2021

The change to Paragraph A of this Article makes the burden of proof to obtain a default judgment in justice of the peace courts and district courts with concurrent jurisdiction consistent with the burden of proof that is imposed in district court pursuant to Article 1702.

Article 4921.1. Demand for trial; abandonment; applicability

* * *

C.(1) Notwithstanding the provisions of Paragraph A of this Article, the justice of the peace or clerk may set the matter for trial upon filing of a petition. The date, time, and location of the trial shall be contained in the citation. The first scheduled trial date shall be not more than forty-five days, nor less than ten days, from the service of the citation. If the defendant appears, he need not file an answer unless ordered to do so by the court. If a defendant who has been served with citation fails to appear at the time and place specified in the citation, the judge may enter a ~~final~~ default judgment for the plaintiff in the amount proved to be due. If the plaintiff does not appear, the judge may enter an order dismissing the action without prejudice.

(2) If a matter has been set for trial pursuant to Subparagraph (1) of this Paragraph, no ~~final~~ default judgment shall be rendered prior to the trial date.

Article 5095. Same; defense of action

The attorney at law appointed by the court to represent a defendant shall use reasonable diligence to inquire of the defendant, and to determine from other available sources, what defense, if any, the defendant may have, and what evidence is available in support thereof.

Except in an executory proceeding, the attorney may except to the petition, shall file an answer or other pleading in time to prevent a ~~final~~ default judgment from being rendered, may plead therein any affirmative defense available, may prosecute an appeal from an adverse judgment, and generally has the same duty, responsibility, and authority in defending the action or proceeding as if he had been retained as counsel for the defendant.

R.S. 13:3205. Default judgment; hearings; proof of service of process

No ~~preliminary default or final~~ default judgment may be rendered against the defendant and no hearing may be held on a contradictory motion, rule to show cause, or other summary proceeding, except for actions pursuant to R.S. 46:2131 et seq., until thirty days after the filing in the record of the affidavit of the individual who has done any of the following:

* * *

R.S. 13:4990. Diligence in locating co-owners; known co-owners made parties

In any judicial proceeding in which real property is sought to be partitioned upon the trial of the cause upon the merits or upon ~~confirmation of any preliminary~~ rendering a default judgment therein, due proof shall be made of a diligent effort on the part of the plaintiff to locate all co-owners of the property to be partitioned and that all known co-owners have been made parties thereto.

Next, the Council considered the proposed deletion of R.S. 23:1316 and the proposed revisions to R.S. 23:1316.1, on page 12 of the materials, concerning default judgments in worker's compensation cases. Judge Holdridge noted that similar changes had been made with respect to the seven-day notice required when a party has made an appearance of record or when a party's attorney has contacted the plaintiff or the plaintiff's attorney in writing concerning the case. He also noted that he had received approval of the proposed revisions from representatives of the Louisiana Worker's Compensation Corporation. After the Council agreed to make the corresponding change in Paragraph C with respect to deleting the introductory language and replacing "the action" with "an action after it has been filed" on line 36, a motion was made and seconded to adopt the deletion of R.S. 23:1316 and the revision of R.S. 23:1316.1 as amended. The motion passed with no objection, and the adopted proposals read as follows:

~~**R.S. 23:1316. Answer or other pleading, failure to file; preliminary default**~~

~~If a defendant in the principal or incidental demand fails to answer or file other pleadings within the time prescribed by law or the time extended by the workers' compensation judge, and upon proof of proper service having been made, preliminary default may be entered against him. The preliminary default shall be obtained by written motion.~~

R.S. 23:1316.1. ~~Confirmation of preliminary default~~ Default judgment

A.(1) ~~A preliminary default on behalf of any party at interest must be confirmed by proof of the demand sufficient to establish a prima facie case. If no answer or other pleading is filed timely, this confirmation may be made after two days, exclusive of holidays, from the entry of the preliminary default.~~ If a defendant in the principal or incidental demand fails to answer or file other pleadings within the time prescribed by law or the time extended by the workers' compensation judge, and the plaintiff establishes a prima facie case by competent and admissible evidence and proof of proper service is made, a default judgment may be rendered against the defendant.

(2) If a party has made an appearance of record in the case, notice that the plaintiff intends to obtain a default judgment shall be sent by certified mail to counsel of record for the party who failed to answer, or if there is no counsel of record, to the party who failed to answer, at least seven days, exclusive of holidays, before a default judgment may be rendered.

(3) If an attorney for the party has contacted the plaintiff or the plaintiff's attorney in writing concerning an action after it has been filed, notice that the plaintiff intends to obtain a default judgment shall be sent by certified mail to the attorney for the party who failed to answer at least seven days, exclusive of holidays, before a default judgment may be rendered.

* * *

Finally, a motion was made and seconded to adopt the proposed effective date of January 1, 2022, and the motion passed with no objection. The Council then considered the earlier suggestion that perhaps the rendition of a default judgment should be allowed to be raised in a motion for new trial. The Council member who suggested this proposed including some variation of the following language in Article 1972: "A new trial may also be granted in any case in which a default judgment was rendered." As an alternative, he noted that "when a default judgment was rendered" could also be added as Subparagraph (4) in Article 1972. He then agreed to send these alternatives to the staff attorney for presentation to the Code of Civil Procedure Committee.

At this time, Judge Holdridge concluded his presentation, and a few administrative announcements were made concerning CLE credits and plans to hold an additional Council meeting in February. The February 5, 2021 Council meeting was then adjourned.

Jessica Braun

Mallory C. Waller