LOUISIANA STATE LAW INSTITUTE

MEETING OF THE COUNCIL

November 17, 2023

Friday, November 17, 2023

Persons Present:

Baker, Pamela J.
Braun, Jessica G.
Breard, L. Kent
Carroll, Andrea B.
Castle, Marilyn
Crochet, Vickie
Cromwell, L. David
Daly, Margaret M.
Davrados, Nick
DeGrange, Lucinda Lang
Doguet, Andre'
Drury, Trey
Edwards, Claire
Forrester, William R., Jr.
Green, Chelsee
Hall, Senae D.
Hawthorne, George "Trippe"
Hayes, Thomas M., III
Hogan, Lila Tritico
Holdridge, Guy
Janke, Benjamin West
Jones, Allison
Knighten, Arlene D.
Lovett, John A.
Manning, C. Wendell
Miller, Gregory A.
Peyton, Scott
Philips, Harry "Skip", Jr.
Price, Donald W.
Riviere, Christopher H.
Saloom, Douglas J.
Sole, Emmett C.
Surprenant, Monica T.
Talley, Susan G.
Thibeaux, Robert P.
Title, Peter S.
Tucker, Zelda W.
Ventulan, Josef
Viator, James E.
Waller, Mallory C.
Weems, Charles S., III
Woodruff-White, Lisa
Ziober, John David

President Thomas M. Hayes, III called the November Council meeting to order at 10:00 a.m. on Friday, November 17, 2023 at the Louisiana Supreme Court in New Orleans. After asking Council members to briefly introduce themselves, the President called on Professor Lloyd "Trey" Drury, III, Reporter of the Corporations Committee, to begin his presentation of materials.

Corporations Committee

Professor Drury began his presentation by reminding the Council that the Corporations Committee is presently revising Louisiana's LLC law, using ULLCA as its starting point but drawing from the LBCA, existing provisions in Louisiana, the ABA Prototype Act, and Delaware law. He then explained that today's presentation would be focused on what it means to be a member of an LLC, but first, the Committee proposes to make a technical change to R.S. 12:22-105(F) as previously approved by the Council. Turning to page 3 of the materials, the Reporter explained that the addition of "contrary to the limitation or prohibition" on line 14 is intended to provide clarification when a written operating agreement limits – but does not outright prohibit – oral or tacit amendments. A motion was made and seconded to adopt the proposed change as presented, and the motion passed with no objection. The adopted proposal reads as follows:

> **R.S. 12:22-105. Operating agreement; scope, function, and limitations~~; exclusive operating agreement~~**
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> * * *
>
> F. Members of a limited liability company may enter into a written operating agreement that expressly limits or prohibits oral or tacit amendments. In that case, no evidence may be admitted in a proceeding to

establish that the written operating agreement was modified by a subsequent oral or tacit amendment contrary to the limitation or prohibition.

The Reporter then explained that the Council previously approved Sections 401 through 403 and therefore directed members' attention to R.S. 12:22-404, on page 21 of the materials. Professor Drury noted that this provision sets forth the default rule that the profits, losses, and distributions of a company will be allocated in accordance with the members' interests in the LLC, or equally if an allocation is not made in an operating agreement. He explained that existing Louisiana law is similar but requires a divergence from the default rule to be included in a written operating agreement, and a motion was made and seconded to adopt the proposal as presented. The Council discussed the interaction between this provision and the provisions on liquidation in Part VII, which are not inconsistent with the rules provided here, as well as the ability of the company to create different classes of membership. Members of the Council also questioned whether it is necessary to qualify that these rules apply only if no provision of an operating agreement provides otherwise, and the Reporter reminded the Council that R.S. 12:22-105 will contain provisions concerning the matters that cannot be varied in an operating agreement, but otherwise, all of these default rules can be changed. After additional discussion concerning the ability of a company to provide for membership interest percentages that change over time, as well as the meaning of "right to demand or receive" and of the requirement that each part of the asset be fungible in Subsection C, a vote was taken on the motion to adopt R.S. 12:22-404, which passed without objection. The adopted proposal reads as follows:

R.S. 12:22-404. Sharing of profits, losses, and distributions; right to distributions before dissolution

~~(a)~~ A. ~~Any distribution made by a limited liability company before its dissolution and winding up must be in equal shares among members and persons dissociated as members, except to the extent necessary to comply with a transfer effective under Section 502 or charging order in effect under Section 503.~~ The profits, losses, and distributions of a limited liability company shall be allocated among the members in proportion to their membership interests. If the membership interests are not allocated in an operating agreement, the interests shall be allocated equally.

~~(b)~~ B. A person has a right to a distribution before the dissolution and winding up of a limited liability company only if the company decides to make an interim distribution. A person's dissociation does not entitle the person to a distribution.

~~(c)~~ C. A person does not have a right to demand or receive a distribution from a limited liability company in any form other than money. Except as otherwise provided in ~~Section 707(d)~~ R.S. 12:22-707(D), a company may distribute an asset in kind only if each part of the asset is fungible with each other part and each person receives a percentage of the asset equal in value to the person's share of distributions.

~~(d)~~ D. If a member or transferee becomes entitled to receive a distribution, the member or transferee has the status of, and is entitled to all remedies available to, a creditor of the limited liability company with respect to the distribution. However, the company's obligation to make a distribution is subject to offset for any amount owed to the company by the member or a person dissociated as a member on whose account the distribution is made.

Next, the Council considered R.S. 12:22-405, on page 26 of the materials, and Professor Drury noted that this provision is modeled after R.S. 12:1-640 of the LBCA. The Council discussed whether this provision is included in Section 105 as something that cannot be varied in an operating agreement and, with respect to Subsection C, issues concerning the timing of the measurement of the company's solvency and the effect of distributions, particularly whether Paragraph (C)(2) applies to situations in which the

company holds the debts of a third party. One Council member then questioned whether this Section and its provisions on distributions and dissolution have implications with respect to bankruptcy, and the Reporter agreed to review this in conjunction with Part VII of the revision. The motion to adopt R.S. 12:22-405 as presented then passed without objection, and the adopted proposal reads as follows:

R.S. 12:22-405. Limitation on distributions

~~(a)~~ A. A limited liability company may not make a distribution, including a distribution under ~~Section~~ R.S. 12:22-707, if after the distribution either of the following conditions would exist:

(1) ~~the~~ The company would not be able to pay its debts as they become due in the ~~ordinary~~ usual course of ~~the company's activities and affairs; or~~ business.

(2) ~~the~~ The company's total assets would be less than the sum of its total liabilities plus, unless the articles of organization or a written provision of the operating agreement permit otherwise, the amount that would be needed, if the company were to be dissolved and wound up at the time of the distribution, to satisfy the preferential rights upon dissolution and winding up of members and transferees whose preferential rights are superior to the rights of persons receiving the distribution.

~~(b)~~ B. A limited liability company may base a determination that a distribution is not prohibited under ~~subsection (a) on:~~ Subsection A of this Section either on ~~(1)~~ financial statements prepared on the basis of accounting practices and principles that are reasonable in the circumstances~~;~~ or ~~(2)~~ a fair valuation or other method that is reasonable ~~under~~ in the circumstances.

~~(c)~~ C. Except as otherwise provided in ~~subsection (e)~~ Subsection E of this Section, the effect of a distribution under ~~subsection (a)~~ Subsection A of this Section is measured at the applicable one of the following dates:

(1) ~~in~~ In the case of a distribution as defined in ~~Section 102(4)(A)~~ R.S. 12:22-102(4)(a), as of the earlier of the following dates:

~~(A)~~ (a) ~~the~~ The date money or other property is transferred or debt is incurred by the limited liability company~~; or~~.

~~(B)~~ (b) ~~the~~ The date the person entitled to the distribution ceases to own the interest or right being acquired by the company in return for the distribution~~;~~.

(2) ~~in~~ In the case of any other distribution of indebtedness, as of the date the indebtedness is distributed~~; and~~.

(3) ~~in~~ In all other cases, as of the date~~: (A)~~ the distribution is authorized, if the payment occurs not later than ~~120~~ one hundred twenty days after that date~~;~~, or ~~(B)~~ the date payment is made, if the payment occurs more than ~~120~~ one hundred twenty days after the distribution is authorized.

~~(d)~~ D. A limited liability company's indebtedness to a member or transferee incurred by reason of a distribution made in accordance with this ~~section~~ Section is at parity with the company's indebtedness to its general, unsecured creditors, except to the extent subordinated by agreement.

~~(e)~~ E. A limited liability company's indebtedness, including indebtedness issued as a distribution, is not a liability for purposes of ~~subsection (a)~~ Subsection A of this Section if the terms of the indebtedness provide that payment of principal and interest is made only if and to the extent that payment of a distribution could then be made under this ~~section~~

Section. If the indebtedness is issued as a distribution, each payment of principal or interest is treated as a distribution, the effect of which is measured on the date the payment is made.

~~(f)~~ F. In measuring the effect of a distribution under ~~Section~~ R.S. 12:22-707, the liabilities of a dissolved limited liability company do not include any claim that has been disposed of under ~~Section~~ R.S. 12:22-704, 705, or 706.

Turning to R.S. 12:22-406, motions were quickly made and seconded to approve Subsections A and B as presented, and these motions passed without objection. With respect to Subsection C, one Council member questioned whether the meaning of "knowing" on line 17 was defined, suggesting that perhaps a Comment would be helpful here since the ULLCA Comment on page 36 provides that actual knowledge is necessary to impose liability. The Reporter agreed to consider the inclusion of a Louisiana Comment to this effect, and Subsection C was approved as presented. Professor Drury then explained that he would not be seeking approval of Subsections D and E at this time because the Committee had requested a review of the terminology concerning "impleading" as opposed to "joining as solidary obligors" and the enforcement of a "right of contribution" in situations where a member was unjustly enriched by too large of a distribution. The Reporter noted that these issues would be discussed at the Committee's December meeting, and Subsections A, B, and C of R.S. 12:22-406 as approved by the Council read as follows:

R.S. 12:22-406. Liability for improper distributions

~~(a)~~ A. Except as otherwise provided in ~~subsection (b)~~ Subsection B of this Section, if a member of a member-managed limited liability company or manager of a manager-managed limited liability company consents to a distribution made in violation of ~~Section~~ R.S. 12:22-405 and in consenting to the distribution fails to comply with ~~Section~~ R.S. 12:22-409, the member or manager is personally liable to the company for the amount of the distribution which exceeds the amount that could have been distributed without the violation of ~~Section~~ R.S. 12:22-405.

~~(b)~~ B. To the extent the operating agreement of a member-managed limited liability company expressly relieves a member of the authority and responsibility to consent to distributions and imposes that authority and responsibility on one or more other members, the liability stated in ~~subsection (a)~~ Subsection A of this Section applies to the other members and not the member that the operating agreement relieves of the authority and responsibility.

~~(c)~~ C. A person that receives a distribution knowing that the distribution violated ~~Section~~ R.S. 12:22-405 is personally liable to the limited liability company but only to the extent that the distribution received by the person exceeded the amount that could have been properly paid under ~~Section~~ R.S. 12:22-405.

* * *

The Council then considered R.S. 12:22-407, on page 41 of the materials. Professor Drury explained that existing Louisiana law requires the designation of an LLC as manager-managed to be made in the articles of organization, whereas the revision would allow this to be designated in a written provision of an operating agreement as well. A motion was made and seconded to approve Subsection A as presented, and the motion passed without objection. Turning to Subsection B, the Reporter explained that these rules apply with respect to member-managed LLCs, and one Council member questioned whether the affirmative vote of *"all* of the members" on line 33 is intended to include even nonvoting members, or whether this language should be changed to reflect that all of the voting power is required even if there are additional members who do not have the right

to vote. The Council engaged in a great deal of discussion as to the policy question of whether nonvoting members should nevertheless have the right to vote with respect to certain threshold issues, such as amending the operating agreement or articles of organization or admitting a new member, before ultimately agreeing that Paragraph (B)(4) should be recommitted for the Committee to determine whether nonvoting members should have the right to vote on some things or whether line 33 should be changed to some variation of "all of the voting power." One Council member questioned whether some guiding commentary or interpretation of this provision under ULLCA might exist, and the Reporter agreed to research this issue. Another Council member suggested changing "activities and affairs of the company" to "company's business" on line 30 of page 41 to match the "ordinary course of business" language used in Paragraph (B)(2), and after Professor Drury accepted this change, the Council questioned why Paragraph (B)(3) is necessary in light of Paragraph (B)(6), the catchall that provides for the same voting requirement – a majority in voting power of the members. In light of this discussion, the Council approved Paragraphs (B)(1), (2), (5), and (6) but recommitted Paragraphs (B)(3) and (4) for additional consideration by the Committee.

Turning to R.S. 12:22-407(C), the Reporter explained that this provision sets forth the rules that apply with respect to manager-managed LLC but also requires a vote of the members in certain situations. The Council agreed to make the language on line 17 of page 42 consistent with Subsection B, as well as to delete "limited liability" before "company" in four places since the complete phrase is used in the introductory language on line 5. One Council member questioned the deletion of Paragraph (3) on line 34 of page 42, and after the Reporter explained that merger is covered by the reference to Part 10 on lines 10 and 11 of page 43, the member suggested that some sort of cross-reference or Comment be added providing that Part 10 governs mergers. The Council then agreed that Paragraphs (C)(3) and (5) should be recommitted for purposes of consistency with the Committee's decisions concerning Paragraphs (B)(3) and (4). With respect to Paragraph (C)(7), one Council member suggested deleting "of the managers" since the previous provisions refer to votes of both the members and the managers, and the Reporter accepted this change. In Paragraph (C)(8), the Council agreed that "voting interest" should be changed to "voting power" in two places, and in Paragraph (C)(9), Professor Drury explained that the Committee removed the default rule that the dissociation of a member who is also a manager removes that person as a manager, contemplating family situations in which a parent might transfer his interest to a trust for the benefit of his children but wish to continue in a managerial role. The Council debated whether an affirmative statement should be included providing that a person who is no longer a member may nevertheless continue to serve as a manager but ultimately agreed that this was not necessary. A motion was then made and seconded to adopt Paragraphs (C)(1), (2), (4), and (6) through (10) as amended and to recommit Paragraphs (C)(3) and (5) for further consideration, and the motion passed without objection.

Finally, the Council considered Subsections D through G of R.S. 12:22-407, on pages 43 and 44 of the materials. One Committee and Council member questioned why Subsection G and R.S. 12:22-404(A) on page 21 refer only to the operating agreement and not also to the articles of organization. The Reporter pointed to the note on lines 21 through 24 of page 44 concerning a future Comment intended to clarify that in most cases, the articles of organization are considered as part of the operating agreement unless there is a conflict between the two but agreed to review this issue. A motion was then made and seconded to adopt Subsections D through G as presented, and the motion passed with no objection. R.S. 12:22-407 as adopted by the Council reads as follows:

R.S. 12:22-407. Management of limited liability company

~~(a)~~ A. A limited liability company is a member-managed ~~limited liability company~~ unless the articles of organization or a written provision of the operating agreement~~:~~ states that the company is "manager-managed" or uses words or phrases of similar import to vest management of the company in managers.

~~(1) expressly provides that:~~

~~(A) the company is or will be "manager-managed";~~

~~(B) the company is or will be "managed by managers"; or~~

~~(C) management of the company is or will be "vested in managers";~~ ~~or~~

~~(2) includes words of similar import.~~

~~(b)~~ B. In a member-managed limited liability company, the following rules apply:

(1) Except as expressly provided in this ~~[act]~~ Chapter, the management and conduct of the company are vested in the members.

(2) Each member ~~has equal rights in the management and conduct of the company's activities and affairs~~ is a mandatary of the company for all matters in the ordinary course of its business other than the alienation, lease, or encumbrance of its immovables.

* * *

(5) A transaction governed by Part 10 of this Chapter shall require the approval of members as provided in that Part.

(6) All decisions of the members not governed by another Paragraph of this Subsection shall be made by a majority in voting power of the members.

~~(c)~~ C. In a manager-managed limited liability company, the following rules apply:

(1) Except as expressly provided in this ~~[act]~~ Chapter, ~~any matter relating to the activities and affairs of the company is decided exclusively by the manager, or, if there is more than one manager, by a majority of the managers~~ the management and conduct of the company are vested in the managers.

(2) Each manager ~~has equal rights in the management and conduct of the company's activities and affairs~~ is a mandatary of the company for all matters in the ordinary course of its business other than the alienation, lease, or encumbrance of its immovables.

* * *

(4) The affirmative vote or consent of ~~all~~ a majority in voting power of the members is required to take any of the following actions:

~~(A) undertake an act outside the ordinary course of the company's activities and affairs; or~~

~~(B) amend the operating agreement.~~

~~(1)~~ (a) The dissolution and winding up of the ~~limited liability~~ company.

~~(2)~~ (b) The sale, exchange, lease, mortgage, pledge, or other transfer of all or substantially all of the assets of the ~~limited liability~~ company.

~~(3) The merger or consolidation of the limited liability company.~~

~~(4)~~ (c) The incurrence of indebtedness by the ~~limited liability~~ company other than in the ordinary course of its business.

~~(5)~~ (d) The alienation, lease, or encumbrance of any immovables of the ~~limited liability~~ company.

~~(6) An~~ (e) The amendment ~~to~~ of the articles of organization or ~~an~~ the operating agreement for the sole purpose of appointing or removing a manager.

* * *

(6) A transaction governed by Part 10 of this Chapter shall require the approval of members as provided in that Part.

(7) All decisions not governed by another Paragraph of this Subsection shall be made by a majority of the managers.

~~(4)~~ (8) A manager may be chosen at any time by the affirmative vote or consent of a majority in voting power of the members and remains a manager until a successor has been chosen, unless the manager at an earlier time resigns, is removed, or dies, or, in the case of a manager that is not an individual, terminates. A manager may be removed at any time by the affirmative vote or consent of a majority in voting power of the members without notice or cause.

~~(5)~~ (9) A person need not be a member to be a manager~~[, but the dissociation of a member that is also a manager removes the person as a manager]~~. If a person that is both a manager and a member ceases to be a manager, that cessation does not by itself dissociate the person as a member.

~~(6)~~ (10) A person's ceasing to be a manager does not discharge any debt, obligation, or other liability to the ~~limited liability~~ company or members ~~which~~ that the person incurred while a manager.

~~(d)~~ D.(1) An action requiring the vote or consent of members or managers under this ~~[act]~~ Chapter may be taken without a meeting~~, and a~~.

(2) A member may appoint a proxy or other agent to vote, consent, or otherwise act for the member by signing an appointing ~~record~~ document, personally or by the member's agent.

~~(e)~~ E. The dissolution of a limited liability company does not affect the applicability of this ~~section~~ Section. ~~However, a person that wrongfully causes dissolution of the company loses the right to participate in management, as a member and a manager.~~

~~(f) A limited liability company shall reimburse a member for an advance to the company beyond the amount of capital the member agreed to contribute.~~

~~(g) A payment or advance made by a member which gives rise to a limited liability company obligation under subsection (f) or Section 408(a) constitutes a loan to the company which accrues interest from the date of the payment or advance.~~

~~(h)~~ F. A member is not entitled to remuneration for services performed for a member- managed limited liability company, except for reasonable compensation for services rendered in winding up the activities of the company.

G. The voting power of the members of a limited liability company shall be allocated in proportion to their membership interests. If the membership interests are not allocated in an operating agreement, the voting power shall be allocated equally.

At this time, Professor Drury concluded his presentation, and the Council adjourned for lunch.

Employment Law Committee

After breaking for lunch, the President called on Ms. Allison Jones and Ms. Vicki Crochet, Co-Chairs of the Employment Law Committee, to begin their presentation of materials. The Co-Chairs first provided the Council with background information relative to the formation of the Committee, indicating that it was created in response to Senate Resolution No. 100 of the 2021 Regular Session, which tasked the Law Institute with studying and making recommendations relative to collateral consequences that can hinder persons with criminal records from obtaining employment or occupational licenses. Because several bills were proposed during the 2022 Regular Session speaking directly to the issue, Committee leadership found it appropriate to observe the progress of those bills rather than immediately convene, thus allowing for a more relevant work product. They then stated that the legislature subsequently passed Acts 2022, No. 486, which addressed several objectives of the resolution, particularly with respect to occupational licensing.

The Co-Chairs next advised the Council that leadership conducted a comparative law study of the consideration of criminal histories relative to employment and occupational licensure among various states and met with several stakeholders. Moreover, because Act 486 addressed issues relative to occupational licensing, the Committee would narrow the focus of its immediate study to employment. The Co-Chairs stated that the Committee found it necessary to consolidate the procedure for considering criminal history in employment procedures for both public and private employment, finding no reason to have two standards – particularly, the Committee identified that the standards for hiring for state employment contained only permissive language, thus providing no real protections for applicants. Thus, the Committee ultimately proposed the repeal of the entirety of R.S. 42:1701 relative to public employment and replacing current language of R.S. 23:291.2 with consolidated language. They expressed that much of the language in the Committee's proposal was borrowed from the wage payment statutes.

Introducing Subsection A, the Co-Chairs stated that the provision sought to make clear that the statute applies only to prospective employees and does not contemplate application to internal hirings or promotions. They further explained that employers would be permitted to inquire about a prospective employee's criminal history only until after the prospective employee has been given an opportunity to interview for a position or, if there is no interview, until after the prospective employee has been given a conditional offer of employment. They suggested that the underlying policy behind this proposal is to expand an employer's pool of potential applicants and provide job seekers with the opportunity to interview for employment. The Co-Chairs then emphasized that once the requirements of this Subsection are satisfied, employers may inquire as to criminal histories consistent with current law.

During this discussion, one Council member asked whether the proposal distinguishes between felony records and misdemeanor records. In response, the Co-Chairs directed the Council's attention to Subsection C, indicating that the proposal would exclude consideration of felony convictions that occurred ten or more years prior to the date of application and misdemeanor convictions that occurred five years or more prior to the date of application. One Council member pointed out that the exclusion applies only to that Subsection, and the Co-Chairs explained that this draws the distinction with respect to the inquiry on the application or the interview and actual consideration of the applicant for employment. Another Council member suggested that it may be important to know whether applicants interviewing have convictions related to the employment – for example, if a person interviewing for an elementary school teacher position was convicted of molestation of a juvenile. The Co-Chairs replied that Subsection H excepts positions

for which a criminal background check is required by law and further stated that crimes of violence are excluded from the prohibition in Subsection C. One Council member then suggested that perhaps the Committee should draft a report for the Council's consideration prior to the submission of proposed legislation. Another Council member suggested that the provision relative to crimes of violence be incorporated into Subsection A such that an employer would be able to inquire as to whether the applicant was convicted of a crime of violence within the previous ten years. The Co-Chairs explained that it was not the Committee's intent to have the proposed language apply to any crime of violence, and thus, they were amenable to this change. Another Council member suggested that this provision be placed at the end of the statute.

One Council member then pointed out that perhaps consideration is premature since the incremental adoption of the provisions presupposes that the Council agrees with the policy contained within the proposal. After discussion relative to the treatment of felonies and misdemeanors, the Co-Chairs contended that the proposal does not completely exclude the consideration of criminal behavior. Moreover, the proposed legislation was drafted pursuant to the mandate of the resolution, attempting to provide an opportunity for potential applicants, discouraged from even applying due to criminal history. Further, stakeholder studies have suggested that, for many, criminal histories are not relevant to the positions for which people apply. Discussion then ensued as to the proposed language's intent and practicalities during the employment process with respect to negligent hiring practices.

A motion was then made and seconded directing the Committee to submit a report to the Council detailing the underlying policy predicating the suggestions, including a comparative law analysis relative to the frameworks of other states and municipal ordinances, as well as other objective data. The Council further requested the legislative history of the resolution to ascertain the legislature's underlying considerations prompting the resolution. One Council member asked whether the Committee planned to address the occupational licensing issue per the resolution, and it was clarified that recent legislation made many changes with respect to occupational licensure; thus, the Committee decided to address that issue after it addressed issues relative to employment.

Returning to a discussion of the proposed language, one Council member pointed out that the creation of a cause of action would likely undermine the bill's success. The Council then discussed the implications of arrests on criminal history, with one Council member contending that crimes often may not be prosecuted due to a victim's refusal or his being intimidated from testifying. The Council member further stated that the decision to inquire should fall to the employer. Another Council member expressed concern that the creation of a cause of action would result in a deluge of litigation. For example, individuals may mistakenly believe that they were not hired due to criminal history, when in reality another more qualified candidate was hired. The Co-Chairs then clarified the intent of the proposal, stating that it contemplates the eventuality of an interview or conditional offer of employment, and subsequently, in either situation, criminal history records may be considered pursuant to the requirements set forth in the statute. One Council member noted that the current iteration of the statute seems to express that an employer may inquire of criminal history during the interview, and another Council member questioned whether the Committee considered whether someone may already have knowledge of an applicant prior to even application. Members then inquired about the effects of the statute on expungements. In line with this, the Council asked that the report reflect the consideration that some violent crimes are still cause for concern to employers and the effects of proposed language on an employer's liability to third parties.

Due to various concerns, the Council requested that the Committee return at a future meeting to present the entirety of its study. Ms. Jones and Ms. Crochet then concluded their presentation, and 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 her presentation by introducing to the Council House Resolution No. 242 of the 2022 Regular Session, which requests that the Law Institute compare the *Bergeron* standard applied in modifying a considered decree of permanent custody to similar standards in other states and make recommendations on the codification of an appropriate standard. Professor Carroll further noted that although the Civil Code presently contains standards for modification for child and spousal support, there is not an express modification standard for a custody order; rather, all that exists is a Comment providing that the "best interest of the child" standard controls, yet the Louisiana Supreme Court noted in the *Bergeron* case in 1986 that application of that standard alone leads to harassment of the other party and instability for children. After conducting fifty-state research and reviewing numerous cases that highlight the inconsistencies in the application of this standard in Louisiana, the Marriage-Persons Committee proposes to codify the existing *Bergeron* standard to provide clarity, especially for self-represented litigants, and to educate lawyers and judges regarding the second segment of the standard that is often overlooked and misunderstood.

Turning to page 5 and proposed Civil Code Article 138, the Reporter explained that Paragraph A applies the "best interest of the child" standard when the parties have consented to an award of custody and are now seeking modification. Paragraph B codifies the *Bergeron* standard relative to considered decrees with a few changes. This proposal uses the term "harmful" instead of "deleterious" and clarifies that Subparagraphs (1) and (2) are alternatives. Further, to resolve a split in the courts of appeal, the Committee recommends the addition of Paragraph C to allow the parties to alter the applicable burden of proof. Professor Carroll noted that there were concerns for self-represented litigants and domestic abuse victims in allowing the parties to modify by agreement, but arguments in favor of freedom of contract ultimately prevailed.

Professor Carroll next mentioned that some Council members would prefer for the proposal to define "consent decree" and "considered decree" and pointed to Revision Comment (c) at the bottom of page 5 and top of page 6. This Comment notes a Supreme Court case that distinguished a consent decree, which occurs "through a stipulated judgment...and no evidence of parental fitness is taken...", from a considered decree, "wherein the trial court receives evidence of parental fitness." The Reporter then noted that there are also hybrid proceedings, wherein the court receives evidence of parental fitness but the parties ultimately enter into a stipulated judgment. These cases are treated as consent decrees, and therefore the "best interest of the child" modification standard is applicable. Professor Carroll then explained that although the Committee voted against defining these terms, it was a tie vote. The Council discussed the importance of sound custody judgments for the development and wellbeing of children and the sizeable percentage of parents that are self-represented. The assurance of due process protections such as proper notice and an opportunity to be heard were also emphasized, particularly since courts across the state approach the matters differently. The debate continued with arguments against adding common law definitions to the Civil Code and even against the *Bergeron* standard altogether. Ultimately, however, the Council voted against adding definitions to the proposal.

Focusing on Paragraph A, the Reporter reiterated that this provision codifies the long-standing jurisprudential standard for modification of consent decrees. The Council questioned the use of the term "final judgment" because many courts award custody on a rule, and Code of Civil Procedure Articles 3942 and 3943 simply use the term "judgment." The Reporter noted that because Revision Comment (e) explains what the Committee means by "final judgment," she would accept deletion of the word "final" from the text of the proposal. Moving to discussion regarding the introductory clause of Paragraph B, one Council member suggested adding language to define "considered decree" by implication. The Reporter continued to note the issue of hybrid proceedings wherein the court has a hearing and takes evidence but does not issue a custody order based on that evidence because the parties stipulate instead. Members of the Council eventually compromised on the addition of language that distinguishes between quick hearings on rule day and full hearings in which parties are able to bring witnesses. Thereafter, the Council quickly approved Subparagraphs (1) and (2) as presented.

Reviewing Paragraph C, the Council first suggested requiring the agreement to alter the burden to be in writing or on the record to avoid litigation. The Reporter accepted this change. Members of the Council next questioned whether parties should be permitted only to lessen the burden and whether the proposal grants carte blanche authority to agree to anything. Professor Carroll clarified that the parties may only agree to choose one of the standards set out in either Paragraph A or B of this new Article. One Council member expressed opposition to this concept due to issues involving coercion and control and self-represented litigants, but upon clarification that regardless of the standard agreed upon by the parties, the "best interest of the child" standard will still apply to every modification, the Council member was satisfied.

The Reporter next asked the Council to approve a 2024 Revision Comment to Civil Code Article 131 because the approval of the new Article on modification renders a Revision Comment from 1993 erroneous. Thereafter, all of the following were approved:

Civil Code Article 138. Modification of custody award

A. When a court has awarded custody pursuant to a judgment of custody rendered by consent of the parties, the award may be modified by the court upon a change in circumstances that materially affects the welfare of the child and if modification is in the best interest of the child.

B. When a court has awarded custody pursuant to a judgment of custody rendered by a considered decree, based on evidence presented after a full evidentiary hearing or trial, the award may be modified by the court in accordance with the best interest of the child upon proof of either of the following:

(1) Continuation of the present custody award is so harmful to the child as to justify modification.

(2) By clear and convincing evidence, the harm likely to be caused by a change of custody is substantially outweighed by the advantages to the child.

C. By written agreement, parties may adopt either of the standards under this Article or a lesser standard.

Revision Comments – 2024

(a) This revision codifies the standard set by the Supreme Court of Louisiana for modification of custody orders pursuant to considered decrees in *Bergeron v. Bergeron*, 492 So. 2d 1193, 1200 (La. 1986). It also codifies the existing, and lesser, standard for modifying consent decrees. *See, e.g., McCorvey v. McCorvey*, 916 So. 2d 357, 370-71 (La. 3d Cir. 2005). It is not intended to abrogate the 30 years of jurisprudence interpreting *Bergeron*. It is intended to add clarity by codifying the *Bergeron* standard, and by calling attention to the often jurisprudentially overlooked alternative weighing standard set out in *Bergeron*.

(b) The change in circumstances described in Paragraph A of this Article refers to a change that materially affects the child's welfare. *Burns v. Burns*, 236 So. 3d 571, 574 (La. App. 1 Cir. 2017). A parent's remarriage, engagement, and similar life changes do not necessarily rise to such a level. *See id.*

(c) Louisiana jurisprudence explains that a consent decree subject to the best interest standard is one made "through a stipulated judgment, such as when the parties consent to a custodial arrangement, *and* no evidence of parental fitness is taken . . ." Alternatively, a considered decree is one "wherein the trial court receives evidence of parental fitness to exercise care, custody, and control of a child." *McCorvey v. McCorvey*, 916

So. 2d 357, 370-71 (La. 3d Cir. 2005); *Evans v. Lungrin*, 708 So. 2d 731 (La. 1998). Some Louisiana courts have noted that judgments may be "hybrid" proceedings wherein, for instance, the court received some evidence of parental fitness, but the parties enter into a stipulated judgment prior to the court's ruling. Such judgments should be treated under the modification standard applicable to consent decrees. *Id.* at 371.

(d) The standards set forth in this Article apply to modifications of judgments of custody rendered by consent decree or considered decree and not to minor changes in decision-making authority or in custodial schedules.

(e) Interim, temporary, or interlocutory custodial orders are not governed by the standards set out here.

Civil Code Article 131. Court to determine custody

* * *

Revision Comments – 2024

(a) The standard set forth in this article applies in actions to change custody as well as in those to initially set it.

(b) Due to the enactment of Article 138 in 2024, Revision Comments-1993 (d) has been superseded and new Article 138 should be consulted, as it elaborates upon and modifies jurisprudential treatment of custody modification.

Professor Carroll then introduced House Concurrent Resolution No. 42 of the 2022 Regular Session, which directs the Law Institute to study and make recommendations for the adoption of the Uniform Collaborative Law Act. The Committee reviewed social science data regarding the benefits of the process, the harm to children as a result of parental conflict, the basic requirements of the Act, and the fact that twenty-three states have adopted this tool, with fifteen of them restricting its application to family law matters. The Reporter and the Marriage-Persons Committee recommend adoption of the Uniform Act, with a few changes that are highlighted in the materials, as a regulatory framework for this voluntary process limited to family law matters. The Council thereafter voted in favor of the recommendation.

The Reporter then proceeded to explain each provision, beginning on page 4 of the materials. She noted that Subsections A and B of R.S. 9:377.1 were modeled after Texas law and legitimize the implementation of the Act. Professor Carroll also informed the Council that although the Uniform Act has over thirty pages of Comments, the Committee is only proposing modest Comments to explain the differences between Louisiana's law and the Uniform Act. For example, Comment (b) specifies the family law matters that may be addressed in a collaborative process. The Reporter agreed to add a Comment that the provisions of this Act do not prevail over R.S. 46:236.1.2 wherein parties assign their rights to the state for the enforcement of child support. The following were approved:

PART VI. UNIFORM COLLABORATIVE FAMILY LAW ACT

§377. Short title

This Part may be cited as the Uniform Collaborative Family Law Act.

§377.1. Legislative Intent; conflicts; application and construction

A. It is the policy of this state to encourage the peaceable resolution of disputes, with special consideration given to disputes involving the

parent-child relationship, including disputes over the custody and support of a child, and the early resolution of pending litigation through compromise.

B. If a provision of this Part conflicts with another provision of Louisiana law and the conflict cannot be reconciled, this Part prevails.

C. In applying and construing this Part, consideration shall be given to the need to promote uniformity of the law with respect to its subject matter among states that enact a collaborative law process for family law matters.

Revision Comments – 2024

(a) Collaborative law is a voluntary, contractually based alternative dispute resolution process for parties who seek to negotiate a resolution of their matter. The ground rules for collaborative family law participation are set forth in a written agreement in which parties designate collaborative lawyers and agree not to seek tribunal resolution of a dispute during the collaborative law process.

(b) Collaborative law matters which arise under the family law of this state are those matters detailed in R.S. 13:1401.

Moving to the definitions in R.S. 9:377.2, Professor Carroll noted the only change from the Uniform Act is to the definition of "collaborative matter" and serves to limit the application of the process to family law matters that are specified in the previous Comments. She noted that although the Committee agrees that some of the language may be circular and not very civilian, they recommend retaining it in order to be as uniform as possible. The Council was concerned that the proposed language does not limit the process to family law matters because any matter mentioned in the agreement could be addressed in the process. The Reporter explained that the Committee is proposing limiting language by adding the terms "family law" in conjunction with the phrases "collaborative law process," "collaborative communication," and "collaborative participation agreement." In light of the Council's continued concerns, the Reporter agreed to draft an alternative definition for presentation during the Saturday session.

Professor Carroll then concluded her presentation, and the Friday session of the November 2023 Council meeting was adjourned.

LOUISIANA STATE LAW INSTITUTE

MEETING OF THE COUNCIL

November 18, 2023

Saturday, November 18, 2023

Persons Present:

Baker, Pamela J.
Braun, Jessica G.
Breard, L. Kent
Carroll, Andrea B.
Doguet, Andre'
Hall, Senae D.
Hawthorne, George "Trippe"
Hayes, Thomas M., III
Knighten, Arlene D.
Lee, Amy Allums
Lovett, John A.
Miller, Gregory A.
Riviere, Christopher H.
Roussel, Randy
Sole, Emmett C.
Talley, Susan G.
Tucker, Zelda W.
Ventulan, Josef
Waller, Mallory C.
Weems, Charles S., III
Ziober, John David

President Thomas M. Hayes, III called the Saturday session of the November Council meeting to order at 9:00 a.m. on Saturday, November 18, 2023 at the Louisiana Supreme Court in New Orleans. The President then called on Mr. Randy Roussel, Reporter of the Common Interest Ownership Regimes Committee, to begin his presentation of materials.

Common Interest Ownership Regimes Committee

Mr. Roussel began his presentation with a reminder that the recommended Planned Community Act bill was submitted to the legislature during the 2022 Regular Session. At the request of the author, however, the bill was delayed to allow the Reporter and the Committee time to meet with various associations and interest groups to answer questions and address concerns. As a result, today's presentation includes proposed changes and compromises, all of which are noted in the accompanying memorandum. Directing the Council to page 73 of the materials, the Reporter explained that revised Part III is a distinct and comprehensive approach to privileges and the enforcement thereof for planned communities, condominium regimes, and associations with the authority to impose assessments although there are no shared facilities. Therefore, the Committee recommends clarifying terminology and concepts in this Part and eliminating duplicative language in the proposed Planned Community Act. R.S. 9:1145 was adopted as presented:

§1145. Privileges; enforcement

A. This Part authorizes associations, including but not limited to associations organized in accordance with R.S. 9:1141.19 or R.S. 9:1123.101, to enforce the payment of assessments authorized in the community documents. A privilege in favor of the association shall arise on a lot or unit for any assessment attributable to that lot or unit or fines imposed against the owner.

B. For the purposes of this Part, an association refers to a nonprofit corporation, partnership, association, or other legal entity whose members are owners of lots subject to community documents or units in a condominium regime that maintains certain portions of the land or improvements for the use and benefit of the owners and that has the right to impose assessments.

C. This Part does not affect the personal liability of an owner for the payment of past due sums for which R.S. 9:1146 grants a privilege or

prevent an association from acquiring a lot or unit through a giving in payment.

D. Within ten business days of receipt of a request made in a record, the association shall furnish to the owner a statement of the amount of any unpaid assessments against his lot or unit. The statement shall be binding on the association.

E. With approval from the board of directors, an association may commence an action to enforce a privilege in accordance with this Part.

Turning to R.S. 9:1146 regarding the demand for failure to pay money owed to the association, the Council first questioned the need for the catchall in Paragraph (A)(5). It was explained that perhaps an association maintains a website or other type of communication system to send out notices to its members that should not be excluded. With respect to Subsection B, Council members expressed concern over the use of the term "delivery" because use of several of the methods available to make demand do not allow for proof of actual delivery. Lastly, in Subsection D, discussion focused on the appropriateness of including Code of Civil Procedure Article 863, and although it was noted that attorneys may dishonestly verify the privilege and lien and need to be sanctioned, the Council removed that reference. All of the following was approved:

~~§1145.~~ §1146. ~~Association of owners~~ Demand; privilege; notice ~~to owner; definition~~

A. ~~(1) If an individual lot~~ When an owner has failed to pay the charges, expenses, or dues imposed upon his lot or unit ~~by the association of owners of lots in a residential or commercial subdivision~~, the association shall ~~deliver a~~ make written demand for past due charges, expenses, or dues owed ~~to the association to the owner by certified or registered mail,~~ by any of the following methods:

(1) United States mail postage paid, or commercial courier as defined in Code of Civil Procedure Article 1313(D), ~~or at the address and method on file with the association~~ to the mailing address designated by the owner.

(2) Electronic mail to the address designated by the owner.

(3) Hand delivery to the physical location of the lot or unit, if neither a mailing address nor an electronic mail address has been designated by the owner.

(4) United States mail postage paid, or commercial courier as defined in Code of Civil Procedure Article 1313(D), to the mailing address of each unit.

(5) Any other method reasonably calculated to provide notice to the owner.

~~(2)~~ B. (1) The ~~individual lot~~ owner shall have thirty days after ~~delivery of~~ the date of written demand to deliver payment for the amount owed to the association.

(2) The association shall apply any sums paid by the owner delinquent in paying assessments in the following order:

(a) Unpaid assessments.

(b) Late charges.

(c) Reasonable attorney fees, costs, and other collection charges.

(d) All other unpaid fees, charges, fines, penalties, and interest.

(3) After the thirty days has run, the association may file a sworn detailed statement of privilege in accordance with this Part.

~~B.~~ C. Upon the filing of a sworn detailed statement ~~in accordance with this Part~~, ~~an~~ of privilege the association ~~of owners of lots in a residential or commercial subdivision~~ shall have a privilege upon the lot or unit and improvements thereon ~~of an owner in the subdivision who fails to pay charges, expenses, or dues imposed upon such lot and improvements thereon in accordance with recorded restrictions, servitudes, or obligations affecting such subdivision~~. The privilege shall be against the lot or unit and the improvements thereon and shall secure unpaid charges, expenses, or dues imposed by the association ~~of owners~~, together with interest thereon at the rate provided in the declaration or, in the absence thereof, at the legal interest rate from the date due and ~~reasonable attorney fees~~ any amount awarded in accordance with Subsection D of this Section.

~~C.~~ D. For actions brought pursuant to this Section, the court may award the prevailing party costs of court, reasonable attorney fees, and other related costs~~, as well as any other sanctions and relief requested pursuant to Code of Civil Procedure Article 863~~.

~~D. For the purposes of this Part, an association of owners refers to a nonprofit corporation, partnership, association, or other legal entity whose members are owners of lots in the subdivision, and which maintains certain portions of the land or improvements in such subdivision for the use and benefit of the owners of lots in such subdivision.~~

Moving to R.S. 9:1147, one Council member requested the inclusion of the date of written demand in the statement of privilege, and although the Reporter did not think this was necessary, he accepted the change. The Council also discussed the use of the terms "verified" and "commensurate with" before finally approving the following:

~~§1146.~~ §1147. ~~Privilege; sworn~~ Sworn detailed statement; filing

A. The sworn detailed statement ~~shall contain the nature and amount of the unpaid charges, expenses, or dues, a description of the lot or lots on which behalf the charges, expenses, or dues have been assessed,~~ of privilege shall be signed and verified by an officer or agent of the association, and ~~shall be~~ filed for registry in the mortgage records in the parish in which the ~~residential subdivision~~ lot or unit is located. The statement of privilege shall include a complete property description of the lot or unit, the name of the record owner, the date the assessment became delinquent, a statement of the amount assessed relative to periodic dues including any accelerated amount, a statement relative to the amount assessed relative to fines, and any late fees, and the date written demand was made.

B. The association shall, ~~commensurate with~~ upon the filing for registry of the statement of privilege, ~~serve upon~~ provide a copy thereof to the delinquent owner ~~a sworn detailed statement of the claim~~ by ~~certified mail, registered mail or personal delivery~~ any method provided in R.S. 9:1146(A).

Mr. Roussel then read new R.S. 9:1148 regarding the time and rank of the privilege and requested approval of the deletion of existing R.S. 9:1148 as no longer necessary. Council members discussed the use of the word "perempt" and compared it to the concept of extinguishment in the Private Works Act. The Reporter also explained the five-year time period as a consumer protection to acknowledge an owner's freedom relative to his property. The following was adopted:

~~§1147.~~ §1148. Privilege; time periods; rank

A. (1) ~~A recorded sworn statement shall preserve the privilege against the lot or lots and improvements thereon for charges assessed to the owner~~ Except as provided in Subsection B of this Section, if the assessment is imposed for alleged violations of community documents ~~for a period of one year after the date of recordation. The~~ the effect of recordation ~~shall cease and the privilege preserved by this recordation shall perempt unless a suit to enforce the privilege is filed within one year after the date of its recordation and a notice of the filing of such suit is filed in the mortgage records of the parish in which the subdivision is located~~ of a statement of privilege shall cease and the privilege preserved by it shall be extinguished as to third persons unless a notice of pendency of action in accordance with Code of Civil Procedure Article 3752, identifying the suit required to be filed in accordance with this Subsection, is filed for registry in the mortgage records of the parish where the lot or unit is located within one year after the privilege becomes effective. In addition to the requirements of Code of Civil Procedure Article 3752, the notice of pendency of action shall also contain a reference to the recorded statement of privilege. If the effect of recordation of a statement of privilege has ceased for lack of timely filing of a notice of pendency of action, the recorder of mortgages, upon receipt of a written signed application shall cancel the recordation of the statement of privilege.

(2) ~~This Subsection shall not apply to~~ If the assessment is imposed to enforce the affirmative duty of ~~a homeowner~~ an owner to pay monthly or periodic dues or fees, or assessments for particular expenses or capital improvements that are reasonable for ~~the~~ maintenance, improvement, or safety, or any combination thereof, ~~of the planned community~~ then the effect of recordation of a statement of privilege shall cease and the privilege preserved by it shall be extinguished as to third persons unless a notice of pendency of action in accordance with Code of Civil Procedure Article 3752, identifying the suit required to be filed in accordance with this Subsection, is filed for registry in the mortgage records of the parish where the lot or unit is located within five years after the privilege becomes effective. In addition to the requirements of Code of Civil Procedure Article 3752, the notice of pendency of action shall also contain a reference to the recorded statement of privilege. If the effect of recordation of a statement of privilege has ceased for lack of timely filing of a notice of pendency of action, the recorder of mortgages upon receipt of a written signed application shall cancel the recordation of the statement of privilege.

B. ~~A recorded sworn statement shall preserve the privilege against the lot or lots and improvements thereon for dues, fees, or assessments as provided in Paragraph (A)(2) of this Section for a period of five years after the date of recordation. The effect of recordation shall cease and the privilege preserved by this recordation shall perempt unless a suit to enforce the privilege is filed within five years after the date of its recordation and a notice of the filing of such suit is filed in the mortgage records of the parish in which the subdivision is located.~~ A privilege pursuant to this Part ranks in accordance with Civil Code Articles 3273 and 3274 from the time the statement of privilege is filed for registry in the mortgage records and, except as otherwise provided in the Private Works Act, R.S. 9:4801 et seq., is preferred in rank to all mortgages, privileges, and other rights in the lot or unit that become effective against third persons after that time.

C. In the absence of a contrary provision in the declaration authorizing two or more associations, privileges in favor of those associations for assessments have equal priority regardless of the date on which they filed statements of privilege unless there is an intervening encumbrance, in which event this Subsection does not apply.

~~§1148. Privilege; ranking~~

~~The privilege provided in this Part shall be ranked according to its time of recordation.~~

The Reporter moved to R.S. 9:1141.14 relative to more burdensome restrictions. At a previous meeting, the Council questioned how Subparagraphs (a) and (b) of Paragraph (C)(6) work together and noted the need for more clarity. The Reporter redrafted the proposals, but a Council member then wondered why an appraisal is necessary if the owner readily acknowledges that the value of the improvements will be more than forty percent and agrees to comply with the more burdensome restrictions. The following changes were thereafter approved:

§1141.14. Amendment to declaration; community documents; use restrictions

* * *

(6) Unless a greater percentage is required in the community documents, an association may adopt by two-thirds vote more burdensome restrictions governing construction, design criteria, and aesthetic standards, subject to the following limitations:

(a) No more burdensome restriction governing construction, design criteria, aesthetic standards, set backs, or square footage requirements shall impose a duty on a lot owner to act affirmatively or remove or renovate any existing improvements, but more burdensome standards shall apply to new renovations, repairs, or reconstructions as provided in Subparagraph (b) of this Paragraph.

(b) Only exterior renovations, repairs, or reconstructions that increase the value of the improvements on the lot by more than forty percent are required to comply with the more burdensome construction, design criteria, and aesthetic standards. Unless the lot owner agrees in writing to comply with the more burdensome standards the lot owner shall submit to the association, prior to the start of renovation, repair, or reconstruction, an estimate of the increase in value of the improvements as determined by a qualified appraiser.

Mr. Roussel next drew attention to R.S. 9:1141.20(E) and (F), which were also redrafted after a previous Council meeting to address concerns regarding increased litigation and subjecting members of the board of directors to liability under nonprofit corporation law for actions determined to be arbitrary or capricious. With little discussion, the following provision was adopted:

§1141.20. Powers and duties of the lot owners association

* * *

E. The association has discretion in pursuing or declining enforcement depending on each set of circumstances.

F. The association shall not be arbitrary or capricious in its decision to pursue or decline enforcement in accordance with Subsections D and E of this Section.

Looking to R.S. 9:1141.22(B)(1), the Reporter noted the substitution of the words "lot owners other than the declarant or an affiliate of the declarant" for the defined term "unrelated purchasers." The Council quickly approved the following:

§1141.22. Declarant control of the association

* * *

B. Regardless of the period provided in the declaration, a period of declarant control terminates as follows:

(1) If the right to add additional immovable property to the planned community was not reserved in the declaration, one hundred twenty days after the date that seventy-five percent of the total number of lots in the planned community are transferred to ~~lot owners other than the declarant or an affiliate of the declarant~~ unrelated purchasers.

Focus shifted to R.S. 9:1141.27, and Mr. Roussel explained the necessity of providing for a quorum in the event of an emergency. The following was adopted:

§1141.27. Quorum

* * *

D. Notwithstanding any other Subsection of this Section, provided notice is given as required by R.S. 9:1141.38, in the event of an emergency, a quorum is present if lot owners holding at least ten percent of the voting interest are present in person, by proxy, or by means of electronic communication.

The next revision, which appears on page 53, resulted from the Committee's meeting with an insurance consultant. The deletion of specific medical payments insurance is because of its duplication with coverage for bodily injury. The following was approved:

§1141.30. Insurance

A. Commencing not later than the time of the first transfer of a lot to an unrelated purchaser, the association shall maintain, to the extent reasonably available and subject to reasonable deductibles, commercial general liability insurance, ~~including medical payments insurance,~~ in an amount determined by the board of directors, but not less than any amount specified in the declaration, covering all occurrences commonly insured against for bodily injury, death, and property damage arising out of or in connection with the use, ownership, or maintenance of the common areas. The declaration may require the association to carry any other insurance, and the association may carry any other insurance it considers appropriate to protect the association or the lot owners.

Shifting to assessments on page 54 of the materials and R.S. 9:1141.32, the Reporter noted the addition of the ability of the association to accelerate assessments when an owner repeatedly fails to timely pay in order to eliminate the burden on the association in constantly seeking collection. The intent is for the association to send notice of failure to pay after the ten-day grace period and then, if the owner is not compliant after thirty days, the association may file a detailed statement of privilege and seek enforcement. The Council asked for clarification on the fact that the notice provided is the notice of delinquency as provided in new Part III, and the following was adopted:

§1141.32. Assessments

* * *

B. Except for assessments made in accordance with Subsections C, D, or E of this Section or as otherwise provided in this Part, all common expenses shall be assessed against all of the lots in accordance with the allocations set forth in the declaration pursuant to R.S. 9:1141.6. The owner

of a lot shall be personally liable for the payment of all assessments levied against the lot during the period of his ownership. The association may charge late fees and interest on any past due assessment or portion thereof at the rate established by the association, which shall not exceed ~~twelve percent per year~~ the rate established in Part III of this Chapter.

C. If the lot owner fails to timely pay the assessments for common areas for a period of three months or more during any eight-month period after the association has provided notice of delinquency, the association may accelerate the assessment on the common areas for a twelve-month period and file a statement of privilege for the accelerated sums. The preservation and enforcement of the privilege shall be governed by Part III of this Chapter.

* * *

E. If damage to a lot or other part of the planned community or any other common expense is caused by the willful misconduct of any lot owner or occupant, or a guest or invitee of a lot owner, the association may assess that damage or common expense exclusively against that owner's lot, even if the association maintains insurance with respect to that damage or common expense.

Mr. Roussel next explained that R.S. 9:1141.34(A) was modified after feedback from interested parties who were concerned with the expense of hiring a Certified Public Accountant to construct a budget. Subsection D was added as a best practice when the association accumulates a surplus after making special assessments, for example, to cover insurable losses while waiting for settlement of the claim. The Council added a catchall to allow associations to also use surpluses for operating expenses in the event that things such as insurance costs rise due to the filing of a claim or industry demand. The following language was approved:

§1141.34. Adoption of budgets; special assessments

A.(1) For planned communities consisting of more than twenty-five lots, the association ~~board of directors~~ shall submit, at least annually, a proposed budget for the planned community for consideration by the lot owners at a duly called meeting of the association. Not later than thirty days after adoption of a proposed budget, the board of directors shall provide to all lot owners a summary of the budget, including any reserves, and a statement of the basis on which any reserves are calculated and funded. Simultaneously, the board shall set a date, which shall be no fewer than ten days nor more than sixty days after the summary is provided, for a meeting of the association to consider ratification of the budget. A majority vote, or any greater vote specified in the declaration, is required to ratify the budget. If a proposed budget is not ratified, the budget last ratified at a meeting of the association continues until a subsequent budget is ratified.

(2) Nothing in this Subsection requires a certain format for the annual submission of the proposed budget.

* * *

D. If the association has accumulated a surplus from prior years, the budget may propose any of the following:

(1) Refund to the unit owners contributing to the surplus if created by a special assessment.

(2) Reduce assessments prospectively in the amount of the surplus.

(3) Establish a reserve for future repairs, replacements, or operating expenses.

R.S. 9:1141.35 on page 57 was largely moved to new Part III, which was previously discussed, resulting in the Council quickly approving the following:

§1141.35. Privileges for sums due to the association; enforcement

A. A privilege in favor of the association shall arise on a lot for any assessment attributable to that lot or any fines imposed against the lot owner.

B. The time period, rank, and method to enforce and preserve a privilege in favor of the association shall be governed by Part III of this Chapter.

Lastly, the Council approved the addition of language in R.S. 9:1141.36(A) to specifically allow the association to maintain certain records in an electronic format.

Running short on time, Mr. Roussel then concluded his presentation, and the President called on Professor Andrea B. Carroll, Reporter of the Marriage-Persons Committee, to continue her presentation from Friday.

Marriage-Persons Committee

Professor Carroll began by reminding the Council of the points made yesterday regarding the circular nature of the definitions in R.S. 9:377.2 of the Uniform Collaborative Law Act. She then noted that the Uniform Act included Alternatives A and B for the definition of "collaborative matter" and, although the Committee chose the language on page 5, Alternative A specifically lists family law matters such as marriage, divorce, custody, visitation, support, adoption, and property distribution. The Council questioned the inclusion of common law terms such as "alimony" and "maintenance" but agreed to retain them because they are uniform. The Council then wondered when a legislative hearing would be held for a collaborative family law matter as indicated by the definitions of "proceeding" and "tribunal". Although recognizing the uniform language in this respect, the Council voted to remove the legislature in those two definitions. After discussion concluded, the following was approved:

§377.2. Definitions

In this Part the following terms have the following meanings:

(1) "Collaborative family law communication" means a statement, whether oral or in a record, or verbal or nonverbal, that:

(a) Is made to conduct, participate in, continue, or reconvene a collaborative family law process.

(b) Occurs after the parties sign a collaborative family law participation agreement and before the collaborative family law process is concluded.

(2) "Collaborative family law participation agreement" means an agreement by persons to participate in a collaborative family law process.

(3) "Collaborative family law process" means a procedure intended to resolve a collaborative family law matter without intervention by a tribunal in which persons:

(a) Sign a collaborative family law participation agreement.

(b) Are represented by collaborative lawyers.

(4) "Collaborative lawyer" means a lawyer who represents a party in a collaborative family law process.

(5) "Collaborative family law matter" means a dispute, transaction, claim, problem, or issue for resolution, including a dispute, claim, or issue in a proceeding, which is described in a collaborative family law participation agreement and arises under the family or domestic relations law of this state, including:

(a) Marriage, divorce, dissolution, annulment, and property distribution.

(b) Child custody, visitation, and parenting time.

(c) Alimony, spousal support, maintenance, and child support.

(d) Adoption.

(e) Parentage.

(f) Premarital, marital, and post-marital agreements.

(6) "Law firm" means:

(a) Lawyers who practice law together in a partnership, professional corporation, sole proprietorship, limited liability company, or association.

(b) Lawyers employed in a legal services organization, or the legal department of a corporation or other organization, or the legal department of a government or governmental subdivision, agency, or instrumentality.

(7) "Nonparty participant" means a person, other than a party and the party's collaborative lawyer, that participates in a collaborative family law process.

(8) "Party" means a person that signs a collaborative family law participation agreement and whose consent is necessary to resolve a collaborative family law matter.

(9) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, public corporation, government or governmental subdivision, agency, or instrumentality, or any other legal or commercial entity.

(10) "Proceeding" means a judicial, administrative, arbitral, or other adjudicative process before a tribunal, including related prehearing and post-hearing motions, conferences, and discovery.

(11) "Prospective party" means a person that discusses with a prospective collaborative lawyer the possibility of signing a collaborative family law participation agreement.

(12) "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(13) "Related to a collaborative family law matter" means involving the same parties, transaction or occurrence, nucleus of operative fact, dispute, claim, or issue as the collaborative family law matter.

(14) "Sign" means either, with present intent to authenticate or adopt a record:

(a) To execute or adopt a tangible symbol.

(b) To attach to or logically associate with the record an electronic symbol, sound, or process.

(15) "Tribunal" means a court, arbitrator, administrative agency, or other body acting in an adjudicative capacity which, after presentation of evidence or legal argument, has jurisdiction to render a decision affecting a party's interests in a family law matter.

Professor Carroll then proposed R.S. 9:377.3 and 377.4 together and highlighted the repeated mandate that the process be voluntary. One Council member inquired as to the meaning of "record," and it was noted that all uniform acts include a definition of "record." The following provisions were adopted:

§377.3. Applicability

This Part applies to a collaborative family law participation agreement that meets the requirements of R.S. 9:377.4 and that is signed on or after August 1, 2024.

§377.4. Collaborative family law participation agreement; requirements

A. A collaborative family law participation agreement is a voluntary, contractually based alternative dispute resolution process which shall:

(1) Be in a record.

(2) Be signed by the parties.

(3) State the parties' intention to resolve a collaborative family law matter through a collaborative family law process in accordance with this Part.

(4) Describe the nature and scope of the family law matter.

(5) Identify the collaborative lawyer who represents each party in the process.

(6) Contain a statement by each collaborative lawyer confirming the lawyer's representation of a party in the collaborative family law process.

B. Parties may agree to include in a collaborative family law participation agreement additional provisions not inconsistent with this Part.

Moving to R.S. 9:377.5, the Reporter described how a collaborative family law process begins and ends, and the proposal was approved as presented:

§377.5. Beginning and concluding collaborative family law process

A. A collaborative family law process begins when the parties sign a collaborative law participation agreement.

B. A tribunal may not order a party to participate in a collaborative family law process over that party's objection.

C. A collaborative family law process is concluded by any of the following:

(1) Resolution of a collaborative family law matter as evidenced by a signed record.

(2) Resolution of a part of the collaborative family law matter, evidenced by a signed record, in which the parties agree that the remaining parts of the family law matter will not be resolved in the process.

(3) Termination of the process.

D. A collaborative family law process terminates:

(1) When a party gives notice to other parties in a record that the process is ended.

(2) When a party:

(a) Begins a proceeding related to a collaborative family law matter without the agreement of all parties.

(b) In a pending proceeding related to the family law matter:

(i) Initiates a pleading, motion, order to show cause, or request for a conference with the tribunal.

(ii) Requests that the proceeding be put on the tribunal's active calendar.

(iii) Takes similar action requiring notice to be sent to the parties.

(3) Except as otherwise provided by Subsection G of this Section, when a party discharges a collaborative lawyer or a collaborative lawyer withdraws from further representation of a party.

E. A party's collaborative lawyer shall give prompt notice to all other parties in a record of a discharge or withdrawal.

F. A party may terminate a collaborative family law process with or without cause.

G. Notwithstanding the discharge or withdrawal of a collaborative lawyer, a collaborative family law process continues, if not later than thirty days after the date that the notice of the discharge or withdrawal of a collaborative lawyer required by Subsection E of this Section is sent to the parties:

(1) The unrepresented party engages a successor collaborative lawyer.

(2) In a signed record:

(a) The parties consent to continue the process by reaffirming the collaborative family law participation agreement.

(b) The collaborative family law agreement is amended to identify the successor collaborative lawyer.

(c) The successor collaborative lawyer confirms the lawyer's representation of a party in the collaborative family law process.

H. A collaborative family law process does not conclude if, with the consent of the parties, a party requests a tribunal to approve a resolution of the collaborative family law matter or any part thereof as evidenced by a signed record.

I. A collaborative family law participation agreement may provide additional methods of concluding a collaborative family law process.

Next, R.S. 9:377.6 and 377.7 were introduced as the rule to stay the proceeding once the parties agree to resolve the dispute using the collaborative family law process with an exception for the health, safety, and welfare of certain parties. The Council clarified that the language is broad enough to include an emergency change of custody order for the welfare of a child and to further clarify that the reference to Title 46 is for the defined terms. The Reporter accepted an amendment, and all of the following were approved:

§377.6. Proceedings pending before tribunal; status report

A. Persons in a proceeding pending before a tribunal may sign a collaborative family law participation agreement to seek to resolve a collaborative family law matter related to the proceeding. The parties shall file promptly with the tribunal a notice of the agreement after it is signed. Subject to Subsection C of this Section and R.S. 9:377.7 and 377.8, the filing operates as an application for a stay of the proceeding.

B. The parties shall file promptly with the tribunal notice in a record when a collaborative family law process concludes. The stay of the proceeding in accordance with Subsection A of this Section is lifted when the notice is filed. The notice may not specify any reason for termination of the collaborative family law process.

C. A tribunal in which a proceeding is stayed in accordance with Subsection A of this Section may require the parties and collaborative lawyers to provide a status report on the collaborative family law process and the proceeding. A status report may include only information on whether the process is ongoing or concluded. It may not include a report, assessment, evaluation, recommendation, finding, or other communication regarding a collaborative family law process or collaborative family law matter.

D. A tribunal may not consider a communication made in violation of Subsection C of this Section.

E. A tribunal shall provide parties notice and an opportunity to be heard before dismissing a proceeding in which a notice of collaborative family law process is filed based on delay or failure to prosecute.

§377.7. Emergency order

During a collaborative family law process, a tribunal may issue emergency orders to protect the health, safety, welfare, or interest of a party, or of a family member or household member as those terms are defined in R.S. 46:2132.

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If a party to a collaborative family law process initiates a proceeding under the Domestic Abuse Assistance Act (R.S. 46:2131 et seq.), the collaborative process terminates in accordance with R.S. 9:377.5. Emergency orders may include, inter alia, orders issued in accordance with Code of Civil Procedure Article 3945, R.S. 13:1816, or Children's Code Articles 618, 1560, and 1564 et seq.

R.S. 9:377.8 and 377.9 were quickly reviewed and approved as presented as simple codifications of practices that already exist relative to approval of settlements and the disqualification of attorneys:

§377.8. Approval of agreement by tribunal

A tribunal may approve an agreement resulting from a collaborative family law process.

§377.9. Disqualification of collaborative lawyer and lawyers in associated law firm

A. Except as otherwise provided in Subsection C of this Section, a collaborative lawyer is disqualified from appearing before a tribunal to represent a party in a proceeding related to the collaborative family law matter.

B. Except as otherwise provided in Subsection C of this Section and R.S. 9:377.10 and 377.11, a lawyer in a law firm with which the collaborative lawyer is associated is disqualified from appearing before a tribunal to represent a party in a proceeding related to the collaborative family law matter if the collaborative lawyer is disqualified from doing so in accordance with Subsection A of this Section.

C. A collaborative lawyer or a lawyer in a law firm with which the collaborative lawyer is associated may represent a party:

(1) To ask a tribunal to approve an agreement resulting from the collaborative family law process.

(2) To seek or defend an emergency order to protect the health, safety, welfare, or interest of a party, or of a family member or household member as those terms are defined in R.S. 46:2132, if a successor lawyer is not immediately available to represent that person.

D. If Paragraph (C)(2) of this Section applies, a collaborative lawyer, or lawyer in a law firm with which the collaborative lawyer is associated, may represent a party or family member or household member as those terms are defined in R.S. 46:2132 only until the person is represented by a successor lawyer or reasonable measures are taken to protect the health, safety, welfare, or interest of the person.

Professor Carroll next drew attention to R.S. 9:377.10 and 377.11 as uniform provisions relative to low-income and governmental parties. The Council mentioned that the government may be a party to an adoption or child support proceeding when a child is in state custody but remained doubtful that low-income parties would utilize this process anyway. The following were approved as recommend by the Uniform Act:

§377.10. Low income parties

A. The disqualification of R.S. 9:377.9(A) applies to a collaborative lawyer representing a party with or without fee.

B. After a collaborative family law process concludes, another lawyer in a law firm with which a collaborative lawyer disqualified in accordance with R.S. 9:377.9(A) is associated may represent a party without fee in the collaborative family law matter or a matter related to the collaborative family law matter if:

(1) The party has an annual income that qualifies the party for free legal representation in accordance with the criteria established by the law firm for free legal representation.

(2) The collaborative family law participation agreement so provides.

(3) The collaborative lawyer is isolated from any participation in the collaborative family law matter or a matter related to the collaborative family law matter through procedures within the law firm which are reasonably calculated to isolate the collaborative lawyer from participation.

§377.11. Governmental entity as party

A. The disqualification of R.S. 9:377.9(A) applies to a collaborative lawyer representing a party that is a government or governmental subdivision, agency, or instrumentality.

B. After a collaborative family law process concludes, another lawyer in a law firm with which the collaborative lawyer is associated may represent a government or governmental subdivision, agency, or instrumentality in the collaborative family law matter or a matter related to the collaborative family law matter if all of the following:

(1) The collaborative family law participation agreement so provides.

(2) The collaborative lawyer is isolated from any participation in the collaborative family law matter or a matter related to the collaborative family law matter through procedures within the law firm which are reasonably calculated to isolate the collaborative lawyer from participation.

Moving to R.S. 9:377.12 and 377.13, the Reporter explained the necessity of parties disclosing all relevant information without formal discovery and how this ties into disqualification from representing the party if actual family law proceedings later arise. The following provisions were approved:

§377.12. Disclosure of information

Except as provided by law other than this Part, during the collaborative family law process, on the request of another party, a party shall make timely, full, candid, and informal disclosure of information related to the collaborative family law matter without formal discovery. A party also shall update promptly previously disclosed information that has materially changed. The parties may define the scope of disclosure during the collaborative family law process.

§377.13. Standards of professional responsibility and mandatory reporting not affected

This Part does not affect any of the following:

(1) The professional responsibility obligations and standards applicable to a lawyer or other licensed professional.

(2) The obligation of a person to report abuse or neglect, abandonment, or exploitation of a child or adult under the laws of this state.

R.S. 9:377.14 requires the attorney to assess whether the collaborative law process is appropriate for this matter and these parties. The Council wondered whether this burden is higher than present professional responsibility but concluded that these same duties exist in arbitration and mediation. The following was approved:

§377.14. Appropriateness of collaborative law process

Before a prospective party signs a collaborative family law participation agreement, a prospective collaborative lawyer shall:

(1) Assess with the prospective party factors the lawyer reasonably believes relate to whether a collaborative family law process is appropriate for the prospective party's family law matter.

(2) Provide the prospective party with information that the lawyer reasonably believes is sufficient for the party to make an informed decision about the material benefits and risks of a collaborative family law process as compared to the material benefits and risks of other reasonably available alternatives for resolving the proposed collaborative family law matter, such as litigation, mediation, arbitration, or expert evaluation.

(3) Advise the prospective party that:

(a) After signing an agreement if a party initiates a proceeding or seeks tribunal intervention in a pending proceeding related to the collaborative family law matter, the collaborative family law process terminates.

(b) Participation in a collaborative family law process is voluntary and any party has the right to terminate unilaterally a collaborative family law process with or without cause.

(c) The collaborative lawyer and any lawyer in a law firm with which the collaborative lawyer is associated may not appear before a tribunal to represent a party in a proceeding related to the collaborative family law matter, except as authorized by R.S. 9:377.9(C), 377.10(B), or 377.11(B).

The uniform provision additionally requiring attorneys to continually assess whether there is a history of coercive or violent behavior between the parties, R.S. 9:377.15, was characterized as exposing attorneys to increased liability and thereby reducing the number who may participate in this process at all. The Council agreed to delete proposed R.S. 9:377.15 from the materials and directed the Reporter to add a Comment to R.S. 9:377.14 that one of the factors to consider is whether the Post Separation Family Violence Relief Act or the Domestic Abuse Assistance Act would apply to the parties.

The Reporter next described R.S. 9:377.16, 377.17, 377.18, and 377.19 as all relative to the confidentiality of communications. These provisions set out confidentiality, the privilege, waiver thereof, and limitations. Professor Carroll further noted that the Marriage-Persons Committee consulted with the Code of Criminal Procedure Committee regarding felony and misdemeanor proceedings. The Council discussed that the confidentiality provisions may not prevent access to the courts and noted the parallel provisions concerning privileges in mediation. The Council directed the Reporter to add a Comment to emphasize that although the communication may be privileged and protected, the underlying evidence giving rise to the communication is not. All of the following were approved:

§377.16. Confidentiality of collaborative family law communication

A collaborative family law communication is confidential to the extent agreed by the parties in a signed record or as provided by the laws of this state other than this Part.

§377.17. Privilege against disclosure for collaborative family law communication; admissibility; discovery

A. Subject to R.S. 9:377.18 and 377.19, a collaborative family law communication is privileged in accordance with Subsection B of this Section, is not subject to discovery, and is not admissible in evidence.

B. In a proceeding, the following privileges apply:

(1) A party may refuse to disclose, and may prevent any other person from disclosing, a collaborative family law communication.

(2) A nonparty participant may refuse to disclose, and may prevent any other person from disclosing, a collaborative family law communication of the nonparty participant.

C. Evidence or information that is otherwise admissible or subject to discovery does not become inadmissible or protected from discovery solely because of its disclosure or use in a collaborative family law process.

§377.18. Waiver and preclusion of privilege

A. A privilege in accordance with R.S. 9:377.17 may be waived in a record or orally during a proceeding if it is expressly waived by all parties and, in the case of the privilege of a nonparty participant, it is also expressly waived by the nonparty participant.

B. A person that makes a disclosure or representation about a collaborative family law communication which prejudices another person in a proceeding may not assert a privilege in accordance with R.S. 9:377.17, but this preclusion applies only to the extent necessary for the person prejudiced to respond to the disclosure or representation.

§377.19. Limits of privilege

A. There is no privilege in accordance with R.S. 9:377.17 for a collaborative family law communication that is any of the following:

(1) Available to the public in accordance with R.S. 44:1, et seq. or made during a session of a collaborative family law process that is open, or is required by law to be open, to the public.

(2) A threat or statement of a plan to inflict bodily injury or commit a crime of violence.

(3) Intentionally used to plan a crime, commit or attempt to commit a crime, or conceal an ongoing crime or ongoing criminal activity.

(4) In an agreement resulting from the collaborative family law process, evidenced by a record signed by all parties to the agreement.

B. The privileges in accordance with R.S. 9:377.17 for a collaborative family law communication do not apply to the extent that a communication is any of the following:

(1) Sought or offered to prove or disprove a claim or complaint of professional misconduct or malpractice arising from or related to a collaborative family law process.

(2) Sought or offered to prove or disprove abuse, neglect, abandonment, or exploitation of a child or adult, unless the Department of Children and Family Services is a party to or otherwise participates in the process.

C. There is no privilege in accordance with R.S. 9:377.17 if a tribunal finds, after a hearing in camera, that the party seeking discovery or the proponent of the evidence has shown the evidence is not otherwise available, the need for the evidence substantially outweighs the interest in protecting confidentiality, and the collaborative family law communication is sought or offered in:

(1) A court proceeding involving a felony or misdemeanor.

(2) A proceeding seeking rescission or reformation of a contract arising out of the collaborative family law process or in which a defense to avoid liability on the contract is asserted.

D. If a collaborative family law communication is subject to an exception in accordance with Subsections B or C of this Section, only the part of the communication necessary for the application of the exception may be disclosed or admitted.

E. Disclosure or admission of evidence excepted from the privilege in accordance with Subsections B or C of this Section does not make the evidence or any other collaborative family law communication discoverable or admissible for any other purpose.

F. The privileges in accordance with R.S. 9:377.17 do not apply if the parties agree in advance in a signed record, or if a record of a proceeding reflects agreement by the parties, that all or part of a collaborative family law process is not privileged. This Subsection does not apply to a collaborative family law communication made by a person that did not receive actual notice of the agreement before the communication was made.

Professor Carroll then introduced R.S. 9:377.20, which allows the court to find that the parties intended to enter into a collaborative family law agreement despite minor noncompliance. Without discussion, the following provision was adopted:

§377.20. Authority of tribunal in case of noncompliance

A. If an agreement fails to meet the requirements of R.S. 9:377.4, or a lawyer fails to comply with R.S. 9:377.14 or 377.15, a tribunal may nonetheless find that the parties intended to enter into a collaborative family law participation agreement if they:

(1) Signed a record indicating an intention to enter into a collaborative family law participation agreement.

(2) Reasonably believed they were participating in a collaborative family law process.

B. If a tribunal makes the findings specified in Subsection A of this Section, and the interests of justice require, the tribunal may do the following:

(1) Enforce an agreement evidenced by a record resulting from the process in which the parties participated.

(2) Apply the disqualification provisions of R.S. 9:377.5, 377.6, 377.9, 377.10, and 377.11.

(3) Apply a privilege in accordance with R.S. 9:377.17.

To conclude the materials, the Council agreed that Sections 21 through 24 of the Uniform Collaborative Law Act should not be included in Louisiana's Act and also voted against the inclusion of a form. Professor Carroll then ended her presentation, and the November 2023 Council meeting was adjourned.

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