LOUISIANA STATE LAW INSTITUTE

MEETING OF THE COUNCIL

January 19, 2024

Friday, January 19, 2024

Persons Present:

Adams, Lauren Brink
Allen, Alena M.
Baker, Pamela J.
Belanger, Kathryn (Katie)
Braun, Jessica G.
Breard, L. Kent
Breaux, Alexander M.
Breuhl, Bailey A.
Carroll, Andrea B.
Crigler, James C., Jr.
Crochet, Anne J.
Cromwell, L. David
David, Blake R.
Davidson, James J., III
Doguet, Andre'
Dyess, Desiree Duhon
Forrester, William R., Jr.
Girouard, Destiny F.
Green, Chelsee
Gregorie, Isaac M. "Mack"
Hamilton, Leo C.
Hawthorne, George "Trippe"
Hayes, Thomas M., III
Hogan, Lila Tritico
Holdridge, Guy
Janke, Benjamin West
Knudsen, Mallory E.
Koch, Patricia E.
Lazier, Edwin G.
Lee, Amy Allums
Lonegrass, Melissa T.
Manning, C. Wendell
McCallum, Jay B.
Morgenstern, Caitlin
North, Colin M.
Pavy, Lily P.
Philips, Harry "Skip", Jr.
Price, Donald W.
Procell, Christopher A.
Riviere, Christopher H.
Roussel, Randy
Saloom, Douglas J.
Scalise, Ronald J., Jr.
Skarupsky, Lauren
Smith, Baylee M.
Smith, Kenya
Stuckey, James A.
Title, Peter S.
Tucker, Zelda W.
Vance, Shawn D.
Ventulan, Josef
Veron, J. Michael
Waller, Mallory C.
Weems, Charles S., III
Zeno, Micah C.
Ziober, John David

President L. David Cromwell called the January Council meeting to order at 10:00 a.m. on Friday, January 19, 2024 at the Lod Cook Alumni Center in Baton Rouge. After asking Council members to briefly introduce themselves, the President called on Judge Guy Holdridge, Reporter of the Code of Civil Procedure Committee, to begin his presentation of materials.

Code of Civil Procedure Committee

The Reporter began his presentation with materials relative to Language Access, stating that House Concurrent Resolution No. 71 of the 2022 Regular Session tasked the Law Institute with studying laws regarding the use of foreign language interpreters in court proceedings. Judge Holdridge further stated that the Committee worked not only with the Louisiana Supreme Court's Office of Language Access but also with other Committees of the Law Institute to codify the guidance and practices already promulgated by the Louisiana Supreme Court.

Judge Holdridge then introduced proposed revisions to Code of Evidence Article 604. He explained that the Rules of the Louisiana Supreme Court were included in the Article because those rules provide detailed guidance as to the use and role of an interpreter in proceedings. Judge Holdridge then explained that the term "expert" was removed from the Article since the Committee determined that the role of an appointed interpreter was distinct from the role of what is deemed an expert in most proceedings. He went on to explain that "interpretation" was added to the Article since there is a

distinction between interpretation and translation – only the latter of which is currently included in the statute. After brief discussion, the Council adopted the proposed language as follows:

Code of Evidence Article 604. Interpreters

An interpreter is subject to the provisions of this Code and the Rules of the Louisiana Supreme Court relating to qualification as ~~an expert~~ a court-appointed interpreter and the administration of an oath or affirmation that ~~he~~ the interpreter will make a true translation or interpretation.

Comments – 2024

The amendments to this Article make clear that the regulation and use of interpreters in court proceedings are set forth in the Rules of the Louisiana Supreme Court. The amendments also clarify that the Article applies to interpreters that are appointed by the court as officers of the court, distinguishable from interpreters retained by a party for the party's own purposes. In accordance with the Rules of the Louisiana Supreme Court, the amendment also draws the distinction between interpretation and translation. An interpretation involves hearing information spoken in one language and orally relaying the information to another in a manner that preserves the language's meaning. A translation consists of taking information that has been written in one language and conveying it in writing in another language while preserving the language's meaning.

Judge Holdridge subsequently directed the Council's attention to the proposed enactment of Code of Evidence Article 604.1. The proposed Article primarily seeks to address situations in which a qualified interpreter is not readily available, and the parties opt instead to use as an interpreter a person not qualified in accordance with the Rules of the Louisiana Supreme Court – for example, a family member. This issue is particularly prevalent in more rural parishes. Judge Holdridge then began with an explanation of Paragraph A of the Article, providing parties with the right to conduct a voir dire examination of any interpreter. After little discussion, the Council adopted Paragraph A.

Judge Holdridge then explained that Paragraph B provides for the appointment of an alternative, nonqualified interpreter with the consent of all parties. He further stated that the Committee found it necessary to provide for the right of a party to conduct a voir dire examination prior to this consent. Judge Holdridge explained that the latter provision binds the parties to the use of an interpreter and aims to avoid a party's subsequent rejection of an interpreter, since the party would have consented to the interpreter's use. He further stated that this provision is important within the context of criminal court – for example, the setting of bond – where matters may be more urgent, yet a qualified interpreter is not readily available. Beginning discussion, one Council member questioned whether a court on its own should be able to appoint an interpreter for simpler matters, asserting that a family member of a party often is used but is an inherently interested person in the proceedings. Judge Holdridge replied that as long as the other party consents, use of an inherently interested party may be appropriate. Should the parties not agree as to the use of an interpreter, the court would be required to continue the proceeding in order to procure an interpreter qualified pursuant to the Rules of the Louisiana Supreme Court. Another Council member asked whether a person appointed in accordance with Paragraph B is entitled to a fee. In response, one Council member suggested that either the current Rules of the Louisiana Supreme Court relative to compensation would apply, or an interpreter appointed in accordance with Paragraph B could agree to interpret without compensation. One Council member then asked whether a party's consent to an interpreter would bind the party to use that interpreter for future proceedings. Judge Holdridge explained that consent in a civil proceeding would be for the single hearing. Discussion then turned to the use of technology in interpretations, and the Council indicated that the proposed language should be narrowed to unequivocally contemplate that only natural persons are allowed to serve as interpreters. After further discussion, the Council adopted Paragraph B.

Judge Holdridge then explained that Paragraph C provides that any party may object to the interpretation or translation of an interpreter. One Council member questioned whether this is subject to evidentiary rules of waiver and, if so, the appropriate time to raise an objection. Another Council member then offered that the purpose of Paragraph C emphasizes the right to object, rather than the party's failure to do so. Discussion then turned to the application of the contemporaneous objection rule and the difficulties with respect to objecting to an interpretation or translation. Judge Holdridge explained that as a practical matter, parties should bring their own interpreters to proceedings, particularly to trials. Judge Holdridge reiterated that the provision aims to preserve the right to object. Further, he reminded the Council that even in proceedings in which the court has appointed an interpreter qualified under the Rules of the Louisiana Supreme Court, a party should nevertheless be able to object to the qualified interpreter's interpretation or translation. Moreover, the provision is not meant to deviate from the contemporaneous objection rule. The Council then adopted Paragraph C.

Next, Judge Holdridge directed the Council's attention to Paragraph D. After a brief explanation, one Council member asked whether "shall be retained" contemplated retention in perpetuity. The member went on to assert that if a civil record is subject to destruction, both clerks and courts should not be burdened by an obligation to retain the records once destruction has been ordered. Judge Holdridge explained that there are procedural frameworks to destroy records – for example, in civil cases, judges often order the destruction of records after a time prescribed by law has elapsed. Another Council member questioned the purpose of keeping those records in light of the evidentiary rule requiring contemporaneous objections and the waiver upon a party's failure to do so. The member expressed concern that this would create an argument providing for non-contemporaneous objections. Judge Holdridge explained that a dispute may arise regarding an interpretation to which an objection was raised, and the original audio in the original language would be needed to determine the propriety of an interpretation. In support, another Council member raised that in criminal proceedings, this provision is in line with possible arguments with respect to ineffective assistance of counsel – for example, if an interpretation was especially egregious and the attorney for the party failed to object. One Council member then stated that proceedings in small claims court are not recorded and suggested that this provision should only apply to courts of record. After a brief discussion regarding the nature of proceedings pertaining to a court of record, the Council agreed with this suggestion.

Judge Holdridge then directed the Council's attention to Paragraph E. One Council member expressed concern that in juvenile matters, a parent may be entitled to an interpreter provided for and paid by the court. The member then questioned whether it was necessary to clarify that this provision is not meant to suggest that the court compensate all interpreters for all parties. Judge Holdridge explained that the Rules of the Louisiana Supreme Court provide that the court is generally only responsible for payment of its own interpreters. The Council agreed with the suggestion and adopted the proposed language of Article 604.1 as follows:

Code of Evidence Article 604.1. Qualifications of interpreters; interpretations

A. If a party objects to the qualifications of any court-appointed interpreter, the party or the party's attorney shall have the right to conduct a voir dire examination of the interpreter.

B. If a qualified interpreter is not available for a court proceeding, upon the consent of all parties, the court may appoint a person who the court and parties agree will be able to accurately interpret the proceeding in a fair and impartial manner. Before giving consent, the party or the party's attorney shall have the right to conduct a voir dire examination of the interpreter.

C. Any party may object to the interpretation or translation of an interpreter.

D. In all court proceedings in a court of record, interpreted communications with the court shall be recorded in an audio or audiovisual format. The recordings shall be retained by the court.

E. Nothing in this Article prevents any party from having its own interpreter at any proceeding for the party's own purposes.

Comments – 2024

This Article is new and sets forth the procedure for objecting to the qualifications of a court-appointed interpreter and selecting an interpreter when a qualified interpreter is not available. This Article also provides for the recordation and retention of interpreted communications in all proceedings in a court of record and permits a party to have its own interpreter present at any proceeding for the party's own purposes.

Judge Holdridge next introduced revisions to Article 192.2. He explained that the changes were made to conform the Article with the previous proposals. Opening discussion, Council members suggested that the Article clarify that it applies to court-appointed interpreters. Judge Holdridge agreed to the Council's suggested changes, and the Council adopted the proposed language as follows:

Code of Civil Procedure Article 192.2. Appointment of interpreter for non-English-speaking persons

A. If a non-English-speaking person who is a ~~principal~~ party ~~in interest~~ or a witness in a proceeding before the court has requested that the court appoint an interpreter for the proceeding, a judge shall appoint~~, after consultation with the non-English-speaking person or his attorney, a competent interpreter to interpret or to translate the proceedings to him and to interpret or translate his testimony.~~ an interpreter in accordance with the Code of Evidence and the Rules of the Louisiana Supreme Court.

B. Notwithstanding any other provision of law to the contrary, the court shall order payment to the court-appointed interpreter for his services at a fixed reasonable amount, and that amount shall be paid out of the appropriate court fund.

C. In a proceeding alleging abuse ~~under~~ in accordance with R.S. 46:2134 et seq., an interpreter, if necessary, shall be appointed prior to a rule to show cause hearing.

Judge Holdridge then introduced a report drafted in response to House Concurrent Resolution No. 22 of the 2023 Regular Session, which tasked the Law Institute with studying the mailing of notice with respect to the commencement of certain deadlines in order to determine whether timely notice should be predicated by the date of mailing or actual receipt of the notice. The Reporter went on to explain that the Committee reviewed the applicable articles and met with various clerks of court. Judge Holdridge then noted that the lack of a uniform system, particularly with respect to how mailings are handled by various clerks of court, raised concern among stakeholders. As a result, the Committee determined that any changes at this time would likely be premature. Judge Holdridge then stated to the Council that the Committee would continue to monitor the issue and reevaluate as the issue ripens. The Council ultimately approved the report as written.

Next, Judge Holdridge introduced changes to Code of Evidence Article 702. He stated that the Federal Rules of Evidence were recently amended, and the changes presented to the Council aim to conform the Article with the new federal language. Judge Holdridge indicated that the revision does not change the law, and many judges indicated that current practices are in line with the proposed language. After brief discussion, the Council adopted the proposed language as follows:

Code of Evidence Article 702. Testimony by experts

A. A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the proponent demonstrates to the court that it is more likely than not that:

(1) The expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;

(2) The testimony is based on sufficient facts or data;

(3) The testimony is the product of reliable principles and methods; and

(4) The ~~expert has reliably applied~~ expert's opinion reflects a reliable application of the principles and methods to the facts of the case.

* * *

Comments – 2024

This amendment does not change the law. The amendment only seeks to align the language of this article with the new language of Federal Rule of Evidence 702.

Judge Holdridge then introduced proposed revisions to Code of Civil Procedure Articles 2298 and 2751. He explained that Articles 2298 and 2751 were both amended in 1981, and a Comment explaining the amendment was added to Article 2751 but not to Article 2298. He further stated that this provision was later removed from Article 2751 in 1989, but the Comment remained, as has the language in Article 2298. As a result, Comment (f) to Article 2751 should be deleted and should instead be replicated at Article 2298. With little discussion, the Council adopted the proposed language as follows:

Code of Civil Procedure Article 2298. Injunction prohibiting sale; damages

A. Injunctive relief prohibiting the sheriff from proceeding with the sale of property seized under a writ of fieri facias shall be granted to the judgment debtor or to a third person claiming ownership of the seized property:

(1) When the sheriff is proceeding with the execution contrary to law~~;~~.

(2) When subsequent to the judgment payment has been made, or compensation has taken place against the judgment, or it has been otherwise extinguished. If the payment, compensation, or extinguishment is for a part of the judgment, the injunction shall be granted to that extent, and the execution shall continue for the amount of the excess~~;~~.

(3) When the judgment is for the payment of the purchase price of property sold to the judgment debtor and a suit for recovery of the property has been filed by an adverse claimant~~; or~~.

(4) When the judgment sought to be executed is absolutely null.

B. In the event injunctive relief is granted to the judgment debtor or third party claiming ownership of the seized property, if the court finds the seizure to be wrongful, it may allow damages. ~~Attorney's~~ Attorney fees for

the services rendered in connection with the injunction may be included as an element of the damages.

Comments – 2024

Paragraph B of this Article, the substance of which was enacted in 1981, is intended to give the trial judge the discretion to award damages and attorney fees where the seizure through executory process was wrongful. It is not intended to require that damages and attorney fees be awarded in every case where an injunction is issued, for example, where an injunction is issued because of a technical deficiency or a technical error.

* * *

Code of Civil Procedure Article 2751. Grounds for arresting seizure and sale; damages

The defendant in the executory proceeding may arrest the seizure and sale of the property by injunction when the debt secured by the security interest, mortgage, or privilege is extinguished, or is legally unenforceable, or if the procedure required by law for an executory proceeding has not been followed.

OFFICIAL REVISION COMMENTS—1960

~~(f) The second paragraph to this Article, which was enacted in 1981, is intended to give the trial judge the discretion to award damages and attorney's fees where the seizure through executory process was wrongful. It is not intended to require that damages and attorney's fees be awarded in every case where an injunction is issued, for example, where an injunction is issued because of a technical deficiency or a technical error.~~

* * *

Judge Holdridge continued his presentation by directing the Council's attention to Article 863. He explained that the revision only seeks to clarify that a party or attorney may sign a pleading by electronic signature in accordance with Article 253. One Council member raised that perhaps the provision should reference with more specificity Article 253. Judge Holdridge then replied that a subsequent Council meeting would offer revisions to Article 253, perhaps alleviating any concerns. The Council then adopted the proposed language as follows:

Article 863. Signing of pleadings; effect

A. Every pleading of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose physical address and email address for service of process shall be stated. A party who is not represented by an attorney shall sign his pleading and state his physical address and email address, if ~~he~~ the party has an email address, for service of process. If mail is not received at the physical address for service of process, a designated mailing address shall also be provided. A party or attorney may sign a pleading by electronic signature in accordance with Article 253.

* * *

Next, Judge Holdridge directed the Council's attention to the proposed revision of Article 1425(F). The Reporter explained that the change seeks to clarify that a pretrial hearing is necessary to determine whether a witness qualifies as an expert or whether the methodologies employed by the witness are reliable. He noted that a recent First Circuit case held that the use of the permissive "may" did not mandate a pretrial motion. During discussion, Council members expressed that the proposed language appears to

contemplate that a party must file a motion for a pretrial hearing even if the matter is not contested. Acknowledging these concerns, Judge Holdridge offered several technical revisions, and the Council eventually adopted the proposed language as follows:

Article 1425. Experts; pretrial disclosures; scope of discovery

A.

* * *

F.(1) ~~Any party may file a motion for a pretrial hearing to determine~~ A party seeking to challenge whether a witness qualifies as an expert or whether the methodologies employed by ~~such~~ the witness are reliable under Code of Evidence Articles 702 through 705 of the ~~Louisiana Code of Evidence~~ shall file a motion for a pretrial hearing. The motion shall be filed not later than sixty days prior to trial and shall set forth sufficient allegations showing the necessity for these determinations by the court.

(2) The court shall hold a contradictory hearing and shall rule on the motion not later than thirty days prior to the trial. At the hearing, the court shall consider the qualifications and methodologies of the proposed witness based upon the provisions of Code of Evidence Articles 104(A) and 702 through 705 ~~of the Louisiana Code of Evidence~~. For good cause shown, the court may allow live testimony at the contradictory hearing.

* * *

Comments – 2024

The amendment to Paragraph F of this Article makes clear that a pretrial hearing is necessary to determine whether a witness qualifies as an expert or whether the methodologies employed by the witness are reliable. This would change the result reached by the First Circuit in Williams v. State Farm Mutual Automobile Insurance Company, 322 So. 3d 795, 797 (La. App. 1 Cir. 2021), in which the court held that the use of the permissive "may" did not mandate a pretrial motion to challenge the qualifications of an expert.

Judge Holdridge then began his presentation of Article 2595 and indicated to the Council that the proposed revision seeks to remove outdated language. With little discussion, the Council adopted the proposed language as follows:

Article 2595. Trial; decision

A. Upon reasonable notice, a summary proceeding ~~may be tried in open court or in chambers, in term or in vacation; and~~ shall be tried by preference over ordinary proceedings, and without a jury, except as otherwise provided by law.

B. The court shall render its decision as soon as practicable after the conclusion of the trial of a summary proceeding and, whenever practicable, without taking the matter under advisement.

Next, Judge Holdridge directed the Council's attention to Article 3136. He stated that the change only aims to remove an outdated reference to the Department of Revenue. With little discussion, the Council adopted the proposed language as follows:

Article 3136. Descriptive list of property in lieu of inventory

A. Whenever an inventory of succession property otherwise would be required by law, the person at whose instance the inventory would be taken may file ~~with the Department of Revenue and~~ in the succession

proceeding, in lieu of an inventory complying with Articles 3131 through 3135, a detailed, descriptive list of all succession property. This list shall be sworn to and subscribed by the person filing it, shall show the location of all items of succession property, and shall set forth the fair market value of each item thereof at the date of the death of the deceased.

B. The privilege of filing a descriptive list of succession property, in lieu of an inventory thereof, may be exercised without judicial authority.

Judge Holdridge then began his discussion of Civil Code Article 3462. He reminded the Council that it had previously approved the proposed language and thus only the Comment required approval. He further noted to the Council that numerous statutes require an action to be filed in a court of both competent jurisdiction and proper venue to interrupt prescription. The Reporter explained that the Committee originally sought to revise these statutes in conformity with the proposed revision of Article 3462 but ultimately decided against doing so. As a result, the Committee thought it appropriate to include a Comment pointing to and reminding practitioners of these statutes. Members of the Council then discussed the proposed language of the Article itself, with many expressing that practitioners often encounter issues with venue rules and agreeing that a change is warranted. Council members expressed that perhaps the Comment should not state whether the Article changes the law and instead only state that other statutes require both competent jurisdiction and proper venue. Other Council members, however, expressed that the revision presented a substantial change to the law, and thus, it is not inappropriate to indicate that in the Comment. A question was then raised with respect to whether the Comment contemplates that the relevant provisions in the Revised Statutes would be affected by the Article's language. One Council member stated that the language "Unless otherwise expressly provided by legislation," should be interpreted to emphasize that the specific provisions in the Revised Statutes remain applicable. After brief commentary, the Council ultimately accepted the proposed Comment as follows:

Civil Code Article 3462. Interruption by filing of suit or by service of process

* * *

Revision Comments - 2024

This amendment changes the law. The filing of an action in a court of competent jurisdiction will interrupt the prescriptive period even if venue is improper. There are, however, numerous more specific statutes that still require an action to be filed in a court of both competent jurisdiction and proper venue in order to interrupt prescription, including R.S. 9:5604 (professional accounting liability), 5605 (legal malpractice), 5606 (professional insurance agent liability), 5607 (professional engineer, surveyor, interior designer, architect, and real estate developer liability), and 5608 (action against home inspectors).

Judge Holdridge then directed the Council's attention to proposed Article 3601.1 relative to mandatory injunctions. One Council member stated that jurisprudence draws a distinction between prohibitory and mandatory injunctions, directing what may be done rather than prohibiting an action. The member expressed that if irreparable injury truly exists, the remedy should be a summary proceeding. Ultimately, the Council deferred consideration of Article 3601.1, as well as the repeal of Article 3784.

Judge Holdridge then concluded his presentation, and the President 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 proposed Planned Community Act bill was submitted to the legislature during the 2022 Regular Session; however, at the request of the author, the bill was delayed to give the Reporter and the

Committee time to meet with associations and interest groups. Today's presentation thus includes proposed changes and compromises as noted in the accompanying memorandum.

Directing the Council to page 38 of the materials, the Reporter read new Subsection A of R.S. 9:1141.21 regarding the composition of the board of directors and applicable procedures. One Council member asked if there are additional time limitations if a meeting has to be adjourned and reconvened due to the lack of a quorum. The Reporter noted that existing nonprofit law applies and that the meeting could be reconvened as soon as later that afternoon as long as the new place and time were declared at the originally called meeting. R.S. 9:1141.21(A) was adopted as follows:

§1141.21. Board of directors and officers of the association

A. The board of directors shall consist of at least three persons, each of whom shall be a lot owner or a representative of a lot owner if the lot is owned by a juridical person. If the planned community consists of fewer than three lots, the board of directors shall consist of the same number of persons as there are lots. Except as otherwise provided in R.S. 9:1141.17(E), a special meeting of the association shall be held for the purpose of electing the board of directors at least thirty days prior to the termination of the period of declarant control. The meeting notice shall be given, in accordance with R.S. 9:1141.38, no more than sixty days and no fewer than thirty days before the date of the meeting. If a quorum is not present at the meeting, then it may be adjourned and reconvened by the association at the place and time declared at the meeting, at which time those lot owners who are present shall constitute a quorum for purposes of electing the board of directors. Unless the community documents provide for the election of officers by the lot owners, the board of directors shall be entitled to elect the officers. The directors and officers shall take office upon the termination of the period of declarant control.

Turning to R.S. 9:1141.21(D)(6), Mr. Roussel explained that an additional limitation on the authority of the board of directors is being proposed in light of a recent case. In that case, homeowners voted against adding a more burdensome use restriction, so the board, in an end-around, imposed the same more burdensome restriction by passing rules and regulations that do not require homeowner approval. One Council member questioned the reference to R.S. 9:1141.14(C) and questioned whether the proposal is only providing that the board does not have the authority to change the voting requirements. Mr. Roussel explained that the intent of the new language is to prohibit boards from imposing rules that are contrary to an issue upon which the homeowners have previously voted. Other Council members read the provision more broadly but, in order to be specific and clear in light of recent jurisprudence, the Reporter accepted the following change:

D. The board of directors shall not do any of the following:

* * *

(6) Impose any rules or regulations inconsistent with the declaration.

Mr. Roussel then explained that the change to R.S. 9:1141.36(G) simply rewords the proposal for clarity. Council members asked for examples of improper purposes, and the Reporter noted harassment, political or religious targeting, and business advertisement. With one addition, the following provision was approved:

§1141.36. Association records

* * *

G. Information provided pursuant to this Section shall not be used for commercial or other improper purposes, and the association may deny access to information if the association has a good faith belief that the information is being requested for such purposes. ~~The court may order the person obtaining information from the association to pay the association's expenses if the court determines that the information was used for an improper purpose.~~ If an action is filed regarding the production of information, the court may order that the association's expenses be reimbursed upon determining that the information was used for commercial or other improper purposes.

Mr. Roussel then moved to R.S. 9:1141.37(B) regarding rules and rationalized that, because Subsection A requires the board to provide notice and the text of a proposed rule or amendment to owners, the requirement of providing a copy of the adopted, amended, or repealed rule in Subsection B may be eliminated. One Council member then noted that R.S. 9:1141.26(A)(3)(a) requires that proposed amendments to the declaration be generally described and questioned whether these two circumstances should be consistent. The Council also pondered a situation in which the proposed rule is amended at the meeting and what is ultimately adopted ends up being different from what was included in the notice received by the owners. The Reporter noted the input from community associations regarding the expense and the burden associated with providing notice before and copies after when posting on the association website would be effective. The Council thereafter adopted the following changes:

§1141.26. Meetings

A. The following requirements apply to association meetings:

* * *

(3) The association shall notify lot owners of the time, date, and place of each annual and special meeting not more than sixty days nor fewer than thirty days before the meeting date. Notice may be given by any means provided in R.S. 9:1141.38. The notice shall state the items on the agenda, including the following:

(a) The general nature and text of any proposed amendment to the community documents.

§1141.37. Rules

* * *

B. Following the adoption, amendment, or repeal of a rule, the board of directors shall notify the lot owners of its action and provide a copy of the text of the rule if it is different from that stated in the notice given in accordance with Subsection A of this Section.

The Reporter next focused on R.S. 9:1141.38(C) and explained the need to add instructions for providing notice to owners during an emergency. One Council member asked if the word "emergency" is defined, and if not, whether it includes public or economic emergencies or just natural disasters and acts of God. Another Council member worried that this provision would be a trap for the unwary or a violation of the statute if the board acts in an emergency without first attempting to give notice. The Council asked, and the Reporter accepted, that the emergency notice inform the owner of the nature of the emergency. The following changes were thereafter approved:

§1141.38. Notice to lot owners

* * *

C. In the event of an emergency, notice may be given by whatever method the association deems appropriate to provide reasonable notice to the lot owners regardless of the provisions of Subsection A of this Section. The notice shall state the nature of the emergency.

Mr. Roussel next drew attention to the highlighted and bolded language in R.S. 9:1141.39(A) and noted that it is unnecessary to address the type of votes in this Subsection because R.S. 9:1141.28 more specifically does so. With little discussion, the following language was adopted:

§1141.39. Removal of directors and officers

A. Notwithstanding any provision of the community documents to the contrary, lot owners ~~present in person, by proxy, or by absentee ballot~~ at any meeting of the association at which a quorum is present and for which notice of removal was given may by majority vote remove any director of the board of directors and any officer of the association elected by the lot owners, with or without cause. However, a director appointed by the declarant may not be removed during the period of declarant control.

* * *

Turning to R.S. 9:1141.45(A)(13), the Reporter noted a few minor changes for conformity with the wording used in the proposed Condominium Act. The Council quickly approved the following:

§1141.43. Public offering statement; requirements

A. A public offering statement shall contain and fully and accurately disclose all of the following:

* * *

(13) A description of and the amount of the premiums for the insurance coverage provided for the benefit of the association and lot owners.

* * *

Moving to R.S. 9:1141.45(A)(2), Mr. Roussel explained the addition of the highlighted phrase for clarity. Without discussion, the following language was adopted:

§1141.45. Express warranties of declarant

A. Express warranties made by a declarant to an unrelated purchaser, if relied upon by the unrelated purchaser, regardless of the delivery or receipt of a public offering statement, are created as follows:

* * *

(2) A provision that a purchaser may put a lot only to a specified use is an express warranty that the specified use is lawful at the time the warranty was made.

* * *

The next change appeared on page 68 in R.S. 9:1141.47(B), and the Reporter noted that it was made upon request of interest groups. Mr. Roussel gave the example of a community wherein the developer is also the contractor and has control of the board. If there is faulty construction, the developer would not bring suit against himself, therefore the proposal would allow a lot owner to enforce a claim on his own behalf if the association fails to do so. Members of the Council first equated the claim to a derivative action but

then noted that if an owner recovers money for a claim relative to the common areas, that is personal. Mr. Roussel stated that if the pool is unusable, the owner may have recoverable expenses because he paid to swim elsewhere, but the Council still questioned whether there is a right of action to recover money to actually repair the pool. Council members expressed further concern regarding intervention and res judicata and questioned whether a separate claim should be created for lot owners outside of the warranty claim in this Section because the interests of the association and the owners could be different. The Reporter emphasized that these claims relate to the quality of construction and not the existence of construction, which is addressed in R.S. 9:1141.49. One Council member then asked if the phrase "loss, injury, or damage" includes just loss of use or also economic damages related to a decrease in property value. Another Council member asked whether prescription was interrupted or suspended during the period of declarant control and about the resurrection of claims. After the Council offered a few revisions to clarify and limit the claim, the provision was recommitted.

Mr. Roussel then concluded his presentation, and the Council adjourned for lunch.

Marriage-Persons Committee

After lunch, the President called on Professor Andrea B. Carroll, Reporter of the Marriage-Persons Committee, to begin her presentation of materials. Professor Carroll first introduced to the Council Senate Resolution No. 31 of the 2023 Regular Session, which requests the Law Institute to study and make recommendations as to whether a limited continuing tutorship should be established. After researching the issues, the Marriage-Persons Committee proposes the creation of limited continuing tutorship as a less expensive and quicker alternative to seeking a limited interdiction for persons meeting the requirements. The Committee also seeks to revise the standard for continuing tutorship to include adaptive functioning upon the request of practitioners and mental health professionals.

Reviewing the Section heading and Civil Code Article 354 on page 6 of the materials, the Reporter explained the duplicative use of the terms "permanent" and "continuing" throughout this Section of the Code and the Committee's suggestion to delete "permanent" for conciseness and clarity. The Reporter also noted the recommendation to properly reference persons with disabilities. One Council member questioned the phraseology of "Persons, including certain children", and the Reporter pointed out the requirements for continuing tutorship contained in Civil Code Article 355, explaining that, in practice, once a person attains the age of majority, interdiction becomes the proper avenue. With a minor change to the proposal, the following provision was approved:

SECTION 12--OF CONTINUING ~~OR PERMANENT~~ TUTORSHIP OF PERSONS WITH ~~INTELLECTUAL~~ DISABILITIES

Civil Code Article 354. Procedure for placing under continuing tutorship

~~Persons, including certain~~ Certain children~~,~~ with ~~intellectual~~ disabilities ~~or mental deficiencies~~ may be placed under full or limited continuing ~~or permanent~~ tutorship without formal or complete interdiction in accordance with the following rules and the ~~procedures stated in the Louisiana~~ provisions of the Code of Civil Procedure.

Revision Comments – 2024

(a) This revision changes the law to provide for the possibility of a limited continuing tutorship of a minor, and to mirror the law of interdiction, which provides for the possibility of both full and limited interdiction. Where the candidate for continuing tutorship has an intellectual or adaptive functioning level that renders him consistently able to make reasoned decisions regarding some, but not all, matters, a limited continuing tutorship may be appropriate.

(b) This revision changes the nomenclature to refer only to "continuing" tutorship. Previously, the phrases "continuing tutorship" and "permanent tutorship" were used interchangeably. This revision suppresses the use of the phrase "permanent tutorship" in the interest of accuracy and to avoid superfluity.

Professor Carroll next drew attention to Civil Code Article 355 and noted the application to children above the age of fifteen with less than two-thirds intellectual functioning. She expounded upon the addition of the adaptive functioning criteria and the Comment that points out the most commonly used test to determine adaptive functioning. The Council then discussed clarifying the application to certain children between the ages of fifteen and eighteen years of age and examined the procedure for modifying the tutorship after the person reaches the age of majority. The following was approved:

Civil Code Article 355. Petition for full or limited continuing ~~or permanent~~ tutorship

When ~~a person~~ an unemancipated minor above the age of fifteen possesses less than two-thirds of the intellectual or adaptive functioning of a person of the same age with average intellectual or adaptive functioning, evidenced by standard testing procedures administered by competent persons or other relevant evidence acceptable to the court, the parents of ~~such~~ the person, or the person entitled to custody or tutorship if one or both parents are dead, incapacitated, or absent persons, or if the parents are judicially separated or divorced or have never been married to each other, may, with the written concurrence of the coroner of the parish of the ~~intellectually~~ disabled person's domicile, petition the court of that district to place ~~such~~ the person under a full or limited continuing tutorship which shall not automatically end at any age but shall continue until revoked by the court of domicile. The petitioner shall not bear the coroner's costs or fees associated with securing the coroner's concurrence.

Revision Comments – 2024

This revision changes the standard for placing a person under continuing tutorship to allow the court to consider either intellectual or adaptive functioning. Prior law did not allow children functioning at very low levels in the areas of communication, daily living skills, and socialization to be placed under continuing tutorship where their intellectual functioning was near average. This revision permits broader considerations of disability, including, for example, adaptive functioning under the Vineland-3 Adaptive Behavior Scale.

Focusing on Civil Code Articles 356 and 357, the Reporter identified the proposed changes as ministerial. One Council member requested the deletion of Paragraph (2) of Article 356 as confusing due to the consensus that persons over the age of majority may not be placed under a continuing tutorship. The Reporter agreed, and the following were adopted:

Civil Code Article 356. Title of proceedings; procedural rules; parent to be named tutor

The title of the proceedings shall be Continuing Tutorship of (Name of Person), A Person with ~~an Intellectual~~ a Disability.

(1) When the person to be placed under the full or limited continuing tutorship is above the age of fifteen, and under the age of majority, the proceeding shall be conducted according to the procedural rules established for ordinary tutorships.

(2) ~~When the person to be placed under the continuing tutorship is above the age of majority, the proceeding shall be conducted according to the procedural rules established for interdictions.~~

~~(3)~~ When the parents of the person to be placed under the full or limited continuing tutorship are married to each other and petition jointly, the court shall appoint the parents as co-tutors, unless for good cause the court decrees otherwise.

~~(4)~~ (3) When the parents of the person to be placed under the full or limited continuing tutorship are married to each other but do not petition jointly, the court shall appoint either a petitioning parent as tutor or both individually petitioning parents as co-tutors, in accordance with the best interest of the child.

~~(5)~~ (4) Upon the petition of a parent of the person to be placed under the full or limited continuing tutorship, the court shall, unless good cause requires otherwise, appoint as tutor the petitioning parent who is:

(a) The surviving parent, if one parent is dead.

(b) The parent awarded custody during minority of the person to be placed under the full or limited continuing tutorship, if the parents are divorced or judicially separated.

(c) The parent who was tutor or tutrix during minority, if the parents were never married to each other.

Revision Comments – 2024

This revision makes it clear that continuing tutorship may be sought only for persons between the ages of fifteen and eighteen. Once a person reaches the age of majority, Louisiana's law of interdiction applies. *See, e.g.*, Civil Code Articles 389, et seq.

Civil Code Article 357. Decree~~,~~; place of recording~~,~~; notice~~.~~

If the prayer for full or limited continuing ~~or permanent~~ tutorship ~~be~~ is granted, the decree shall be recorded in the conveyance and mortgage records of the parish of the minor's domicile, and of any future domicile, and in ~~such~~ other parishes as may be deemed expedient. The decree shall not be effective as to persons without notice thereof outside of the parishes in which it is recorded.

Moving to discussion of Civil Code Article 358, the Reporter again noted the ministerial changes and specifically drew attention to this provision's application to only full continuing tutorship. In this situation, the tutor will be granted the same authority, privileges, and responsibilities as in other tutorships. With little discussion, the following was approved:

Civil Code Article 358. ~~Authority,~~ Full continuing tutorship; authority; privileges~~,~~ and duties of tutor and undertutor; termination of tutorship

The granting of ~~the~~ a decree of full continuing tutorship shall confer upon the tutor and undertutor the same authority, privileges, and responsibilities as in other tutorships, including the same authority to give consent for any medical treatment or procedure, to give consent for any educational plan or procedure, and to obtain medical, educational, or other records, but the responsibility of the tutor for the offenses or quasi-offenses of the person ~~with an intellectual disability~~ under continuing tutorship shall be the same as that of a curator for those of ~~the~~ an interdicted person and the tutorship shall not terminate until the decree is set aside by the court of

the domicile of the person under continuing tutorship, or the court of last domicile if the domicile of the person ~~with an intellectual disability~~ under continuing tutorship is removed from the State of Louisiana.

Professor Carroll then introduced the creation of Civil Code Article 358.1 to provide for the authority of a tutor in a limited continuing tutorship and noted the parallels to the law regarding interdiction. A Council member mentioned the requirement in Code of Civil Procedure Article 4541 that the petition include a description of the efforts to use less restrictive means before seeking interdiction and questioned whether such language would be appropriate in this case when the person is under the age of eighteen. The Council then noted that the court of domicile that terminates the tutorship may be different from the issuing court. Thereafter, the following was adopted:

Civil Code Article 358.1 Limited continuing tutorship; authority; privileges and duties of tutor and undertutor; termination of tutorship

The granting of a decree of limited continuing tutorship shall confer upon the tutor and undertutor only the authority, privileges, and responsibilities required to protect the interest of the person under limited continuing tutorship, and the tutorship shall not terminate until the decree is set aside by the court of the domicile of the person under continuing tutorship, or the court of last domicile if the domicile of the person under continuing tutorship is removed from the State of Louisiana.

Moving to Civil Code Article 359, the Reporter indicated the addition of the second sentence to address limited continuing tutorship. One Council member pointed out the fact that minors may have some legal capacity in certain circumstances and wondered if the use of "an unemancipated minor" would be more accurate. Professor Carroll explained the Committee's desire to not disturb the law in other places relative to capacity to run a business or execute a will but agreed that the word "unemancipated" provides clarification. Another Council member asked whether it would be possible for a person to be under a full continuing tutorship and maintain some right to contract or under a limited continuing tutorship and not have any capacity. The Reporter answered affirmatively and remarked that the decree of the court will control in all circumstances and that the intent is to allow courts as much flexibility as possible. The proposal was approved with the following changes:

Civil Code Article 359. Restriction on legal capacity

~~The decree if granted shall restrict~~ A person under full continuing tutorship has the legal capacity ~~of the person with an intellectual disability to that~~ of ~~a~~ an unemancipated minor or such lesser capacity as may be ordered in the decree. A person under limited continuing tutorship has legal capacity in accordance with the decree of continuing tutorship.

To conclude the materials on this topic, the Reporter addressed the changes to Civil Code Articles 360, 361, and 362 together. One Council member noted that Article 361 gives capacity to the minor to contest the decree, but it is unclear whether this language gives the person capacity to modify or terminate the continuing tutorship. The Council member further expressed concern about whether the person under the continuing tutorship could sign a petition. The Reporter believes the second sentence of the Article is broad enough but agreed to add a Comment clarifying that the word "contest" includes objecting to the initial decree or seeking to later modify or terminate the decree. The following articles were approved as recommend:

Civil Code Article 360. Parents' rights of administration

In addition to the rights of tutorship, the parents shall retain, during the marriage and for the minority of the child ~~with an intellectual disability~~ under continuing tutorship, all rights of administration granted to parents of children ~~without an intellectual disability~~ not under continuing tutorship during their minority.

Civil Code Article 361. Contest of decree restricting legal capacity

The decree restricting ~~his~~ legal capacity may be contested in the court of domicile by the person under continuing tutorship himself or by anyone adversely affected by the decree. For good cause, the court may modify or terminate the decree restricting legal capacity.

Revision Comments – 2024

Under this Article, a person may contest the decree by objecting to its initial issuance, or by seeking a later modification or termination of the decree.

Civil Code Article 362. Persons subject to interdiction

Persons subject to mental or physical illness or disability, whether of a temporary or permanent nature, of such a degree as to render them subject to interdiction, ~~under~~ in accordance with the provisions of Title IX ~~hereof~~ of this Code, remain subject to interdiction as provided in Articles 389 to 399, ~~inclusive,~~ and ~~such~~ any other laws as may relate thereto.

Professor Carroll then directed the Council to the next topic on mental health evaluations. She explained that the first Senate resolution on this topic was received in 2018 and the Law Institute recommended Act 614 of the 2022 Regular Session concerning the qualifications of mental health professionals and prohibiting ex parte communication. Following the 2022 Session, the Law Institute received two additional resolutions containing the continued directive to review laws and procedures related to evaluations conducted by mental health professionals and used in child custody and visitation proceedings. The Reporter further explained the confusion in the law between mental health evaluations and full-scale custody evaluations. After carefully reviewing the resolutions and conducting research, the Marriage-Persons Committee decided to focus on the following four issues: (1) distinguishing between mental health and custody evaluations, (2) determining the weight that is to be given to reports, (3) reducing costs, and (4) addressing situations of domestic abuse.

Focusing on page 12 of the materials and the proposed revisions to R.S. 9:331, Professor Carroll noted the separation of mental health evaluations from child custody evaluations. In a mental health evaluation, the evaluator only provides an opinion on the mental health of the parties. The evaluator does not recommend which parent should be the domiciliary parent or how often visitation should occur. The Reporter pointed out the specific addition of the phrase "mental health" to Subsection A for clarity. In addition, Subsection B was revised so that the evaluator's report is provided to the parties and to clarify that the evaluator shall serve as a witness. These changes draw attention to the fact that these reports are simply one piece of evidence and are subject to cross-examination as well as all of the other rules of evidence. The following language was approved as presented:

R.S. 9:331. Custody or visitation proceeding; mental health evaluation by licensed mental health professional

A. The court may order ~~an~~ a mental health evaluation of a party or the child in a custody or visitation proceeding for good cause shown. The mental health evaluation shall be made by a licensed mental health professional selected by the parties or by the court. The court may render judgment for costs of the mental health evaluation, or any part thereof, against any party or parties, as it may consider equitable and taking into consideration the parties' ability to pay. The Court may also preliminarily allocate costs at the outset and reverse the right to reallocate upon conclusion of the matter.

B. The court may order a party or the child to submit to and cooperate in the mental health evaluation, testing, or interview by the licensed mental health professional. The licensed mental health professional shall provide

~~the court and~~ the parties with a written report. The licensed mental health professional shall serve as ~~the~~ a witness ~~of the court~~, subject to cross-examination by a party.

The Reporter then provided background information relative to Subsection C and noted that the Committee recommends the deletion of the exceptions on line 19 of page 12. She explained that those exceptions to the qualifications of a licensed mental health professional were added by the legislature in 2022 to arguably allow ministers and rabbis to conduct mental health evaluations. Although the Committee recognizes the important work done by ministers and rabbis, it does not believe that they are qualified to conduct this type of evaluation. With little discussion, Subsection C was approved as presented:

C. "Licensed mental health professional" as used in this ~~Chapter~~ Section means a person who possesses at least a master's degree and who ~~is licensed~~ holds a current unrestricted license in counseling, social work, psychology, or marriage and family counseling~~, or exempt from licensing requirements pursuant to R.S. 37:1113 and 1121~~.

Moving to Subsections D and E, Professor Carroll mentioned that advocates for domestic abuse victims attended Committee meetings and requested special consideration with respect to issues of coercion and control. The proposed language is modeled after existing language in the Post Separation Family Violence Relief Act. Without further discussion, all of the following provisions were approved:

D. Any licensed mental health professional appointed by the court to conduct a mental health evaluation in a case where domestic abuse is an issue shall have current and demonstrable training and experience working with perpetrators and victims of domestic abuse.

~~D.~~ E. When a licensed mental health professional has been appointed by the court, there shall be no ex parte communication by the litigants or their attorneys with the licensed mental health professional unless authorized by law or court order or agreed to by the parties. All oral communication with the licensed mental health professional shall be by teleconference or meeting in which each party to the proceeding participates either through the party's attorney or as a self-represented litigant. All written communication or correspondence to the licensed mental health professional, along with any attachments thereto, shall be provided contemporaneously to all parties to the litigation or their attorneys of record. Communications initiated by the licensed mental health professional with a litigant for the purpose of conducting the court-ordered evaluation shall not be considered ex parte communications prohibited by this Subsection.

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Introduction and use of mental health evaluations in court are governed by the general rules of the Code of Civil Procedure and the Code of Evidence.

Next, Professor Carroll introduced a new provision to exclusively address child custody evaluations and explained that although most of the concepts are parallel to R.S. 9:331, it is important to specifically set forth the standards and ethical responsibilities of child custody evaluators. The proposal is intended to bring legitimacy and consistency to this area of the law, which greatly impacts the lives of many of the most vulnerable citizens: children. The Reporter informed the Council that the Committee compromised on the recommendation to require a licensed mental health professional to conduct at least five court-ordered child custody evaluations under the supervision of a child custody evaluator prior to becoming qualified as a child custody evaluator in their own right. The Council questioned the circular nature of these provisions and noted procedural issues surrounding appointment and supervised performance. One Council member also suggested separating out the qualifications from the conduction of the evaluation for clarity. The Reporter agreed to redraft Subsection A in light of this discussion.

Moving to proposed R.S. 9:331.3(B), the definition of "licensed mental health professional," the Reporter noted the addition of the unrestricted qualifier, and a Council member asked why the same term is used when conducting a child custody evaluation to determine best interest and a mental health evaluation for an entirely different purpose. The Reporter discussed the desire to retain the meaning of the phrase because it is also used elsewhere in the law. Another Council member stated that determining the best interest of the child is the role of the court, not a mental health professional. Turning to Subsection C, the Reporter pointed out the use of the same language previously approved to specifically address the unique circumstances surrounding domestic abuse. All of the following language was approved:

R.S. 9:331.3. Custody or visitation proceeding; court-ordered child custody evaluation

* * *

B. "Licensed mental health professional" as used in this Section means a person who possesses at least a master's degree and who holds a current unrestricted license in counseling, social work, psychology, or marriage and family counseling.

C. In a case where domestic abuse is an issue the child custody evaluator shall have current and demonstrable training and experience working with perpetrators and victims of domestic abuse.

In considering Subsection D of this Section, the Reporter explained the Committee's desire to call attention to how expensive court-ordered evaluations are and specifically provide courts with the flexibility to render costs in an equitable manner. The cost limits the usefulness of the reports when the parties cannot afford to depose the evaluator or have them testify. One Council member asked why the same language was not replicated in the mental health evaluation provision, and Professor Carroll responded that the costs are not as expensive by nature. To eliminate an argument as to whether the court may consider the parties' ability to pay for one type of evaluation but not for the other, the Council approved adding the same language to R.S. 9:331(A). Following discussion, Subsection D was approved as presented:

D. The court may render judgment for costs of the child custody evaluation, or any part thereof, against any party or parties, as it may consider equitable and taking into consideration the parties' ability to pay. The court may also preliminarily allocate costs at the outset and reserve the right to reallocate upon conclusion of the custody matter.

Professor Carroll next detailed the necessity of the provisions of Subsections E, F, and G to clarify the manner in which the report should be used and how much weight it should be given in a court of law. The Committee heard from members and guests that some reports are considered as fact without an opportunity to rebut the contents even though the law already provides for cross-examination of the evaluator. One Council member asked whether the court should be able to call the evaluator as a witness, but several other members of the judiciary responded that it is the parties' duty to prove the case. All of the following provisions were then approved as presented:

E. The child custody evaluator shall provide the parties with a written report. This report shall state the basis of the evaluator's conclusions or recommendations, and the extent to which the information obtained limits the reliability and validity of the opinion and the conclusions and recommendations of the evaluator.

F. There shall be no presumption in favor of the child custody evaluator's findings.

G. The child custody evaluator shall serve as a witness, subject to cross-examination by a party.

In finishing the materials, the Reporter noted that Subsection H is identical to the provision in R.S. 9:331 that prohibits certain ex parte communication, and the Comments reiterate that these reports are also governed by the Code of Civil Procedure and the Code of Evidence. Without discussion, the following language was approved:

> H. When a child custody evaluator has been appointed by the court, there shall be no ex parte communication by the litigants or their attorneys with the child custody evaluator unless authorized by law or court order or agreed to by the parties. All oral communication with the child custody evaluator shall be by teleconference or meeting in which each party to the proceeding participates either through the party's attorney or as a self-represented litigant. All written communication or correspondence to the child custody evaluator, along with any attachments thereto, shall be provided contemporaneously to all parties to the litigation or their attorneys of record. Communications initiated by the child custody evaluator with a litigant for the purpose of conducting the court-ordered evaluation shall not be considered ex parte communications prohibited by this Subsection.

Revision Comments – 2024

(a) In Subsection D of this Section, *See* R.S. 9:365, requiring such experience when the Post-Separation Family Violence Relief Act applies.

(b) Under this Section, the court may order a child custody evaluation that is broad in scope, or it may limit the scope of the evaluation to a particular area.

(c) Expert child custody evaluations are also governed by the general rules of the Code of Civil Procedure and the Code of Evidence.

Professor Carroll then concluded her presentation, and there being no additional business, the January 2024 Council meeting was adjourned.

Jessica G. Braun

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