LOUISIANA STATE LAW INSTITUTE

MEETING OF THE COUNCIL

February 14, 2025

Friday, February 14, 2025

Person Present:

Alpandinar, Erin N.
Belanger, Kathryn (Katie)
Borel, Danielle L.
Braun, Jessica G.
Breard, L. Kent
Crigler, James C., Jr.
Crochet, Anne J.
Cromwell, L. David
Darensburg, June Berry
Davrados, Nikolaos A.
Doguet, Andre'
Forrester, William R., Jr.
Gregorie, Isaac M. "Mack"
Grochowski, Mateusz F.
Gulotta, James
Hamilton, Leo C.
Hayes, Thomas M., III
Hogan, Lila Tritico
Holdridge, Guy
Holthaus, C. Frank
Janke, Benjamin West
Johnson, Rachael D.
Kutcher, Robert A.
Lee, Amy Allums
Lonegrass, Melissa T.
McCallum, Jay B.
Miller, Gregory A.
Norman, Rick J.
North, Donald W.
Payer, Julie Baxter
Penzato, Allison H.
Philips, Harry "Skip", Jr.
Price, Donald W.
Procopio, Sarah M.
Ramsey, Regina
Richardson, Sally Brown
Riviere, Christopher H.
Saloom, Douglas J.
Scalise, Ronald J., Jr.
Schimmel, Kathryn E.
Smith, Kenya J.H.
Sossamon, Meera U.
Stuckey, James A.
Talley, Patrick A.
Talley, Susan G.
Talluto, John
Thrower, Jason B.
Ventulan, Josef
Waller, Mallory C.
Walters, Edward J., Jr.
White, H. Aubrey, III
Ziober, John David

President L. David Cromwell called the February 2025 Council meeting to order on Friday, February 14, 2025 at the Lod Cook Alumni Center in Baton Rouge. After asking Council members to briefly introduce themselves, the President called on Judge Guy Holdridge, Director and Reporter of the Code of Civil Procedure Committee, to begin his presentation of materials.

Code of Civil Procedure Committee

Judge Holdridge began his presentation by directing the Council to the report in response to House Resolution No. 150 of the 2024 Regular Session. He stated that the resolution tasked the Law Institute with a study regarding the creation of small or speedy claims procedures for delictual actions under fifty thousand dollars. Judge Holdridge explained that, upon receipt of the resolution, the Code of Civil Procedure Committee noted that a similar study was conducted in response to Senate Concurrent Resolution No. 108 of the 2012 Regular Session, tasking the Law Institute to study expedited jury trials. As a result, the materials of the previous study were adapted to create an initial draft of suggested revisions for the present study. The Committee, however, noted various issues, including the limited level of demand for jury trials of delictual actions under fifty thousand dollars, and ultimately determined that the promulgation of new rules for jury trials of claims less fifty thousand dollars would create multiple trial frameworks and cause confusion to practicing attorneys and courts, leading to even more delays – particularly in smaller parishes where the availability of trial dates is often limited. Ultimately, the proposal did not achieve sufficient support for approval by the Code of Civil Procedure Committee; rather, the Committee suggested that the Legislature review the Committee's previous work set forth in House Bill No. 321 of the 2013 Regular

Session as a framework for any possible new legislation. Accordingly, the report in response to the resolution proposes that no revisions be made at this time. Judge Holdridge further indicated that the Code of Civil Procedure Committee would continue to monitor this issue and reevaluate the law as needed. After a brief discussion, the Council adopted the report.

Next, Judge Holdridge directed the Council to the materials relative to Code of Civil Procedure Article 1915. He reminded the Council that the proposed language seeks to address confusion with respect to the appealability of partial judgments. Judge Holdridge explained that the trial court's ability to certify a partial judgment as final, and therefore appealable, would often encounter the appellate court's opposite determination, ultimately leading to dismissal of the appeal. This, in addition to the practice of filing both an appeal and a writ, has led to unnecessary increases in the cost of litigation. To address this issue, practitioners and members of the Code of Civil Procedure Committee and its Appellate Subcommittee expressed interest in removing the trial court's ability to designate a judgment as final and clearly demarcate the appealability of partial judgments. Summarizing the changes to Article 1915, Judge Holdridge stated that although Paragraph A remains relatively unchanged, the provision would now provide for appealable judgments. He then stated that revisions to Paragraph B, repealing the trial court's ability to designate a judgment as final, set forth language found in former Paragraph C, providing for retention of the trial court's jurisdiction. Continuing, he explained that revisions to Paragraph C adapt language from the former Paragraph B and provide for partial interlocutory judgments. Additionally, new Paragraph D seeks to clearly define the commencement of the applicable legal delays, requiring that all judgments rendered in accordance with the Article be reduced to writing and signed by the court. Judge Holdridge further indicated that other articles were changed to conform with these revisions. The Reporter subsequently stated that numerous proposals were considered prior to the Committee's consensus, including one in which the appellate court was required consider the merits of a writ. These proposals, however, were met with much opposition, with many arguing that such a consideration would become the law of the case, depriving the ability to later appeal those issues.

Beginning discussion of Paragraph A, Judge Holdridge directed the Council's attention to page 1, line 7 of the materials, which states "or fully resolves the claims and issues." He explained that the language was added to address a recent appellate decision and clarify that if a judgment does not fully resolve the claims and issues as to fewer than all of the parties, then the matter is likely to fall under new Paragraph C. One Council member then pointed out that this language is not entirely consistent with language used later in the Article, providing "claims, demands, issues, or theories." In response, Judge Holdridge explained that the change in Paragraph A is narrower, clarifying that there are no outstanding issues with respect to a party that was dismissed, while the latter language is broader, applying to interlocutory judgments generally. Another Council member questioned whether the language was truly necessary since dismissal presupposes that all of the claims and issues have been resolved. In response, one Council member raised that Paragraph A is narrower and may be inapplicable to that situation since the first sentence contains the language "even though." The Council then discussed the context of the provision, historically interpreted to apply to both matters that resolve the claims and issues and those that do not. It was then discussed whether the provision should replace "suit" with "action." One Council member asked whether such a change would address the appealability of a principal demand while the attendant reconventional demand remained unadjudicated. He asserted that replacing "suit" with "action" would change the commonly accepted interpretation – that is, wholesale and partial resolution – since "action" would apply separately to both the principal and reconventional demand. Another member pointed out that the heading was changed to emphasize that the provision encompasses both scenarios. Consequently, because the provision has been interpreted to contemplate dismissal of the entire suit, it would be inappropriate to draw a distinction at this time. The Council then discussed how various courts have disagreed with this application of the Article. Judge Holdridge subsequently noted that the Committee was hesitant to revise Paragraph A and left it relatively unchanged due to the large body of jurisprudence interpreting the provision, guiding courts and lending to the appealability of the judgments contemplated therein. One Council member suggested that while it may be appropriate to perhaps task the Code of Civil Procedure Committee with

reviewing how judgments have been statutorily defined, he agreed with the proposed Paragraph A – particularly, in light of the revisions to Paragraph B. Another Council member pointed out that language as to dismissal of the suit is absent in similar provisions, and thus appropriate to include within Paragraph A. Further, in support of the proposal, another member noted that the failure to dismiss all of the claims or issues as to one party clearly falls within the realm of new Paragraph C, that being an interlocutory judgment – thus, the language is consistent with jurisprudence. Members of the Council then discussed whether judgments should explicitly dismiss or grant all of the claims, with many stating that courts – particularly high-volume courts – are not always able to examine and evaluate a judgment's compliance with various statutory provisions.

Returning to the language, one Council member asked whether "or" or "and" would be appropriate on page 1, line 7. He explained that "or" seems to provide for the finality of a resolved principal demand while the reconventional demand remains unadjudicated. Judge Holdridge replied that while all of the issues of that party may be resolved, it is likely not a final judgment since the resolution of the principal demand may not resolve all of the issues as to that party – those remaining issues being contained within an opposing party's reconventional demand. He went on to state that it would be inappropriate for that issue to be appealable in light of a potential subsequent trial on the reconventional demand. A suggestion was then made to separate the concepts in Subparagraph (A)(1) into separate subparagraphs. The Council member further pointed out that the provisions of Paragraph A are inconsistent with Article 1841, providing for definitions of judgments. This suggestion, however, was met with resistance since it would not logically follow the introductory paragraph of Article 1915. Judge Holdridge then explained that though Article 1841 may be problematic in this context, it must be read concurrently with Article 1915 to ascertain jurisdiction. He further noted that the Committee plans to review Article 1841 and suggest changes at a later time. To reconcile these issues, one Council member suggested that Paragraph A provide for a distinction and state that "Except as otherwise provided by law, a judgment is final when it dismisses a suit in its entirety or fully resolves all claims and issues as to all parties. A judgment is also final even though it may not grant the successful party or parties all of the relief prayed for, or may not adjudicate all of the issues in the case, when it does the following..." Though many members were amenable to this revision, it was noted that the proposed revisions to Paragraph A are deliberately narrow and only serve to make the provision consistent with the more substantial change of eliminating the trial court's ability to designate a judgment as final. A Council member further stated that additional changes would confuse and weaken the body of jurisprudence supporting the current interpretation of Paragraph A. Consequently, she suggested that if the language "or fully resolves the claims and issues" is problematic, then the language of this Paragraph should be reverted to its original, pre-proposal form, leaving only technical and semantic changes. After additional discussion as to the various problems posed by Paragraph B, the Council, ultimately moved by this suggestion, opted to revert much of the language of Paragraph A to its original arrangement.

Next, Judge Holdridge directed the Council to Paragraph B, containing the language of the original Paragraph C. He stated that this revision makes no change to the law and provides that the trial court retains jurisdiction to adjudicate remaining issues when an appeal is taken from a judgment rendered in accordance with Paragraph A. With little discussion, the Council adopted the changes. Moving to Paragraph C, Judge Holdridge indicated that the proposed language contains much of the language of former Paragraph B. Moreover, the proposed language adds that all judgments rendered in accordance with this Paragraph are interlocutory judgments, thus emphasizing the Committee's intent to demarcate judgments that are appealable in accordance with Paragraph A from those that are not appealable in accordance with Paragraph C. After the Reporter accepted a few semantic changes, the Council adopted the proposal.

Judge Holdridge then presented new Paragraph D, replicating language that was removed from Paragraph A and requiring that all judgments rendered in accordance with the Article be reduced to writing and signed by the court. He went on to state that this change clarifies the commencement of the delay to apply for a supervisory writ from an interlocutory judgment rendered in accordance with Paragraph C. One Council member argued that this would create confusion since Paragraph B of Article 1914 mandates the circumstances under which an interlocutory judgment is reduced to writing. Judge

Holdridge clarified that Article 1914 was revised to conform to the changes made in Article 1915. Another Council member then raised that uncertainty is created when a court enters an oral ruling that is not reduced to writing – sometimes, this uncertainty leads to missed deadlines. He further asserted that the requirements of Paragraph D and the corresponding changes in other articles sufficiently address this uncertainty. Agreeing, the Council adopted the remaining changes and Comments, and the adopted proposal reads as follows:

Article 1915. ~~Partial final~~ Final and interlocutory judgments; partial judgment; partial exception; partial summary judgment

A. A final judgment may be rendered ~~and signed by the court,~~ even though it may not grant the successful party or parties all of the relief prayed for, or may not adjudicate all of the issues in the case, when the court:

(1) Dismisses the suit as to ~~less~~ fewer than all of the parties, defendants, ~~third party~~ third-party plaintiffs, ~~third party~~ third-party defendants, or ~~intervenors~~ interveners.

* * *

(4) ~~Signs~~ Grants a judgment on either the principal or incidental demand, when the two have been tried separately, as provided by Article 1038.

(5) ~~Signs~~ Grants a judgment on the issue of liability when that issue has been tried separately by the court, or when, in a jury trial, the issue of liability has been tried before a jury and the issue of damages is to be tried before a different jury.

* * *

~~B.(1) When a court renders a partial judgment or partial summary judgment or sustains an exception in part, as to one or more but less than all of the claims, demands, issues, or theories against a party, whether in an original demand, reconventional demand, cross-claim, third-party claim, or intervention, the judgment shall not constitute a final judgment unless it is designated as a final judgment by the court after an express determination that there is no just reason for delay.~~

~~(2) In the absence of such a determination and designation, any such order or decision shall not constitute a final judgment for the purpose of an immediate appeal and may be revised at any time prior to rendition of the judgment adjudicating all the claims and the rights and liabilities of all the parties.~~

~~C.~~ B. If an appeal is taken from any judgment rendered ~~under~~ in accordance with ~~the provisions of~~ Paragraph A of this Article, the trial court shall retain jurisdiction to adjudicate the remaining issues in the case.

C. Except as otherwise provided by law, when a court grants a judgment or summary judgment, or sustains an exception in part, as to one or more but fewer than all of the claims, demands, issues, or theories by or against a party, whether in an original demand, reconventional demand, cross-claim, third-party claim, or intervention, that judgment is an interlocutory judgment.

D. All judgments rendered in accordance with this Article shall be reduced to writing and signed by the court.

Comments – 2025

(a) These amendments largely restore the Article to its pre-1997 form. The revisions remove from Paragraph B of this Article the authority of the trial court to designate a judgment as final and appealable after an express determination that there is no just reason for delay. As a result, Paragraph A of this Article now provides a list of judgments from which an appeal may be taken. This change seeks to remove uncertainty as to whether an appeal or a supervisory writ should be taken from a judgment that does not grant the successful party or parties all of the relief prayed for or may not adjudicate all of the issues in the case.

(b) Paragraph B of this Article retains much of the language of the former Paragraph C. The language of Paragraph C of this Article is new and provides for interlocutory judgments that are not appealable. See Article 2083(C). Paragraph D of this Article provides that all judgments in accordance with this Article shall be reduced to writing and signed by the court, thus clearly defining the commencement of the delay to apply for a supervisory writ from a judgment in accordance with Paragraph C. See La. Ct. App. Unif. R. 4-2 and 4-3, and Article 1914.

Judge Holdridge subsequently began his presentation of changes to Article 1914 and stated that the amendments correspond with the revision of Article 1915 and further provide that a clerk may deliver in open court notice of the judgment to each party. As to the latter change, he explained that the delivery of the notice of judgment in open court often results in subsequent failure to mail the notice of judgment, thus preventing the commencement of legal delays in accordance with Article 1913. Members of the Council then discussed the logistics of this proposal, with many questioning how clerks, typically housed in other areas of the court building, are able to deliver in open court the notices to the parties. Judge Holdridge replied that the court's minute clerk is typically deputized by the clerk of court, even though the clerk may work for the judge, and is thus able to deliver the notices. Further, he noted that although the minutes of a proceeding may document that the notice was delivered, such a recordation does nothing to trigger the commencement of legal delays and is often overlooked by parties. Judge Holdridge reiterated that the law already requires that these notices are mailed, but delivery in open court confuses this process, and the failure to mail may invoke many consequences; thus, commencement of delays should also be predicated by manual delivery. The Council then discussed various issues with respect to the process of drafting judgments that may further convolute application of the Article, including the fact that judgments may be drafted by the court, by the parties, before or after trial. It was then suggested that the language borrow the proposed language used in Article 1913, providing that delivery of the signed judgment in open court shall constitute notice of judgment and shall be documented in the record of the proceeding. Judge Holdridge was amenable to these suggestions. One Council member then questioned how this would apply to absent parties who are unable to receive the judgment since this may lead to different legal deadlines. Another member replied that such a situation is possible under current law if, for example, the clerk fails to mail notice of judgment to one of the parties. The Council then discussed the implications of electronic filing systems and their roles in the mailing of notice. Members argued that these systems were not always reliable due to a variety of factors, including human error and lack of uniformity. Thus, the revision should make clear the time at which the legal delay begins to run. In support of the amended proposal, one Council member stated that because the requirements are as to the parties individually, no party is prejudiced due to an absence in court. Additionally, a clerk may mail the notice of judgment soon after rendition and manual delivery, thus aligning the commencement of the legal deadlines. Another Council member then asked that the Code of Civil Procedure Committee also examine whether Code of Civil Procedure Article 4922 required revision to conform with these changes.

Next, while acknowledging that no change was made to Paragraph E, one Council member questioned why the word "judgment" was used in this provision. He stated that the use of "judgment" seems to suggest that the Article does not apply to interlocutory judgments. Judge Holdridge stated that the provision likely means to apply to preliminary

injunctive orders or judgments. He further noted that while the Article applies to interlocutory judgments, Paragraph E makes clear that the Article does not apply to appealable interlocutory judgments – though the Article only lists interlocutory injunctive orders or judgments, class action certifications would also fall within the classification of appealable interlocutory judgments. Judge Holdridge stated that the issue could be studied by the Code of Civil Procedure Committee. After further discussion, the Council adopted the proposed revision, including the earlier suggested language providing that delivery of the signed judgment in open court shall constitute notice of judgment and shall be documented in the record of the proceeding. The adopted proposal reads as follows:

Article 1914. Interlocutory judgments; notice; delay for further action

* * *

B. The interlocutory judgment shall be reduced to writing if the court so orders, if a party requests within ten days of rendition in open court that it be reduced to writing, if a judgment is granted or an exception is sustained in accordance with Article 1915(C), or if the court takes the interlocutory matter under advisement. The clerk shall mail or deliver in open court notice of the ~~subsequent~~ judgment to each party. Delivery of the signed judgment in open court shall constitute notice of judgment and shall be documented in the record of the proceeding.

* * *

D. Except as provided in Paragraph C of this Article, each party shall have ten days either from notice of the interlocutory judgment~~,~~ or from the mailing of notice when required to take any action or file any pleadings in the trial court~~; however, this~~. This provision does not suspend or otherwise affect the time for applying for supervisory writs, nor does it affect the time for appealing an interlocutory judgment ~~under~~ in accordance with Article 2083.

* * *

The Council was then directed to the proposed revisions to Article 1913. Judge Holdridge first indicated to the Council that while these revisions are unrelated to the amendments of Article 1915, the changes in Article 1913 form the basis of the changes adopted in Article 1914. Beginning discussion, one Council member expressed concern that the removal of the word "contested" on page 4, line 4 would cause unnecessary increases in filing costs. Judge Holdridge explained that this was removed since many clerks have expressed that they were unable to determine whether a matter was contested. He was, however, sympathetic to the growing cost of litigation and agreed to strike the revision. Questioning why the Article contained "Except as otherwise provided by law," another Council member asked which final judgments do not fall within the scope of the Article. A Council member replied that this may be a vestige of a previous iteration of the Article. Though some members expressed an interest in removing the provision, others argued that it should remain so as not to disturb any preexisting procedural framework. Another Council member suggested that the language "or delivered in open court" be included on page 4, line 17, and Judge Holdridge accepted this suggestion. The Council then discussed other issues with respect to notice in succession proceedings. After further brief discussion, the Council adopted the proposal as amended, and the language reads as follows:

Article 1913. Notice of judgment

A. Except as otherwise provided by law, notice of the signing of a final judgment~~, including a partial final judgment under Article 1915,~~ is required in all contested cases~~,~~ and shall be mailed or delivered in open court by the clerk of court to the counsel of record for each party, and to each party not represented by counsel. Delivery of the signed judgment in

open court shall constitute notice of judgment and shall be documented in the record of the proceeding.

* * *

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

D. The clerk shall file a certificate in the record showing the date on which, and the counsel and parties to whom, notice of the signing of the judgment was mailed or delivered in open court.

* * *

Next, Judge Holdridge presented Article 1911. He explained that the revision removes references to Article 1915(B) and adds that the judgment must be signed by the judge. He stated that this amendment supplants the previous language stating that no appeal may be taken until the requirements of the Article have been fulfilled and explained that the previous language was problematic because the Article also requires that the judgment contain the typewritten or printed name of the judge – a recent decision held that the failure to include the typewritten or printed name of the judge resulted in a fatal procedural defect. One Council member then questioned the effect of that decision in light of the Article providing that the judgment was not to be invalidated for that reason. Judge Holdridge explained that while the judgment was substantively valid, the court held that it was not a judgment from which an appeal could be taken. After Judge Holdridge accepted a technical change to the title of the Article, the Council adopted the proposal, which reads as follows:

Article 1911. Final judgment~~; partial final judgment;~~ signing; appeals

* * *

B. For the purpose of an appeal as provided in Article 2083, no appeal may be taken from a final judgment until the judgment has been signed by the judge ~~requirement of this Article has been fulfilled~~. ~~No appeal may be taken from a partial final judgment under Article 1915(B) until the judgment has been designated a final judgment under Article 1915(B). An appeal may be taken from a final judgment under Article 1915(A) without the judgment being so designated~~.

Judge Holdridge then introduced a minor revision to Article 966, removing a reference to the former Article 1915(B). With little discussion, the Council adopted the change, and the adopted proposal reads as follows:

Article 966. Motion for summary judgment; procedure

* * *

B. Unless extended by the court and agreed to by all of the parties, a motion for summary judgment shall be filed, opposed, or replied to in accordance with the following provisions:

* * *

(5) ~~Notwithstanding Article 1915(B)(2), the~~ The court shall not reconsider or revise the granting of a motion for partial summary judgment on motion of a party who failed to meet the deadlines imposed by this Paragraph, nor shall the court consider any documents filed after those deadlines.

* * *

Judge Holdridge subsequently explained that the changes to Articles 1811 and 1974 conform these provisions with the revisions to Article 1913, adding that notice of judgment may be delivered in open court. With little discussion, the Council adopted the changes. The adopted proposals read as follows:

Article 1811. Motion for judgment notwithstanding the verdict

A.(1) Not later than seven days, exclusive of legal holidays, after the clerk has mailed or delivered in open court, or the sheriff has served, the notice of judgment ~~under~~ in accordance with Article 1913, a party may move for a judgment notwithstanding the verdict. If a verdict was not returned, a party may move for a judgment notwithstanding the verdict not later than seven days, exclusive of legal holidays, after the jury was discharged.

* * *

Article 1974. Delay for applying for new trial

A party may file a motion for a new trial not later than seven days, exclusive of legal holidays, after the clerk has mailed or delivered in open court, or the sheriff has served, the notice of judgment as required by Article 1913.

Next, Judge Holdridge introduced revisions to Article 2088 and explained that the amendment removes a reference to Article 1915(B). After brief discussion, the Council adopted the changes, which read as follows:

Article 2088. Divesting of jurisdiction of trial court

A. The jurisdiction of the trial court over all matters in the case reviewable under the appeal is divested, and that of the appellate court attaches, on the granting of the order of appeal and the timely filing of the appeal bond, in the case of a suspensive appeal, or on the granting of the order of appeal, in the case of a devolutive appeal. Thereafter, the trial court has jurisdiction in the case only over those matters not reviewable under the appeal, including the right to do any of the following:

* * *

(11) ~~Certify a partial judgment or partial summary judgment in accordance with Article 1915(B).~~

~~(12)~~ Amend a judgment to provide proper decretal language ~~under~~ in accordance with Article 1918 or 1951.

* * *

Judge Holdridge then directed the Council's attention to the materials entitled "Reporter's Proposed Revisions." Beginning with Article 81, he stated that the revision proposes several technical changes – particularly, replacing on page 1, line 9 the word "succession" with "estate." It was then explained that this change is in line with changes that were proposed by the Successions and Donations Committee and previously adopted by the Council. One Council member then questioned the use of "shall be brought in the court in which the succession proceeding is pending" on page 1, lines 4-5. He asked whether this somehow precluded bringing an action delineated by the Article within the same suit as the succession proceeding. Judge Holdridge clarified and explained that the provision primarily seeks to ensure that the action is brought in the same court and does not preclude practitioners from bringing those actions within the pending succession proceeding. Another Council member questioned the use of "to the succession" on page 1, line 11 and suggested replacing the phrase with "to the estate"

consistent with line 9. The Reporter of the Successions and Donations Committee then expressed that the language states "to the succession of the deceased," so the change may not be appropriate. Another Council member suggested replacing "to" with "in," asserting that "in" is more broad and encompasses more rights than implied by the use of "to." Judge Holdridge agreed to the replacement of "to" with "in," and the Council adopted the proposal as follows:

Article 81. Action involving succession

When a succession has been opened judicially, until rendition of the judgment of possession, the following actions shall be brought in the court in which the succession proceeding is pending:

(1) A personal action by a creditor of the deceased; but an action brought against the deceased prior to ~~his~~ death may be prosecuted against ~~his~~ the succession representative in the court in which it was brought~~;~~.

(2) An action to partition the ~~succession~~ estate~~;~~.

(3) An action to annul the testament of the deceased~~; and~~.

(4) An action to assert a right ~~to~~ in the succession of the deceased, either under ~~his~~ the testament or by effect of law.

Next, Judge Holdridge directed the Council's attention to Article 684. He reminded the Council that this amendment seeks to address an issue wherein the First Circuit sustained an exception of lack of procedural capacity in a civil proceeding against a plaintiff who was determined, in a criminal proceeding, to be a mental incompetent. He went on to state that this is inconsistent with the notion that one must first be interdicted prior to losing one's procedural capacity to sue. Beginning discussion, one Council member asked whether the same language should be used to replace "interdict" on page 2, line 6. He suggested that this would clarify that a curator is the proper plaintiff to enforce the rights of both an interdict and a person whose limited interdiction specifically restricts the procedural capacity to sue. The Reporter accepted this suggestion, and the Council adopted the proposal as amended as well as the Comments. The adopted provision reads as follows:

Article 684. ~~Mental incompetent; interdict~~ Interdict

A. ~~A mental incompetent~~ A person fully interdicted or a person whose limited interdiction specifically restricts the procedural capacity to sue does not have the procedural capacity to sue.

B. Except as otherwise provided in Articles 4431, 4554, and 4566, the curator is the proper plaintiff to sue to enforce a right of ~~an interdict~~ a person fully interdicted or a person whose limited interdiction specifically restricts the procedural capacity to sue.

Comments – 2025

This amendment seeks to address an issue raised by the court in Walcott v. Louisiana Department of Health and Valley Services, 341 So. 3d 696 (La. App. 1 Cir. 2022), in which the First Circuit held that sustaining an exception of lack of procedural capacity in a civil proceeding against a plaintiff who, in a criminal proceeding, was determined a mental incompetent but was not interdicted would leave the plaintiff with no avenue to pursue a civil claim. Under the amendment to this Article, a person determined in a criminal proceeding to be a mental incompetent has the procedural capacity to file a civil action unless that person is fully interdicted or the person's limited interdiction restricts the capacity to sue. A court may order the full interdiction of a person whose interests cannot be protected by less restrictive means. See Civil Code Article 389. A limited interdiction

does not deprive the interdict of the procedural capacity to sue unless the limited interdiction specifically restricts the ability to sue. See Article 4551 and Civil Code Article 390.

Judge Holdridge then moved to his presentation of Article 927 relative to the peremptory exception of no cause of action. He explained that this change addresses a procedural circuit split and clarifies that a partial judgment sustaining an exception raising the objection of no cause of action may be appropriate when two or more actions based on the same operative facts of a single transaction or occurrence are cumulated. Judge Holdridge further explained that while Article 1915 was previously amended to permit a trial court to grant an exception in part, some appellate courts have declined to apply the provision in this manner. Judge Holdridge further stated that the amendment would change the result reached by the Louisiana Supreme Court in *Everything on Wheels Subaru, Inc. v. Subaru South, Inc.*, holding that an exception of no cause of action in part may be maintained only if the action results from separate and distinct causes of action. After a brief discussion, the Council adopted the proposal and Comments as follows:

Article 927. Objections raised by peremptory exception

A. The objections that may be raised through the peremptory exception include but are not limited to the following:

* * *

(5) No cause of action, <u>including an objection of no cause of action in part, as to one or more but fewer than all of the claims, demands, issues, or theories against a party, whether in an original demand, reconventional demand, cross-claim, third-party claim, or intervention</u>.

* * *

Comments – 2025

Subparagraph (A)(5) was amended to clarify that a partial judgment sustaining an exception raising the objection of no cause of action may be appropriate when two or more actions based on the same operative facts of a single transaction or occurrence are cumulated. This would change the result reached by the Louisiana Supreme Court in Everything on Wheels Subaru, Inc. v. Subaru South., Inc., 616 So. 2d 1234 (La. 1993).

Judge Holdridge then directed the Council's attention Article 1351. He stated that although the Council previously approved the proposed changes to the Article, the Council tasked the Code of Civil Procedure Committee with drafting a Comment to ensure that the changes do not affect the authority of a justice of the peace to issue a summons under Article 4921.2. With little discussion, the Council adopted the proposed Comment as follows:

Article 1351. Issuance; form

* * *

Comments – 2025

The amendment to this Article is not intended to remove the authority of a justice of the peace to issue a summons pursuant to Article 4921.2.

After recessing for lunch, the Council reconvened, and Judge Holdridge began his presentation of changes to Article 1551. He first stated that the revisions result from ongoing discussions of the Code of Civil Procedure Committee seeking to require pretrial and scheduling conferences. Moreover, while the proposal does not outright mandate in all circumstances pretrial and scheduling conferences, it does require conferences when a party intends to use an expert in a summary judgment proceeding or trial. These

changes seek to address the many issues involved with scheduling and ensure that the various motions are filed, and hearing dates are set, in accordance with the applicable law and in consideration of the court's calendar.

Judge Holdridge then directed the Council to proposed Paragraph A, which sets forth the general framework of pretrial and scheduling conferences. The revisions aim to modernize the Article, setting forth that conferences may be conducted in person, by telephone, or by video teleconference, and provide further guidance as to what may be considered during the conference. Judge Holdridge then directed the Council's attention to Subparagraph (A)(5) and indicated that these provisions are new and set forth that the parties should address at a pretrial conference or hearing the authenticity and admissibility of exhibits that are suspected to have been created, altered, or manipulated. He then stated that in light of the growing use of generative AI, this provision would mitigate unnecessary delay with respect to ascertaining the authenticity and admissibility of potentially manipulated exhibits. Moreover, Judge Holdridge pointed out that the provisions do not apply to demonstrative evidence since its use is only illustrative. Next, he pointed to page 6, line 15, providing for the consideration of the setting of any trial, motion, or exception hearing by audiovisual means, or the presentation of any evidence or testimony by audiovisual means. Beginning discussion, one Council member expressed concern that the provisions of Subparagraph (A)(5) were not broad enough to encompass forged documents. Moreover, the provision may even be unnecessary since the law already provides for the handling of such issues. He then suggested that Subsubparagraphs (A)(5)(a) and (b) provide for whether a party suspects that an exhibit has been falsified. Judge Holdridge subsequently accepted the suggestion. In support of the proposal, one Council member contended that the Paragraph's changes are consistent with practice. He explained that it is inappropriate to argue the admissibility of documents during a trial on the merits and that these issues are waived if not raised prior.

Moving to Paragraph B, Judge Holdridge noted that though the conference itself is not mandatory, should a conference take place, the provision would require that the court render an order that recites the actions taken at the conference.

Next, Judge Holdridge directed the Council to Paragraph C and stated that the provisions require a pretrial or scheduling conference in all actions where a party intends to use an expert in a summary judgment proceeding or call upon an expert to serve as a witness at a trial or hearing. One Council member then questioned whether the Paragraph's mandatory nature would undermine the idiosyncratic scheduling practices of certain courts. Moreover, members questioned whether the Paragraph required that all discovery be completed prior to the scheduling of a conference. Judge Holdridge clarified that if the issues described in Paragraph C are discussed in a conference in accordance with Paragraph A, the Article does not require that another conference be held. These changes only seek to guide courts and parties in abiding by the legal delays provided in Articles 966 and 1425. One Council member then asked whether this change would address situations in which hearing dates are not available for months. He further pointed out that there might be situations in which set hearing dates are continued and are thus unable to abide by the deadlines of Articles 966 and 1425. Discussion then turned to the various issues that may arise when trying to abide by the temporal requirements of Article 966 and 1425, including the implications of waiving and consenting to deadlines. One Council member then suggested that, because a court must decide a motion in accordance with Article 1425(F) prior to the hearing on a motion for summary judgment, Subsubparagraph (C)(1)(c) should also provide for a deadline for the ruling date of the motion in accordance with Article 1425(F). Judge Holdridge accepted this suggestion. Another Council member then raised that Article 1571(A)(2) prohibits the assignment of trial except after an answer is filed and asked whether the amendments were inconsistent with this authority. Continuing, she asserted that while this is the law, it is often ignored and, when read with the proposal, may inflict chaos upon deadlines and scheduling. Judge Holdridge explained that if a conference is held and deadlines are scheduled prior to the filing of an answer, a party should apply for supervisory writ. To address the concern, however, Judge Holdridge agreed to draft a Comment stating that the requirements of the Article are not meant to supersede the requirements of Article 1571.

Judge Holdridge then indicated to the Council that Paragraph D, providing that a party's failure to abide by the scheduling would subject them to sanctions, was not amended. Beginning discussion, one Council member asserted that perhaps the Committee, in light of other revisions to the Article, should reevaluate the Paragraph. He expressed that the changes to Paragraph A and the requirements of Paragraph C may lend to a rigid enforcement of sanctionable offenses and ignore the more practical aspects of scheduling. Judge Holdridge indicated that Paragraph B provides the necessary flexibility, stating that the court may modify the order to prevent manifest injustice. Additionally, he stated that Paragraph D is rarely, if ever, used.

Next, Judge Holdridge noted that Paragraph E was subject to minor amendments. The Paragraph provides for the setting of a conference upon the motion of any party if a suit has been pending for more than one year since the date of filing of the original petition and no trial date has been assigned. As to the former requirement, the revision replaces "date of filing of the original petition" with "date of service of the original petition on all defendants." Judge Holdridge then directed the Council to the Comments, explaining that a member previously requested that the Article include a definition for deepfakes. Accordingly, the Comments provide definitions for "deepfake" as found in R.S. 14:73:13 and Black's Law Dictionary. Judge Holdridge asked whether the Council found their inclusion necessary, and after brief discussion, the Council decided to include both definitions. After a review of the various changes to the Article as a whole, the Council ultimately adopted the proposal as amended, and the language reads as follows:

Article 1551. Pretrial and scheduling conference; order

A. In any civil action in a district court, the court may in its discretion direct the attorneys for the parties to appear before it for conferences that may be conducted in chambers, by telephone, or by video teleconference, to consider any of the following:

(1) ~~The simplification of the issues, including the elimination of frivolous claims or defenses~~ The setting of deadlines for the filing of a motion in accordance with Article 1425(F), motion for summary judgment, motion in limine, and any other pretrial motion.

(2) The setting of the trial and the deadline for the filing of any jury bond.

(3) The necessity or desirability and the deadlines for the filing of any amendments to the pleadings.

~~(3) What material facts and issues exist without substantial controversy, and what material facts and issues are actually and in good faith controverted.~~

(4) The simplification of the issues, including stipulations as to material facts, exhibits, and issues that are not disputed, and determining the facts, exhibits, and issues to be litigated. ~~Proof, stipulations regarding the authenticity of documents, and advance rulings from the court on the admissibility of evidence.~~

(5) The authenticity and admissibility of exhibits that a party intends to introduce at trial, including a pretrial ruling on the admissibility of exhibits or the setting of a hearing date as to the admissibility of exhibits.

(a) If a party has reasonable suspicion that an opposing party's exhibits have been falsified, including having been generated by artificial intelligence or altered by any means, the party shall raise these concerns at the pretrial conference or at a pretrial hearing on the admissibility of the exhibits.

(b) If a party knows or has reason to know that its exhibits have been falsified, including having been generated by artificial intelligence or altered by any means, the party shall disclose this fact in accordance with Article 371.

(c) Subsubparagraphs (a) and (b) of this Subparagraph shall not apply to demonstrative exhibits.

(6) Limitations or restrictions on or regulation of the use of expert testimony under ~~Louisiana~~ Code of Evidence Article 702.

~~(6)~~ (7) The control and scheduling of discovery including any issues relating to disclosure or discovery of electronically stored information, and the form or forms in which it should be produced.

~~(7)~~ (8) Any issues relating to claims of privilege or protection of trial preparation material, and whether the court should include agreements between counsel relating to such issues in an order.

~~(8)~~ (9) The identification of witnesses, documents, and exhibits.

~~(9)~~ (10) The setting of any trial, motion, or exception hearing by audiovisual means, or the presentation of any evidence or testimony by audiovisual means, in accordance with Article 195.1 ~~The presentation of testimony or other evidence by electronic devices~~.

~~(10)~~ (11) Such other matters as may aid in the disposition of the action.

B. The court shall render an order ~~which~~ that recites the action taken at the conference pursuant to Paragraph A of this Article.~~, the amendments allowed to the pleadings, and the agreements made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by admissions or agreements of counsel. Such~~ The order ~~controls~~ shall control the subsequent course of the action, unless modified ~~at the trial~~ by the court to prevent manifest injustice.

C. (1) In all actions where a party intends to file the affidavit of an expert in a summary judgment proceeding or call upon an expert to serve as a witness at a hearing or trial, upon notice from a party, the court shall conduct a pretrial or scheduling conference and shall issue an order establishing deadlines for the following:

(a) The identification of the expert.

(b) The production of the report of the expert.

(c) The filing of any motion in accordance with Article 1425(F), the hearing date of the motion, and the ruling date by the trial court.

(d) The filing of any motion for summary judgment and the hearing date of the motion.

(e) The trial date.

(2) This Paragraph does not apply to testimony in an action for divorce or annulment of marriage, or to a separation in a covenant marriage, to a property partition, or to an administration of a succession, or to testimony in any incidental or ancillary proceedings or matters arising from those actions.

~~C.~~ D. If a party's attorney fails to obey a pretrial order, or to appear at the pretrial and scheduling conference, or is substantially unprepared to participate in the conference or fails to participate in good faith, the court, on its own motion or on the motion of a party, after hearing, may make such orders as are just, including orders provided in Article 1471 (2), (3), and (4). In lieu of or in addition to any other sanction, the court may require the party or the attorney representing the party or both to pay the reasonable expenses incurred by noncompliance with this Paragraph, including attorney fees.

~~D.~~ E. If a suit has been pending for more than one year since the date of ~~filing~~ service of the original petition on all defendants and no trial date has been assigned, upon motion of any party, the court shall set the matter for conference for the purpose of resolving all matters subject to the provisions of this Article, including the scheduling of discovery, assignment for trial, and any other matters that will expedite the resolution of the suit. ~~The conference may be conducted in chambers, by telephone, or by video teleconference.~~

Comments – 2025

(a) Subparagraph (A)(5) requires that the parties address at a pretrial conference or hearing the authenticity and admissibility of exhibits that are suspected to have been created, altered, or manipulated. The Article's use of "artificial intelligence" is broad and encompasses the suspected use of "deepfakes." R.S. 14:73:13 defines "deepfake" to mean "any audio or visual media in an electronic format ... that is created, altered, or digitally manipulated in a manner that would falsely appear to a reasonable observer to be an authentic record of the actual speech or conduct of the individual or replace an individual's likeness with another individual and depicted in the recording." Black's Law Dictionary (12th ed. 2024) defines "deepfake" to mean "a false video, audio recording, or other medium that is generated or manipulated by computer, often using artificial intelligence, with the intent to deceive viewers or listeners."

(b) Paragraph C of this Article is new and mandatory. To resolve the many issues with respect to the timing of challenging an expert's qualifications or methodologies, the court shall either provide for deadlines in a pretrial or scheduling order in accordance with Paragraph A or, upon being notified by a party that it intends to use an expert in a summary judgment proceeding or trial, issue an order in accordance with Paragraph C. These deadlines aim to ensure that motions are filed, and hearing dates are set, in accordance with applicable law and in consideration of the court's calendar.

(c) The requirements of this Article are not meant to supersede the requirements of Article 1571.

Next, Judge Holdridge introduced changes made to Article 5059 relative to the computation of time. He explained that the changes are minor, replacing "after" with "from" on page 9, line 5 and providing for the definition of "next day." The changes seek to explicitly broaden the application of the Article such that it may be used to count both backwards and forwards from a given date when calculating a period of time. After brief discussion, the Council adopted the proposal as follows:

Article 5059. Computation of time

A. In computing a period of time allowed or prescribed by law or by order of court, the date of the act, event, or default ~~after~~ from which the period begins to run is not ~~to be~~ included. The last day of the period is ~~to be~~ included, unless it is a legal holiday, in which event the period runs until the end of the next day ~~which~~ that is not a legal holiday.

B. The "next day" as set forth in Paragraph A of this Article means the subsequent calendar day that is not a legal holiday following a legal holiday.

~~B~~ C. A half-holiday is considered ~~as~~ a legal holiday. A legal holiday is ~~to be~~ included in the computation of a period of time allowed or prescribed, except when:

(1) It is expressly excluded;

(2) It would otherwise be the last day of the period; or

(3) The period is less than seven days.

~~C~~ D. (1) A legal holiday shall be excluded in the computation of a period of time allowed or prescribed to seek rehearing, reconsideration, or judicial review or appeal of a decision or order by an agency in the executive branch of state government.

(2) Subparagraph (1) of this Paragraph shall not apply to the computation of a period of time allowed or prescribed to seek rehearing, reconsideration, or judicial review or appeal of a decision or order by the Department of Revenue, the Department of Environmental Quality, or the Department of Insurance relative to examination reports in R.S. 22:1983.

Comments –2025

The revisions to this Article clarify existing law and conforms to the computation of time set forth in Becnel v. Northrop Grumman Ship Systems, Inc., 18 So. 3d 1269 (La. 2009) and Article 966(B)(4). Paragraph B makes clear that if the last day in a period of time allowed or prescribed by law or court order falls on a legal holiday, the period runs until the subsequent, later-in-time calendar day that is not a legal holiday. For example, if the legal deadline to file a pretrial motion is due sixty days prior to trial and that day is a Saturday, the motion is not due until the subsequent Monday if that Monday is not a legal holiday.

At this time, Judge Holdridge concluded his presentation, and the President called on Professor Ronald J. Scalise, Jr., Reporter of the Successions and Donations Committee, to begin his presentation of materials.

Successions and Donations Committee

Professor Scalise began his presentation by reminding the Council of the discussion at its January meeting relative to penalty clauses and the fact that a recent Supreme Court case invited the legislature to clarify the public policy surrounding the enforcement of such clauses. He explained that presently, courts look to Civil Code Article 1519, but that the Committee recommends a more specific article governing penalty clauses. The Reporter noted that the Committee's research revealed that only one state always prohibits and only one state always upholds no-contest clauses in wills, and thus most states take the middle ground approach of prohibiting enforcement if probable cause to challenge the will exists. Professor Scalise also explained that at its January meeting, the Council resisted the use of the term "probable cause" due to a belief that its extensive use in the criminal context would cause confusion in the civil law. As a result, the Committee has redrafted the proposal using the definition of probable cause from the Restatement but without using the actual term.

Members of the Council questioned whether this will result in a case within a case, and Professor Scalise explained that it will be up to the judge in the succession proceeding to determine whether a reasonable person could conclude that there is a substantial likelihood that a challenge would be successful. Further discussion included whether the clause may be enforceable against some but not all of the persons

challenging the will, retroactive application because the law in effect at the date of death will be controlling, and examples of inter vivos challenges. The Council then approved the following language:

Article 1519.1. Penalty clauses

A provision in a juridical act that purports to penalize a person for filing an action to challenge an *inter vivos* or *mortis causa* donation, an action related to a succession, or an action related to a trust administration is unenforceable if, at the time of instituting the action to challenge, a factual basis exists that would lead a reasonable person to conclude that there is a substantial likelihood that the challenge would be successful.

Revision Comments – 2025

(a) Penalty, no-contest, or in-terrorem clauses have traditionally been dealt with by Louisiana courts under Article 1519. In the absence of more specific and clearer legislation, however, the courts have not developed a consistent approach to determine when penalty clauses are or are not enforceable. *See, e.g.*, *Succession of Maloney,* 392 So. 3d 302 (La. 2024); *Succession of Maloney*, 353 So. 3d 267 (La. App. 5 Cir. 2022); *Succession of Gardiner*, 366 So. 2d 1065 (La. App. 3d Cir. 1979); *Succession of Kern*, 252 So.2d 507 (La. App. 4 Cir. 1971); Irina Fox, Comment, *Penalty Clauses in Testaments: What Louisiana Can Learn from the Common Law*, 70 La. L. Rev. 1265 (2010). The Louisiana Supreme Court, in fact, has invited legislative clarity on the issue of penalty or in terrorem clauses. *Succession of (Bonnie Babin) Maloney*, 392 So. 3d 302 (La. 2024) ("We leave this question for another day noting that – in the interim – our legislature may wish to evaluate whether public policy dictates that specific statutory exceptions precluding the operation of no-contest clauses should exist based on the nature of a legatee's action in contesting a will."). The approach of this revision balances the donor's interest in preventing vexatious and frivolous lawsuits with a donee or other person's interest in ensuring that a provision in a donation is fully free. This provision accords with the modern approach in the United States regarding penalty or in terrorem clauses in donations. *See, e.g.*, Unif. Prob. Code §3-905; Restatement (Third) Property: Wills and Other Donative Transfers §8.5.

(b) This revision adopts the approach of the Restatement (Third) Property and the Uniform Probate Code but declines to codify the term "probable cause" in the text of this Article due to a concern for confusion of concepts between this special "civil" conception of probable cause and the more common concept of probable cause prevalent in "criminal" law. The Restatement (Third) Property explains the civil standard of probable cause thusly: "Probable cause exists when, at the time of instituting the proceeding, there was evidence that would lead a reasonable person, properly informed and advised, to conclude that there was a substantial likelihood that the challenge would be successful. A factor that bears on the existence of probable cause is whether the beneficiary relied upon the advice of independent legal counsel sought in good faith after a full disclosure of the facts. The mere fact that the person mounting the challenge was represented by counsel is not controlling, however, since the institution of a legal proceeding challenging a donative transfer normally involves representation by legal counsel." Restatement (Third) Property: Wills and Other Donative Transfers § 8.5 cmt c. In the criminal context, affidavits of probable cause are required in certain contexts. *See, e.g.*, C.Cr.P. Art. 230.2. In those circumstances, probable cause exists "when the facts and circumstances known to the officer and of which he has reasonably trustworthy information are sufficient to justify a man of ordinary caution in believing the person to be arrested has committed a crime." *State v. Wilson*, 467 So.2d 503, 515 (La. 1985). The creation and use of a special civil version of a criminal law term, as employed in this Article, is not

unknown in the civil law. *See, e.g.*, Civil Code Article 521 (employing the term "stolen" in a narrow way to mean misappropriation or taking of a corporeal movable, without the consent of its owner, and excluding the broader definition of theft used in Revised Statute 14:67 to include a taking through fraud or artifice). The civil and criminal versions of probable cause are similar insofar as they involve the evaluation of the likely success of a claim on a spectrum somewhere between the poles of mere suspicion and ultimate success on the merits of a claim. *See, e.g., Brinegar v. United States*, 338 U.S. 160, 175 (1949) (probable cause "means less than evidence which would justify condemnation ... or conviction" but "more than bare suspicion").

(c) Although different states may have slight variations on the details of civil probable cause, the use of probable cause in evaluating penalty, no-contest, or in-terrorem clauses is the dominant approach throughout the United States. *See, e.g.*, Alaska Stat. § 13.16.555; Ariz. Stat. § 14-2517; Cal. Prob. Code § 21311; Colo. Rev. Stat. § 15-12-905; Haw. Rev. Stat. § 560:3-905; Idaho Code § 15-3-905; In re Estate of Foster, 376 P.2d 278 (Kan. 1962); Maine Tit. 18-C: §3-905; MD Estates and Trusts Code § 4-413; Mich. Comp. Laws Ann. § 700.3905; Minn. Stat. Ann. § 524.2-517; 524.3-905; Mont. Code Ann. § 72-2-537; Neb. Rev. Stat. § 30-24,103; N.J. Stat. Ann. § 3B:3-47; N.M. Stat. Ann. § 45-2-517; N.D. Cent. Code § 30.1-20-05; Pa. Stat. tit. 20 § 2521; S.C. Code Ann. § 62-3-905; S.D. Codified Laws § 29A-3-905; Utah Code Ann. § 75-3-905; Wis. Stat. § 854.19. Common-law concepts have sometimes been borrowed and transplanted into the Louisiana Civil Code when helpful. *See, e.g.* Civil Code Article 1479 (adopting the common-law concept of "undue influence" after the change in forced heirship). The explanation in the Restatement and the jurisprudence of other states should be informative to Louisiana courts. In explaining when no contest clauses should be applied, the North Carolina Supreme Court explained as follows: "In our opinion, a bona fide inquiry whether a will was procured through fraud or undue influence, should not be stifled by any prohibition contained in the instrument itself. In fact, our courts should be as accessible for those who in good faith and upon probable cause seek to have the genuineness of a purported will determined, as they are to those who seek to find out the intent of a testator in a will whose genuineness is not questioned. Forfeiture clauses are usually included in wills to prevent vexatious litigation, but we should not permit such provisions to oust the supervisory power of the courts over such conditions and to control them within their legitimate sphere. There is a very great difference between vexatious litigation instituted by a disappointed heir, next of kin, legatee or devisee, without probable cause, and litigation instituted in good faith and with probable cause, which leads the contestant to believe that a purported will is not in fact the will of the purported testator. We think it is better to rely upon our trial courts to ascertain the facts in this respect." *Ryan v. Wachovia Bank & Tr. Co.*, 70 S.E.2d 853, 856-57 (N.C. 1952). *See also* Cal. Prob. Code § 21311(b) ("[P]robable cause exists if, at the time of filing a contest, the facts known to the contestant would cause a reasonable person to believe that there is a reasonable likelihood that the requested relief will be granted after an opportunity for further investigation or discovery.").

(d) This article applies broadly to provisions in juridical acts that attempt to discourage or prevent actions challenging the effectiveness of donations, successions, or trust administrations. A juridical act is "a licit act intended to have legal consequences." *See* Civil Code Article 3506(2) (2025) and Article 3483 cmt b. The term includes contracts, such as donations inter vivos, and a unilateral juridical act, such as a donations mortis causa. *See* Civil Code Articles 1468 & 1469. This article applies even if the provision discouraging challenge or contest appears in a juridical act that is not a part of but rather related to the donative disposition.

(e) This article does not purport to specify exhaustively what types of actions do or do not constitute contests sufficient to invoke a properly drafted penalty clause. *Succession of Maloney*, 392 So. 3d 302 (La. 2024) ("As a threshold matter, a court must determine whether a no-contest clause is triggered by the actions of a legatee, i.e., is the no-contest clause applicable."). A good faith action for interpretation of a disposition should not invoke a penalty clause in a will nor should a compromise between parties. *See, e.g.*, Article 3071. This approach is consistent with the law of some other states. *See, e.g.*, Ga. Code Ann. §53-4-68(c)(1) (excluding settlement agreements and providing that "[a] condition in terrorem shall not be enforceable against an interested person for ... [b]ringing an action for interpretation or enforcement of a will"). A variety of other types of actions may also not invoke the application of a penalty clause. For example, the following are some examples of actions that may not invoke application of a no contest clause: a request for an accounting, a challenge to the appointment of an executor, a suit to remove or compel a fiduciary to perform duties, a suit against a fiduciary for the non-performance of his duties, an action for the probate of an alternative testament. *See, e.g, Successions of Rouse*, 80 So. 229 (La. 1918); *Succession of Rosenthal*, 369 So. 2d 166 (La. App. 4th Cir. 1979); *Succession of Robinson*, 277 So. 3d 454 (La. App. 2d Cir. 2019). Courts should apply discretion and good judgment in ascertaining the purpose of an action by a donee and evaluating the nature of the action in light of the no contest clause. Because no contest clauses operate as penalties or forfeitures, they should be strictly construed by courts. *See, e.g., In re Succession of Scott*, 950 So.2d 846 (La. App. 1 Cir. 2006); *Estate of Newbill*, 781 S.W.2d 727, 728 (Tex. App. 1989); *Calvery v. Calvery*, 55 S.W.2d 527 (Tex. App. 1932).

(f) This article does not displace the application of other prohibitions in the civil code, including the application of Article 1519 to other aspects of penalty clauses. *See, e.g., Succession of Kern*, 252 So.2d 507 (La. App. 4 Cir. 1971) (holding that a clause in a will providing that the entire will was "null and void" if "any heir" challenges the will "in any way" was "repugnant to the law and good morals and cannot be sanctioned by the courts"). Of course, a donor also may not in a testament subject a forced heir's receipt of his legitime to a no contest clause. Such a restriction would be violative of Article 1496 and long-standing Louisiana public policy. Civil Code Article 1496 ("No charges, conditions, or burdens may be imposed on the legitime except those expressly authorized by law, such as a usufruct in favor of a surviving spouse or the placing of the legitime in trust."); *see also Hoggatt v. Gibbs*, 12 La. Ann. 770 (1857).

Directing the Council to the materials entitled "Will Formalities," Professor Scalise explained that although the proposal may appear to be making big changes in the law, it is in fact simplifying the law to eliminate repeated problems appearing in the jurisprudence. The Reporter then presented a PowerPoint that highlighted the history of wills in Louisiana and the evolution of the numerous requirements for validity that do not exist in any other state or country. These formalities are counterproductive and lead to many people dying intestate despite having executed a will that would be valid almost anywhere else in the world.

Focusing on the changes to notarial testaments in Civil Code Article 1576, the proposal aligns the requirements for validity with those to execute an authentic act, eliminates publication, and expands the meaning of signature and date and allows them to appear anywhere. Members of the Council questioned how much fraud occurs in Louisiana compared to other states who do not have these requirements. The Reporter responded that research did not reveal an increase in claims of fraud and undue influence elsewhere and that criminal law serves as a deterrent to swapping out pages and forgeries. Many Council members expressed their approval of removing technicalities as to form in favor of keeping the focus on the testator's intent. Further discussion revolved around ensuring that the witnesses still meet the requirements of Civil Code Article 1581 for competency, retroactivity, the fact that existing forms for notarial wills do not have to

be altered to comply, and that the use of online notaries is not sufficient. The following was thereafter adopted:

Article ~~1577~~ 1576. Notarial testament; ~~Requirements~~ requirements of form

A. The notarial testament shall be prepared in writing, ~~and~~ dated, executed before a notary public in the presence of two witnesses, and signed by the testator, each witness, and the notary. If a testator is unable to sign, the testator may affix his mark in place of signing or direct another person to sign on behalf of the testator in the presence of the testator. ~~and shall be executed in the following manner. If the testator knows how to sign his name and to read and is physically able to do both, then:~~

~~(1) In the presence of a notary and two competent witnesses, the testator shall declare or signify to them that the instrument is his testament and shall sign his name at the end of the testament and on each other separate page.~~

~~(2) In the presence of the testator and each other, the notary and the witnesses shall sign the following declaration, or one substantially similar: "In our presence the testator has declared or signified that this instrument is his testament and has signed it at the end and on each other separate page, and in the presence of the testator and each other we have hereunto subscribed our names this ____ day of _____, ____."~~

B. The signature may appear anywhere in the testament and is sufficient if it identifies the testator and evidences an intent by the testator to adopt the document as the testator's testament.

C. The date may appear anywhere in the testament, may be clarified by extrinsic evidence, and is sufficient if it resolves those controversies for which the date is relevant.

Revision Comments – 2025

(a) This revision changes the law to simplify the execution of notarial wills in Louisiana. This approach is consistent with the law of other states. *See, e.g.*, UNIF. PROB. CODE § 2-502 (2008). For discussion of the application of will formalities under Louisiana law, see Ronald J. Scalise Jr., *Will Formalities in Louisiana: Yesterday, Today, and Tomorrow*, 80 LA. L. REV. 1333 (2020).

(b) Most importantly, this revision eliminates the "attestation clause" as a condition of "validity" for notarial wills, a requirement under prior law that caused much litigation. *See, e.g., Succession of Liner*, 320 So. 3d 1133 (La. 2021); *Succession of Toney*, 226 So. 3d 397 (La. 2017). Attestation clauses may still be used in notarial wills to make wills self-proving. *See, e.g.*, Code of Civil Procedure Article 2887. Under this revision, the absence of an attestation clause from a notarial will shall not invalidate a will. Rather, the absence of an attestation clause or a subsequently executed affidavit will require proof of proper execution in accordance with Code of Civil Procedure Article 2887(B). The Louisiana Supreme Court long ago observed that the attestation clause is of "evidentiary" value only, rather than substantive value. See, e.g., *Succession of Porche*, 288 So. 2d 27 (La. 1973) ("[T]he purpose of the attestation clause is primarily to evidence, at the time the will was executed, that the statutory formalities have been satisfied...").

(c) This revision aligns the formalities required for the execution of a notarial will more closely with the formalities required for the execution of an authentic act. *See, e.g.*, Civil Code Article 1833. Unlike an authentic act,

however, a notarial will still requires a date for purposes of validity and a particular standard for competency of witnesses as provided in Article 1581. The date requirement, as with all formalities for wills, should not be interpreted strictly. Rather, a substantial compliance approach should be used by courts in assessing whether the formalities of a particular document sufficiently protect against fraud. Extrinsic evidence may be used to complete or clarify the date of a will. For the meaning of the requirement of date, see comments to Civil Code Article 1575. Although a date has always been required for olographic wills, the date requirement was added for notarial ones only in 1999. Prior to then, the statutory will, on which the notarial will is based, did not require a date. Lemuel E. Hawsey III, *Louisiana's Statutory Will: The Role of Formal Requirements*, 32 LA. L. REV. 452, 459 (1972) ("Although neither the statute nor the jurisprudence makes the date a formal requirement for validity of a statutory will, it is still necessary to determine whether some general principle at either common or civil law necessitates inclusion of the date of execution for a testament to be valid. The Louisiana Wills Statute had as its origin similar statutes existing in all of the common law states. It is well settled at common law that, in the absence of an express statutory requirement, the date of execution is not essential to the validity of a statutory will."). Attested wills that are common in other states do not generally require a date. *See, e.g.*, UNIF. PROB. CODE §2-502.

(d) For the meaning of the signature requirement, see comments to Civil Code Article 1575. The revision expressly avoids using the phrase, "sign his name," which the Louisiana Supreme Court has interpreted to exclude signing by initialing. *See Succession of Toney*, 226 So. 3d 397 (La. 2017), overruled in part by *Succession of Liner*, 320 So. 3d 1133 (La. 2021) (on rehearing); *Succession of Frabbiele*, 397 So. 3d 391 (La. 2024).

(e) Both notarial and olographic wills must be in writing. Former Civil Code Article 1580 allowed for a notarial will to be executed in braille. Although that article has been repealed in this revision, no change in the law is intended, as braille is unquestionably a form of "writing." For the meaning and requirements of a writing, see comments to Civil Code Article 1575.

(f) This revision also eliminates the "publication" requirement that existed in prior law as a condition of validity. Publication, simply stated, is "the declaration by the testator that the instrument is his will." No major statutory enactment has ever required that a will be published, and it is hard to understand today why this formality persists in the modern day. Specifically, publication was not required by the English Wills Act, the Statute of Frauds, or by any version of the Uniform Probate Code. Although English courts did impose such a requirement at one point, it has long since been abandoned. Today, only a very few states require publication as a condition of validity. *See, e.g.*, ARK. CODE § 28-25-103; IOWA CODE § 633.279; N.Y EST. POWER & TRUST LAW § 3-2.1; OKLA. STAT. ANN. tit. 84, § 55; TENN. CODE § 32-1-104. The significance of the "publication" requirement under prior law has largely eroded. *See, e.g.*, Civil Code Article 1577 (2001) cmt c ("The testator's indication that the instrument contains his last wishes may be given verbally or in any other manner that indicates his assent to its provisions."); *Succession of Guidry*, 160 So. 2d 759 (La. App. 3d Cir. 1964) (Nothing in the statute requires a "verbal signification," and thus a testatrix may signify her intention "by shaking her head."); *Succession of Saarela*, 151 So. 2d 144 (La. App. 4 Cir. 1963) (Reference in a will to "this is my last will and testament" was a sufficient declaration to constitute publication of the will.); *Succession of Porche*, 273 So. 2d 665 (La. App. 4 Cir. 1973); *Succession of Thibodeaux*, 527 So. 2d 559 (La. App. 3 Cir. 1988) (The very signing of the will itself can be a sufficient declaration, even when there is no verbal declaration or other significant action.).

(g) Although signing a will on every page is good practice, it is no longer required as a condition of validity. To make a will self-proving, however, a signature on every page of the will is necessary. See Code of Civil Procedure Article 2887. The requirement in prior law that every page of the notarial will be signed appears to be a somewhat unique Louisiana rule copied, most likely, from the same innovation imposed upon statutory wills. In *Succession of Hoyt*, the court observed that "[t]he purpose of the requirement is to prevent fraud by the substitution of one typewritten page for another after the execution of the will by the testator." *Succession of Hoyt*, 303 So. 2d 189 (La. App. 1 Cir. 1974). Despite good practice, the requirement that each page be signed has wrought substantial havoc in Louisiana law. For instance, in *Succession of Hoyt*, a Louisiana court declared invalid a two-page will that was signed only on the last page. *Succession of Hoyt*, 303 So. 2d 189 (La. App. 1 Cir. 1974). The court noted that "[t]he failure of the testator to sign each sheet is fatal to the validity of the will." *Id.* Similarly, in *Land v. Succession of Newsom*, the court found that failure to sign each page of a two-page will was "fatal" to the validity of the entire will. *Land v. Succession of Newsom*, 193 So.2d 411 (La. App. 2d Cir. 1966). More recently, a court held invalid a will that was not signed on every page by noting that it was "undisputed that [the testator] did not sign one of the pages of the ... testament that contained dispositive provisions in favor of his three sisters." *In re Hendricks*, 28 So. 3d 1057 (La. App. 1 Cir. 2009). *But see Succession of Simonson*, 982 So. 2d 143 (La. App. 5 Cir. 2008) (a will was not rendered invalid under prior law if the testator fails to sign a page relating solely to the powers of a trustee and other administrative matters); *Succession of Guezuraga*, 512 So. 2d 366 (La. 1987) (same regarding end of attestation clause). Experience has shown that although good practice would encourage the signing of every page, the absence of a signature on every page should not be an absolute bar to a will's validity, especially when no fraud or similar allegation is made, or when the testator made some identifying mark, such as initialing, to indicate assent to the will's provisions. *But see Succession of Frabbiele*, 397 So.3d 391 (La. 2024) (invalidating a will under prior law that was initialed on every page). No other document must be signed on every page as a condition of validity. Similarly, experience from other jurisdictions and conventions is likewise illuminating. Many civil and common law jurisdictions do not require the signing of every page of a will. *See, e.g.*, FR. CIV. CODE arts. 971-974; BGB §2231-2233; UNIF. PROB. CODE §2-502. Some civil law jurisdictions still require that "secret" wills be signed on every page. *See, e.g.*, ITAL. CIV. CODE art. 604; SP. CIV. CODE art. 706. Although the Uniform Law on International Wills also requires a signature on every page, it does not consider it a core formality, such that its absence does not affect the validity of the will. UNIF. INT'L WILLS ACT Arts. 1 & 6.

(h) This revision repeals former Civil Code Articles 1578 and 1579, which provide special procedures for testators who were unable to sign or unable to read. Although well intentioned, those articles proved unnecessarily cumbersome in the modern day. A testator who is unable to sign, can direct another person to sign in his place under this article. Similarly, a testator who is unable to read can still sign a legal document, including a will. Before doing so, however, it is important that the document be explained to the signatory to ensure that it represents his intent. Former Civil Code Article 1580.1, which provided special procedures for testators who were deaf or deaf and blind, was again well intentioned but either unnecessary or impractical in its application. For an explanation of the difficulties of utilizing Article 1580.1, see Ronald J. Scalise Jr., *Will Formalities in Louisiana: Yesterday, Today, and Tomorrow*, 80 LA. L. REV. 1333 (2020).

Professor Scalise next remarked that in addition to the general law on notarial testaments, Louisiana has also enacted over the years special laws for testators who are physically unable to sign or read, deaf, deaf and blind, or who can read braille. The

Committee recommends repealing all of these special provisions because the standard formalities provided in proposed Civil Code Article 1576 would apply for everyone. Furthermore, some attorneys informed the Committee that testators who are unable to read find it degrading and an invasion of privacy to have their will read aloud. The Council approved the repeal of Civil Code Articles 1577, 1578, 1579, 1580, and 1580.1.

Turning to page 15 of the materials, the Reporter explained the creation of a new Code of Civil Procedure Article – Article 2887 – to address the proof requirements for a notarial testament. If the will is signed on every page and contains an attestation clause, the will is self-proving. Because most notarial testaments are executed in this manner today, attorneys' forms will not require modification. However, if a testator does not sign every page or if the language of the attestation clause varies slightly, the will may still be upheld if it is proven to be the will of the testator. The proposal also provides that a notarial testament may be self-proving if, at any time after the execution of the will in accordance with Civil Code Article 1576, the notary and the witnesses who subscribed to the will sign a declaration that the will was executed in their presence and signed on each separate page. The Reporter agreed to further clarify in Comment (a) that testaments have to be both signed on every page and contain an attestation clause either in the testament itself or in a subsequently executed affidavit to be self-proving.

Professor Scalise continued with Paragraph B and commented that if a will is not self-proving, there are four ways to prove that it is the will of the testator. The notary and at least one of the subscribing witnesses, the two subscribing witnesses, the notary or one of the witnesses, or two credible witnesses who recognize the signature of the testator may testify orally or by affidavit that the testament was signed by the testator. With little discussion, the following provision was approved:

Article 2887. Notarial testament

A.(1). A notarial testament executed pursuant to Civil Code Article 1576 does not need to be proved if it is signed on each separate page at the time of execution and is accompanied by either of the following declarations:

(a) If in the testament, the notary and the subscribing witnesses sign the following declaration or one substantially similar: "In our presence the testator has declared or signified that this instrument is his testament and has signed each separate page."

(b) If in an affidavit attached to the testament but executed after the execution of the testament, the notary and the witnesses who subscribed to the will sign the following declaration or one substantially similar: "In our presence the testator has declared or signified that the attached instrument is his testament and has signed each separate page."

(2) If the testator is unable to sign and has directed another person to sign on his behalf, the testament shall be signed on each separate page by the person authorized by the testator, and the declarations provided in Subparagraph (1) of this Paragraph shall be modified to indicate that a person other than the testator signed at the direction of the testator.

B. (1). A notarial testament that does not comply with Paragraph A of this Article shall be proved to have been signed by the testator or by another person at the testator's direction either by the testimony of the notary and at least one of the subscribing witnesses or by the testimony of the two subscribing witnesses.

(2) If only the notary or only one of the subscribing witnesses is living in the state, not incapacitated, or can be located, the testimony of the notary or one of the witnesses that the testament was signed by the testator or by another person at the testator's direction shall be sufficient.

(3) If the notary and all of the subscribing witnesses are dead, absent from the state, incapacitated, or cannot be located, the testament may be proved by the testimony of two credible witnesses who recognize the signature of the testator on the testament.

(4) A person's testimony for the purpose of this Paragraph may be given in the form of an affidavit executed after the death of the testator, unless the court in its discretion requires the person to appear and testify orally. All affidavits accepted by the court in lieu of oral testimony shall be filed in the probate proceedings. This Subparagraph does not apply to testimony with respect to the genuineness of a will that is judicially attacked.

Revision Comments – 2025

(a) This article is new. It changes the law by providing that an attestation clause for testaments executed pursuant to Civil Code Article 1576 is no longer a condition of validity for the execution of a notarial will nor is signing the will on every page or the publication of the will. This Article provides that notarial wills may be self-proving if the will or a subsequently executed affidavit contains an appropriate attestation clause, and the will is signed on every page. Notarial wills executed pursuant to Civil Code Article 1576 that do not contain attestation clauses or are not signed on every page or published may still be probated in accordance with Paragraph B of this Article if sufficient proof can be adduced that the testament was properly executed.

(b) Paragraph A of this Article provides examples of attestation clauses that may be used to make a will under Civil Code Article 1576 self-proving. The exact wording of this Paragraph does not need to be used. Language substantially similar is sufficient. Also, to be signed on every page, a full legal name of the testator is not required. Nicknames or initials may constitute a signature under this Article. For further discussion of what constitutes a signature, see comment (b) to Civil Code Article 1576. Similarly, a testator may declare or signify that a document is his will in any number of ways. *See, e.g.*, comment (f) to Civil Code Article 1576.

(c) Subparagraph (B)(1) of this Article provides that if a testament or subsequently executed affidavit does not contain an attestation clause substantially similar to the example in Paragraph A, then the testament is not self-proving and must be proved by the testimony of the notary and one of the subscribing witnesses or by the testimony of both subscribing witnesses. Subparagraph (B)(2) adopts a procedure for probating a notarial will in which only the notary or only one of the witnesses can testify. It is similar to the prior procedure for probating a statutory will. *See* Article 2887 (repealed). Subparagraph (B)(3) adopts a procedure for probating a notarial will in which neither the notary nor the witnesses can testify. It is similar to the prior procedure for probating a statutory will and with the procedure that already exists in the law for similar situations involving nuncupative wills by private act and mystic wills. *See* Articles 2886(B) and 2887(repealed). Notarial wills signed by another person at the testator's direction cannot be probated pursuant to Subparagraph (B)(3). Subparagraph (B)(4) allows for a person's testimony to be given by affidavit. *See* Articles 2883(B), 2884(B), 2885(B), and 2886(C).

To comply with the adoption of the new Code of Civil Procedure Article 2887, the Reporter stated that existing Code of Civil Procedure Article 2891 needs to be amended to provide that only notarial testaments signed on every page and containing an attestation clause do not need to be proved. The following language was approved:

Article 2891. Notarial testament~~,~~; nuncupative testament by public act~~,~~ ~~and~~; statutory testament executed without probate

A notarial testament that complies with the provisions of Article 2887(A), a nuncupative testament by public act~~,~~ and a statutory testament do not need to be proved. Upon production of the testament, the court shall order it filed and executed and this order shall have the effect of probate.

Revision Comments – 2025

This revision changes the law to recognize that notarial wills are not always self-proving but only when they comply with the requirements of Article 2887(A).

Professor Scalise followed by asking for approval of special effective date language so that the provisions will apply to all claims existing and pending on the effective date of the Act but will not revive prescribed claims. Members of the Council asked whether this language could affect a case pending on appeal, and the Reporter answered in the affirmative but noted that final and definitive cases may not be relitigated. The following language was approved:

Section 2. The provisions of this Act shall apply both prospectively and retroactively and shall be applied to all claims existing and pending on its effective date and all claims arising or actions filed on and after its effective date. It shall not be applied to revive claims prescribed as of the effective date of this Act.

Moving to olographic wills, Professor Scalise pointed to the ill-starred *Succession of King* case from 1992 that led us down the path of requiring signatures at the end and what it means to be dated. This proposal reverts to previous law and the simple requirements of being written, dated, and signed by the testator to be valid. The signature and date may appear anywhere in the writing, and the Comments further elaborate on what constitutes a signature and the fact that flexibility regarding the date is necessary. Members of the Council discussed wills drafted on an iPad, carved in walls or on bumpers, and drawn in the dirt and noted that the only limiting factor seems to be preservation of such writings. The Reporter provided the example of a will drafted on an etch a sketch as being invalid because of the use of knobs instead of the testator's handwriting. The Council also noted that the requirements of Code of Civil Procedure Article 2903 that the proponent bears the burden of proving the authenticity of the testament, and its compliance with all of the formal requirements of law, alleviates some concerns. Discussion also included issues such as identifying a strikethrough of text as the handwriting of the testator, the use of preprinted forms, and the location of the signature. The following provision was then approved:

Article 1575. Olographic testament; requirements of form

A. An olographic testament is one entirely written, dated, and signed in the handwriting of the testator. ~~Although the date may appear anywhere in the testament, the testator must sign the testament at the end of the testament. If anything is written by the testator after his signature, the testament shall not be invalid and such writing may be considered by the court, in its discretion, as part of the testament.~~ The olographic testament is subject to no other requirement as to form. ~~The date is sufficiently indicated if the day, month, and year are reasonably ascertainable from information in the testament, as clarified by extrinsic evidence, if necessary.~~

B. The signature may appear anywhere in the testament and is sufficient if it identifies the testator and evidences an intent by the testator to adopt the document as the testator's testament.

C. The date may appear anywhere in the testament, may be clarified by extrinsic evidence, and is sufficient if it resolves those controversies for which the date is relevant.

~~B.~~ D. Additions and deletions on the testament made after the execution of the testament may be given effect only if made by the hand of the testator and need not comply with the formalities for the execution of a will or the revocation of a legacy.

Revision Comments – 2025

(a) This revision changes the law to simplify the execution of olographic wills in Louisiana and return Louisiana law to the approach traditionally used for nearly two hundred years. *See* Article 1588 (1870); Article 1581 (1825); LA. DIGEST Art. 103 (1808). The simplified approach of this revision is consistent with the more streamlined approach employed by other civil law jurisdictions and other American states. *See, e.g.*, FR. CIV. CODE art. 970; BGB § 2247; QUEBEC CIV. CODE art. 726; UNIF. PROB. CODE § 2-502(b) (2008). For discussion of the application of will formalities under Louisiana law, see generally Ronald J. Scalise Jr., *Will Formalities in Louisiana: Yesterday, Today, and Tomorrow*, 80 LA. L. REV. 1333 (2020).

(b) Under long-standing Louisiana law, an olographic will must be "entirely" written, dated, and signed in the testator's hand. Question has arisen as to the exact meaning of the word "entirely." Louisiana courts have adopted the "surplusage" approach to this problem, which, stated briefly, provides that "the portions of the document in the testator's handwriting are given effect as an olographic will if they make sense as a will standing alone." *Andrew's Heirs v. Andrew's Executors*, 12 Mart. (o.s.) 713 (La. 1823). In some instances, the handwritten material may be insufficient, standing alone, to constitute an olographic will and thus cannot be given effect. *See, e.g.*, *Succession of Plummer*, 847 So. 2d 185 (La. App. 2d Cir. 2003). This revision maintains the traditional "surplusage" approach and does not adopt the more permissive approaches to olographic wills advocated by various versions of the Uniform Probate Code. *See* UNIF. PROB. CODE §2-503 (1990) (requiring only "material provisions" to be in the testator's handwriting); UNIF. PROB. CODE §2-503(b) & (c) (requiring only "material portions" to be in the testator's handwriting and allowing preprinted material to serve as extrinsic evidence of a testator's intent); RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS §3.2, cmt b.

(c) Under prior law, the signature in an olographic will was required to appear "at the end of the testament," but "anything ... written by the testator after his signature ... [did not invalidate], the testament ... [but could] be considered by the court, in its discretion." Civil Code Article 1575 (2001). This revision changes the law but declines to impose a location requirement for a signature in an olographic will. Rather it defines what is required to constitute a signature, irrespective of its location. This approach is consistent with historical Louisiana law and with the law of other jurisdictions. *See, e.g.*, FR. CIV. CODE art. 970; BGB §2247; QUEBEC CIV. CODE art. 726; UNIF. PROB. CODE §2-502 (2008); UNIF. PROB. CODE §2-503 (1990). The 1870 Louisiana Civil Code merely provided that "[t]he olographic testament is that which is written by the testator himself. In order to be valid, it must be entirely written, dated and signed by the hand of the testator. It is subject to no other form, and may be made anywhere, even out of the State." Civil Code Article 1588 (1870). In 1999, when the revision to the law on donations went into effect, Civil Code Article 1575 read as follows:

> An olographic testament is one entirely written, dated, and signed in the handwriting of the testator. It is subject to no other requirement as to form. Additions and deletions on the testament may be given effect only if made by the hand of the testator.

The language regarding signatures at the end was added in 2001 to overrule an ill-starred case, *Succession of King*, 595 So. 2d 805, 809 (La. App. 2 Cir. 1992), which invalidated an olographic will that had not been signed at the end. Although overruling *Succession of King* was a laudable goal, the 2001 revision unfortunately precluded courts from even considering wills in which the signature was not at the end and rather was contained in the exordium to the will, such as in *Succession of Ally,* 354 So. 3d 1248 (La. App. 5 Cir. 2022). *See also* THOMAS E. ATKINSON, HANDBOOK OF THE LAW OF WILLS 255 (1937).

Furthermore, this revision makes clear that no rigid rule exists as to how one must sign one's name. To the extent that *Succession of Frabbiele,* 397 So.3d 391 (La. 2024), may have been applicable by analogy, the holding of that case is legislatively rejected by the adoption of a broader definition of "signing" or "signature." Prior to *Frabbiele*, Louisiana jurisprudence was replete with varying manifestations of a testator's signature. Although one's full legal name may be signed in some cases, a full legal name is not a requirement. *See, e.g., In re Succession of Caillouet*, 935 So. 2d 713 (La. App. 4 Cir. 2006) (finding "Auntie" to be a sufficient signature); *Succession of Cordaro*, 126 So. 2d 809 (La. App. 2d Cir. 1961) (finding an olographic will valid that was signed only with the testator's first name, Lorene); *Balot y Ripoll v. Morina*, 12 Rob. 552, 558 (La. 1846) (holding a false name was a signature); *Succession of Squires*, 640 So. 2d 813 (La. App. 3d Cir. 1994) (holding that initialing constitutes a signature); *Succession of Armstrong*, 636 So. 2d 1109 (La. App. 4 Cir. 1994) (holding that initialing constitutes a signature); *Succession of McKlinski*, 331 So. 3d 414 (La. App. 4 Cir. 2021) (holding that initialing constitutes a signature); *Succession of Pedescleaux*, 341 So. 3d 1224 (La. App. 5 Cir. 2022) (holding that initialing constitutes a signature); *Succession of Spain*, 344 So. 3d 115 (La. App. 4 Cir. 2022) (holding that initialing constitutes a signature). Under this revision, a full legal name, a nickname, a pseudonym, or even initials may constitute a signature. A broad definition of "signing" or "signature" is consistent with both civil and common law practices. For instance, French law is untroubled by first names or initials as signatures. *Philippe Malaurie & Claude Brenner, Droit des Successions et des Libéralities* 297 (8th ed. 2018). Italian law provides that "[A] signature is valid even without the forename and surname so long as it designates with certainty the person of the testator .... Accordingly, ... it is possible to sign the will by using, for instance, only the surname or the first name (whether with or without the initial of the surname) or a nickname if that is habitually used to identify the testator or even the initials of the first name and surname." Alexandra Braun, *Testamentary Formalities in Italy*, *in* Testamentary Formalities 51, 64 (Kenneth G.C. Reid, Marius J de Waal, & Reinhard Zimmermann eds., 2011*);* Italian Civil Code Art. 602 ("*La sottoscrizione deve essere posta alla fine delle disposizioni. Se anche non è fatta indicando nome e cognome, è tuttavia valida quando designa con certezza la persona del testatore.*"). Under Brazilian law, a signature by "a pseudonym may also be sufficient if it is a name which the testator generally uses." Jan Peter Schmidt, Testamentary Formalities in Latin America with Particular Reference to Brazil, *in* Testamentary Formalities 51, 64 (Kenneth G.C. Reid, Marius J de Waal, & Reinhard Zimmermann eds., 2011). German Law is also flexible on the signature requirement. BGB §2247(3) ("The signature should contain the first name and the last name of the testator. If the testator signs in another manner and this signature suffices to establish the identity of the testator and the seriousness of his declaration, such a signature does not invalidate the will."). Common law sources are also in accord. *See, e.g.*, 2 PAGE ON THE LAW OF WILLS §§ 19.41, at 89 (2003) ("The testator may sign his name by writing it out in full or by abbreviating it, or by writing his initials, ... or by using an assumed name where not done with intent to deceive."); RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS §3.1, cmt j ("Ideally, the testator 'signs' the will by writing out his or her name in full. Signature by mark or cross is sufficient, however. So also is signature

by term of relationship (such as 'Dad,' 'Mom,' or 'Auntie'), abbreviation, nickname, a pet name, a first name, a last name, initials, or pseudonym, or even by fingerprint or seal. The name need not be spelled correctly. It need not be legible. It may be made with the assistance of another, who guides the testator's hand. The crucial requirement is that it must be done with intent of adopting the document as the testator's will.").

(d) Under prior law, the date was sufficient only if the "day, month, and year are reasonably ascertainable from information in the testament, as clarified by extrinsic evidence, if necessary." Civil Code Article 1575 (2001). Question, however, may exist as to the exact date when slash or numeric dates are used and both the first and second numbers are below twelve. And, in fact, early Louisiana courts invalidated wills with slash dates, such as "10/3/50," "12.10.1934," and "9/8/18," because in all such cases the date was uncertain. *Succession of Mayer*, 144 So. 2d 896 (La. App. 4 Cir. 1962); *Succession of Lasseigne*, 181 So. 879 (La. App. 1st Cir. 1938). Prior law altered the above results by allowing extrinsic evidence to be admitted to clarify an ambiguous date. Civil Code Article 1575; *see also Succession of Beird*, 82 So. 881 (La. 1919). However, extrinsic evidence was still needed to render the day, month, and year "reasonably ascertainable." In *Succession of Raiford*, 404 So. 2d 251 (La. 1981), the Louisiana Supreme Court considered an olographic will dated "Monday.8 1968." Even after the admission of extrinsic evidence, the Court concluded that "[t]he only certain thing about the date here is the year 1968. The figure 8 could reflect either the day or the month." Thus, "the will [was] invalid." Other decisions from the Louisiana Supreme Court have been equally clear that "the month, without the day, is no date" at all. *See also Succession of Robertson*, 21 So. 586 (La. 1897) (holding a will invalid when the first three digits of the date (i.e., 189) were in print, and the testator merely supplied the last numeral).

This revision takes a more expansive approach as to what constitutes a sufficient date and declines to establish a rigid definition of what constitutes a date and rather adopts a more flexible approach of allowing courts to examine what might be "sufficient if it resolves those controversies for which the date is relevant." In other words, if a testator dies with two wills dated "March 2024," a sufficient date will require determining temporal priority of the wills in order to probate either. On the other hand, if the testator has only one will and there are no issues regarding capacity or free consent, knowing only that the will was executed in March of 2024 could be entirely sufficient. Along these lines, Justice Lemmon in dissent in the *Raiford* case observed similarly in concluding that a will dated only by the year ought to be valid when the purposes for which the date are required (i.e., competency of the testator and order of multiple wills) are not thwarted. *Succession of Raiford*, 404 So. 2d 251 (La. 1981) (Lemmon, J., dissenting). Commentators have likewise criticized a strict rule requiring a date and argued that "[o]ne need only say that the 'date' must be sufficient to resolve those controversies present in the case for which the date was intended." H. Alston Johnson, *Successions and Donations*, 43 LA. L. REV. 585, 601 (1982); Ronald J. Scalise Jr., *Will Formalities in Louisiana; Yesterday, Today, and Tomorrow*, 80 LA. L. REV. (2020); *Succession of Boyd*, 306 So. 2d 687 (La. 1975) (Dixon, J). *See also Succession of Raiford*, 404 So. 2d 251, 254 (1981) (Lemmon, J., dissenting) (arguing that a will dated "1968" should be valid because it establishes "the point in time of its making sufficiently to show that this will was made later than the 1963 will in which the decedent left the property to her brother."). Other civil law jurisdictions have also shown flexibility regarding the date requirement for an olographic will. *See, e.g.*, Cass. Civ. 1re, 22 nov. 2023, No. 21-17.524 (upholding an olographic will without a handwritten date, despite an explicit requirement in the French Civil Code to the contrary); BGB § 2247 (providing that an olographic will may be made by a writing signed by the testator and may still be valid without a date); QUEBEC CIV. CODE art. 726

("*Le testament olographe doit être entièrement écrit par le testateur et signé par lui, autrement par un moyen technique.*"). *See also* UNIF. PROB. CODE § 2-502 (allowing for holographic wills provided they are signed and "material portions of the document are in the testator's handwriting").

(e) Paragraph D of this revision continues the approach of prior law but clarifies that handwritten additions or deletions made on olographic wills may be given effect by a court, even if the amendments are not in the form of a will or the revocation of a legacy. This has long been the law in Louisiana and in other jurisdictions. *See, e.g.*, Civil Code Article 1589 (1870) ("Erasures not approved by the testator are considered as not made, and words added by the hand of another as not written."); *Succession of Melancon*, 330 So. 2d 679 (La. App. 3 Cir. 1976) ("We recognize that Article 1589 of the Revised Civil Code and the jurisprudence interpreting the provisions thereof recognize that the writer of an olographic will may later or completely change testamentary dispositions in his handwritten testament without affecting its validity so long as the alterations or additions are made by the hand of the testator."); *Succession of Butterworth*, 196 So. 39 (La. 1940); Restatement (Third) Property: Wills and Other Donative Transfers § 3.2 cmt f ("After the testator signs a holographic will, the testator may validly make a handwritten alteration of the will without re-signing the document.").

(f) An olographic will, like a notarial will, must be in "writing." Prior to the 1997 revision, Louisiana law allowed for certain extraordinary oral wills. Those wills have been suppressed. See, e.g., Civil Code Article 1597-1604 (1870). Today, all wills must be in writing. Traditionally, the writing is on paper, but neither Louisiana law, nor the law of other jurisdictions, have ever required that a will be on paper. *See, e.g.*, Restatement (Third) Property: Wills and Other Donative Transfers §3.1 cmt i ("The requirement of a writing does not require that the will be written on sheets of paper, but it does require a medium that allows the markings to be detected. A will, for example, scratched in the paint on the fender of a car would be in writing, but one "written" by waving a finger in the air would not be."). In the modern day, it is even possible that an olographic will could be written on an electronic tablet. *See, e.g., In re Estate of Javier Castro*, No. 2013ES11140 (Lorain Cnty. Ohio Ct. Com. Pl. June 19, 2013). There is also no requirement that a will be written in English. *See, e.g.*, Civil Code Article 1577 cmt (d) (1997). Louisiana law contains examples of wills written in French, among other languages. *See, e.g., Lagrave v. Merle*, 5 La. Ann. 278 (La. 1850).

At this time, Professor Scalise concluded his presentation, and the Friday session of the February 2025 Council meeting was adjourned.

LOUISIANA STATE LAW INSTITUTE

MEETING OF THE COUNCIL

February 15, 2025

Saturday, February 15, 2025

Person Present:

Braun, Jessica G.
Breard, L. Kent
Coco, Ashley
Crigler, James C., Jr.
Crochet, Anne J.
Forrester, William R., Jr.
Gregorie, Isaac M. "Mack"
Hamilton, Leo C.
Hayes, Thomas M., III
Hayes, Karen L.
Hogan, Lila Tritico
Holdridge, Guy
Holthaus, C. Frank
Lee, Amy Allums
Manning, C. Wendell
McCallum, Jay B.
Meyer, Julia A.
Miller, Gregory A.
Price, Donald W.
Reeves, Ruth A.
Richardson, Sally Brown
Scalise, Ronald, J., Jr.
Smith, Kenya J.H.
Talley, Patrick A.
Talley, Susan G.
Tate, George J.
Vance, Shawn D.
Waller, Mallory C.
White, H. Aubrey, III

Vice President Leo C. Hamilton called the Saturday session of the February Council meeting to order on Saturday, February 15, 2025, at the LSU Paul M. Hebert Law Center in Baton Rouge. He then called on Professor Sally Brown Richardson, Reporter of the Property Committee, to begin her presentation of materials.

Property Committee

Professor Richardson quickly reminded the Council of the progress made during her prior presentation on enclosed estates before directing the Council to pages 6 and 7 of the materials and the Comments to Civil Code Article 692. Professor Richardson explained that the changes to the Article had already been approved but Comments (c) and (d) were added to recognize that courts may have to engage in a multi-step process to determine which of the intervening lands should become the servient estate and to clarify that this Article does not apply to a right of passage created in accordance with Article 694. The following Comments were approved:

Article 692. Location of passage

* * *

Revision Comments – 2025

* * *

(c) In determining the location of the right of passage, this Article recognizes that there may be multiple estates, or intervening lands, which could serve as the servient estate, all of which may allow an equidistant passage to the public road. In such a case, the court must determine which estate will be the servient estate and where on that estate the passage will be located. In both instances, the court should ensure the shortest route that is the least injurious is selected.

(d) The location of the passage applies to a right of passage created under Article 689. This Article does not apply to a right of passage created under Article 694.

Turning to Article 694, Professor Richardson informed the Council that in this circumstance an estate has been enclosed upon through no fault of its own. Therefore, the owner of the estate who caused the enclosure is required to gratuitously provide a right of passage over his land. The revision is intended to clarify that passage must be given in both judicial partition and alienation enclosures and where passage will be located will depend on whether the enclosure was the result of a partition or alienation. In the partition situation, and in accordance with existing law, passage will be located wherever passage was previously located. For alienation, passage will be over the tract that caused the enclosure because other surrounding tracts should not be burdened. Discussion included the fact that the shortest route refers to the shortest route over the tract that caused the enclosure and not necessarily the shortest route to the public road and situations in which passage has not ever been previously exercised. All of the following language was approved:

Article 694. Enclosed estate; voluntary alienation or judicial partition

A. When in the case of judicial partition, or a voluntary alienation of an estate or of a part thereof, property alienated or partitioned becomes enclosed, passage shall be furnished gratuitously to the owner and the owner's successors even if the location of the passage is not the shortest route to the public road, and even if the act of alienation or partition does not mention a right of passage.

B. In the case of judicial partition, passage shall be furnished by the owner of the land on which the passage was previously exercised~~, even if it is not the shortest route to the public road or utility, and even if the act of alienation or partition does not mention a servitude of passage~~. In the case of a voluntary alienation, passage shall be furnished on the estate whose owner caused the enclosure.

Revision Comments—2025

(a) This revision clarifies that when an estate is enclosed by judicial partition or alienation, a gratuitous right of passage is owed to the owner of the enclosed estate and the owner's successors. Prior jurisprudence was unclear whether a gratuitous right of passage was always owed by the estate that caused the enclosure or only when passage had clearly previously been exercised over the estate that caused the enclosure. This revision clarifies that when an estate is enclosed due to a judicial partition, passage should be provided where it was previously exercised, but when an estate is enclosed due to a voluntary alienation, the estate that caused the enclosure must furnish the passage. *See* Patin v. Richard, 291 So. 2d 879 (La. App. 3 Cir. 1974); Langevin v. Howard, 363 So. 2d 1209 (La. App. 2 Cir. 1978), *writ denied*, 366 So. 2d 560 (La. 1979); Petrovich v. Trabeau, 780 So. 2d 1258 (La. App. 4 Cir. 2001), *writ denied* 793 So. 2d 1251 (La. 2001). *See also* Yiannopoulos, Predial Servitudes §5:20 (2013).

(b) The rule that passage shall be furnished by the owner of the land on which passage was previously exercised applies only to judicial partitions; it does not apply to extrajudicial partitions. Prior law did not distinguish between judicial and extrajudicial partitions. Accordingly, enclosed estates created through extrajudicial partitions prior to this revision should be governed by prior law.

(c) This article does not apply to a right of passage created under Article 689. Instead, Article 692 provides the rule for where a right of passage created under Article 689 should be located.

(d) This revision is modeled in part after French Civil Code Article 684.

Moving to Article 696, the Reporter noted that the Article was approved at a prior Council meeting but that there was a request for a Comment to include examples of the types of indemnification that may be necessary. Comment (c) provides examples of indemnification for the removal of timber and the relocation of deer stands. It also notes that indemnification may not be owed at all if the servient estate cannot prove that the exercise of passage caused any damage. The following language was approved:

Article 696. ~~Prescriptibility of action for indemnity~~ Indemnity

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Revision Comments – 2025

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(c) Indemnification for damages is distinct from the compensation required in Article 689. Whereas compensation under Article 689 is the fair market value of the right of passage, the amount of the indemnity is fixed in light of the damage occasioned to the servient estate. *See, e.g.*, Dickerson v. Coon, 71 So. 3d 1135 (La. App. 2 Cir. 2011) (indemnification for the removal of timber to build a right of passage); Robertson v. Arledge, 328 So. 3d 551 (La. App. 2 Cir. 2021) (indemnification for the forced relocation and replacement of deer stands). If the servient estate cannot prove the exercise of the servitude has caused any damage, no indemnity may be owed. *See* Altemus v. Boudreaux, 184 So. 3d 142 (La. App. 3 Cir. 2015).

Professor Richardson next introduced the utility servitudes revision and explained that when the concept was added to the Civil Code in 2012, the Law Institute immediately formed a Committee that repeatedly recommended that the provisions be moved to the Revised Statutes. However, the Law Institute's proposals failed to pass, and the Committee was disbanded. When the Property Committee was revived in 2019, its members immediately agreed to propose another revision to move utility servitudes to Title 9 of the Revised Statutes. The revision mirrors much of the enclosed estates articles but is separated out because a right of passage is not the same as a right to have access to running water or electricity.

Turning to proposed R.S. 9:1281 and the definition of a utility, the Reporter noted that this is existing law presently contained in Civil Code Article 696.1. The idea is to cover the types of utilities that are normally expected for a household without granting a servitude to run massive power lines over someone's property to supply a chemical plant. Industrial utilities are covered elsewhere in the law. After further discussion, the Council was satisfied that the language applies to services of the kind used in the operation of a household and not the kind of utility. Members of the Council suggested adding to Comment (a) that this provision was relocated from the Civil Code to alert practitioners that the revision clarifies and does not change the law, and the Reporter expressed her willingness to do so. After also explaining that this provision may not be used to gain a servitude over someone's property to then service some other location beyond the enclosed estate, the following was approved:

R.S. 9:1281. Definition

As used in this Chapter, a utility is a service, such as electricity, water, sewer, gas, telephone, cable, and power and communication networks, of the kind commonly used in the operation of an ordinary household, whether the service is provided to a household or business.

Revision Comments – 2025

(a) This revision does not change the law but simply relocates existing law from the Civil Code to the Revised Statues. The only utilities for which a servitude may be claimed under this Chapter are those of the nature described in this Section. However, a utility of the nature described in this

Section may be claimed for any type of dominant estate regardless of whether it is used for residential, agricultural, or commercial purposes.

(b) The reference to an "ordinary household" does not mean that only an estate on which an ordinary household is located is entitled to a utility servitude under this Chapter, nor that the utility may be used only for household purposes.

Professor Richardson then explained that R.S. 9:1282 is the default rule, parallel to Civil Code Article 689, providing that if the owner of an estate does not have access to a utility, that owner may claim a utility servitude over the neighbor's property. The following was adopted:

R.S. 9:1282. Estate having no access to utility; utility servitude

A. The owner of an estate that has no access to a utility may claim a utility servitude over neighboring property to the nearest utility. The owner of the dominant estate is bound to compensate the neighbor for the utility servitude acquired.

B. The right to demand compensation from the owner of the dominant estate may be lost by prescription. Loss of the right to demand compensation has no effect on the utility servitude due to the owner of the dominant estate.

Revision Comments – 2025

(a) A utility servitude is a predial servitude and regulated by application of the rules governing predial servitudes to the extent that their application is compatible with the rules governing a utility servitude.

(b) A utility servitude is based on the rules governing a right of passage for an enclosed estate in C.C. Article 689, et seq. To the extent applicable, the Civil Code articles on enclosed estates and jurisprudence interpreting those articles may be applied by analogy to a utility servitude under this Chapter.

Next, Professor Richardson stated that R.S. 9:1283 is the same concept as the enclosed estate rule but differs slightly in that the burden imposed is limited to the burden that is required to provide the utility to an ordinary household. It is not as expansive as being whatever passage is necessary and reasonable for the use of the estate. The following provision was approved:

R.S. 9:1283. Extent of the utility servitude

The utility servitude shall be limited to the rights reasonably necessary to provide the utility to the dominant estate. The burden imposed on the servient estate shall not be substantially different from that required to provide the utility to an ordinary household.

Revision Comments – 2025

A utility servitude may be claimed under this Chapter regardless of whether the dominant estate is used for residential, agricultural, or commercial purposes. However, the burden imposed upon the servient estate in any case cannot be substantially different from the burden necessary to provide the utility to an ordinary household. See R.S. 9:1281.

Moving to R.S. 9:1284, the Reporter explained that this language is taken from Civil Code Article 691 and authorizes the construction of the works necessary to exercise the servitude, but in a manner that minimizes hazards. The Comment indicates that a

third party may be hired to perform the works for the owner of the estate who lacks access to the utility. The Council adopted the following:

R.S. 9:1284. Necessary works

The owner of the dominant estate may construct on the location of the utility servitude the works that are reasonably necessary for the exercise of the servitude. The works shall be constructed, maintained, and operated in a manner that reasonably minimizes hazards posed by the servitude.

Revision Comments – 2025

(a) This Section permits the owner of the dominant estate to construct upon the servient estate the works that are reasonably necessary to the exercise of the utility servitude. Because of the limitations imposed by R.S. 9:1281, however, those works cannot be substantially different from the works that would be required to provide the utility to an ordinary household.

(b) This Section does not require the owner of the dominant estate to construct the works on the servient estate. The owner may execute a juridical act granting to a third person, such as a utility provider, the right to enter upon the servient estate for the purpose of constructing or maintaining the necessary works, but the juridical act may not grant the third person any rights greater than those enjoyed by the owner of the dominant estate.

Professor Richardson then explained that R.S. 9:1285 concerns the location of the servitude and maintains the fact that the owner of the dominant estate may not demand the location anywhere that the owner chooses. The Comment reiterates factors to consider when determining the shortest route that is the least injurious. The Council worked through a few examples and concluded that the judiciary is doing a great job in balancing factors such as buried vs. pole lines, where current utilities and servitudes of passage exist, and costs. Upon the Council's request, the Reporter agreed to add the same Comment added to Civil Code Article 692 to recognize that there may be multiple estates and intervening lands that the utility may traverse.

Directing the Council to R.S. 9:1286, the Reporter recognized the first use of the term "enclosed" in the utility servitude statutes to clarify that an estate may be enclosed from a utility even if it has access to a public road. In this instance, if the estate enclosed itself from a utility that exists at the time of the enclosure, the neighbors are not required to furnish a utility servitude. If in the future, however, a new kind of utility emerges from which the estate is enclosed, the owner may claim and pay compensation for, under R.S. 9:1282, a utility servitude. With an addition to Comment (b), the following provision was approved:

R.S. 9:1286. Voluntary loss of utility access

If an estate becomes enclosed from a utility as a result of a voluntary act of its owner, the neighbors are not bound to furnish a utility servitude to the owner or the owner's successors.

Revision Comments – 2025

(a) The owner of an estate deprives himself of access to a utility only if the estate had access to that utility at the time of the alienation that caused the estate to lose access to the utility. Thus, the preclusion of this Section does not apply unless the utility actually existed before the estate became enclosed, and the estate had access to the utility at the time of the alienation.

(b) The utility servitude is based on the rules governing a right of passage for an enclosed estate in Civil Code Article 689. However, an estate may be enclosed as to a utility while having access to a public road.

For an estate to be enclosed under this Section, the estate must lose access to a utility as a result of a voluntary act of its owner.

Professor Richardson next introduced R.S. 9:1287 as the equivalent of Civil Code Article 694 and explained that this provision addresses the circumstance where an estate has been enclosed from a utility through no fault of its own. Therefore, the owner of the estate who caused the enclosure is required to gratuitously provide a servitude. This statute clarifies that passage must be given in both judicial partition and alienation enclosures and where passage will be located depends on whether the enclosure was the result of a partition or alienation. The following language was approved:

R.S. 9:1287. Voluntary alienation or partition

A. When in the case of judicial partition, or a voluntary alienation of an estate or a part thereof, property alienated or partitioned becomes enclosed from a utility, a utility servitude shall be furnished gratuitously to the owner and the owner's successors even if it is not the location that otherwise would be selected in accordance with R.S. 9:1285, and even if the act of alienation or partition does not mention a utility servitude.

B. In the case of judicial partition, a utility servitude shall be furnished by the owner of the land on which the utility servitude was previously exercised. In the case of a voluntary alienation, a utility servitude shall be furnished on the estate whose owner caused the enclosure.

Revision Comments – 2025

(a) Rules of statutory construction require that words used in the singular number include the plural. See R.S. 1:7. An estate could become enclosed from a utility due to a voluntary alienation of multiple estates or a partition involving multiple co-owners, such that a utility servitude must be furnished gratuitously over multiple estates whose owners caused the enclosure.

(b) The utility servitude is based on the rules governing a right of passage for an enclosed estate in Civil Code Article 689. However, an estate may be enclosed as to a utility while having access to a public road. For an estate to be enclosed, the estate must lose access to a utility as a result of a partition or alienation of the estate or a part thereof.

The final two statutes, R.S. 9:1288 and 1289, are the same rules provided in the enclosed estates articles in the Civil Code for relocation of a servitude after it has been fixed and indemnification. There are no Comments to these two provisions because the comments to R.S. 9:1282 direct the reader to the Civil Code and the rules governing rights of passage to the extent that they may be applied analogously to utility servitudes. With little discussion, the following provisions were both approved:

R.S. 9:1288. Relocation of the utility servitude

The owner of the dominant estate has no right to the relocation of the utility servitude after it is fixed. The owner of the servient estate has the right to demand relocation of the utility servitude to a more convenient place at his own expense, provided that the new location is equally convenient to the dominant estate.

R.S. 9:1289. Indemnity

A. The owner of a dominant estate having a utility servitude under this Chapter is bound to indemnify the owner of the servient estate for any damage caused by the exercise of the servitude.

B. The right to demand indemnity against the owner of the dominant estate may be lost by prescription. Loss of the right to demand indemnity has no effect on the utility servitude.

There being no additional business, Professor Richardson concluded her presentation, and the February 2025 Council meeting was adjourned.

Jessica G. Braun

Josef Ventulan