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January 24, 2022

Representative Clay Schexnayder
Speaker of the House of Representatives
P.O. Box 94062
Baton Rouge, Louisiana 70804

RE: HOUSE RESOLUTION NO. 49 OF THE 2020 REGULAR SESSION

Dear Mr. Speaker:

The Louisiana State Law Institute respectfully submits its report to the legislature relative to divorce by authentic act.

Sincerely,

A handwritten signature in blue ink, appearing to read "Guy Holdridge".

Guy Holdridge
Director

cc: Representative Robby Carter

email cc: David R. Poynter Legislative Research Library
drplibrary@legis.la.gov
Secretary of State, Mr. R. Kyle Ardoin
admin@sos.louisiana.gov

**LOUISIANA STATE LAW INSTITUTE
MARRIAGE-PERSONS COMMITTEE**

**REPORT TO THE LEGISLATURE IN RESPONSE TO
HR NO. 49 OF THE 2020 REGULAR SESSION**

Relative to divorce by authentic act

Prepared for the
Louisiana Legislature on

January 24, 2022

Baton Rouge, Louisiana

LOUISIANA STATE LAW INSTITUTE MARRIAGE-PERSONS COMMITTEE

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Katherine S. Spaht, Chair

Andrea B. Carroll, Reporter

Jessica G. Braun, Staff Attorney

2020 Regular Session

HOUSE RESOLUTION NO. 49

BY REPRESENTATIVE ROBBY CARTER

A RESOLUTION

To urge and request the Marriage-Persons Committee of the Louisiana State Law Institute to study, and the Louisiana State Law Institute to make specific recommendations and the Task Force on Benefits of Marriage and Incentives for Premarital Counseling and Pre-Divorce Counseling to study and make recommendations for revisions to Louisiana laws in order to implement divorce by authentic act and to urge and request the Louisiana State Law Institute to study and make recommendations regarding the laws on trusts with an indefinite term.

WHEREAS, although some Louisiana residents may wish to divorce, the expenses associated with seeking a divorce under present law can make a divorce cost prohibitive; and

WHEREAS, being unable to incur the cost of seeking a divorce, some Louisiana residents may instead separate and continue their lives by having children with someone other than their spouse, thereby creating a presumption of paternity that must be overcome; and

WHEREAS, for a couple who is married without children or immovable property, there is no legal or practical need to involve the court in the termination of the matrimonial regime; and

WHEREAS, in certain limited circumstances, it is prudent to enable Louisiana residents to secure a divorce without incurring the legal fees and court costs associated with a divorce under present law; and

WHEREAS, when judicial proceedings are unnecessary, the same legal effects may be achieved by authentic act; and

WHEREAS, in recognition of the value of providing a means to avoid judicial proceedings in certain limited circumstances, the legislature enabled small succession by affidavit in Code of Civil Procedure Articles 3431 through 3434; and

WHEREAS, for a couple who is married without children or immovable property, the law should enable the couple to achieve a divorce through an authentic act; and

WHEREAS, the Trust Code imposes limitations on the term of a trust; and

WHEREAS, perpetual trusts without a term are allowed in other states; and

WHEREAS, a settlor may wish to create a perpetual trust in Louisiana; and

WHEREAS, the Trust Code could be improved by allowing for perpetual trusts.

THEREFORE, BE IT RESOLVED that the House of Representatives of the Legislature of Louisiana does hereby urge and request the Marriage-Persons Committee of the Louisiana State Law Institute and the Task Force on Benefits of Marriage and Incentives for Premarital Counseling and Pre-Divorce Counseling to each study divorce by affidavit and the Louisiana State Law Institute and the Task Force on Benefits of Marriage and Incentives for Premarital Counseling and Pre-Divorce Counseling to each make recommendations, if any, of specific revisions in state law to authorize divorce by affidavit when the married couple has no children and owns no immovable property.

BE IT FURTHER RESOLVED that the House of Representatives of the Legislature of Louisiana does hereby urge and request that the Louisiana State Law Institute study the Trust Code and make recommendations, if any, for the implementation of perpetual trusts and that the Louisiana State Law Institute report its findings and recommendations to the Legislature of Louisiana on or before March 1, 2021.

BE IT FURTHER RESOLVED that a copy of this Resolution be transmitted to the director of the Louisiana State Law Institute and the chair of the Task Force on Benefits of Marriage and Incentives for Premarital Counseling and Pre-Divorce Counseling and that the Louisiana State Law Institute and the Task Force on Benefits of Marriage and Incentives for Premarital Counseling and Pre-Divorce Counseling each report its findings and recommendations to the Legislature of Louisiana on or before March 1, 2021.

SPEAKER OF THE HOUSE OF REPRESENTATIVES

January 24, 2022

To: Representative Clay Schexnayder
Speaker of the House of Representatives
P.O. Box 94062
Baton Rouge, Louisiana 70804

**REPORT TO THE LOUISIANA LEGISLATURE
IN RESPONSE TO HR NO. 49 OF THE 2020 REGULAR SESSION**

House Resolution No. 49 of the 2020 Regular Session urged and requested the Louisiana State Law Institute “to make recommendations for revisions to Louisiana laws in order to implement divorce by authentic act.” In fulfillment of this request, the Law Institute assigned the project to the Marriage-Persons Committee, which operates under the direction of Professor Andrea B. Carroll as Reporter.

The Marriage-Persons Committee researched divorce rules in all fifty states and determined that roughly half of the states (including, for instance, Hawaii, Utah, Delaware, Colorado, Indiana, Florida, Texas, California, Oklahoma, South Dakota, and Tennessee) have legislation or court rules permitting divorce by affidavit or some other nonjudicial, contractual, simplified, summary, or non-adversarial procedure. State law regarding those qualified to use these simplified divorced procedures varies substantially. Some statutes require that there be no minor children of the marriage. Some permit simplified divorce procedure only for marriages with a duration of less than a specified number of years. Some states mandate that the procedures be used only when the value of the marital property falls below a prescribed dollar amount. A few states require the parties to waive a right to support or complete a collaborative law process prior to using nonjudicial divorce procedures.

The Committee also reviewed and discussed empirical data and academic commentary related to this issue. The Committee noted a growing national trend toward collaborative divorce, and a less adversarial, more problem-solving approach toward resolving family law matters. The primary drivers of that trend appear to be concern over the cost and accessibility of divorce under the present system.

The Marriage-Persons Committee explored these concerns in depth with a view toward determining whether divorce by authentic act is the best way to address them. In that vein, the Committee noted that Louisiana has recently made significant progress in addressing access issues for litigants who cannot afford an attorney. The Louisiana District Judges Association formed a Self-Represented Litigant Committee in 2012 to assist judges, litigants, and attorneys alike in addressing the growing challenge of self-represented litigants. That committee has worked with the Louisiana State Bar Association and others to combine self-help resources and promote greater access to justice for litigants statewide. Over the course of the last decade, this work has resulted

in the provision of far more accessible resources, forms, and instructions to facilitate self-represented litigants' divorces. In some areas of the state, personal assistance has been made available to complete and notarize forms. Likewise, forms and assistance are available for applications to proceed in forma pauperis.

Additionally, in September of 2015, the Louisiana Supreme Court formed a statewide Access to Justice Commission to work toward a more coordinated and systemic approach to ensuring the public's access to the legal system. The articulated purpose of the Commission is to "assure continuity of policy and purpose in the collaboration between the private bar, the courts, and the civil justice community so as to further the goal of assuring that Louisianans, regardless of their economic circumstance, have access to equal justice under the law." The Access to Justice Commission has noted the availability of self-help forms for divorce, child custody, child support, name change, and a host of other family law-related procedures in some areas of the state. The group's strategic plan is to continue to develop more forms, encourage or mandate their adoption statewide, and educate the judiciary on the desirability of this uniformity.

Finally, Act 174 of the 2021 Regular Session eliminated the concept of preliminary defaults from Louisiana law. Rather than moving for a preliminary default and then confirming it, the Code of Civil Procedure now permits litigants to move straight to default judgment, even in divorce cases. This change substantially simplifies procedures for self-represented litigants in divorce. Moreover, in eliminating preliminary defaults in Act 174, the legislature was careful to preserve Louisiana judges' ability to render a default judgment in a divorce case under Civil Code Article 103(1) or 103(5) without a hearing. Of course, these changes not only benefit self-represented litigants, but also serve to reduce the fees that other litigants would pay their attorneys to navigate the divorce process before the passage of Act 174.

After discussing the assistance currently available to pro se litigants and the simplicity of obtaining a divorce under Civil Code Article 103(1), the Law Institute turned to a consideration of the implications of divorce by authentic act. Should a nonjudicial procedure for divorce be implemented, the Committee wondered about the widespread ramifications of individuals believing they properly divorced by contract, only to have that divorce set aside for form defects.

Noting the divorce rate nationwide, and particularly in Louisiana, and in deference to Louisiana's strong public policy in favor of marriage, the Law Institute also questioned whether Louisiana's no-fault waiting period would serve its purpose if divorce were permitted by authentic act. The Law Institute's Council feared these procedures may be abused for the purpose of obtaining an instantaneous divorce, which would be contrary to Louisiana's expressed public policy.

Accordingly, after thoroughly researching and discussing divorce avenues both in Louisiana and across the country, the Law Institute determined that divorce by authentic act is not currently desirable in Louisiana, and the Institute makes no recommendations to change present law at this time.