

LOUISIANA STATE LAW INSTITUTE

THE MEETING OF THE COUNCIL

March 13-14, 2015

Friday, March 13, 2015

Persons Present:

Adams, Marguerite (Peggy) L.	Landry, Ron J.
Alston, Elizabeth A.	Lavergne, Luke
Baiamonte, Joseph J.	Lonegrass, Melissa T.
Baker, Katherine S.	Maloney, Marilyn
Bergstedt, Thomas	Medlin, Kay C.
Breard, L. Kent	Mengis, Joseph W.
Brister, Dorrell J.	Morel, Stephen
Burriss, William J.	Norman, Rick J.
Comeaux, Conrad	Odinet, Christopher
Crawford, William E.	Perez, Elizabeth
Crigler, James C., Jr.	Pittman, Richard
Cromwell, L. David	Pohorelsky, Peter
Curry, Kevin C.	Popovich, Claire
Curry, Robert L., III	Price, Donald
Dampf, Katherine Hand	Reed, Angelique
David, Robert	Richard, Herschel, Jr.
Davidson, James J., III	Richard, Michael Jeb
Dawkins, Robert G.	Richardson, Sally
Dimos, Jimmy N.	Riviere, Christopher H.
Doguet, Andre	Robert, Deidre D.
Domingue, Billy J.	Roberson, Lynette
Foote, Elizabeth E.	Scalise, Ron J., Jr.
Forrester, William R.	Sharp, Carl Van
Freel, Angelique	Shea, Joseph L., Jr.
Frilot, Caroline	Sklamba, Stephen
Garrett, J. David	Sole, Emmett C.
Gasaway, Grace B.	Storms, Tyler
Griffin, Judge Piper	Stuckey, James A.
Hallstrom, Karen	Suprenant, Monica T.
Hamilton, Leo C.	Talley, Susan G.
Hargrove, Joseph L., Jr.	Tate, George J.
Hayes, Thomas M., III	Thibaut, Martha
Haymon, Cordell H.	Thibeaux, Robert P.
Hebert, Christopher B.	Title, Peter S.
Hester, Mary C.	Tooley-Knoblett, Dian
Hogan, Lila T.	Tucker, Zelda W.
Holdridge, Guy	Veith, Rebekka
Jackson, Patrick	White, H. Aubrey, III
Knighten, Arlene D.	White, Roederick
Kostelka, Robert "Bob" W.	Williams, Rebecca
Landrieu, Judge Madeleine	Ziober, John David

The Friday, March 13, 201 meeting of the Council of the Louisiana State Law Institute was called to order by the President, Mr. James C. Crigler, Jr. at 10:00 a.m. at the Monteleone Hotel in New Orleans, Louisiana.

The President began the meeting by having all present state their name and their hometown. Thereafter, the President informed the Council that first on the agenda was a presentation by the Security Devices Committee. The President then yielded the floor to Mr. L. David Cromwell, the Reporter of the Security Devices Committee.

Security Devices

Mr. Cromwell began his presentation by explaining that Senate Resolution No. 158 from 2012 was the origin of the Committee's work on the Private Works Act. He also explained to the Council the existence and importance of the "Special Advisors" who had been added, on a temporary basis, to the Committee to aid it in its study of the Act. Mr. Cromwell also informed the Council that the changes that the Committee would be recommending would not constitute a wholesale revision of the Act.

Mr. Cromwell began the body of his presentation by asking the members to turn their attention to the document that was made available prior to the meeting and was entitled, "Revision of the Private Works Act, R.S. 9:4801 et seq., Avant-Projet No. 1, Prepared for Consideration by the Council, March 13, 2015". He explained the definitions of the words in R.S. 9:4809 (i.e., "business day," "complete property description," and "professional subconsultant"). A member queried the Reporter as to whether the definition of a "professional subconsultant" should specify the type of engineer that is included in the definition. Mr. Cromwell assured the member that the definition of "professional subconsultant" was not a change to the law; however, he agreed that the Committee would consider whether it should specify which engineer is included in the definition. A member then moved that that all of the Sections be adopted. Another member of the Council then suggested to Mr. Cromwell that the Security Devices Committee study Revised Statute Title 37 to see if, and if so, which type of engineer or architect should be included in the definition of a "professional subconsultant." Mr. Cromwell agreed that the Committee would consider whether "landscape architects" should be included as a "professional subconsultant." Following this action, R.S. 9:4809 was approved to read as follows:

9:4809. Miscellaneous definitions

For purposes of this Part:

() A business day is any day except for Saturdays, Sundays and other days on which the office of the clerk of court is closed in accordance with R.S. 1:55(E) in the parish of location of the immovable upon which work is to be or has been performed.

() A complete property description of an immovable is any description which, if contained in a mortgage of the immovable properly filed for registry, would be sufficient for the mortgage to be effective against third persons.

() A professional subconsultant is a registered or certified surveyor or engineer, or a licensed architect, who is employed by another registered or certified surveyor or engineer or licensed architect.

() A qualified inspector is a registered or certified engineer or surveyor, a licensed architect, a building inspector employed by the municipality or parish in which an immovable being inspected is located, or a building inspector employed by a lending institution chartered under federal or state law.

The Reporter of the Security Devices Committee then asked the Council to look at R.S. 9:4811. After briefly introducing the Section, a member of the Council immediately moved that Subsections (A) – (C) be approved as presented. A few questions followed, and they were answered to the members' satisfaction. The earlier motion was revived and seconded, and the Subsections were approved without opposition. Mr. Cromwell then introduced Subsection D, explaining that the Committee had extensively considered whether to continue the existing rule that a contractor who

fails to file a notice of contract loses his right to a privilege and whether other alternatives, such as the delayed effectiveness of the contractor's privilege, might be a sufficient means of providing contractors with an incentive to file notice of contract. The Reporter also gave the reasons for the increase in the \$25,000 threshold and explained the intent of the proposal to overrule certain reported cases that had allowed a contractor to assert a privilege for work he had not subcontracted out, even though he had failed to comply with the statutory requirement of filing notice of contract. It was moved and seconded that the Subsection be approved as presented. A member asked the Reporter what would happen if a person who is not entitled to file a claim does so. The Reporter answered this question, and the Subsection was unanimously approved. Thus, R.S. 9:4811 was adopted by the Council to read as follows:

9:4811. Notice of a contract with a general contractor to be filed

A. Written notice of a contract between a general contractor and an owner shall be filed as provided in R.S. 9:4831 before the contractor begins work, as defined by R.S. 9:4820, on the immovable. The notice:

- (1) Shall be signed by the owner and contractor.
- (2) Shall contain ~~the legal property~~ a complete property description of the immovable upon which the work is to be performed and the name, if any, of the project.
- (3) Shall identify the parties and give their mailing addresses.
- (4) Shall state the price of the work or, if no price is fixed, describe the method by which the price is to be calculated and give an estimate of it.
- (5) Shall state when payment of the price is to be made.
- (6) Shall describe in general terms the work to be done.

B. A notice of contract is not improperly filed because of an error in or omission from the notice in the absence of a showing of actual prejudice by a claimant or other person acquiring rights in the immovable. An error in or omission of the identity of the parties or their mailing addresses or the ~~improper identification~~ or insufficient description of the immovable shall be prima facie proof of actual prejudice.

C. A notice of contract is not improperly filed because a proper bond is not attached.

D. A general contractor shall not enjoy the any privilege granted by ~~R.S. 9:4804~~ arising under this Part if the price of the work stipulated or reasonably estimated in his contract exceeds ~~twenty five one hundred~~ one hundred thousand dollars unless notice of the contract is timely filed. A general contractor who is deprived of his privilege by this Subsection shall not be entitled to file a statement of claim or privilege for any amounts due him.

~~E. If a notice of contract is mutually released by the owner and contractor, then the contract will have no effect, provided no work has begun on the land or materials placed on the site. The recorder of mortgages shall immediately cancel the contract upon the filing of the mutual release and an affidavit made by a registered or certified engineer or surveyor, licensed architect, or building inspector employed by the city or parish or by a lending institution chartered under federal or state law, that states he inspected the immovable at a specified time subsequent to the filing of the contract and work had not been commenced and no materials placed at the site. If the contract, or a certified copy, is then refiled, the refiling date shall become the effective date for privilege for work done pursuant to the contract in accordance with R.S. 9:4820(A)(1).~~

The Reporter then directed the Council's attention to R.S. 9:4822. He introduced each Subsection individually. The reporter introduced and explained Subsection A, specifically that the intent of the proposal was to change the existing rule that, where notice of contract has been filed, the period for filing statements of claim or privilege does not commence to run until notice of termination is filed. The reporter further explained that, despite appearances, the proposed imposition of a six-month deadline is not a lengthening of the existing period, but rather the imposition of an outside filing deadline for purposes of promoting the stability of land titles. A member moved that the

provision be approved as presented. This motion was seconded. Another member of the Council asked what the definition of "abandonment" is for the Act. Mr. Cromwell answered the member; thereafter, Subsection A was approved without opposition. He then proceeded to introduce Subsection B. It was immediately moved and seconded that the Subsection be approved as presented. This motion was seconded and approved without opposition. Next, Mr. Cromwell explained the proposed changes to Subsection C. It was moved and seconded that the Subsection be approved as presented. The motion passed without opposition. The same outcome resulted for Subsection D. After Subsection E was introduced by the Reporter, a member of the Council moved that it be approved as presented. This motion was seconded. A member asked the Reporter what the term "property description" is intended to mean. It was then moved that the word "or" be inserted before the word "if," as is seen on line 13 of page 23 of the materials. This motion was seconded, but also failed to pass. Another motion was made to recommit Subsection E to the Committee with instructions to clarify the language of the provision. This motion was seconded, but also failed to pass. The previous motion to approve Subsection E was then put to a vote and passed without opposition. Mr. Cromwell then asked the Council to consider Subsection G. It was moved, seconded, and unanimously approved. Thus, 9:4822 was approved to read as follows:

9:4822. Preservation of claims and privileges

A. If a notice of contract is properly and timely filed in the manner provided by R.S. 9:4811, ~~the persons~~ a person to whom a claim or privilege is granted by R.S. 9:4802 shall ~~within thirty days after the filing of a notice of termination of the work:~~

~~(1) File~~ file a statement of ~~their claims or~~ his claim and privilege.

~~(2) Deliver and deliver~~ to the owner ~~a copy of the statement of claim or privilege. If the, if his~~ address of the owner is ~~not~~ given in the notice of contract, ~~the claimant is not required to deliver~~ a copy of his ~~the~~ statement ~~to the owner.~~ of claim and privilege:

(1) no later than thirty days after the filing of a notice of termination of the work; or

(2) no later than six months after the substantial completion or abandonment of the work, if a notice of termination is not filed.

B. A general contractor to whom a privilege is granted by R.S. 9:4801 of this Part, and whose privilege has been preserved in the manner provided by R.S. 9:4811, shall file a statement of his privilege ~~within sixty days after the filing of the notice of termination or substantial completion of the work.~~ no later than sixty days after:

(1) The filing of a notice of termination of the work; or

(2) The substantial completion or abandonment of the work, if a notice of termination is not filed.

C. Those persons granted a claim and privilege by R.S. 9:4802 for work arising out of a general contract, notice of which is not properly and timely filed, and other persons granted a privilege under R.S. 9:4801 or a claim and privilege under R.S. 9:4802 shall file a statement of their respective claims and privileges ~~within~~ no later than sixty days after:

(1) The filing of a notice of termination of the work; or

(2) The substantial completion or abandonment of the work, if a notice of termination is not filed.

D. (1) Notwithstanding the other provisions of this Part, the time for filing a statement of claim or privilege to preserve the privilege granted by R.S. 9:4801(5) expires sixty days after the ~~latter~~ later of:

(a) The filing of a notice for termination of the work ~~that~~ for which the services giving rise to the privilege were rendered; or,

(b) The substantial completion or abandonment of the work if a notice of termination is not filed. This privilege shall have no effect as to third persons acquiring rights in, to, or on the immovable before the statement of claim or privilege is filed.

(2) Notwithstanding the provisions of this Part, the seller of movables sold for use or consumption in work on an immovable for residential purposes, if a notice of contract is not filed, shall file a statement of claim or privilege ~~within~~ no later than seventy days after:

(a) The filing of a notice of termination of the work; or

(b) The substantial completion or abandonment of the work, if a notice of termination is not filed.

E. A notice of termination of the work:

(1) Shall ~~reasonably identify~~ contain a complete property description of the immovable upon which the work was performed and the work to which it relates. If the work is evidenced by notice of a contract, reference to the notice of contract as filed or recorded, together with its registry number or other appropriate recordation information and the names of the parties to as they appear in the notice of contract, shall be deemed adequate identification of the immovable and work.

(2) Shall be signed by the owner or his representative, who contracted with the contractor, or, if the owner has conveyed the immovable, then it may also be signed by the new owner, or his representative.

(3) Shall certify that:

(a) The work has been substantially completed; or

(b) The work has been abandoned by the owner; or

(c) A contractor is in default under the terms of the contract.

(4) Shall be conclusive of the matters certified if it is made in good faith by the owner, his representative, or his successor.

G. A statement of a claim or privilege:

(1) Shall be in writing.

(2) Shall be signed by the person asserting the same or his representative.

(3) Shall ~~reasonably identify~~ contain a reasonable identification of the immovable with respect to which the work was performed or movables or services were supplied or rendered and the owner thereof.

(4) Shall set forth the amount and nature of the obligation giving rise to the claim or privilege and reasonably itemize the elements comprising it including the person for whom or to whom the contract was performed, material supplied, or services rendered. The provisions of this Paragraph shall not require a claimant to attach copies of unpaid invoices unless the statement of claim or privilege specifically states that the invoices are attached.

Following this action, Mr. Cromwell thanked the members of the Council for their approval of the Committee's work and yielded the floor to the President at 11:11 a.m.

President Crigler called on Kären Hallstrom and Isabel Wingerter, Children's Code Committee Co-Reporters. They in turn introduced committee member Hector Linares. Mr. Linares presented the Children's Code Committee's report, dealing with mandatory reporters, as contained in 3.4.15-New Proposal for Amendment Art 603-Revised.

Children's Code

Mr. Linares explained that the proposal amends Children's Code Article 603 (17) (b) to add behavioral health professionals to those mental health/social service practitioners defined as mandatory reporters. The amendment carves out a limited

exception for a mental health /social service practitioner engaged by an attorney to assist the attorney in providing legal services to a client.

After some discussion it was moved and seconded to adopt the proposal, on pages 2 – 4, as presented. The motion to adopt passed. The adopted proposal reads as follows:

Art. 603. Definitions

As used in this Title:

* * *

(17) "Mandatory reporter" is any of the following individuals:

* * *

(b) "Mental health/social service practitioner" is any individual who provides mental health care or social service diagnosis, assessment, counseling, or treatment, including a psychiatrist, psychologist, marriage or family counselor, social worker, member of the clergy, aide, behavioral health professional or other individual who provides counseling services to a child or his family. Notwithstanding any other provision of law to the contrary, a mental health or social service practitioner shall not be considered a mandatory reporter under the following limited circumstances: (i) When the practitioner is engaged by an attorney to assist in the rendition of professional legal services to a client and (ii) The knowledge that would serve as the basis for reporting arises in furtherance of obtaining, rendering, or facilitating the aforementioned legal representation of that client.

* * *

Comments - 2015

(a) As in other areas of legal practice, representation involving children and families is increasingly reliant upon the use of interdisciplinary assistance from mental health and social service practitioners as an essential element of providing effective assistance of counsel. The United States Supreme Court has long recognized that a defendant's constitutional right to prepare a defense may necessitate various types of assistance from mental health experts. *See Ake v. Oklahoma*, 470 U.S. 68 (1985). Additionally, state standards for the representation of parents in child in need of care and termination of parental rights proceedings provide that attorneys should use a "multidisciplinary approach to representation when available" and "engage or involve a social worker as part of the parent's 'team' to help determine an appropriate case plan, evaluate social services suggested for the client, and act as a liaison and advocate for the client with the service providers." Louisiana Administrative Code, Title 22, Part XV, Chapter 11, Section 1123(B).

(b) Absent the additional protections provided by this amendment, attorneys may be forced to choose between forgoing practitioner services necessary for effective representation or risking the mandatory reporting of confidential and privileged information by their representatives in a manner that is antithetical to the client's stated goals of representation. This amendment carves out a narrow exception to the definition of a mandatory reporter by excluding mental health and social service practitioners only under the limited circumstances when the practitioner is acting as the agent or representative of an attorney by providing services in furtherance of individual legal representation and, in the course of providing that assistance, becomes aware of information that would otherwise require mandatory reporting.

(c) This revision does not relieve the mental health or social service practitioner from his obligation to comply with the reporting requirements imposed by the ethical or professional rules of conduct promulgated by the practitioner's licensing agency or association. Such ethical or professional rules could provide an independent basis for a practitioner's obligation to report under certain circumstances such as in cases of suspected child abuse.

(d) The District of Columbia Code is the model for this revision. DC Code §7-1903. The revised language also draws from Code of Evidence Article 506 to reconcile any potential conflict between mandatory reporting requirements and rules of lawyer-client privilege and confidentiality applicable to attorney representatives. R.S. 40:2153 defines a behavioral health services provider and Children's Code Article 603 defines a mental health/social service practitioner.

Tax Sales

Stephen G. Sklamba, Reporter of the Tax Sales Committee [NEW], made a presentation to the Law Institute Council in response to a charge given at the October 2014 Council Meeting. In October 2014, after the committee's presentation in response to SR 40 of the 2013 Regular Session and SR 109 of the 2012 Regular Session, the Council directed the committee to study the feasibility and constitutionality of both the tax lien and tax sale certificate systems and to present its findings to the Council. The Reporter presented a report to the Council and updated members on the committee's progress.

Mr. Sklamba reported that the committee decided against proposing conversion of the state's tax sales system to a tax lien system, finding that the Law Institute revision of the tax sales system enacted in 2008 had only, within recent years, faced challenges in state courts and did not require another major revision at this time. The committee, instead, plans to study and propose amendments to Article 7, Section 25 of the Louisiana Constitution, included in a draft appended to the report, to achieve the following:

- Make the language consistent with the 2008 revision to the revised statutes (for example, providing for the sale of tax title and not the property).
- Require post-sale notice to be provided within six months of the sale instead of at the end of the three-year redemption period.
- Amend the date at which the redemption period begins to either the date of the post-sale notice or the date that the tax sale title is converted to ownership by the purchaser, whichever is later.

- Limit the ability of tax sale purchasers to buy a fractional interest in a property.
- Introduce payment of a premium by tax sale purchasers.

Council members provided feedback on the working draft of the proposed amendments, though the provision was provided for information and not submitted for approval. Members recommended that only general provisions be made in the constitution and more specific requirements of the tax sale process be provided for in the revised statutes. A member also recommended that the committee carefully consider proposed amendments that conflict with current statutory law and the impact of the amendments on merchantability.

LUNCH

Following lunch, the Friday, March 13, 2015 meeting of the Council of the Louisiana State Law Institute reconvened at 1:30 p.m. The President resumed the meeting by introducing the Subcommittee Head of the Summary Judgment Subcommittee, Honorable Guy Holdridge. The President then yielded the floor to Judge Holdridge.

Summary Judgment

Judge Holdridge began his presentation by asking the members of the Council to turn their attention to the document that was distributed in advance that was entitled, "Louisiana State Law Institute, Summary Judgment Subcommittee, Prepared for the Meeting of the Council, March 13, 2015, New Orleans, Louisiana". He then introduced the first two Subparagraphs of Code of Civil Procedure Article 966, (A)(1) & (2). Next, he briefly introduced Subparagraph (A)(3) and then (A)(4). Many questions ensued. A motion was made and seconded that the phrase "or self-authenticating records" be added after the word "stipulations" as is found on line 16 of page 1 of the document. Judge Holdridge accepted this change without reservation. More questions and discussion ensued. This led to one member calling the question of the motion that was on the table. At this motion, the President called for a vote on the motion to add the phrase "or self-authenticating records" to Subparagraph (A)(4). The motion passed with only one member voting in opposition. Thereafter, a motion was made to add the phrase "affidavits and properly-authenticated documents attached to any of the foregoing" to the end of the first sentence of Subparagraph (A)(4) (i.e., line 16 of page 1 of the materials). This motion was seconded and passed without opposition. A motion was then made to approve Subparagraphs (A)(1) – (4). This motion was seconded and passed without opposition. A discussion broke out and a motion was subsequently made to add the phrase "the only" before the word "documents" and "may" before the verb "be filed," as they are found on line 14 of page 1 of the material. This motion was seconded and passed without opposition. Thus, Paragraph A of C.C.P. Article 966 was approved to read as follows:

Art. 966. Motion for summary judgment; procedure

A. (1) ~~The plaintiff or defendant in the principal or any incidental action, with or without supporting affidavits,~~ A party may move for a summary judgment ~~in his favor~~ for all or part of the relief for which he has prayed. ~~The~~ A plaintiff's motion may be ~~made~~ filed at any time after the answer has been filed. ~~The~~ A defendant's motion may be ~~made~~ filed at any time.

(2) The summary judgment procedure is designed to secure the just, speedy, and inexpensive determination of every action, except those disallowed

by Article 969. The procedure is favored and shall be construed to accomplish these ends.

(3) After an opportunity for adequate discovery, a motion for summary judgment shall be granted if the motion, memorandum, and supporting documents show that there is no genuine issue as to material fact and that the mover is entitled to judgment as a matter of law.

(4) The only documents that may be filed in support of or in opposition to the motion are pleadings, memoranda, affidavits, depositions, answers to interrogatories, certified medical records, written stipulations or self-authenticating records, admissions, and affidavits and properly-authenticated documents attached to any of the foregoing. The court may permit documents to be filed in any electronically stored format authorized by court rules or approved by the clerk of the court.

The Council then took Paragraph B under consideration. The provision engendered much discussion. A motion was made to change the phrase "Unless extended by the court and agreed to by all of the parties," as is found on line 16 of page 2 and line 1 of page 3, to read "Unless otherwise provided for in a case management order." This motion provoked much discussion. A substitute motion was made to have the phrase read, "Unless ordered by the court." This motion was not seconded. Another substitute motion was made; the motion was to have the phrase read "Unless otherwise ordered by the court." Much discussion ensued. Still another substitute motion was made that the phrase read "Unless extended by the court or agreed to by all of the parties." This motion was seconded but failed to pass. Another motion was made to change the word "and," as found on line 16 of page 2, to "or." This motion was seconded and a discussion ensued; however, the motion failed to pass. Thereafter, a motion was made to add the word "motion" after the word "filing" as is found on line 12 of page 3. This motion was seconded and passed. Another motion was made to accept Paragraph B as modified. This motion was seconded and passed without opposition. Judge Holdridge then informed the Council that every instance of the cite to "1313(A)" would be changed to "1313." Another motion was made to approved Paragraph B as modified. This motion was seconded and passed unanimously. Thus, Paragraph B was approved to read as follows:

Art. 966. Motion for summary judgment; procedure

~~B. (1) The motion for summary judgment, memorandum in support thereof, and supporting affidavits shall be served within the time limits provided in District Court Rule 9.9. For good cause, the court shall give the adverse party additional time to file a response, including opposing affidavits or depositions. The adverse party may serve opposing affidavits, and if such opposing affidavits are served, the opposing affidavits and any memorandum in support thereof~~

~~shall be served pursuant to Article 1313 within the time limits provided in District Court Rule 9.9.~~

~~(2) The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions, together with the affidavits, if any, admitted for purposes of the motion for summary judgment, show that there is no genuine issue as to material fact, and that mover is entitled to judgment as a matter of law. If the motion for summary judgment is denied, the court should provide reasons for the denial on the record, either orally upon rendition or in writing sua sponte or upon request of a party within ten days of rendition. Time to file: 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:~~

(1) A motion for summary judgment and all documents in support of the motion shall be filed and served on all parties in accordance with Article 1313 at least sixty-five days prior to the trial.

(2) Any opposition to the motion and documents in support of the opposition shall be filed and served in accordance with Article 1313 at least fifteen days prior to the hearing date.

(3) Any reply memoranda shall be filed and served in accordance with Article 1313 at least five days prior to the hearing on the motion. No additional documents may be filed with the reply memorandum.

(4) If the deadline for filing a motion, an opposition, or reply memorandum falls on a legal holiday, the opposition or reply is timely if it is filed on the next day which is not a legal holiday.

Judge Holdridge began his introduction of Paragraph C to the Council by explaining that he would like to change the structure of the Paragraph. Specifically, he stated that the phrase beginning with "a contradictory hearing" and ending with "at least thirty days prior to the trial date," as found on lines 13 through 15 on page 4, should become Sub-subparagraph (a) of Subparagraph (C)(1). Additionally, Subparagraph (2), as seen on lines 1 through 2 on page 5, should be redesignated as Sub-subparagraph (b). He stated that the numbering for the subsequent Subparagraphs would also be modified as appropriate to accommodate this change. A motion was made to accept the changes. This motion was seconded, and the Council unanimously agreed with these modifications. Thereafter, a member asked that the word "Article" be added before "1313(C)," as is found on line 2 of page 5. The Subcommittee Head readily accepted this change. A member moved that the phrase "In all cases" replace the phrase "However, in all other cases," as is found on line 7 of page 5 of the materials.

This motion was seconded. Another member moved that the two sentences in newly-redesignated Subparagraph (C)(4) be transposed. This motion was seconded and passed without opposition. A motion was made and seconded that the word "rendered" replace the word "granted," as is currently found on line 6 of page 5 of the materials. Thus, Paragraph C was approved to read as follows:

Art. 966. Motion for summary judgment; procedure

~~C. (1) After adequate discovery or after a case is set for trial, a motion which shows that there is no genuine issue as to material fact and that the mover is entitled to judgment as a matter of law shall be granted.~~

~~(2) The burden of proof remains with the movant. However, if the movant will not bear the burden of proof at trial on the matter that is before the court on the motion for summary judgment, the movant's burden on the motion does not require him to negate all essential elements of the adverse party's claim, action, or defense, but rather to point out to the court that there is an absence of factual support for one or more elements essential to the adverse party's claim, action, or defense. Thereafter, if the adverse party fails to produce factual support sufficient to establish that he will be able to satisfy his evidentiary burden of proof at trial, there is no genuine issue of material fact.~~

Time for hearing and judgment on the motion:

(1) Unless otherwise agreed to by all of the parties and the court:

(a) A contradictory hearing on the motion for summary judgment shall be set more than thirty days after the filing and at least thirty days prior to the trial date; and

(b) Notice of the hearing date shall be served on all parties in accordance with Article 1313(C) or 1314, at least thirty days prior to the hearing.

(2) For good cause shown, the court may order a continuance of the hearing on a motion for summary judgment.

(3) The court shall render a judgment at least twenty days prior to the trial.

(4) In all cases the court shall state on the record or in writing the reasons for granting or denying the motion. If an appealable judgment is rendered, a party may request written reasons for judgment as provided in Article 1917.

Judge Holdridge then asked the members of the Council to turn their attention to Paragraph D. He briefly introduced Subparagraph (D)(1). A member of the Council moved that the term "legal support" be added to the Subparagraph. Some discussion ensued. At the conclusion of the discussion, the Subcommittee Head promised that in the future the Subcommittee will consider including that that term to the Subparagraph. Thereafter, a motion was made to adopt the Subparagraph as presented. This motion was seconded and passed with only one vote in opposition. Judge Holdridge then introduced Subparagraph (D)(2) to the Council. A motion was made to replace the word "evidence," as is found on line 9 of page 6, with the word "documents." This motion was seconded and pass without opposition. Similarly, a motion was made to approved Subparagraph (D)(2) as modified. This motion was seconded and passed unanimously. Paragraph D was approved by the Council to read as follows:

Art. 966. Motion for summary judgment; procedure

~~D. The court shall hear and render judgment on the motion for summary judgment within a reasonable time, but in any event judgment on the motion shall be rendered at least ten days prior to trial.~~

(1) The burden of proof rests with the mover. However, if the mover will not bear the burden of proof at trial on the issue that is before the court on the motion for summary judgment, the mover's burden on the motion does not require him to negate all essential elements of the adverse party's claim, action, or defense, but rather to point out to the court the absence of factual support for one or more elements essential to the adverse party's claim, action, or defense. The burden is on the non-mover to produce factual support sufficient to establish the existence of a genuine issue of material fact or that the mover is not entitled to judgment as a matter of law.

(2) The court may only consider documents filed in support of or in opposition to the motion for summary judgment, and shall consider any documents to which no objection is made. Any objection to any document shall be raised in a timely-filed opposition or reply memorandum. The court shall consider all objections prior to rendering a judgment. The court shall specifically state on the record or in writing what documents, if any, it held to be inadmissible or declined to consider.

The Subcommittee Head of the Summary Judgment Subcommittee briefly mentioned that he would be skipping Paragraph E as the Subcommittee did not have any suggested modifications for the provision. Subsequently, he asked the members of the Council to turn their attention to Paragraph F, and he introduced the provision. A member moved that the Paragraph be approved as shown in the material. This motion

was seconded. Another motion was made to add “, or appeal” after the word “opposition,” as is found on line 16 of page 6. Another motion was made to change the word “court,” as found on the same line and page, to “courts.” This motion provoked much discussion. Another member made a motion that the suggested modifications to Subparagraph (F)(1) not be adopted; rather, the motion was to replace the word “may,” as is found on line 14 of page 6 with “shall” and delete Subparagraphs (2) and (3). This motion was seconded and engendered much discussion. A substitute motion was made to include the word “memorandum” in Subparagraph (F)(1). The motion was not seconded. A motion was made to vote on the penultimate motion made. This motion was seconded and Paragraph F was approved to read as follows:

Art. 966. Motion for summary judgment; procedure

F. ~~(1)~~ A summary judgment ~~may~~ shall be rendered or affirmed only as to those issues set forth in the motion under consideration by the court at that time.

~~(2) Evidence cited in and attached to the motion for summary judgment or memorandum filed by an adverse party is deemed admitted for purposes of the motion for summary judgment unless excluded in response to an objection made in accordance with Subparagraph (3) of this Paragraph. Only evidence admitted for purposes of the motion for summary judgment may be considered by the court in its ruling on the motion. The court may permit documentary evidence to be filed in the record with the motion or opposition in any electronically stored format authorized by the local court rules of the district court or approved by the clerk of the district court for receipt of evidence.~~

~~(3) Objections to evidence in support of or in opposition to a motion for summary judgment may be raised in memorandum or written motion to strike stating the specific grounds therefor. Any such memorandum or written motion to strike shall be served pursuant to Article 1313 within the time limits provided in District Court Rule 9.9.~~

Judge Holdridge then asked the Council to consider Paragraph G. After its introduction the Council debated the provision’s merits. A motion was made to approve the Paragraph as presented. The motion was seconded and passed without opposition. Thus, Paragraph G was approved to read as follows:

Art. 966. Motion for summary judgment; procedure

G. ~~(1) When the court grants a motion for summary judgment in accordance with the provisions of this Article, that a party or nonparty is not~~

~~negligent, not at fault, or did not cause, whether in whole or in part, the injury or harm alleged, that party or nonparty shall not be considered in any subsequent allocation of fault. Evidence shall not be admitted at trial to establish the fault of that party or nonparty nor shall the issue be submitted to the jury nor included on the jury verdict form. This Paragraph shall not apply when a summary judgment is granted solely on the basis of the successful assertion of an affirmative defense in accordance with Article 1005, except for negligence or fault.~~

~~(2) If the provisions of this Paragraph are applicable to the summary judgment, the court shall so specify in the judgment. If the court fails to specify that the provisions of this Paragraph are applicable, then the provisions of this Paragraph shall not apply to the judgment.~~

When the court grants a motion for summary judgment providing that a party or nonparty is not negligent, not at fault, or did not cause, whether in whole or in part, the injury or harm alleged, that party or nonparty shall not be considered in any subsequent allocation of fault. Evidence shall not be admitted at trial to establish the fault of that party or nonparty. During the course of the trial, no party or person shall refer directly or indirectly to any such fault nor shall that party or nonparty's fault be submitted to the jury or included on the jury verdict form.

The Subcommittee Head then introduced Paragraph G. Almost immediately a motion was made to approve the provision as presented. This motion was seconded, but some discussion followed. A motion was made to add the phrase "permitting the parties an opportunity for" before the word "oral," as found on line 17 of page 8 of the materials. A member of the Council moved that the provision be approved as modified. This motion was seconded and approved without opposition. Thus, Paragraph G was approved to read as follows:

Art. 966. Motion for summary judgment; procedure

H. On review, an appellate court shall not reverse and grant a summary judgment that was denied by the trial court dismissing a case or a party without assigning the case for briefing and permitting the parties an opportunity for oral argument.

At the conclusion of Judge Holdridge's presentation for the Summary Judgement Subcommittee, the President adjourned the March 13, 2015 meeting of the Council at 4:15 p.m.

LOUISIANA STATE LAW INSTITUTE

THE MEETING OF THE COUNCIL

March 13-14, 2015

Saturday, March 14, 2015

Persons Present:

Alston, Elizabeth A.	Kostelka, Robert "Bob" W.
Baiamonte, Joseph J.	Landry, Ron J.
Baker, Katherine S.	Lavergne, Luke
Bergstedt, Thomas	Maloney, Marilyn
Braun, Jessica	Medlin, Kay
Breard, L. Kent	Norman, Rick J.
Burris, William J.	Popovich, Claire
Carriere, Jeanne Louise	Richard, Herschel, Jr.
Carroll, Andrea	Richardson, Sally
Crawford, William E.	Riviere, Christopher H.
Crigler, James C.	Robert, Deidre D.
Cromwell, L. David	Scalise, Ronald J., Jr.
Curry, Kevin C.	Sharp, Carl Van
Curry, Robert L., III	Shea, Joseph L., Jr.
Davidson, James J., III	Sole, Emmett C.
Dawkins, Robert G.	Storms, Tyler
Dimos, Jimmy N.	Tate, George J.
Doguet, Andre	Thibaut, Marth
Domingue, Billy J.	Thibeaux, Robert P.
Foote, Elizabeth E.	Tucker, Zelda
Garrett, J. David	Veith, Rebekka
Hayes, Thomas M., III	White, H. Aubrey, III
Hebert, Christopher B.	Wooland, Jeremy
Hester, Mary C.	Ziober, John David
Hogan, Lila T.	
Holdridge, Guy	
Knighten, Arlene D.	

President James C. Crigler, Jr. opened the Saturday session of the March 2015 Council meeting at 9:00 AM on March 14, 2015 at the Monteleone Hotel in New Orleans, LA. During today's session, The Reporter, Professor Andrea B. Carroll, represented the Disabled Adult Children Committee and presented materials regarding the support of adult children with disabilities.

Disabled Adult Children

1. Professor Carroll started today by reminding the Council about the November 2014 meeting when they last reviewed materials on this subject and that Representative Franklin Foil has agreed to author a bill for the Law Institute this legislative session pending approval by the Council today. As a housekeeping matter, the resolution did ask the Council to consider custody issues which also arise in these circumstances; however, the committee was not able to reconcile any proposals with the constitutional issues.

2. The Reporter asked the Council to turn to Subsection E(1) on page 3 of the materials and the definition of disability and the manifestation requirement. The Council also noted that the committee added an exclusion for substance abuse and addiction into the substance of the statute. The Reporter explained that substance abuse alone would not meet the definition of disability, but that abuse which leads to a disability prior to the age of 22 would qualify under this proposal. This tracks federal law.

3. The council raised concerns regarding the language “substantial care” in the definition of disability and the Reporter agreed to add a comment explaining that it is not meant to require twenty-four hour care. The Council was also troubled by the restriction that the child be unmarried. The Reporter explained that this tracks present emancipation law in Civil Code Article 367. After much discussion and a vote by the Council, the Reporter was directed to provide a comment to explain that the adult child is only required to be unmarried at the time of the filing. Therefore, if an adult child with a disability was married and then divorced, he could seek support from his parents after the divorce is final. Thereafter, the Council approved Subsection E(1).

4. Regarding Subsection E(2), the reporter agreed to change the word “suit” to “action” and the Council approved without further discussion.

3. Moving to Subsection E(3), the Reporter reminded the Council that it had directed the committee to look at making this a strictly personal action to prohibit the state from being able to bring this action. The Reporter explained that the committee met with representatives from the Department of Children and Family Services and were informed that the state does not sue the parents to recoup TANF money after the child has reached the age of majority. The Reporter suggested deleting the bracketed language on page 3 of the materials and adding a comment to address this exclusion. Several members of the Council desired more clarity in the law on this issue. After much discussion, the Reporter agreed to finish the presentation of the materials and take a break to work on this language.

4. A member of the Council was concerned that the present language grants a parent the right to bring an action. He was concerned about a spouse having an independent cause of action to sue his former spouse. The Reporter voluntarily agreed to remove the words “or a parent” on line 7 on page 3. The Council also voted to add the words “file an action” to the end of line 7 on page 3.

5. Moving to Subsection E(4) of the proposal, the Reporter again agreed to change the word “suit” to “action” and the Council approved.

6. The Reporter next noted that the Council asked the committee to evaluate more deeply governmental benefits and to make the trust provisions more essential in Subsection E(5). After little discussion regarding the committee’s decisions, the Reporter agreed to add the phrase “placing the award in trust” and the Council approved this Subsection.

7. Moving to page 8 of the materials, the Council was reminded that in November, they asked the committee to give the court more discretion to determine “disability” and to not require strict enforcement of the child support guidelines. The committee is suggesting a new deviation provision to existing law. After the Reporter agreed to delete the phrase “in light of his present and future earning capacity” the Council approved.

8. The Reporter explained the procedural changes which need to be made to the subject matter jurisdiction and venue articles in the Code of Civil Procedure. The Council quickly adopted these provisions. However, the Council did instruct the Reporter to add Code of Civil Procedure Article 2592 to the materials and to delete the word “minor” in existing Paragraph 8.

9. Returning to Subsection E(3) of the materials, the Reporter suggested adding a new sentence to read “The state has no action under this Subsection to establish, modify, or enforce an award of support for the purposes of recovering public benefits and services provided on behalf of the child.” The Council approved.

CONCLUSION

The Council adjourned this meeting at 10:52 AM.



Joseph Baiamonte Date



Lynette Roberson Date



Claire Popovich Date



Jessica Braun Date