

LOUISIANA STATE LAW INSTITUTE

THE MEETING OF THE COUNCIL

November 6-7, 2015

Friday, November 6, 2015

Persons Present:

Adams, Marguerite (Peggy) L.	Little, F. A., Jr.
Bergstedt, Thomas	Lonegrass, Melissa T.
Bowers, Clinton	Lovett, John
Braun, Jessica	Medlin, Kay C.
Breard, L. Kent	Mengis, Joseph W.
Brister, Dorrell J.	Morris, Glenn G.
Carriere, Jeanne Louise	Norman, Rick J.
Carroll, Andrea	Randall, Patsy
Cox, Andrew	Reed, Angelique
Crawford, William E.	Richardson, Sally
Crigler, James C., Jr.	Riviere, Christopher H.
Cromwell, L. David	Scalise, Ronald J., Jr.
Curry, Robert L., III	Simien, Eulis, Jr.
Dawkins, Robert G.	Sole, Emmett C.
Di Giulio, John E.	Stanton, John B.
Dimos, Jimmy N.	Storms, Tyler
Doguet, Andre	Stuckey, James A.
Freel, Angelique	Suprenant, Monica T.
Garrett, J. David	Tate, George, J.
Gasaway, Grace B.	Thibaut, Martha
Gregorie, Isaac M. "Mack"	Thibeaux, Robert P.
Hayes, Thomas M., III	Trahan, J. Randall
Hebert, Christopher B.	Tranchina, Frank
Hogan, Lila T.	Vance, Shawn
Jewell, John Wayne	White, H. Aubrey, III
Knighten, Arlene D.	Wilson, Evelyn
Kostelka, Robert "Bob" W.	Yiannopoulos, A. N.
Landry, Ron J.	Ziober, John David
LaVergne, Luke	
Levy, H. Mark	

President James C. Crigler, Jr. opened the Friday session of the November 2015 Council meeting at 10:00 AM on November 6, 2015 at the Monteleone Hotel in New Orleans, LA. During today's session, The Reporter, Professor Andrea B. Carroll, represented the Marriage-Persons Committee and presented materials regarding Same-Sex Marriage and Filiation.

1. Professor Carroll started today by introducing the members of the Marriage-Persons Committee who were attending the Council meeting. She proceeded with the Same-Sex Marriage Revision materials and gave the Council background information on the *Obergefell v. Hodges* United States Supreme Court case and the *Constanza v. Caldwell* Louisiana Supreme Court case. These cases authorize same-sex couples to marry in Louisiana and they require Louisiana to give full faith and credit to same-sex marriages validly contracted in other states. The Reporter stated that as a continuous revision Committee, the Marriage-Persons Committee proposes to revise articles and statutes which are rendered obsolete, or on which courts will need guidance, in light of these cases. Although the Committee recognizes that sweeping changes may be needed in the near future, this proposal only includes changes the Committee considers absolutely necessary.

2. The Reporter drew the Council's attention to page 2, Civil Code Article 86. The Committee proposes changing present law from "a man and a woman" to "two natural persons". She explained that a side effect of this proposed change is the suggestion that polygamy remains illegal in Louisiana. A Council member suggested that *Obergefell* is not the law of the land and same-sex marriage in Louisiana remains unconstitutional. He stated that the United States Supreme Court abused its power and has eroded the power of the legislative branch of government. He suggested the best course of action is to resist and not cooperate with this unconstitutional decision.

3. Thereafter, the Council engaged in a lengthy discussion regarding whether to proceed with this proposal. A motion to table the project failed. A motion to submit the committee changes as a Council-recommended bill failed 18-24. A motion passed to have the committee draft a Report, to be voted on by the Council at a later meeting, and to attach the materials under consideration as something the Legislature might want to consider if it desires to address the situation.

4. The Council suggested and the Reporter accepted the following changes to the comment which follows Civil Code Articles 86, 87, and 3520:

"This article has been modified to comply with the mandate of the United States Supreme Court that same-sex couples be permitted to exercise the right to marry in Louisiana and that same-sex marriages validly contracted elsewhere be given full faith and credit in Louisiana. *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015). See also *Constanza v. Caldwell*, 167 So.3d 619 (La. 2015)."

5. Thereafter, the Council approved the changes to C.C. Articles 86, 87, 96, 221, 236, 246, 257, 259, 263, 270, 2315.1, 2318, 2333, and 3520. The repeal of Civil Code Article 89 was also approved.

6. Moving to Civil Code Article 3506 regarding general definitions, the Reporter explained to the Council that the Committee is recommending changes to modernize the definition of "Children", add a definition of "parent", and repeal the definition of "family". The Council is worried that the term "child" could also mean "descendant". The Reporter agreed to add this language back into the proposal. The Reporter also accepted the suggestion to delete the words "by law" because they do not add any substance to the definition. The Council approved the following:

"Art. 3506. General definitions of terms

Whenever the terms of law, employed in this Code, have not been particularly defined therein, they shall be understood as follows:

* * *

8. ~~Children. Under this name are included these persons~~ Child signifies a person born of the marriage, those adopted, and those whose filiation to the parent has been established in the manner provided or otherwise filiated to a parent by-law, as well as descendants of them the child in the direct line.

A child born of marriage is a child conceived or born during the marriage of his parents or adopted by them.

A child born outside of marriage is a child conceived and born outside of the marriage of his parents.

9. Parent. Parent signifies a person who is filiated to a child.

* * *

~~12. Family. Family in a limited sense, signifies father, mother, and children. In a more extensive sense, it comprehends all the individuals who live under the authority of another, and includes the servants of the family.~~

~~It is also employed to signify all the relations who descend from a common root.~~

* * **

7. The Reporter next introduced the issues surrounding community property and the *Obergefell* case. She explained that the issue of retroactivity of constitutional law decisions has had a stormy history, but generally, decisions have retroactive application. Since the *Obergefell* decision did not address its temporal effect, there are many unanswered questions. Scholars believe that in Louisiana, the community property regime applies to same-sex couples back to the date of their marriage. This may create unintended consequences for the parties themselves and third parties. Therefore, the Committee recommends a simple solution using a concept in present law. In present law, Civil Code Article 2329, there is a grace period for new domiciliaries to opt out of the community property regime without court approval. The Committee would like to extend a one year grace period to same-sex couples for the same policy reasons.

LUNCH

1. The Council broke for lunch at 11:55 AM.
2. Emmett Sole, the Chair of the Membership and Nominating Committee, gave a report to the Council at 1:30 PM. He asked the Council to pass along any suggestions for new members.
3. The Council resumed its consideration of the Same-Sex Marriage Revision materials and the discussion of community property issues related thereto.
4. The Council approved adding a comment to C.C. Art. 2329 to draw reader’s attention to a new provision in Title 9 which allows married same-sex couples a one year period to opt out of a community property regime. The discussion of R.S. 9:2831 revolved around whether both spouses should be required to enter into a marital agreement to opt out of the regime. The Council directed the Committee to research whether other states allow one party to the marriage to opt out of the community property regime and to come back to the Council with the results and possible changes to proposed R.S. 9:2831.
5. The Council next approved R.S. 35:11 and R.S. 1:18 without discussion. Regarding R.S. 9:223 and the new form for the application of a marriage license, the Council was concerned about the requirement on the application to include your surname at birth. It was argued that if a party legally changes his name, would they have to provide their surname at birth or just the surname that appears on their new birth certificate. The Council decided and the Reporter accepted to change this language and to add the term “ethnicity” where the term “race” appears on the form and in R.S. 9:224(A)(2). Thereafter, the following was approved:

9:223. Form

A. An application for a marriage license shall be made on a form provided by Subsection B of this Section.

B. The application form shall be as follows:

Application for Marriage _____(Parish), State of Louisiana				
Date of Application:				
Hour of Application:				
GROOM Applicant 1	<u>Last Name Surname of Groom Applicant 1</u>	<u>First Name of Groom Applicant 1</u>	<u>Middle/Second Name of Groom Applicant 1</u>	<u>Surname on Birth Certificate of Applicant 1</u>

	Address	Is residence inside city limits? <input type="checkbox"/> Yes <input type="checkbox"/> No	Parish/County	State
	Race/ <u>Ethnicity</u>	Date of Birth (month-day-year)	State of Birth	
	<u>Father Parent's Full Birth Name</u>	State of Birth	Mother <u>Parent's Maiden Full Birth Name</u>	State of Birth
BRIDE <u>Applicant 2</u>	<u>Last Name Surname of Bride Applicant 2</u>	<u>First Name of Bride Applicant 2</u>	<u>Middle/Second Name of Bride Applicant 2</u>	<u>Maiden Name of Bride Surname on Birth Certificate of Applicant 2</u>
	Address	Is residence inside city limits? <input type="checkbox"/> Yes <input type="checkbox"/> No	Parish/County	State
	Race/ <u>Ethnicity</u>	Date of Birth (month-day-year)	State of Birth	
	<u>Father Parent's Full Birth Name</u>	State of Birth	Mother <u>Parent's Maiden Full Birth Name</u>	State of Birth
	Covenant Marriage <input type="checkbox"/> Yes <input type="checkbox"/> No If yes, complete the following: We, _____ and _____ do hereby declare our intent to contract a Covenant Marriage and, accordingly, have executed a declaration of intent attached hereto.			
<u>Groom Applicant 1</u>	Has the groom Applicant 1 been formerly married? _____ How many times? _____		Are you divorced _____?	
<u>Bride Applicant 2</u>	Has the bride Applicant 2 been formerly married? _____ How many times? _____		Are you divorced _____?	
SSN	Grooms's Applicant 1's Social Security Number		<u>Bride's Applicant 2's</u> Social Security Number	
I _____ (print name of groom) do swear or affirm that the information contained in this application for marriage is true and correct. I further swear or affirm that this is my _____ (1 st , 2 nd , etc. number) marriage but that I am not currently married to anyone else, and that I am free to marry under the laws of the state of Louisiana. I further understand and acknowledge that giving any false information or false statement in this application of marriage shall constitute the crime of filing a false public record in violation of the Louisiana Criminal Code (R.S. 14:133).				

Signature of ~~Groom~~ Applicant 1

Sworn to and subscribed before me this _____ day of _____,
20____.

Notary Public/Deputy Clerk/Deputy Registrar

I _____ (print name of ~~bride~~) do swear or affirm that the information contained in this application for marriage is true and correct. I further swear or affirm that this is my _____ (1st, 2nd, etc. number) marriage but that I am not currently married to anyone else, and that I am free to marry under the laws of the state of Louisiana. I further understand and acknowledge that giving any false information or false statement in this application of marriage shall constitute the crime of filing a false public record in violation of the Louisiana Criminal Code (R.S. 14:133).

Signature of ~~Bride~~ Applicant 2

Sworn to and subscribed before me this _____ day of _____,
20____.

Notary Public/Deputy Clerk/Deputy Registrar

9:224. Application; information required

A. The application for a marriage license provided by R.S. 9:223, and containing all of the following information, shall be sworn to and signed by both parties before a notary public, deputy clerk, or deputy registrar:

- (1) The date and hour of the application.
- (2) The full name, residence, race/ethnicity, and age of each party.

* * *

6. Finishing up these materials, the Council approved R.S. 9:273, 273.1, 275, 275.1, 309, 2729, and 13:1832 as proposed. In C.C.P. Art. 3947, the Council changed "surname at birth" to "surname on the birth certificate".

7. The Council next began its review of the Filiation Revision proposed by the Marriage-Persons Committee. The Reporter, Professor Carroll, reminded the Council that the committee was tasked with reviewing the law of filiation as a result of issues which came to light when the Council heard presentations from the Birth Certificates Committee. The first issue presented was the prescriptive period in disavowal actions. Scholars in this area all agree the period is too short and deception by the mother is a huge problem.

8. The Council discussed the merits of prescription and peremption at length and voted to propose that the periods set out in article 189 be prescriptive, not peremptive. The Council agreed with the Committee that the period should run from the actual or constructive knowledge that the presumed father may not be the father of the child. The Council did want to see a one-year period, with an outside limit of ten years. The Reporter agreed to take the proposed changes to C.C. Art. 189 and 190 back to the Committee for further discussion and implementation of this policy.

9. The next issue presented involves C.C. Art. 195 and the need for clarification in the law. If a man marries the mother of a child and acknowledges the child, but later revokes the acknowledgment is he the father of the child? Is he also required to disavowal the child? Because the father marries the mother and acknowledges, the Committee proposes that he also be required to disavowal. The Council approved this proposal.

10. The final issue today regards revocation of formal acknowledgments. Present R.S. 9:406 has a two year prescriptive period to seek a revocation of an acknowledgement upon proof of fraud, duress, material mistake of fact or error. It is well established that an action for annulment of an absolutely null contract does not prescribe. Therefore, the Committee proposes deleting this prescriptive period. The Council approved.

CONCLUSION

The Council adjourned this meeting at 3:45 PM.

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Morris, Glenn G.
Norman, Rick J.
Popovich, Claire
Randall, Patsy
Scalise, Ronald J., Jr.
Sherman, Ed
Simien, Eulis, Jr.
Sole, Emmett C.
Storms, Tyler
Stuckey, James A.
Tate, George J.
Vance, Shawn
White, H. Aubrey, III
Wilson, Evelyn
Ziober, John David

President James C. Crigler, Jr. opened the Saturday session of the November 2015 Council meeting at 9:00 AM on November 7, 2015 at the Monteleone Hotel in New Orleans, LA.

Alternative Dispute Resolution

At 9:00 a.m. the Chair, Mr. Emmett C. Sole, began the Alternative Dispute Resolution ("ADR") Committee's presentation to the November 7, 2015 meeting of the Council. He began by giving a brief history of the Committee since its inception. Once he had concluded his introduction, he turned the floor over to the Reporter of the Committee, Dean Edward F. Sherman.

Dean Sherman began his portion of the presentation by touching on the points addressed on pages 1 through 4 of the main document entitled, "Louisiana State Law Institute Alternative Dispute Resolution Committee, Louisiana Version of the Uniform Law Commission's Revised Uniform Arbitration Act (RUAA), Prepared for the Meeting of the Council, November 7, 2015, New Orleans, Louisiana". He then returned the floor to Mr. Sole who spoke for a few moments on the Delaware Rapid Arbitration Act. Once he had explained the act, the Chair returned the floor to the Reporter to continue his presentation. Shortly thereafter a Council member asked the Reporter whether Section 6(b), as written, includes matters *not* subject to binding arbitration thereby making them subject to arbitration. The member specifically wondered about disputes that implicate the Louisiana Insurance Code. Some discussion ensued. Another member volunteered that he would like to see the act include a definition of the term "arbitration." Another member recommended that the act should exclude insurance-related disputes from the requirement to arbitrate. A recommendation

was made that the phrase "unless provided otherwise in the law" be added to the proposed act. Yet another member of the Council pointed out that there are several other provisions in Louisiana law wherein the rules pertaining to arbitration are unique. A question arose as to the intended effect of the use of the terms "arbitration organization," "arbitration tribunal," and "forum." The Reporter agreed to examine this issue to clarify it in the act.

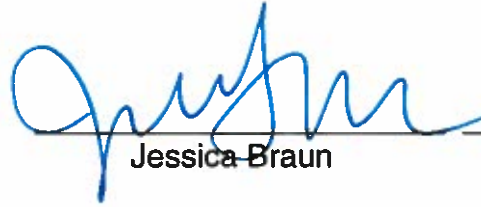
Dean Sherman then related to the Council that the ADR Committee has been considering the issue of whether to allow mandatory arbitration clauses in wills and trust instruments. A member of the Council indicated that he was appreciative that the Committee has deferred action on the issue in favor of other Law Institute Committees. He also gave his opinion that he felt that it was too soon for Louisiana to decide this issue. A member of the ADR Committee who was present informed the Council that he was primarily interested in having the Law Institute decide the issue definitely. Another member of the ADR Committee addressed the Council and indicated that he would not like Louisiana law to prohibit the use of mandatory arbitration clauses in wills or trust instruments. He also repeated his opinion that the act should include a definition of the word "arbitration."

Following these statements the Reporter began a systematic, section-by-section review of the act. He began by giving a brief introduction to Section 1. He agreed again to examine whether the act should incorporate a definition of the word "arbitration" and whether the terms "forum," "arbitration organization," and "arbitration tribunal" are intended to refer to the same idea and should be standardized under one term. Dean Sherman then explained to the Council why the Committee had decided to include a definition of "submission" when none had been provided in the original version of the act. A member of the Council then asked whether the definition of an "arbitration organization," as shown on page 5 of the main document, was a substantive requirement. He also stated that he did not believe that the use of the word "neutral," as found on line 6 of page 5, was appropriate. The Reporter agreed to have the ADR Committee examine the issue. Thereafter, a member of the Council suggested to the Reporter that commas be used in place of semicolons after the words "government" and "instrumentality," as found on line 14 of page 5 of the main document. Dean Sherman agreed to these edits. A motion was made that Section 1 be adopted as modified. This motion was not seconded. A substitute motion was made to recommit Section 1 to the Committee. This motion was seconded and passed.


The Reporter then briefly introduced Section 2 of the proposed act and opened the floor to discussion. A motion was made that the section be approved. This motion was seconded. A member then questioned Dean Sherman as to the mechanics for giving and receiving notice according to the proposed act. Another member of the Council pointed out that the formulation used by the act is actually borrowed from the Uniform Commercial Code. Yet another Council member asked whether it would be fair to consider the reception of an email to be sufficient to deem that notice has been received. This question prompted the Council to consider what should be considered reasonable notice for the purposes of beginning arbitration. The Council also wondered whether this issue could be addressed in a comment that would accompany the section. A member of the Council asked whether for its next presentation to the Council the Committee could show the text of the original act as drafted by the Uniform Law Commission. The Reporter informed the Council that the Committee had already decided that it will have the text available for its next presentation. Another Council member asked if a comment to the Section should state that email alone is not sufficient for notice to be deemed given. Following this question a motion was made to recommit the section to the Committee for further consideration. This motion was seconded. Another question was posed to the Reporter regarding what would happen if the terms of a contract regarding notice conflicted with the provisions of the act. After Dean Sherman answered this

question, a member of the Council made a motion to recommit Section 2 to the Committee. This motion was seconded and approved.

Following this action the President of the Louisiana State Law Institute Council adjourned the Saturday, November 7, 2015 meeting of the Council.

 1-19-16

Jessica Braun Date

 1/19/2016

Claire Popovich Date