

**LOUISIANA STATE LAW INSTITUTE**

**THE MEETING OF THE COUNCIL**

**January 20-21, 2017**

**Friday, January 20, 2017**

**Persons Present:**

Amy, Jeanne L.	Lawrence, Quintillis Kenyatta
Bergstedt, Thomas	Levy, H. Mark
Braun, Jessica	Lonegrass, Melissa T.
Breard, L. Kent	Luneau, W. Jay
Brister, Dorrell J.	Mengis, Joseph W.
Cox, Rachel D.	Morvant, Camille A.
Crawford, William E.	Norman, Rick J.
Cromwell, L. David	Odinet, Christopher
Curry, Kevin C.	Pohorelsky, Peter
Curry, Robert L., III	Richardson, Sally
Davidson, James J., III	Riviere, Christopher H.
Dawkins, Robert G.	Ryan, Graham H.
Dimos, Jimmy N.	Scalise, Ronald J., Jr.
Doguet, Andre	Sole, Emmett C.
Domingue, Billy J.	Stuckey, James A.
Forrester, William R., Jr.	Talley, Susan G.
Garofalo, Raymond E., Jr.	Tate, George J.
Garrett, J. David	Title, Peter S.
Gregorie, Isaac M. "Mack"	Thibeaux, Robert P.
Griffin, Piper D.	Trahan, J. Randall
Hamilton, Leo C.	Varnado, Sandi S.
Hayes, Thomas M., III	Waller, Mallory Chatelain
Haymon, Cordell H.	Weems, Charles S., III
Holdridge, Guy	White, H. Aubrey, III
Jewell, John Wayne	Wilson, Evelyn L.
Johnson, Pamela Taylor	Woodruff-White, Lisa
Knighten, Arlene D.	Ziober, John David
Kostelka, Robert "Bob" W.	
Kunkel, Nick	
LaVergne, Luke	

President David Ziober began the January 2017 Council meeting by welcoming members and guests to the Council's first meeting at Lod Cook in Baton Rouge. After asking the Council members to briefly introduce themselves, the President called on Mr. Charles S. Weems, III, Reporter of the Constitutional Laws Committee, to begin his presentation with respect to HCR 129 of the 2016 Regular Session.

### **Constitutional Laws Committee**

Mr. Weems began by informing the Council that HCR 129 of the 2016 Regular Session requested the Law Institute to study the issue of preferences for Louisiana contractors for integrated coastal protection contracts. He explained that specifically, the resolution asked the Law Institute to consider the following questions: whether a preference for such contracts should be given to Louisiana contractors, the effect of competitive bidding requirements, the advantages and disadvantages of granting a preference to Louisiana contractors, and the effect such a preference will have on resident contractors working outside of the state. The Reporter also explained that background research, including a fifty state survey of other states' reciprocal preference laws, had been conducted by the staff and was currently being reviewed by the Constitutional Laws Committee. Finally, he explained that the Committee's current view is that evaluation with respect to the advantages and disadvantages of a preference for Louisiana contractors, as well as the policy determination of whether such a preference should be granted, is beyond the purview of the Committee. Mr. Weems concluded his presentation by informing the Council that he would return in the coming months to present the Committee's final report with respect to HCR 129 of 2016.

At this time, President David Ziober called on Professor Ronald J. Scalise, Jr., Reporter of the Trust Code Committee, and Mr. Emmett C. Sole, Chairman of the Alternative Dispute Resolution Committee, to present a joint report in response to SCR 62 of the 2016 Regular Session.

### **Alternative Dispute Resolution and Trust Code Committees**

Professor Scalise began the presentation by informing the Council that SCR 62 of the 2016 Regular Session requested the Law Institute to study and make recommendations regarding the feasibility of revisions to the law of wills and testaments and trusts to expressly permit the inclusion of enforceable mediation and arbitration provisions in such instruments. Professor Scalise explained that, in light of the resolution's subject matter, the issue was referred not only to the ADR Committee, but also to the Trust Code and Successions and Donations Committees. Each Committee separately considered and discussed the issue and ultimately agreed upon this joint recommendation, notwithstanding that the Committees were not of one mind with respect to the policy considerations surrounding whether enforceable mediation and arbitration provisions should be included in testaments and trusts.

Professor Scalise explained that both the Trust Code and Successions and Donations Committees agreed that testators and settlors should not be able to impose arbitration provisions in testaments and trusts for a number of reasons. Primarily, the Committees concluded that arbitration law is founded upon consent between the parties, and when an arbitration or mediation provision is included in a testament or trust, the heir or beneficiary does not have an opportunity to consent. Professor Scalise also noted that currently only ten states expressly allow for such provisions, whereas the other forty states either prohibit these provisions or say nothing about them. He also explained that the Committees were concerned that issues with respect to appeals and forced heirship could arise from the inclusion of arbitration provisions in testaments and trusts.

Mr. Sole informed the Council that, contrastingly, the ADR Committee voted in favor of expressly permitting the inclusion of mediation and arbitration provisions in testaments and trusts, concluding that careful drafting might overcome some of the objections expressed by opponents. Nevertheless, Mr. Sole explained that in light of the ADR Committee's ongoing revision of the

Louisiana Binding Arbitration Law, the Committee agreed that no revision to Louisiana law should be made at this time. Rather, all three Committees agreed to continue to monitor developments with respect to the enforceability of mediation and arbitration provisions contained in testaments and trusts and to make recommendations as needed in the future.

At this time, it was moved and seconded to adopt the joint report as presented, and the motion passed over one objection. Professor Scalise and Mr. Sole then concluded their presentation, and President David Ziober called on Professor Andrea B. Carroll to present materials from the Marriage-Persons Committee.

### **Marriage-Persons Committee**

Professor Carroll asked the Council to turn their attention to the Report to the Legislature on Senate Resolution No. 142 from the 2016 Regular Session. This Resolution asked the Law Institute to study and make recommendations regarding the feasibility of revisions to present law to require physical custody of children to be shared equally. After lengthy study and analysis, the Committee recommends that no changes to Louisiana's child custody provisions be made at this time. With little discussion, the Council approved the report.

Professor Carroll proceeded with the Same-Sex Marriage Revision materials in response to Senate Resolution No. 143 of the 2016 Regular Session which requested the Law Institute to recommend annual comprehensive changes to state law in light of the *Obergefell v. Hodges* United States Supreme Court case. The Reporter gave a brief history of *Obergefell* and the Louisiana Supreme Court case, *Costanza v. Caldwell*. She then reminded the Council that the Institute filed a report with the Legislature last year recommending changes to laws which were rendered obsolete, but legislation was not introduced. In response to SR No. 143, the Committee is proposing many of the same changes that appeared in the report last year and a few new changes to address problems which have come to light in the jurisprudence.

There was a motion made and seconded that the Institute submit a bill in response to SR No. 143. 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. The Council engaged in a lengthy discussion regarding whether to proceed with filing a Law Institute recommended bill and when the question was called the motion passed overwhelmingly.

The Reporter began presenting the proposals article by article starting with page 5, 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. With little discussion, the proposal was adopted as written. Thereafter, the Council approved the changes to C.C. Articles 87, 89, and 96.

The Reporter presented the changes to C.C. Arts. 221, 236, 246, 257, 259, 263, and 270 as a package because the proposals all change the terms "father" and "mother" to "parent". The Reporter further explained that the Committee proposes adding a definition of "parent" to C.C. Art. 3506. Reserving a few discussion points until the review of C.C. Art. 3506, the Council approved C.C. Arts. 221, 236, 246, 257, 259, 263, and 270 and also quickly approved the changes to C.C. Arts. 2315.1, 2318, and 2333.

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 voiced concern about maintaining the phrase "descendants of the child in the direct line". The Reporter explained that the term "child" could also mean "descendant" in the succession context and therefore it should be retained. She also mentioned the work of the Signification of Terms Committee and the plan to move all three of these definitions to Book I. The Reporter also agreed to add language to the definition of "parent" to ensure that grandparents are not included. 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 those 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 the descendants of them in the direct line the child.

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 an ascendant of the first degree 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.~~

\* \* \*

After quickly approving proposed C.C. Art. 3520 and the addition of C.C. Arts. 2315.2 and 2315.6 to be consistent with other revisions, the Reporter introduced the issues surrounding community property and *Obergefell*. 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.

The Council approved adding a comment to C.C. Art. 2329 to draw 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 Council offered language to clarify the intention of the Committee in R.S. 9:2831 to ratify all matrimonial agreements entered into at any time until one year after the effective date of this Act. They also authorized the Reporter to add comments stating that the agreement shall not contain matters prohibited by public policy and shall not prejudice the rights of third parties.

Due to developments in case law across the country, the Committee is also recommending a new Civil Code Article regarding the effects of the community property regime on third party rights. It is not yet certain that *Obergefell* has retroactive effect, but the Committee is anticipating this and offers a solution to mitigate the effects for unsuspecting third parties. The Council was concerned that C.C. Art. 2334.1 does not have a temporal limit. After much discussion, they voted to move this proposal to Title 9 and add new language. The following was adopted:

**R.S. 9:2832. Application of the community property regime of same sex couples; third persons**

For same-sex couples married on or before June 26, 2015, the application of the legal regime of the community of acquets and gains shall be without prejudice to the rights of third parties validly acquired before the effective date of this Act.

**LUNCH**

Returning from lunch, Professor Carroll finished presenting the Same Sex Marriage Revisions and the Council approved R.S. 35:11, R.S. 1:18, R.S. 9:223, 224, 273, 273.1, 275, 275.1, 309, 2729, 13:1832, and C.C.P. Art. 3947 as proposed.

The Reporter's final presentation today relates to no fault divorce and interim spousal support. The Reporter provided extensive background information to the Council regarding the history of no fault divorce in the United States, the divorce epidemic, the effects of divorce on children, the issues regarding pregnant women seeking divorce, and the games litigants play regarding interim spousal support. The Council questioned whether they should suggest legislative changes without a resolution directing them to do so, but the continuous revision duty imposed on the Institute by R.S. 24:204 resolved the issue. The Council also discussed the legislative history of the one year waiting period when there are children of the marriage, whether a long period promotes reconciliation, social science research, and possible unintended consequences. Following the debate, proposed Articles 102, 103 and 103.1 were approved.

Professor Carroll informed the Council of the Committee's recommendation to treat the no fault divorce waiting period issue and the interim spousal support proposals as a package. There were continuing discussions of gamesmanship, timing issues, giving the court discretion, eliminating the requirement that a claim for final support be pending, and the true intention of interim support to preserve the status quo. The proposed changes to C.C. Art. 113 provided for interim spousal support to terminate after one year, but a member proposed changing that period to one hundred and eighty days. It was noted that a shorter period eliminates game playing, reduces litigation, and if a party is truly in need, final periodic support may be awarded. The Council also noted that changing the proposal to one hundred and eighty days still provides the other party with a year to fourteen months of support due to timing delays. Finally, the following was approved:

Art. 113. Interim spousal support allowance ~~pending final spousal support award~~

A. Upon motion of a party ~~or when a demand for final spousal support is pending~~, the court may award a party an interim spousal support allowance based on the needs of that party, the ability of the other party to pay, any interim allowance or final child support obligation, and the standard of living of the parties during the marriage, ~~which.~~ An award of interim spousal support

allowance shall terminate upon one hundred eighty days from the rendition of a judgment of divorce.

~~B. If a claim for final spousal support is pending at the time of the rendition of the judgment of divorce, the interim spousal support award shall thereafter terminate upon rendition of a judgment awarding or denying final spousal support or one hundred eighty days from the rendition of judgment of divorce, whichever occurs first. The obligation to pay interim spousal support may extend beyond one hundred eighty days from the rendition of judgment of divorce, but only for good cause shown.~~

~~C. Notwithstanding Paragraph B of this Article, if a claim for final spousal support is pending at the time of the rendition of a judgment of divorce pursuant to Article 103(4) or (5) and the final spousal support award does not exceed the interim spousal support award, the interim spousal support award shall thereafter terminate no less than one hundred eighty days from the rendition of judgment of divorce. The obligation to pay final spousal support shall not begin until after an interim spousal support award has terminated.~~

The Reporter explained the need to clarify C.C. Arts. 114 and 115 regarding modification and extinguishment of support obligations in light of the approved changes to C.C. Art. 113. The Council discussed the ability to modify an order but only if a material change in circumstances is shown. The Council approved the proposals and also approved the supplemental materials consisting of C.C.P. Arts. 3952, 3953, and 3956 and R.S. 13:3491 and 3492.

## CONCLUSION

The Council thereafter adjourned for the day.

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**THE MEETING OF THE COUNCIL**

**January 20-21, 2017**

**Saturday, January 21, 2017**

**Persons Present:**

Adams, E. Pete	Knigheten, Arlene D.
Amy, Jeanne L.	Kostelka, Robert "Bob" W.
Bergstedt, Thomas	Kunkel, Nick
Braun, Jessica	Lawrence, Quintillis Kenyatta
Breard, L. Kent	Levy, H. Mark
Brister, Dorrell J.	McWilliams, Ford
Burris, William J.	Norman, Rick J.
Castille, Preston J., Jr.	Philips, Harry "Skip", Jr.
Crawford, William E.	Richardson, Sally
Curry, Robert L., III	Ryan, Graham
Dawkins, Robert G.	Scalise, Ronald J., Jr.
Dimos, Jimmy N.	Sole, Emmett C.
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Garofalo, Raymond E., Jr.	Tate, George J.
Garrett, J. David	Waller, Mallory Chatelain
Hamilton, Leo C.	White, H. Aubrey, III
Hayes, Thomas M., III	Wilson, Evelyn L.
Holdridge, Guy	Ziober, John David
Jewell, John Wayne	

President John David Ziober opened the Saturday session of the January 2017 Council meeting at 9:00 AM on January 21, 2017 at the Lod Cook Conference Center in Baton Rouge, LA. During this session, Co-Reporter, Karen Hallstrom represented the Children's Code Committee and presented materials regarding the expungement of juvenile records, curatorship, and a report to the Legislature in response to House Concurrent Resolution No. 125 from the 2015 Regular Session and House Concurrent Resolution No. 34 from the 2016 Regular Session regarding relative preference.

**Children's Code Committee**

Mrs. Hallstrom started with the report to the Legislature in response to HCR 125 from the 2015 Regular Session and HCR 34 from the 2016 Regular Session regarding relative preference. The Reporter gave a brief review of the issue and a recap of the federal law and social science research on which the current Children's Code articles are based. Reporter Hallstrom explained that although present law requires relative preference to be considered as an element of best interest of the child, inconsistent practices across Louisiana are due to interpretation and application and not because of the state of the law. Therefore the report does not propose any changes to present law. The Council

members cited a few examples of cases they are familiar with and adopted the report.

Mrs. Hallstrom next presented the materials regarding curatorship. With the changes to the law in 2016 clarifying that public defender representation for indigent parents in child welfare cases includes absentee parents, the burden to pay the out of pocket expenses of curators now falls on the public defender offices. The Reporter suggested that the proposed amendments clarify the responsibility for curator fees and costs in state and non-state initiated proceedings. With no discussion, the proposed changes to Ch.C. Article 405 were adopted. Insofar as the public defenders have insufficient resources, they have placed a restriction on services. This issue directly relates to the cost of publication and whether that should be required to constitute a diligent effort for locating an absent parent. The Committee is proposing adding a definition in the law to offer guidance to the court regarding what constitutes a diligent effort and minimize the use of expensive publication. The Council asked the Reporter to add a comment suggesting that internet searches are very effective and should be given preference. The Council adopted proposed Ch.C. Article 116.

The President then called on Judge Guy Holdridge, Acting Reporter of the Code of Criminal Procedure Committee, to begin his presentation with respect to Act 501 of the 2016 Regular Session in conjunction with Ms. Hallstrom and the Children's Code Committee.

#### **Code of Criminal Procedure Committee**

Judge Holdridge began by explaining to the Council that Act 501 of the 2016 Regular Session directed the Law Institute to study and to recommend amendments and additions to the Children's Code, Code of Criminal Procedure, and Revised Statutes as may be appropriate to effectuate the purpose of the Act, which was to raise the juvenile offender age from seventeen to eighteen. Judge Holdridge explained that both the Children's Code and Code of Criminal Procedure Committees reviewed their respective Codes as well as the Revised Statutes to determine which provisions should be amended in light of this Act. He also explained that some provisions applied to seventeen-year-old victims rather than seventeen-year-old offenders, and in those cases, both Committees determined that a list of provisions should be provided to the legislature for the policy determination of whether these statutes should also be amended. It was then moved and seconded to adopt the report.

One Council member expressed concern with respect to addressing the two-step implementation process contemplated by the Act, with nonviolent crimes effective in 2018 and violent crimes effective in 2020. In response to this concern, Judge Holdridge explained that neither Committee was suggesting revisions with respect to the definitions of substantive crimes and their penalties. Nevertheless, the Council member suggested adding a disclaimer stating that the Law Institute recognizes that Act 501 of the 2016 Regular Session contemplates a two-step process that distinguishes between nonviolent and violent crimes and that, as a result, the legislature may have to make a policy determination with respect to when to implement these suggested revisions. The Reporters of the Code of Criminal Procedure Committee and the Children's Code Committee accepted that change.

Another Council member then suggested replacing "of the age seventeen years, and under," with "under the age of eighteen years" on line 36 of page 5 of the report, and Judge Holdridge accepted that change. When another Council member questioned the necessity of both the definitions of "delinquent child" on line 3 and "juvenile" on lines 15 and 16 of page 3 of the report, Ms. Hallstrom explained that the difference between these terms is that "delinquent child" refers to the commission of a delinquent act, whereas "juvenile" refers to the accusation



of committing a delinquent act. Finally, when a Council member questioned why “seventeen” was used on line 22 of page 2 of the report, staff explained that this was a legislative change that was simply replicated from Act 501 itself.

There being no additional questions, a vote was then taken on the motion to adopt the report as amended, and the motion passed with no objection. The President then asked Ms. Hallstrom to continue her presentation of materials from the Children’s Code Committee.

**Children’s Code Committee**

Mrs. Hallstrom next presented the materials regarding the expungement of juvenile records. She reminded the Council that last January they approved a series of proposals that will make expungement available earlier as a means of helping children more fully participate in society, seal instead of destroy records, give interested parties the opportunity to oppose the expungement, and give Families In Need of Services youth the right to seek expungement. However, difficulties with merging the process for FINS and delinquency records came to light and the Reporters decided to hold the bill another year. The Committee has worked over the past year to separate out the changes needed for FINS cases, while making only tweaks to the previously approved material for delinquency expungement. Today, the Reporter is seeking approval of the proposals related to FINS.



With that background in mind, the Reporter directed the Council to proposed Ch.C. Article 728. The Council discussed that sometimes a child can be duly adjudicated FINS and delinquent, that status offenses are distinct from delinquency, and that a contempt judgment for the violation of a FINS order would remain under FINS. Thereafter, Ch.C. Article 728 and the comments to Ch.C. Arts. 733, 733.1, 735, and 736 were all adopted. A Council member also suggested adding the same comment proposed under Ch.C. Article 736.1 regarding the confidentiality of FINS records to the previously approved articles. The Reporter agreed to do so.

The Reporter explained the need for clarification in Ch.C. Articles 736.1, 737, 738, 740, 742 and 782 and they were all adopted without discussion. Moving to new Ch.C. Articles 792 and 793, the Reporter informed the Council of the Committee’s desire to add a positive statement to the law that FINS proceedings are civil in nature. This has always been the case, however over time the perception of “juvenile” has grown to include status offenders as well as delinquents. With a motion and second, these Articles were approved.

The Reporter reminded the Council that pages 14-32 of the materials are the delinquency expungement articles that were approved last year with the removal of FINS. FINS only appears here as a lesser included adjudication in a delinquency matter. With a few technical changes accepted by the Reporter, the Council again approved all of the proposals on pages 14-32.

**CONCLUSION**

Having completed the presentation of the material, the Council adjourned.

 _____ Jessica Braun	4-11-17 _____ Date
 _____ Mallory Waller	4/11/2017 _____ Date